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## RACE SEGREGATION IN THE PUBLIC SCHOOLS: JIM CROW AT THE JUDGMENT SEAT

EDWARD F. WAITE\*

In December, 1952, five cases were argued in the Supreme Court of the United States, the decision of which is still eagerly, even anxiously, awaited by the entire country. Indeed, it promises to be one of the most momentous decisions ever rendered by our national court of last resort. It is expected to settle a vitally important question on which state and subordinate federal courts have passed many times and in different ways, but which the Supreme Court has hitherto consistently avoided—some might say evaded, but we should not forget the salutary rule that the Court will not make a new interpretation of the Constitution unless required for determination of the case at bar.

Do our public schools, insofar as under state constitutions or by statute law they separate children of the white race from those of the colored races, on the sole ground of race or color, thereby violate the Federal Constitution?

The writer seeks to add to the common understanding of this decision by presenting in advance a factual review of the previous holdings of the Supreme Court involving race in the field of state-supported education.

In twenty-one states and the District of Columbia separate public schools for white and "colored" children are permitted by the state constitution or by statute, usually with the proviso that facilities shall be substantially equal. Segregation is mandatory in seventeen states, and four of these require it in private schools also. Whether segregation in the District of Columbia is obligatory under Acts of Congress has been questioned.

Since 1896 the rule of "substantial equality" has been recognized even when not expressed in the written law. A Negro (of  $\frac{7}{8}$  Caucasian blood and  $\frac{1}{8}$  African) who was a railway passenger between local points in Louisiana, was forcibly ejected from a coach reserved for whites under a state law which required railways carrying passengers to provide "equal but separate accommodations for the white and colored races," and forbade under penalty persons of the different races "to occupy seats in coaches other than the ones assigned to them on account of the race they belong to." The passenger was prosecuted and claimed by way of defense that the

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statute was invalid under the 14th Amendment. The relevant portion of this Amendment, which took effect in 1868, is as follows: "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of 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."

The case went to the Supreme Court, where of the nine sitting Justices six had been appointed by Republican Presidents and three by President Cleveland. It involved no claim that the coaches provided for colored passengers were inferior to those assigned to whites: the single issue was as to the validity of discrimination based on race. The Court held it to be a reasonable regulation of railway traffic, and therefore a valid exercise of the police power of the state and not discrimination within the prohibitions of the U. S. Constitution.<sup>1</sup>

This decision has been accepted as adopting the test of equality of facilities in cases involving compulsory segregation of the races by law. In the course of the opinion Justice Brown, who spoke for the Court, said: "So far, then, as conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable or more obnoxious to the 14th Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures."

The sole dissenter was Justice Harlan, a Kentuckian, who said: "I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation as is here in question is in-

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1. *Plessey v. Ferguson*, 163 U. S. 537 (1896).

consistent, not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by every one within the United States. . . . Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead anyone, or atone for the wrong this day done."

Rather strangely, as it seems to many lawyers, the reference by Justice Brown to the public schools, although only a part of the Court's argument for the reasonableness of segregation as a police measure, has been accepted in later cases as making *Plessy v. Ferguson* an authoritative precedent for the "separate but equal" doctrine in litigation involving public schools as well as transportation in public conveyances.

Not until 1899 was the race issue in the public schools brought directly before the Supreme Court in any form.<sup>2</sup> The only issue presented by the attorneys for certain Georgia Negro plaintiffs was whether, conceding the validity of the state's "separate but equal" school law, the school authorities had made a discriminatory and unlawful appropriation of public funds. The facts were complicated and Justice Harlan, presenting the opinion for the unanimous Court, held that this was not shown. The narrow limits of the decision appear in his concluding words: "The education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land. We have here no such case to be determined; and as this view disposes of the only question which this court has jurisdiction to review and decide, the judgment is affirmed." The elimination from the case of any constitutional issue could hardly be more emphatic.

Discrimination in education was next before the Supreme Court in 1908 in *Berea College v. Commonwealth of Kentucky*.<sup>3</sup> Although public, tax-supported education was not involved, the same seems appropriate to include in this review. A Kentucky statute made it unlawful under heavy penalties for any person, corporation or association of persons to maintain or operate any college, school or institution where persons of the white and colored races are together received as pupils for instruction. Berea College, a private corporation created by an Act of the Kentucky legislature, was prosecuted

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2. See *Cumming v. Board of Education*, 175 U. S. 528 (1899).

