Supreme Court of the United States

OCTOBER TERM, 1953

No. ~~101~~ 2

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.

BRIEF FOR APPELLEES

ROBERT McC. FIGG, JR.,
S. E. ROGERS,
Counsel for Appellees.

T. C. CALLISON,
Attorney General of South Carolina.

JOHN W. DAVIS,
WILLIAM R. MEAGHER,
Of Counsel.

Dated: October 3, 1952.

INDEX

TABLE OF CASES CITED*

*This table does not include cases cited in the Appendices.

AUTHORITIES CITED

STATUTES CITED*

*This table does not include statutes cited in the Appendices.

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.

BRIEF FOR APPELLEES

This is an appeal by plaintiffs from a final decree filed March 13, 1952 in the United States District Court for the Eastern District of South Carolina after hearings before a district court of three judges. This decree adjudged in material part: (a) that neither Article II, section 7 of the Constitution of South Carolina, nor section 5377 of the Code of South Carolina requiring separate schools for children of the white and colored races are of themselves violative of the provisions of the Fourteenth Amendment to the Constitution of the United States and plaintiffs are not entitled to an injunction forbidding segregation in the public schools of School District No. 1, Clarendon County, South Carolina; (b) that the educational facilities, equipment, and opportunities afforded in School District No. 1 for colored pupils are not substantially equal to those af-

forded for white pupils, and that this inequality is violative of the equal protection clause of the Fourteenth Amendment; and (c) that the appellee-school officials proceed at once to furnish to plaintiffs and other Negro pupils of the District educational facilities, equipment, curricula and opportunities equal to those furnished white pupils (R. 306-7).

Opinions Below

The opinions below (R. 176-209, 301-5) are reported in 98 F. Supp. 529 and 103 F. Supp. 920.

Grounds of Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. § 1253 (June 25, 1948, c. 646, 62 Stat. 928). On May 9, 1952, the district court allowed appeal to this Court from the final decree of March 13, 1952 (R. 309-10). The grounds of jurisdiction are stated in the Statement as to Jurisdiction filed in the district court (R. 312) and docketed herein, October Term, 1951, No. 273.

Statement of the Case

This is a class suit brought by certain Negro minors and their parents on behalf of themselves and all others similarly situated, against the Board of Trustees of School District No. 22 of Clarendon County,* South Carolina, and

*On October 16, 1951 School District No. 22 was consolidated with six other school districts of Clarendon County into a single school district known as School District No. 1 (R. 262). Accordingly, the decree of the district court directed that the authorities of School District No. 1 be made parties to this suit and be bound by all orders and decrees entered herein (R. 306).

other school authorities. Separate primary and secondary schools in that district are provided for children of the white and colored races as required by the constitution of South Carolina and consequent statutes. These schools in the present District No. 1 serve 2,799 Negro and 295 white children within the district (R. 265).

The grounds of complaint are: First, that the constitution and statutes of South Carolina in their requirement of separate schools for the two races violate the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. Second, that in carrying out the provisions of the constitution and statutes of the State equal educational facilities are not provided for colored and for white children. A declaratory judgment and injunctive relief were sought (R. 2-11).

A three-judge court was assembled as required by Title 28 U. S. C. §§ 2281 and 2284. At the hearing the defendants withdrew their previous denial of inequality, and amended their answer to admit that the school facilities provided for Negro students "are not substantially equal to those afforded in the District for white pupils". They announced their intention to proceed forthwith to remove these inequalities in accordance with recent measures adopted by the legislature of South Carolina. They asked only that a reasonable time be fixed by the court in which they might accomplish this result (R. 30-35).

After full hearing, the district court (Waring, *D. J.* dissenting) entered its decree on June 23, 1951 in which it found:

(1) That the challenged constitutional and statutory provisions were not of themselves violative of the Fourteenth Amendment. (2) That the educational facilities afforded

by appellees for Negro pupils were not equal to those provided for white children.

The district court did not enjoin enforcement of the requirement that Negro and white pupils attend separate schools, but did order appellees to proceed at once to furnish educational facilities for Negroes equal to those furnished white pupils; and in the decree, it ordered that appellees report to the court within six months as to any action taken by them to carry out the court's order (R. 209-10). 98 F. Supp. 529.

From the decree filed June 23, 1951, plaintiffs appealed to this Court. Pending this appeal and before jurisdiction had been noted, defendants filed in the court below within the allotted time their report of progress (R. 211-54). Because the case was then on appeal, the report was forwarded by the district court to this Court (R. 255) which thereupon (Justices Black and Douglas dissenting) vacated the decree of the district court and remanded the case to it in order that it might consider the report and be afforded the opportunity to take whatever action it might deem appropriate in the light of the additional facts so brought to its attention. 342 U. S. 350.

The case as remanded was called for hearing on March 3d last (R. 261). Appellees filed a supplementary report bringing down to date further steps taken in compliance since their earlier report (R. 263-70). Of these reports, which will be later referred to at more length in this brief, the district court said

> "[They] show beyond question that defendants have proceeded promptly and in good faith to comply with the court's decree.* * *" (R. 302).

Accordingly, on March 13, 1952, the court entered the decree now appealed from, denying an injunction abolishing segregation and granting one requiring appellees to equalize the educational facilities and opportunities provided white and colored children in School District No. 1, Clarendon County (R. 306-7). 103 F. Supp. 920.

Summary of Argument

The inequalities in educational facilities afforded white and colored children in the public grade schools of Clarendon County, School District No. 1, admittedly existing when the district court entered its first decree on June 23, 1951, have been effectually removed as a factor for consideration on the present appeal, because, as the district court unanimously found on March 13, 1952 after further hearings pursuant to this Court's mandate:

> "There can be no doubt that as a result of the program in which defendants are engaged the educational facilities and opportunities afforded Negroes within the district will, by the beginning of the next school year beginning in September 1952, be made equal to those afforded white persons. * * *" (R. 304)

This fact, about which there is no dispute, renders moot the contention made by appellants on June 23, 1951 and again on March 13, 1952, that because the educational facilities afforded the white and colored within the district were not at that moment equal, the district court "should enter a decree abolishing segregation and opening all the schools of the district at once to white persons and Negroes" (R. 304).

Indeed, if the contention were not now academic, the action of this Court in vacating the decree of June 23, 1951 and remanding the case for further proceedings in the district court (342 U. S. 350) carries the clear implication that the contention is unsound and is so regarded by this Court. See comments of Judge Parker at Record, pages 279-280, 284-285.

Therefore, as the case comes here it presents this question: Is segregation of white and colored pupils in public elementary and secondary schools of a state violative of the Fourteenth Amendment where the educational facilities and opportunities afforded pupils of each race are substantially equal?

The history of the adoption of the Fourteenth Amendment compels the conclusion that it has no such scope as is claimed by appellants. Under that amendment, the right of a state which maintains a public school system to classify its students on the basis of race, or for that matter of sex or age or mental capacity, has been so often and so pointedly declared by the highest authorities that it should no longer be regarded as open to debate. These authorities are from legislative sources, both federal and state, and from the judicial branch, both state and federal. There is no conflict of opinion among them which needs to be resolved. Only an excess of zeal can explain the present challenge.

It is, however, equally well settled that this right of a state to classify for purposes of education is qualified by the requirement that equal facilities and opportunities must be provided for each class. The equal protection of the law demands no less. This also is beyond all debate.

All this the State of South Carolina and its authorities fully recognize. Under the leadership of its present gov-

ernor it is making purposeful and well-planned efforts to wipe out throughout the state all inequalities between its white and colored schools. The pay of teachers has been equalized; curricula have been made uniform; transportation has been provided for all at state expense; and a building program has been entered upon which promises to leave in the future only such differences as may and must arise between the older buildings and the new.

Local self-government in local affairs is essential to the peace and happiness of each locality and to the strength and stability of our whole federal system. Nowhere is this more profoundly true than in the field of education. It is the duty and function of each state primarily to provide for the education of its citizens. To devolve this sensitive activity so far as may be on those to whose minds and hearts it is an intimate concern is surely the highest statesmanship. As the district court so well said, "if conditions have changed so that segregation is no longer wise, this is a matter for the legislature and not for the courts" (R. 189).

ARGUMENT

I

THE STATE OF SOUTH CAROLINA AND THE APPELLEES AS ITS AGENTS HAVING PROCEEDED TO WIPE OUT ALL INEQUALITIES BETWEEN ITS WHITE AND COLORED SCHOOLS, APPELLANTS' CONTENTION THAT THE DISTRICT COURT SHOULD NOT HAVE AFFORDED OPPORTUNITY FOR SUCH EQUALIZATION IS MOOT.

