

APPENDIX TABLE OF CONTENTS

	Page
<i>Briggs v. Elliott</i> , 98 F. Supp. 529 (E.D.S.C. 1951).....	App. 1
<i>Briggs v. Elliott</i> , 342 U.S. 350, 72 S.Ct. 327 (1952).....	App. 49
<i>Briggs v. Elliott</i> , 103 F. Supp. 920 (E.D.S.C. 1952).....	App. 52
<i>Briggs v. Elliott</i> , 132 F. Supp. 776 (E.D.S.C. 1955).....	App. 58
<i>Brown v. Board of Education</i> , 98 F. Supp. 797 (D. Kan. 1951).....	App. 64
<i>Brown v. Board of Education</i> , 344 U.S. 1 (1952)....	App. 73
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954).....	App. 76
<i>Brown v. Board of Education</i> , 349 U.S. 294 (1955).....	App. 92
<i>Plessy v. Ferguson</i> , 163 U.S. 537 (1896).....	App. 99

App. 1

98 F.Supp. 529

BRIGGS et al.

v.

ELLIOTT et al.

Civ. A. No. 2657.

**United States District Court E. D.
South Carolina, Charleston Division.**

Heard May 28, 1951.

Decided June 23, 1951.

Thurgood Marshall, Robert L. Carter, New York City, Harold R. Boulware, Columbia, S. C., Spottswood W. Robinson, III, Richmond, Va., Arthur Shores, Birmingham, Ala., A. T. Walden, Atlanta, Ga., for plaintiffs.

T. C. Callison Atty. Gen., of South Carolina, Robert McC. Figg, Jr., Charleston, S. C., S. E. Rogers, Summerton, S. C., for defendants.

Before PARKER, Circuit Judge, and WARING and TIMMERMAN, District Judges.

PARKER, Circuit Judge.

This is a suit for a declaratory judgment and injunctive relief in which it is alleged that the schools and educational facilities provided for Negro children in School District No. 22 in Clarendon County, South Carolina, are inferior to those provided for white children in that district and that this amounts to a denial of the equal protection of the laws guaranteed them by the Fourteenth Amendment to the Federal

App. 2

Constitution, and further that the segregation of Negro and white children in the public schools, required by Article 11, section 7 of the Constitution of South Carolina and section 5377 of the Code of Laws of that state,¹ is of itself violative of the equal protection clause of the Fourteenth Amendment. Plaintiffs are Negro children of school age who are entitled to attend the public schools in District No. 22 in Clarendon County, their parents and guardians. Defendants are the school officials who, as officers of the state, have control of the schools in the district. A court of three judges has been convened pursuant to the provisions of 28 U.S.C. §§ 2281 and 2284, the evidence offered by the parties has been heard and the case has been submitted upon the briefs and arguments of counsel.

At the beginning of the hearing the defendants admitted upon the record that “the educational facilities, equipment, curricula and opportunities afforded in School District No. 22 for colored pupils * * * are not substantially equal to those afforded for white pupils”. The evidence offered in the case fully sustains this admission. The defendants contend, however, that the district is one of the rural school districts which has

¹ Article 11, section 7 of the Constitution of South Carolina is as follows: “Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race.”

Section 5377 of the Code of Laws of South Carolina of 1942 is as follows: “It shall be unlawful for pupils of one race to attend the schools provided by boards of trustees for persons of another race.”

App. 3

not kept pace with urban districts in providing educational facilities for the children of either race, and that the inequalities have resulted from limited resources and from the disposition of the school officials to spend the limited funds available “for the most immediate demands rather than in the light of the overall picture”. They state that under the leadership of Governor Byrnes the Legislature of South Carolina has made provision for a bond issue of \$75,000,000 with a three per cent sales tax to support it for the purpose of equalizing educational opportunities and facilities throughout the state and of meeting the problem of providing equal educational opportunities for Negro children where this had not been done. They have offered evidence to show that this educational program is going forward and that under it the educational facilities in the district will be greatly improved for both races and that Negro children will be afforded educational facilities and opportunities in all respects equal to those afforded white children.

There can be no question but that where separate schools are maintained for Negroes and whites, the educational facilities and opportunities afforded by them must be equal. The state may not deny to any person within its jurisdiction the equal protection of the laws, says the Fourteenth Amendment; and this means that, when the state undertakes public education, it may not discriminate against any individual on account of race but must offer equal opportunity to all. As said by Chief Justice Hughes in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349, 59 S.Ct. 232, 236, 83 L.Ed. 208.

App. 4

“The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State.” See also *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114; *Corbin v. County School Board of Pulaski County*, 4 Cir., 177 F.2d 924; *Carter v. School Board of Arlington County, Va.*, 4 Cir., 182 F.2d 531; *McKissick v. Carmichael*, 4 Cir., 187 F.2d 949. We think it clear, therefore, that plaintiffs are entitled to a declaration to the effect that the school facilities now afforded Negro children in District No. 22 are not equal to the facilities afforded white children in the district and to a mandatory injunction requiring that equal facilities be afforded them. How this shall be done is a matter for the school authorities and not for the court, so long as it is done in good faith and equality of facilities is afforded; but it must be done promptly and the court in addition to issuing an injunction to that effect will retain the cause upon its docket for further orders and will require that defendants file within six months a report showing the action that has been taken by them to carry out the order.

Plaintiffs ask that, in addition to granting them relief on account of the inferiority of the educational facilities furnished them, we hold that segregation of the races in the public schools, as required by the Constitution and statutes of South Carolina, is of itself a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment, and that we enjoin the enforcement of the constitutional provision and

App. 5

statute requiring it and by our injunction require defendants to admit Negroes to schools to which white students are admitted within the district. We think, however, that segregation of the races in the public schools, so long as equality of rights is preserved, is a matter of legislative policy for the several states, with which the federal courts are powerless to interfere.

One of the great virtues of our constitutional system is that, while the federal government protects the fundamental rights of the individual, it leaves to the several states the solution of local problems. In a country with a great expanse of territory with peoples of widely differing customs and ideas, local self government in local matters is essential to the peace and happiness of the people in the several communities as well as to the strength and unity of the country as a whole. It is universally held, therefore, that each state shall determine for itself, subject to the observance of the fundamental rights and liberties guaranteed by the federal Constitution, how it shall exercise the police power, i. e. the power to legislate with respect to the safety, morals, health and general welfare. And in no field is this right of the several states more clearly recognized than in that of public education. As was well said by Mr. Justice Harlan, speaking for a unanimous court in *Cumming v. County Board of Education*, 175 U.S. 528, 545, 20 S.Ct. 197, 201, 44 L.Ed. 262, "while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state

App. 6

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.”

It is equally well settled that there is no denial of the equal protection of the laws in segregating children in the schools for purposes of education, if the children of the different races are given equal facilities and opportunities. The leading case on the subject in the Supreme Court is *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 1140, 41 L.Ed. 256, which involved segregation in railroad trains, but in which the segregation there involved was referred to as being governed by the same principle as segregation in the schools. In that case the Court said: “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 commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored

App. 7

children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.”

Later in the opinion the Court said: “So far, then, as a conflict with the fourteenth 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.*” (Italics supplied.)

Directly in point and absolutely controlling upon us so long as it stands unreversed by the Supreme Court is *Gong Lum v. Rice*, 275 U.S. 78, 48 S.Ct. 91, 93, 72 L.Ed. 172, in which the complaint was that a child of Chinese parentage was excluded from a school maintained for white children under a segregation law and was permitted to enter only a school maintained for colored children. Although attempt is made to distinguish this case, it cannot be distinguished. The question as to the validity of segregation in the public schools on the ground of race was squarely raised, the Fourteenth Amendment was relied upon as forbidding segregation and the issue was squarely met by the Court. What was said by Chief Justice Taft speaking for a unanimous court, is determinative of the question before us. Said he:

App. 8

“The case then reduces itself to the question whether a state can be said to afford to a child of Chinese ancestry, born in this country and a citizen of the United States, the equal protection of the laws, by giving her the opportunity for a common school education in a school which receives only colored children of the brown, yellow or black races.

“The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear. * * *

“The question here 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. 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 power of the state Legislature to settle, without intervention of the federal courts under the federal Constitution. *Roberts v. City of Boston*, 5 Cush. (Mass.) 198, 206, 208, 209; *State ex rel. Garnes v. McCann*, 21 Ohio St. 198, 210; *People ex rel. King v. Gallagher*, 93 N.Y. 438; *People ex rel. Cisco v. School Board*, 161 N.Y. 598, 56 N.E. 81, 48 L.R.A. 113; *Ward v. Flood*, 48 Cal. 36; *Wysinger v. Crookshank*, 82 Cal. 588, 590, 23 P. 54; *Reynolds v. Board of Education*, 66 Kan. 672, 72 P. 274; *McMillan v. School Committee*, 107 N.C. 609, 12 S.E. 330, 10 L.R.A. 823; *Cory v. Carter*, 48 Ind. 327; *Lehew v. Brummell*, 103 Mo. 546, 15 S.W. 765, 11 L.R.A. 828; *Dameron v. Bayless*, 14 Ariz. 180, 126 P.

App. 9

273; State ex rel. Stoutmeyer v. Duffy, 7 Nev. 342, 348, 355; Bertonneau v. Board, 3 Woods 177, 3 Fed.Cas. 294, Case No. 1,361; United States v. Buntin (C.C.), 10 F. 730, 735; Wong Him v. Callahan (C.C.), 119 F. 381.

“In Plessy v. Ferguson, 163 U.S. 537, 544, 545, 16 S.Ct. 1138, 1140, 41 L.Ed. 256, in upholding the validity under the Fourteenth Amendment of a statute of Louisiana requiring the separation of the white and colored races in railway coaches, *a more difficult question than this*, this court, speaking of permitted race separation, said:

“The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.’

* * *

“Most of the cases cited 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 Fourteenth Amendment.*” (Italics supplied.)

Only a little over a year ago, the question was before the Court of Appeals of the District of Columbia in *Carr v. Corning*, 86 U.S.App.D.C. 173, 182 F.2d 14, 16, a case involving the validity of segregation within the District, and the whole matter was exhaustively explored in the light of history and the pertinent decisions in an able opinion by Judge Prettyman, who said:

“It is urged that the separation of the races is itself, apart from equality or inequality of treatment, forbidden by the Constitution. The question thus posed is whether the Constitution lifted this problem out of the hands of all legislatures and settled it. We do not think it did. Since the beginning of human history, no circumstance has given rise to more difficult and delicate problems than has the coexistence of different races in the same area. Centuries of bitter experience in all parts of the world have proved that the problem is insoluble by force of any sort. The same history shows that it is soluble by the patient processes of community experience. Such problems lie naturally in the field of legislation, a method susceptible of experimentation, of development, of adjustment to the current necessities in a variety of community circumstance. We do not believe that the makers of the first ten Amendments in 1789 or of the Fourteenth Amendment in 1866 meant to foreclose legislative treatment of the problem in this country.

“This is not to decry efforts to reach that state of common existence which is the obvious highest good in our concept of civilization. It is merely to say that the social and economic interrelationship of two races

App. 11

living together is a legislative problem, as yet not solved, and is not a problem solved fully, finally and unequivocally by a fiat enacted many years ago. We must remember that on this particular point we are interpreting a constitution and not enacting a statute.

“We are not unmindful of the debates which occurred in Congress relative to the Civil Rights Act of April 9, 1866, the Fourteenth Amendment, and the Civil Rights Act of March 1, 1875. But the actions of Congress, the discussion in the Civil Rights cases, and the fact that in 1862, 1864, 1866 and 1874 Congress, as we shall point out in a moment, enacted legislation which specifically provided for separation of the races in the schools of the District of Columbia, conclusively support our view of the Amendment and its effect.

“The Supreme Court has consistently held that if there be an ‘equality of the privileges which the laws give to the separated groups’, the races may be separated. That is to say that constitutional invalidity does not arise from the mere fact of separation but may arise from an inequality of treatment. Other courts have long held to the same effect.”

It should be borne in mind that in the above cases the courts have not been dealing with hypothetical situations or mere theory, but with situations which have actually developed in the relationship of the races throughout the country. Segregation of the races in the public schools has not been confined to South Carolina or even to the South but prevails in many other states where Negroes are present in large numbers. Even

App. 12

when not required by law, it is customary in many places. Congress has provided for it by federal statute in the District of Columbia; and seventeen of the states have statutes or constitutional provisions requiring it. They are Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.² And the validity of legislatively requiring segregation in the schools has been upheld wherever the question has been raised. See *Wong Him v. Callahan*, C. C., 119 F. 381; *United States v. Buntin*, C.C., 10 F. 730; *Bertonneau v. Board of Directors*, 3 Fed.Cas. 294, No. 1,361; *Dameron v. Bayless*, 14 Ariz. 180, 126 P. 273; *Maddox v. Neal*, 45 Ark. 121, 55 Am.Rep. 540; *Ward v. Flood*, 48 Cal. 36, 17 Am. Rep. 405; *Cory v. Carter*, 48 Ind. 327, 17 Am.Rep. 738; *Graham v. Board of Education*, 153 Kan. 840, 114 P.2d 313; *Richardson v. Board of Education*, 72 Kan. 629, 84 P. 538; *Reynolds v. Board of Education*, 66 Kan. 672, 72 P. 274; *Chrisman v. Mayor of City of Brookhaven*, 70 Miss. 477, 12 So. 458; *Lehew v. Brummell*, 103 Mo. 546, 15 S.W. 765, 11 L.R.A. 828, 23 Am.St.Rep. 895; *State ex rel. Stoutmeyer v. Duffy*, 7 Nev. 342, 8 Am.Rep. 713; *People ex rel. Cisco v. School Board*, 161 N.Y. 598, 56 N.E. 81, 48 L.R.A. 113; *People v. Gallagher*, 93 N.Y. 438, 45 Am.Rep. 232; *McMillan v. School Committee*, 107 N.C. 609, 12 S.E. 330, 10 L.R.A. 823; *State ex rel. Garnes v. McCann*, 21 Ohio St. 198;

² Statistical Summary of Education, 1947-48, 'Biennial Survey of Education in the United States, 1946-48', ch. 1, pp. 8, 40 (Federal Security Agency, Office of Education).

Board of Education v. Board of Com'rs, 14 Okl. 322, 78 P. 455; *Martin v. Board of Education*, 42 W.Va. 514, 26 S.E. 348.³ No cases have been cited to us holding that such legislation is violative of the Fourteenth Amendment. We know of none, and diligent search of the authorities has failed to reveal any.

