No. 164

Brief of Miller for Def. & Pl.

Filed Sept. 28, 1899

Supreme Court of the United States.

OCTOBER TERM, 1899.

NO. 164.

J. W. CUMMING, JAS. S. HARPER, AND JOHN C. LADEVEZE,

Plaintiffs in Error.

vs.

THE COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, STATE OF GEORGIA.

IN ERROR TO THE SUPERIOR COURT OF RICHMOND COUNTY, STATE OF GEORGIA.

Brief of FRANK H. MILLER for Defendant in Error.

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STATEMENT OF THE CASE.

Plaintiffs in error, persons of color and parents of children of school age, filed a verified petition in equity in Richmond Superior Court against the Board of Education and Tax Collector, to enjoin the collection of the tax levied by the Board of Education July 10th, 1897, pursuant to the act to regulate public instruction in the County of Richmond, approved August 23rd, 1872, P. L. 456. This petition alleged that the Board had established a *system of primary schools, a system of intermediate schools, a system of grammar schools, and a system of high schools in the County.* That ten per cent. of the tax assessed would be used by the Board for the support of the system of high schools. That this was illegal, because the Board, after having organized and maintained up to the time of the tax levy and for many years prior thereto, a system of high schools, where the colored school population had the same educational advantages as the white school population, on July 10, 1897, withdrew and denied to the colored school population any admission to or participation in the educational facilities of the high school *system*, and has voted to continue to deny to them any admission to or participation in these educational advantages. Pleading and relying on so much of the supreme law of the land, to-wit: *the Constitution of the United States* as declares that no state shall deny to any person within its jurisdiction the *equal protection of the laws*, they averred that the said action of the Board *was a denial of the equal protection of the laws*, and such as is forbidden by the said Constitution.

The petitioners prayed an injunction against the tax collector from collecting so much of the tax as had been levied for the support of the

system of high schools, and against the Board of Education from using *any funds or property for educational purposes* in said county for the support, maintenance or operation of said *system of high schools*. An interlocutory rule was issued to show cause why the relief prayed for in the petition should not be granted, and hearing was had thereunder.

The tax collector demurred, among other grounds, because plaintiffs made no such case as would authorize judicial interference by injunction with the system of taxation established by the Board of Education pursuant to the law of its creation said Act of Aug. 23, 1872.

The Board demurred for want of equity. It answered, admitting it had established the Ware High School for colored people but had discontinued it *temporarily* because 400 negro children were turned away from the primary grade unable to be provided with seats or teachers, and the same means and the same building which was used to teach *sixty* high school pupils would accommodate 200 pupils in the rudiments of an education, and because the Board at that time *was not financially able to erect buildings and employ additional teachers for the large number of colored children who were in need of primary education*. That there was at that time in the City of Augusta three public high schools which were public to the colored people and were charging fees no larger than had been charged by the board for pupilage in the Ware High School. That with these means and buildings the Board had established three primary schools for colored children, which were organized, established, and in operation when the petitioners filed their bill. The Board denied the allegation that the said Act of 1872 denied to the colored race equal protection of the law, or that the course and conduct of the Board thereunder was obnoxious to this constitutional limitation.

The Board admitted in its answer that under a petition for re hearing, when representatives of the colored race were present representing the interests of the primary schools, and the high schools, it had adhered to its former decision, but had resolved *to reinstate the Ware High School whenever the Board could afford it*. That the effort of the Board was to give more of the blacks an education in the elementary branches of an English education, and if there was any discrimination it was in favor of the little negro as against his more advanced brother.

As to the disposition of the fund when collected, they say, Record 15, "The school fund at the disposal of the board is annually divided according to the school population among the city wards, the five country districts, and the two villages, after reserving a fund for the general expenses of the board and for the high schools. By this means each set of local trustees can see the amount at their disposal and can regulate their schools accordingly. They can have few or many teachers, a long or a short term, build and repair just as they please and as their funds permit.

"Each district, village, and the city wards run a separate set of schools, and yet the whole system is controlled by one Board of Education, and the actions of the various local trustees are under the supervision of suitable committees from the general board. The secretary and county school commissioner is in general charge of the whole. The teachers in the high schools are chosen by the conference board of

the city trustees, which consists of the 15 members from the 5 wards. Those in the country districts are chosen by the local trustees in which the district is situated." The Court below, Printed Record 35, held the Act of '72 creating the Board of Education of Richmond County, vested in that board large discretionary powers, and the exercise of these discretionary powers are in most instances not subject to control, revision or alteration of any court or any other governmental ageney; but found it had no power, discretion, or authority save those given by the Act of the legislature creating the board and the acts amendatory thereof—and every exercise of discretion or power by the board, whether it be characterized as legislative, judicial, or executive, must be exercised within the limits of the authority delegated by the legislature. The Court then, construing the ninth and tenth section of the Act of '72, held that the discretion authorized to be exercised by section ten, was controlled by the provisions of section nine, and that the board must provide the same facilities for higher education for both races; stating that this construction placed upon the Act of '72 is not violative of the provisions of the constitution of 1868 nor of the fourteenth amendment of the Constitution of the United States, *but, if the construction contended for by the defendants is placed upon the act, it would in his opinion be repugnant to both:* He thereupon sustained as cause under the rule, Record 38, the demurrer of the tax-collector and overruled the demurrer of the board, granting the second prayer of the plaintiff's petition, Printed Record 4, to-wit, "That said board be enjoined from using any funds or property now in or hereafter coming into its hands for educational purposes in said county for the support, maintenance, or operation of said system of high schools."

The Court below in passing thereon, Printed Record 37, found it immaterial, to determine the right to charge tuition, because not sufficiently raised, and because counsel for plaintiff in his argument stated that he did not desire the Court to consider the question otherwise than in its bearing upon the right of the colored race to have equal high school facilities as the white children.

To this decision the Board of Education excepted and made parties to the writ of error the plaintiffs and the tax-collector. The judgment of the Court below was reversed, Printed Record 53, wherein the Court say, page 57.