The decree of the district court entered June 23, 1951 directed appellees to "proceed at once" to furnish appellants and other Negro pupils of the school district educational

facilities, curricula, and opportunities equal to those furnished white pupils. It was further ordered that they should report within six months the action taken by them to carry out this order (R. 209-10).

In pursuance of this decree a report was filed on December 20, 1951 (R. 211). A second report was filed at the final hearing on March 3, 1952 (R. 263). To anyone, whether white or colored, genuinely interested in the schools of South Carolina and especially in the appellants, these reports should give only the liveliest satisfaction.

They make it appear that, upon the recommendation of the present governor, the legislature of South Carolina by Act of 1951 authorized the issuance of bonds in aid of this educational program to an aggregate total of $75,000,000 to be serviced by a state sales tax of 3%; that it formed a State Educational Finance Commission with power to effect desirable consolidation of school districts and to grant to them the necessary funds for improvements; that this Commission has already provided for the issuance of state school bonds to be used for the purpose of school buses and for buildings; that the 34 school districts of Clarendon County have been consolidated into Districts 1, 2 and 3, District No. 1 containing the former District 22 and 6 others; that plans have been prepared and contracts let for the new Negro high school at Scott's Branch to be ready in September, 1952 and for repairs to the existing Scott's Branch elementary school at an estimated cost of $261,000; that sites have been purchased for other Negro elementary schools; that $21,522.18 has been spent for furniture and equipment in existing Negro schools; and that District No. 1 has been authorized by Special Act to issue its own bonds to the amount of 30% of the taxable property within its borders to provide additional funds.

It further appears that curricula in the schools, white and colored, have been completely equalized; that the teachers' salaries have also been equalized; and that school bus transportation has been provided by the state for all pupils in the district, white and colored alike.

Pursuant to the mandate of this Court (342 U. S. 350) the district court examined these reports, the accuracy of which appellants concede (R. 278-9), and summed up its findings thus (R. 302-4):

> "The reports of December 21 and March 3 filed by defendants, which are admitted by plaintiffs to be true and correct and which are so found by the court, show beyond question that defendants have proceeded promptly and in good faith to comply with the court's decree. As a part of a statewide educational program to equalize and improve educational facilities and opportunities throughout the State of South Carolina, a program of school consolidation has been carried through for Clarendon County, District No. 22 has been consolidated with other districts so as to abolish inferior schools, public moneys have been appropriated to build modern school buildings, within the consolidated district, and contracts have been let which will insure the completion of the buildings before the next school year. The curricula of the Negro Schools within the district has already been made equal to the curricula of the white schools and building projects for Negro schools within the consolidated district have been approved which will involve the expenditure of $516,960 and will unquestionably make the school facilities afforded Negroes within the district equal to those afforded to white persons. The new district high school for Negroes is already 40% completed, and under the provisions of the construction contract will be ready for occu-

facilities, curricula, and opportunities equal to those furnished white pupils. It was further ordered that they should report within six months the action taken by them to carry out this order (R. 209-10).

In pursuance of this decree a report was filed on December 20, 1951 (R. 211). A second report was filed at the final hearing on March 3, 1952 (R. 263). To anyone, whether white or colored, genuinely interested in the schools of South Carolina and especially in the appellants, these reports should give only the liveliest satisfaction.

They make it appear that, upon the recommendation of the present governor, the legislature of South Carolina by Act of 1951 authorized the issuance of bonds in aid of this educational program to an aggregate total of $75,000,000 to be serviced by a state sales tax of 3%; that it formed a State Educational Finance Commission with power to effect desirable consolidation of school districts and to grant to them the necessary funds for improvements; that this Commission has already provided for the issuance of state school bonds to be used for the purpose of school buses and for buildings; that the 34 school districts of Clarendon County have been consolidated into Districts 1, 2 and 3, District No. 1 containing the former District 22 and 6 others; that plans have been prepared and contracts let for the new Negro high school at Scott's Branch to be ready in September, 1952 and for repairs to the existing Scott's Branch elementary school at an estimated cost of $261,000; that sites have been purchased for other Negro elementary schools; that $21,522.18 has been spent for furniture and equipment in existing Negro schools; and that District No. 1 has been authorized by Special Act to issue its own bonds to the amount of 30% of the taxable property within its borders to provide additional funds.

It further appears that curricula in the schools, white and colored, have been completely equalized; that the teachers' salaries have also been equalized; and that school bus transportation has been provided by the state for all pupils in the district, white and colored alike.

Pursuant to the mandate of this Court (342 U. S. 350) the district court examined these reports, the accuracy of which appellants concede (R. 278-9), and summed up its findings thus (R. 302-4):

> "The reports of December 21 and March 3 filed by defendants, which are admitted by plaintiffs to be true and correct and which are so found by the court, show beyond question that defendants have proceeded promptly and in good faith to comply with the court's decree. As a part of a statewide educational program to equalize and improve educational facilities and opportunities throughout the State of South Carolina, a program of school consolidation has been carried through for Clarendon County, District No. 22 has been consolidated with other districts so as to abolish inferior schools, public moneys have been appropriated to build modern school buildings, within the consolidated district, and contracts have been let which will insure the completion of the buildings before the next school year. The curricula of the Negro Schools within the district has already been made equal to the curricula of the white schools and building projects for Negro schools within the consolidated district have been approved which will involve the expenditure of $516,960 and will unquestionably make the school facilities afforded Negroes within the district equal to those afforded to white persons. The new district high school for Negroes is already 40% completed, and under the provisions of the construction contract will be ready for occu-

> pancy sometime in August of this year. That the State of South Carolina is earnestly and in good faith endeavoring to equalize educational opportunities for Negroes with those afforded white persons appears from the fact that, since the inauguration of the state-wide educational program, the projects approved and under way to date involve $5,515,619.15 for Negro school construction as against $1,992,-018.00 for white school construction. The good faith of defendants in carrying out the decree of this court is attested by the fact that, when in October delay of construction of the Negro high school within the consolidated district was threatened on account of inability to obtain release of necessary materials, defendants made application to the Governor of the State and with his aid secured release of the materials so that construction could go forward.
>
> There can be no doubt that as a result of the program in which defendants are engaged the educational facilities and opportunities afforded Negroes within the district will, by the beginning of the next school year beginning in September 1952, be made equal to those afforded white persons. * * * "

Appellants' brief completely ignores these findings of the district court. Appellants argue, however, that equality should have been *immediately* directed, and that it could have been produced at once by directing the admission forthwith of themselves, and so many of the 2,799 Negro children resident in District No. 1 as might so desire, to the white schools of the district then serving a total of 295 children. Theoretically, of course, the same uniformity could have been produced by closing the white schools and remitting the white children to the Negro facilities; all this, be it noted, however, in direct violation of the constitution and statutes

of South Carolina whose validity the court had upheld. The impracticability of appellants' suggestion is apparent on its face. It could have resulted only in the "indiscriminate imposition of inequalities." Nor could it possibly have advantaged the education and general welfare of the children concerned, either white or colored.

As the district court said in its opinion (R. 304):

> "There can be no doubt that as a result of the program in which defendants are engaged the educational facilities and opportunities afforded Negroes within the district will, by the beginning of the next school year beginning in September 1952, be made equal to those afforded white persons. Plaintiffs contend that because they are not now equal we should enter a decree abolishing segregation and opening all the schools of the district at once to white persons and Negroes. A sufficient answer is that the defendants have complied with the decree of this court to equalize conditions as rapidly as was humanly possible, that conditions will be equalized by the beginning of the next school year and that no good would be accomplished for anyone by an order disrupting the organization of the schools so near the end of the scholastic year. As heretofore stated, the curricula of the white and Negro schools have already been equalized. By the beginning of the next scholastic year, physical conditions will be equalized also. This is accomplishing equalization as rapidly as any reasonable person could ask. * * *"

This being an action for a declaratory judgment, it was within the equitable jurisdiction of the court. And it "is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief." *Eccles* v. *People's Bank of*

Lakewood Village, California, 333 U. S. 426, 431 (1948). It was therefore within the sound discretion of the district court to refuse to require the impossible—i.e., immediate equalization of facilities—but instead to afford reasonable opportunity for such equalization and, to that end, to demand within an allotted period a report of progress made (342 U. S. 350).