Plaintiffs rely upon expressions contained in opinions relating to professional education such as *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114, *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149, and *McKissick v. Carmichael*, 4 Cir., 187 F.2d 949, where equality of opportunity was not afforded. *Sweatt v. Painter*, however, instead of helping them, emphasizes that the separate but equal doctrine of *Plessy v. Ferguson*, has not been overruled, since the Supreme Court, although urged to overrule it, expressly refused to do so and based its decision on the ground that the educational facilities offered Negro law students in that case were not equal to those offered white students. The decision in *McKissick v. Carmichael*, was based upon the same ground. The case of *McLaurin v. Oklahoma State Regents*, involved humiliating and embarrassing treatment of a Negro graduate student to which no one should have been required to submit. Nothing of the sort is involved here.

The problem of segregation as applied to graduate and professional education is essentially different from that involved in segregation in education at the lower

³ See also *Roberts v. City of Boston*, 5 Cush., Mass., 198, decided prior to the Fourteenth Amendment.

levels. In the graduate and professional schools the problem is one of affording equal educational facilities to persons sui juris and of mature personality. Because of the great expense of such education and the importance of the professional contacts established while carrying on the educational process, it is difficult for the state to maintain segregated schools for Negroes in this field which will afford them opportunities for education and professional advancement equal to those afforded by the graduate and professional schools maintained for white persons. What the courts have said, and all they have said in the cases upon which plaintiffs rely is that, notwithstanding these difficulties, the opportunity afforded the Negro student must be equal to that afforded the white student and that the schools established for furnishing this instruction to white persons must be opened to Negroes if this is necessary to give them the equal opportunity which the Constitution requires.

The problem of segregation at the common school level is a very different one. At this level, as good education can be afforded in Negro schools as in white schools and the thought of establishing professional contacts does not enter into the picture. Moreover, education at this level is not a matter of voluntary choice on the part of the student but of compulsion by the state. The student is taken from the control of the family during school hours by compulsion of law and placed in control of the school, where he must associate with his fellow students. The law thus provides that the school shall supplement the work of the parent in

the training of the child and in doing so it is entering a delicate field and one fraught with tensions and difficulties. In formulating educational policy at the common school level, therefore, the law must take account, not merely of the matter of affording instruction to the student, but also of the wishes of the parent as to the upbringing of the child and his associates in the formative period of childhood and adolescence. If public education is to have the support of the people through their legislatures, it must not go contrary to what they deem for the best interests of their children.

There is testimony to the effect that mixed schools will give better education and a better understanding of the community in which the child is to live than segregated schools. There is testimony, on the other hand, that mixed schools will result in racial friction and tension and that the only practical way of conducting public education in South Carolina is with segregated schools. The questions thus presented are not questions of constitutional right but of legislative policy, which must be formulated, not in vacuo or with doctrinaire disregard of existing conditions, but in realistic approach to the situations to which it is to be applied. In some states, the legislatures may well decide that segregation in public schools should be abolished, in others that it should be maintained—all depending upon the relationships existing between the races and the tensions likely to be produced by an attempt to educate the children of the two races together in the same schools. The federal courts would be going far outside their constitutional function were they to

attempt to prescribe educational policies for the states in such matters, however desirable such policies might be in the opinion of some sociologists or educators. For the federal courts to do so would result, not only in interference with local affairs by an agency of the federal government, but also in the substitution of the judicial for the legislative process in what is essentially a legislative matter.

The public schools are facilities provided and paid for by the states. The state's regulation of the facilities which it furnishes is not to be interfered with unless constitutional rights are clearly infringed. There is nothing in the Constitution that requires that the state grant to all members of the public a common right to use every facility that it affords. Grants in aid of education or for the support of the indigent may properly be made upon an individual basis if no discrimination is practiced; and, if the family, which is the racial unit, may be considered in these, it may be considered also in providing public schools. The equal protection of the laws does not mean that the child must be treated as the property of the state and the wishes of his family as to his upbringing be disregarded. The classification of children for the purpose of education in separate schools has a basis grounded in reason and experience; and, if equal facilities are afforded, it cannot be condemned as discriminatory for, as said by Mr. Justice Reed in *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578, 58 S.Ct. 721, 724, 82 L.Ed. 1024: "It has long been the law under the Fourteenth Amendment that 'a distinction in legislation is

not arbitrary, if any state of facts reasonably can be conceived that would sustain it.’”⁴

We are cited to cases having relation to zoning ordinances, restrictive covenants in deeds and segregation in public conveyances. It is clear, however, that nothing said in these cases would justify our disregarding the great volume of authority relating directly to education in the public schools, which involves not transient contacts, but associations which affect the interests of the home and the wishes of the people with regard to the upbringing of their children. As Chief Justice Taft pointed out in *Gong Lum v. Rice*, *supra*, 275 U.S. 78, 48 S.Ct. 93, “a more difficult” question is presented by segregation in public conveyances than by segregation in the schools.

We conclude, therefore, that if equal facilities are offered, segregation of the races in the public schools as prescribed by the Constitution and laws of South

⁴ See also, *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357, 36 S.Ct. 370, 60 L.Ed. 679; *Borden’s Farm Products Co. v. Baldwin*, 293 U.S. 194, 209, 55 S.Ct. 187, 79 L.Ed. 281; *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 584, 55 S.Ct. 538, 79 L.Ed. 1070; *State Board of Tax Com’rs v. Jackson*, 283 U.S. 527, 537, 51 S.Ct. 540, 75 L.Ed. 1248; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 55 L. Ed. 369; *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 465, 65 S.Ct. 1384, 89 L.Ed. 1725; *Asbury Hospital v. Cass County, N.D.*, 326 U.S. 207, 215, 66 S.Ct. 61, 90 L.Ed. 6; *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509, 57 S.Ct. 868, 81 L.Ed. 1245; *South Carolina Power Co. v. South Carolina Tax Com’n*, 4 Cir., 52 F.2d 515, 518; *United States v. Carolene Products Co.*, 304 U.S. 144, 152, 58 S.Ct. 778, 82 L.Ed. 1234; *Bowles v. American Brewery*, 4 Cir., 146 F.2d 842, 847; *White Packing Co. v. Robertson*, 4 Cir., 89 F.2d 775, 779.

Carolina is not of itself violative of the Fourteenth Amendment. We think that this conclusion is supported by overwhelming authority which we are not at liberty to disregard on the basis of theories advanced by a few educators and sociologists. Even if we felt at liberty to disregard other authorities, we may not ignore the unreversed decisions of the Supreme Court of the United States which are squarely in point and conclusive of the question before us. As said by the Court of Appeals of the Fourth Circuit in *Boyer v. Garrett*, 183 F.2d 582, a case involving segregation in a public playground, in which equality of treatment was admitted and segregation was attacked as being per se violative of the Fourteenth Amendment: "The contention of plaintiffs is that, notwithstanding this equality of treatment, the rule providing for segregation is violative of the provisions of the federal Constitution. The District Court dismissed the complaint on the authority of *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256; and the principal argument made on appeal is that the authority of *Plessy v. Ferguson* has been so weakened by subsequent decisions that we should no longer consider it as binding. We do not think, however, that we are at liberty thus to disregard a decision of the Supreme Court which that court has not seen fit to overrule and which it expressly refrained from reexamining, although urged to do so, in the very recent case of *Sweatt v. Painter* 339 U.S. 629, 70 S.Ct. 848 94 L.Ed. 1114. It is for the Supreme Court, not us, to overrule its decisions or to hold them outmoded."

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

It is argued that, because the school facilities furnished Negroes in District No. 22 are inferior to those furnished white persons, we should enjoin segregation rather than direct the equalizing of conditions. In as much as we think that the law requiring segregation is valid, however, and that the inequality suffered by plaintiffs results, not from the law, but from the way it has been administered, we think that our injunction

should be directed to removing the inequalities resulting from administration within the framework of the law rather than to nullifying the law itself. As a court of equity, we should exercise our power to assure to plaintiffs the equality of treatment to which they are entitled with due regard to the legislative policy of the state. In directing that the school facilities afforded Negroes within the district be equalized promptly with those afforded white persons, we are giving plaintiffs all the relief that they can reasonably ask and the relief that is ordinarily granted in cases of this sort. See *Carter v. County School Board of Arlington County, Virginia*, 4 Cir., 182 F.2d 531. The court should not use its power to abolish segregation in a state where it is required by law if the equality demanded by the Constitution can be attained otherwise. This much is demanded by the spirit of comity which must prevail in the relationship between the agencies of the federal government and the states if our constitutional system is to endure.

Decree will be entered finding that the constitutional and statutory provisions requiring segregation in the public schools are not of themselves violative of the Fourteenth Amendment, but that defendants have denied to plaintiffs rights guaranteed by that amendment in failing to furnish for Negroes in School District 22 educational facilities and opportunities equal to those furnished white persons, and injunction will issue directing defendants promptly to furnish Negroes within the district educational facilities and opportunities equal to those furnished white persons and to

App. 21

report to the court within six months as to the action that has been taken by them to effectuate the court's decree.

Injunction to abolish segregation denied.

Injunction to equalize educational facilities granted.

WARING, District Judge (dissenting).

This case has been brought for the express and declared purpose of determining the right of the State of South Carolina, in its public schools, to practice segregation according to race.

The plaintiffs are all residents of Clarendon County, South Carolina which is situated within the Eastern District of South Carolina and within the jurisdiction of this court. The plaintiffs consist of minors and adults there being forty-six minors who are qualified to attend and are attending the public schools in School District 22 of Clarendon County; and twenty adults who are taxpayers and are either guardians or parents of the minor plaintiffs. The defendants are members of the Board of Trustees of School District 22 and other officials of the educational system of Clarendon County including the superintendent of education. They are the parties in charge of the various schools which are situated within the aforesaid school district and which are affected by the matters set forth in this cause.

The plaintiffs allege that they are discriminated against by the defendants under color of the Constitution and laws of the State of South Carolina whereby they are denied equal educational facilities and opportunities and that this denial is based upon difference in race. And they show that the school system of this particular school district and county (following the general pattern that it is admitted obtains in the State of South Carolina) sets up two classes of schools; one for people said to belong to the white race and the other for people of other races but primarily for those said to belong to the Negro race or of mixed races and either wholly, partially, or faintly alleged to be of African or Negro descent. These plaintiffs bring this action for the enforcement of the rights to which they claim they are entitled and on behalf of many others who are in like plight and condition and the suit is denominated a class suit for the purpose of abrogation of what is claimed to be the enforcement of unfair and discriminatory laws by the defendants. Plaintiffs claim that they are entitled to bring this case and that this court has jurisdiction under the Fourteenth Amendment of the Constitution of the United States and of a number of statutes of the United States, commonly referred to as civil rights statutes.¹ The plaintiffs demand relief under the above referred to sections of the laws of the United States by way of a declaratory judgment and permanent injunction.

¹ Fourteenth Amendment of the Constitution of the United States, Section 1; Title 8 U.S.C.A. §§ 41, 43; Title 28, U.S.C.A. § 1343.

It is alleged that the defendants are acting under the authority granted them by the Constitution and laws of the State of South Carolina and that all of these are in contravention of the Constitution and laws of the United States. The particular portions of the laws of South Carolina are as follows:

Article XI, Section 5 is as follows: “Free public schools.—The General Assembly shall provide for a liberal system of free public schools for all children between the ages of six and twenty-one years * * *.”

Article XI, Section 7 is as follows: “Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race.”

Section 5377 of the Code of Laws of South Carolina is as follows: “It shall be unlawful for pupils of one race to attend the schools provided by boards of trustees for persons of another race.”

It is further shown that the defendants are acting under the authority of the Constitution and laws of the State of South Carolina providing for the creation of various school districts,² and they have strictly separated and segregated the school facilities, both elementary and high school, according to race. There are, in said school district, three schools which are used

² Constitution of South Carolina, Article XI, Section 5; Code of Laws, 5301, 5316, 5328, 5404 and 5405; Code of Laws of South Carolina, Sections 5303, 5306, 5343, 5409.

exclusively by Negroes: to wit, Rambay Elementary School, Liberty Hill Elementary School, and Scotts Branch Union (a combination of elementary and high school). There are in the same school district, two schools maintained for whites, namely, Summerton Elementary School and Summerton High School. The last named serves some of the other school districts in Clarendon County as well as No. 22.

It appears that the plaintiffs filed a petition with the defendants requesting that the defendants cease discrimination against the Negro children of public school age; and the situation complained of not having been remedied or changed, the plaintiffs now ask this court to require the defendants to grant them their rights guaranteed under the Fourteenth Amendment of the Constitution of the United States and they appeal to the equitable power of this court for declaratory and injunctive relief alleging that they are suffering irreparable injuries and that they have no plain adequate or complete remedy to redress the wrongs and illegal acts complained of other than this suit. And they further point out that large numbers of people and persons are and will be affected by the decision of this court in adjudicating and clarifying the rights of Negroes to obtain education in the public school system of the State of South Carolina without discrimination and denial of equal facilities on account of their race.

The defendants appear and by way of answer deny the allegations of the complaint as to discrimination and inequality and allege that not only are they acting

within the laws of the State in enforcing segregation but that all facilities afforded the pupils of different races are adequate and equal and that there is no inequality or discrimination practiced against these plaintiffs or any others by reason of race or color. And they allege that the facilities and opportunities furnished to the colored children are substantially the same as those provided for the white children. And they further base their defense upon the statement that the Constitutional and statutory provisions under attack in this case, that is to say, the provisions requiring separate schools because of race, are a reasonable exercise of the State's police power and that all of the same are valid under the powers possessed by the State of South Carolina and the Constitution of the United States and they deny that the same can be held to be unconstitutional by this Court.

The issues being so drawn and calling for a judgment by the United States Court which would require the issuance of an injunction against State and County officials, it became apparent that it would be necessary that the case be heard in accordance with the statute applicable to cases of this type requiring the calling of a three-judge court.³ Such a court convened and the case was set for a hearing on May 28, 1951.

The case came on for a trial upon the issues as presented in the complaint and answer. But upon the call of the case, defendants' counsel announced that they wished to make a statement on behalf of the

³ Title 28, U.S.C.A. §§ 2281-2284.

defendants making certain admissions and praying that the Court make a finding as to inequalities in respect to buildings, equipment, facilities, curricula and other aspects of the schools provided for children in School District 22 in Clarendon County and giving the public authorities time to formulate plans for ending such inequalities. In this statement defendants claim that they never had intended to discriminate against any of the pupils and although they had filed an answer to the complaint, some five months ago, denying inequalities they now admit that they had found some; but rely upon the fact that subsequent to the institution of this suit, James F. Byrnes, the Governor of South Carolina, had stated in his inaugural address that the State must take steps to provide money for improving educational facilities and that thereafter, the Legislature had adopted certain legislation. They stated that they hoped that in time they would obtain money as a result of the foregoing and improve the school situation.

This statement was allowed to be filed and considered as an amendment to the answer.