"It is claimed that this action is in violation of the 14th amendment to the Constitution of the United States. This point in the case was not argued before us by the learned counsel for the defendant in error, either *orrally or by brief*, the only mention made of it in his brief being at the conclusion, where he says: To deny the colored school population of Richmond county, the equal protection of the educational laws of force in that county is to violate not only the State law, but the Constitution of the United States, fourteenth amendment. He cites no authority to sustain this contention. He does not point out in his brief which paragraph of the fourteenth amendment is violated. If it be the first, he does not point out what clause of that paragraph is violated, whether the privileges or immunities of citizens of the United States are abridged, whether his clients are deprived of life, liberty, or property without due process of law, or whether his clients are denied

the equal protection of the laws. It is difficult, therefore, for us to determine whether this amendment has been violated. If any authority had been cited, we could from that have determined which paragraph or clause counsel relied upon, but as he has left us in the dark we can only say that in our opinion none of the clauses of any of the paragraphs of the amendment, under the facts disclosed by the record, is violated by the board."

The mandate of the Supreme Court was made the judgment of the Court below and plaintiffs were then refused all relief, Record 39 *by a dismissal of their petition.*

CHRONOLOGICAL STATEMENT OF CONSTITUTIONS AND STATUTES CITED.

The people of Georgia, in convention assembled, March 11th, 1868, adopted a Constitution.

By proclamation from the President of the United States, July 27th, 1868, it was made known that the State of Georgia, through its legislature, had on July 21st, 1868, ratified the 14th Article of the Constitution of the United States.

Thereafter, the Act of Congress relating to the State of Georgia, approved July 15th, 1870, was passed, which enacted—That the State, having complied with the reconstruction acts and ratified the 14th and 15th Articles of Amendment to the Constitution of the United States, was entitled to representation in the Congress of the United States.

Article VI of this Constitution, Code 1873, Sec. 5132 and 5134, ordains as follows:

"SEC. 1. The General Assembly, at its first session after the adoption of this Constitution, shall provide a thorough system of *general education* to be forever free to all children of the state, the expense of which shall be provided for by taxation, or otherwise.

"SEC. 3. The poll tax allowed by this Constitution, any educational fund now belonging to this state—except the endowment of, and debt due to the State University—or that may hereafter be obtained in any way, a special tax on shows and exhibitions, and on the sale of spirituous and malt liquors—which the General Assembly is hereby authorized to assess—and the proceeds from the commutation for militia service, are hereby set apart and devoted to the support of common schools. And if the provision herein made shall at any time prove insufficient, the General Assembly shall have power to levy such general tax upon the property of the state as may be necessary for the support of said school system. And there shall be established, as soon as practicable, one or more *common schools* in each school district in this state."

Thereafter, by Act of October 13th, 1870, (Public Laws 49) there was established a system of public instruction, which was repealed by Act approved August 23rd, 1872, (Public Laws 64), to perfect the public school system and to supersede existing school laws.

There was also approved August 23, 1872, P. L. 456, an Act to regulate public instruction in the County of Richmond, the material portions of which are as follows:

"SEC 9. And be it further enacted, That the County Board of "Education, *under the advice and assistance of the trustees in each "ward or school district*, shall make all necessary arrangements for "the instruction of the white and colored youth in separate schools; "they shall provide the same facilities for each, both as regards

"school-houses and fixtures, attainments and abilities of teachers, "length of term time, and all other matters appertaining to educa- "tion, but in no case shall white and colored children be taught to- "gether in the same school."

"SEC. 10. And be it further enacted, That the County Board of "Education may establish schools of *higher grade*, at such points "in the county as the interests and convenience of the people may "require, which school shall be under the *special management of "the board at large*, who shall have full power, in respect to such "schools, to employ, pay, and dismiss teachers, to build, repair and "furnish the school-house or houses, purchase or lease sites therefor "or rent suitable rooms, and make all other necessary provisions "relative to such schools as they may deem proper; the funds for "such purpose shall be deducted ratably from the quota apportioned "to the respective school districts."

"SEC. 16. And be it further enacted, That at their first meeting in "January of each year, or as soon thereafter as practicable, the "county board, by a two-thirds vote of all its members, shall levy "such tax as they may deem necessary for public school purposes; "it shall be the duty of the County Commissioner to make out an "assessment and return of such tax against all the legal tax-payers "in the county, and furnish a copy of said assessment and return to "the County Tax Collector, whose duty it shall be to collect the said "tax, and deposit it to the credit of the county board, in such bank "in the city of Augusta as may be designated by the State Com- "missioner for the deposit of the county school fund."

SEC. 19. And be it further enacted, That admissions to all the "*public schools*, of the county shall be *gratuitous* to minors, between "the ages of six and eighteen years, who are the children, wards or "apprentices of actual residents in Richmond county: Provided, "That the county board shall have power to admit to such public "schools other pupils, upon such terms, or the payment of such tui- "tion, as the Board may prescribe."

"SEC. 20. And be it further enacted, That no general law upon "the subject of education, now in force in this State, or hereafter to "be enacted by its General Assembly, shall be construed as to inter- "fere with, diminish or supersede the rights, powers and privileges "conferred upon the Board of Education of Richmond county by "this Act, unless it shall be so expressly provided by designating "the said county and board under their respective names."

Subsequently a new Constitution went into operation, December 21, 1877, Civil Code of '95 p. 1783, which ordained, Article 8, Section 1, Paragraph 1, Code 5906: There shall be a thorough system of common schools for the education of children in the elementary branches of an English education only, as nearly uniform as practicable, the expenses of which shall be provided for by taxation or otherwise. The Schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races.

SEC. 5, Paragraph 1, Code 5910: Existing local school systems shall not be affected by this Constitution. Nothing contained in the first section of this article shall be construed to deprive schools in this state, not common schools, from participating in the educational fund of the state as to all pupils therein taught in the elementary branches of an English education.

