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IN THE

Supreme Court of the United States

October Term, 1952

No. 8 /

OLIVER BROWN, MRS. RICHARD LAWTON,
MRS. SADIE EMMANUEL, *et al.*,
Appellants,

VS.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE
COUNTY, KANSAS, *et al.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

Opinion Below

The opinion of the statutory three-judge-District Court for the District of Kansas (R. 238-244) is reported at 98 F. Supp. 797.

Jurisdiction

The judgment of the court below was entered on August 3, 1951 (R. 247). On October 1, 1951, appellants filed a petition for appeal (R. 248), and an order allowing the appeal was entered (R. 250). Probable jurisdiction was noted on June 9, 1952 (R. 254). Jurisdiction of this Court rests on Title 28, United States Code, §§ 1253 and 2201(b).

Questions Presented

1. Whether the State of Kansas has power to enforce a state statute pursuant to which racially segregated public elementary schools are maintained.

2. Whether the finding of the court below—that racial segregation in public elementary schools has the detrimental effect of retarding the mental and educational development of colored children and connotes governmental acceptance of the conception of racial inferiority—compels the conclusion that appellants here are deprived of their rights to share equally in educational opportunities in violation of the equal protection clause of the Fourteenth Amendment.

The Law of Kansas and the Statute Involved

All boards of education, superintendents of schools and school districts in the state are prohibited from using race as a factor in affording educational opportunities in the public schools within their respective jurisdictions unless expressly empowered to do so by statute. *Knox* v. *Board of Education,* 54 K. 152, 25 P. 616 (1891); *Cartwright* v. *Board of Education,* 73 K. 32, 84 P. 382 (1906); *Rowles* v. *Board of Education,* 76 K. 361, 91 P. 88 (1907); *Woolridge, et al.* v. *Board of Education,* 98 K. 397, 157 P. 1184 (1916); *Thurman-Watts* v. *Board of Education,* 115 K. 328, 222 P. 123 (1924); *Webb* v. *School District,* 167 K. 395, 206 P. 2d 1066 (1949).

Segregated elementary schools in cities of the first class are maintained solely pursuant to authority of Chapter 72-1724 of the General Statutes of Kansas, 1949, which reads as follows:

> "Powers of board; separate schools for white and colored children; manual training. The board of education shall have power to elect their own

officers, make all necessary rules for the government of the schools of such city under its charge and control and of the board, subject to the provisions of this act and the laws of this state; to organize and maintain separate schools for the education of white and colored children, including the high schools in Kansas City, Kans.; no discrimination on account of color shall be made in high schools except as provided herein; to exercise the sole control over the public schools and school property of such city; and shall have the power to establish a high school or high schools in connection with manual training and instruction or otherwise, and to maintain the same as a part of the public-school system of said city. (G. S. 1868, Ch. 18, § 75; L. 1879, Ch. 81, § 1; L. 1905, Ch. 414, § 1; Feb. 28; R. S. 1923, § 72-1724.)"

Statement of the Case

Appellants are of Negro origin and are citizens of the United States and of the State of Kansas (R. 3-4). Infant appellants are children eligible to attend and are now attending elementary schools in Topeka, Kansas, a city of the first class within the meaning of Chapter 72-1724, General Statutes of Kansas, 1949, hereinafter referred to as the statute. Adult appellants are parents of minor appellants and are required by law to send their respective children to public schools designated by appellees (R. 3-4). Appellees are state officers empowered by state law to maintain and operate the public schools of Topeka, Kansas.

For elementary school purposes, the City of Topeka is divided into 18 geographical divisions designated as territories (R. 24). In each of these territories one elementary school services white children exclusively (R. 24). In addition, four schools are maintained for the use of Negro children exclusively (R. 11, 12). These racial distinctions

are enforced pursuant to the statute. In accordance with the terms of the statute there is no segregation of Negro and white children in junior and senior high schools (R. 12).

On March 22, 1951, appellants instituted the instant action seeking to restrain the enforcement, operation and execution of the statute on the ground that it deprived them of equal educational opportunities within the meaning of the Fourteenth Amendment (R. 2-7). In their answer, appellees admitted that they acted pursuant to the statute, and that infant appellants were not eligible to attend any of the 18 white elementary schools solely because of their race and color (R. 12). The Attorney General of the State of Kansas filed a separate answer for the specific purpose of defending the constitutional validity of the statute in question (R. 14).

