#25 - Burton

clerk
ant

May 31, 1950

dissent

Dear Harold:

Re: No. 25 - Henderson v. U. S.

Recirculation of May 29, 1950

I agree.

C. J.

Mr. Justice Burton

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CHAMBERS OF THE
CHIEF JUSTICE

SUPREME COURT OF THE UNITED STATES

No. 25.—October Term, 1949.

Elmer W. Henderson, Appellant, *v.* The United States of America, Interstate Commerce Commission, and Southern Railway Company.	On Appeal From the United States District Court for the District of Maryland.

[June 5, 1950.]

Mr. Justice Burton delivered the opinion of the Court.

The question here is whether the rules and practices of the Southern Railway Company, which divide each dining car so as to allot ten tables exclusively to white passengers and one table exclusively to Negro passengers, and which call for a curtain or partition between that table and the others, violate § 3 (1) of the Interstate Commerce Act. That section makes it unlawful for a railroad in interstate commerce "to subject any particular person, . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . . ." 54 Stat. 902, 49 U. S. C. § 3 (1). We hold that those rules and practices do violate the Act.

This issue grows out of an incident which occurred May 17, 1942. On that date the appellant, Elmer W. Henderson, a Negro passenger, was traveling on a first-class ticket on the Southern Railway from Washington, D. C., to Atlanta, Georgia, en route to Birmingham, Alabama, in the course of his duties as an employee of the United States. The train left Washington at 2 p. m. At about 5:30 p. m., while the train was in Virginia,[1] the first call to dinner was announced and he went promptly to the

[1] No reliance is placed in this case upon any action by any state.

dining car. In accordance with the practice then in effect, the two end tables nearest the kitchen were conditionally reserved for Negroes. At each meal those tables were to be reserved initially for Negroes and, when occupied by Negroes, curtains were to be drawn between them and the rest of the car. If the other tables were occupied before any Negro passengers presented themselves at the diner then those two tables also were to be available for white passengers, and Negroes were not to be seated at them while in use by white passengers.[2] When the appellant reached the diner, the end tables in question were partly occupied by white passengers but at

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[2] Rule of the Southern Railway Company issued July 3, 1941, and in effect May 17, 1942:

"DINING CAR REGULATIONS

"Meals should be served to passengers of different races at separate times. If passengers of one race desire meals while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartment set aside for them." 258 I. C. C. 413, 415, 63 F. Supp. 906, 910.

Joint Circular of the Southern Railway System issued August 6, 1942:

"Effective at once please be governed by the following with respect to the race separation curtains in dining cars:

"Before starting each meal pull the curtains to service position and place a 'Reserved' card on each of the two tables behind the curtains.

"These tables are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables.

"After the tables are occupied by white passengers, then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated.

" 'Reserved' cards are being supplied you." 258 I. C. C. at p. 415, 63 F. Supp. at p. 910.

least one seat at them was unoccupied. The dining-car steward declined to seat the appellant in the dining car but offered to serve him, without additional charge, at his Pullman seat. The appellant declined that offer and the steward agreed to send him word when space was available. No word was sent and the appellant was not served, although he twice returned to the diner before it was detached at 9 p. m.

In October, 1942, the appellant filed a complaint with the Interstate Commerce Commission alleging especially that the foregoing conduct violated § 3 (1) of the Interstate Commerce Act.[3] Division 2 of the Commission found that he had been subjected to undue and unreasonable prejudice and disadvantage, but that the occurrence was a casual incident brought about by the bad judgment of an employee. The Commission declined to enter an order as to future practices. 258 I. C. C. 413. A three-judge United States District Court for the District of Maryland, however, held that

[3] "(1) *It shall be unlawful for any common carrier* subject to the provisions of this part *to make, give, or cause any undue or unreasonable preference or advantage to any particular person,* company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, *in any respect whatsoever; or to subject any particular person,* company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic *to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . . .*" (Emphasis supplied.) 54 Stat. 902, 49 U. S. C. § 3 (1).

The appellant sought an order directing the railroad not only to cease and desist from the specific violations alleged but also to establish in the future, for the complainant and other Negro interstate passengers, equal and just dining-car facilities and such other service and facilities as the Commission might consider reasonable and just, and requiring the railroad to discontinue using curtains around tables reserved for Negroes.

