IN THE

Supreme Court of the United States

October Term, 1952

No. 101

HARRY BRIGGS, JR., *et al.*,

Appellants,

VS.

R. W. ELLIOTT, Chairman, J. D. CARSON, *et al.*, MEMBERS OF BOARD OF TRUSTEES OF SCHOOL DISTRICT No. 22, Clarendon County, S. C., *et al.*

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

BRIEF FOR APPELLANTS

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INDEX

Table of Cases Cited

Authorities Cited

Notes

Statutes Cited

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Opinions

The majority and dissenting opinions filed at the conclusion of the first hearing are reported in 98 F. Supp. 529-548 and appear in the record (R. 176-209). The opinion filed at the conclusion of the second hearing is reported in 103 F. Supp. 920-923 and appears in the record (R. 301-306).

Jurisdiction

The judgment of the statutory three-judge District Court was entered on March 13, 1952 (R. 306). A petition for appeal was presented to the district court and allowed on May 10, 1952 (R. 309). Probable jurisdiction was noted by this Court on June 9, 1952 (R. 316).

This is an appeal from an order denying an injunction in a civil action required by an act of Congress to be heard and determined by a district court of three judges. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b).

Statement of the Case

The Constitutional Issue Involved

The complaint in this case was filed by Negro children of public school age residing in School District No. 22, Clarendon County, South Carolina, and their respective parents and guardians, against the public school officials of said county and school district who, as officers of the State, maintain, operate and control the public schools for children residing in said district. It was alleged that appellees maintained certain public schools for the exclusive use of white children and certain other public schools for Negro children; that the schools for Negro children were in all respects inferior to the schools for white children; that the appellees excluded the infant appellants from the white schools pursuant to Article XI, section 7, of the Constitution of South Carolina, and section 5377 of the Code of Laws of South Carolina of 1942, which require the segregation of the races in public schools; and that it was impossible for the infant appellants to obtain a public school education equal to that afforded and available to white children as long as the appellees enforced these laws.

The complaint sought a judgment declaring the invalidity of these laws as a denial of the equal protection of the laws secured by the Fourteenth Amendment of the Constitution of the United States, and an injunction restraining the appellees from enforcing them and from making any distinctions based upon race or color in

the educational opportunities, facilities and advantages afforded public school children residing in said district.

Appellees in their answer joined issue on this question and admitted that in obedience to the constitutional and statutory mandates separate schools were provided for the children of the white and colored races; and that no child of either race was permitted to attend a school provided for children of the other race. In the Third Defense of Appellees' Answer they alleged that the above constitutional and statutory provisions were a valid exercise of the State's legislative power.

The jurisdiction of a three-judge District Court was invoked pursuant to Title 28, United States Code, Sections 2281, 2284, for the purpose of determining the validity of the provisions of the Constitution and laws of South Carolina requiring segregation of the races in public schools. This issue was clearly raised, and was decided by upholding the validity of these provisions and by refusing to enjoin their enforcement.

First Hearing

At the opening of the trial (before a three-judge District Court as required by Title 28, United States Code, sections 2281 and 2284) appellees admitted upon the record that "the educational facilities, equipment, curricula and opportunities afforded in School District No. 22 for colored pupils * * * are not substantially equal to those afforded in the District for white pupils." The appellees also stated that they did "not oppose an order finding that inequalities in respect to buildings, equipment, facilities, curricula, and other aspects of the schools provided for the white and colored children of School District No. 22, in Clarendon County now exist, and enjoining any discrimination in respect thereto."

These admissions were made part of the record by being filed as an amendment to the answer. The only issue

remaining to be tried was the question of the constitutionality of the laws requiring segregation of the races in public education as applied to the appellants.

During the trial the appellants produced testimony showing the extent of the physical inequality in the segregated schools of Clarendon County and especially School District No. 22. Over the objection of the appellants[1] the appellees introduced testimony that a three per cent sales tax and authorization of a $75,000,000 bond issue for improvement of schools had recently been adopted by the State of South Carolina, and that the State Educational Finance Commission had just been organized to supervise the distribution of these funds and had not even set up rules or procedures.[2] About a week before the trial Clarendon County had "inquired" about making an application for funds.

The testimony of nine expert witnesses was introduced by appellants; two experts in the field of education who offered a comparison of the public schools; one expert in educational psychology, three experts in the respective fields of child and social psychology, one expert in political science, one expert in school administration, and one expert in the field of anthropology.

The uncontroverted testimony of these witnesses demonstrated that the Negro schools in question were inferior in every material aspect to the white schools, and that similarly the caliber of education offered to Negro pupils was inferior to that offered to white pupils. The testimony of these witnesses also established the fact that the segregation of Negro pupils in these schools would in and of itself

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[1] On the grounds that equality within the meaning of the Fourteenth Amendment did not include contemplated future action (R. 108).

