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Supreme Court of the United States

October Term, 1952

No. 8

OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, *et al.*, *Appellants*,

vs.

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

BRIEF FOR THE

CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

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THE INTEREST OF THE CIO

This brief *amicus curiae* is submitted by the Congress of Industrial Organizations with the consent of the parties. The CIO is an organization dedicated to the maintenance and extension of our democratic rights and civil liberties and therefore has a deep interest in the elimination of segregation and discrimination from every phase of American life.

The CIO's interest is also direct and personal. The CIO, through its constituent organizations, is endeavoring to practice non-segregation and non-discrimination in the everyday functioning of union affairs. Repeatedly in the past this endeavor has been obstructed by statutes, ordinances, and regulations which require segregation in public dining places, public meeting halls, toilet facilities, etc. These laws attempt to require CIO unions to maintain "equal but separate" facilities in

their own semi-public buildings, despite the avowed desire of the membership to avoid segregation in any form.

These requirements, whether in the form of regulations, statutes or ordinances, rest constitutionally on a line of reasoning and authority identical with that relied on by the court below in the present case. The disposition which this Court makes of the case is therefore of real and direct interest to the Congress of Industrial Organizations in the regulation of its activities.

THE QUESTIONS BEFORE THE COURT

In this case, we have a segregated public school system in which the District Court has found that the physical facilities, curriculum and teaching staff provided in the Negro schools are substantially equal to those provided in the white schools.

The District Court, however, did not stop with its finding as to physical facilities. It also found, in line with the virtually unanimous opinion of social scientists, that

> "Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and deprive them of some of the benefits they would receive in a racially integrated school system." R. 246.

The District Court, nevertheless, refused to enjoin the maintenance of segregation. It held that the decisions of this Court, and, particularly *Plessy* v. *Ferguson,* required denial of the relief sought.

Hence this Court is now faced with the question which it found unnecessary to decide in *Sweatt* v. *Painter,* 339 U.S. 629, viz.: whether "*Plessy* v. *Ferguson* should be re-examined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation." *Id.* at 636.

ARGUMENT

In this brief *amicus* we shall, of course, not attempt to encompass the full range of the points argued by the parties to the case. Rather we shall seek simply to point up certain aspects of the case which might otherwise escape attention.

I

THE DISTRICT COURT MISINTERPRETED THE SWEATT AND McLAURIN DECISIONS

Plessy v. *Ferguson* established the broad doctrine that laws "requiring the separation of the two races in schools, theaters, and railway carriages" do not violate the 14th Amendment if the facilities provided for the two races are equal, 163 U.S. 537, 545. In recent years the Court has been repeatedly asked to repudiate that doctrine and to hold that the mere fact of compulsory separation constitutes a denial of the equal protection of the laws, forbidden by the 14th Amendment.

The Court has, however, thus far avoided either re-affirming or rejecting the *Plessy* doctrine. Instead, it has treated each case on its merits and, where inequality has been found, has directed that appropriate relief be granted. *Sweatt* v. *Painter,* 339 U.S. 629; *McLaurin* v. *Board of Regents,* 339 U.S. 637. This approach was said, in the *Sweatt* case, to be required by the established doctrine that "this Court will decide constitutional questions only when necessary to the disposition of the case at hand and such decisions will be drawn as narrowly as possible." 339 U.S. 629, 631.

The decisions of this Court in the *Sweatt* and *McLaurin* cases were, however, interpreted by the District Court in the present case as leaving intact the *Plessy* doctrine that the provision of separate but physically equal school facilities would not violate the equal protection clause of the 14th Amendment. Since the District Court found that the only inequality in the Topeka system was inherent in segregation itself, it concluded that the *Plessy* case controlled and dismissed the complaint.