The appellant sought damages, but the Commission found no pecuniary damages and that issue has not been pressed further.

the railroad's general practice, as evidenced by its instructions of August 6, 1942, was in violation of § 3 (1). Accordingly, on February 18, 1946, it remanded the case for further proceedings. 63 F. Supp. 906. Effective March 1, 1946, the company announced its modified rules which are now in effect. They provide for the reservation of ten tables, of four seats each, exclusively and unconditionally for white passengers and one table, of four seats, exclusively and unconditionally for Negro passengers. Between this table and the others a curtain is drawn during each meal.[4]

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[4] "TRANSPORTATION DEPARTMENT CIRCULAR NO. 142. CANCELLING INSTRUCTIONS ON THIS SUBJECT, DATED JULY 3, 1941, AND AUGUST 6, 1942.

"SUBJECT: SEGREGATION OF WHITE AND COLORED PASSENGERS IN DINING CARS.

"To: Passenger Conductors and Dining Car Stewards.

"Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows:

"(1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons, shall be reserved exclusively for colored passengers, and the other tables in the diner shall be reserved exclusively for white passengers.

"(2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal.

"(3) A 'Reserved' card shall be kept in place on the left-hand table in Station No. 1, described above, at all times during the meal except when such table is occupied as provided in these rules.

"(4) These rules become effective March 1, 1946.

"R. K. McClain,
"Assistant Vice-President."

269 I. C. C. 73, 75, 80 F. Supp. 32, 35.

Counsel for the railway company, at a subsequent hearing, corrected the above rules "to the extent of using the word 'negroes' in place

On remand, the full Commission, with two members dissenting and one not participating, found that the modified rules do not violate the Interstate Commerce Act and that no order for the future is necessary.[5] 269 I. C. C. 73. The appellant promptly instituted the present proceeding before the District Court, constituted of the same three members as before, seeking to have the Commission's order set aside and a cease and desist order issued. 28 U. S. C. §§ 41 (28), 43–48; 49 U. S. C. § 17 (9); see also, 28 U. S. C. (Supp. III) §§ 1336, 1398, 2284, 2321, 2325. With one member dissenting, the court sustained the modified rules on the ground that the accommodations are adequate to serve the average number of Negro passengers and are "proportionately fair." 80 F. Supp. 32, 39. The case is here on direct appeal. 28 U. S. C. (Supp. III) §§ 1253, 2101 (b). In this Court, the

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of 'colored persons.'" Also, the evidence shows, and the Commission has stated, that "White and Negro soldiers are served together, without distinction." 258 I. C. C. 413, 415. The rules, accordingly, are treated as applicable only to civilian passengers. The company further showed that it is now substituting a five-foot high wooden partition in place of the curtain. The steward's office is being placed in the table space opposite that reserved for Negro passengers and a similar wooden partition is being erected between that office and the rest of the car.

[5] The company was permitted to introduce two tabulations, covering about ten days each, showing the comparative numbers of meals served to white and Negro passengers on trips comparable to the one which the appellant had taken. These show that only about 4% of the total meals served were served to Negro passengers whereas four reserved seats exceed 9% of a total seating capacity of 44. On the other hand, the tabulations also show that at one meal 17 Negro passengers, and at each of 20 meals more than eight Negro passengers, were served. Similarly, the brief filed by the Commission states that, out of the 639 serving periods reported, on 15 occasions more than four times as many white passengers were served as there were seats reserved for them, and, on 541 occasions, there were two or more rounds of servings.

United States filed a brief and argued orally in support of the appellant.

It is clear that appellant has standing to bring these proceedings. He is an aggrieved party, free to travel again on the Southern Railway. Having been subjected to practices of the railroad which the Commission and the court below found to violate the Interstate Commerce Act, he may challenge the railroad's current regulations on the ground that they permit the recurrence of comparable violations. *Mitchell* v. *United States,* 313 U. S. 80, 92–93.

The material language in § 3 (1) of the Interstate Commerce Act has been in that statute since its adoption in 1887. 24 Stat. 380. From the beginning, the Interstate Commerce Commission has recognized the application of that language to discriminations between white and Negro passengers. *Councill* v. *Western & Atlantic R. Co.,* 1 I. C. C. 339;[6] *Heard* v. *Georgia R. Co.,* 1 I. C. C. 428; *Heard* v. *Georgia R. Co.,* 3 I. C. C. 111; *Edwards* v. *Nashville, C. & St. L. R. Co.,* 12 I. C. C. 247; *Cozart* v. *Southern R. Co.,* 16 I. C. C. 226; *Gaines* v. *Seaboard Air Line R. Co.,* 16 I. C. C. 471; *Crosby* v. *St. Louis-San Francisco R. Co.,* 112 I. C. C. 239. That section recently was so applied in *Mitchell* v. *United States, supra.*