[2] It was admitted that although the school population of South Carolina was approximately forty to forty-five per cent Negro there were no Negroes on the Commission and no Negro employees of the Commission (R. 114).

preclude them from receiving educational benefits equal to those offered to white pupils or pupils in a non-segregated school. These witnesses not only established their qualifications in their respective fields but also supported their conclusions by objective and scientific authorities.

One of the experts in the field of child and social psychology testified that he had made special studies of the recognized methods of testing the effects of racial prejudice and segregation on children. He used a test of this type on Negro school children including the infant appellants in School District No. 22 a few days before the trial. From his general experience in this field and the results of his tests he testified:

> "A. The conclusion which I was forced to reach was that these children in Clarendon County, like other human beings who are subjected to an obviously inferior status in the society in which they live, have been definitely harmed in the development of their personalities; that the signs of instability in their personalities are clear, and I think that every psychologist would accept and interpret these signs as such.
>
> "Q. Is that the type of injury which in your opinion would be enduring or lasting? A. I think it is the kind of injury which would be as enduring or lasting as the situation endured, changing only in its form and in the way it manifests itself" (R. 89-90).

These witnesses testified as to the unreasonableness of segregation in public education and the lack of any scientific basis for such segregation and exclusion. They testified that all scientists agreed that there are no fundamental biological differences between white and Negro school pupils which would justify segregation. An expert in anthropology testified:

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> "The conclusion, then to which I come, is differences in intellectual capacity or inability to learn have not been shown to exist as between Negroes and whites, and further, that the results make it very probable that if such differences are later shown to exist, they will not prove to be significant for any educational policy or practice" (R. 161).

Another expert witness testified:

> "It is my opinion that except in rare cases, a child who has for 10 or 12 years lived in a community where legal segregation is practiced, furthermore, in a community where other beliefs and attitudes support racial discrimination, it is my belief that such a child will probably never recover from whatever harmful effect racial prejudice and discrimination can wreck" (R. 134).

The appellees did not produce a single expert to contradict these witnesses. There were only two witnesses for the appellees. The Superintendent of Schools for District No. 22 testified as to the reasons for the physical inequalities between the white and Negro schools. The Director of the Educational Finance Commission testified as to the proposed operation of the Commission and the possibility of the appellees obtaining funds to improve public schools. The latter witness testified that from his experience as a school administrator in Sumter and Columbia, South Carolina, it would be "unwise" to remove segregation in public schools in South Carolina. On cross-examination, he admitted he had not made any formal study of racial tensions but based his conclusion on the fact that he had "observed conditions and people in South Carolina" all of his life. He also admitted that his conclusion was based in part on the fact that all of his life he had believed in segregation of the races.

The judgment on this hearing, one judge dissenting stated that neither the constitutional nor statutory provisions requiring segregation in public schools were in violation of the Fourteenth Amendment and that appellants were not entitled to an injunction against the enforcement of these provisions by these appellees. The judgment also stated that the educational facilities offered infant appellants were unequal to those offered to white pupils, and ordered the appellees "to furnish to appellants and other Negro pupils of said district educational facilities, equipment, curricula and opportunities equal to those furnished white pupils."

First Appeal

An appeal from this judgment was allowed on July 20, 1951 and the appellees filed a motion to dismiss or affirm. On December 21, 1951 appellees filed their report in the District Court showing progress being made toward equalization of physical facilities in the public schools of Clarendon County. A copy of this report was forwarded to this Court. On January 28, 1952, this Court vacated the judgment of the District Court and remanded the case to that court in order to obtain the views of the trial court upon the additional facts in the record and to give the District Court an opportunity to take whatever action it might deem appropriate in light of the report (342 U. S. 350). Mr. Justice Black and Mr. Justice Douglas dissented on the ground that the additional facts in the report were "wholly irrelevant to the constitutional questions presented by the appeal to this court" (342 U. S. 350).

Second Hearing

As soon as the mandate reached the District Court, appellants filed a Motion for Judgment requesting an early hearing and a final judgment granting the relief as prayed for in the complaint. Among the reasons for this motion appellants alleged:

"It is, therefore, clear that plaintiff's rights guaranteed by the Fourteenth Amendment are being violated and remain unprotected. The injury is irreparable. The only available relief is by injunction against the continued denial of their right to equality which is brought about by compulsory racial segregation required by the Constitution and laws of South Carolina. (So. Car. Const. Art. XI, Sec. 7: S. C. Code, 1942, Sec. 5377.)

"Plaintiffs can get no immediate relief except by the issuance of a final judgment of this Court enjoining the enforcement of the policy of racial segregation by defendants which excludes Negro pupils from the only schools where they can obtain an education equal to that offered white children.

"Plaintiffs can get no permanent relief unless this Court declares that the provisions of the Constitution and laws of South Carolina requiring racial segregation in public schools are unconstitutional insofar as they are enforced by the defendants herein to exclude Negro pupils from the only schools where they can obtain an education equal to that offered white children" (R. 258).