In attempting to maintain a contrary position, appellants stress the holding of this Court in *Sipuel* v. *Board of Regents*, 332 U. S. 631, 633 (1948), that the state must provide equal educational opportunities for a member of the Negro race "as soon as it does for applicants of any other group". But we do not believe that by these words the Court meant to say that where inequalities in educational facilities pre-exist the courts can expect their immediate abolition, however impossible immediate physical abolition may be. Buildings do not rise at the rubbing of Aladdin's lamp nor can they be created by court decree.

Surely the lower court did not act improperly in giving appellees a reasonable time in which to equalize facilities and assure continuance of the policy of segregation which their State's constitution and statutes require. Under the circumstances present in this case, where the State's good faith is apparent and its goal readily capable of achievement, it would be unreasonable to do otherwise. That the lower federal courts have not interpreted the *Sipuel* case as establishing a contrary rule is demonstrated by the following cases decided since that ruling:

> *Davis* v. *County School Board of Prince Edward County*, 103 F. Supp. 337, 340 (D. C. Va. 1952) (state given reasonable time in which to equalize public school facilities);

Pitts v. *Board of Trustees of Dewitt Special School District,* 84 F. Supp. 975, 988 (D. C. Ark. 1949) (state given reasonable time in which to equalize public school facilities);

Cf. Beal v. *Holcombe,* 193 F. 2d 384, 388 (CA 5th 1952) (state given reasonable time in which to equalize public park facilities).

But, as has already been shown, this question has been effectively removed from controversy by the district court's uncontradicted finding that "the educational facilities and opportunities afforded Negroes within the district will, by the beginning of the next school year beginning in September 1952, be made equal to those afforded white persons."

Here, as appellants' counsel was forced to concede, in the attempt to comply with the requirements for equalization contained in the decree of the district court, appellees could not "physically do more" (R. 281). And counsel was ultimately driven to the position that appellees could do nothing more, as of March, 1952, to meet the demand of the Fourteenth Amendment, as conceived by appellants, short of abandoning altogether the "policy of segregation" (R. 286)—a policy which the district court properly held it was within the constitutional power of the sovereign State of South Carolina to adopt and maintain, provided only that the educational facilities and opportunities afforded white and colored children within the state be substantially equal.

II

THE CONSTITUTION OF SOUTH CAROLINA, ART. XI, SEC. 7 AND THE STATUTES, CODE OF 1942, SEC. 5377, DO NOT VIOLATE THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The issue of equal facilities having thus been removed from the case on this appeal, we come to a consideration of the only question which is presented, namely, is racial segregation in state primary and secondary schools *per se* unconstitutional?

The provisions of the constitution and statutes of South Carolina which are here assailed, because of their mandate for separate schools for white and colored pupils, are as follows:

The Constitution, Article XI, § 7, provides:

> "Section 7. Separate schools.—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."

The Code of South Carolina (1942), § 5377, provides:

> "§ 5377. Mixed schools unlawful.—It shall be unlawful for pupils of one race to attend the schools provided by boards of trustees for persons of another race."

That these provisions do not of themselves deny the equal protection of the laws is so adequately expounded by the opinion of Judge Parker in the court below (R. 176-190) that detailed discussion here seems unnecessary.

Moreover, the question has been so often and so recently ventilated in this Court that it would be difficult to add anything to previous arguments on the subject.

It is worth noting, however, in a summary fashion, the wealth of legislative and judicial precedents.

Congress has repeatedly and clearly expressed its own view as to the bearing of the Fourteenth Amendment on separate schools for white and colored children in the District of Columbia. They were first set up by statute in 1862. See *Carr* v. *Corning,* 182 F. 2d 14, 17 (D. C. App. 1950). The same Congress which adopted on June 16, 1866 the resolution submitting the Fourteenth Amendment to the legislatures of the states enacted measures dealing with separate schools for the two races in the District. 14 Stat. 343 (1866); 14 Stat. 216 (1866). After the adoption of the Amendment, Congress in 1874 again provided for separate schools in the District. (Sections 281, 282 Revised Statutes relating to the District of Columbia, U. S. Gov. Printing Office, 1875.) The legislation presently in force provides for separate schools in the District. (District of Columbia Code 1951, Sections 31-1110, 1111, 1112, 1113.)

After the Fourteenth Amendment became effective, Congress consistently refused to include the public schools as part of the Civil Rights legislation (Cong. Globe, 42d Cong., 2nd Sess., pp. 3734, 3735 (1872); 3 Cong. Rec., 43rd Cong., 2nd Sess., pp. 997, 1010, 1011 (1875)) although a number of efforts were made to include such schools therein.

The legislative action of the states on the subject is equally explicit. Today 17 states make separation of the white and colored races in their public schools mandatory. These states are: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Mis-

souri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia. Four additional states make such segregation permissible in the discretion of their educational authorities. These are: Arizona, New Mexico, Wyoming and Kansas.*

Nor is this all that exists in the way of legislative interpretation. At the time of the submission of the Fourteenth Amendment there were 37 states in the Union. The Amendment was proclaimed adopted on July 28, 1868 when 30 states had ratified. Of the 37 states in the Union at that time, 23 continued, or adopted soon after the Amendment, statutory or constitutional provisions calling for racial segregation in the public schools. These were: Alabama, Arkansas, California, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia and West Virginia.** That some of these states have subsequently abandoned their earlier policy of segregation does not lessen the force of their previous enactment as a practical interpretation of the scope of the Fourteenth Amendment.

It is not surprising in view of this direct interpretation by those who framed and those who ratified the Fourteenth Amendment that the courts, both federal and state, have been unanimous in their holding that racial segregation in education, does not *per se* violate the Amendment. These decisions run from California to Virginia, from New York to Arizona.***

---

*The citations and texts of the state constitutional and statutory provisions referred to are in Appendices A and B to this brief (pp. 38-46, *infra*).

**See Appendix C to this brief (pp. 47-50, *infra*).

***See Appendix D to this brief (pp. 51-53, *infra*).

In so far as this Court is concerned, it is enough to mention without further discussion *Plessy* v. *Ferguson,* 163 U. S. 537 (1896), which first enunciated the "separate but equal doctrine"; *Cumming* v. *Richmond County Board of Education,* 175 U. S. 528 (1899), opinion by Harlan, *J.* who dissented in *Plessy* v. *Ferguson, supra*; and *Gong Lum* v. *Rice,* 275 U. S. 78, 86 (1927), holding that segregation in state public schools had been "many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution".

Even those decisions of this Court which appellants claim to have weakened the "separate but equal doctrine" recognize that, provided the educational facilities offered are in fact equal, the decision as to whether or not those facilities are to be offered in the same or separate public institutions of learning is within the discretion of the state in regulating its public schools and not inhibited by the Fourteenth Amendment. See *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 344 (1938), saying that the state had sought to fulfill, although unsuccessfully, its recognized obligation to provide Negroes with advantages for higher education substantially equal to the advantages afforded for white students "by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions"; *Sweatt* v. *Painter,* 339 U. S. 629 (1950), in which the Court applied to educational segregation the *Plessy* doctrine as still controlling and expressly refrained from reexamining the doctrine, although urged to do so.

There is nothing, we insist, in any of these later cases which weakens (to use the word adopted by the plaintiffs) the "separate but equal doctrine" announced in *Plessy* v. *Ferguson,* and applied by a unanimous court (consisting of Chief Justice Taft and Associate Justices Holmes, Van Devanter, Brandeis, Stone, McReynolds, Butler and Sanford)* in *Gong Lum* v. *Rice,* both above.

The whole argument on this topic cannot be better put than it was by the opinion of the court below (R. 189) which again we ask leave to quote:

> "To this we may add that, when seventeen states and the Congress of the United States have for more than three quarters of a century required segregation of the races in the public schools, and when this has received the approval of the leading appellate courts of the country including the unanimous approval of the Supreme Court of the United States at a time when that court included Chief Justice Taft and Justices Stone, Holmes and Brandeis, it is a late day to say that such segregation is violative of fundamental constitutional rights. It is hardly reasonable to suppose that legislative bodies over so wide a territory, including the Congress of the United States, and great judges of high courts have knowingly defied the Constitution for so long a period or that they have acted in ignorance of the meaning of its provisions. The constitutional principle is the same now that it has been throughout this period; and if conditions have changed so that segregation is no longer wise, this is a matter for the legislatures and not for the courts. The members of the judiciary have no more right to read their ideas of sociology into the Constitution than their ideas of economics."

---

*Mr. Justice Sutherland was absent from the Bench due to illness.

III

THE DISTRICT COURT CORRECTLY HELD THAT THE CONFLICTS OF OPINION REGARDING THE EFFECTS OF SEGREGATION AND ITS ABOLITION PRESENT QUESTIONS OF LEGISLATIVE POLICY AND NOT OF CONSTITUTIONAL RIGHT.