The decision of this case is largely controlled by that in the *Mitchell* case. There a Negro passenger holding a first-class ticket was denied a Pullman seat, although such a seat was unoccupied and would have been available to him if he had been white. The railroad rules

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[6] "The Western and Atlantic Railroad Company will be notified to cease and desist from subjecting colored persons to undue and unreasonable prejudice and disadvantage in violation of section 3 of the Act to regulate commerce, and from furnishing to colored persons purchasing first-class tickets on its road accommodations which are not equally safe and comfortable with those furnished other first-class passengers." 1 I. C. C. at p. 347.

had allotted a limited amount of Pullman space, consisting of compartments and drawing rooms, to Negro passengers and, because that space was occupied, the complainant was excluded from the Pullman car and required to ride in a second-class coach. This Court held that the passenger thereby had been subjected to an unreasonable disadvantage in violation of § 3 (1).[7]

The similarity between that case and this is inescapable. The appellant here was denied a seat in the dining car although at least one seat was vacant and would have been available to him, under the existing rules, if he had been white.[8] The issue before us, as in the *Mitchell* case, is whether the railroad's current rules and practices cause passengers to be subjected to undue or unreasonable prejudice or disadvantage in violation of § 3 (1). We find that they do.

The right to be free from unreasonable discriminations belongs, under § 3 (1), to each particular person. Where a dining car is available to passengers holding tickets entitling them to use it, each such passenger is equally entitled to its facilities in accordance with reasonable regulations. The denial of dining service to any such passenger by the rules before us subjects him to a prohibited disadvantage. Under the rules, only four Negro passengers may be served at one time and then only at the table reserved for Negroes. Other Negroes who present themselves are compelled to await a vacancy at that table, although there may be many vacancies elsewhere in the diner. The railroad thus refuses to extend to those passengers the use of its existing and unoccupied

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[7] The rules also denied access by Negroes to the dining car and observation car. The principles there announced applied equally to those facilities.

[8] That specific denial of service was condemned by the Commission and the District Court as a violation of § 3 (1). Review of that condemnation is not sought here.

facilities. The rules impose a like deprivation upon white passengers whenever more than 40 of them seek to be served at the same time and the table reserved for Negroes is vacant.

We need not multiply instances in which these rules sanction unreasonable discriminations. The division between the tables is at most symbolic. The curtains, partitions and signs emphasize the artificiality of a division which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility. Cf. *McLaurin* v. *Oklahoma State Regents, ante,* p. ——, decided today. They violate § 3 (1).

Our attention has been directed to nothing which removes these racial allocations from the statutory condemnation of "undue or unreasonable prejudice or disadvantage . . . ." It is argued that the limited demand for dining-car facilities by Negro passengers justifies the regulations. But it is no answer to the particular passenger who is denied service at an unoccupied place in a dining car that, on the average, persons like him are served. As was pointed out in *Mitchell* v. *United States,* 313 U. S. 80, 97, "the comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment, a right specifically safeguarded by the provisions of the Interstate Commerce Act." Cf. *McCabe* v. *Atchison, T. & S. F. R. Co.,* 235 U. S. 151; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337.

That the regulations may impose on white passengers, in proportion to their numbers, disadvantages similar to those imposed on Negro passengers is not an answer to the requirements of § 3 (1). Discriminations that operate to the disadvantage of two groups are not the less to be condemned because their impact is broader than if only one were affected. Cf. *Shelley* v. *Kraemer,* 334 U. S. 1, 22.

Since § 3 (1) of the Interstate Commerce Act invalidates the rules and practices before us, we do not reach the constitutional or other issues suggested.

The judgment of the District Court is reversed and the cause is remanded to that court with directions to set aside the order of the Interstate Commerce Commission which dismissed the original complaint and to remand the case to that Commission for further proceedings in conformity with this opinion.

It is so ordered.

MR. JUSTICE CLARK took no part in the consideration or decision of this case.

No 25

To: The Chief Justice

From: BURTON, J.

Circulated: ----------

Recirculated: 5/29/50

See note. 8 + 9

#25-Burton

May 26, 1950

Dear Harold:

Re: No. 25 - Henderson v. U.S., etc.

I agree.

C. J.

Mr. Justice Burton

#25 - Burton

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SUPREME COURT OF THE UNITED STATES

No. 25.—October Term, 1949.