It appearing that School District No. 22 of Clarendon County had been combined with six other school districts into a single school district the district court made the appellees parties in their present capacities as officials of School District No. 1 (R. 262-263; 306).

The second hearing was held on March 3, 1952, at which time the appellees filed an additional report showing progress since the December report. The appellants did not question the accuracy of these statements of physical changes in the making.

At the second hearing the District Court ruled that the question of the decision on the validity of segregation statutes was closed by the original judgment and could not be argued at that hearing. The District Court also refused to rule that, aside from the question of the validity of these statutes, the admitted lack of equality of facilities entitled appellants to an injunction restraining appellees from excluding them from an opportunity to share the superior schools and the inferior schools on an equal basis without regard to race and color.

On March 13, 1952, the District Court filed an opinion and a decree again finding that the educational facilities for Negroes were not substantially equal to those afforded white pupils. Despite this finding the District Court held that "plaintiffs are not entitled to an injunction forbidding segregation in the public schools of School District No. 1".

Errors Relied Upon

The District Court erred:

I

In refusing to enjoin the enforcement of the laws of South Carolina requiring racial segregation in the public schools of Clarendon County on the ground that these laws violate rights secured under the equal protection clause of the Fourteenth Amendment.

II

In refusing to grant to appellants immediate and effective relief against the unconstitutional practice of excluding appellants from an opportunity to share the public school facilities of Clarendon County on an equal basis with other students without regard to race or color.

III

In predicating its decision on the doctrine of *Plessy* v. *Ferguson* and in disregarding the rationale of *Sweatt* v. *Painter* and *McLaurin* v. *Board of Regents*.

Questions Presented

I

Whether legally enforced racial segregation in the public schools of South Carolina denies the Negro children of the state that equality of educational opportunity and benefit required under the equal protection clause of the Fourteenth Amendment.

II

Whether the compulsory segregation laws of South Carolina infect its public schools with that racism which this Court has repeatedly declared unconstitutional in other areas of governmental action.

III

Whether the decision in Plessy v. Ferguson or the decision in Gong Lum v. Rice are applicable to this case.

IV

Whether the equalization decree in this case grants effective relief and can be effectively enforced without involving the District Court in supervising the daily operation of the public schools.

Constitution and Statute Involved

Article XI, section 7 of the Constitution of South Carolina provides:

> "Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race."

Section 5377 of the Code of Laws of South Carolina is as follows:

> "It shall be unlawful for pupils of one race to attend the schools provided by boards of trustees for persons of another race."

Summary of Argument

Although the decisions in the case of *Sweatt* v. *Painter* and *McLaurin* v. *Oklahoma State Regents* involved state afforded education on the graduate and professional level, the underlying principles of these decisions are applicable and controlling in this case involving public education on the elementary and high school level.

Applying these principles, the basic question in the instant case is: "To what extent does the equal protection clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races" in the educational benefits afforded on the elementary and high school level of public education. Further, the equality or inequality of physical facilities are not decisive of this question. Consideration must be given not only to the measurable physical facilities but to all of the factors which have educational significance. Finally, if it appears from the record, as it does in this case, that segregation is a major handicap to the segregated pupils, then the state laws requiring this segregation violate the equal protection clause of the Fourteenth Amendment.

The laws here challenged are likewise unconstitutional under a uniform line of decisions of this Court striking down governmental classifications based solely on race or ancestry. The laws of South Carolina segregate Negro public school pupils from other public school pupils solely because of race or color. Such a classification based on race alone cannot be justified as a classification based upon any real difference which has pertinence to a valid legislative objective.

The District Court was in error in rejecting the basic principles set forth in the *Sweatt* and *McLaurin* decisions as being inapplicable to the instant case despite the uncontroverted expert testimony showing the injury to the segregated Negro children on the public elementary and high school level. Neither the case of *Plessy* v. *Ferguson* nor the case of *Gong Lum* v. *Rice* relied on by the majority of

the District Court are decisive of the issues in this case. The final order of the District Court in upholding the segregation laws of the State of South Carolina cannot bring about the equality of educational benefits required.

ARGUMENT

I

Legally enforced racial segregation in the public schools of South Carolina denies the Negro children of the State that equality of educational opportunity and benefit required under the equal protection clause of the Fourteenth Amendment.

In its recent opinions on the constitutionality of racially segregated public education, this Court has refused, on the one hand, to give blanket sanction to such state racism, but refrained on the other hand, from formulating a general rule that all forms of governmentally imposed segregation offend the equal protection clause of the Fourteenth Amendment. Without saying that such racial segregation is *per se* valid or *per se* invalid this Court has tested each complaint against segregated education in terms of whether or not—taking into account the nature, purpose and circumstances of the educational program—the segregated person or group is in some real and significant sense denied educational benefits available to the rest of the community.