By this maneuver, the defendants have endeavored to induce this Court to avoid the primary purpose of the suit. And if the Court should follow this suggestion and fail to meet the issues raised by merely considering this case in the light of another "separate but equal" case, the entire purpose and reason for the institution of the case and the convening of a three-judge court would be voided. The 66 plaintiffs in this cause have brought this suit at what must have cost much in

effort and financial expenditures. They are here represented by 6 attorneys, all, save one, practicing lawyers from without the State of South Carolina and coming here from a considerable distance. The plaintiffs have brought a large number of witnesses exclusive of themselves. As a matter of fact, they called and examined 11 witnesses. They said that they had a number more coming who did not arrive in time owing to the shortening of the proceedings and they also stated that they had on hand and had contemplated calling a large number of other witnesses but this became unnecessary by reason of the foregoing admissions by defendants. It certainly appears that large expenses must have been caused by the institution of this case and great efforts expended in gathering data, making a study of the issues involved, interviewing and bringing numerous witnesses, some of whom are foremost scientists in America. And in addition to all of this, these 66 plaintiffs have not merely expended their time and money in order to test this important Constitutional question, but they have shown unexampled courage in bringing and presenting this cause at their own expense in the face of the long established and age-old pattern of the way of life which the State of South Carolina has adopted and practiced and lived in since and as a result of the institution of human slavery.

If a case of this magnitude can be turned aside and a court refused to hear these basic issues by the mere device of admission that some buildings, blackboards, lighting fixtures and toilet facilities are unequal but that they may be remedied by the spending of a few

dollars, then, indeed people in the plight in which these plaintiffs are, have no adequate remedy or forum in which to air their wrongs. If this method of judicial evasion be adopted, these very infant plaintiffs now pupils in Clarendon County will probably be bringing suits for their children and grandchildren decades or rather generations hence in an effort to get for their descendants what are today denied to them. If they are entitled to any rights as American citizens, they are entitled to have these rights now and not in the future. And no excuse can be made to deny them these rights which are theirs under the Constitution and laws of America by the use of the false doctrine and pater called "separate but equal" and it is the duty of the Court to meet these issues simply and factually and without fear, sophistry and evasion. If this be the measure of justice to be meted out to them, then, indeed, hundreds, nay thousands, of cases will have to be brought and in each case thousands of dollars will have to be spent for the employment of legal talent and scientific testimony and then the cases will be turned aside, postponed or eliminated by devices such as this.

We should be unwilling to straddle or avoid this issue and if the suggestion made by these defendants is to be adopted as the type of justice to be meted out by this Court, then I want no part of it.

And so we must and do face, without evasion or equivocation, the question as to whether segregation in education in our schools is legal or whether it cannot exist under our American system as particularly

enunciated in the Fourteenth Amendment to the Constitution of the United States.

Before the American Civil War, the institution of human slavery had been adopted and was approved in this country. Slavery was nothing new in the world. From the dawn of history we see aggressors enslaving weak and less fortunate neighbors. Back through the days of early civilization man practiced slavery. We read of it in Biblical days; we read of it in the Greek City States and in the great Roman Empire. Throughout medieval Europe, forms of slavery existed and it was widely practiced in Asia Minor and the Eastern countries and perhaps reached its worst form in Nazi Germany. Class and caste have, unfortunately, existed through the ages. But, in time, mankind, through evolution and progress, through ethical and religious concepts, through the study of the teachings of the great philosophers and the great religious teachers, including especially the founder of Christianity—mankind began to revolt against the enslavement of body, mind and soul of one human being by another. And so there came about a great awakening. The British who had indulged in the slave trade, awakened to the fact that it was immoral and against the right thinking ideology of the Christian world. And in this country, also, came about a moral awakening. Unfortunately, this had not been sufficiently advanced at the time of the adoption of the American Constitution for the institution of slavery to be prohibited. But there was a struggle and the better thinking leaders in our Constitutional Convention endeavored to prohibit slavery but unfortunately

compromised the issue on the insistent demands of those who were engaged in the slave trade and the purchase and use of slaves. And so as time went on, slavery was perpetuated and eventually became a part of the life and culture of certain of the States of this Union although the rest of the world looked on with shame and abhorrence.

As was so well said, this country could not continue to exist one-half slave and one-half free and long years of war were entered into before the nation was willing to eradicate this system which was, itself, a denial of the brave and fine statements of the Declaration of Independence and a denial of freedom as envisioned and advocated by our Founders.

The United States then adopted the 13th, 14th and 15th Amendments and it cannot be denied that the basic reason for all of these Amendments to the Constitution was to wipe out completely the institution of slavery and to declare that all citizens in this country should be considered as free, equal and entitled to all of the provisions of citizenship.

The Fourteenth Amendment to the Constitution of the United States 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.”

It seems to me that it is unnecessary to pore through voluminous arguments and opinions to ascertain what the foregoing means. And while it is true that we have had hundreds, perhaps thousands, of legal opinions outlining and defining the various effects and overtones on our laws and life brought about by the adoption of this Amendment, one of ordinary ability and understanding of the English language will have no trouble in knowing that when this Amendment was adopted, it was intended to do away with discrimination between our citizens.

The Amendment refers to *all* persons. There is nothing in there that attempts to separate, segregate or discriminate against any persons because of their being of European, Asian or African ancestry. And the plain intendment is that all of these persons are citizens. And then it is provided that no State shall make or enforce any law which shall abridge the privileges of citizens nor shall any state deny “to *any person* within its jurisdiction the equal protection of the laws”.

The Amendment was first proposed in 1866 just about a year after the end of the American Civil War and the surrender of the Confederate States government. Within two years, the Amendment was adopted and became part of the Constitution of the United States. It cannot be gainsaid that the Amendment was proposed and adopted wholly and entirely as a result of the great conflict between freedom and slavery. This

will be amply substantiated by an examination and appreciation of the proposal and discussion and Congressional debates (see Flack on Adoption of the 14th Amendment) and so it is undeniably true that the three great Amendments were adopted to eliminate not only slavery, itself, but all idea of discrimination and difference between American citizens.

Let us now come to consider whether the Constitution and Laws of the State of South Carolina which we have heretofore quoted are in conflict with the true meaning and intendment of this Fourteenth Amendment. The whole discussion of race and ancestry has been intermingled with sophistry and prejudice. What possible definition can be found for the so-called white race, Negro race or other races? Who is to decide and what is the test? For years, there was much talk of blood and taint of blood. Science tells us that there are but four kinds of blood: A, B, AB and O and these are found in Europens, Asiatics, Africans, Americans and others. And so we need not further consider the irresponsible and baseless references to preservation of "Caucasian blood". So then, what test are we going to use in opening our school doors and labeling them "white" and "Negro"? The law of South Carolina considers a person of one-eighth African ancestry to be a Negro. Why this proportion? Is it based upon any reason: anthropological, historical or ethical? And how are the trustees to know who are "whites" and who are "Negroes"? If it is dangerous and evil for a white child to be associated with another child, one of whose great-grandparents was of African descent, is it not equally

dangerous for one with a one-sixteenth percentage? And if the State has decided that there is danger in contact between the whites and Negroes, isn't it requisite and proper that the State furnish a series of schools one for each of these percentages? If the idea is perfect racial equality in educational systems, why should children of pure African descent be brought in contact with children of one-half, one-fourth, or one-eighth such ancestry? To ask these questions is sufficient answer to them. The whole thing is unreasonable, unscientific and based upon unadulterated prejudice. We see the results of all of this warped thinking in the poor under-privileged and frightened attitude of so many of the Negroes in the southern states; and in the sadistic insistence of the "white supremacists" in declaring that their will must be imposed irrespective of rights of other citizens. This claim of "white supremacy", while fantastic and without foundation, is really believed by them for we have had repeated declarations from leading politicians and governors of this state and other states declaring that "white supremacy" will be endangered by the abolition of segregation. There are present threats, including those of the present Governor of this state, going to the extent of saying that all public education may be abandoned if the courts should grant true equality in educational facilities.

Although some 73 years have passed since the adoption of the Fourteenth Amendment and although it is clearly apparent that its chief purpose, (perhaps we may say its only real purpose) was to remove from

Negroes the stigma and status of slavery and to confer upon them full rights as citizens, nevertheless, there has been a long and arduous course of litigation through the years. With some setbacks here and there, the courts have generally and progressively recognized the true meaning of the Fourteenth Amendment and have, from time to time, stricken down the attempts made by state governments (almost entirely those of the former Confederate states) to restrict the Amendment and to keep Negroes in a different classification so far as their rights and privileges as citizens are concerned. A number of cases have reached the Supreme Court of the United States wherein it became necessary for that tribunal to insist that Negroes be treated as citizens in the performance of jury duty. See *Strauder v. West Virginia*⁴, where the Court says 100 U.S. at page 307, 25 L.Ed. 664; “* * * 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? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of 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,

⁴ 100 U.S. 303, 25 L.Ed. 664.

lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.”

Many subsequent cases have followed and confirmed the right of Negroes to be treated as equals in all jury and grand jury service in the states.

The Supreme Court has stricken down from time to time statutes providing for imprisonment for violation of contracts. These are known as peonage cases and were in regard to statutes primarily aimed at keeping the Negro “in his place”.⁵

In the field of transportation the court has now, in effect declared that common carriers engaged in interstate travel must not and cannot segregate and discriminate against passengers by reason of their race or color.⁶

Frequent and repeated instances of prejudice in criminal cases because of the brutal treatment of

⁵ Peonage: *Bailey v. Alabama*, 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191; *U. S. v. Reynolds*, 235 U.S. 133, 35 S.Ct. 86, 59 L.Ed. 162.

⁶ Transportation: *Mitchell v. U. S.*, 313 U.S. 80, 61 S.Ct. 873, 85 L.Ed. 1201; *Morgan v. Virginia*, 328 U.S. 373, 66 S. Ct. 1050, 90 L.Ed. 1317; *Henderson v. U. S.*, 339 U.S. 816, 70 S.Ct. 843, 94 L. Ed. 1302; *Chance v. Lambeth*, 4 Cir., 186 F.2d 879, certiorari denied *Atlantic Coast Line R. Co. v. Chance*, 341 U.S. 941, 71 S.Ct. 1001, May 28, 1951.

App. 36

defendants because of their color have been passed upon in a large number of cases.⁷

Discrimination by segregation of housing facilities and attempts to control the same by covenants have also been outlawed.⁸

In the field of labor employment and particularly the relation of labor unions to the racial problem, discrimination has again been forbidden.⁹

Perhaps the most serious battle for equality of rights has been in the field of exercise of suffrage. For years, certain of the southern states have attempted to prevent the Negro from taking part in elections by various devices. It is unnecessary to enumerate the long list of cases, but from time to time courts have stricken down all of these various devices classed as the "grandfather clause", educational tests and white private clubs.¹⁰

⁷ Criminals: *Brown v. Mississippi*, 297 U. S. 278, 56 S.Ct. 461, 80 L.Ed. 682; *Chambers v. Florida*, 309 U.S. 227, 60 S. Ct. 472, 84 L.Ed. 716; *Shepherd v. Florida*, 341 U.S. 50, 71 S.Ct. 549.

⁸ Housing: *Buchanan v. Warley*, 245 U. S. 60, 38 S.Ct. 16, 62 L.Ed. 149; *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161.

⁹ Labor: *Steele v. Louisville & N. R. R. Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173; *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187.

¹⁰ Suffrage: *Guinn v. U. S.*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340; *Nixon v. Herndon*, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759; *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281; *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987; *Elmore v. Rice*, D.C., 72 F. Supp. 516; 4 Cir., 165 F.2d 387; certiorari denied, 333 U.S. 875, 68 S.Ct. 905, 92 L.Ed. 1151; *Brown v. Baskin*, D.C., 78

The foregoing are but a few brief references to some of the major landmarks in the fight by Negroes for equality. We now come to the more specific question, namely, the field of education. The question of the right of the state to practice segregation by race in certain educational facilities has only recently been tested in the courts. The cases of *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 and *Sipuel v. Board of Regents*, 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. 247, decided that Negroes were entitled to the same type of legal education that whites were given. It was further decided that the equal facilities must be furnished without delay or as was said in the *Sipuel* case, the state must provide for equality of education for Negroes "as soon as it does for applicants of any other group". But still we have not reached the exact question that is posed in the instant case.

We now come to the cases that, in my opinion, definitely and conclusively establish the doctrine that separation and segregation according to race is a violation of the Fourteenth Amendment. I, of course, refer to the cases of *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L. Ed. 1114, and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 70 S.Ct. 851, 94 L. Ed. 1149. These cases have been followed in a number of lower court decisions so that there is no longer any question as to the rights of Negroes to enjoy all the rights and facilities afforded by the law schools of the States of Virginia, Louisiana, Delaware, North Carolina and

F.Supp. 933; *Brown v. Baskin*, D.C., 80 F.Supp. 1017; 4 Cir., 174 F.2d 391.

Kentucky. So there is no longer any basis for a state to claim the power to separate according to race in graduate schools, universities and colleges.

The real rock on which the defendants base their case is a decision of the Supreme Court of the United States in the case of *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256. This case arose in Louisiana and was heard on appeal in 1895. The case related to the power of the State of Louisiana to require separate railroad cars for white and colored passengers and the Court sustained the State's action. Much discussion has followed this case and the reasoning and decision has been severely criticized for many years. And the famous dissenting opinion by Mr. Justice Harlan has been quoted throughout the years as a true declaration of the meaning of the Fourteenth Amendment and of the spirit of the American Constitution and the American way of life. It has also been frequently pointed out that when that decision was made, practically all the persons of the colored or Negro race had either been born slaves or were the children of slaves and that as yet due to their circumstances and surroundings and the condition in which they had been kept by their former masters, they were hardly looked upon as equals or as American citizens. The reasoning of the prevailing opinion in the *Plessy* case stems almost completely from a decision by Chief Justice Shaw of Massachusetts¹¹, which decision was made many

¹¹ *Roberts v. City of Boston*, 5 Cush., Mass., 198.

years before the Civil War and when, of course, the Fourteenth Amendment had not even been dreamed of.

But these arguments are beside the point in the present case. And we are not called upon to argue or discuss the validity of the Plessy case.

Let it be remembered that the Plessy case decided that separate railroad accommodations might be required by a state in intra-state transportation. How similar attempts relating to inter-state transportation have fared have been shown in the foregoing discussion and notes.¹² It has been said and repeated here in argument that the Supreme Court has refused to review the Plessy case in the Sweatt, McLaurin and other cases and this has been pointed to as proof that the Supreme Court retains and approves the validity of Plessy. It is astonishing that such an argument should be presented or used in this or any other court. The Supreme Court in Sweatt and McLaurin was not considering railroad accommodations. It was considering education just as we are considering it here and the Supreme Court distinctly and unequivocally held that the attempt to separate the races in education was violative of the Fourteenth Amendment of the Constitution. Of course, the Supreme Court did not consider overruling Plessy. It was not considering railroad matters, had no arguments in regard to it, had no business or concern with railroad accommodations and should not have even been asked to refer to that case since it had no application or business in the consideration of

¹² See cases cited in Note 6.

an educational problem before the court. It seems to me that we have already spent too much time and wasted efforts in attempting to show any similarity between traveling in a railroad coach in the confines of a state and furnishing education to the future citizens of this country.

