Supreme Court of the United States

October Term, 1947

No. 369

ADA LOIS SIPUEL,
Petitioner,
v.

BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, GEORGE L. CROSS, MAURICE H. MERRILL, GEORGE WADSACK and ROY GITTINGER,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

The American Civil Liberties Union, which is devoted to the furtherance of the civil rights guaranteed by the Constitution of the United States, submits this brief in the belief that respondents' refusal to admit petitioner to the School of Law of the University of Oklahoma constitutes a violation of that provision of the 14th Amendment to the Constitution of the United States which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

The Facts

The facts have been admitted by respondents (R. 22-25). Petitioner brought this proceeding in the District Court of Cleveland County, Oklahoma, seeking mandamus to compel respondents to admit her to the School of Law of the University of Oklahoma (R. 2-6). Petitioner is a resident and citizen of the United States and of Oklahoma; she desires to practice law in Oklahoma and, to that end, being fully qualified financially, scholastically and morally, applied for admission on January 14, 1946, to the School of Law of the University of Oklahoma, the only law school maintained by the state (R. 22, 23). Petitioner was refused admission solely because she is a Negro (R. 24), and this suit followed on April 6, 1946 (R. 2). Respondents are the Board of Regents of the University of Oklahoma, which has authority as to the admission of students to the University, George L. Cross, President of the University, Maurice H. Merrill, Dean of the School of Law, Roy Gittinger, Dean of Admissions, and George Wadsack, Registrar (R. 3-4, 14). All the personal respondents act pursuant to orders of respondent the Board of Regents of the University (R. 4, 14).

The University of Oklahoma is maintained by public funds raised by taxation, and the School of Law specializes in Oklahoma law (R. 23). Indeed, unless petitioner is permitted to attend the School of Law, she will be placed "at a distinct disadvantage" both at the Oklahoma bar and in the Oklahoma public service, vis a vis those who have gone to the School of Law (R. 23), to which, however, only whites are admitted (R. 16-17, 23-24).

Petitioner did not apply to the Board of Regents of Higher Education of Oklahoma to set up a separate law school for Negroes, although after this action was filed

that Board considered whether it should open such a school and concluded that it had no funds so to do and that it had never requested or been asked to request such funds from the State Legislature (R. 24-25).

The District Court of Cleveland County denied the writ of mandamus (R. 25), on the ground that petitioner had not chosen the proper form of action in which to raise the Constitutional question (R. 21-22). The Supreme Court of Oklahoma affirmed (R. 51). It explicitly refused to pass on whether mandamus was the appropriate remedy, and decided "the merits" of the claim that failure to admit petitioner to the School of Law constituted a discrimination "on account of race contrary to the 14th Amendment to the United States Constitution" (R. 38). The reasoning of the Supreme Court was that the state's policy, specifically embodied in its statutes, is to segregate Negroes and whites in its educational institutions, that this policy is valid under the language of *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, and other cases, and that if the State may satisfy the 14th Amendment by a separate law school for Negroes, it was incumbent upon petitioner to make known by demand or other form of notice to the Board of Regents of Higher Education her desire for separate legal education, which she has failed to do (R. 38-51).

POINT I

The requirement that petitioner give notice that a separate law school be opened and the inevitable delay in opening it cast an unequal burden on petitioner.

Assuming *arguendo* that Oklahoma could and would, after appropriate demand or notice, open a law school which petitioner may attend, "equal" in the Constitu-

tional sense to the law school to which she has applied for admission, that fact would not, contrary to the position of the Court below and of respondents, indicate satisfaction of the equal protection clause. It is not asserted that whites are subject to any burden to give such notice or make such demand. It is undisputed (R. 24-25) that there are no State funds available with which to open without delay a separate law school. The additional burden to give notice or make demand and the inevitable delay in opening another school in themselves make plain the inequality of treatment petitioner has been accorded. That inequality is not to be justified by reference to the so-called "valid" state policy of segregation. Even assuming, without conceding, that separate facilities for Negroes may in some instances satisfy the demands of equal protection, we start, by reason of the Supremacy Clause of the Constitution, Article VI, with the 14th Amendment which prohibits the state from denying to any "person" the "equal protection of the laws." We do not start with the assumption that segregation is "valid" *per se* so that additional burdens, both of time and circumstance, may be visited on a Negro, asserted by the Oklahoma Supreme Court to be the first such to desire legal education in Oklahoma (R. 41), in order to enable the state to pursue its policy of segregation. The right given by the equal protection clause is a personal, not a group, right. *McCabe* v. *Atchison, T. S. F. Ry.*, 235 U. S. 151, 161, 162; *Mitchell* v. *United States,* 313 U. S. 80, 97; *Missouri ex rel. Gaines* v. *Canada, supra,* 350, 351. The state may not, in the words of the Amendment, "deny to any person" that right. Segregation does not justify discrimination, even on the assumption that segregation does not demonstrate discrimination.