Elmer W. Henderson, Appellant, *v.* The United States of America, Interstate Commerce Commission, and Southern Railway Company.	On Appeal From the United States District Court for the District of Maryland.

[May —, 1950.]

Mr. Justice Burton delivered the opinion of the Court.

The question here is whether the rules and practices of the Southern Railway Company, which divide each dining car so as to allot ten tables exclusively to white passengers and one table exclusively to Negro passengers, and which call for a curtain or partition between that table and the others, violate § 3 (1) of the Interstate Commerce Act. That section makes it unlawful for a railroad in interstate commerce "to subject any particular person, . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . . ." 54 Stat. 902, 49 U. S. C. § 3 (1). We hold that those rules and practices do violate the Act.

This issue grows out of an incident which occurred May 17, 1942. On that date, Elmer W. Henderson, a Negro passenger, was traveling on a first-class ticket on the Southern Railway from Washington, D. C., to Atlanta, Georgia, en route to Birmingham, Alabama, in the course of his duties as an employee of the United States. The train left Washington at 2 p. m. At about 5:30 p. m., while the train was in Virginia,[1] the first call to dinner was announced and he went promptly to the

[1] No reliance is placed in this case upon any action by any state.

dining car. In accordance with the practice then in effect, the two end tables nearest the kitchen were conditionally reserved for Negroes. At each meal those tables were to be reserved initially for Negroes and, when occupied by Negroes, curtains were to be drawn between them and the rest of the car. If the other tables were occupied before any Negro passengers presented themselves at the diner those two tables then were to be available for white passengers, and Negroes were not to be seated at them while in use by white passengers.[2] When the appellant reached the diner, the end tables in question were partly occupied by white passengers but at least one seat at them was unoccupied. The dining-car steward declined to seat the appellant in the dining car

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[2] Rule of the Southern Railway Company issued July 3, 1941, and in effect May 17, 1942:

". . . Dining Cars. Meals should be served to passengers of different races at separate times. If passengers of one race desire meals served while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartments set aside for them."

Joint Circular of the Southern Railway System issued August 6, 1942:

"Effective at once please be governed by the following with respect to the race separation curtains in dining cars:

"Before starting each meal pull the curtains to service position and place a 'Reserved' card on each of the two tables behind the curtains.

"These tables are not to be used by white passengers until all other seats in the car have been taken, then, if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables.

"After the tables are occupied by white passengers then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated.

" 'Reserved' cards are being supplied you."

but offered to serve him, without additional charge, at his Pullman seat. The appellant declined that offer and the steward agreed to send him word when space was available. No word was sent and he was not served, although he twice returned to the diner before it was detached at 9 p. m.

In October, 1942, the appellant filed a complaint with the Interstate Commerce Commission alleging especially that the foregoing conduct violated § 3 (1) of the Interstate Commerce Act.[3] Division 2 of the Commission found that he had been subjected to undue and unreasonable prejudice and disadvantage, but that the occurrence was a casual incident brought about by the bad judgment of an employee. The Commission declined to enter an order as to future practices. 258 I. C. C. 413. A three-judge United States District Court for the District of Maryland, however, held that the railroad's general practice, as evidenced by its instruc-

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[3] "(1) *It shall be unlawful for any common carrier* subject to the provisions of this part *to make, give, or cause any undue or unreasonable preference or advantage to any particular person,* company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, *in any respect whatsoever; or to subject any particular person,* company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic *to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . . .*" (Emphasis supplied.) 54 Stat. 902, 49 U. S. C. § 3 (1).

The appellant sought an order directing the railroad not only to cease and desist from the specific violations alleged but also to establish in the future, for the complainant and other Negro interstate passengers, equal and just dining-car facilities and such other service and facilities as the Commission might consider reasonable and just, and requiring the railroad to discontinue using curtains around tables reserved for Negroes.

The appellant sought damages, but the Commission found no pecuniary damages and that issue has not been pressed further.

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[4] "Southern Railway System

"Office of Assistant Vice-President

"Washington, D. C., February 19, 1946.

"Transportation Department Circular No. 142. Cancelling instructions on this subject, dated July 3, 1941, and August 6, 1942.

"Subject: Segregation of White and Colored Passengers in Dining Cars.

"To: Passenger Conductors and Dining Car Stewards.

"Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows:

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"(4) These rules become effective March 1, 1946.

"R. K. McClain, Assistant Vice-President."