By Act approved February 22, 1877, P. L. 347, Section 10 of the Act approved August 23, 1872, was amended to read as follows:

"And be it further enacted, That the County Board of Education "may establish schools of higher grade at such points in the county

"as the interest and convenience of the people may require, which "schools shall be under the special management of the Board at "large, who shall have full power in respect to such schools to em- "ploy, pay and dismiss teachers, to build, repair and furnish the "school-house or houses, purchase or lease sites therefor, or rent "suitable rooms, and make all other necessary provisions relative to "such schools as they may deem proper. The funds for such pur- "pose shall be deducted ratably from the quota apportioned to the "respective school districts, and the *County Board of Education* "*shall have full power and authority to charge such sums for tuition,* "*and incidental expenses, in said schools of higher grade, as the* "*Board from time to time, may fix and determine.*"

This Act was held Constitutional by the Supreme Court of the State in *Smith et al. vs. Bohler*, 72 Ga., 546, and affirmed in *Montgomery-Executor vs. The County Board of Education of Richmond County et al.*, 74 Ga., 41.

BRIEF OF THE ARGUMENT.

POINTS OF LAW.

THIS COURT IS WITHOUT JURISDICTION TO ENTERTAIN THIS WRIT OF ERROR.

(a). There is a want of proper Parties. One prayer in the original petition, and reaffirmed in the amended petition, Printed Record 4 and 21, was that the Tax Collector be enjoined from collecting so much of the tax levy of July 10th 1897, as had been levied for the support by said board in said county of said systemof high schools.

The Tax Collector, at the hearing of the rule against him, demurred and plead, as to any such procedure, against him, "res adjudicata", citing 72 Ga. Reports, page 546.

The Court below, Printed Record 38, sustained the demurrer and refused the prayer of the plaintiffs petition, but the petition was not dismissed as to him until after the decision of the Supreme Court, page 38, P. R. when all relief was refused.

The Tax Collector being a party to the original petition and the writ of error to the Supreme Court of Georgia and duly served, Supplemental Record, page 2, he should have been a party to this writ of error to be bound thereby.

The procedure was to enjoin the collection by the Tax Collector of taxes assessed and to be collected for 1897. No other year was at issue or involved in the procedure. Since the rendition of the decision dismissing the bill, all these taxes have been in conformity to law paid out and disbursed. The Tax Collector not being a party before this Court there is no way to make the judgment of the Court applicable to him or reach the taxes assessed.

(b) The final decree of Richmond Superior Court, Record 39, Par. 2, was that the plaintiffs in the cause, "be and they are hereby refused all the relief prayed for," and the petition be dismissed at their costs. The final decision on the merits specifies no particular ground. Therefore it does not affirmatively appear that a Federal question was presented, and that the judgment as rendered could not have been given without deciding it, which is necessary.

Harrison vs. Morton, 171 U. S., 38.

(c) It was an application to a Court of Equity to restrain by injunction the exercise by the respective trustees comprising the Board, of the privileges of their office, which is prohibited.

White vs. Berry, 171 U. S., 366.

(d) It really rested upon grounds other than those dependent upon a Federal question, and is not reviewable, although a Federal question was originally sought to be raised in the State Court.

Chappell Chemical & Fertilizer Co. vs. Sulphur Mines Co. of Virginia, 172 U. S., 474. 101 U. S. 22; 120 U. S. 68.

To the same effect see McQuade vs. inhabitants of the City of Trenton, 172 U. S., 636, in which the Court cites in support of it, 142 U. S., 254; 113 U. S., 574; 116 U. S., 410; 171 U. S., 38, and 163 U. S., 207.

(e) Regulation by a Board of Education of schools of higher grade than free schools abridges no privileges or immunity of a citizen of the United States or denies him the equal protection of the laws.

Slaughterhouse cases, 16 Wal., 81.

FIRST ASSIGNMENT OF ERROR, PRINTED RECORD 40.

The language of the statute of Georgia referred to, acts of '72, P. L., 460, is, *May establish schools of higher grade at such points in the County as the interest and convenience of the people may require—and may make all other necessary provisions relating to such schools as they may deem proper.*

This Act is now assigned as contrary to the Constitution, especially the 14th amendment, in that it gives a *discretion* to the Board to establish and maintain, and to discontinue and refuse to maintain, high schools for persons of the negro race. This question that the statute was unconstitutional because of discretion given, was not made in either the Superior or the Supreme Court of Georgia. The latter, in its opinion, P. R., 57, say that this point, violation of Constitution U. S., was not argued before them by the learned counsel for the defendant in error, either orally or by brief, the only mention of it in his brief being at the conclusion, where he states the denial is to violate not only the State law but the Constitution of the United States—fourteenth amendment, citing no other authority to sustain the contention;

neither did he point out in the brief which paragraph of the 14th amendment was violated.

The decision below, Record 35, was based upon the construction of a State Statute, was never excepted to by the plaintiffs and what is said by the Supreme Court on this question is as to the claim in the petition, Record, 57, in violation *of the Constitution of Georgia and the United States.*

The Judge of the Superior Court in his decision, page 36 of the Printed Record, held that the establishment and maintenance of schools of higher grades than common schools, authorized by section ten of the Act, was a matter that rests exclusively in the sound discretion of the Board, but if the discretion is exercised in the establishment or maintenance of schools of higher grade they must be established and maintained in harmony and in compliance with section nine of the said Act, and the Board must provide the same facilities for higher education for both races.

The Supreme Court of the State, reviewing this decision, held, Printed Record, page 55, "That discretion is a power conferred upon "them by law of acting officially under certain circumstances according to their own judgment and conscience, not controlled by the "judgment or conscience of others. The powers conferred are legislative in their character."

And on page 56 say: We think the Board were "not required to "establish a high school for negroes whenever they established one for "whites * * We do not mean to intimate that any public corporation of "this kind can arbitrarily and without reason establish one school and "suspend another, but where it is in its discretion to pass upon facts "and determine from the best interests of the people at large, courts "will not control its discretion unless it is manifestly abused, although "the Court may be of the opinion that the corporation erred upon the "facts," holding also that the 9th section of the Act related entirely to common schools and not to the matter of high schools, and that the 10th section related to separate and independent schools from those established under the 9th section, which were not to be free schools, but pupils were required to pay tuition. *Such a school is therefore "not a free high school."*

In Atchison, Topeka & Sante Fe R. R. vs. Matthews & Trudell, decided Arpil 17 1899. 174 U. S. Reports, 96, this Court held the statuteof Kansas, putting upon railroad companies the burden of proof where damages by fire had been caused by operating the railroad, was not in violation of the 14th amendment, as this amendment did not forbid classification—that "It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public * * * Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

In the same case the Court say: "All questions of fact are settled by the decision of the state courts. (Hedrick vs. Atchison, T. & S. F. R. R. Co., 167 U. S., 673, 677. and cases cited in the opinion), and the single matter for our consideration is the constitutionality of

this statute."—As in this case at bar the constitutionality of a delegation of discretion by the statute.

