IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 101

HARRY BRIGGS, JR., ET AL.,
Appellants,
v.
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

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

I.

A major part of the brief of appellees is an attempt to sustain the amazing proposition which they state this way:

> "The District Court correctly held that the conflict of opinion regarding the effects of segregation and its abolition present questions of *legislative policy* and *not* of *constitutional right.*" (Emphasis added.)

This proposition is amazing in its bald assertain that, if a state decides that its continuing imposition of segregation is desirable, there is no issue for the independent decision of this Court as to whether segregation can be squared with equal protection of the laws. We think it a sufficient answer

to this contention to point out that it is no more or less than a denial that the doctrine of judicial supremacy extends to the Constitutional characterization of state action in the organization of public education. Thus, appellees' argument is a negation of the very postulates and whole history of constitutional government in the United States.

Actually, this case invites such authoritative exposition and decision as only this Court can give upon the meaning and requirements of "equal protection of the laws" in the organization of public education, and the consistency or inconsistency of the presently challenged state imposition with those requirements.

This process is aided by the historic fact that the Fourteenth Amendment represents an effort permanently to debar the states from imposing disadvantages upon individuals because of their race or ancestry. In contemporary recognition of this constitutional purpose opinions of this Court have more than once indicated that our civilization has advanced to the point where all governmentally imposed race distinctions are so odious that a state, bound to afford equal protection of the laws, must not impose them. See: *Nixon* v. *Herndon,* 273 U.S. 536; *Edward* v. *California* (concurring opinion of Mr. Justice Jackson), 314 U.S. 160; *Skinner* v. *Oklahoma,* 316 U.S. 535; cf: *Hirabayashi* v. *United States,* 320 U.S. 81; *Korematsu* v. *United States,* 323 U.S. 214; *Steele* v. *Louisville & N.R. Co.,* 323 U.S. 192.

There is a short, but decisive answer to appellees' argument that the meaning of the Fourteenth Amendment is fixed by the racial practices that existed in various states at the time the Amendment was adopted. Most of the states which required segregation in public schools at the time of ratification of the Fourteenth Amendment and Fifteenth also restricted the right to vote and the right of jury service to white citizens. As to these rights this Court has consistently held that the Fourteenth and Fifteenth Amendments effectively struck the qualifying word "white" from

these state statutes. *Strauder* v. *West Virginia,* 100 U.S. 303, 307; *Neal* v. *Delaware,* 103 U.S. 370, 389; *Bush* v. *Kentucky,* 107 U.S. 111, 120; *Guinn* v. *United States,* 238 U.S. 347, 363; See also: *Exparte Yarbrough,* 110 U.S. 651, 665; *Lester* v. *Garnett,* 258 U.S. 130, 136-137.

II.

In the organization of public education state imposed racism has taken different forms and has placed the individual at various disadvantages. This Court considered fifteen years ago the situation in which a state required its Negro citizens to go outside its borders for particular training, albeit training as good or better, except for geography, as that afforded locally to white citizens. The Court did not find it difficult to strike down this imposition of educational disadvantage on racial basis as a denial of equal protection. *Missouri ex rel Gaines* v. *Canada,* 305 U.S. 337. The same conclusion was reached when it was found disadvantageous to Negroes training for the legal profession to be separated in training from white persons in or preparing for the same public calling. *Sweatt* v. *Painter,* 339 U.S. 629. Even the circumstances of state imposed racial separation in a single classroom have been found disadvantageous to the extent of denying equal protection. *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637.

So here the evidence shows the real and substantial disadvantages which are and must continue to be suffered by the Negro children of Clarendon County so long as the state shall require that because of race they be trained separate and apart from the rest of the children of the community. On the record the proof of these disadvantages is nowhere challenged, much less countered. While we believe this Court has treated such demonstrable disadvtanges imposed upon Negro students as unconstitutional in any circumstances, they are made the more clearly intolerable because this injury of the segregated persons serves no edu-

cational purpose and results from distinctions which in their nature are alien and odious to a democratic and equalitarian society such as ours.