Counsel for the railway company, at a subsequent hearing, corrected the above rules "to the extent of using the word 'negroes' in place

On remand, the full Commission, with two members dissenting and one not participating, found that the modified rules do not violate the Interstate Commerce Act and that no order for the future is necessary.[5] 269 I. C. C. 73. The appellant promptly instituted the present proceeding before the District Court, constituted of the same three members as before, seeking to have the Commission's order set aside and a cease and desist order issued. 28 U. S. C. §§ 41 (28), 43–48; 49 U. S. C. § 17 (9); see also, 28 U. S. C. Supp. III, §§ 1336, 1398, 2284, 2321, 2325. With one member dissenting, the court sustained the modified rules on the ground that the accommodations are adequate to serve the average number of Negro passengers and are "proportionately fair." 80 F. Supp. 32, 39. The case is here on direct appeal. 28 U. S. C. Supp. III, §§ 1253, 2101 (b). In this Court, the

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had allotted a limited amount of Pullman space, consisting of compartments and drawing rooms, to Negro passengers and, because that space was occupied, the complainant was excluded from the Pullman car and required to ride in a second-class coach. This Court held that the passenger thereby had been subjected to an unreasonable disadvantage in violation of § 3 (1).[7]

The similarity between that case and this is inescapable. The appellant here was denied a seat in the dining car although at least one seat was vacant and would have been available to him, under the existing rules, if he had been white.[8] The issue before us, as in the *Mitchell* case, is whether the railroad's current rules and practices cause passengers to be subjected to undue or unreasonable prejudice or disadvantage in violation of § 3 (1). We find that they do.

The right to be free from unreasonable discriminations belongs, under § 3 (1), to each particular person. Where a dining car is available to passengers holding tickets entitling them to use it, each such passenger is equally entitled to its facilities in accordance with reasonable regulations. The denial of dining service to any such passenger by the rules before us subjects him to a prohibited disadvantage. Under the rules, only four Negro passengers may be served at one time and then only at the table reserved for Negroes. Other Negroes who present themselves are compelled to await a vacancy at that table, although there may be many vacancies elsewhere in the diner. The railroad thus refuses to extend to those passengers the use of its existing and unoccupied

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We need not multiply instances in which these rules sanction unreasonable discriminations. The division between the tables is at most symbolic. The curtains, partitions and signs emphasize the artificiality of a division which serves only to call attention to a racial classification of passengers holding identical tickets and using the same dining facility. Cf. *McLaurin* v. *Oklahoma State Regents,* decided today. They violate § 3 (1).

Our attention has been directed to nothing which removes these racial allocations from the statutory condemnation of "undue or unreasonable prejudice or disadvantage . . . ." It is argued that the limited demand for dining-car facilities by Negro passengers justifies the regulations. But it is no answer to the particular passenger who is denied service at an unoccupied place in a dining car that, on the average, persons like him are served. As was pointed out in *Mitchell* v. *United States,* 313 U. S. 80, 97, "the comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment, a right specifically safeguarded by the provisions of the Interstate Commerce Act." Cf. *McCabe* v. *Atchison, T. & S. F. R. Co.,* 235 U. S. 151; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337.

That the regulations may impose on white passengers, in proportion to their numbers, disadvantages similar to those imposed on Negro passengers is not an answer to the requirements of § 3 (1). Discriminations that operate to the disadvantage of two groups are not the less to be condemned because their impact is broader than if only one were affected. What this Court has said of rights protected by the constitutional guaranty of the equal protection of the laws is applicable to the

personal rights protected by the Interstate Commerce Act. That protection is not achieved "through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer,* 334 U. S. 1, 22.

Since § 3 (1) of the Interstate Commerce Act invalidates the rules and practices before us, we do not reach the constitutional issues suggested.

The judgment of the District Court is reversed and the cause is remanded to that court with directions to set aside the order of the Interstate Commerce Commission which dismissed the original complaint and to remand the case to that Commission for further proceedings in conformity with this opinion.

It is so ordered.

No 25

To: The Chief Justice

From: BURTON, J.

Circulated: 5/25/50

Recirculated: _____

#25 - Douglas memo

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CHAMBERS OF THE
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SUPREME COURT OF THE UNITED STATES

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Elmer W. Henderson, Appellant, *v.* The United States of America, Interstate Commerce Commission, and Southern Railway Company.	On Appeal From the United States District Court for the District of Maryland.

[June —, 1950.]

Memorandum from Mr. Justice Douglas.