In Magoun vs. Illinois Trust & Savings Bank, 170 U. S., 295, this Court, affirming the previous rulings in 134 U. S., 232 and 148 U. S., 657, say that the 14th amendment was not intended to compel the state to adopt an iron rule of equal taxation. "There is therefore, no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

SECOND ASSIGNMENT OF ERROR, PRINTED RECORD 41.

There was no such finding of the Court below as set out in the language of this assignment. The right to the equal protection of the laws is not denied by a state court when it is apparent that the same law and course of procedure would be applied to any other person in the state under similar circumstances and conditions.

Tinley vs. Anderson, 171 U. S. Reports, 101.

The "due process of law," and which was the proper remedy open to the plaintiffs, was to have the decision of the Board of Education reviewed by writ of certiorari by the State Commissioner, which was not resorted to, and the time to sue out the same allowed to expire without any resort thereto.

In Dewy vs. DesMoines, 173 U. S., 198, the Court say: Parties are not confined here to the same arguments which were advanced in the Court below upon a Federal question there discussed. Having, however, raised only one Federal question in the Court below, can a party come into this Court from a State Court and argue the question thus raised, and also another not connected with it and which was not raised in any of the Courts below and does not necessarily arise on the record, although an inspection of the record shows the existence of facts upon which the question might have been raised?" Here the assignment claims violation of the Constitution as a whole without specification which is not a sufficient compliance with the rule.

THIRD ASSIGNMENT OF ERROR, PRINTED RECORD 41.

This assignment, that the Court decided that negroes could consistently with the Constitution of the United States be by the laws of Georgia taxed and the money derived therefrom appropriated to the establishment and maintenance of high schools for white persons, while pursuant to the same law said Board at the same time refused to establish and maintain high schools for the education of persons of the negro race, does not specify the particular portion of the Constitution of the United States which is violated, nor the true decision rendered. To understand the error in the assignment, reference is made to the facts.

1st. The educational tax for 1897 arose from the tax levy of the state, poll tax of the County of Richmond, and the State Educational Fund

tax, to which was added the tax imposed by the Board of Education it self and required of the tax collector, P. R. 9, of $45,000.00. The proportion of the amount assessed for the colored schools was far in excess of the entire tax upon the colored population. These plaintiffs in error, see affidavit of the Tax collector P. R. 33, had assessed against them as a whole $23.17, of which amount, according to the averments in their petition, ten per cent. to-wit: $2.31, was appropriated to the "system of high schools."

2nd. In their answer the Board say, P. R. 12, that in their view, until the local trustees—i. e., the city conference board—should have furnished a sufficiency of primary schools for the colored population it would be unwise and unconscionable to keep up a high school for sixty pupils and turn away three hundred little negroes who are asking to be taught their alphabet and to read and write. That no part of the funds of this board accrued or accruing, and no property appropriated to the education of the negro race, has been taken from them. This Board has only applied the same means and moneys from one grade of their education to another; and in this connection says that the enrollment in the colored school in this year is 238 more than last, the Ware High School building accommodating 188 pupils.

So, in fact, there was no appropriation of the tax assessed on the colored people under this law to the support of white high schools, but all of it was applied in the discretion of the Board by adding it to what had been appropriated for primary education of the negro race and increasing the number of pupils.

FOURTH ASSIGNMENT OF ERROR, PRINTED RECORD 41.

That the Court erred in dismissing the complaint of the plaintiffs in error.

If this is a proper assignment of error (which is denied), it opens to the Court the whole case, which I proceed to discuss.

THE CONSTITUTION OF THE UNITED STATES.

1. Plaintiffs originally based their application for relief by injunction on the fourteenth amendment of the Constitution of the United States, which, among other things, provides: "*No State* shall make or enforce any law which shall abridge *the privileges or immunities of the citizens of the United States;* nor shall *any State* deprive any person of life, liberty or property, without due process of law, nor *deny to any person* within its jurisdiction the equal protection of the laws." This language of the Constitution does not confer any power on the Congress except to correct any illegal state action. Congress can pass no affirmative legislation in reference to negroes thereunder. It is solely a prohibition on the power of the state.

163 U. S., 543-4, 549, 551. Plessy's case.
109 U. S., 3, 10, 13. Civil right cases.
16 Wallace, 36. Slaughter House cases.

The meaning of the Fourteenth Amendment of the Constitution of the United States is thus explained in the following cases:

Plessy's case, in 163 U. S., 537, arose relative to an Act of Louisiana requiring railroads to provide equal but separate accommodations for white and colored on their cars. In this case it was held that the conductors could eject a negro and he could be jailed for riding in a car reserved for white persons, and that this law was not in conflict with the Thirteenth and Fourteenth amendments of the Constitution. The Court say, speaking of this amendment (163 U. S., 543, citing the Slaughter House cases, 16 Wallace, 36): "It's main purpose was to establish the citizenship of the negro and to give definition of citizenship of the United States and of the states, and to protect from the hostile legislation of the states *the privileges* and immunities of *citizens* of the United States, *as distinguished from those of citizens of the states,*" (page 544). "The object of the amendment was undoubtedly to enforce the *absolute equality* of the *two races before the law*, but in the nature of things it could not have been intended *to abolish distinctions based upon color*, or *to enforce social* as distinguished from political equality, or a comingling of the two races upon terms unsatisfactory to either." Therefore laws have been enacted providing for the support of separate schools for white and colored children, and forbidding intermarriage between the races, &c.