To counter this great weight of legislative and judicial precedent, appellants introduced testimony of eight witnesses who stated as their opinion that separate schools are hurtful to both races alike.

These witnesses variously describe themselves as an Associate Professor of Education, Teachers College, Columbia University (McNalley, R. 70-74); a Professor of Education, Howard University (Knox, R. 75-82); an Assistant Professor of Psychology, New York City College (Clark, R. 82-97); a Dean of Students and Professor of Education and Psychology, Wesleyan College of West Virginia (Hupp, R. 97-101); an Associate Professor of Political Science, University of Louisville (Kesselmann, R. 101-104); a visiting Professor of Social Psychology, University of California and Harvard University (Krech, R. 132-136); a lecturer and consultant in curricula, Vassar College (Trager, R. 136-148); and a Professor of Anthropology, University of Chicago (Redfield, whose testimony in the *Sweatt* case was read into the record by stipulation, R. 156-175).

In summary, the opinions of these witnesses were to the effect that segregation of Negro and white children in separate schools created psychopathic complexes of inferiority in the Negro and of superiority in the white; and that the children of both races suffered from such segrega-

tion in that those of each race were prevented from gaining a knowledge and understanding of those of the other race—a knowledge and understanding essential to proper training for responsibilities of citizenship in a free society under a democratic form of government.

Not one of these witnesses, however, has had any responsibility whatever for decisions in the field of public policy. And, with but one exception, no one of them admits any investigation of educational, social or racial conditions in the state of South Carolina, or even in Clarendon County.

The sole exception is the witness Kenneth Clark. At the request of appellants' counsel, he visited the Scott's Branch Colored School in Clarendon District No. 22 (now included in District No. 1), and applied to 16 pupils of ages ranging from 6 to 9 what he calls a "projective test" (R. 84). The children were shown colored and white dolls and drawings of such dolls, which were otherwise identical. They were asked to choose the "nice" doll, the "bad looking" doll, and the doll they would prefer to play with. After these judgments had been expressed, each child was asked to point out in turn the white doll, the colored doll, and finally the doll that looked like himself. Of the 16 children tested, 10 preferred the white doll and 6 the colored. Nine considered the white doll to be the "nice" doll and 7 the colored doll; 11 said the colored doll looked "bad" and one the white doll. The remaining 4 children made no choice at all (R. 87-88).

From all this, Professor Clark drew the sad conclusion that there was "confusion in the individuals and their concepts about themselves conflicting in their self images", and that they, "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" (R. 89).

A similar "scientific test" was applied by the witness Trager in the city of Philadelphia (*which does not have segregated schools*) and this resulted in the startling discovery that at as early an age as 5 years both white and colored children "were aware of racial differences" (R. 138).

The "symptoms" revealed by the doll tests cannot, however, be traced to educational segregation. There is ample support for this statement in an article written by Professor Clark himself and his wife, Clark & Clark, *Racial Identification and Preferences in Negro Children,* appearing at p. 169 in READINGS IN SOCIAL PSYCHOLOGY (Newcomb & Hartley ed. 1947) (hereafter referred to as Clark & Clark). A North-South breakdown of the results obtained in testing Negro children establishes very little statistically significant difference in the preferences for the white doll or self-identification with it, although whatever difference does exist indicates greater stability in southern children than in northern children. (Clark & Clark, 174-178). Thus 69% of the southern children identified themselves with the colored doll but only 61% of the northern children did so (id. 174). 72% of the northern children preferred to play with the white doll compared with 62% of the southern children. 68% of the northern children chose the white doll as "nice" as compared with 52% of the southern. 71% of the northern children chose the colored doll as "bad" compared with only 49% of the southern children. Answering the "nice color" question, 63% of the northern and 57% of the southern picked the white doll.

From these figures, Professor Clark drew the following conclusions:

> "In general, it may be stated that northern and southern children in these age groups tend to be similar in the degree of their preference for the white doll with the northern children tending to be somewhat more favorable to the white doll than are the southern children. The southern children, however, in spite of their equal favorableness toward the white doll, are significantly less likely to reject the brown doll (evaluate it negatively), as compared to the strong tendency for the majority of the northern children to do so. That this difference is not primarily due to the larger number of light children found in the northern sample is indicated by more intensive analysis presented in the complete report." [Clark & Clark 178]

While these experiments would seem to indicate that Negro children in the South are healthier psychologically speaking than those of the North, Dr. Clark appears to disagree. In any case, the results obtained in the broader sample of experiments completely explode any inference that the "conflicts" from which Professor Clark's Clarendon County subjects were found to suffer are the result of their education in segregated schools. ("It is clear, however, that these tests do not isolate school segregation as the source of emotional disturbances in Negro children. * * *" *Grade School Segregation: The Latest Attack on Racial Discrimination,* 61 Yale L. J. 730, 737, note 32.)

Furthermore, analysis of the tests by age groups shows that Negro children are already aware of race and accompanying value judgments at the pre-school age (Clark & Clark, 171, 175). This rules out the possibility that the schools play an initiating role in creating psychological conflicts. According to Professor Clark, the tests do indicate that the age of starting school is a crucial one in the develop-

ment of the child's ego structure; and the child at this time is especially sensitive to the accepted social values of his larger environment, because he seeks group identification and personal self-esteem (id. 177).

If we assume, with Professor Clark, that the age of starting school is a critical one, surely the question as to whether or not a child of very tender years, so psychologically pre-conditioned, should be placed in a separate school of his own race or in a school with children whom he regards as superior, is a question fraught with difficulty and requiring the most careful and painstaking consideration, necessarily involving study of the accumulated data which the most thorough, impartial and scientific research can supply. This question, we submit, is one for the legislative and educational authorities of the states to decide and not for the courts.

This Court may judicially notice the fact that there is a large body of respectable expert opinion to the effect that separate schools, particularly in the South, are in the best interests of children of both races as well as of the community at large.

The recorded history of South Carolina reveals clearly that the provisions for separate schools came about after the State had had some 12 years of experience with mixed schools in the period from 1865 to 1877. The constitutional convention held in South Carolina in 1866 debated the question of separate or mixed schools, and adopted a provision for the latter. We read of that convention's action in *Public Education in the South*, by Dr. Edgar W. Knight, Professor of Education in the University of North Carolina, published in 1922, at page 322, as follows:

> "The debate concluded by the chairman of the committee, the Reverend E. L. Cardozo, a negro

member who finally became treasurer of the State. He argued that the whole scheme of reconstruction was antagonistic to the wishes of South Carolinians and that the mixed-school plan was a legitimate part of that scheme. Race prejudices could best be removed, he said, by forcing the white children and the negro children 'to mingle in school together and to associate generally.' In some communities, however, it might be necessary to provide separate schools, but for a few white children 'to demand such separation would be absurd, and I hope that the convention will give its consent to no such proposition.' This was the final word on the subject in the convention, and the vote gave an overwhelming majority for the mixed-school section.

Referring to this action of the convention in his message to the Legislature in July, Governor Orr, who was retiring from office, said that the provision for mixed schools was a reckless and dangerous experiment and was not desired by the negroes or the whites, and if submitted to their decision the provision would have been completely repudiated by both. He noted also the causes for bickering and controversy already existing between the two people, and declared that 'no greater cruelty could be inflicted by legislation upon the parents of the children of the two races, than that which is contemplated by this objectional feature of the constitution.' Governor Scott, who succeeded Orr, shared the latter's opinion of the constitutional provision for mixed schools and likewise urged, in his message to the Legislature, the establishment of separate schools for the education of the children of the State. He believed the separation of the children in the public schools 'a matter of the greatest importance to all classes of our people.' Later he said:

> 'It is the declared design of the Constitution that all classes of our people shall be educated, but not to provide for this separation of the two races will be to repel the masses of the whites from the educational training that they so much need, and virtually to give our colored population the exclusive benefit of our public schools. Let us, therefore, recognize facts as they are and rely upon time and the elevating influences of popular education to dispel any unjust prejudices that may exist among the two races of our fellow citizens.' "

The unhappy result of the mixed-schools provision are thus summarized in Dr. Knight's article entitled *Reconstruction and Education in South Carolina,* which appeared in THE SOUTH ATLANTIC QUARTERLY, Vol. XVIII, No. 4, October, 1919, and Vol. XIX, No. 1, January, 1920:

> "The presence and influence of the negro in political, educational and social affairs also complicated an otherwise unhappy condition. Just how far the promoters of mixed school legislation expected it to extend is a matter for conjecture, but that it was perhaps the most unwise action of the period is a certainty, lending itself to a most unfortunate and damaging reaction for many years after the return to home rule. The principal objection raised to the school system during this time arose from the fear of mixed schools, a provision which was not demanded by either race. On the contrary, both races were violently opposed to the scheme and the friends of the schools constantly urged the adoption of separate schools. But the agitation in Congress of the Civil Rights Bill in 1872 had here, as in other southern states, the effect of aggravating a prejudice which had begun to develop with the state constitutional provision for mixed schools. * * *" (Vol. XIX, p. 61).