The instant case which relates to lower school education is based upon exactly the same reasoning followed in the Sweatt and McLaurin decisions. In the Sweatt case, it was clearly recognized that a law school for Negro students had been established and that the Texas courts had found that the privileges, advantages and opportunities offered were substantially equivalent to those offered to white students at the University of Texas. Apparently, the Negro school was adequately housed, staffed and offered full and complete legal education, but the Supreme Court clearly recognized that education does not alone consist of fine buildings, class room furniture and appliances but that included in education must be all the intangibles that come into play in preparing one for meeting life. As was so well said by the Court: “* * * Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.” 339 U.S. 629, 70 S.Ct. 850. And the Court quotes with approval from its opinion in *Shelley v. Kramer*, supra: “* * * Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.” The Court further points out that this right to a proper and equal education is a personal one and

that an individual is entitled to the equal protection of the laws. And in closing, the Court, referring to certain cases cited, says: "In accordance with these cases, petitioner may claim his full constitutional right: legal education equivalent to that offered by the State to students of other races. Such education is not available to him in a separate law school as offered by the State."

In the companion case of *McLaurin v. Oklahoma State Regents*, *McLaurin* was a student who was allowed to attend the same classes, hear the same lectures, stand the same examinations and eat in the same cafeteria; but he sat in a marked off place and had a separate table assigned to him in the library and another one in the cafeteria. It was said with truth that these facilities were just as good as those afforded to white students. But the Supreme Court says that even though this be so:

"These restrictions were obviously imposed in order to comply, as 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.

"Our society grows increasingly complex, and our need for trained leaders increases correspondingly.

Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State-imposed restrictions which produce such inequalities cannot be sustained." 339 U. S. 637, 70 S.Ct. 853.

The recent case of *McKissick v. Charmichael*, 4 Cir., 187 F.2d 949, 953, wherein the question of admission to the law school of the University of North Carolina was decided follows and amplifies the reasoning of the *Sweatt* and *McLaurin* cases. In the *McKissick* case, officials of the State of North Carolina took the position that they had adopted a fixed and continued purpose to establish and build up separate schools for equality in education and pointed with pride to the large advances that they had made. They showed many actual physical accomplishments and the establishment of a school which they claimed was an equal in many respects and superior in some respects to the school maintained for white students. The Court of Appeals for the 4th Circuit in this case, speaking through Judge Soper, meets this issue without fear or evasion and says: "These circumstances are worthy of consideration by any one who is responsible for the solution of a difficult racial problem; but they do not meet the complainants' case or overcome the deficiencies which it discloses. Indeed the defense seeks in part to avoid the

charge of inequality by the paternal suggestion that it would be beneficial to the colored race in North Carolina as a whole, and to the individual plaintiffs in particular, if they would cooperate in promoting the policy adopted by the State rather than seek the best legal education which the State provides. The duty of the federal courts, however, is clear. We must give first place to the rights of the individual citizen, and when and where he seeks only equality of treatment before the law, his suit must prevail. It is for him to decide in which direction his advantage lies.”

In the instant case, the plaintiffs produced a large number of witnesses. It is significant that the defendants brought but two. These last two were not trained educators. One was an official of the Clarendon schools who said that the school system needed improvement and that the school officials were hopeful and expectant of obtaining money from State funds to improve all facilities. The other witness, significantly named Crow, has been recently employed by a commission just established which, it is proposed, will supervise educational facilities in the State and will handle monies if, as and when the same are received sometime in the future. Mr. Crow did not testify as an expert on education although he stated flatly that he believed in separation of the races and that he heard a number of other people say so, including some Negroes, but he was unable to mention any of their names. Mr. Crow explained what was likely and liable to happen under the 1951 State Educational Act to which

frequent reference was made in argument on behalf of the defense.

It appears that the Governor of this state called upon the legislature to take action in regard to the dearth of educational facilities in South Carolina pointing out the low depth to which the state had sunk. As a result, an act of the legislature was adopted (this is a part of the General Appropriations Act adopted at the recent session of the legislature and referred to as the 1951 School Act). This Act provides for the appointment of a commission which is to generally supervise educational facilities and imposes sales taxes in order to raise money for educational purposes and authorizes the issuance of bonds not to exceed the sum of \$75,000,000, for the purpose of making grants to various counties and school districts to defray the cost of capital improvement in schools. The Commission is granted wide power to accept applications for and approve such grants as loans. It is given wide power as to what schools and school districts are to receive monies and it is also provided, that from the taxes there are to be allocated funds to the various schools based upon the enrollment of pupils. Nowhere is it specifically provided that there shall be equality of treatment as between whites and Negroes in the school system. It is openly and frankly admitted by all parties that the present facilities are hopelessly disproportional and no one knows how much money would be required to bring the colored school system up to a parity with the white school system. The estimates as to the cost merely of equalization of physical facilities run

anywhere from forty to eighty million dollars. Thus, the position of the defendants is that the rights applied for by the plaintiffs are to be denied now because the State of South Carolina intends (as evidenced by a general appropriations bill enacted by the legislature and a speech made by its Governor) to issue bonds, impose taxes, raise money and to do something about the inadequate schools in the future. There is no guarantee or assurance as to when the money will be available. As yet, no bonds have been printed or sold. No money is in the treasury. No plans have been drawn for school buildings or order issued for materials. No allocation has been made to the Clarendon school district or any other school districts and not even application blanks have, as yet, been printed. But according to Mr. Crow, the Clarendon authorities have requested him to send them blanks for this purpose if, as and when they come into being. Can we seriously consider this a bona-fide attempt to provide equal facilities for our school children?

On the other hand, the plaintiffs brought many witnesses, some of them of national reputation in various educational fields. It is unnecessary for me to review or analyze their testimony. But they who had made studies of education and its effect upon children, starting with the lowest grades and studying them up through and into high school, unequivocally testified that aside from inequality in housing appliances and equipment, the mere fact of segregation, itself, had a deleterious and warping effect upon the minds of children. These witnesses testified as to their study and

researches and their actual tests with children of varying ages and they showed that the humiliation and disgrace of being set aside and segregated as unfit to associate with others of different color had an evil and ineradicable effect upon the mental processes of our young which would remain with them and deform their view on life until and throughout their maturity. This applies to white as well as Negro children. These witnesses testified from actual study and tests in various parts of the country, including tests in the actual Clarendon School district under consideration. They showed beyond a doubt that the evils of segregation and color prejudice come from early training. And from their testimony as well as from common experience and knowledge and from our own reasoning, we must unavoidably come to the conclusion that racial prejudice is something that is acquired and that that acquiring is in early childhood. When do we get our first ideas of religion, nationality and the other basic ideologies? The vast number of individuals follow religious and political groups because of their childhood training. And it is difficult and nearly impossible to change and eradicate these early prejudices, however strong may be the appeal to reason. There is absolutely no reasonable explanation for racial prejudice. It is all caused by unreasoning emotional reactions and these are gained in early childhood. Let the little child's mind be poisoned by prejudice of this kind and it is practically impossible to ever remove these impressions however many years he may have of teaching by philosophers, religious leaders or patriotic citizens. If segregation is wrong

then the place to stop it is in the first grade and not in graduate colleges.

From their testimony, it was clearly apparent, as it should be to any thoughtful person, irrespective of having such expert testimony, that segregation in education can never produce equality and that it is an evil that must be eradicated. This case presents the matter clearly for adjudication and I am of the opinion that all of the legal guideposts, expert testimony, common sense and reason point unerringly to the conclusion that the system of segregation in education adopted and practiced in the State of South Carolina must go and must go now.

Segregation is per se inequality.

As heretofore shown, the courts of this land have stricken down discrimination in higher education and have declared unequivocally that segregation is not equality. But these decisions have pruned away only the noxious fruits. Here in this case, we are asked to strike its very root. Or rather, to change the metaphor, we are asked to strike at the cause of infection and not merely at the symptoms of disease. And if the courts of this land are to render justice under the laws without fear or favor, justice for all men and all kinds of men, the time to do it is now and the place is in the elementary schools where our future citizens learn their first lesson to respect the dignity of the individual in a democracy.

To me the situation is clear and important, particularly at this time when our national leaders are called upon to show to the world that our democracy means what it says and that it is a true democracy and there is no under-cover suppression of the rights of any of our citizens because of the pigmentation of their skins. And I had hoped that this Court would take this view of the situation and make a clear cut declaration that the State of South Carolina should follow the intent and meaning of the Constitution of the United States and that it shall not abridge the privileges accorded to or deny equal protection of its laws to any of its citizens. But since the majority of this Court feel otherwise, and since I cannot concur with them or join in the proposed decree, this opinion is filed as a dissent.

App. 49

342 U.S. 350
72 S.Ct. 327
96 L.Ed. 392
BRIGGS et al.

v.

ELLIOTT et al.

No. 273.

Decided Jan. 28, 1952.

Harold R. Boulware, Columbia, S.C., Spottswood W. Robinson, III, Richmond, Va., Robert L. Carter, Thurgood Marshall, New York City (Arthur D. Shores, Birmingham, Ala., A. T. Walden, Atlanta, Ga., of counsel), for appellants.

S. E. Rogers, Summerton, S.C., Robert McC. Figg, Jr., Charleston, S.C., for appellees.

PER CURIAM.

Appellant Negro school children brought this action in the Federal District Court to enjoin appellee school officials from making any distinctions based upon race or color in providing educational facilities for School District No. 22, Clarendon County, South Carolina. As the basis for their complaint, appellants alleged that equal facilities are not provided for Negro pupils and that those constitutional and statutory provisions of South Carolina requiring separate schools "for children of the white and colored races"¹ are invalid under the Fourteenth Amendment. At the trial before a court of three judges, appellees conceded that the

¹ S.C.Const. Art. XI, § 7; S.C.Code 1942, § 5377.

school facilities provided for Negro students 'are not substantially equal to those afforded in the District for white pupils.'

The District Court held, one judge dissenting, that the challenged constitutional and statutory provisions were not of themselves violative of the Fourteenth Amendment. The court below also found that the educational facilities afforded by appellees for Negro pupils are not equal to those provided for white children. The District Court did not issue an injunction abolishing racial distinctions as prayed by appellants, but did order appellees to proceed at once to furnish educational facilities for Negroes equal to those furnished white pupils. In its decree, entered June 21, 1951, the District Court ordered that appellees report to that court within six months as to action taken by them to carry out the court's order. 98 F. Supp. 529.

Dissatisfied with the relief granted by the District Court, appellants brought a timely appeal directly to this Court under 28 U.S.C. (Supp. IV) § 1253, 28 U.S.C.A. § 1253. After the appeal was docketed but before its consideration by this Court, appellees filed in the court below their report as ordered.

The District Court has not given its views on this report, having entered an order stating that it will withhold further action thereon while the cause is pending in this Court on appeal. Prior to our consideration of the questions raised on this appeal, we should have the benefit of the views of the District Court upon the additional facts brought to the attention of that

App. 51

court in the report which it ordered. The District Court should also be afforded the opportunity to take whatever action it may deem appropriate in light of that report. In order that this may be done, we vacate the judgment of the District Court and remand the case to that court for further proceedings. Another judgment, entered at the conclusion of those proceedings, may provide the basis for any further appeals to this Court.

It is so ordered.

Judgment vacated and case remanded with directions.

Mr. Justice BLACK and Mr. Justice DOUGLAS dissent to vacation of the judgment of the District Court on the grounds stated. They believe that the additional facts contained in the report to the District Court are wholly irrelevant to the constitutional questions presented by the appeal to this Court, and that we should note jurisdiction and set the case down for argument.

App. 52

103 F.Supp. 920 (1952)

BRIGGS et al.

v.

ELLIOTT et al.

Civ. No. 2657.

**United States District Court E. D. South Carolina,
Charleston Division.**

March 13, 1952.

Harold R. Boulware, Columbia, S. C., Spottswood Robinson, III, Richmond, Va., Robert L. Carter, Thurgood Marshall, New York City, Arthur Shores, Birmingham, Ala., and A. T. Walden, Atlanta, Ga., for plaintiffs.

T. C. Callison, Atty. Gen. of South Carolina, S. E. Rogers, Summerton, S. C., and Robert McC. Figg, Jr., for defendants.

Before PARKER and DOBIE Circuit Judges, and TIMMERMAN, District Judge.

PARKER, Circuit Judge.

On June 23, 1951, this court entered its decree in this cause finding that the provisions of the Constitution and statutes of South Carolina requiring segregation of the races in the public schools are not of themselves violative of the Fourteenth Amendment of the federal Constitution, but that defendants had denied to plaintiffs rights guaranteed by that amendment in failing to furnish for Negroes in School District 22 educational facilities and opportunities equal to those furnished white persons. That decree denied the application for

an injunction abolishing segregation in the schools but directed defendants promptly to furnish Negroes within the district educational facilities and opportunities equal to those furnished white persons and to report to the court within six months as to the action that had been taken to effectuate the court's decree. See *Briggs v. Elliott*, D.C., 98 F. Supp. 529. Plaintiffs appealed from so much of the decree as denied an injunction that would abolish segregation and this appeal was pending in the Supreme Court of the United States when the defendants, on December 21, 1951, filed with this court the report required by its decree, which report was forwarded to the Supreme Court. The Supreme Court thereupon remanded the case that we might give consideration to the report and vacated our decree in order that we might take whatever action we might deem appropriate in the light of the facts brought to our attention upon its consideration. *Briggs v. Elliott*, 342 U.S. 350, 72 S. Ct. 327. When the case was called for hearing on March 3, 1952, defendants filed a supplementary report showing what additional steps had been taken since the report of December 21, 1951, to comply with the requirements of the court's decree and equalize the educational facilities and opportunities of Negroes with those of white persons within the district.

