when Justice Brennan, Jr. delivered his opinion in the *Eisenstadt* case,[16] "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." If Ms. Roe achieves the performance of these words, her mission will have been successful.

1 The first motion of the fetus in the womb felt by the mother, occurring usually about the middle of the term of pregnancy.
2 (1216-1272).
3 Lord Ellenborough's Act, 43 Geo. 3, c.58.
4 367 U.S. 497.
5 381 U.S. 470.
6 402 U.S. 62.
7 405 U.S. 438.
8 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147.
9 *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), pp. 163-165.
10 410 U.S. 179.
11 428 U.S. 52.
12 492 U.S. 490.
13 505 U.S. 833.
14 *Planned Parenthood v. Casey*, No. 91-744, Justice O'Connor, Justice Kennedy and Justice Souter delivering opinion, pp. 864-869.
15 supra, p. 966.
16 *Eisenstadt* at 453.

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Separate but Equal?

The United States Supreme Court's Approach to Racial Segregation in the 20th Century

Michal Bobek

....All men are created equal[1]

...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.[2]

Introduction

Despite the relatively plain meaning of the **Fourteenth Amendment** to the **U.S. Constitution** (1868), the reality of equality in the United States has been a far cry from the spirit underlying this strong language. Following the Civil War and the reconstruction period in the United States, a new spirit of equality swept the nation. New laws were passed that explicitly protected the political and civil rights of the black community. Nevertheless, along with these changes came the return of "white man's government" in the South. As a result, new ways were discovered to circumvent the constitutional requirement of equality.

From today's point of view, the situation in the South was anything but pleasant at the end of the 19th century. Every attempt was made to "keep the Negro in his place."[3] Social discrimination and intimidation were constant. Blacks were expected to move off the sidewalk to make room for whites. They were to address whites with great respect while blacks were called by their first names. They were excluded from higher education. By laws created and enforced by the state, blacks had to use separate parks, waiting rooms and coaches. The intermarriage of whites and blacks was prohibited while a black man who even looked at a white woman ran the risk of hanging or castration. Similar laws in all Southern States created a system of racial segregation under which blacks and whites were required to use separate public facilities. Blacks were indeed, as argued by Cox, "condemned to social, political, and economical inequality from the cradle to their segregated graves."[4]

The aim of this essay is to demonstrate the active and sometimes ambiguous role the United States Supreme Court played in (de)segregation of the public space in the 20th century. We will follow the Court through its judgments on its bumpy road from the firm confirmation and acceptance of segregation in *Plessy v. Fergusson*,[5] the reversal of its previous ruling in *Brown v. Board of Education*,[6] and finally, the approval of the *Affirmative Action* in *University of California v. Bakke*.[7] How did such an unadulterated u-turn over an eighty year period come about?

Mr. Plessy & Equality?

In accordance with local custom, the State of Louisiana enacted a statute in 1890 requiring railroads to provide "equal but separate accommodation for the white and colored races."[8] In fact, this law really only forbad blacks from entering 'white' cars since (understandably) no case has ever been reported where a white man desired to enter a 'black' coach. The controversy arose when Mr. Plessy, allegedly seven-eighth Caucasian and one-eighth African, attempted to use a coach

for whites. He was subsequently arrested and fined.

Plessy challenged the constitutionality of the **Louisiana's Railroad Act**. The crucial question, submitted to the court, was whether the provisions of the Act violated the *equal protection* clause of the **XIV^th^ Amendment**. The court held almost unanimously (8-1) that the law did not contradict the constitution, formally adopting the doctrine of *separate but equal*.[9] Granted the *federal imprimatur*, the *Plessy* decision authorized states to pass statutes which in South Africa had later been called apartheid and which has since been declared by a **United Nations Convention** to be international crime.[10] In the United States however, the same attitude disguised itself in the more sophisticated guise of *separate but equal*.