This conclusion is obviously erroneous, as the decisions in the *Sweatt* and *McLaurin* cases themselves show. In those cases, the Court has implicitly limited the doctrine, if not the holding, of the *Plessy* case. The broad ruling of that case that the provision of "separate but equal" school systems is constitutionally valid necessarily presupposes that inequality does not arise from mere separation. If compulsory sep-

aration in itself creates inequality, "separate but equal" is a contradiction in terms. In the *Sweatt* and *McLaurin* cases, the Court did refuse to overrule the *Plessy* case directly. But it made it perfectly clear that it was simply refusing to reach the question of whether, as a matter of law, compulsory separation of the races *always* in itself means inequality. That is the question which is now before the Court.

Where it is shown that the facilities offered to Negroes in a particular case are not equal to those offered to whites because they are segregated, and also because they are physically inferior, there is no constitutional doctrine which requires that this Court shall decide the case on the second ground rather than the first. Both are claims of inequality under the laws. Either is available as the "narrow" basis for decision. The Court could hold that the inequality created by segregation was a sufficient basis for decision and therefore not reach the alleged difference in the physical facilities. Equally, it could hold that, the physical facilities being unequal, it need not pass upon the alleged inequality created by the enforced separation of the races. Or, as it did in the *Sweatt* case, it could look both at the difference in physical facilities and the difference in educational opportunity created by segregation itself. Neither approach is forbidden to the Court by its own doctrine of limited constitutional decision, if the decision is based upon the facts found in the record of the particular case. What is excluded by the "narrow" approach which the court has recently adopted is the broad generalization, implicit in the *Plessy* case, that separation in itself can *never* be a ground for showing inequality.

The generalization implicit in *Plessy* is clearly no longer the law. In the *Sweatt* case, the Court explicitly recognized the inequality in the educational opportunity offered to Negro law students by the State of Texas arising out of the very fact of separation. Referring to the fact that white students would be excluded from the Negro law school, the Court concluded:

> "With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he

would receive if admitted to the University of Texas Law School." 339 U.S. at 634.

In *McLaurin*, the issue was even clearer. In that case, McLaurin was offered the use of the identical physical facilities, the same faculty, the same curriculum, the same items—in short—which the District Court referred to in its findings of physical equality in the present case. But, because these were offered under segregated restrictions the Court found, on the facts of that case, that an unconstitutional inequality existed.

What the Court did in the *Sweatt* and *McLaurin* cases, therefore, seems to us to be this. The Court made no broad generalization as to whether compulsory segregation in itself constituted a violation of the 14th Amendment. The Court did not hold, at that time, that "separate" facilities were invalid. But it also did not hold that "equal but separate" facilities were valid. The Court in effect said that inequality can be created by compulsory segregation, and held as a matter of law that segregation *per se* created inequality in graduate and legal education. As to other kinds of education—and, indeed, as to other facilities than education which are provided by the state or regulated by it—the Court expressed no opinion.

In the present case public school education is before the Court. And the case comes here with an express finding that segregation in the public schools does create inequality. Unless the Court is prepared to rule that such a finding cannot stand as a matter of law, we submit that the *Sweatt* and *McLaurin* cases necessarily require that the decision below be reversed. Equality before the law does not require just that there be no substantial difference in the physical educational facilities offered by the state. Negro schools housed in a new building, with qualified teachers and well-balanced curricula still could not be said to be equal to similar schools for whites if each Negro school was deliberately, and by specific authority of the State, placed next door to a boiler factory so as to impair substantially the ability of the pupils to hear, and hence to learn. Yet it is an analogous impairment that the court below has here found. It has found that the ability of pupils

in the Negro schools to obtain the education offered to them is substantially impaired by the very fact of segregation. This impairment is the result of a deliberate policy specifically authorized by the state. If this be so, we do not understand how it can sensibly be argued that the Negro pupils are being afforded "the equal protection of the laws."

II

THE COURT SHOULD HOLD THAT ENFORCED SEGREGATION IS ILLEGAL PER SE.

This Court, in the *Sweatt* and *McLaurin* cases, refused to announce any broad principles concerning the validity of state-enforced segregation *per se*. It limited its conclusions to the specific cases of inequality which were before it.