In two recent cases, *Sweatt* v. *Painter,* 339 U. S. 629 and *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637, this Court considered the question: "to what extent does the equal protection clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university?" (339 U. S. 629, 631).

In neither case were physical inequalities decisive of the issue. In the *Sweatt* case, there were quantitative differences between the white and Negro law schools with respect

to such matters as the number of faculty members, the size of the libraries and the scope of the curricula. This Court, however, laid stress upon those "more important" factors which are "incapable of objective measurement"—factors such as the relative reputation of the faculties, the relative experience of the school administration, the relative status and influence in the community of the alumni, and the relative ease with which the two student groups could associate with fellow students and with their future professional colleagues. This Court concluded that Sweatt was entitled to claim his "full constitutional right" to a legal education equivalent in all respects to that offered by the state to students of other races and that such education was not available to him in a separate law school.

In the *McLaurin* case, there was no question of inequality insofar as buildings, faculties or curricula were concerned because McLaurin was actually in the same classroom with the other students. The only issue in that case was whether the enforced racial segregation of McLaurin inherent in his being seated apart from the other students denied to him educational benefits equivalent to those offered other students. This Court held that it did.

Although the Sweatt and McLaurin cases arose in the field of higher education, the constitutional issue is the same at every level of public education: Does state-imposed segregation destroy equality of educational benefits?

The *Sweatt* and *McLaurin* cases teach not only that this is the issue which must be resolved in every case presented for judicial review, but also that in seeking the answer the Court will consider the educational process in its entirety, including, apart from the measurable physical facilities, whatever factors have been shown to have educational significance. And where the record shows that segregation is a major handicap to education, the Court will hold that the difference in treatment is the type of state-imposed inequality which is prohibited by the equal protection clause of the Fourteenth Amendment.

Any other conclusion would be inconsistent with the rule recognized in the *Sweatt* and *McLaurin* cases that where the state-imposed racial restrictions impair the ability of the segregated student to secure an equal education because of the denial of any kind of educational benefits available to other students, the aggrieved student may invoke the protection afforded by the equal protection clause of the Fourteenth Amendment to enjoin the maintenance of state-imposed barriers to a racially integrated school environment.

This rule cannot be peculiar to any level of public education. Public elementary and high school education is no less a governmental function than graduate and professional education in state institutions. Moreover, just as Sweatt and McLaurin were denied certain benefits characteristic of graduate and professional education, it is apparent from this record that appellants are denied educational benefits which the state itself asserts are the fundamental objectives of public elementary and high school education.

South Carolina, like the other states in this country, has accepted the obligation of furnishing the extensive benefits of public education. Article XI, section 5, of the Constitution of South Carolina, declares: "The General Assembly shall provide for a liberal system of free public schools for all children between the ages of six and twenty-one years." Some 410 pages of the Code of Laws of South Carolina deal with "education". Title 31, Chapters 122-23, S. C. Code, pp. 387-795 (1935). Provision is made for the entire state-supported system of public schools, its administration and organization, from the kindergarten through the university. Pupils and teachers, school buildings, minimum standards of school construction, and specifications requiring certain general courses of instruction are dealt with in detail. In addition to requiring that the three "R's" must be taught, the law compels instruction in "morals and good behaviour" and in the "principles" and "essentials of the United States Constitution, including

the study of and devotion to American institutions." Title 31, Chapter 122, sections 5321, 5323, 5325, S. C. Code (1935).

South Carolina thus recognizes the accepted broad purposes of general public education in a democratic society. There is no question that furnishing public education is now an accepted governmental function. There are compelling reasons for a democratic government's assuming the burden of educating its children, of increasing its citizens' usefulness, efficiency and ability to govern.

In a democracy citizens from every group, no matter what their social or economic status or their religious or ethnic origins, are expected to participate widely in the making of important public decisions. The public school, even more than the family, the church, business institutions, political and social groups and other institutions, has become an effective agency for giving to all people that broad background of attitudes and skills required to enable them to function effectively as participants in a democracy. Thus, "education" comprehends the entire process of developing and training the mental, physical and moral powers and capabilities of human beings. *Weyl* v. *Comm. of Int. Rev.,* 48 F. 2d 811, 812 (C. A. 2d 1931); *Jones* v. *Better Business Bureau,* 123 F. 2d 767, 769 (C. A. 10 1941).[1]

The record in this case emphasizes the extent to which the state has deprived the appellants of these fundamental educational benefits by separating them from the rest of the school population.

Expert witnesses testified that compulsory racial segregation in elementary and high schools inflicts considerable personal injury on the Negro pupils which endures as long

[1] See: Brief of Committee of Law Teachers Against Segregation in Legal Education filed in *Sweatt* v. *Painter,* No. 44, October Term, 1949, pp. 36-38.

as these students remain in the segregated school. These witnesses testified that compulsory racial segregation in the public schools of South Carolina injures the Negro students by: (1) impairing their ability to learn (R. 140, 161); (2) deterring the development of their personalities (R. 86, 89); (3) depriving them of equal status in the school community (R. 89, 141, 145); (4) destroying their self-respect (R. 140, 148); (5) denying them full opportunity for democratic social development (R. 98, 99, 103); (6) subjecting them to the prejudices of others (R. 133) and stamping them with a badge of inferiority (R. 148).