Again, on page 546, in "The Civil Rights Cases," 109 U. S., 3, above cited, it was held an Act of Congress entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, etc., of inns, theatres, etc., "and made applicable to citizens of every race and color regardless of any previous condition of servitude," was *unconstitutional and void*, upon the ground that the Fourteenth amendment was prohibitory *upon the states only*, and the legislation authorized to be adopted by Congress for enforcing it was not direct legislation on matters respecting which the states were prohibited from making or enforcing certain laws or doing certain acts, *but corrective legislation*, such as might be necessary or proper for counteracting and redressing the effects of such laws or acts. In delivering the opinion of the Court, Mr. Justice Bradley observed, "That the Fourteenth amendment does not invest Congress with power to legislate on subjects that are within the domain of state legislation, but to provide modes of relief against state legislation or state action of the kind referred to."

In 93rd New York, 435, *People vs. Gallager*, *mandamus*, was applied for to compel the principal of a public school to admit a negro pupil, and the Court held he was not entitled to the *mandamus*, as there was another school he could attend. In construing the Fourteenth Amendment the Court say: "In speaking of the *privileges and immu-*
"*nities* which the state is forbidden to deny the citizens, they are "referred to as the *privileges and immunities* which belong to them as "*citizens of the United States.* It has been argued from this language "that such rights and privileges as are granted to its citizens, *and de-*
"*pend solely upon the laws of the State for their origin and support, are not*
"*within the constitutional inhibition*, and may lawfully be denied to any "class or race by the states at their will and discretion. This construc-
"tion is distinctly and plainly held in the Slaughter House cases (16

"Wall, 36), by the Supreme Court of the United States. The doctrine "of that case has not, to our knowledge been retracted or questioned by "any of its subsequent decisions.

"It would seem to be a plain deduction from the rule in that case that "the privilege of receiving an education at the expense of the state, "being created and conferred solely by the laws of the state, and always "subject to its *discretionary regulation* might be *granted or refused to any* "*individual* or class at the pleasure of the state. This view of the "question is also taken in State, ex rel., Garnes vs. McCann, (21 Ohio "St., 210), and Cory vs. Carter (48 Ind., 337; 17 Am. Rep., 738). The "judgment appealed from might, therefore, very well be affirmed upon "the authority of these cases."

This last decision of the Supreme Court, 163rd U. S., 550, leaves the states with the power to reasonably regulate the negro in the enjoyment of his civil and social rights in accordance with tradition and custom, and unless his rights are greatly abused, he has no cause of complaint. The state need not provide for *his education* unless it sees fit.

The fundamental mistake of the Plaintiff's in this case is in supposing that the Fourteenth Amendment of the Constitution of the United States controls this case, and that *equal protection* of the laws mean *equal privileges*. The contrary to this principle is shown in three cases cited In *exparte Kenny*, 3rd Hughes, 16, the matter is logically discussed.

The Fourteenth Amendment of the Constitution of the United States provides that no state shall make or enforce any law which shall abridge the *privileges of citizens of the United States*, nor deny to any person within its jurisdiction the equal protection of the laws. The only *privileges* guaranteed by this section are those of persons who are citizens of the United States: "No state shall abridge the privileges of citizens of the United States. Privileges of citizens of the United States are those protected by this amendment, and they are the only privileges that are protected. The *equal protection of the laws* is guaranteed "to any person within its jurisdiction," that is the jurisdiction of the state. There is a difference between citizens of the United States and citizens of states. The rights which a person has as a citizen of the United States, are such that he has by virtue of his state being a member of the American Union under the provision of our national Constitution." As for example, "a citizen of Virginia is allowed by "her laws to carry on business by paying a certain tax, a citizen of "Maryland who comes into Virginia and pay the same tax is entitled "under the national Constitution, to carry on the same business in Vir"ginia." The Virginian carries on business in his state by right of his *state citizenship*. The Marylander carries on business in Virginia by right of his *national citizenship*.

The amendment further provides that no state shall "deny to any per"son within its jurisdiction the equal protection of the laws." "Here is "a distinction between citizens of the United States and *"any person,"* "whether citizen or alien, residing or "happening to be within the "borders of a state. The *declaratory* clause forbids any abridgment of the "rights of citizens of the United States." The *remedial* clause gives "equal "protection to all persons whatever while within a state's borders.

"The amendment does not provide that the *privileges shall be equal*, but "it does provide that *protection shall be equal*. It establishes equality "between all persons in their *right to protection*, but does not confer "*equality in the privileges they are to enjoy*. It provides that whatever "privileges the Constitution and laws of the United States confer upon "a citizen as a citizen of the United States shall be enjoyed without "abridgement; and it provides that all persons within a state, whether "a citizen of the United States, or of the states, or aliens, shall be "equally protected by the laws in whatever privileges, whether equal "or not equal, they may have from the United States or from the "state. However *unequal their privileges* respectively, yet a foreigner, "a citizen of another American state, and a citizen of the state, shall "have the benefit equally in the state of all remedial laws for the re. "covery of rights and of all legal safe-guards ordained for the protec. "tion of life, liberty and property.

"I think it plain from this review, that an *equality of privileges* is not "enforced by the Constitution upon a state *in respect to its domestic laws* "for the government of its own citizens as such, while they are within "its jurisdiction."

Therefore, whether a state will educate its citizens or not, is a question with which the United States Constitution has nothing to do. It is a matter of purely domestic concern an internal police regulation. If the state does not see fit to educate its citizens, Congress cannot compel it under the Constitution, but if the states determine to give educational facilities to its citizens, it is in its province to do so in the exercise of its police power.

113 U. S., 27-31; 135 U. S., 131; 136 U. S., 436-449; 140 U. S., 555.

In *Giozza vs. Tierman*, 148 U. S., 662, the Supreme Court say, speaking of the Fourteenth Amendment: "The amendment does not take "from the states these powers of police that *were reserved* at the time "the original Constitution was adopted. Undoubtedly it forbids any "arbitrary deprivation of life, liberty or property, and secures equal "protection to all under like circumstances in the enjoyment of their "rights; but it was not designed to interfere with the power of the "state to protect the lives, liberty and property of its citizens, and to "promote their health, morals, *education* and good order." Citing:

Barbier vs. Connelly, 113 U. S., 27-31. *In re* Kemler, 136 U. S., 436.