It seems to us, however, that there are cogent arguments against such an approach. If the question of the validity of compulsory racial segregation were a new question, there is no doubt that the Court properly should hesitate to announce broad doctrine in this field. But the prior actions of the Court may have placed a larger responsibility upon it. In *Plessy* v. *Ferguson,* the Court decided broadly that compulsory racial segregation did not violate the 14th Amendment. With this broad pronunciamento on the record, it may very well be argued that the Court now has a responsibility, if not to reverse the *Plessy* case, at least to indicate some doubt as to the continued validity of its doctrine. By failing to do so, the Court is in effect telling the states that, absent any finding of inequality, the compulsory segregation of the races is constitutionally permissible. Whether the Court likes it or not, its continued silence on this broad question is taken by many, including the court below, to represent a positive statement that the doctrine of *Plessy* v. *Ferguson*, except as specifically modified, remains the law.

Even if we accept the Court's refusal to reach the broad issue of *Plessy* v. *Ferguson,* however, it may not be amiss to consider certain broader questions. To take one step at a time is not to deny the usefulness of looking forward to where you

are going. Such broadeer considerations, of course, need not be stated by the Court. But they are nevertheless relevant in the Court's decision as to whether it will take the immediate step before it.

Three considerations seem to us worthy of discussion. The first is the general question of the doctrine of *Plessy* v. *Ferguson* and the arguments which we believe have been erroneously addressed to the holding of that case. The second is the extent to which the compulsory nature of primary school education should be regarded as differentiating it from the cases of higher education already decided by the courts. Finally, we think that a word should be said concerning the "racial friction and tension"[1] which have been relied upon by some courts to justify their refusal to determine whether segregated education is, in fact, equal education.

1. *Compulsory intermingling is not the only alternative to compulsory segregation.* Much of the argument relating to the basic question of the validity of racial segregation under the 14th Amendment has, we believe, missed the point. For example, in the *Briggs* case, No. 101, this Term, it seems to have been assumed by the defendants that the only alternative to compulsory segregation is compulsory intermingling of the races. Testimony was offered by the defendants in that case to the effect that separation of the races in the public schools would occur even "if this issue should be settled on a voluntary basis" because if Negroes were given a choice as to whether to attend Negro schools or schools which were predominantly white, they would prefer to attend schools of their own race.[2]

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[1] *Briggs* v. *Elliott*, No. 101, this Term, R. 180.

[2] "Q. Do you know what the Negro's reaction would be to mixed schools?

. . . .

A. I could not predict what they would do but I have an opinion that is based upon what a number of Negro school administrators have said to me, that if this issue should be settled on a voluntary basis that you would have a continuance of substantially the same situation.

. . .

A good many Negroes, Negro school administrators have said that if they remain free to choose the schools to which they would go, they would prefer to have schools of their own race."

—*Briggs* v. *Elliott*, No. 101, this Term, R. 116–117

Argument based upon such testimony seems to us to miss the very point at issue. The essence of the whole segregation controversy lies in the distinction between a provision of law *permitting* individuals to separate themselves according to race and a provision *requiring* them so to separate. As we pointed out in the *Sweatt* and *McLaurin* cases, it is this important distinction which the Court itself ignored in *Plessy* v. *Ferguson*. A law permitting individuals to separate themselves according to race permits individuals to exercise their own freedom of choice, to respond in whatever way their prejudices or lack of prejudices may impel them. To require individuals so to separate permits no such choice. Prejudice is imposed by the constituted authority of the state without regard to the preferences of the individual. Yet this Court in the *Plessy* case treated the two together and assumed that they were the same. Thus the Court said that "we cannot say that a law which authorizes or even requires the separation of the two races in public conveyance" is violative of the 14th Amendment. 163 U.S. at 550. And the argument against the statute, the Court said, "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." 163 U.S. at 551.