Dr. Kenneth Clark, an expert in the fields of social and child psychology who tested the infant plaintiffs and other Negro school children in District No. 22, testified:

> "A. The conclusion which I was forced to reach was that these children in Clarendon County, like other human beings who are subjected to an obviously inferior status in the society in which they live, have been definitely harmed in the development of their personalities; that the signs of instability in their personalities are clear, and I think that every psychologist would accept and interpret these signs as such.
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> "Q. Is that the type of injury which in your opinion would be enduring or lasting? A. I think it is the kind of injury which would be as enduring or lasting as the situation endured, changing only in its form and in the way it manifests itself" (R. 89-90).

Dr. David Krech, another psychologist, testified:

> "* * * Legal segregation, because it is legal, because it is obvious to everyone, gives what we call in our lingo environmental support for the belief that Negroes are in some way different from and

inferior to white people, and that in turn, of course, supports and strengthens beliefs of racial differences, of racial inferiority. I would say that legal segregation is both an effect, a consequence of racial prejudice, and in turn a cause of continued racial prejudice, and insofar as racial prejudice has these harmful effects on the personality of the individuals, on his ability to earn a livelihood, even on his ability to receive adequate medical attention, I look at legal segregation as an extremely important contributing factor. May I add one more point. Legal segregation of the educational system starts this process of differentiating the Negro from the white at a most crucial age. Children, when they are beginning to form their views of the world, beginning to form their perceptions of people, at that very crucial age they are immediately put into the situation which demands of them, legally, practically, that they see Negroes as somehow of a different group, different being, than whites. For these reasons and many others, I base my statement.

"Q. These injuries that you say come from legal segregation, does the child grow out of them? Do you think they will be enduring, or is it merely a sort of temporary thing that he can shake off? A. It is my opinion that except in rare cases, a child who has for 10 or 12 years lived in a community where legal segregation is practiced, furthermore, in a community where other beliefs and attitudes support racial discrimination, it is my belief that such a child will probably never recover from whatever harmful effect racial prejudice and discrimination can wreak" (R. 133-134).

Dr. Harold McNalley, an expert in the field of Educational Psychology, testified:

"* * * And, secondly, that there is basically implied in the separation—the two groups in this case of Negro and White—that there is some difference in the two groups which does not make it feasible for them to be educated together, which I would hold to be untrue. Furthermore, by separating the two groups, there is implied a stigma on at least one of them. And, I think that that would probably be pretty generally conceded. We thereby relegate one group to the status of more or less second-class citizens. Now, it seems to me that if that is true—and I believe it is—that it would be impossible to provide equal facilities as long as one legally accepts them.

"Q. I see. Now, all of the items that you talked about that you based your reason for reaching your conclusion, you consider them to be important phases in the educational process? A. Very much so" (R. 74).

Dr. Louis Kesselman, a political scientist, testified:

"I think that I do. My particular interest in the field of Political Science is citizenship and the Political process. And, based upon studies which we regard as being scientifically accurate by virtue of use of the scientific methods, we have come to feel that a number of things result from segregation which are not desirable from the standpoint of good citizenship; that the segregation of white and Negro students in the schools prevents them from gaining an understanding of the needs and interests of both groups. Secondly, segregation breeds suspicion and distrust in the absence of a knowledge of the other group. And, thirdly, where segregation is enforced by law, it may even breed distrust to the point of conflict. Now, carrying that over into the field of

> citizenship, when a community is faced with problems which every community would be faced with, it will need the combined efforts of all citizens to solve those problems. Where segregation exists as a pattern in education, it makes that cooperation more difficult. Next, in terms of voting and participating in the electorial process, our various studies indicate that those people who are low in literacy and low in experience with other groups are not likely to participate as fully as those who have * * * " (R. 103-104).

Mrs. Helen Trager, a child psychologist who had conducted tests of the effects of racial segregation and racial tensions among children, testified:

> "Q. Mrs. Trager, in your opinion, could these injuries under any circumstances ever be corrected in a segregated school? A. I think not, for the same reasons that Dr. Krech gave. Segregation is a symbol of, a perpetuator of, prejudice. It also stigmatizes children who are forced to go there. The forced separation has an effect on personality and one's evaluation of one's self, which is interrelated to one's evaluation of one's group" (R. 148).

Dr. Robert Redfield, an expert in the field of anthropology, testified as to the unreasonableness of racial classification in education:

> "Q. As a result of your studies that you have made, the training that you have had in your specialized field over some 20 years, given a similar learning situation, what, if any difference, is there between the accomplishment of a white and a Negro student, given a similar learning situation? A. I understand, if I may say so, a similar learning situation to include a similar degree of preparation?