And further:

> "It was many years, therefore, before confidence could be restored and the principle of universal and free education could gather sufficient strength to give it wide acceptance and popular approval. Here, as in the other southern states, it has been difficult to recover from the ills inherited from the reconstruction practices following the close of the Civil War, and here, as elsewhere in that region, the stigma and the reproach of the indignities and the injustices of that period have been a deadly upas to the cause of public education. Only in recent years has recuperation been rapid enough to assure promise of a better day in public education." (Vol. XIX, p. 66).

The propriety of the administrative practice of separate schools at the present time and under present conditions in South Carolina is fully sustained by the opinion and judgment of leading sociologists and educators who, unlike the witnesses for appellants, have the basis, in years of research, observation, and practical experience in states where the two races live in the same areas in great numbers, which validates and gives compelling substance to their informed judgment publicly expressed.

The witness, E. R. Crow, with years of experience as superintendent of the school affairs of Sumter, S. C. (having approximately 7,200 children in its schools in the proportion of 53% white and 47% colored), testified that in the light of his experience as a school administrator, assuming that separate schools were neither commanded nor prohibited by law and that the several schools of the school system afford substantially equal educational facilities and opportunities, it would be unwise in administrative practice in his opinion to mix the two races in the same schools at the

present time and under present conditions; that it would be impossible to have sufficient acceptance of the idea of mixed groups attending the same schools to have public education on that basis at all; that there would not be community acceptance of mixed schools at this time; that there would be a probability of violent emotional reaction in the communities; that it would be impossible to have peaceable association of the races in the public schools; and that it would eliminate the public schools in most, if not all, of the communities in the State (R. 113, 114).

Those who are familiar with local conditions in South Carolina know that Mr. Crow was not overstating the case. The reasons for such results are as yet deep-rooted in the people of such a State as South Carolina, and those reasons are indicated sociologically in some detail by Dr. Howard W. Odum, Kenan Professor of Sociology in the University of North Carolina, in a recent address delivered by him to the Southern Sociological Society in Atlanta, Ga., on April 27, 1951, entitled "The Mid-Century South: Looking Both Ways". Dr. Odum's years of research in the field of racial relations in the southern states; his untiring efforts to bring about progress in that field; and his acknowledged freedom from anything which could even remotely be suggested as prejudice or preconceived approach to racial questions, are widely known; and it is believed that he is the best informed authority in the country on southern racial matters and the considerations which must be taken into account in evaluating and dealing with them.

In his Atlanta address, Dr. Odum set forth what he termed "four main segments or levels calling for mature and quick action on a statesmanlike basis" in achieving the ultimate solution of the South's racial problems:

"The first is to remedy the inexcusable situation with reference to brutalities, injustices, inequalities, and discrimination to which we have referred.

The second is to set up what would currently be designated as 'Operation Equal Opportunity' to comprehend all phases of public education.

The third is to provide immediately for non-segregation in all university education on the graduate and professional level.

The fourth is to move judiciously but speedily toward agenda for negotiations and specifications for future achievement on the total front."

He said:

"First in the southern situation is the cumulative racial and conflict heritage that has gone into the architecture of all cultures, whether in the bi-racial South or in India, in Pakistan, in China, in all the way-places of Africa, Australia, New Zealand, and in uncounted little culture islands of the Pacific; and in counted big nations and little democracies of the western world. This heritage, which is basic to conflict and war, is also the very heart of group loyalties, patriotism and institutional solidarity, symbolic of the universal formula by which men covenant 'for God, for country and for home'. The Southern culture structure rates the same diagnosis as any other.

In the Southern situation is the same cumulative heritage which leads India's powerful Nehru, as late as yesterday and in tomorrow's news, to beg for the preservation of world peace and world order with hope and faith, but with an appeal for character and patience. But he adds, 'Anyway we can't have it suddenly or by decree. One has to grow up to it;' and again, in what he terms 'an unbelievable varied world', he protests the quick 'imposition of

> of any form of foreign domination against the will of the people', on the structural grounds that 'no solution which is not accepted by large masses of the people can have any possible enduring quality.' Nor would Nehru relish the stereotype designation of being caricatured as a 'gradualist', outmoded echo of superficial rationalization."

He says further:

> "The above agenda for equalizing educational opportunities applies to all levels of schooling and assumes the normal status and processes of segregation *and* non segregation consistent with the development and administration of educational systems everywhere. It assumes a certain inevitable continuity of the sub system featuring primarily segregation in the public schools but with both non-segregation and segregation modes and privileges in institutions of higher learning. This is necessary to insure equality of opportunity for the extraordinary Negro institutions, teachers, students, and administrative officers in ways which will give maximum recognition and opportunity for Negro professional folk and students."

After urging the immediate ending of segregation in graduate and professional schools, he stated:

> "That this is a structurally different situation from elementary and secondary schools, in the framework of America's private, religious, and public school system will be as manifest to the courts as it is to the executive and legislative units of government and to the practical administrative constituency of American education."

He warned:

> "If there are those who hold that the South, having too many people of both races anyway, would profit

> by a certain amount of violent revolution, and slaughter of the people, as I have heard prominent metropolitan leaders say, that might be a democratic prerequisite; but to urge the Supreme Court to set the incidence of such a conflict is something else. * * *"

And further:

> "Anyone who is not naive enough to try to repeal the laws of individuation, of personality, of freedom, of opportunity, of classification, knows that the major construct is not segregation *or* non-segregation but non-segregation *and* segregation, developed through total processes of interaction and of growth, of means and ends, of moral imperatives and administrative reality."

Finally, as to the conversion of the "Southern compound bi-racial culture to an American complex integrated multicultured society", Dr. Odum says:

> "Such a conversion brings with it no more compulsion or specifications for negating the facets of race and ethnic minorities, supreme in whatever personality and cultural loyalties they may wish. Such a conversion automatically, as in any organic structure or process, carries with it the inevitable continuity of separateness, autonomy, and segregation inherent in not only the American ideal but in all the newer reaches of social science, philosophy, freedom for all the differential-groups to have a say in how they shall integrate themselves into the new world society."

Another distinguished educator and outstanding liberal, Dr. Frank P. Graham, formerly President of the University of North Carolina, and one qualified to express an informed

judgment on the racial matters facing the Southern states, had this to say in an address delivered April 9, 1951, to a joint assembly of the North Carolina legislature at the unveiling of the portrait of Governor Charles B. Aycock:

> "In view of the origin, history, and power of the 'mores' of peoples based on the universal consciousness of kind, an historic social heritage, the degree of the visibility of the difference between races, the largeness of the members of the groups involved and the economic competition of the low income groups, there is needed a new emphasis on the influence of religion, education, personal kindness, decent respect for the human dignity of persons, and voluntary cooperation of people of good will for better relations in the local communities, in the long haul of the generations for justice on this Earth. To our good Northern friends, I emphasize the unwisdom of using federal legislation and force at educational levels beyond the levels of acceptance by the people in the States. Such unwise compulsions cause bitter set-backs not enduring progress which mainly comes from within the minds and hearts of the majority of the people in the States."

In an address entitled "Justice and Opportunity", made November 28, 1950, to the Southern Governors' Conference at Charleston, President Colgate W. Darden, Jr., of the University of Virginia, after acknowledging that separate facilities were too often not equal and advocating constructive effort toward the speedy solution of the South's racial problems, said:

> "The Southern people are overwhelmingly opposed, in my opinion, to mixed public schools. * * *

> This is not difficult to understand. People feel quite differently about young children, and they are not willing to make the concessions as to their education that they are willing to make in the cases of those who are more mature. To undertake to set up mixed public schools in the face of this sentiment would be to open up a festering wound that would sap our strength and destroy that unity without which there is no hope for substantial progress for either race in the South."