THE SCHOOLS.

1. The question in this case is how has the state acted? The Act of 1872 and amendments established the County Board of Education. This Act provides for regulation of public instruction in Richmond County. The establishment of district schools, under the control of the district trustees, (Section 6, *was mandatory*. These trustees *were required* to erect schools. Their kind was not designated in the Act, but they were to be for the district. Whatever they were, *equal facilities* in these schools were to be given to the whites and blacks, and the schools were to be separate for both races. Under this Act the district trustees have established what are known as primary

schools, wherein the elementary branches of an English education were taught. And this was but a repitition of the general state policy. See Act 1872, pg. 66.

By Section 10 of the Act the *whole County Board may* establish schools of higher grade at such points in the county as the interest and convenience of the people may require. Over these higher schools the whole Board acts for all the people "with full power." The Board is elected by the people, and any improper action by the Board can be corrected at the voting polls. Proper men can be returned as members of the Board.

These schools, when established by the Board, are to be partly supported by contributions from the taxes of the several districts, and by tuition under Act of 1877. The State has, therefore, promised a common school education. *That much is free.* She permits higher schools to be established—if the Board, the representatives of the people, wish it. The Board "may establish," *and pupils pay* for tuition. It is not a free public high school. The want of or necessity for such school is to be determined by the Board.

Under this power high schools have in the past been established, and have been discontinued at the discretion or legislative will of the Board, as the public need or wants required. The Tubman High School for white girls has been established, which is maintained by aid from the Board and the tuition paid by pupils, $15 a year. The Ware High School for negro boys and girls was established, $10 per annum, and has been temporarily discontinued. The question is, *can its re-establishment be compelled?*

The Board is a legislature for the purpose of determining this question. The legislative power on the subject of education is under the Act of 1872 delegated by the Legislature to the whole County Board of Education. It can act or not as it sees best. Such a delegation of power is legal (71 Ga., 856; 72 Ga., 554; 73 Ga., 604; 78 Ga., 672; 70 Ga., 694.) The power to establish is necessarily legislative in its character. To declare what shall be in the future is essentially a legislative power (19 Am. E. C. L., 391.) The power to establish includes the power to vacate and annull (44 Ga., 465; 51 Ga., 227; 22 Ga., 535). From legislative action there is no appeal, except to enlightened public opinion. Ib., 118 U. S., 370.

The Courts will not interfere. 72 Ga., 353 (c), 358, bottom, 554; 52 Ga., 212; 50 Ga., 179; 19 Ga., 471; 43 Ga., 67.

The establishment of discontinuance of a school being legislative is a matter entirely within the discretion of the Board, and as the Board is not distinctly required to establish a system of high schools, and has not done so, they cannot be compelled to exercise their legislative power. Cases *supra* and Mobile School Commissioners vs. Putnam, 44 Ala., 506-537, cited from 13 Am. E. C. L., 223, bottom; 54 Ga., 426; 75 Ga., 433; 72 Ga., 553; 17 Ga., 56 (4)-612; 19 Ga., 471; 19 Am. E. C. L., 463; 118 U. S., 370). As the Board are not required to establish a high school system or a single high school, it cannot be compelled to exercise

their legislative power to re-establish one high school for negro boys and girls where there is no sufficient reason therefor. No system of high schools has been established as the wants of the community never required it.

The Board has never established a free high school. It cannot establish such, because the direction of the legislature to charge tuition is practically a limitation on the power to make a free school, and such a legislative act is equivalent to saying there shall be no purely free high school, only the district and primary schools are free. The petitioners ask the establishment of a school for boys and girls when this Board does not maintain anything but a high school for white girls, and that because the property was given for that purpose. The power to charge tuition, was by Act of 1877, p. 347, passed in February, prior to the Constitution of Dec. 21, 1877, and the cases in 27 S. E. R., 710; 96 Ga., 477 and 86 Ga., 605, have no application—They are based on action under the Constitution of 1877. Defendant has never had a *free high school.*

Defendant therefore cannot be compelled to establish a free public high school for negro boys and girls.

(a). The state has not put the imperative or mandatory duty on defendant to do so.

(b). By directing tuition to be charged, the State has forbidden the establishment of free high Schools in Richmond county.

(c). It has not established a high school for white boys and girls.

DISCRETION OF THE BOARD.

No imperitave duty being put on the Board, there is no breach of duty for petitioners to complain of, nothing to compel the Board to do.

The Tubman building was given for a high school, and for such the Board accepted it.

The plaintiffs do not offer defendant a school building, and ask defendant to establish a negro girl school therein. They ask the re-establishment of a school for negro boys and girls, which the whites do not have. Until they donate a proper building and the Board refuses, they are not in a position *to complain of a want of equality and identity of benefits,* and defendant can establish a white high school solely.

In Chrisman vs. Brookhaven, 12 Southern Reporter, 458, the Supreme Court of Mississippi, Jan. 30, 1893, say:

"1. The constitutional provision requiring the legislature to estab-
"lish and maintain a uniform system of free public schools *does not pre-*
"*vent its providing* for the establishment outside of that system of *a school*
"*exclusively for whites,* and the issue of bonds by the town in which it is
"located to pay therefor.

"2. The constitutional provision for equal and uniform taxation does
" not prevent local taxation for local purposes and benefits.

"3. Const. 1869, art. 1, §21, with its proviso inhibiting any distinc-
"tion among citizens, does not prevent legislation making separate
" provision from the different races in the matter of schools."

The Act of 1872, Section 10, leaves the establishment of high schools entirely to the discretion of the Board, not compulsory; nor are *equal*

facilities in high schools required to be given under the 10th section. The Board is simply to meet the public wants as far as it can do so. The high schools under §10 are permissive and are outside the public primary school system—no part thereof—the primary are *free*, the high schools are *pay*, and attendance voluntary.

The question of financial distribution of taxes must be left somewhere. The law has given that to the County Board, with legislative power. Petitioners have not:

(a). Shown *any inequality in the law itself*, which is what the Constitution forbids (see Strauder vs. West Virginia, 100 U. S., 303, head note 5); 163 U. S., 543-4; 93 N. Y., 447.