The reports of December 21 and March 3 filed by defendants, which are admitted by plaintiffs to be true and correct and which are so found by the court, show beyond question that defendants have proceeded promptly and in good faith to comply with the court's

decree.^[1] As a part of a state-wide educational program to equalize and improve educational facilities and opportunities throughout the State of South Carolina, a program of school consolidation has been carried through for Clarendon County, District No. 22 has been consolidated with other districts so as to abolish inferior schools, public moneys have been appropriated to build modern school buildings, within the consolidated district, and contracts have been let which will insure the completion of the buildings before the next school year. The curricula of the Negro schools within the

^[1] The facts disclosed by the ordered and supplemental report are these: In order to qualify for state aid the old school district 22 has been combined with six other districts to become district 1, whose officials have requested and have by order been admitted as parties to this action. Teachers' salaries in the district have been equalized by local supplement, bus transportation has been instituted (none was furnished previously for either race), and \$21,522.81 has been spent for furniture and equipment in Negro schools. Enabling legislation has been secured in the state legislature which permits the issuance of bonds of the school district up to 30% of the assessed valuation. (The enabling legislation was made possible by an Amendment to the Constitution of South Carolina passed in 1951. Const. art. 10, § 5, as amended, see 47 St. at Large, p. 14. The maximum had theretofore been 8%). Compliance with the requirements of the newly formed State Education Finance Commission has resulted in funds being made available to District 1 and a plan of school house construction based on a survey of education needs has been prepared, approved and adopted. Plans have been approved for the building of two Negro elementary schools at St. Paul and Spring Hill and advertisements for bids have been circulated in the press. The contract for remodeling the Scotts Branch Elementary School and for construction of the new Scotts Branch High School has already been let, construction has been commenced, and will, according to the record, be completed in time for the next school year.

district has already been made equal to the curricula of the white schools and building projects for Negro schools within the consolidated district have been approved which will involve the expenditure of \$516,960 and will unquestionably make the school facilities afforded Negroes within the district equal to those afforded white persons. The new district high school for Negroes is already 40% completed, and under the provisions of the construction contract will be ready for occupancy sometime in August of this year. That the State of South Carolina is earnestly and in good faith endeavoring to equalize educational opportunities for Negroes with those afforded white persons appears from the fact that, since the inauguration of the state-wide educational program, the projects approved and under way to date involve \$5,515,619.15 for Negro school construction as against \$1,992,018.00 for white school construction. The good faith of defendants in carrying out the decree of this court is attested by the fact that, when in October delay of construction of the Negro high school within the consolidated district was threatened on account of inability to obtain release of necessary materials, defendants made application to the Governor of the State and with his aid secured release of the materials so that construction could go forward.

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

persons. Plaintiffs contend that because they are not now equal we should enter a decree abolishing segregation and opening all the schools of the district at once to white persons and Negroes. A sufficient answer is that the defendants have complied with the decree of this court to equalize conditions as rapidly as was humanly possible, that conditions will be equalized by the beginning of the next school year and that no good would be accomplished for anyone by an order disrupting the organization of the schools so near the end of the scholastic year. As heretofore stated, the curricula of the white and Negro schools have already been equalized. By the beginning of the next scholastic year, physical conditions will be equalized also. This is accomplishing equalization as rapidly as any reasonable person could ask. We dealt with the question in our former opinion where we said, 98 F.Supp. at 537:

“It is argued that, because the school facilities furnished Negroes in District No 22 are inferior to those furnished white persons, we should enjoin segregation rather than direct the equalizing of conditions. In as much as we think that the law requiring segregation is valid, however, and that the inequality suffered by plaintiffs results, not from the law, but from the way it has been administered, we think that our injunction should be directed to removing the inequalities resulting from administration within the framework of the law rather than to nullifying the law itself. As a court of equity, we should exercise our power to assure to plaintiffs the equality of treatment to which they are entitled with due regard to the legislative policy of the state. In directing that the school

facilities afforded Negroes within the district be equalized promptly with those afforded white persons, we are giving plaintiffs all the relief that they can reasonably ask and the relief that is ordinarily granted in cases of this sort. See *Carter v. County School Board of Arlington County, Virginia*, 4 Cir., 182 F.2d 531. The court should not use its power to abolish segregation in a state where it is required by law if the equality demanded by the Constitution can be attained otherwise. This much is demanded by the spirit of comity which must prevail in the relationship between the agencies of the federal government and the states if our constitutional system is to endure.”

For the reasons set forth in our former opinion, we think that plaintiffs are not entitled to a decree enjoining segregation in the schools but that they are entitled to a decree directing defendants promptly to furnish to Negroes within the consolidated district educational facilities and opportunities equal to those furnished white persons. The officers and trustees of the consolidated district will be made parties to this suit and will be bound by the decree entered herein.

Injunction abolishing segregation denied.

Injunction directing the equalization of educational facilities and opportunities granted.

DOBIE, Circuit Judge, and TIMMERMAN, District Judge, concur.

App. 58

132 F.Supp. 776 (1955)

Harry BRIGGS, Jr., et al., Plaintiffs,

v.

R. W. ELLIOTT et al., Defendants.

Civ. A. No. 2657.

**United States District Court E. D. South Carolina,
Charleston Division.**

July 15, 1955.

Thurgood Marshall, New York, N. Y., Harold R. Boulware, Columbia, S. C., for plaintiffs.

S. E. Rogers, Summerton, S. C., Robert McC. Figg, Jr., Charleston, S. C., for defendants.

Before PARKER and DOBIE, Circuit Judges, and TIMMERMAN, District Judge.

PER CURIAM.

This Court in its prior decisions in this case, 98 F.Supp. 529; 103 F.Supp. 920, followed what it conceived to be the law as laid down in prior decisions of the Supreme Court, *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256; *Gong Lum v. Rice*, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172, that nothing in the Fourteenth Amendment to the Constitution of the United States forbids segregation of the races in the public schools provided equal facilities are accorded the children of all races. Our decision has been reversed by the Supreme Court, *Brown v. Board of Education of Topeka*, 349 U.S. 294, 75 S.Ct. 753, 757, which has remanded the case to us with direction "to take such

proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially non-discriminatory basis with all deliberate speed the parties to these cases”.

Whatever may have been the views of this court as to the law when the case was originally before us, it is our duty now to accept the law as declared by the Supreme Court.

Having said this, it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such

segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals.

The Supreme Court has pointed out that the solution of the problem in accord with its decisions is the primary responsibility of school authorities and that the function of the courts is to determine whether action of the school authorities constitutes “good faith implementation of the governing constitutional principles”. With respect to the action to be taken under its decision the Supreme Court said:

“Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.

“In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its

remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a non-discriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

“While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to

achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.

“The judgments below, except that in the Delaware case, are accordingly reversed and remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”

The Court is convened to hear any concrete suggestions you may have to make as to the decree that it should enter.

Decree

This cause coming on to be heard on the motion of plaintiffs for a judgment and decree in accordance with the mandate of the Supreme Court, and the Court having carefully considered the decision of the Supreme Court, the arguments of counsel, and the record heretofore made in this cause:

It is ordered that the decree heretofore entered by this Court be set aside and, in accordance with the decision

and mandate of the Supreme Court, it is ordered, adjudged and decreed that the provisions of the Constitution and laws of the State of South Carolina requiring segregation of the races in the public schools are null and void because violative of the Fourteenth Amendment to the Constitution of the United States, and that the defendants be and they are hereby restrained and enjoined from refusing on account of race to admit to any school under their supervision any child qualified to enter such school, from and after such time as they may have made the necessary arrangements for admission of children to such school on a non-discriminatory basis with all deliberate speed as required by the decision of the Supreme Court in this cause.

It is further ordered that this cause be retained on the docket for the entry of further orders herein if necessity for same should arise.

App. 64

98 F. Supp. 797 (1951)

BROWN et al.

v.

BOARD OF EDUCATION OF TOPEKA,
SHAWNEE COUNTY, KANSAS et al.

Civ. No. T-316.

United States District Court, D. Kansas.

August 3, 1951.

John Scott and Charles Scott, Topeka, Kan., Robert L. Carter, New York City, Jack Greenberg, New York City, and Charles Bledsoe, Topeka, Kan., for plaintiffs.

George Brewster and Lester Goodell, Topeka, Kan., for defendants.

Before HUXMAN, Circuit Judge, MELLOTT, Chief Judge, and HILL, District Judge.

HUXMAN, Circuit Judge.

Chapter 72-1724 of the General Statutes of Kansas, 1949, relating to public schools in cities of the first class, so far as material, authorizes such cities to organize and maintain separate schools for the education of white and colored children in the grades below the high school grades. Pursuant to this authority, the City of Topeka, Kansas, a city of the first class, has established and maintains a segregated system of schools for the first six grades. It has established and maintains in the Topeka School District eighteen schools for white students and four schools for colored students.

The adult plaintiffs instituted this action for themselves, their minor children plaintiffs, and all other persons similarly situated for an interlocutory injunction, a permanent injunction, restraining the enforcement, operation and execution of the state statute and the segregation instituted thereunder by the school authorities of the City of Topeka and for a declaratory judgment declaring unconstitutional the state statute and the segregation set up thereunder by the school authorities of the City of Topeka.

As against the school district of Topeka they contend that the opportunities provided for the infant plaintiffs in the separate all Negro schools are inferior to those provided white children in the all white schools; that the respects in which these opportunities are inferior include the physical facilities, curricula, teaching resources, student personnel services as well as all other services. As against both the state and the school district, they contend that apart from all other factors segregation in itself constitutes an inferiority in educational opportunities offered to Negroes and that all of this is in violation of due process guaranteed them by the Fourteenth Amendment to the United States Constitution. In their answer both the state and the school district defend the constitutionality of the state law and in addition the school district defends the segregation in its schools instituted thereunder.

We have found as a fact that the physical facilities, the curricula, courses of study, qualification of and quality of teachers, as well as other educational facilities in the two sets of schools are comparable. It is obvious that

absolute equality of physical facilities is impossible of attainment in buildings that are erected at different times. So also absolute equality of subjects taught is impossible of maintenance when teachers are permitted to select books of their own choosing to use in teaching in addition to the prescribed courses of study. It is without dispute that the prescribed courses of study are identical in all of the Topeka schools and that there is no discrimination in this respect. It is also clear in the record that the educational qualifications of the teachers in the colored schools are equal to those in the white schools and that in all other respects the educational facilities and services are comparable. It is obvious from the fact that there are only four colored schools as against eighteen white schools in the Topeka School District, that colored children in many instances are required to travel much greater distances than they would be required to travel could they attend a white school, and are required to travel much greater distances than white children are required to travel. The evidence, however, establishes that the school district transports colored children to and from school free of charge. No such service is furnished to white children. We conclude that in the maintenance and operation of the schools there is no willful, intentional or substantial discrimination in the matters referred to above between the colored and white schools. In fact, while plaintiffs' attorneys have not abandoned this contention, they did not give it great emphasis in their presentation before the court. They relied primarily upon the contention that segregation in and of itself

without more violates their rights guaranteed by the Fourteenth Amendment.

This contention poses a question not free from difficulty. As a subordinate court in the federal judicial system, we seek the answer to this constitutional question in the decisions of the Supreme Court when it has spoken on the subject and do not substitute our own views for the declared law by the Supreme Court. The difficult question as always is to analyze the decisions and seek to ascertain the trend as revealed by the later decisions.

There are a great number of cases, both federal and state, that have dealt with the many phases of segregation. Since the question involves a construction and interpretation of the federal Constitution and the pronouncements of the Supreme Court, we will consider only those cases by the Supreme Court with respect to segregation in the schools. In the early case of *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 1140, 41 L. Ed. 256, the Supreme Court said: "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 commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the

state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.”

It is true as contended by plaintiffs that the Plessy case involved transportation and that the above quoted statement relating to schools was not essential to the decision of the question before the court and was therefore somewhat in the nature of dicta. But that the statement is considered more than dicta is evidenced by the treatment accorded it by those seeking to strike down segregation as well as by statements in subsequent decisions of the Supreme Court. On numerous occasions the Supreme Court has been asked to overrule the Plessy case. This the Supreme Court has refused to do, on the sole ground that a decision of the question was not necessary to a disposal of the controversy presented. In the late case of *Sweatt v. Painter*, 339 U.S. 629, 70 S. Ct. 848, 851, 94 L. Ed. 1114, the Supreme Court again refused to review the Plessy case. The Court said: “Nor need we reach petitioner’s contention that *Plessy v. Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation.”

Gong Lum v. Rice, 275 U.S. 78, 48 S. Ct. 91, 93, 72 L. Ed. 172, was a grade school segregation case. It involved the segregation law of Mississippi. *Gong Lum* was a

Chinese child and, because of color, was required to attend the separate schools provided for colored children. The opinion of the court assumes that the educational facilities in the colored schools were adequate and equal to those of the white schools. Thus the court said: "The question here 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." In addition to numerous state decisions on the subject, the Supreme Court in support of its conclusions cited *Plessy v. Ferguson*, *supra*. The Court also pointed out that the question was the same no matter what the color of the class that was required to attend separate schools. Thus the Court said: "Most of the cases cited 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 court held that the question of segregation was within the discretion of the state in regulating its public schools and did not conflict with the Fourteenth Amendment.

It is vigorously argued and not without some basis therefor that the later decisions of the Supreme Court in *McLaurin v. Oklahoma*, 339 U.S. 637, 70 S. Ct. 851, 94 L. Ed. 1149, and *Sweatt v. Painter*, 339 U.S. 629, 70 S. Ct. 848, 94 L. Ed. 1114, show a trend away from the

Plessy and Lum cases. *McLaurin v. Oklahoma* arose under the segregation laws of Oklahoma. McLaurin, a colored student, applied for admission to the University of Oklahoma in order to pursue studies leading to a doctorate degree in education. He was denied admission solely because he was a Negro. After litigation in the courts, which need not be reviewed herein, the legislature amended the statute permitting the admission of colored students to institutions of higher learning attended by white students, but providing that such instruction should be given on a segregated basis; that the instruction be given in separate class rooms or at separate times. In compliance with this statute McLaurin was admitted to the university but was required to sit at a separate desk in the ante room adjoining the class room; to sit at a designated desk on the mezzanine floor of the library and to sit at a designated table and eat at a different time from the other students in the school cafeteria. These restrictions were held to violate his rights under the federal Constitution. The Supreme Court held that such treatment handicapped the student in his pursuit of effective graduate instruction.¹

¹ The court said: "Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is

In *Sweatt v. Painter*, 339 U.S. 629, 70 S. Ct. 848, 850, 94 L. Ed. 1114, petitioner, a colored student, filed an application for admission to the University of Texas Law School. His application was rejected solely on the ground that he was a Negro. In its opinion the Supreme Court stressed the educational benefits from commingling with white students. The court concluded by stating: "we cannot conclude that the education offered petitioner [in a separate school] is substantially equal to that which he would receive if admitted to the University of Texas Law School." If segregation within a school as in the *McLaurin* case is a denial of due process, it is difficult to see why segregation in separate schools would not result in the same denial. Or if the denial of the right to commingle with the majority group in higher institutions of learning as in the *Sweatt* case and gain the educational advantages resulting therefrom, is lack of due process, it is difficult to see why such denial would not result in the same lack of due process if practiced in the lower grades.

unequal to that of his classmates. State-imposed restrictions which produce such inequalities cannot be sustained.

"It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference a Constitutional difference between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. * * * having been admitted to a state-supported graduate school, (he), must receive the same treatment at the hands of the state as students of other races." [339 U.S. 637, 70 S. Ct. 853.]

It must however be remembered that in both of these cases the Supreme Court made it clear that it was confining itself to answering the one specific question, namely: "To what extent does the Equal Protection Clause * * * limit the power of a state to distinguish between students of different races in professional and graduate education in a state university?", and that the Supreme Court refused to review the Plessy case because that question was not essential to a decision of the controversy in the case.