Hodding Carter recently wrote (*Equality in America: The Issue of Minority Rights.* Compiled by George B. de Huszar. The Reference Shelf, Vol. 21, No. 3, pp. 101-02 (1949)):

> "It will be tragic for the South, the Negro and the nation itself if the government should enact and attempt to enforce any laws or Supreme Court decisions that would open the South's public schools and public gathering places to the Negro. The one saving factor in such an event would be the southern Negro's own common-sense refusal to implement the law. * * *
>
> The southern Negro, by and large, does not want an end to segregation in itself any more than does the southern white man. The Negro in the South knows that discriminations, and worse, can and would multiply in such event. He knows that those things which he does want—the vote, educational opportunities and the rest—are more readily attainable in the South that is not aroused against federal intervention in the field of segregation."

In Myrdal, *An American Dilemma,* Chapter 41, "The Negro School", Section 6, at pp. 901-02 (1944) it is stated:

> "Negroes are divided on the issue of segregated schools. In so far as segregation means discrimina-

tion and is a badge of Negro inferiority, they are against it, although many Southern Negroes would not take an open stand that would anger Southern whites. Some Negroes, however, prefer the segregated school, even for the North, when the mixed school involves humiliation for Negro students and discrimination against Negro teachers. Du Bois has expressed this point of view succinctly:

'* * * theoretically, the Negro needs neither segregated schools nor mixed schools. What he needs is Education. What he must remember is that there is no magic, either in mixed schools or in segregated schools. A mixed school with poor and unsympathetic teachers, with hostile opinion, and no teaching concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad. Other things being equal, the mixed school is the broader, more natural, basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal, and in that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer.'

Other Negroes prefer the mixed schools at any cost, since for them it is a matter of principle or since they believe that it is a means of improving race relations."

Elsewhere W. E. B. Du Bois, the same prominent Negro whose views are quoted at length by Myrdal, has said:

"It is difficult to think of anything more important for the development of a people than proper training for their children; and yet I have repeatedly seen wise and loving colored parents take infinite pains to force their little children into schools where

> the white children, white teachers, and white parents despised and resented the dark child, made mock of it, neglected or bullied it, and literally rendered its life a living hell. Such parents want their child to 'fight' this thing out,—but, dear God, at what a cost! Sometimes, to be sure, the child triumphs and teaches the school community a lesson; but even in such cases, the cost may be high, and the child's whole life turned into an effort to win cheap applause at the expense of healthy individuality. In other cases, the result of the experiment may be complete ruin of character, gift, and ability and ingrained hatred of schools and men. For the kind of battle thus indicated, most children are under no circumstances suited. It is the refinement of cruelty to require it of them. Therefore, in evaluating the advantage and disadvantage of accepting race hatred as a brutal but real fact or of using a little child as a battering ram upon which its nastiness can be thrust, we must give greater value and greater emphasis to the rights of the child's own soul. We shall get a finer, better balance of spirit; an infinitely more capable and rounded personality by putting children in schools where they are wanted, and where they are happy and inspired, than in thrusting them into hells where they are ridiculed and hated." *Does the Negro Need Separate Schools?*, 4 J. OF NEGRO ED. 328, 330-31 (1935).

In a survey prepared for the U. S. Department of Education on higher education of Negroes by Dr. Ambrose Caliver, a Negro who was senior Specialist on Negro Education in the U. S. Office of Education from 1930 to 1945, it is stated:

> "In some of the States the *mores* of racial relationships are such as to rule out, for the present at least, any possibility of admitting white persons and

> Negroes to the same institutions. * * *" Vol. II Misc. No. 6, p. 17, National Survey of Higher Education for Negroes.

It is thus obvious that there is sharp conflict of opinion (1) as to the effect of segregation upon the children and communities involved; and (2) as to the appropriate time and circumstances under which, if at all, segregation may be abolished.

Upon this second score, appellants' witness Dr. Redfield testified (as he did in *Sweatt* v. *Painter, supra*) that while he believes that in every community there is some segregation that can be changed at once and that the area of higher education is the most favorable for making the change (R. 166), he is of the view that the steps by which, and the rapidity with which, segregation in education can be removed with benefits to the public welfare will vary with the circumstances of each community (R. 166). Throughout his testimony Dr. Redfield stressed the importance of local conditions as a determinative factor bearing upon the extent to which, and the appropriate time when, separate schools may be eliminated. He recognized the historical fact that the attempt to coerce abolition of segregation in the South did not work, and that the social attitudes and beliefs of the people of both races in the South immediately after the Civil War, had an important bearing on the result (R. 167).

He recognized that there is a limit to the abolition of segregation and that the limit will be defined by "particular circumstances" (R. 169). He admitted that the attitudes of each community are complex and that in considering what is best to be done for the individual in the particular community, the attitude of both races in that community should be considered (R. 174-175).

All of the considerations advanced by the witnesses for appellants, as well as all of the general learning and information on the subject, could properly be taken into account by South Carolina in determining its policy on the question whether separate or mixed schools should be prescribed in its public school system. There is disagreement among authorities on the subject. The fact that there is disagreement and difference of opinion on the proper approach to efficient administration of the public school system at the present time and under conditions presently prevailing in race relations in South Carolina and in Clarendon County, does not serve to invalidate the State's constitutional and legislative action in the light of the considerations and information available to it. The showing indicates clearly that the State had to make choice of the kind of public school system it would operate, and the purposes of that system, and also its administrative requirements in respect to separate or mixed schools, and disagreement among the authorities supports the propriety of the State's choice.

The showing also serves to demonstrate the preeminent correctness of the view expressed by Judge Parker in his learned opinion below when he said (R. 186-87):

> "The questions thus presented are not questions of constitutional right but of legislative policy, which must be formulated, not in vacuo or with doctrinaire disregard of existing conditions, but in realistic approach to the situations to which it is to be applied. In some states, the legislatures may well decide that segregation in public schools should be abolished, in others that it should be maintained—all depending upon the relationships existing between the races and the tensions likely to be produced by an attempt to educate the children of the two races together in

> the same schools. The federal courts would be going far outside their constitutional function were they to attempt to prescribe educational policies for the states in such matters, however desirable such policies might be in the opinion of some sociologists or educators. For the federal courts to do so would result, not only in interference with local affairs by an agency of the federal government, but also in the substitution of the judicial for the legislative process in what is essentially a legislative matter."

This statement, we submit, is in the highest tradition of this Court: See *Buck* v. *Bell,* 274 U. S. 200 (1927); *Jacobson* v. *Massachusetts,* 197 U. S. 11 (1905); *Cumming* v. *Richmond County Board of Education,* 175 U. S. 528 (1899); *Powell* v. *Pennsylvania,* 127 U. S. 678 (1888); *Mugler* v. *Kansas,* 123 U. S. 623 (1887).

Conclusion

The decree appealed from should be affirmed.

Respectfully submitted,

ROBERT McC. FIGG, JR.
S. E. ROGERS,
Counsel for Appellees

T. C. CALLISON,
Attorney General of South Carolina

JOHN W. DAVIS
WILLIAM R. MEAGHER,
Of Counsel

Dated: October 3, 1952.

APPENDIX A

State Constitutional and Statutory Provisions Requiring Separate Public Schools for White and Colored Children.

Alabama

Cont. (1901), Art. XIV, § 256:

"The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years. * * * Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race."

Code (1940), Title 52, § 93:

"Free separate schools for white and colored.—The county board of education shall provide schools of two kinds, those for white children and those for colored children. * * *"

Arkansas

Stats. Ann. (1947), § 80-509:

"The board of school directors of each district in the State shall be charged with the following powers and perform the following duties:

* * * * *

(c) Establish separate schools for white and colored persons."

Delaware

Const. (1897), Art. X, § 2:

"* * * separate schools for white and colored children shall be maintained.* * *"

Rev. Code (1935), Ch. 71, Art. 1, § 9:

"The State Board of Education is authorized, empowered, directed and required to maintain a uniform, equal and effective system of public schools throughout the State. * * * The schools provided shall be of two kinds; those for white children and those for colored children.* * *"

Florida

Const. (1887), Art. XII, § 12:

"White and colored; separate schools.—White and colored children shall not be taught in the same school, but impartial provision shall be made for both."

Stats. (1951), § 228.09:

"Separate schools for white and negro children required.—The schools for white children and the schools for negro children shall be conducted separately. * * *"

Georgia

Const. (1945), Art. VIII, § 1:

"System of common schools; free tuition; separation of races.—The provision of an adequate education for the citizens shall be a primary obligation of the State of Georgia, the expense of which shall be provided for by taxation. Separate schools shall be provided for the white and colored races."

Code Ann. (1951 Cum. Supp.), § 32-909:

"It shall also be the duty of said board of education to make arrangements for the instruction of the children of the white and colored races in separate schools. They shall, as far as practicable, provide

the same facilities for both races in respect to attainments and abilities of teachers, but the children of the white and colored races shall not be taught together in any common or public school.* * *"

Kentucky

Const. (1891), § 187:

"Each race to share fund equally; separate schools.—In distributing the school fund no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained."