Thereupon, the court below was convened in accordance with Title 28, United States Code, § 2284. On June 25-26, a trial on the merits took place (R. 63 *et seq.*). On August 3, 1951, the court below filed its opinion (R. 238-244), its findings of fact (R. 244-246), and conclusions of law (R. 246-247), and entered a final judgment and decree in appellees' favor denying the injunctive relief sought (R. 247).

Specifications of Error

The District Court erred:

1. In refusing to grant appellants' application for a permanent injunction to restrain appellees from acting pursuant to the statute under which they are maintaining separate public elementary schools for Negro children solely because of their race and color.

2. In refusing to hold that the State of Kansas is without authority to promulgate the statute because it enforces

a classification based upon race and color which is violative of the Constitution of the United States.

3. In refusing to enter judgment in favor of appellants after finding that enforced attendance at racially segregated elementary schools was detrimental and deprived them of educational opportunities equal to those available to white children.

Summary of Argument

The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone. The State of Kansas has no power thereunder to use race as a factor in affording educational opportunities to its citizens.

Racial segregation in public schools reduces the benefits of public education to one group solely on the basis of race and color and is a constitutionally proscribed distinction. Even assuming that the segregated schools attended by appellants are not inferior to other elementary schools in Topeka with respect to physical facilities, instruction and courses of study, unconstitutional inequality inheres in the retardation of intellectual development and distortion of personality which Negro children suffer as a result of enforced isolation in school from the general public school population. Such injury and inequality are established as facts on this appeal by the uncontested findings of the District Court.

The District Court reasoned that it could not rectify the inequality that it had found because of this Court's decisions in *Plessy* v. *Ferguson,* 163 U. S. 537 and *Gong Lum* v. *Rice,* 275 U. S. 78. This Court has already decided that the *Plessy* case is not in point. Reliance upon *Gong Lum* v. *Rice* is mistaken since the basic assumption of that case is the existence of equality while no such assumption

can be made here in the face of the established facts. Moreover, more recent decisions of this Court, most notably *Sweatt* v. *Painter,* 339 U. S. 629 and *McLaurin* v. *Board of Regents,* 339 U. S. 637, clearly show that such hurtful consequences of segregated schools as appear here constitute a denial of equal educational opportunities in violation of the Fourteenth Amendment. Therefore, the court below erred in denying the relief prayed by appellants.

ARGUMENT

I

The State of Kansas in affording opportunities for elementary education to its citizens has no power under the Constitution of the United States to impose racial restrictions and distinctions.

While the State of Kansas has undoubted power to confer benefits or impose disabilities upon selected groups of citizens in the normal execution of governmental functions, it must conform to constitutional standards in the exercise of this authority. These standards may be generally characterized as a requirement that the state's action be reasonable. Reasonableness in a constitutional sense is determined by examining the action of the state to discover whether the distinctions or restrictions in issue are in fact based upon real differences pertinent to a lawful legislative objective. *Bain Peanut Co.* v. *Pinson,* 282 U. S. 499; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61; *Asbury Hospital* v. *Cass County,* 326 U. S. 207; *Metropolitan Casualty Insurance Co.* v. *Brownell,* 294 U. S. 580; *Dominion Hotel* v. *Arizona,* 249 U. S. 265.

When the distinctions imposed are based upon race and color alone, the state's action is patently the epitome of

that arbitrariness and capriciousness constitutionally impermissive under our system of government. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Skinner* v. *Oklahoma,* 316 U. S. 535. A racial criterion is a constitutional irrelevance, *Edwards* v. *California,* 314 U. S. 160, 184, and is not saved from condemnation even though dictated by a sincere desire to avoid the possibility of violence or race friction. *Buchanan* v. *Warley,* 245 U. S. 60; *Morgan* v. *Virginia,* 328 U. S. 373. Only because it was a war measure designed to cope with a grave national emergency was the federal government permitted to level restrictions against persons of enemy descent. *Hirabayashi* v. *United States,* 320 U. S. 81; *Oyama* v. *California,* 332 U. S. 633. This action, "odious," *Hirabayashi* v. *United States, supra,* at page 100, and "suspect," *Korematsu* v. *United States,* 323 U. S. 214, 216, even in times of national peril, must cease as soon as that peril is past. *Ex Parte Endo,* 323 U. S. 283.