> "Q. Yes. A. Then I would say that my conclusion is that the one does as well as the other on the average" (R. 161).

The testimony on behalf of the appellants was by expert witnesses of unimpeachable qualifications. The record in this case presented for the first time in any case competent testimony of the permanent injury to Negro elementary and high school children forced to attend segregated schools. Testimony was introduced showing the irreparable damage done to the appellants in this case solely by reason of racial segregation. The record also shows the unreasonableness of this racial classification. This evidence stands uncontradicted in the record.

On the basis of like testimony in a similar case another District Court made a finding of fact that segregation in public schools retarded the mental and educational development of the colored children and was generally interpreted as denoting the inferiority of the Negro group. *Brown* v. *Board of Education,* October Term, 1952, No. 8.

The application of the rationale of the *Sweatt* and *McLaurin* cases to the record in the instant case requires the conclusion: "that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws. See: *Sweatt* v. *Painter,* 339 U. S. 629, ante. We hold that under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race." (*McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637, 642).

II

The compulsory segregation laws of South Carolina infect its public schools with that racism which this Court has repeatedly declared unconstitutional in other areas of governmental action.

The issue of the validity of the laws of South Carolina requiring racial segregation in public schools was clearly joined in the pleadings in this case and has been preserved. The District Court has twice decreed that these laws are valid and has twice refused to enjoin their enforcement.

These laws require that all Negro pupils attend schools segregated for their use and prohibit them from attending other schools in which pupils of all other racial groups are educated as a matter of course. The clear vice is that the segregated class is defined wholly in terms of race or color—"simply that and nothing more." *Buchanan* v. *Warley*, 245 U. S. 60, 73.

At the trial of the instant case the State made no effort to justify these provisions of its laws except by statements of one witness to the effect that it would be "unwise" to adopt a policy of non-segregation (R. 113). The basis for this belief was that there was a feeling of "separteness between the races in South Carolina." The witness also testified that there would probably be a "violent emotional reaction" to non-segregation (R. 113-114). Neither of these theories justify the deprivation of constitutional rights. *Buchanan* v. *Warley, supra; McLaurin* v. *Oklahoma State Regents, supra; City of Birmingham* v. *Monk*, 185 F. 2d 859 (C. A. 5th 1951), cert. den. 341 U. S. 940. The District Court, however, concluded that segregation of the races in public schools "so long as equality of rights is preserved, is a matter of legislative policy for the several states, with which the federal courts are powerless to interfere" (R. 179).

The laws here involved, like all others which curtail a civil right on a racial basis, are "immediately suspect" and will be subjected to "the most rigid scrutiny." *Korematsu* v. *United States,* 323 U. S. 214, 216.[2]

In South Carolina the school which a child is permitted to attend depends solely upon his race or color. This Court has declared that insofar as the federal government is concerned "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States,* 320 U. S. 81, 100. The Court reached this conclusion by adopting the reasoning of its prior decisions that similar state imposed classifications and discrimination violated the equal protection clause of the Fourteenth Amendment. See also: *Korematsu* v. *United States, supra.* This Court, however, recognized that insofar as the federal government is concerned its constitutionally conferred right to wage war could temporarily override this civil right. Cf. *Ex parte Endo,* 323 U. S. 283. No state can show either constitutional authorization or any such overriding necessity which would warrant sustaining state action founded upon these constitutionally irrelevant and arbitrary considerations. See: *Oyama* v. *California,* 332 U. S. 633; *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410; *Shelley* v. *Kraemer,* 334 U. S. 1.

During the past quarter century this Court has consistently held that the Fourteenth Amendment invalidated specific state imposed racial distinctions and restrictions in widely separated areas of human endeavor: ownership and occupancy or real property, *Shelley* v. *Kraemer, supra;*

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[2] See also: *Ex parte Endo,* 323 U. S. 283, 299; *United States* v. *Congress of Industrial Organizations,* 335 U. S. 106, 140, concurring opinion; *Skinner* v. *Oklahoma,* 316 U. S. 535, 544, concurring opinion; *Hirabayashi* v. *United States,* 320 U. S. 81, 100; Idem, at 110, concuring opinion; *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192, 209.

Oyama v. *California, supra;* pursuit of gainful employment or occupation, *Takahashi* v. *Fish and Game Commission, supra;* selection of juries, *Shepherd* v. *Florida,* 341 U. S. 50; *Patton* v. *Mississippi,* 332 U. S. 463; *Pierre* v. *Louisiana,* 306 U. S. 354; *Hale* v. *Kentucky,* 303 U. S. 613; and graduate and professional education, *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637; *Sweatt* v. *Painter,* 339 U. S. 629; *Sipuel* v. *Board of Regents,* 332 U. S. 631; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Board of Supervisors* v. *Wilson,* 340 U. S. 909.