In the majority opinion of the court, laws requiring racial segregation did not necessarily imply that one race was inferior. Moreover, the power to segregate had been recognized to be fully within the police power of each state. To the question of whether such a forced segregation wouldn't impress on the black people a stamp of caste inferiority, the court held that "[w]e consider the underlying fallacy of plaintiff's argument in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[11] The logical inference from this decision was that all state legislatures had the right to segregate the races in every public facility from schools to toilets. And for the next sixty years, they actively did so.

Despite these later developments, particular attention should be paid to the dissenting opinion in *Plessy*. Justice John M. Harlan's bitter commentary was in fact an accurate prophecy and his opinion is full of powerful ideas. He completely refused the majority concept of separate but equal, writing that "the thin disguise of 'equal' accommodation for passengers in railroad coaches will not mislead any one, or atone for the wrong this day done.... ...in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens...our Constitution is color-blind...the humblest is the peer of the most powerful." Referring to the *Dred Scott*[12] case, he predicted, that "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... it will...stimulate aggressions, more or less brutal and irritating."[13] Regrettably, Justice Harlan was completely right.

One point should be highlighted - it would be entirely wrong to believe the *separate but equal* doctrine could have ever worked in the reality. One case will illustrate the point. In *Cumming v. Board of Education*[14] the Supreme Court found no denial of equal protection of the law in the failure of a Southern County to provide a separate high school for black children, although it maintained a high school for white children. The Court seemed satisfied with the County's defense that it could not afford to build a high school for Negro children.

Although being subject to many attacks, the entire doctrine of separate but equal established in *Plessy* hadn't been seriously questioned for nearly sixty years. The Supreme Court obeyed a self-imposed rule of *judicial self-restraint* by trying to avoid constitutional matters whenever possible. Eventually, however, it was inevitable that the newly composed Court let by Chief Justice Earl Warren would have to reexamine the separate but equal doctrine.

Brown & Nine Unanimous Men

In 1952, the Supreme Court reviewed five cases challenging the constitutionality of segregation in public schools. In each case, blacks sought admission to public schools on a non-segregated basis. In each case, the state court denied such access and based its decision upon the separate but equal doctrine. The Court consolidated the five appeals into one, *Brown v Board of Education*, which was named after Linda Carol Brown, an eight-year-old black girl from Topeca County, Kansas. Her representatives sought - in a manner similar to the other appeals from South Carolina, Virginia and Delaware - admission to an elementary school in her community of residence on a non-segregated basis.

The crucial question the Court asked itself was: "does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal education opportunities?" The answer was YES.[16] In a famous quote, the Court held that to separate black children from others "solely because of their race generates a feeling of inferiority as to their status in the community that may effect their hearts and minds in a way unlikely ever to be undone..."[17] The Court continued with the statement, that "in the field of public education the doctrine *separate but equal* has no place. Separate education facilities are inherently unequal" At the end of the decision, the Court concluded in a unanimous vote that "[a]ny language in *Plessy v. Fergusson* contrary to this finding is rejected."[18]

The impact of Brown has been immense. Although the Court stated *expressis verbis*, that this decision was limited to the field of public education, subsequent decisions by the Court - as well as lower federal courts - quickly extended the *Brown* principle to other areas of public life. These decisions were short *per curiam* opinions which often only cited *Brown*.[19] The impact of *Brown*, however, and following desegregation cases goes far beyond matters of race. Driven by this decision, the Court began to strike down all differences in state treatment based on sex, origin, sexual orientation, etc. The stormy 1950s and 1960s, with their sit-ins, protest marches, Kings and Wallaces,[20] federal troops supervising the enrollment of black students, violent uprising and race riots eventually led to a new challenge to equality before law - *Affirmative Action*.

Bakke & Affirmative Action

"In order to get beyond racism we must first take account of race....And in order to treat some people equally we must first treat them differently..."[21] As put by Justice Blackmun in

the case of Allan Bakke, are we allowed to sacrifice present equal treatment of different races in order to achieve substantial justice in the future? The fact is that most discrimination today against blacks is not *de jure* discrimination; it is simply *de facto* discrimination. However, such discrimination is still pernicious. *Affirmative Action* seeks to ameliorate these pervasive relics of a discriminatory system.