3. 211 U. S. 45 (1908).

for violating the statute and convicted. In defense it attacked its validity under the Fourteenth Amendment. The Court expressly eliminated the constitutional question thus sought to be raised and held the statute to be valid, as applied to the college, on grounds peculiar to its corporate charter. Justices Harlan and Day dissented, the former urging that the constitutional question ought to be met and decided. "My observations," he said, "have reference to the case before the court and only to the provision of the statute making it a crime for any person to impart harmless instruction to white and colored persons together, at the same time, in the same private institution of learning."

*Gong Lum v. Rice*,<sup>4</sup> decided in 1927, was a petition for an order of court (mandamus) for admission of a Chinese child born in the United States to a public school maintained, pursuant to the Mississippi constitution, for whites only. This constitutional provision was not attacked in the state courts, the claim of the petitioners being merely that a person of Mongolian descent should not be classed as "colored." The claim was rejected by the highest Mississippi court,<sup>5</sup> and as the case went to Washington that was the only issue before the Supreme Court. Chief Justice Taft wrote the opinion, which was unanimous, sustaining the Mississippi decision. Justice Harlan's voice had been stilled in death. "The question here," said the court, "is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black." (To make the question complete and accurate, should he not have added—*but denied admission to white schools on the ground of color?*) "Were this a new question it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional powers of the state legislature to settle without the intervention of the federal courts under the Federal Constitution [citing cases]. Most of the cases arose, it is true, over the establishment of separate schools as between white pupils and black pupils, but we cannot think that the question is any different or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races. The decision is within the discretion of the state in regulating its public schools, and does not conflict with the 14th Amendment."

An analysis of the cases thus cited as conclusive in support of

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4. 275 U. S. 78 (1927).

5. 139 Miss. 760, 104 So. 105 (1925).

the "separate but equal" doctrine yields noteworthy results. The only Supreme Court case is *Plessy v. Ferguson*. Three cases came up from inferior federal courts and twelve from state courts. One of the latter group, *Roberts v. City of Boston*,<sup>6</sup> bore the great name of Chief Justice Shaw of Massachusetts, but its sanction for a construction of the Fourteenth Amendment would seem to be affected by the fact that it was decided many years before the Amendment was framed. The essence of the *Gong Lum* decision was that, there being no question raised in the case as to the validity of segregation of colored pupils, the State of Mississippi was within its rights in classifying a Chinese child as "colored" within the meaning of the law.

In 1935 Lloyd Gaines, a Negro, was refused admission to the Law School of the University of Missouri on the ground that it was "contrary to the constitution, laws and public policy to admit a Negro as a student at the University of Missouri." On his application for relief the Missouri courts denied a writ of mandamus to require his admission as applied for.<sup>7</sup> He was a graduate of Lincoln University, an institution maintained by the state for the higher education of Negroes, and it was admitted that his work and credits there would qualify him for the Law School of the University of Missouri, if otherwise eligible. Lincoln University did not have a law school, but there had been what the Supreme Court of Missouri styled "a legislative purpose to establish" one "whenever necessary and practicable," and a 1929 statute provided as follows: "Pending the full development of the Lincoln University, the board of curators shall have authority to arrange for the attendance of Negro residents of the State of Missouri at the University of any adjacent state to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at the Lincoln University, and to pay the reasonable tuition fees for such attendance."

On review in the United States Supreme Court,<sup>8</sup> Chief Justice Hughes presented the opinion. He recognized, without discussion, "separate but equal" as the applicable law. That was the state's position and nothing different was claimed by the other side. On the issue of equality the Court reversed the Missouri court, saying—"The white resident is afforded legal education within the state; the Negro resident having the same qualifications is refused it there and must go outside the state to obtain it. That is a denial of

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6. 5 Cush. 198 (Mass. 1849).

7. 342 Mo. 121, 113 S. W. 2d 783 (1938).

8. *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337 (1938).

the equality of legal right to the enjoyment of the privilege which the state has set up, and the provision for the payment of tuition fees in another state does not remove the discrimination. The equal protection of the laws is 'a pledge of the protection of equal laws.'"