To offset these considerations the state urges at most that it means well; that certain disturbances of community tranquility are anticipated if racial segregation is not required in the public schools and that prevailing sentiment is so strongly in favor of the present arrangement that socially dangerous resentments would be aroused by a change. This is said to be established on the record by the testimony of one witness that a change in the segregated pattern would be "unwise" at this time and, off the record, by quotations from several speeches and newspaper articles of distinguished persons. Accordingly, appellees ask this Court to recognize that South Carolina is not being arbitrary in its determination that a substantial public interest is served by racial segregation in its public schools. They then argue that the legislature may continue the system which it thus regards as serving a public interest, whatever incidental injury may be suffered by the segregated Negroes. The only recourse left to the appellants is patience, waiting until there shall be change of heart by the majority of the population so apparent as to convince the South Carolina Legislature that it should abolish the school segregation laws.[1]

This entire contention is tantamount to saying that the vindication and enjoyment of constitutional rights recognized by this Court as present and personal can be postponed wherever such postponement seems in the general community interest. We need go no further than *McLaurin* v. *Oklahoma State Regents,* supra, to learn that this exaltation of local policy over fundamental individual right is as declared in the national Constitution not tolerable in the United States.

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[1] In view of South Carolina's disregard of right of Negroes to vote, *Rice* v. *Elmore,* 165 F. 2d 387, cert. den. 333 U.S. 875 and *Baskin* v. *Brown,* 174 F. 2d 391, even the normal political influences of opponents of particular legislature are not here present.

And there are striking and persuasive analogies in other situations where local policy has been urged to minimize or override individual constitutional right. More than a hundred years ago South Carolina attempted to prevent the free movement of Negro seamen into and about its seaport cities on the ground that domestic order and tranquility required their exclusion. Mr. Justice Johnson,[2] sitting on Circuit in South Carolina in 1823 did not hesitate to overrule this defense and condemn the restriction as unconstitutional. *Elkinson* v. *Deliesseline,* 8 Fed. Cas. 493 (C.C.S.C. 1823). The question there involved a South Carolina statute requiring the imprisonment of free Negro sailors on ships tied up in the harbor of Charleston. Much the same argument as presented by appellees in this case was presented on behalf of the statute in the *Elkinson* case. Mr. Justice Johnson disposed of this argument as follows:

> "But to all this the plea of necessity is urged; and of the existence of that necessity we are told the state alone is to judge. Where is this to land us? Is it not asserting the right in each state to throw off the federal Constitution at its will and pleasure? If it can be done as to any particular article it may be done as to all; and, like the old confederation, the Union becomes a mere rope of sand. . . ." (At p. 496.)

More recently contentions that maintenance of peace and order justified segregation of Negro interstate passengers, did not justify what was found otherwise to be an unwarranted interference with commerce. *Morgan* v. *Virginia,* 328 U.S. 373. The present apprehensions of South Carolina have no better standing as impediments to appellants' enjoyment of their constitutional right to be relieved of special educational disadvantages to which the state has subjected them because of their race.

As a matter of face, this argument by appellees is in

[2] See: *Mr. Justice William Johnson and the Constitution,* 57 Harvard Law Review 328, 338.

direct conflict with applicable decisions of this Court. In *Buchanan* v. *Warley,* 245 U.S. 60 this Court held:

> "That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges."

This rule has been cited with approval in later cases, *Shelley* v. *Kraemer,* 334 U.S. 1.

The case of *Birmingham* v. *Monk,* 185 F. 2d 859 (C.A. 5, 1951), certiorari denied 341 U.S. 942, affirmed the decision of the district court which excluded all efforts of the City of Birmingham to justify a residential segregation ordinance on the ground that it was necessary to prevent violence.

III.

The gravamen of the opinions of the District Court and the brief for appellees is that as a matter of policy, legislative or otherwise, the people of South Carolina desire that all Negroes be excluded from the white schools and vice versa. They also assert that the removal of racial segregation in public education will not be acceptable to the people of South Carolina. The individual rights of the appellants herein cannot be made dependent upon this reasoning. This Court stated in the *McLaurin* case:

> "It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between the restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. *Shelley* v. *Kraemer,* 334 U.S. 1, 13, 14, 92 L. ed. 1161, 1180, 1181, 68 S.Ct. 836, 3 ALR 2d 441 (1948). The removal of the state restrictions will not necessarily

> abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits."

It bears repeating that appellants in this case are seeking to remove the barrier of state imposed racial segregation in the educational opportunities and benefits offered by the state. If this barrier is removed, the state, counties and school districts can then assign students on whatever reasonable basis they deem advisable with the sole proviso that race or color shall not be made the determining factor in such assignment. By doing this, the racial groups in South Carolina can work out their common problems without the individual opportunities of either group being subjected to the state imposed barrier of racial segregation.

CONCLUSION

We respectfully submit that, for the reasons stated herein and in appellants' initial brief, the decree of the District Court should be reversed.

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