This Court has found violation of the equal protection clause in racial distinctions and restrictions imposed by the states in selection for jury service, *Shepherd* v. *Florida,* 341 U. S. 50; ownership and occupancy of real property, *Shelley* v. *Kramer,* 334 U. S. 1; *Buchanan* v. *Warley, supra*; gainful employment, *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410; voting, *Nixon* v. *Condon,* 286 U. S. 73; and graduate and professional education. *McLaurin* v. *Board of Regents, supra; Sweatt* v. *Painter, supra.* The commerce clause in proscribing the imposition of racial distinctions and restrictions in the field of interstate travel is a further limitation of state power in this regard. *Morgan* v. *Virginia,* 328 U. S. 373.

Since 1940, in an unbroken line of decisions, this Court has clearly enunciated the doctrine that the state may not validly impose distinctions and restrictions among its citizens based upon race or color alone in each field of governmental activity where question has been raised.

Smith v. *Allwright,* 321 U. S. 649; *Sipuel* v. *Board of Education,* 332 U. S. 631; *Sweatt* v. *Painter, supra; Pierre* v. *Louisiana,* 306 U. S. 354; *Hill* v. *Texas,* 316 U. S. 400; *Morgan* v. *Virginia, supra; McLaurin* v. *Board of Regents, supra; Oyama* v. *California, supra; Takahashi* v. *Fish and Game Commission, supra; Shelley* v. *Kraemer, supra; Shepherd* v. *Florida, supra; Cassell* v. *Texas,* 339 U. S. 282. On the other hand, when the state has sought to protect its citizenry against racial discrimination and prejudice, its action has been consistently upheld, *Railway Mail Association* v. *Corsi,* 326 U. S. 88, even though taken in the field of foreign commerce. *Bob-Lo Excursion Co.* v. *Michigan,* 333 U. S. 28.

It follows, therefore, that under this doctrine, the State of Kansas which by statutory sanctions seeks to subject appellants, in their pursuit of elementary education, to distinctions based upon race or color alone, is here attempting to exceed the constitutional limits to its authority. For that racial distinction which has been held arbitrary in so many other areas of governmental activity is no more appropriate and can be no more reasonable in public education.

II

The court below, having found that appellants were denied equal educational opportunities by virtue of the segregated school system, erred in denying the relief prayed.

The court below made the following finding of fact:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating

> the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system."

This finding is based upon uncontradicted testimony that conclusively demonstrates that racial segregation injures infant appellants in denying them the opportunity available to all other racial groups to learn to live, work and cooperate with children representative of approximately 90% of the population of the society in which they live (R. 216); to develop citizenship skills; and to adjust themselves personally and socially in a setting comprising a cross-section of the dominant population (R. 132). The testimony further developed the fact that the enforcement of segregation under law denies to the Negro status, power and privilege (R. 176); interferes with his motivation for learning (R. 171); and instills in him a feeling of inferiority (R. 169) resulting in a personal insecurity, confusion and frustration that condemns him to an ineffective role as a citizen and member of society (R. 165). Moreover, it was demonstrated that racial segregation is supported by the myth of the Negro's inferiority (R. 177), and where, as here, the state enforces segregation, the communuity at large is supported in or converted to the belief that this myth has substance in fact (R. 156, 169, 177). It was testified that because of the peculiar educational system in Kansas that requires segregation only in the lower grades, there is an additional injury in that segregation occurring at an early age is greater in its impact and more permanent in its effects (R. 172) even though there is a change to integrated schools at the upper levels.

That these conclusions are the consensus of social scientists is evidenced by the appendix filed herewith. Indeed, the findings of the court that segregation constitutes discrimination are supported on the face of the statute itself where it states that: " * * * no discrimination on account of color shall be made in high schools *except as provided herein* * * * " (emphasis supplied).

Under the Fourteenth Amendment equality of educational opportunities necessitates an evaluation of all factors affecting the educational process. *Sweatt* v. *Painter, supra; McLaurin* v. *Board of Regents, supra.* Applying this yardstick, any restrictions or distinction based upon race or color that places the Negro at a disadvantage in relation to other racial groups in his pursuit of educational opportunities is violative of the equal protection clause.