The opinion of the Court, as I read it, proceeds on untenable grounds and compounds the problem of the segregation of white and colored people on interstate railroads.

The type of discrimination practiced on Mr. Henderson is no longer possible under the revised regulations. All concede that the refusal of a seat to him when one was available was an "undue or unreasonable prejudice or disadvantage" to him in violation of § 3 (1) of the Interstate Commerce Act. For under the regulations then in force there were not even separate or segregated facilities reserved for Negroes. That discrimination fell squarely under the ban of *Mitchell* v. *United States,* 313 U. S. 80, since it denied equality of treatment to Negroes as respects the transportation service.

But no such discrimination is possible under the revised regulations. They reserve specified dining-car space for colored passengers and other space for whites. In other words, they institute a segregated system of dining-car service. The Court says that the *Mitchell* decision largely controls the validity of these regulations. But the *Mitchell* case had nothing to do with segregation. Chief Justice

Hughes speaking for the Court said, "The question whether this [the denial of Pullman space to the colored passenger] was a discrimination forbidden by the Interstate Commerce Act is not a question of segregation, but one of equality of treatment." 313 U. S. 94. In the *Mitchell* case, first-class Pullman-car facilities were not available for colored passengers. The *Mitchell* case would be in point here only if specified rooms or berths had been set aside for Negroes. Then the problem of segregation would be presented. So it is that *Mitchell* which presented no aspect of segregation and where a ruling on segregation was expressly disclaimed cannot govern in any degree the question of segregation presented here.

It may be that the Court does not regard the allocation of dining-car space in the present case as segregation—that if the carriers want to practice segregation, they must put on a separate car for colored passengers. The Court says,

> "The division between the tables is at most symbolic. The curtains, partitions and signs emphasize the artificiality of a division which serves only to call attention to a racial classification of passengers holding identical tickets and using the same dining facility."

But what segregation is not symbolic? What segregation is not a classification of passengers on racial lines? Does not a partition or a curtain segregate as plainly as a separate car? Do not both carry the same symbolism? Does not each set one race apart from the other? Is segregation by a five-foot wall any more invidious a discrimination, measured either in terms of intent or result, than segregation in a separate car?

These questions need be faced, if the Court means to hold that the flaw of the case lies in the absence of complete segregation. Carriers and passengers alike are entitled to know how it is that prejudice or disadvantage

in the statutory sense appears when segregation takes the form of a five-foot wall and disappears when clamped with its full rigor on a transportation system.

I cannot believe that the Court really intends to foster that distinction. For the reasoning of the opinion of the Court is sufficient to bring each system of segregation under the ban of § 3 (1) of the Act. The Court says,

> "Where a dining car is available to passengers holding tickets entitling them to use it, each such passenger is equally entitled to its facilities in accordance with reasonable regulations. The denial of dining service to any such passenger by the rules before us subjects him to a prohibited disadvantage. Under the rules, only four Negro passengers may be served at one time and then only at the table reserved for Negroes. Other Negroes who present themselves are compelled to await a vacancy at that table, although there may be many vacancies elsewhere in the diner. The railroad refuses to extend to those passengers the use of its existing and unoccupied facilities. The rules impose a like deprivation upon white passengers whenever more than 40 of them seek to be served at the same time and the table reserved for Negroes is vacant."

The same can be said where separate dining cars are available for white and for colored passengers. Under the reasoning of the Court the waiting line in the white dining car would be entitled to be served in the colored dining room if seats were available there; and the colored waiting line would be entitled to be served in the white car if it had unoccupied seats. If such service were denied, the carrier in the words of the Court would be refusing "to extend to those passengers the use of its existing and unoccupied facilities." A train is not any less a unit than a single car.

What the Court does in effect is to outlaw the present form of segregation (by curtains or a five-foot wall) and to adopt a test of discrimination which outlaws all segregation. It does this under the Interstate Commerce Act.

What is "any undue or unreasonable prejudice or disadvantage" within the meaning of § 3 (1)?