The idea of *Affirmative Action* is simple: to reach the goal of full racial equity in relatively short order. Ending the discrimination is not considered sufficient; proponents of *Affirmative Action* advocate positive steps to repair the damage done on the colored people in the passed centuries and enable them to achieve the same economical and social level. Such arguments can be best illustrated by the Supreme Court's decision in *University of California v. Bakke,*[22] a case that outlined the problems related to *Affirmative Action* as well as the judicial uncertainty concerning resolution of these problems.

Following the *Brown* decision, numerous orders have been issued by the Court demanding not only desegregation in different areas, but also some other positive steps to alleviate racial tensions such as bussing the children to school,[23] redrawing new school district boundaries in order to provide integrated schools, etc. All of these measures have been ordered by the Court within its equitable power to grant an appropriate remedy.

In Bakke's case, however, the Court faced a different problem. Allan Bakke, a former NASA engineer, desperately wanted to study medicine. He applied twice to the University of California Davis School of Medicine and was rejected both times. By that time, the Davis Medical School ran a two-channel admission system: one channel for white applicants and the other for non-white applicants. Out of the 100 available seats in the entering class, 84 were filled through the regular channel. The other 16 were *a priori* guaranteed to the non-whites.[24] Allan Bakke might well have been accepted in the absence of those 16 Special Admission Program seats because of the reduced requirements for entering the Davis as a "member of economically and/or educationally disadvantaged minority group."[25]

Accordingly, Bakke declared he was a victim of reverse discrimination and brought a suit against the University of California, alleging their Special Admission Program violated the *equal protection* clause of the **XIV^th^ Amendment**. Bakke succeeded with his claim before the California Supreme Court and the court ordered the University to admit Bakke. The U.S. Supreme Court granted *certiorari*[26] in February 1977.

The case was argued in October 1978 and the Court split entirely. There were six opinions (between nine Justices!). Four members of the Court voted against the special admission program while another four Justices upheld it. The former thought the admission system was discriminatory. The latter held that to be color-blind, we have to be color-conscious first, and therefore the system was acceptable. These Justices concluded that the setting aside of the sixteen seats for non-white students is consistent with the *equal protection* clause, because the "articulated purpose of remedying the effects of past social discrimination is sufficiently important to justify the use of race-conscious admissions programs..."[27]

The judge that cast the deciding vote was Justice Powell. He chose the middle course. On the one hand, he held that the Davis Admission Program violated the *equal protection* clause and he therefore joined his four colleagues in the holding, making the decision a 5-4 victory for Bakke. On the other hand, in his reasoning, he jointed the other four justices arguing that an applicant's race may be a relevant factor in considering his or her admission. Consequently, as argued by McKenna, "there was something for everyone in Powell's opinion."[28]

The crux of the opinion was that all racial classifications are inherently suspect and "subject to the strictest judicial scrutiny." In Powell's view, no admission program can survive the strict scrutiny test if it sets aside a fixed number or percentage of places for minority applicants. Nevertheless, the school's policy would be acceptable if it held that race is one of a certain set of substantial favorable elements in deciding the admission. Justice Powell referred in his opinion to the Harvard College undergraduate admission policy as to an example of the permissible weighty of minority status, the difference being that Harvard did not use any fixed quotas (even though the result in terms of admissions would probably be the same).

Eventually, Bakke was admitted to Davis in the autumn of

1978. However, the Supreme Court's approach to *Affirmative Action* is anything but clear. "Much remains to be litigated before the meaning of 'equal protection' of the laws is clarified in the field of affirmative question."[29]

Conclusion

Western legal science claims to be positivist, not being based on these muddled concepts of morality or other external references outside the law itself. The fallacy of this statement is demonstrated by the chronology described in this article. If the law is really a self-contained regime of norms, "law as it is, not as it ought to be,"[30] how is it possible that the U.S. Supreme Court, within an eighty year period, made a complete U-turn regarding the interpretation of one provision despite the fact that the language in the provision never changed? The equal protection of law in 1896 meant apartheid, in 1954 chilly equality, and in 1978 tolerance of *Affirmative Action*.