Rev. Stats. Ann. (1943), § 158.020:

"Separate schools for white and colored children.

(1) Each board of education shall maintain separate schools for the white and colored children residing in its district. * * *"

Louisiana

Const. (1921), Art. XII, § 1:

"Schools—Separation of races—School age—Kindergartens.—The educational system of the State shall consist of all public schools, and all institutions of learning, supported in whole or in part by appropriation of public funds. Separate public schools shall be maintained for the education of white and colored children between the ages of six and eighteen years; * * *"

Maryland

Ann. Code (1939), Art. 77, § 111:

"All white youths between the ages of six and twenty-one years shall be admitted into such public schools of the State, the studies of which they may

be able to pursue; provided, that whenever there are grade schools, the principal and the county superintendent shall determine to which school pupils shall be admitted."

Ann. Code (1939), Art. 77, § 192:

"It shall be the duty of the county board of education to establish one or more public schools in each election district for all colored youths, between six and twenty years of age, to which admission shall be free, and which shall be kept open not less than one hundred and eighty (180) actual school days or nine months in each year; provided, that the colored population of any such district shall in the judgment of the county board of education, warrant the establishment of such a school or schools."

Mississippi

Const. (1890), Art. 8, § 207:

"Separate schools shall be maintained for children of the white and colored races."

Code 1942 Ann. (1950 Cum. Supp.), § 6276:

"Separate districts for the races—descriptions of districts.—Separate districts shall be made for the schools of the white and colored races and the districts for each race shall embrace the whole territory of the county outside the separate school districts. * * *"

Missouri

Const. (1945), Art. IX, § 1(a):

"Free public schools—age limit—separate schools. * * * Separate schools shall be provided for white and colored children, except in cases otherwise provided for by law."

Rev. Stats. (1949), § 163.130:

"Separate schools for white and colored children. —Separate free schools shall be established for the education of children of African descent; and it shall herein be unlawful for any colored child to attend any white school, or for any white child to attend a colored school."

North Carolina

Const. (1868), Art. IX, § 2:

"General Assembly shall provide for schools; separate of the races. * * * And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race."

Gen. Stats. (1952), § 115-2:

"Separation of races.—The children of the white race and the children of the colored race shall be taught in separate public schools, but there shall be no discrimination in favor of or to the prejudice of either race. * * *"

Oklahoma

Const. (1907), Art. XIII, § 3:

"Separate schools for white and colored children with like accomodation shall be provided by the Legislature and impartially maintained. * * *"

Sess. Laws (1949), Tit. 70, Art. 5, § 1:

"Separation of Races. The public schools of the State of Oklahoma shall be organized and maintained upon a complete plan of separation between the white and colored races with impartial facilities for both races."

South Carolina

Const. (1895), Art. XI, § 7:

"Separate schools.—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."

Code (1942), § 5377:

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

Tennessee

Const. (1870), Art. XI, § 12:

"No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. * * *"

Code Ann. (Williams 1934), § 2377:

"Schools designated for children; separate schools for white and negro children.—The county board of education shall designate the schools which the children shall attend; provided, that separate schools shall be established and maintained for white and for negro children."

Texas

Const. (1876), Art. VII, § 7:

"Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both."

Civ. Stats. Ann. (Vernon 1951), Art. 2719:

"To provide separate schools. Said board shall provide schools of two kinds; those for white children and those for colored children. * * *"

Virginia

Const. (1902), Art. IX, § 140:

"Mixed schools prohibited.—White and colored children shall not be taught in the same school."

Code (1950), § 22-221:

"White and colored persons.—White and colored persons shall not be taught in the same school, but shall be taught in separate schools, under the same general regulations as to management, usefulness and efficiency."

West Virginia

Const. (1872), Art. XII, § 8:

"White and colored persons shall not be taught in the same school."

Code Ann. (1949), § 1775:

"Schools for Colored Pupils.—White and colored pupils shall not receive instruction in the same school, or in the same building. * * *"

APPENDIX B

State Statutory Provisions Permitting Separate Public Schools or Public School Facilities for White and Colored Children.

Arizona

Code Ann. (1951 Cum. Supp.) § 54-416:

"Board of trustees, powers and duties.—The powers and duties of the board of trustees of school districts are as follows:

* * * * *

2. The board shall prescribe and enforce rules not inconsistent with law or those prescribed by the state board of education for their own government and the government of the schools. They may segregate groups of pupils."

But see *Gonzales* v. *Sheely,* 96 F. Supp. 1004 (1951)

Kansas

Gen. Stats. Ann. (1949) § 72-1724:

"Powers of board; separate schools for white and colored children; manual training. The board of education shall have power * * * to organize and maintain separate schools for the education of white and colored children, including the high schools in Kansas City, Kan.; * * *"

New Mexico

Stats. Ann. (1941) § 55-1201:

"Admittance of residents of district to its schools —Separate schools for colored pupils—Restrictions. *** where, in the opinion of the county school board or municipal school board and on approval of said opinion by the state board of education, it is for

the best advantage and interest of the school that separate rooms be provided for the teaching of pupils of African descent, and said rooms are so provided, such pupils may not be admitted to the school rooms occupied and used by pupils of Caucasian or other descent. Provided, further that such rooms set aside for the teaching of such pupils of African descent shall be as good and as well kept as those used by pupils of Caucasian or other descent, and teaching therein shall be as efficient. Provided, further, that pupils of Caucasian or other descent may not be admitted to the school rooms so provided for those of African descent."

Wyoming

Comp. Stats. Ann. (1945) § 67-624:

"Separate school for colored children.—When there are fifteen [15] or more colored children within any school district, the board of directors thereof, with the approval of the county superintendent of schools, may provide a separate school for the instruction of such colored children."

APPENDIX C

Citations of State Constitutional and Statutory Provisions for Racial Segregation in Public Schools Existing at Time, or Enacted Shortly After, the Fourteenth Amendment Was Ratified.*

1. *Alabama* (1868)—
   Laws 1868, p. 148
   Const. of 1875, Art. XIII, § 1
   Laws 1878-79, p. 136
   Laws 1884-85, p. 349

2. *Arkansas* (1868)—
   Laws 1866-67, p. 100
   Laws 1873, No. 130, § 108, p. 423

3. *California* (Not ratified)—
   Laws 1869-70, c. 556, § 56, p. 839
   Pol. Code 1872, §§ 1662, 1669
   (Segregation of Negroes abolished by Cal. Amend. 1880, p. 47. See *Wysinger* v. *Crookshank*, 23 Pac. 54 (1890)).

4. *Delaware* (Not ratified)—
   Rev. Code 1852, c. 42, § 11(3), p. 115
   Laws 1881, c. 362, p. 385
   Laws 1887, c. 89, pp. 142-45
   Laws 1889, c. 539-45, pp. 650-66
   Laws 1891-93, c. 602, § 14, p. 693
   Const. 1897, Art. X, § 2
   Laws 1898-99, c. 67, § 22, p. 193

5. *Florida* (1868)—
   Const. 1887, Art. XII, § 12
   Laws 1895, c. 4335, pp. 96-97

---

*Only those states which were in the Union at the time of the adoption of the Fourteenth Amendment are considered. The date on which a state legislature ratified the Amendment appears in parentheses after the name of the particular state.

6. *Georgia* (1868)—
   Laws 1866, No. 108, § 3, p. 59
   Laws 1872, No. 70, § 17, p. 69
   Const. 1877, Art. VIII, § 1

7. *Indiana* (1867)—
   Laws 1869, c. 16, § 3, p. 41
   Laws 1877, c. 81, § 1, p. 124
   (Segregation abolished by Ind. Acts 1949, c. 186).