These were the precise words enacted in the original Act to Regulate Commerce in 1887. See 24 Stat. 380. At that time segregation with its Jim Crow cars was the practice. The Interstate Commerce Commission ruled in the same year when the Act became law that segregation of white and colored people on the railroads did not violate the Act. *Councill* v. *Western & Atlantic R. Co.*, 1 I. C. C. 638, 641.[1] That has been the consistent ruling of the Commission through the years. As stated by the Commission in *Stamps & Powell* v. *Louisville & N. R. Co.*, 269 I. C. C. 789, 794, decided in 1948:

> "The Commission, within a few months after its organization, expressed the conclusion that the separation of white and Negro passengers paying the same fare is not in violation of section 3 of the act if cars and conditions equal in all respects are furnished to both and the same care and protection of passengers is observed. *Councill* v. *Western & A. R. Co.*, 1 I. C. C. 339; *Heard* v. *Georgia R. Co.*, 1 I. C. C. 428. It has adhered to that conclusion consistently. Although the question has been constantly and per-

[1] The Commission said: "Public sentiment, wherever the colored population is large, sanctions and requires this separation of races, and this was recognized by counsel representing both complainant and defendant at the hearing. We cannot, therefore, say that there is any undue prejudice or unjust preferences in recognizing and acting upon this general sentiment, provided it is done on fair and equal terms. This separation may be carried out on railroad trains without disadvantage to either race and with increased comfort to both."

sistently agitated before the public and the Congress for many years, the Congress has done nothing to indicate that it did not concur in the Commission's interpretation of the act."

That is a long continued and uniform practice of an administrative agency. It shows a history of consistent administrative construction for over 60 years. We have leaned heavily on administrative construction of statutes in our interpretation of them.[2] I know of no clearer, less deviating uniform construction than is presented here.

Moreover, this construction of the Act by the Commission has throughout the years conformed not only to the social custom in the South but also to the decisions of the Court. This Court never has held that segregation is unlawful *per se.* Quite the contrary. The Court held in 1896 that segregation of white and colored passengers on railroads did not violate the Thirteenth or Fourteenth Amendment. *Plessy* v. *Ferguson,* 163 U. S. 537. If emphasis were needed, it was supplied by the historic dissent of Mr. Justice Harlan. The *Plessy* case has never been overruled. It stands today as a constitutional sanction for the practice of segregating the races.

It is therefore impossible for me to say that "undue or unreasonable prejudice or disadvantage" as used in § 3 (1) of the Act includes segregation. If it means that now, it meant it in 1887 when the Act was passed. We are dealing with legislation, not with the generalities of a Constitution which acquire shades of meaning and connotations from the history and experience of each generation. The legislation up to now has never been supposed to outlaw segregation. Up to now it has sanctioned segregation. No word or line of history is shown to

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[2] See *United States* v. *American Trucking Assn.,* 310 U. S. 534, 549; *Gray* v. *Powell,* 314 U. S. 402, 412; *Labor Board* v. *Hearst Publications,* 332 U. S. 111, 130.

indicate that those who voted for the Act in 1887 thought they were voting for the abolition of segregation. Such a change even today would pull roots that are deep in parts of our society. I cannot believe that if such a basic reform or change were intended by the Act of 1887, it would have gone unnoticed. On the contrary, I cannot but feel that if the purpose was to use the words "undue or unreasonable prejudice or disadvantage" to accomplish that result, the records of Congress would be replete with arguments and debates. Such a decision by the Congress would indeed have been marked in the history books. It would have been so clear and plain that none could doubt the purpose.

For these reasons I cannot say that Congress in the Interstate Commerce Act has done the work for us and that segregation of the races on carriers—whether it be by curtains or partitions or by the use of separate cars—violates § 3 (1) of the Act.

This does not mean that segregation on carriers is lawful. It means that if it is, the Constitution permits it.

Constitutional adjudications should be avoided where other grounds of decision are available. The present case, containing as it does important issues on which people are greatly divided and easily aroused, is as good an illustration of the wisdom of that policy as any. But I see no other alternative. This case squarely raises the issues of *Plessy* v. *Ferguson,* which I think should be met.

To the Chief Justice
from
Douglas

5-31-50

MAY 31 2 02 PM '50
CHAMBERS OF THE
CHIEF JUSTICE

#35-F.F.

MEMORANDUM FOR THE CONFERENCE

It will be recalled that at Saturday's conference Brother Burton indicated that he and I had some discussion on one phase of his opinion in No. 25, Henderson v. The United States. My difficulty could easily enough be met by noting my concurrence merely in the result. But the matter seems to me important enough to bring to the attention of the Conference.