The Court has further held that in the area of interstate travel the state's power is further limited by the commerce clause which similarly proscribes racial distinctions and restrictions. *Morgan* v. *Virginia,* 328 U. S. 373.

A state legislative classification violates the equal protection clause of the Fourteenth Amendment either if it is based upon nonexistent differences or if the differences are not reasonably related to a proper legislative objective.[3] Classifications based on race or color can never satisfy either requirement and consequently are the epitome of arbitrariness in legislation. In *Skinner* v. *Oklahoma,* 316 U. S. 535, 541, this Court held unconstitutional an Oklahoma "habitual criminal" statute providing for sterilization of persons convicted two or more times of felonies involving moral turpitude but exempting persons convicted of embezzlement, declaring that the State of Oklahoma "has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." Similarly, in *Edwards* v. *California,* 314 U. S. 160, 184, where this Court invalidated a California statute making

[3] *Skinner* v. *Oklahoma,* 316 U. S. 535; *Hartford Steam Boiler Inspection & Insurance Co.* v. *Harrison,* 301 U. S. 459; *Mayflower Farms* v. *Ten Eyck,* 297 U. S. 266; *Concordia Fire Insurance Co.* v. *Illinois,* 292 U. S. 535; *Nixon* v. *Herndon,* 273 U. S. 536; *Air-Way Electric Appliance Co.* v. *Day,* 266 U. S. 71; *Truax* v. *Raich,* 239 U. S. 33; *Southern Railway Co.* v. *Greene,* 216 U. S. 400.

it a criminal offense for any person to bring or assist in bringing an indigent nonresident into the state, Mr. Justice Jackson, concurring, pointed out that

> "The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed or color."

Likewise, in *Nixon* v. *Herndon,* 273 U. S. 536, 541, where a Texas statute confining participation in primary elections to white persons was held to violate the equal protection clause the Court stated:

> "States may do a great deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case."

Segregation of Negroes as practiced here is universally understood as imposing on them a badge of inferiority.[4] It "brands the Negro with the mark of inferiority and asserts that he is not fit to associate with white people." It is of a piece with the established rule of the law of South Carolina that it is libelous *per se* to call a white person a Negro. *Flood* v. *News and Courier Co.,* 71 S. C. 112, 50 S. E. 637 (1905); *Flood* v. *Evening Post Publishing Co.,* 71 S. C. 122, 50 S. E. 641 (1905); see also: *Stokes* v. *Gt. A. and P. Tea Co.,* 202 S. C. 24, 23 S. E. 2d 823 (1943).

South Carolina has made no showing of any educational objective that racial segregation subserves. Nor could it. Efforts to conjure up theories of intellectual dif-

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[4] Myrdal, I *An American Dilemma* 615, 640 (1944); Johnson *Patterns of Negro Segregation* 3 (1943); Dollard, *Caste and Class in a Southern Town* 349-351 (1937); Note, 56 Yale L. J. 1059, 1060 (1947); Note, 49 Columbia L. Rev. 629, 634 (1949); Note, 39 Columbia L. Rev. 986, 1003 (1939).

ferences between races are futile. As one authority has put it:[5]

> "* * * there is not one shred of scientific evidence for the belief that some races are biologically superior to others, even though large numbers of efforts have been made to find such evidence."

The record in this case, contains the conclusion of an expert, based on exhaustive investigation, that:

> "Differences in intellectual capacity or inability to learn have not been shown to exist as between Negroes and whites, and further, that the results make it very probable that if such differences are later shown to exist, they will not prove to be significant for any educational policy or practice" (R. 202).

This conclusion accords with all the scientific investigations on the subject. Klineberg, *Race Differences* 343 (1935); Montague, *Man's Most Dangerous Myth—The Fallacy of Race* 188 (1945); American Teachers Association, *The Black and White of Rejections for Military Service* 29 (1944); Klineberg, *Negro Intelligence and Selective Migration* (1935); Peterson and Lanier, Studies in the Comparative Abilities of Whites and Negroes, *Mental Measurement Monograph* (1929); Clark, Negro Children, *Educational Research Bulletin,* Los Angeles (1923).

The record in the instant case clearly establishes that there is absolutely no relation between race and educability, and that racial distinctions in public education inevitably injure those against whom it is directed. Appellants have shown that such distinctions are not relevant to any educational objective; and they have authoritatively

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[5] Rose, *America Divided: Minority Group Relations in the United States* 170 (1948).

demonstrated that classification wholly on the basis of race in public schools cannot be condoned in the light of this Court's decisions in cases involving racial and other odious classifications.

Therefore, the compelling conclusion is that the provisions of the Constitution and Code of South Carolina requiring racial segregation in education are no more capable of surviving constitutional onslaught than the invidious classification legislation previously voided by this Court as repugnant to the constitutional guarantee of the equal protection of the laws.