(b). Nor that by any action of the Board have they been denied any *equal protection*. 3rd Hughes, 16.

(c.) No taxes have been levied or collected exclusively for *high schools*. The levy made is the same as was approved by S. C. Ga., in 72 Ga., 554; 74 Ga., 43, as to this Board.

The *regulation of education*, like the regulation of public health, morals, &c., &c., is governed by the police power of the state, and not by the Fourteenth Amendment of the Constitution.

Barbier vs. Connelly, 113 U. S., 27-31.
Leisy vs. Hardin, 135 U. S., 131.
Giozza vs. Tienan, 148 U. S., 662.
In re Kemmler, 136 U. S., 436-449.
In re Rahrer, 140 U. S., 555.
Paupe, Ex., vs. Seibert, 142 U. S., 354.
Cantini vs. Tilman, 54 Fed. Rep., 974.

Because the police power is among the *powers reserved to the States* at the time of the adoption of the Constitution, and not submitted to Congress or the General Government under the Constitution.

56th Fed. Rep., 356; 11th Peters, 102.
51st Fed. Rep., 788; 111th U. S., 747.
127th U. S., 678; 148 U. S., 662.
167 U. S., 47; 165 U. S., 182.

EQUAL PROTECTION.

This cannot mean *equal benefits* (*cases cited above*) or the Slaughter House cases would not have been decided as they were. There an exclusive privilege was given a corporation to slaughter animals in New Orleans. This was held by the Supreme Court to be a proper exercise of the police power, and *not unreasonable*, although it was a monoply. 16 Wallace, 36-62; 111 U. S., 746; 93rd N. Y., 447.

Nor authority to so regulate the beer trade, as *to destroy* a brewery. Mugler vs. Kansas, 123 U. S., 623-664.

The most extreme authority that gives any such views as that advanced by petitioners are the cases decided by Judge Barr in Kentucky. In Anderson vs. Louisville and Nashville Railroad, 62nd Fed. Rep., 48, he says:

"The Fourteenth Amendment to the Constitution of the United

"States *prohibits discrimination* by a state because of race or previous "condition of servitude, and, indeed, secures to all of its citizens "certain fundamental rights as against state action, but it does not "secure *the joint and common enjoyment of such rights.* It is the equality "of right which is secured, and not the joint and common enjoyment "of such right." Civil Rights Cases, 109 U. S., 3; 3 Sup., Ct., 18; U. S. "vs. Buntin, 10 Fed., 730; Claybrook vs. Owensboro, 16 Fed., 297.

In *Davenport vs. Cloverport*, 72 Fed. Rep., 694, Judge Barr, adopting 16 F. R. 302, says: "The equal protection of the laws guaranteed by "this amendment must and can only mean that *the laws of the state* "must be equal in their benefits, as well as in their burdens, and that "less would not be the equal protection of the laws. This does not "mean *absolute equality* in distributing the benefits of taxation. That "is impracticable. But it does mean the distribution of the benefits "upon some fair and equal classification or basis."

Judge Barr says: "This does not mean absolute equality in distributing the benefits of taxation—this is impracticable."

Yet this has been done for petitioners.

(a). The same money is spent now as was spent before, and more negroes taught.

(b). Other high school education is in the city and at same cost to them. Some of petitioners' children have gone there as they should have done. 10 Fed. R., 736. White boys go to a pay high school.

(c). The petitioners do not offer the Board a school house for a high school for negro boys and girls.

(d). The Board has not established such a school, i. e., for white boys and girls.

In *Reid vs. Eatonton*, 80 Ga., 756, the constitutionality of the Act of October 24th, 1887, (P. L., 839,) in reference to schools at Eatonton, was before the Court. This Act provided for bonds to be issued for the erection of white and colored schools, and in the distribution of the funds raised by the bonds, it was to be divided between the whites and negroes on the following basis (Section 2): "That in no event shall the "amount appropriated to each school exceed the *pro rata* part of the "taxes paid by the white and colored people of said city, as shown by "the tax digest of said city." A white taxpayer sought to enjoin the distribution, on the ground that it was unlawful discrimination against the negroes. It appeared that the negroes themselves, as a class, were not complaining, and this Court held that the white taxpayer had not sufficient interest to bring the suit, and said further: "Even if the com- "plainant had a right to file this bill, we are not prepared to hold that "the injunction should have been granted, or that the Act was uncon- "stitutional."

In the distribution from school taxes the negroes in Augusta receive over $17,000 more than what they—the negro race—pay in. Suppose they were allowed only what they pay in, as in the Eatonton case. The parties who are complaining do not show a sufficient interest to bring the suit, or that they represent the negroes as a class, or how they will be damaged by the continued payment of the taxes charged against

them, or that they themselves are being deprived of an education. 72 Ga., 553, (c).

Many inequalities in the execution of state laws exist, and are allowed, notwithstanding equal protection is the rule, such as:

(a). Venire not required to have negroes on list for trial before a petit jury, 100 U. S., 315 (7), 321; 107 U. S., 110. Nor on list grand jury, 162U. S., 580-566.

(b). No person allowed to speak on "Boston Common" in absence of permit from Mayor. Reasonable regulation, 167, U.S., 47; 165 U.S., 180-2.

(c). Woman and foreign residents not on jury. 100U.S., 335, 162U.S., 565

(d). No negro and white judge not required on bench. 100 U. S., 335.

(e). Citizens of a state can have privileges not given citizens of the United States, Slaughter House case. 16 Wall, 38; 3 Hughes, 16.

(f). No woman practicing law. 16 Wall, 130.

(g). Marriage between negroes and whites, not allowed. 39 Ga., 321; 163 U. S., 545; 3 Hughes, 16; 1 Wood R., 537; 3 Woods, 367.

(h). Negroes not allowed in Theatres, Inns, Cars, etc. 16 L. R. A., 560; 109 U. S., 3; 163 U. S., 544 and 550.