1. The decision explicitly goes on the construction of § 3 (1) of the Interstate Commerce Act and does not reach the constitutional issue. In brief, my point relates to the fact that § 3 (1) of the Act does not outlaw segregation as such. I believe it is not the intention of the opinion to construe § 3 (1) to prohibit segregation as such. Naturally so. It is inconceivable that the purpose to do so could be attributed to Congress either at the time of the original enactment in 1887 or on what might be deemed to have been its readoption by way of the Transportation Act of 1940. Considering the inability to bring FEPC even to a vote on the floor of the Senate, to suggest that either in 1887 or in 1940 the Congress passed an Act abolishing segregation as such on interstate carriers could only have been on the same theory as that by which a sardonic critic of English imperialism explained the acquisition of empire by Great Britain - it occurred in a fit of absentmindedness.

2. If then Henderson is not to decide, as I understand from Brother Burton it is not intended to decide, that § 3 (1) is to go beyond the Mitchell case, which of course means an application merely of the Gaines doctrine, 305 U. S. 337, it seems to me highly important that the opinion should resolutely steer clear of implying that it does more. And it is here where my difficulty arises, because it can and will fairly be read to do more.

3. As I understand the Mitchell case, it merely requires availability of the same facilities and the same services to all passengers or shippers. It precludes apportioning facilities according to average use by a particular class, whether it be a particular class of passengers or of shippers. The

mere fact that on the average no more than four colored passengers seek dining facilities is no justification for denying a fifth or a sixth colored passenger the right to sit at a vacant table reserved for white passengers because the provisions made for colored passengers have been exhausted. It is equally clear that inferior service cannot be allocated to colored passengers. An inferior service may consist in cooping in colored diners or restricting their seating to an undesirable table near the kitchen or the like, when a more comfortable one is unoccupied.

4. But if we are not now deciding, as I understand we are not, that giving exactly the same opportunities for eating or sleeping to colored passengers as are given to white, although these facilities may be afforded in separate cars violates § 3 (1), I see no distinction between regarding that as not constituting a violation of § 3 (1) and making the separateness in the same car, so long as the separateness does not carry with it consequences other than separateness.

5. Therefore, for this Court to indicate objection to the division at tables as being "symbolic" is to introduce legal objection to separateness as such. "Symbolic" is the anti-segregation slogan. That is precisely the social objection to segregation, namely, that it represents a symbol of inferiority. We cannot introduce it into an opinion without giving just ground to the notion that we have ruled out segregation as such. The Interstate Commerce Act is not concerned with symbolic differentiations. It is concerned with the facilities and services which railroads afford.

6. A totally different situation is presented by segregation in graduate schools. Such segregation inherently involves disadvantage to colored graduate students. Colored students who are restricted to segregated instruction cannot possibly have the same educational opportunities given in State institutions to white graduate students. This results from a number of educational considerations. There is one overriding and conclusive consideration. Anyone having even the least knowledge of educational problems touching universities knows that perhaps the most limiting circumstance is the paucity of teachers

of quality to meet the demands, particularly for graduate instruction. Every law school in the country is plagued by that problem. We need no evidence to enable us to know that there just are not enough law teachers to duplicate State-maintained law schools. Even if law teachers, or teachers in any other graduate department, do double duty by teaching in colored duplications of white graduate departments, the teaching would intrinsically not be the same, apart from other limiting circumstances in colored schools.

Even in the opinions dealing with graduate instruction we should not give currency to the term "symbolic". I cannot put too strongly my conviction that if we put this Court behind that term we have opened the door to the very thing which, at least for the moment, we have agreed to keep out - passing on segregation as such - reaching down to primary instruction. Indeed it would affect not only the whole question of education but all other aspects of segregation. It seems to me we ought to avoid language which will do the very thing we have decided not to adjudicate.

By way of being concrete in the suggestions that I have in mind regarding the Henderson opinion, so as to use as a fact the objection to being curtained-in and yet avoid the "symbolic" argument, I attach a paragraph that I proposed to Brother Burton in lieu of his first two full paragraphs of page 8 of his opinion.

F.F.

May 31, 1950.

It is argued that the limited demand for dining-car facilities by Negro passengers justifies the regulations. But even apart from the "undue or unreasonable prejudice or disadvantage" involved in shutting Negro diners behind a curtain or partition when dining space is afforded them, it is no less a denial to a passenger who is denied service, merely because he is a Negro, at an unoccupied place in a dining car that, on the average, persons like him are served. As was pointed out in Mitchell v. United States, 313 U.S. 80, 97, "the comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment, a right specifically safeguarded by the provisions of the Interstate Commerce Act." Cf. McCabe v. Atchison, T. & S. F. R. Co., 235 U.S. 151; Missouri ex rel. Gaines v. Canada, 305 U.S. 337.