III

Neither the decision in *Plessy* v. *Ferguson* nor the decision in *Gong Lum* v. *Rice*, are applicable to this case.

At the conclusion of the first hearing a majority of the District Court rejected the principles recognized in the *Sweatt* and *McLaurin* decisions and accepted as controlling the statements in the decisions in *Plessy* v. *Ferguson*, 163 U. S. 537 and *Gong Lum* v. *Rice*, 275 U. S. 78. The dissenting Judge considered the decisions in the *Sweatt* and *McLaurin* cases decisive of the issue raised.

In *Plessy* v. *Ferguson, supra*, the majority of the Supreme Court held that the application to an intrastate passenger of a Louisiana statute requiring the segregation of white and Negro passengers did not violate the Fourteenth Amendment. The case was decided upon pleadings which assumed the possibility of attainment of a theoretical equality within the framework of racial segregation, rather than on a full hearing and evidence which would have established the inevitability of discrimination under a system of segregation.

Plessy v. *Ferguson* is not applicable here. 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 rather 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 Regents, supra; Fisher* v. *Hurst,* 333 U. S. 147; *Sweatt* v. *Painter, supra; McLaurin* v. *Ohlahoma State Regents, supra.*

IV

The equalization decree does not grant effective relief and cannot be effectively enforced without involving the Court in supervising the daily operation of the public schools.

The rights here asserted are personal and present.

At the beginning of the first hearing (R. 30-35), at the time of the first judgment and at the time of the judgment here appealed from, the appellants and appellees were in

agreement that the equal protection of the laws of South Carolina was being denied to the appellants herein—and the District Court twice made this finding (R. 210, 306-307).

The appellants were entitled to effective and immediate relief as of the time of the first judgment on June 23, 1951. *Sipuel* v. *Board of Regents, supra; Sweatt* v. *Painter, supra; McLaurin* v. *Oklahoma State Regents, supra.*[6] At the second hearing on March 3, 1952, appellees admitted that, although progress was being made, the physical facilities were still unequal. The District Court ruled that the question of the validity of the segregation laws was foreclosed by their prior decision (R. 279, 281). Appellants then urged that even under this ruling, they were entitled to immediate relief by an injunction against the continuation of the policy of excluding them from an opportunity to share all of the public school facilities—good and bad—on an equal basis without regard to race and color. This the District Court refused to do even after a showing that the June, 1951, decree had failed to produce even physical equality after eight months.

Rather, the District Court again ordered an injunction requiring the appellees to make available to appellants and other Negro pupils of the district "educational facilities, equipment, curricula and opportunities equal to those afforded white pupils" (R. 307). Appellees' sole defense has been complete reliance on the segregation laws of South Carolina. As long as the District Court insists on declaring these laws valid and constitutional, appellees will continue to enforce them. The record in this case shows that in the past their action has discriminated against appellants and all other Negroes. Whatever they do in the future will be under the continuing policy of rigid racial segregation.

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[6] See also: *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Belton, et al.* v. *Gebhart, et al.,* —— Del. ——, decided August 28, 1952.

Education is not an inert subject. Teachers differ in ability, personality and effectiveness, and their teachings correspondingly vary in value. Schools differ in size, location and environment. These are among the many variables in any educational system.[7] Public education, as education generally, is an ever-growing and progressing field. Facilities and methods improve as experience demonstrates the need and the way. Buildings and facilities are constantly increased to accommodate the expanding school population. It seems clear that no two schools can retain a constant and fixed relationship in the flux of educational progress. Certainly this relationship cannot be fixed or maintained by judicial decree.

Resolution of the basic issue in this case—the right to equal educational benefits—by an equalization decree will engage the parties and the court interminably. The task of attempting equality under a segregated school system is clearly one for which the machinery of the court is unsuited. The decisions of this Court establish the impropriety of a decree which would require the continuous supervision of numerous details. *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131; *Armour & Co.* v. *Dallas*, 255 U. S. 280; *Javierre* v. *Central Altagracia*, 217 U. S. 502; *Beasley* v. *Texas & Pacific Ry. Co.*, 191 U. S. 492; *Texas & Pacific Ry. Co.* v. *City of Marshall*, 136 U. S. 393; *Rutland Marble Co.* v. *Ripley*, 10 Wall. 339.

If under any circumstances the decree is to be effective, even as to physical facilities, courses and teachers, children, parents and school authorities alike must be constant litigants.

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[7] Judge Edgerton, dissenting in *Carr* v. *Corning*, 182 F. 2d 14, 31 (C. A. D. C. 1950), pointed out that:

> "* * * two schools are seldom if ever fully equal to each other in location, environment, space, age, equipment, size of classes and faculty."

At some point appellants are entitled to conclude their litigation and enjoy constitutional equality in the public schools. The District Court's decree can accomplish neither objective. It should be annulled, and a decree entered restraining the use of race as the factor determinative of the school which the child is to attend.

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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