We are accordingly of the view that the Plessy and Lum cases, *supra*, have not been overruled and that they still presently are authority for the maintenance of a segregated school system in the lower grades.

The prayer for relief will be denied and judgment will be entered for defendants for costs.

App. 73

344 U.S. 1
73 S.Ct. 1
97 L.Ed. 3
BROWN et al.

v.

**BOARD OF EDUCATION OF TOPEKA,
SHAWNEE COUNTY, KAN., et al.**
BRIGGS et al. v. ELLIOTT et al.
**DAVIS et al. v. COUNTY SCHOOL BOARD
OF PRINCE EDWARD COUNTY, VA., et al.**

Nos. 8, 101, 191.

Decided Oct. 8, 1952.

Page 2

PER CURIAM.

In two appeals now pending, No. 8, Brown et al. v. Board of Education of Topeka et al., and No. 101, Briggs et al. v. Elliott et al., the appellants challenge, respectively, the constitutionality of a statute of Kansas, and a statute and the Constitution of South Carolina, which provide for segregation in the schools of these states. Appellants allege that segregation is, per se, a violation of the Fourteenth Amendment. Argument in these cases has heretofore been set for the week of October 13, 1952.

In No. 191, Davis et al. v. County School Board of Prince Edward County et al., the appellants have filed a Statement of Jurisdiction raising the same issue in respect to a statute and the constitution of Virginia.

D.C., 103 F.Supp. 337. Appellees in the Davis case have called attention to the similarity between it and the Briggs and Brown cases; by motion

Page 3

they have asked the Court to take necessary action to have all three cases argued together.

This Court takes judicial notice of a fourth case, which is pending in the United States Court of Appeals for the District of Columbia Circuit, *Bolling et al. v. Sharpe et al.*, No. 11,018 on that court's docket. In that case, the appellants challenge the appellees' refusal to admit certain Negro appellants to a segregated white school in the District of Columbia; they allege that appellees have taken such action pursuant to certain Acts of Congress; they allege that such action is a violation of the Fifth Amendment of the Constitution.

The Court is of the opinion that the nature of the issue posed in those appeals now before the Court involving the Fourteenth Amendment, and also the effect of any decision which it may render in those cases, are such that it would be well to consider, simultaneously, the constitutional issue posed in the case of *Bolling et al. v. Sharpe et al.*

To the end that arguments may be heard together in all four of these cases, the Court will continue the *Brown* and *Briggs* cases on its docket. Probable jurisdiction is noted in *Davis et al. v. County School Board of Prince Edward County et al.* Arguments will be

App. 75

heard in these three cases at the first argument session in December.

The Court will entertain a petition for certiorari in the case of *Bolling et al. v. Sharpe et al.*, 28 U.S.C. §§ 1254(1), 2101(e), 28 U.S.C.A. §§ 1254(1), 2101(e), which if presented and granted will afford opportunity for argument of the case immediately following the arguments in the three appeals now pending. It is so ordered.

Cases continued.

Mr. Justice DOUGLAS dissents from postponing argument and decision in the three cases presently here for *Bolling et al. v. Sharpe et al.*, in the United States Court of Appeals for the District of Columbia Circuit.

App. 76

347 U.S. 483
74 S.Ct. 686
98 L.Ed. 873
BROWN et al.

v.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KAN., et al. BRIGGS et al. v. ELLIOTT et al. DAVIS et al. v. COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VA., et al. GEBHART et al. v. BELTON et al.

Nos. 1, 2, 4, 10.

Reargued Dec. 7, 8, 9, 1953.
Decided May 17, 1954.

[Syllabus from pages 483-484 intentionally omitted]

Page 484

No. 1:

Mr. Robert L. Carter, New York City, for appellants Brown and others.

Mr. Paul E. Wilson, Topeka, Kan., for appellees Board of Education of Topeka and others.

Nos. 2, 4:

Messrs. Spottswood Robinson III, Thurgood Marshall, New York City, for appellants Briggs and Davis and others.

App. 77

Messrs. John W. Davis,

Page 485

T. Justin Moore, J. Lindsay Almond, Jr., Richmond, Va.,
for appellees Elliott and County School Board of Prince
Edward County and others.

Asst. Atty. Gen. J. Lee Rankin for United States
amicus curiae by special leave of Court.

No. 10:

Mr. H. Albert Young, Wilmington, Del., for petition-
ers Gebhart et al.

Mr. Jack Greenberg, Thurgood Marshall, New
York City, for respondents Belton et al.

Page 486

Mr. Chief Justice WARREN delivered the opinion
of the Court.

These cases come to us from the States of Kansas,
South Carolina, Virginia, and Delaware. They are
premised on different facts and different local condi-
tions, but a common legal question justifies their con-
sideration together in this consolidated opinion.¹

¹ In the Kansas case, *Brown v. Board of Education*, the plain-
tiffs are Negro children of elementary school age residing in To-
peka. They brought this action in the United States District Court
for the District of Kansas to enjoin enforcement of a Kansas stat-
ute which permits, but does not require, cities of more than 15,000
population to maintain separate school facilities for Negro and
white students. Kan.Gen.Stat.(1949), § 72-1724. Pursuant to that
authority, the Topeka Board of Education elected to establish

segregated elementary schools. Other public schools in the community, however, are operated on a nonsegregated basis. The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, 28 U.S.C.A. §§ 2281 and 2284, found that segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. 98 F.Supp. 797. The case is here on direct appeal under 28 U.S.C. § 1253, 28 U.S.C.A. § 1253.

In the South Carolina case, *Briggs v. Elliott*, the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. They brought this action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. S.C.Const., Art. XI, § 7; S.C.Code 1942 § 5377. The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, 28 U.S.C.A. §§ 2281, 2284, denied the requested relief. The court found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to equalize the facilities. But the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 98 F.Supp. 529. This Court vacated the District Court's judgment and remanded the case for the purpose of obtaining the court's views on a report filed by the defendants concerning the progress made in the equalization program. 342 U.S. 350, 72 S.Ct. 327, 96 L.Ed. 392. On remand, the District Court found that substantial equality had been achieved except for buildings and that the defendants were proceeding to rectify this inequality as well. 103 F.Supp. 920. The case is again here on direct appeal under 28 U.S.C. § 1253, 28 U.S.C.A. § 1253.

In the Virginia case, *Davis v. County School Board*, the plaintiffs are Negro children of high school age residing in Prince Edward county. They brought this action in the United States District Court for the Eastern District of Virginia to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in

public schools. Va.Const., § 140; Va.Code 1950 § 22-221. The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, 28 U.S.C.A. §§ 2281 and 2284, denied the requested relief. The court found the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forthwith to provide substantially equal curricula and transportation and to 'proceed with all reasonable diligence and dispatch to remove' the inequality in physical plant. But, as in the South Carolina case, the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 103 F.Supp. 337. The case is here on direct appeal under 28 U.S.C. § 1253, 28 U.S.C.A. § 1253.

In the Delaware case, *Gebhart v. Belton*, the plaintiffs are Negro children of both elementary and high school age residing in New Castle County. They brought this action in the Delaware Court of Chancery to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Del.Const. Art. X, § 2; Del.Rev.Code, 1935, § 2631, 14 Del.C. § 141. The Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children, on the ground that the Negro schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance involved in travel. Del.Ch., 87 A.2d 862. The Chancellor also found that segregation itself results in an inferior education for Negro children (see note 10, *infra*), but did not rest his decision on that ground. 87 A.2d at page 865. The Chancellor's decree was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished. 91 A.2d 137, 152. The defendants, contending only that the Delaware courts had erred in ordering the immediate admission of the Negro plaintiffs to the white schools, applied to this Court for certiorari. The writ was granted, 344 U.S. 891, 73 S.Ct. 213, 97 L.Ed. 689. The plaintiffs, who were successful below, did not submit a cross-petition.

Page 487

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance,

Page 488

they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called 'separate but equal' doctrine announced by this Court in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not 'equal' and cannot be made 'equal,' and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the

question presented, the Court took jurisdiction.² Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.³

Page 489

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

² 344 U.S. 1, 73 S.Ct. 1, 97 L.Ed. 3, Id., 344 U.S. 141, 73 S.Ct. 124, 97 L.Ed. 152, *Gebhart v. Belton*, 344 U.S. 891, 73 S.Ct. 213, 97 L.Ed. 689.

³ 345 U.S. 972, 73 S.Ct. 1118, 97 L.Ed. 1388. The Attorney General of the United States participated both Terms as *amicus curiae*.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time.⁴ In the South, the movement toward free common schools, sup-

Page 490

ported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate.

⁴ For a general study of the development of public education prior to the Amendment, see Butts and Cremin, *A History of Education in American Culture* (1953), Pts. I, II; Cubberley, *Public Education in the United States* (1934 ed.), cc.II-XII. School practices current at the time of the adoption of the Fourteenth Amendment are described in Butts and Cremin, *supra*, at 269–275; Cubberley, *supra*, at 288–339, 408–431; Knight, *Public Education in the South* (1922), cc.VIII, IX. See also H. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871). Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South (e.g., the rural character of the South and the different regional attitudes toward state assistance) are well explained in Cubberley, *supra*, at 408–423. In the country as a whole, but particularly in the South, the War virtually stopped all progress in public education. *Id.*, at 427–428. The low status of Negro education in all sections of the country, both before and immediately after the War, is described in Beale, *A History of Freedom of Teaching in American Schools* (1941), 112–132, 175–195. Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. Cubberley, *supra*, at 563–565.

In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race.⁵ The doctrine of

⁵ In *re Slaughter-House Cases*, 1873, 16 Wall. 36, 67–72, 21 L.Ed. 394; *Strauder v. West Virginia*, 1880, 100 U.S. 303, 307–308, 25 L.Ed. 664.

‘It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. 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

Page 491

'separate but equal' did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson*, supra, involving not education but transportation.⁶ American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the 'separate but equal' doctrine in the field of public education.⁷ In *Cumming v. Board of Education of Richmond County*, 175 U.S. 528, 20 S.Ct. 197, 44 L.Ed. 262, and *Gong Lum v. Rice*, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172, the validity of the doctrine

primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of 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, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.'

See also *State of Virginia v. Rives*, 1879, 100 U.S. 313, 318, 25 L.Ed. 667; *Ex parte Virginia*, 1879, 100 U.S. 339, 344–345, 25 L.Ed. 676.

⁶ The doctrine apparently originated in *Roberts v. City of Boston*, 1850, 5 Cush. 198, 59 Mass. 198, 206, upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. Mass. Acts 1855, c. 256. But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

⁷ See also *Berea College v. Kentucky*, 1908, 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81.

itself was not challenged.⁸ In more recent cases, all on the graduate school

Page 492

level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208; *Sipuel v. Board of Regents of University of Oklahoma*, 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. 247; *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114; *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter*, *supra*, the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications

⁸ In the *Cumming* case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for Negro children. Similarly, in the *Gong Lum* case, the plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with Negro children and requiring him to attend a Negro school.

and salaries of teachers, and other 'tangible' factors.⁹ Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout

Page 493

the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the

⁹ In the Kansas case, the court below found substantial equality as to all such factors. 98 F.Supp. 797, 798. In the South Carolina case, the court below found that the defendants were proceeding 'promptly and in good faith to comply with the court's decree.' 103 F.Supp. 920, 921. In the Virginia case, the court below noted that the equalization program was already 'afoot and progressing' 103 F.Supp. 337, 341; since then, we have been advised, in the Virginia Attorney General's brief on reargument, that the program has now been completed. In the Delaware case, the court below similarly noted that the state's equalization program was well under way. 91 A.2d 137, 149.

importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt v. Painter*, *supra* (339 U.S. 629, 70 S.Ct. 850), in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on 'those qualities which are incapable of objective measurement but which make for greatness in a law school.' In *McLaurin v. Oklahoma State Regents*, *supra* (339 U.S. 637, 70 S.Ct. 853), the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ' * * * his ability to study, to engage in

discussions and exchange views with other students, and, in general, to learn his profession.’

Page 494

Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

‘Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.’¹⁰

¹⁰ A similar finding was made in the Delaware case: ‘I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated.’ 87 A.2d 862, 865.

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.¹¹ Any lan-

Page 495

guage in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.¹²

¹¹ K. B. Clark, *Effect of Prejudice and Discrimination on Personality Development* (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, *Personality in the Making* (1952), c. VI; Deutscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 *J. Psychol.* 259 (1948); Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 *Int. J. Opinion and Attitude Res.* 229 (1949); Brameld, *Educational Costs, in Discrimination and National Welfare* (MacIver, ed., 1949), 44–48; Frazier, *The Negro in the United States* (1949), 674–681. And see generally Myrdal, *An American Dilemma* (1944).

¹² See *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, concerning the Due Process Clause of the Fifth Amendment.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term.¹³ The Attorney General

¹³ ‘4. Assuming it is 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 this 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?

‘5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

‘(a) should this Court formulate detailed decrees in these cases;

‘(b) if so, what specific issues should the decrees reach;

‘(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

‘(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what

Page 496

of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.¹⁴

It is so ordered.

Cases ordered restored to docket for further argument on question of appropriate decrees.

procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

¹⁴ See Rule 42, Revised Rules of this Court, effective July 1, 1954, 28 U.S.C.A.

App. 92

349 U.S. 294

75 S.Ct. 753

99 L.Ed. 1083

Oliver BROWN, et al., Appellants,

v.

BOARD OF EDUCATION OF TOPEKA, Shawnee County, KANSAS, et al. Harry BRIGGS, Jr., et al., Appellants, v. R. W. ELLIOTT, et al. Dorothy E. DAVIS, et al., Appellants, v. COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al. Spottswood Thomas BOLLING, et al., Petitioners, v. C. Melvin SHARPE, et al. Francis B. GEBHART, et al., Petitioners, v. Ethel Louise BELTON, et al.

Nos. 1 to 5.

Argued April 11, 12, 13 and 14, 1955.

Decided May 31, 1955.

[Syllabus from pages 294-295 intentionally omitted]

Page 296

Mr. Robert L. Carter, New York City, for appellants in No. 1.

Mr. Harold R. Fatzer, Topeka, Kan., for appellees in No. 1.

Messrs. Thurgood Marshall, New York City, and Spottswood W. Robinson, III, Richmond, Va., for appellants in Nos. 2 and 3.

App. 93

Messrs. S. E. Rogers, Summerton, S.C., and Robert McC. Figg, Jr., Charleston, S.C., for appellees in No. 2.

Messrs. Archibald G. Robertson, Richmond, Va., and J. Lindsay Almond, Jr., Atty. Gen., for appellees in No. 3.

Messrs. George E. C. Hayes and James M. Nabrit, Jr., Washington, D.C., for petitioners in No. 4.

Mr. Milton D. Korman, Washington, D.C., for respondents in No. 4.