8. *Kansas* (1867)—
   Gen. Stats. 1868, c. 18, § 75, p. 146
   Laws 1879, c. 81, § 1, p. 163

9. *Kentucky* (Not ratified)—
   Laws 1869-70, I, c. 854, Art. 6, §§ 9, 11, p. 127
   Laws 1871-72, I, c. 112, p. 194
   Laws 1871-72, I, c. 520, § 8, p. 598
   Laws 1871-72, II, c. 594, § 10, p. 62
   Laws 1879-80, I, c. 377, § 9, p. 341
   Laws 1879-80, II, c. 894, p. 273
   Const. 1891, § 187
   Laws 1891-93, c. 260, Art. XIV, pp. 1490-91

10. *Louisiana* (1868)—
    Const. 1852, Title VIII
    Const. 1898, Art. 248

11. *Maryland* (Not ratified)—
    Laws 1870, c. 311, pp. 555-56
    Laws 1872, c. 377, pp. 650-51
    Laws 1874, c. 463, p. 690

12. *Mississippi* (Not ratified)—
    Laws 1878, c. 14, § 35, p. 103
    Const. 1890, Art. 8, § 207

13. *Missouri* (1867)—
Const. 1865, Art. IX, § 2
Laws 1865, p. 126
Laws 1868, p. 170
Laws 1869, p. 86
Laws 1874, p. 163-64
Const. 1875, Art. XI, § 3
Laws 1887, pp. 264-65
Laws 1889, p. 226

14. *Nevada* (1867)—
Laws, 1864-65, c. 145, § 50, p. 426
Laws, 1867, c. 52, § 21, p. 95
(Statutes later held to violate Nevada Constitution. *State ex rel. Stoutmeyer* v. *Duffy*, 7 Nev. 342 (1872)).

15. *New York* (1867)—
Laws 1864, c. 555, Title 10, p. 1281.
Laws 1894, II, c. 556, Title 15, Art. 11, § 28, p. 1288
(Segregation abolished by N. Y. Laws 1938, c. 134).

16. *North Carolina* (1868)—
Laws 1866-67, c. 14, § 8, p. 20
Laws 1872-73, c. 90, § 20, p. 124
Const. 1868 (amendment of 1875), Art. IX, § 2

17. *Ohio* (1867)—
Laws 1852-53, p. 441
Laws 1864, pp. 32-33
Laws 1878, p. 513
(Segregation abolished by Ohio Laws 1887, p. 34).

18. *Pennsylvania* (1867)—
    Laws 1854, No. 610, § 24, p. 623
    Purdon's Digest, Common Schools, § 43, p. 177 (Brightly 1700-1871)
    Laws 1869, No. 133, § 15, p. 153
    (Segregation abolished by Pa. Laws 1881, No. 83, p. 76).

19. *South Carolina* (1868)—
    Const. 1895, Art. XI, § 7
    Laws 1896, No. 63, § 58, p. 171

20. *Tennessee* (1866)—
    Laws 1865-66, c. 40, § 4, p. 65
    Const. 1870, Art. XI, § 12
    Laws 1873, c. 25, § 30, p. 46

21. *Texas* (1870)—
    Const. 1876, Art. VII, § 7
    Gen. Laws 1876, c. 120, § 54, p. 209
    Gen. Laws 1884, c. 25, p. 40
    Gen. Laws 1893, c. 122, § 58, p. 198
    Gen. Laws 1895, c. 24, p. 29

22. *Virginia* (1869)—
    Laws 1869-70, c. 259, § 47, p. 413
    Laws 1871-72, c. 370, p. 461
    Laws 1876-77, c. 38, p. 29
    Laws 1877-78, c. 14, p. 10
    Laws 1881-82, c. 40, p. 37
    Laws 1895-96, c. 318, p. 352

23. *West Virginia* (1867)—
    Laws 1865, c. 59, p. 54
    Laws 1871, c. 152, p. 206
    Const. 1872, Art. XII, § 8
    Laws 1872-73, c. 123, §§ 17, 18, p. 391
    Laws 1881, c. 15, §§17, 18, p. 176

APPENDIX D

Federal and State Court Cases Which Enunciate the Principle that State Laws Providing for Racial Segregation in the Public Schools do not Conflict with the Fourteenth Amendment.

United States Supreme Court

Gong Lum v. *Rice,* 275 U. S. 78 (1927).

See *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 344 (1938); *Cumming* v. *Richmond County Board of Education,* 175 U. S. 528, 545 (1899); *Plessy* v. *Ferguson,* 163 U. S. 537, 544 (1896); *Hall* v. *DeCuir,* 95 U. S. 485, 504 (concurring opinion, Clifford, *J.*) (1877).

Lower Federal Courts

Carr v. *Corning,* 182 F. 2d 14 (D. C. App. 1950); *Wong Him* v. *Callahan,* 119 Fed. 381 (C. C. Cal. 1902); *United States* v. *Buntin,* 10 Fed. 730 (C. C. Ohio 1882); *Bertonneau* v. *Board of Directors of City Schools,* 3 Fed. Cases 294 (C. C. La. 1878); *Davis* v. *County School Board of Prince Edward County,* 103 F. Supp. 337 (D. C. Va. 1952); *Brown* v. *Board of Education of Topeka,* 98 F. Supp. 797 (D. C. Kan. 1951).

See *Corbin* v. *County School Board of Pulaski County,* 84 F. Supp. 253, 254 (D. C. Va. 1949), reversed on other grounds in 177 F. 2d 924, 925 (C. A. 4th, 1949); *McSwain* v. *County Board of Education,* 104 F. Supp. 861, 868 (D. C. Tenn. 1952); *Moses* v. *Corning,* 104 F. Supp. 651, 652 (D. C., D. of Col. 1952); *Pitts* v. *Board of Trustees of DeWitt Special School District,* 84 F. Supp. 975, 988 (D. C. Ark. 1949).

State Courts

Dameron v. *Bayless,* 14 Ariz. 180, 126 Pac. 273 (1912); *Ward* v. *Flood,* 48 Cal. 36, 17 Am. Rep. 405 (1874); *Gebhart* v. *Belton,* decided by Sup. Ct. of Del., Aug. 28, 1952 (not yet reported); *Cory* v. *Carter,* 48 Ind. 327, 17 Am. Rep. 738 (1874); *Richardson* v. *Board of Education of Kansas City,* 72 Kan. 629, 84 Pac. 538 (1906); *Reynolds* v. *Board of Education of City of Topeka,* 66 Kan. 672, 72 Pac. 274 (1903); *Bond* v. *Tij Fung,* 148 Miss. 462, 114 So. 332 (1927), reversed with instruction to dismiss as moot, 279 U. S. 818 (1929); *Chrisman* v. *Mayor of Brookhaven,* 70 Miss. 477, 12 So. 458 (1893); *Lehew* v. *Brummell,* 103 Mo. 546, 15 S. W. 765 (1891); *People ex rel. Cisco* v. *The School Board of the Borough of Queens,* 161 N. Y. 598, 56 N. E. 81 (1900); *People ex rel. King* v. *Gallagher,* 93 N. Y. 438, 45 Am. Rep. 232 (1883); *People ex rel. Dietz* v. *Easton,* 13 Abb. Pr. N. S. 159 (N. Y. 1872); *State ex rel., Garnes* v. *McCann,* 21 Ohio St. 198 (1871).

See *Maddox* v. *Neal,* 45 Ark. 121, 125, 55 Am. Rep. 540, 543 (1885); *State ex rel. Cheeks* v. *Wirt,* 203 Ind. 121, 140, 177 N. E. 441, 448 (1931); *Greathouse* v. *Board of School Commissioners of City of Indianapolis,* 198 Ind. 95, 104, 151 N. E. 411, 414 (1926); *State ex rel. Mitchell* v. *Gray,* 93 Ind. 303 (1884); *Graham* v. *Board of Education of City of Topeka,* 153 Kan. 840, 842, 114 P. 2d 313, 315 (1941); *Wright* v. *Board of Education of City of Topeka,* 129 Kan. 852, 284 P. 363 (1930); *Daviess County Board of Education* v. *Johnson,* 179 Ky. 34, 38, 200 S. W. 313, 315 (1918); *McMillan* v. *School Committee,* 107 N. C. 609, 614, 12 S. E. 330, 331 (1890); *Puitt* v. *Commissioners of Gaston County,* 94 N. C. 709, 718 (1886); *State ex rel. Gumm* v. *Albritton,* 98 Okl. 158, 160, 224 P. 511, 513 (1923);

Jelsma v. *Butler,* 80 Okl. 46, 49, 194 P. 436, 438 (1920); *Board of Education of City of Kingfisher* v. *Board of Com'rs of Kingfisher County,* 14 Okl. 322, 331, 78 P. 455, 458 (1904); *Tucker* v. *Blease,* 97 S. C. 303, 328, 81 S. E. 668, 674 (1914); *Martin* v. *Board of Education,* 42 W. Va. 514, 515, 26 S. E. 348, 349 (1896).

Compare *Wall* v. *Oyster,* 36 App. D. C. 50, 31 L. R. A. (N. S.) 180 (1910); *Dallas* v. *Fosdick,* 40 How. Prac. 249 (N. Y. 1869); *Roberts* v. *City of Boston,* 5 Cush. 198 (Mass. 1849).