In the instant case, the court found as a fact that appellants were placed at such a disadvantage and were denied educational opportunities equal to those available to white students. It necessarily follows, therefore, that the court should have concluded as a matter of law that appellants were deprived of their right to equal educational opportunities in violation of the equal protection clause of the Fourteenth Amendment.

Under the mistaken notion that *Plessy* v. *Ferguson* and *Gong Lum* v. *Rice* were controlling with respect to the validity of racial distinctions in elementary education, the trial court refused to conclude that appellants were here denied equal educational opportunities in violation of their constitutional rights. Thus, notwithstanding that it had found inequality in educational opportunity as a fact, the court concluded as a matter of law that such inequality did not constitute a denial of constitutional rights, saying:

> "*Plessy* v. *Ferguson,* 163 U. S. 537, and *Gong Lum* v. *Rice,* 275 U. S. 78, uphold the constitution-

> ality of a legally segregated school system in the lower grades and no denial of due process results from the maintenance of such a segregated system of schools absent discrimination in the maintenance of the segregated schools. We conclude that the above-cited cases have not been overruled by the later case of *McLaurin* v. *Oklahoma,* 339 U. S. 637, and *Sweatt* v. *Painter,* 339 U. S. 629."

Plessy v. *Ferguson* is not applicable. Whatever doubts may once have existed in this respect were removed by this Court in *Sweatt* v. *Painter, supra,* at page 635, 636.

Gong Lum v. *Rice* is irrelevant to the issues in this case. There, a child of Chinese parentage was denied admission to a school maintained exclusively for white children and was ordered to attend a school for Negro children. The power of the state to make racial distinctions in its school system was not in issue. Petitioner contended that she had a constitutional right to go to school with white children, and that in being compelled to attend school with Negroes, the state had deprived her of the equal protection of the laws.

Further, there was no showing that her educational opportunities had been diminished as a result of the state's compulsion, and it was assumed by the Court that equality in fact existed. There the petitioner was not inveighing against the system, but that its application resulted in her classification as a Negro rather than as a white person, and indeed by so much conceded the propriety of the system itself. Were this not true, this Court would not have found basis for holding that the issue raised was one "which has been many times decided to be within the constitutional power of the state" and, therefore, did not "call for very full argument and consideration."

In short, she raised no issue with respect to the state's power to enforce racial classifications, as do appellants here. Rather, her objection went only to her treatment under the classification. This case, therefore, cannot be pointed to as a controlling precedent covering the instant case in which the constitutionality of the system itself is the basis for attack and in which it is shown the inequality in fact exists.

In any event the assumptions in the *Gong Lum* case have since been rejected by this Court. In the *Gong Lum* case, without "full argument and consideration," the Court assumed the state had power to make racial distinctions in its public schools without violating the equal protection clause of the Fourteenth Amendment and assumed the state and lower federal court cases cited in support of this assumed state power had been correctly decided. Language in *Plessy* v. *Ferguson* was cited in support of these assumptions. These assumptions upon full argument and consideration were rejected in the *McLaurin* and *Sweatt* cases in relation to racial distinctions in state graduate and professional education. And, according to those cases, *Plessy* v. *Ferguson,* is not controlling for the purpose of determining the state's power to enforce racial segregation in public schools.

Thus, the very basis of the decision in the *Gong Lum* case has been destroyed. We submit, therefore, that this Court has considered the basic issue involved here only in those cases dealing with racial distinctions in education at the graduate and professional levels. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sipuel* v. *Board of Education, supra; Fisher* v. *Hurst,* 333 U. S. 147; *Sweatt* v. *Painter, supra; McLaurin* v. *Board of Regents, supra.*

In the *McLaurin* and *Sweatt* cases, this Court measured the effect of racial restrictions upon the educational development of the individual affected, and took into account the

community's actual evaluation of the schools involved. In the instant case, the court below found as a fact that racial segregation in elementary education denoted the inferiority of Negro children and retarded their educational and mental development. Thus the same factors which led to the result reached in the *McLaurin* and *Sweatt* cases are present. Their underlying principles, based upon sound analyses, control the instant case.

Conclusion

In light of the foregoing, we respectfully submit that appellants have been denied their rights to equal educational opportunities within the meaning of the Fourteenth Amendment and that the judgment of the court below should be reversed.

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