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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS

SEGREGATION—WHETHER A CONVICTION OF NEGRO STUDENTS FOR DISTURBING THE PEACE FOR SITTING AT "WHITE" LUNCH COUNTERS VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT—Whether a conviction of Negro students for disturbing the peace for sitting at "white" lunch counters violates the Due Process Clause of the Fourteenth Amendment was presented to the United States Supreme Court in the combined cases of *Garner v. Louisiana, Briscoe v. Louisiana,* and *Hoston v. Louisiana.*[1]

It appears that the police were notified of the students' presence at the white lunch counter-notification in one case coming from the "owner or his agent,"[2] and from observers in the other two cases. It further appears that in the *Garner* and *Hoston* cases, the students remained at the "white" lunch counters with the implied consent of the management.[3]

Upon arrival, the police "without consulting the manager or anyone else on the premises, went directly to confront the petitioners,"[4] "asked the petitioners to leave the counter because 'they were disturbing the peace by sitting there,' "[5] and, when the students refused to leave, arrested them for disturbing the peace.

The Supreme Court of the United States unanimously reversed the convictions. Chief Justice Warren expressed the views of six members of the Court that the convictions were so devoid of evidentiary support that they were rendered unconstitutional under the Due Process Clause of the Fourteenth Amendment, thus making it "unnecessary to reach the broader constitutional questions presented."[6]

1 368 U.S. 157 (1961).
2 *Id.* at 171.
3 *Id.* at 199.
4 *Id.* at 172.
5 *Ibid.*
6 *Id.* at 163.
Petitioners had contended that:
(a) The decision below affirms a criminal conviction based upon no evidence of guilt and, therefore, deprives them of due process of law.
(b) The State statute under which they were convicted was so vague, indefinite, and uncertain as to offend the Due Process Clause of the Fourteenth Amendment.
(c) The decisions below conflict with the Fourteenth Amendment's guarantee of freedom of expression.
(d) The decision below conflicts with prior decisions of this Court which condemn racially discriminatory administration of State criminal laws in contravention of the Equal Protection Clause of the Fourteenth Amendment.
Thus, the Court did not pass upon contentions 2, 3 and 4 above.

Justice Douglas stated in his concurring opinion[7] that "if all the constitutional questions are to be put aside and the problem treated merely in terms of disturbing the peace, I would have difficulty in reversing the judgment."[8] He would then reach the constitutional questions which would make reversal necessary.

He apparently views the factual situation as follows: Negroes "sat-in" at lunch counters or restaurants catering only to white customers. The police officers making the arrests were acting in accordance with state "custom" and enforced a policy of segregation in restaurant facilities. He stated: "It is my view that a State may not constitutionally enforce a policy of segregation in restaurant facilities."[9]

Justice Douglas, in the above statement, intertwined the two separate and distinct concepts of "state action," and "public facility." He would have the judgment reversed because states may not enforce a policy of racial segregation in a "public facility." How does he arrive at the conclusion that "state policy" in effect, is operating on a "public facility?"

Recognizing that it is only "state action that is prohibited by the Fourteenth Amendment, not the action of individuals,"[10] Justice Douglas notes Justice Bradley's statement in the *Civil Rights Cases*[11] that: ". . . civil rights, such as are guaranteed by the Constitution against State aggression cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, *customs*, or judicial or executive proceedings."[12] (Italics added by Justice Douglas) He then cites *Baldwin v. Morgan*[13] for the proposition that the " 'custom, practice and usage' of a city and its police in arresting four Negroes for using the 'white' waiting room (of a public facility) was state action in violation of the Fourteenth Amendment, even though no ordinance was promulgated and no order issued."[14]

Relying on the preamble to Act no. 630, La. Acts 1960, and other enumerated statutes,[15] Justice Douglas concludes that "segregation is basic to the structure of Louisiana as a community; the custom that maintains it is at least as powerful as any law."[16]

7 Justices Douglas, Frankfurter, and Harlan concurred in the judgment in separate opinions.

8 Garner v. Louisiana, *supra* note 1, at 177.

9 *Id.* at 181.

10 *Id.* at 177.

11 Civil Rights Cases, 109 U.S. 3 (1883).

12 Garner v. Louisiana, *supra* note 1, at 178.

13 Baldwin v. Morgan, 287 F.2d 750 (5th Cir. 1961).

14 Garner v. Louisiana, *supra* note 1, at 179.

15 *Ibid.*

16 *Id.* at 181.