Page 297

Mr. Joseph Donald Craven, Wilmington, Del., for petitioners in No. 5.

Mr. Louis L. Redding, Wilmington, Del., for respondents in No. 5.

Messrs. Richard W. Ervin and Ralph E. Odum, Tallahassee, Fla., for State of Florida, I. Beverly Lake, Raleigh, N.C., for State of North Carolina, Thomas J. Gentry, Little Rock, Ark., for State of Arkansas, Mac Q. Williamson, Oklahoma, City, Okl., for State of Oklahoma, C. Ferdinand Sybert, Ellicott City, Md., for State of Maryland, John Ben Shepperd and Burnell Waldrep, Austin, Tex., for State of Texas, Sol. Gen. Simon E. Sobeloff, Washington, D.C., for the United States, amici curiae.

[Amicus Curiae Information from page 297 intentionally omitted]

Mr. Chief Justice WARREN delivered the opinion of the Court.

These cases were decided on May 17, 1954. The opinions of that date,¹ declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle. There remains for consideration the manner in which relief is to be accorded.

Because these cases arose under different local conditions and their disposition will involve a variety of local problems, we requested further argument on the question of relief.² In view of the nationwide importance

¹ 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884.

² Further argument was requested on the following questions, 347 U.S. 483, 495–496, note 13, 74 S.Ct. 686, 692, 98 L.Ed. 873, previously propounded by the Court:

‘4. Assuming it is 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 this 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?

‘5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

of the decision, we invited the Attorney General of the United

Page 299

States and the Attorneys General of all states requiring or permitting racial discrimination in public education to present their views on that question. The parties, the United States, and the States of Florida, North Carolina, Arkansas, Oklahoma, Maryland, and Texas filed briefs and participated in the oral argument.

These presentations were informative and helpful to the Court in its consideration of the complexities arising from the transition to a system of public education freed of racial discrimination. The presentations also demonstrated that substantial steps to eliminate racial discrimination in public schools have already been taken, not only in some of the communities in which these cases arose, but in some of the states appearing as amici curiae, and in other states as well. Substantial progress has been made in the District of Columbia and in the communities in Kansas and Delaware involved in this litigation. The defendants in the

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- “(a) should this Court formulate detailed decrees in these cases;
 - “(b) if so, what specific issues should the decrees reach;
 - “(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;
 - “(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?”

cases coming to us from South Carolina and Virginia are awaiting the decision of this Court concerning relief.

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.³

Page 300

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies⁴ and by a facility for adjusting and reconciling public and private needs.⁵

³ The cases coming to us from Kansas, South Carolina, and Virginia were originally heard by three-judge District Courts convened under 28 U.S.C. §§ 2281 and 2284, 28 U.S.C.A. §§ 2281 and 2284. These cases will accordingly be remanded to those three-judge courts. See *Briggs v. Elliott*, 342 U.S. 350, 72 S.Ct. 327, 96 L.Ed. 392.

⁴ See *Alexander v. Hillman*, 296 U.S. 222, 239, 56 S.Ct. 204, 209, 80 L.Ed. 192.

⁵ See *Hecht Co. v. Bowles*, 321 U.S. 321, 329–330, 64 S.Ct. 587, 591, 592, 88 L.Ed. 754.

These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools

Page 301

on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.

The judgments below, except that in the Delaware case, are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases. The judgment in the Delaware case—ordering the immediate admission of the plaintiffs to schools previously attended only by white children—is affirmed on the basis of the principles stated in our May 17, 1954, opinion, but the case is remanded to the Supreme Court of Delaware for such further proceedings as that Court may deem necessary in light of this opinion.

It is so ordered.

Judgments, except that in case No. 5, reversed and cases remanded with directions; judgment in case No. 5 affirmed and case remanded with directions.

App. 99

163 U.S. 537
16 S.Ct. 1138
41 L.Ed. 256
PLESSY

v.

FERGUSON.

No. 210.

May 18, 1896.

Page 538

This was a petition for writs of prohibition and certiorari originally filed in the supreme court of the state by Plessy, the plaintiff in error, against the Hon. John H. Ferguson, judge of the criminal district court for the parish of Orleans, and setting forth, in substance, the following facts:

That petitioner was a citizen of the United States and a resident of the state of Louisiana, of mixed descent, in the proportion of seven-eighths Caucasian and one-eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right, privilege, and immunity secured to the citizens of the United States of the white race by its constitution and laws; that on June 7, 1892, he engaged and paid for a first-class passage on the East Louisiana Railway, from New Orleans to Covington, in the same state, and thereupon entered a passenger train, and took possession of a vacant seat in a coach where passengers of the white race were accommodated; that such railroad company was

incorporated by the laws of Louisiana as a common carrier, and was not authorized to distinguish between citizens according to their race, but, notwithstanding this, petitioner was required by the conductor, under penalty of ejection from said train and imprisonment, to vacate said coach, and occupy another seat, in a coach assigned by said company for persons not of the white race, and for no other reason than that petitioner was of the colored race; that, upon petitioner's refusal to comply with such order, he was, with the aid of a police officer, forcibly ejected from said coach, and hurried off to, and imprisoned in, the parish jail of

Page 539

New Orleans, and there held to answer a charge made by such officer to the effect that he was guilty of having criminally violated an act of the general assembly of the state, approved July 10, 1890, in such case made and provided.

The petitioner was subsequently brought before the recorder of the city for preliminary examination, and committed for trial to the criminal district court for the parish of Orleans, where an information was filed against him in the matter above set forth, for a violation of the above act, which act the petitioner affirmed to be null and void, because in conflict with the constitution of the United States; that petitioner interposed a plea to such information, based upon the unconstitutionality of the act of the general assembly, to which the district attorney, on behalf of the state, filed a demurrer; that, upon issue being joined upon such

demurrer and plea, the court sustained the demurrer, overruled the plea, and ordered petitioner to plead over to the facts set forth in the information, and that, unless the judge of the said court be enjoined by a writ of prohibition from further proceeding in such case, the court will proceed to fine and sentence petitioner to imprisonment, and thus deprive him of his constitutional rights set forth in his said plea, notwithstanding the unconstitutionality of the act under which he was being prosecuted; that no appeal lay from such sentence, and petitioner was without relief or remedy except by writs of prohibition and certiorari. Copies of the information and other proceedings in the criminal district court were annexed to the petition as an exhibit.

Upon the filing of this petition, an order was issued upon the respondent to show cause why a writ of prohibition should not issue, and be made perpetual, and a further order that the record of the proceedings had in the criminal cause be certified and transmitted to the supreme court.

To this order the respondent made answer, transmitting a certified copy of the proceedings, asserting the constitutionality of the law, and averring that, instead of pleading or admitting that he belonged to the colored race, the said Plessy declined and refused, either by pleading or otherwise, to ad-

Page 540

mit that he was in any sense or in any proportion a colored man.

The case coming on for hearing before the supreme court, that court was of opinion that the law under which the prosecution was had was constitutional and denied the relief prayed for by the petitioner (Ex parte Plessy, 45 La. Ann. 80, 11 South. 948); whereupon petitioner prayed for a writ of error from this court, which was allowed by the chief justice of the supreme court of Louisiana.

Mr. Justice Harlan dissenting.

A. W. Tourgee and S. F. Phillips, for plaintiff in error.

Alex. Porter Morse, for defendant in error.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

This case turns upon the constitutionality of an act of the general assembly of the state of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. Acts 1890, No. 111, p. 152.

The first section of the statute enacts 'that all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so

as to secure separate accommodations: provided, that this section shall not be construed to apply to street railroads. No person or persons shall be permitted to occupy seats in coaches, other than the ones assigned to them, on account of the race they belong to.'

By the second section it was enacted 'that the officers of such passenger trains shall have power and are hereby required

Page 541

to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison, and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this state.'

The third section provides penalties for the refusal or neglect of the officers, directors, conductors, and

employees of railway companies to comply with the act, with a proviso that 'nothing in this act shall be construed as applying to nurses attending children of the other race.' The fourth section is immaterial.

The information filed in the criminal district court charged, in substance, that Plessy, being a passenger between two stations within the state of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong. Neither in the information nor plea was his particular race or color averred.

The petition for the writ of prohibition averred that petitioner was seven-eighths Caucasian and one-eighth African blood; that the mixture of colored blood was not discernible in him; and that he was entitled to every right, privilege, and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate

Page 542

said coach, and take a seat in another, assigned to persons of the colored race, and, having refused to comply with such demand, he was forcibly ejected, with the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the above act.

The constitutionality of this act is attacked upon the ground that it conflicts both with the thirteenth amendment of the constitution, abolishing slavery, and the fourteenth amendment, which prohibits certain restrictive legislation on the part of the states.

1. That it does not conflict with the thirteenth amendment, which abolished slavery and involuntary servitude, except § a punishment for crime, is too clear for argument. Slavery implies involuntary servitude,— a state of bondage; the ownership of mankind as a chattel, or, at least, the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services. This amendment was said in the Slaughter-House Cases, 16 Wall. 36, to have been intended primarily to abolish slavery, as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade, when they amounted to slavery or involuntary servitude, and that the use of the word ‘servitude’ was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name. It was intimated, however, in that case, that this amendment was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern states, imposing upon the colored race onerous disabilities and burdens, and curtailing their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value; and that the fourteenth amendment was devised to meet this exigency.

So, too, in the Civil Rights Cases, 109 U.S. 3, 3 Sup. Ct. 18, it was said that the act of a mere individual, the owner of an inn, a public conveyance or place of amusement, refusing accommodations to colored people, cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant, but

Page 543

only as involving an ordinary civil injury, properly cognizable by the laws of the state, and presumably subject to redress by those laws until the contrary appears. 'It would be running the slavery question into the ground,' said Mr. Justice Bradley, 'to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.'

A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude. Indeed, we do not understand that the thirteenth amendment is strenuously relied upon by the plaintiff in error in this connection.

2. By the fourteenth amendment, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are made citizens of the

United States and of the state wherein they reside; and the states are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty, or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws.

The proper construction of this amendment was first called to the attention of this court in the Slaughter-House Cases, 16 Wall. 36, which involved, however, not a question of race, but one of exclusive privileges. The case did not call for any expression of opinion as to the exact rights it was intended to secure to the colored race, but it was said generally that its main purpose was to establish the citizenship of the negro, to give definitions 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 commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply

the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.

One of the earliest of these cases is that of *Roberts v. City of Boston*, 5 Cush. 198, in which the supreme judicial court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools. 'The great principle,' said Chief Justice Shaw, 'advanced by the learned and eloquent advocate for the plaintiff [Mr. Charles Sumner], is that, by the constitution and laws of Massachusetts, all persons, without distinction of age or sex, birth or color, origin or condition, are equal before the law. * * * But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and

protection of the law for their maintenance and security.' It was held that the powers of the committee extended to the establish-

Page 545

ment of separate schools for children of different ages, sexes and colors, and that they might also establish special schools for poor and neglected children, who have become too old to attend the primary school, and yet have not acquired the rudiments of learning, to enable them to enter the ordinary schools. Similar laws have been enacted by congress under its general power of legislation over the District of Columbia (sections 281-283, 310, 319, Rev. St. D. C.), as well as by the legislatures of many of the states, and have been generally, if not uniformly, sustained by the courts. *State v. McCann*, 21 Ohio St. 210; *Lehew v. Brummell* (Mo. Sup.) 15 S. W. 765; *Ward v. Flood*, 48 Cal. 36; *Bertonneau v. Directors of City Schools*, 3 Woods, 177, Fed. Cas. No. 1,361; *People v. Gallagher*, 93 N. Y. 438; *Cory v. Carter*, 48 Ind. 337; *Dawson v. Lee*, 83 Ky. 49.

Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the state. *State v. Gibson*, 36 Ind. 389.

The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters, and railway carriages has been frequently drawn by this court. Thus, in *Strauder v. West Virginia*, 100 U. S. 303,

it was held that a law of West Virginia limiting to white male persons 21 years of age, and citizens of the state, the right to sit upon juries, was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step towards reducing them to a condition of servility. Indeed, the right of a colored man that, in the selection of jurors to pass upon his life, liberty, and property, there shall be no exclusion of his race, and no discrimination against them because of color, has been asserted in a number of cases. *Virginia v. Rivers*, 100 U. S. 313; *Neal v. Delaware*, 103 U. S. 370; *ush v. Com.*, 107 U. S. 110, 1 Sup. Ct. 625; *Gibson v. Mississippi*, 162 U. S. 565, 16 Sup. Ct. 904. So, where the laws of a particular locality or the charter of a particular railway corporation has provided that no person shall be excluded from the cars on account of

Page 546

color, we have held that this meant that persons of color should travel in the same car as white ones, and that the enactment was not satisfied by the company providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively to white persons. *Railroad Co. v. Brown*, 17 Wall. 445.

Upon the other hand, where a statute of Louisiana required those engaged in the transportation of passengers among the states to give to all persons traveling within that state, upon vessels employed in that business, equal rights and privileges in all parts of the

vessel, without distinction on account of race or color, and subjected to an action for damages the owner of such a vessel who excluded colored passengers on account of their color from the cabin set aside by him for the use of whites, it was held to be, so far as it applied to interstate commerce, unconstitutional and void. *Hall v. De Cuir*, 95 U. S. 485. The court in this case, however, expressly disclaimed that it had anything whatever to do with the statute as a regulation of internal commerce, or affecting anything else than commerce among the states.

In the *Civil Rights Cases*, 109 U. S. 3, 3 Sup. Ct. 18, it was held that an act of congress entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, on land or water, theaters, and other places of public amusement, 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 was corrective legislation, such as might be necessary or proper for counter-acting and redressing the effect 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 upon subjects that are within the

Page 547

domain of state legislation, but to provide modes of relief against state legislation or state action of the kind referred to. It does not authorize congress to create a code of municipal law for the regulation of private rights, but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the fourteenth amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect.’

Much nearer, and, indeed, almost directly in point, is the case of the Louisville, N. O. & T. Ry. Co. v. State, 133 U. S. 587, 10 Sup. Ct. 348, wherein the railway company was indicted for a violation of a statute of Mississippi, enacting that all railroads carrying passengers should provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition, so as to secure separate accommodations. The case was

presented in a different aspect from the one under consideration, inasmuch as it was an indictment against the railway company for failing to provide the separate accommodations, but the question considered was the constitutionality of the law. In that case, the supreme court of Mississippi (66 Miss. 662, 6 South. 203) had held that the statute applied solely to commerce within the state, and, that being the construction of the state statute by its highest court, was accepted as conclusive. 'If it be a matter,' said the court (page 591, 133 U. S., and page 348, 10 Sup. Ct.), 'respecting commerce wholly within a state, and not interfering with commerce between the states, then, obviously, there is no violation of the commerce clause of the federal constitution. * * * No question arises under this section as to the power of the state to separate in different compartments interstate pas-

Page 548

sengers, or affect, in any manner, the privileges and rights of such passengers. All that we can consider is whether the state has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the state is no invasion of the power given to congress by the commerce clause.'