The answer to our problem is obvious. Although the methodology of western legal science may be, *cum grano salis*, regarded as positivist, the reasoning is not, especially in hard cases. Every one of the above-discussed cases reflected the comprehensive theory of the good of society at each respective stage of history. To put the point more simply, during those eighty years, the formal constitutionality test - *equal protection of laws* - remained the same since the **U.S. Constitution** itself did not change. The morality of the society, however, and its comprehensive theory of the good changed. And the law changed accordingly. Accusing the judiciary in this case of judicial activism and arbitrary decisionmaking is, to my mind, a cheap way of ignoring the problem itself and shifting the responsibility for such inevitable and necessary changes to the judiciary.

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1 The Declaration of Independence, July 4, 1776.

2 The Constitution of the United States of America, XIV[th] Amendment, Section 1.

3 In: Cushman, Cases in Constitutional Law, p. 529.

4 In: Cox, The Court and The Constitution, p. 254.

5 163 U.S. 537 (1896).

6 347 U.S. 483 (1954).

7 438 U.S. 265 (1978).

8 In: Cox, The Court and The Constitution, p. 253.

9 The separate but equal concept itself made its first appearance in a Massachusetts pre-Civil War case, in *Roberts v. City of Boston* 59 Mass. (5 Cush.) 198 (1850). See Nowak, Constitutional Law, p. 567.

10 See International Convention on the Suppression and Punishment of the Crime of Apartheid, as adopted by the General Assembly resolution 3068 (XXVIII) of 30 November 1973.

11 *Plessy v. Fergusson*, 163 U.S. 537 (1896).

12 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

13 *Plessy v. Fergusson*, 163 U.S. 537 (1896), dissenting opinion of Justice Harlan.

14 *Cumming v. Board of Education*, 175 U.S. 528 (1899).

15 See: *State Of Missouri Ex Rel. Gaines v. Canada*, 305 U.S. 337 (1938), *Sweatt v. Painter*, 339 U.S. 626 (1950).

16 In: *Brown v. Board of Education* (Brown I), 347 U.S. 483 (1954).

17 Ibid. It is surely worth to point out the way of reasoning used by the Supreme Court in this case. Following the main line of reasoning, one could acquire the impression, the judgment was written by a committee of psychologists and not by nine than the most senior judges in the U.S.

18 Ibid.

19 Further see Nowak, Constitutional Law, p. 576 an.

20 Meant are Reverend Martin Luther King, Jr. and the than Governor of Alabama, George Wallace.

21 *University of California v. Bakke*, 438 U.S. 265 (1978). The opinion of Justice Blackmun.

22 438 U.S. 265 (1978).

23 See e.g. Swann v. Charlotte-Mecklenburg Board of Education 402 U.S. 1 (1971).

24 In: McKenna, The Drama of Democracy, p. 110.

25 In: Nowak, Constitutional Law, p. 611.

26 In the U.S. judicial system, there is no right for your case to be heard in the Supreme Court of the United States, since it is in fact a third instance on the federal scale (above the U.S. District Courts and U.S. Courts of Appeal). The access to the Supreme Court is therefore a matter of Court's own discretion. If the Court considers there are compelling reasons for hearing the case, it will issue a *writ of certiorari*, which gives the appellant the right to appear. See Rules of the Supreme Court of the United States from January 11th 1999, Rules 10 - 16 (Jurisdiction on *writ of certiorari*).

27 University of California v. Bakke, 438 U.S. 265 (1978), the dissenting opinion of Justice William Brennan et al.

28 In: McKenna, The Drama of Democracy, p. 111.

29 In: Cox, The Court and the Constitution, p. 286.

30 Paraphrasing Hart's distinction In: Hart, H.L.A., The Concept of Law, 2nd Ed. (ed. by Raz, J. and Bullow, P.), Clarendon Press, 1994.

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