For more than a quarter of a century there has been no pronouncement by the Supreme Court on race discrimination in public elementary and high schools. But on the issue of discrimination in state-supported institutions of higher learning there have been several cases. In no one of these has the Court met the fundamental issue under the Constitution, which is segregation on the ground of race *per se*. In each case the sole question was as to equality of facilities. In 1848 the *Gaines* precedent was twice applied by the Supreme Court to Negro students seeking admission to the Law School of the University of Oklahoma<sup>9</sup> but nothing was involved in either case which requires mention here.

The facts in *Sweatt v. Painter*,<sup>10</sup> decided in 1950, are sufficiently shown in the official syllabus of the case: "Petitioner was denied admission to the state-supported University of Texas Law School, solely because he is a Negro and state law forbids the admission of Negroes to that Law School. He was offered, but refused, enrollment in a separate law school newly established by the State for Negroes. The University of Texas Law School has sixteen full-time and three part-time professors, 850 students, a library of 65,000 volumes, a law review, moot court facilities, scholarship funds, an Order of the Coif affiliation, many distinguished alumni, and much tradition and prestige. The separate law school for Negroes has five full-time professors, 23 students, a library of 16,520 volumes, a practice court, a legal aid association and one alumnus admitted to the Texas Bar; but it excludes from its student body members of racial groups which number 85% of the population of the State and which include most of the lawyers, witnesses, jurors, judges, and other officials with whom petitioner would deal as a member of the Texas Bar. Held: The legal education offered petitioner is not substantially equal to that which he would receive if admitted to the University of Texas Law School; and the Equal Protection Clause of the Fourteenth Amendment requires that he be admitted to the University of Texas Law School." The opinion was written by Chief Justice Vinson and was unanimous. Briefs submitted (one on behalf of the Committee of Law Teachers against Segregation in Legal Education, signed by members of the faculty of six leading

9. See *Sipuel v. Board of Regents*, 332 U. S. 631 (1948); *Fisher v. Hurst*, 333 U. S. 147 (1948).

10. 339 U. S. 629 (1950).

law schools) argued against all race discrimination in state-supported education, and urged that *Plessy v. Ferguson* be overruled. The Court, while declining to regard that case as requiring affirmation of the Texas decision, declared that it was not necessary to reach petitioner's contention that the *Plessy* case should be re-examined "in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation." Again the rule was declared that "this Court will decide constitutional questions only when necessary to the disposition of the case at hand, and that such decisions will be drawn as narrowly as possible."

On the same day with *Sweatt* the Court decided *McLaurin v. Oklahoma State Regents*.<sup>11</sup> Here too the facts are shown in a paragraph of the official syllabus: "Appellant, a Negro citizen of Oklahoma possessing a master's degree, was admitted to the Graduate School of the state-supported University of Oklahoma as a candidate for a doctorate in education and was permitted to use the same classroom, library and cafeteria as white students. Pursuant to a requirement of state law that the instruction of Negroes in state institutions of higher education be 'upon a segregated basis,' however, he was assigned to a seat in the classroom in a row specified for Negro students, was assigned to a special table in the library, and though permitted to eat in the cafeteria at the same time as other students, was assigned to a special table there. Held: The conditions under which appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws; and the Fourteenth Amendment precludes such differences in treatment by the State based upon race."

The Chief Justice, again speaking for a unanimous Court, said: "These restrictions were obviously imposed in order to comply, so nearly as could be, with the statutory requirements of Oklahoma. But they signify that the State, in administering the facilities it affords for professional and graduate study, sets McLaurin apart from the other students. The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession. . . . State-imposed restrictions which produce such inequalities cannot be sustained." Does this standard for permissible discretion, when contrasted with that of public tradition, custom and convenience declared a half-century before in the *Plessy* case, indi-

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11. 339 U. S. 637 (1950).

cate a change in the scope of recognized "judicial discretion" which must have a bearing on segregation in the public schools, especially in view of compulsory attendance laws which were not discussed in any previous decision?

Why the presentation of the fundamental question of segregation *per se* in such form that it could not be escaped has been postponed for 85 years after the adoption of the Fourteenth Amendment is an interesting question which may not be discussed here. At last the moment has arrived, and Jim Crow in the public schools is at the judgment seat.

Brief reference to each of the five pending cases will be helpful. The definite movement to force the issue seems to have begun in South Carolina, at least as early as 1950, under the leadership of the National Association for the Advancement of Colored People. Article XI, Section 7, of the Constitution of South Carolina is as follows: "Separate schools shall be provided for the 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." *Briggs v. Elliott*,<sup>12</sup> was heard before three district judges, on a petition of parents of Negro children for a declaratory judgment and injunctive relief, alleging inequality in school facilities and specifically attacking all discrimination on the ground of race. Inequality was admitted and ordered to be promptly corrected. Two judges upheld the "separate but equal" doctrine, and rendered a decision accordingly. One member of the Court, Judge Waring, dissented, arguing elaborately that segregation is *per se* inequality and unconstitutional.