But it is submitted that this is a pretty weak foundation to base his conclusion upon. Act 630, a proposed amendment to the Louisiana Constitution, deals with the possible integration of any tax-supported facility in the state, providing *inter alia* that "any facility of government which is maintained by a tax voted by any political subdivision of the state and which was segregated according to race at the time of the election at which the tax was authorized shall be declared by the governing authority of the subdivision to be no longer a function of the government when it is ordered integrated by any commission, board, or other authority."[17]

Why detach the *preamble* to a specific act and attempt to relate it to other *enumerated* acts?[18] Justice Douglas takes the preamble from Act 630, combines it with other *specific* statutes that require segregation under *enumerated* conditions, and arrives at the conclusion that even though there is no state law or municipal ordinance that requires segregation of the races in restaurants, "it is plain that the proprietors in the instant cases were segregating blacks from whites pursuant to Louisiana's custom."[19]

Can't the proprietors also choose segregation? Apparently not, as "this preference does not make the action 'private' rather than 'state' action."[20] But doesn't this viewpoint, if carried to its logical extreme, lead to the ultimate conclusion that any private action, if mentioned anywhere in a statute, becomes state action for purposes of the Fourteenth Amendment?

It is at this point that the second concept relating to a "public facility" is woven into the decision, for he said: "We have held on numerous occasions that the States may not use their powers to enforce racial segregation in public facilities."[21] Still relying on his conclusion that racial segregation in restaurants is the policy of Louisiana, without which reliance the opinion would have no meaning, Justice Douglas invokes the "licensing" concept to transform private property into property "affected with a public

17 See Harvard, *The 1960 Proposals to Amend the Louisiana Constitution*, 21 La. L. Rev. 121 (1960).

18 See Driedger, *The Composition of Legislation*, at p. 94 (1958):

> But granted that a preamble can sometimes assist in the construction of the statute, the chances are equally good that it will create a doubt or ambiguity. (Especially, it is contended by this writer, when it is used to introduce other acts to which it was not intended to apply.) A statute may be clear enough, but a loosely worded preamble (or a loosely used one) may drive a court to an interpretation that cannot reasonably be sustained by the statute itself. . . .

19 Garner v. Louisiana, *supra* note 1, at 183.

20 *Ibid.*

21 But, alas, the horses soon turned back into mice, just as I shall show that a private restaurant, changed into a public facility by judicial fiat, is, in reality, still a private restaurant.

interest," much like Cinderella's fairy godmother changing drab mice into luxurious carriage horses.[22]

Justice Douglas, for example, states that:

> "I do not believe that a State that licenses a business can license it to serve only whites or only blacks or only yellows or only browns"[23]

and

> "Those who run a retail establishment under permit from a municipality operate in my view a public facility. . . ."[24]

Again, Justice Douglas goes to the Revised Statutes of Louisiana[25] to support his view, and comes up with a series of statutes which involve broad powers of the local Boards of Health in reference to inspection and issuance of permits which require, *inter alia,* sanitary facilities and equipment in restaurants. "The City of Baton Rouge in its City Code requires all restaurants to have a permit. Tit. 6 c. 7 § 601."[26] But, from the other provisions of the Baton Rouge Code cited, it can be seen that this is also a requirement bound up with the public health. These statutes are enacted to regulate the public health, a recognized police power of a state. The power to regulate includes the power to license.[27] But, as was pointed out in *Tyson v. Banton*:

> "A license may be required, but such a license is not a franchise which puts the proprietor under the duty of furnishing entertainment to the public, or, if furnished, of admitting everyone who applies."[28]

If this reasoning is valid as regards a theatre, why is it invalid when applied to a restaurant? This writer submits that it is not invalid.

The final step in the reasoning process is to paraphrase the opinion in *Nebbia v. New York*[29] to state that restaurants in Louisiana have a "public consequence" and "affect the community at large."[30]

But is a restaurant affected with a public interest merely because the public "derives benefit, accommodation, ease or enjoyment from the ex-

22 Garner v. Louisiana, *supra* note 1, at 183.
23 *Id.* at 184.
24 *Id.* at 183.
25 *Ibid.*
26 *Ibid.*
27 See Great Atlantic and Pacific Tea Co. v. Grosjean, 301 U.S. 412 (1937).
28 Tyson v. Banton, 273 U.S. 418, 440 (1927).
29 Nebbia v. New York, 291 U.S. 502 (1933).
30 Garner v. Louisiana, *supra* note 1, at 183.

istence or operation of the business"?[31] The Supreme Court of the United States held no, in the *Tyson* case, *supra*, which is still good law today.[32]

Apparently then the ultimate issue which the Supreme Court must resolve will be which of two rights is supreme; the right to eat in a private restaurant, or the right to pick and choose one's customers, in one's private business.

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31 Tyson v. Banton, *supra* note 28, at 430.

32 *Ibid.* ". . . . while the word (interest) has not always been limited narrowly as strictly denoting a 'right,' that synonym more nearly than any other expresses the sense in which it is to be understood."