(i). Even a discrimination based on color is not illegal. In *Lehew vs. Brummel*, 15th S. W. Rep., 765, the Supreme Court of Missouri say speaking of the Fourteenth Amendment: "The common school system of this state is a creature of the State Constitution and the laws passed pursuant to its command. The *right of children* to attend the public schools is not a privilege or immunity belonging to a citizen of the United States as such. It is a right created by the state, and a right belonging to a citizen of this state as such. We then come to the last clause, which is prohibitory of state action. It says: "Nor shall any state deny to any person within its jurisdiction equal protections of the laws." Speaking of this clause in its application to state legislation as to colored persons, Justice Strong said: "What is this but declaring that *the law* in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states; and, in regard to the colored race for whose protection the amendment was primarily designed, that *no discrimination* shall be made against them by law *because of their color?*" *Strauder vs. West Virginia*, 100 *U. S.*, 303. We then come to the simple question whether our Constitution and the Statutes passed pursuant to it requiring persons to attend schools established and maintained at public expense for the education of colored persons only, deny to such persons "equal protection of the laws." It is to be observed, in the first place, that these persons are not denied the advantages of the public schools. The right to attend such schools and receive instruction thereat, it is guaranteed to them."

But it will be said the classification now in question is one *based on color*, and so it is; but the color carries with it natural race peculiarities, which furnish the reason for the classification. There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated. These differences created different social relations, recognized by all well organized governments. If we cast aside chimercial theories and look to practical results, it seems to us it must be conceded that separate schools for

colored children is a regulation to their great advantage. It is true, Brammell's children must go three and one-half miles to reach a colored school, while no white child in the district is required to go further than two miles. The distance which these children must go to reach a colored school is a matter of inconvenience which must arise in any school system. *The law does* not undertake to establish a school within a given distance of any one, white or black. The *inequality in distances* to be traveled by the children of different families is but an incident to any Classification, and furnishes no substantial ground of complaint.

Equality of protection of the law is never determined on the color line. No line can be drawn in public institutions between citizens, on *the color idea*. If color can determine, then equality would mean *equal* number of negroes and whites in all matters—such as juries—6 to 6. City Council. Judges of one negro, one white, etc., etc. *No, the color line* is a fundamental error to illustrate equality of protection under the Constitution. See 16 Federal Reporter, 301; 100 U. S., 314-335; 163 U. S., 544-551. Otherwise "white men's houses painted white—negroes painted black," &c., &c., 163 U. S., 549.

A person may be equally protected and received no benefits. Read 100 U. S., at 335; 163 U. S., 550.

DISTINCTION BASED ON COLOR.

While discrimination *in the law* on account of *race and color* is forbidden. 162 U. S., 580. Yet say the Supreme Court, the Fourteenth Amendment to the U. S. Constitution "could not have intended to "abolish *distinctions based on color*." 163 U. S., 544 top, 551 bottom. They arise from nature. 15 S. W. R., 765 or 766.

While equality of legal rights is what is protected, yet this does not mean *identity* of *benefits*, nor *joint and common* enjoyment of benefits of school funds from taxation. 62 Fed. R. 48; 72 Fed. R., 694; 3 Hughes, 16. Equal protection does mean *equal privilege*. 3 Hughes, 16; 100 U. S., 335 middle; 163 U. S., 550.

When there is no discrimination against *the negro race* in the law itself on account of color, or previous condition of servitude, it is then a question whether the administration of the law *is reasonable*, and "in determining this question of reasonableness (the "state authority) is at liberty to act with reference to the established "*usages, customs and traditions* of the people," etc. 163 U. S., 550 bottom; 100 U. S., 321, 335. General Act 1872, pp. 69. If the action excluding the negro be based on any conditions other than because of his color, or race—then the constitutional amendment has no application. Reasonable action towards the negroes has been had here. Those desiring a high school education, which the state *has not promised should be free*, and which has never been free, and for which the County Board charged $10 each, when the Ware High School existed—can now go to other equally accessible high schools at $8 a year—which schools did not exist when the Ware High School was opened. The evidence is that children of petitioners have now gone to these schools.

CONCLUSION.

In the Slaughter House Cases, 16 Wall, 81, this Court say, as to claim of unconstitutionality of an Act of the legislature of the state Louisiana, that the construction claimed by the plaintiffs in err "would constitute this Court a perpetual censor upon all legislation the state, on the civil rights of their own citizens, with authority nullify such as it did not approve as consistent with these rights they existed at the time of the adoption of this amendment," and whe speaking of the fourteenth amendment say, "We doubt very muc whether any action of the state, not directed by way of discriminatio against the negroes as a class, or on account of their race, will ever b held to come within the purview of this provision."

In the case of the Texas & Pacific Ry. Co. vs. The Inter-State Com Commission, 162 U. S., pp. 199 and 238, this Court say, "The questio whether certain charges were reasonable or otherwise, whether certai discriminations were due or undue, were questions of fact, to be passe upon by the commission in the light of all the facts duly alleged an supported by competent evidence, and it did not comport with the tru scheme of the statute that the Circuit Court of Appeals should under take of its own motion, to find and pass upon such questions of fact, i a case in the position in which the present one was." And in the syl labus of the case, p. 199, say, "The mere fact that * * * disparity be tween through and local rates was considerable, did not warrant th Court in finding that such disparity constitutes any undue discrimina tion."

No evil eye or combination is averred or shown against the Board o Education, and the worst charge that can be brought against it is an error of judgment in applying the money raised by taxation, from a high school for the blacks to a primary school for the blacks.

The evidence clearly established the necessity for this course, but petitioners insisting on re-establishing high schools brought this case to *enjoin the operation* of all the high schools; also a separate suit by man damus to compel a re-establishment of the school. Both cases were de cided against them by the Supreme Court of Georgia. 103 Ga, Reports, 641, 105 Ga. Reports, 463. Error is assigned here only to the decision in the injunction case, 103 Ga. Reports, 641. The highest tribunal in the State of Georgia having construed the 10th section of the Act of 1872, and sustained the action of the Board as a wise and judicious ex ercise of its legislative discretion which could not be interferred with, this Court is respectfully asked to affirm the judgment.

Frank H. Miller,