Further, the discrimination is not "excused by what is called its temporary character." *Missouri ex rel. Gaines* v. *Canada, supra,* 352. Petitioner was entitled to "equal protection" when she applied for admission on January 14, 1946, to the only law school supported by the state. The additional burden and delay imposed upon her by the Court below demonstrate the lack of "equal protection" which she has received.

POINT II

Admission of petitioner to a separate law school for Negroes would not constitute equal protection.

Even if we were to assume for the sake of argument that a law school physically identical to that to which petitioner has applied were available to her, and that segregation in some contexts is valid, the segregation of petitioner in a separate school to which only Negroes would be admitted would, by the very nature of the educational process, deny to petitioner the equal protection to which she is entitled.

The agreed facts of record show that petitioner "will be placed at a distinct disadvantage at the bar of Oklahoma and in the public service of the aforesaid State with persons who have had the benefit of the unique preparation in Oklahoma law and procedure offered to white qualified applicants in the School of Law of the University of Oklahoma, unless she is permitted to attend the School of Law of the University of Oklahoma" (R. 23). Petitioner can reach an equal footing at the bar of Oklahoma and in its public service with white lawyers only if she attends the School of Law of the University of Oklahoma and participates in its "unique" course. Unless

she does so, she "will be placed at a distinct disadvantage." It follows that she will be placed at a disadvantage if she is admitted, not to the school giving "unique" preparation, but, to a law school which will educate only Negroes, perhaps only herself.

It is plain why the course given at any such separate school could not be equal to the "unique" course given at the Law School of the University. Even the novitiate will admit that education, and legal education in particular, is not a matter of bricks and mortar or even of books and paper. Instructors so successful as to give a "unique" course could hardly be duplicated. But neither is legal education the sole work of the professors. The students play a substantial role in individual self-instruction, and in the education of one another. Which lawyer is there whose abilities were not sharpened and enhanced by the varied personalities, abilities and propensities of his fellow students at law school? What makes a great law school, the books, the professors, or the students? It would be a bold Oklahoman who could say that not one white student in the law school of the State University was capable of contributing to the legal education of petitioner.

The Court below made much of the fact that petitioner is the first Negro to desire legal education within Oklahoma (R. 41). Will a legal education in which petitioner will have few, if any, fellows occupying a similar educational position be as fruitful as one in which the ideas of the official educators will be tested, perhaps rejected, by varied intellects within a substantial student body? Further, in the absence of the point of view of the white one-half or more of the State's population, those ideas could hardly be effectually tested and appreciated. Peti-

tioner is entitled to a legal education equal to that of the white students, who could contribute to her education as well as their own.

POINT III

Segregation of Negroes from whites violates the equal protection clause.

The 14th Amendment is one of the three Constitutional provisions "having a common purpose; namely, securing to a race recently emancipated, * * * the enjoyment of all the civil rights that under the law are enjoyed by white persons." *Strauder* v. *West Virginia,* 100 U. S. 303, 306. Before the Civil War discrimination against Negroes had been habitual both in the community's attitude and in the official laws of the states. Indeed, most Negroes were slaves, and the race had long been regarded, officially and unofficially, as inferior and subject. The 13th, 14th, and 15th Amendments were a reaffirmation of the principle that those who were equal in the sight of God were equal too in the sight of the Nation. And so, the Nation prohibited the States from proceeding upon an assumption of the inferiority of Negroes which the blood of a great war had washed away. By the equal protection clause the Negroes were given "a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, *implying inferiority in civil society.*" *Strauder* v. *West Virginia, supra,* 307-308. The States were prohibited from taking action with respect to the Negroes as would be "a brand upon them, affixed by the

law, *an assertion of their inferiority,* and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Strauder* v. *West Virginia, supra,* 368. (Italics ours.)

What more explicit "brand" upon petitioner, what clearer "assertion" of her "inferiority", could there be than the segregation of her in a law school for Negroes only? Segregation in itself serves no rational purpose other than that found in the asserted inferiority of the Negro. That purpose the Nation would not condone.

Even the case of *Plessy* v. *Ferguson,* 163 U. S. 537, 551, in which segregation of the races in separate railroad cars was upheld, recognized that the State could not "stamp" the Negroes "with a badge of inferiority", but the Court held that "solely because the colored race chooses to put that construction upon it" Negroes should not assume that segregation implies inferiority, for the dominant whites and the state which they control make no such assumption. There have been subsequent judicial expressions which have followed the *Plessy* case without examining its basic factual assumption that segregation is no assertion of inferiority: *Gong Lum* v. *Rice,* 275 U. S. 78, and cases cited. In each case in which segregation has been upheld there has been no recognition that or investigation whether segregation of itself implies inferiority. Can Oklahoma honestly say today that the official segregation of petitioner and her exclusion from the School of Law of the University of Oklahoma, where only whites may attend, is based any less on a notion of inferiority than would be a brand or a chain? The equal protection clause loosed the shackles and covered over the scars of

the brands which had been inflicted upon "any person". No less does that clause shield petitioner from the brand of segregation.

The judgment should be reversed.

Respectfully submitted,

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