A like course of reasoning applies to the case under consideration, since the supreme court of Louisiana, in the case of State v. Judge, 44 La. Ann. 770, 11 South. 74, held that the statute in question did not apply to interstate passengers, but was confined in its

application to passengers traveling exclusively within the borders of the state. The case was decided largely upon the authority of *Louisville, N. O. & T. Ry. Co. v. State*, 66 Miss. 662, 6 South, 203, and affirmed by this court in 133 U. S. 587, 10 Sup. Ct. 348. In the present case no question of interference with interstate commerce can possibly arise, since the East Louisiana Railway appears to have been purely a local line, with both its termini within the state of Louisiana. Similar statutes for the separation of the two races upon public conveyances were held to be constitutional in *Railroad v. Miles*, 55 Pa. St. 209; *Day v. Owen* 5 Mich. 520; *Railway Co. v. Williams*, 55 Ill. 185; *Railroad Co. v. Wells*, 85 Tenn. 613; 4 S. W. 5; *Railroad Co. v. Benson*, 85 Tenn. 627, 4 S. W. 5; *The Sue*, 22 Fed. 843; *Logwood v. Railroad Co.*, 23 Fed. 318; *McGuinn v. Forbes*, 37 Fed. 639; *People v. King* (N. Y. App.) 18 N. E. 245; *Houck v. Railway Co.*, 38 Fed. 226; *Heard v. Railroad Co.*, 3 Inter St. Commerce Com. R. 111, 1 Inter St. Commerce Com. R. 428.

While we think the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the fourteenth amendment, we are not prepared to say that the conductor, in assigning passengers to the coaches according to their race, does not act at his peril, or that the provision of the second section of the act that denies to the passenger compensa-

tion in damages for a refusal to receive him into the coach in which he properly belongs is a valid exercise of the legislative power. Indeed, we understand it to be conceded by the state's attorney that such part of the act as exempts from liability the railway company and its officers is unconstitutional. The power to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular state, is to be deemed a white, and who a colored, person. This question, though indicated in the brief of the plaintiff in error, does not properly arise upon the record in this case, since the only issue made is as to the unconstitutionality of the act, so far as it requires the railway to provide separate accommodations, and the conductor to assign passengers according to their race.

It is claimed by the plaintiff in error that, in an mixed community, the reputation of belonging to the dominant race, in this instance the white race, is 'property,' in the same sense that a right of action or of inheritance is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man, and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called 'property.' Upon the other hand, if he be a colored man, and be so assigned, he has been deprived of no

property, since he is not lawfully entitled to the reputation of being a white man.

In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side

Page 550

of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class. Thus, in *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, it was held by this court that a municipal ordinance of the city of San Francisco, to regulate the carrying on of public laundries within the limits of the municipality, violated the provisions of the constitution of the United States, if it conferred upon the municipal authorities arbitrary power, at their own will, and without regard to discretion, in the

legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying or the propriety of the places selected for the carrying on of the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race. While this was the case of a municipal ordinance, a like principle has been held to apply to acts of a state legislature passed in the exercise of the police power. *Railroad Co. v. Husen*, 95 U. S. 465; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, and cases cited on page 700, 161 U. S., and page 714, 16 Sup. Ct.; *Daggett v. Hudson*, 43 Ohio St. 548, 3 N. E. 538; *Capen v. Foster*, 12 Pick. 485; *State v. Baker*, 38 Wis. 71; *Monroe v. Collins*, 17 Ohio St. 665; *Hulseman v. Rems*, 41 Pa. St. 396; *Osman v. Riley*, 15 Cal. 48.

So far, then, as a conflict with the fourteenth 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

Page 551

is unreasonable, or more obnoxious to the fourteenth 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.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. As was said by the court of appeals of New York in *People v. Gallagher*, 93 N. Y. 438, 448: "This end can neither be accomplished nor promoted by laws which conflict with the general

sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed.' Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly

Page 552

or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.

It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states; some holding that any visible admixture of black blood stamps the person as belonging to the colored race (*State v. Chavers*, 5 Jones [N. C.] 1); others, that it depends upon the preponderance of blood (*Gray v. State*, 4 Ohio, 354; *Monroe v. Collins*, 17 Ohio St. 665); and still others, that the predominance of white blood must only be in the proportion of three-fourths (*People v. Dean*, 14 Mich. 406; *Jones v. Com.*, 80 Va. 544). But these are questions to be determined under the laws of

each state, and are not properly put in issue in this case. Under the allegations of his petition, it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race.

The judgment of the court below is therefore affirmed.

Mr. Justice BREWER did not hear the argument or participate in the decision of this case.

Mr. Justice HARLAN dissenting.

By the Louisiana statute the validity of which is here involved, all railway companies

(other than street-railroad companies) carry passengers in that state are required to have separate but equal accommodations for white and colored persons, 'by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations.' Under this statute, no colored person is permitted to occupy a seat in a coach assigned to white persons; nor any white person to occupy a seat in a coach assigned to colored persons. The managers of the railroad are not allowed to exercise any discretion in the premises, but are required to assign each passenger to some coach or compartment set apart for the

exclusive use of his race. If a passenger insists upon going into a coach or compartment not set apart for persons of his race,

Page 553

he is subject to be fined, or to be imprisoned in the parish jail. Penalties are prescribed for the refusal or neglect of the officers, directors, conductors, and employees of railroad companies to comply with the provisions of the act.

Only 'nurses attending children of the other race' are excepted from the operation of the statute. No exception is made of colored attendants traveling with adults. A white man is not permitted to have his colored servant with him in the same coach, even if his condition of health requires the constant personal assistance of such servant. If a colored maid insists upon riding in the same coach with a white woman whom she has been employed to serve, and who may need her personal attention while traveling, she is subject to be fined or imprisoned for such an exhibition of zeal in the discharge of duty.

While there may be in Louisiana persons of different races who are not citizens of the United States, the words in the act 'white and colored races' necessarily include all citizens of the United States of both races residing in that state. So that we have before us a state enactment that compels, under penalties, the separation of the two races in railroad passenger coaches, and makes it a crime for a citizen of either race to enter a

coach that has been assigned to citizens of the other race.

Thus, the state regulates the use of a public highway by citizens of the United States solely upon the basis of race.

However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the constitution of the United States.

That a railroad is a public highway, and that the corporation which owns or operates it is in the exercise of public functions, is not, at this day, to be disputed. Mr. Justice Nelson, speaking for this court in *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 382, said that a common carrier was in the exercise 'of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned.' Mr. Justice Strong, delivering the judgment of

Page 554

this court in *Olcott v. Supervisors*, 16 Wall. 678, 694, said: 'That railroads, though constructed by private corporations, and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question arose whether a state's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly, it could not, unless taking land for such a purpose by such an

agency is taking land for public use. The right of eminent domain nowhere justifies taking property for a private use. Yet it is a doctrine universally accepted that a state legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be built by a private corporation, is an act done for a public use? So, in *Township of Pine Grove v. Talcott*, 19 Wall. 666, 676: 'Though the corporation [a railroad company] was private, its work was public, as much so as if it were to be constructed by the state.' So, in *Inhabitants of Worcester v. Western R. Corp.*, 4 Metc. (Mass.) 564: 'The establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes, therefore, like a canal, turnpike, or highway, a public easement.' 'It is true that the real and personal property, necessary to the establishment and management of the railroad, is vested in the corporation; but it is in trust for the public.'

In respect of civil rights, common to all citizens, the constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that

any legislative body or judicial tribunal may have regard to the

Page 555

race of citizens when the civil rights of those citizens are involved. Indeed, such legislation as that here in question is inconsistent 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.

The thirteenth amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. But, that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the fourteenth amendment, which added greatly to the dignity and glory of American citizenship, and to the security of personal liberty, by declaring that '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,' and that '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.’ These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it was declared by the fifteenth amendment that ‘the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude.’

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely, to secure ‘to a race recently emancipated, a race that through

Page 556

many generations have been held in slavery, all the civil rights that the superior race enjoy.’ They declared, in legal effect, this court has further said, ‘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.’ We also said: ‘The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of 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, lessening the security of their enjoyment of the rights which others enjoy; and discriminations which are steps towards reducing them to the condition of a subject race.’ It was, consequently, adjudged that a state law that excluded citizens of the colored race from juries, because of their race, however well qualified in other respects to discharge the duties of jurymen, was repugnant to the fourteenth amendment. *Strauder v. West Virginia*, 100 U. S. 303, 306, 307; *Virginia v. Rives*, *Id.* 313; *Ex parte Virginia*, *Id.* 339; *Neal v. Delaware*, 103 U. S. 370, 386; *Bush v. Com.*, 107 U. S. 110, 116, 1 Sup. Ct. 625. At the present term, referring to the previous adjudications, this court declared that ‘underlying all of those decisions is the principle that the constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government or the states against any citizen because of his race. All citizens are equal before the law.’ *Gibson v. State*, 162 U. S. 565, 16 Sup. Ct. 904.

The decisions referred to show the scope of the recent amendments of the constitution. They also show that it is not within the power of a state to prohibit colored citizens, because of their race, from participating as jurors in the administration of justice.

It was said in argument that the statute of Louisiana does

not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of commodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. The fundamental objection, therefore, to the statute, is that it interferes with the personal freedom of citizens. 'Personal liberty,' it has been well said, 'consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law.' 1 Bl. Comm. *134. If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so; and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens

of the white and black races from traveling in the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a state can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street, and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road

Page 558

or street? Why may it not require sheriffs to assign whites to one side of a court room, and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the state require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?

The answer given at the argument to these questions was that regulations of the kind they suggest would be unreasonable, and could not, therefore, stand before the law. Is it meant that the determination of questions of legislative power depends upon the inquiry whether the statute whose validity is questioned

is, in the judgment of the courts, a reasonable one, taking all the circumstances into consideration? A statute may be unreasonable merely because a sound public policy forbade its enactment. But I do not understand that the courts have anything to do with the policy or expediency of legislation. A statute may be valid, and yet, upon grounds of public policy, may well be characterized as unreasonable. Mr. Sedgwick correctly states the rule when he says that, the legislative intention being clearly ascertained, 'the courts have no other duty to perform than to execute the legislative will, without any regard to their views as to the wisdom or justice of the particular enactment.' Sedg. St. & Const. Law, 324. There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristic that the three departments of government are co-ordinate and separate. Each must keep within the limits defined by the constitution. And the courts best discharge their duty by executing the will of the law-making power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives. Statutes must always have a reasonable construction. Sometimes they are to be construed strictly, sometimes literally, in order to carry out the legisla-

Page 559

tive will. But, however construed, the intent of the legislature is to be respected if the particular statute in question is valid, although the courts, looking at the

public interests, may conceive the statute to be both unreasonable and impolitic. If the power exists to enact a statute, that ends the matter so far as the courts are concerned. The adjudged cases in which statutes have been held to be void, because unreasonable, are those in which the means employed by the legislature were not at all germane to the end to which the legislature was competent.

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

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.

It was adjudged in that case that the descendants of Africans who were imported into this country, and sold as slaves, were not included nor intended to be included under the word 'citizens' in the constitution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that, at time of the adoption of the constitution, they were 'considered as a subordinate and inferior class of beings, who had been subjugated by the dominant

Page 560

race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them.' 17 How. 393, 404. The recent amendments of the constitution, it was supposed, had eradicated these principles from our institutions. But it seems that we have yet, in some of the states, a dominant race,—a superior class of citizens,—which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the constitution, by one of which the blacks of this country were made citizens of the United States and of the states in which they respectively reside, and whose

privileges and immunities, as citizens, the states are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race. State enactments regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat legitimate results of the

Page 561

war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and

black races in this country. That argument, if it can be properly regarded as one, is scarcely worthy of consideration; for social equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting.

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But, by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the state and nation, who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race. It is scarcely just to say that a colored citizen should not object to occupying a public coach assigned to his own race. He does not object, nor, perhaps, would he object to separate

coaches for his race if his rights under the law were recognized. But he does object, and he ought never to cease objecting, that citizens of the white and black races can be adjudged criminals because they sit, or claim the right to sit, in the same public coach on a public highway.

Page 562

The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution. It cannot be justified upon any legal grounds.

If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens,—our equals before the law. The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.

The result of the whole matter is that while this court has frequently adjudged, and at the present term has recognized the doctrine, that a state cannot, consistently with the constitution of the United States, prevent white and black citizens, having the required

qualifications for jury service, from sitting in the same jury box, it is now solemnly held that a state may prohibit white and black citizens from sitting in the same passenger coach on a public highway, or may require that they be separated by a 'partition' when in the same passenger coach. May it not now be reasonably expected that astute men of the dominant race, who affect to be disturbed at the possibility that the integrity of the white race may be corrupted, or that its supremacy will be imperiled, by contact on public highways with black people, will endeavor to procure statutes requiring white and black jurors to be separated in the jury box by a 'partition,' and that, upon retiring from the court room to consult as to their verdict, such partition, if it be a movable one, shall be taken to their consultation room, and set up in such way as to prevent black jurors from coming too close to their brother jurors of the white race. If the 'partition' used in the court room happens to be stationary, provision could be made for screens with openings through

Page 563

which jurors of the two races could confer as to their verdict without coming into personal contact with each other. I cannot see but that, according to the principles this day announced, such state legislation, although conceived in hostility to, and enacted for the purpose of humiliating, citizens of the United States of a particular race, would be held to be consistent with the constitution.

I do not deem it necessary to review the decisions of state courts to which reference was made in argument. Some, and the most important, of them, are wholly inapplicable, because rendered prior to the adoption of the last amendments of the constitution, when colored people had very few rights which the dominant race felt obliged to respect. Others were made at a time when public opinion, in many localities, was dominated by the institution of slavery; when it would not have been safe to do justice to the black man; and when, so far as the rights of blacks were concerned, race prejudice was, practically, the supreme law of the land. Those decisions cannot be guides in the era introduced by the recent amendments of the supreme law, which established universal civil freedom, gave citizenship to all born or naturalized in the United States, and residing here, obliterated the race line from our systems of governments, national and state, and placed our free institutions upon the broad and sure foundation of the equality of all men before the law.

I am of opinion that the state of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that state, and hostile to both the spirit and letter of the constitution of the United States. If laws of like character should be enacted in the several states of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law, would, it is true, have disappeared from our country; but there would remain a power in the states, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom, to regulate civil

rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community, called the

Page 564

‘People of the United States,’ for whom, and by whom through representatives, our government is administered. Such a system is inconsistent with the guaranty given by the constitution to each state of a republican form of government, and may be stricken down by congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding.

For the reason stated, I am constrained to withhold my assent from the opinion and judgment of the majority.