In 1949 the Kansas legislature enacted a law authorizing cities of the first class to organize and maintain separate schools for white and colored children in grades below high-school, and the city of Topeka thereupon set up a system of separate schools for the first six grades. This law was attacked in 1951 in *Brown v. Board of Education of Topeka*.<sup>13</sup> It was held valid, although facilities for white and colored children were found to be substantially equal.

Virginia provides by law that "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." In *Davis v. County School Board of Prince Edward County*,<sup>14</sup> the court found the facilities of the Negro schools

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12. 98 F. Supp. 529 (E.D. S.C. 1951).

13. 98 F. Supp. 797 (D. Kan. 1951).

14. 103 F. Supp. 337 (E.D. Va. 1952).

in question substantially inferior to those of the whites, but upheld the constitutionality of discrimination on the sole ground of race.

For many years racial discrimination in the public schools of the District of Columbia has been maintained under the accepted authority of certain Acts of Congress, Congress having control under the Constitution of the internal affairs of the District. A case involving this practice, *Bolling v. Sharpe*,<sup>15</sup> which was pending in the District in 1952, was removed by order to the Supreme Court before decision for the purpose of being heard there with the other cases involving the school segregation issue. There was no issue as to equality of facilities, and the construction of the Fourteenth Amendment is not directly involved.

The fifth case, *Gebhart v. Belton*,<sup>16</sup> was the last admitted to the group which now holds so large a place in the public eye. It was brought on appeal to the Supreme Court of Delaware in 1952. The relief sought in the lower court was a declaratory judgment that the "separate but equal" provision of the Delaware constitution is contrary to the "equal protection clause" of the Fourteenth Amendment, together with demand for an injunction restraining the school authorities from denying to certain Negro pupils admittance to schools maintained for whites, on the ground of substantial inferiority of school facilities. The trial court denied the declaratory judgment but found for the plaintiffs on the issue of inequality and granted an injunction. Both sides appealed. The Supreme Court of Delaware affirmed the decision of the lower court, and in November, 1952, the Supreme Court of the United States consented to review the case<sup>17</sup> with the others of like nature then about to be heard.

Although ten hours were given to these cases at the hearings in December, 1952, they were not decided the following summer, as was quite generally expected. Instead, orders were filed June 8, 1953, restoring each case to the calendar for further argument on the following points:

"1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?

2. If neither the Congress in submitting nor the states in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public

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15. 345 U. S. 972 (1953).

16. 91 A. 2d 137 (Del. 1952).

17. 344 U. S. 891 (1952).

schools, was it nevertheless the understanding of the framers of the Amendment

(a) that future Congresses might, in the exercise of their power under Section 5 of the Amendment [to enforce the provisions of the Article by appropriate legislation] abolish such segregation, or

(b) that it would be within judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

3. On the assumption that the answers to questions 2(a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

4. Assuming it to be decided that segregation in public schools violates the Fourteenth Amendment

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

(b) may the Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?"<sup>18</sup>

A fifth question related to the way the details of appropriate remedies might be arrived at, on the assumption of Question 4.

The further hearings on December 7, 8 and 9, consumed eleven hours, and the current comments of members of the Court suggested much interest and differing lines of thought.<sup>19</sup> A noteworthy feature was that the Department of Justice, which participated in the argument at the suggestion of the Court, took the position "that segregation in the public schools cannot be maintained under the Fourteenth Amendment."

If our Supreme Court, charged with final and authoritative interpretation of the Constitution, has hitherto given less than due attention to the tremendously important question now under consideration, the mistake will not now be repeated.

Said Justice Harlan, dissenting in the *Plessy* case, "In my opinion the judgment this day rendered will in time prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case." *Dred Scott* was wiped from American law by civil war and the Thirteenth Amendment. *Plessy v. Ferguson* will now stand or fall after as careful study as has ever been given to any matter in any judicial tribunal.

18. 345 U. S. 972-973 (1953).

19. 22 U. S. L. Week 3157 (U.S. Dec. 15, 1953).