The argument, of course, need make no such assumption. The alternatives are not enforced segregation or enforced commingling. Nor is the question whether a law may constitutionally *permit* the separation of the races. The alternative to enforced segregation is freedom of choice and the question is whether a state may deny that freedom to individuals and require them, willy-nilly, to separate according to race.

The Court could confuse the issue, as it did in the *Plessy* case, only because it implicitly assumed throughout the opinion that the Negro race was "inferior" [3] and that, given freedom of choice, all whites would refuse to associate with Negroes. On that assumption, and only on that assumption, the only alternatives were segregation and compulsory intermingling,

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[3] "If one race be inferior to the other socially," the Court said, "the Constitution of the United States cannot put them upon the same plane." 163 U.S. at 551.

and permissive separation was the same thing as compulsory separation.

The assumption is false. The Congress of Industrial Organizations is living proof that it is false. And, apart from matters of proof, certainly such an assumption, embodying itself the very prejudices at which the 14th Amendment was aimed, has no place in our constitutional doctrine.

2. *There are objections to segregation which are particularly applicable to the public schools.* These general concepts —that permissive separation is not the same as compulsory segregation and that the constitutional evil in all these cases is not the separation of the races but the denial to the individual of his right to choose to be separate or not—may, perhaps, be usefully applied in dealing with the particular kind of segregation problem here presented, viz: public school education.

Public school education is different from the graduate and legal education situations with which the Court dealt in the *Sweatt* and *McLaurin* cases. To pretend otherwise is foolish. But the only difference is not the *mores* of the community. There are other differences, and these differences weigh particularly against segregation in the public schools.

One such difference is the fact that public education is usually compulsory, while legal and graduate education is not. The state does compel children to go to school. And since it does, it may be argued that a different rule should apply to public school education than applies to other forms of education which the state offers on a voluntary basis. Cf. *Hamilton* v. *University of California,* 293 U.S. 245.

Compulsory segregation coupled with compulsory attendance is particularly objectionable. There is nothing which requires a state to compel attendance by each pupil at a specific school. In many communities it is customary to permit individual students, or their parents, to exercise a choice concerning the particular school which they will attend. That, in fact, is the pattern in the Topeka case now before the Court (R. 245). The fact that the state compels children to

go to school, in other words, need not necessarily mean that it must deny to them a choice of schools. It is possible, in the words of the testimony in the *Briggs* case, that this matter can "be settled on a voluntary basis." The appellants do not here complain that the state should compel Negroes to attend white schools. They complain only that it forbids those Negroes who want to attend the white schools from doing so. It may very well be true that most Negroes, if given a choice, will continue to attend schools which are predominantly attended by Negroes and that very few would choose to attend the predominantly white schools. But this lends no support whatsoever to the action of the state in denying to the Negroes the opportunity so to choose.

We do not mean, be it understood, that there is anything in the 14th Amendment which makes it mandatory that pupils be given a choice of school. We only mean that the elimination of compulsory segregation is not the same thing as compulsory attendance of whites at Negro schools, or Negroes at white schools, because the states can, wherever they now compel separation, offer separation on a voluntary basis. Even compulsory attendance at particular schools based on residential districting rests ultimately on the voluntary choice of residence. Negroes and whites would no more be compelled to attend the same schools under such regulations than were Negroes and whites compelled to live in the same neighborhood when compulsory residential segregation was declared invalid in *Buchanan* v. *Warley*, 245 U.S. 60.

If it eventually declares that the States are forbidden to enforce their constitutional and statutory declarations that no Negro shall ever be taught in the same public school as white, the Court will, it is true, necessarily limit the freedom of choice of some. Since public education is assumed to be compulsory and since it is possible that some Negroes will exercise the choice, if it is given to them, of attending the "white schools," it may very well be that some white children will be forced to attend schools in which there are some Negroes in attendance. That is the true measure, we submit, of the "compulsion" which would be involved in the invalidation of segre-

gation in the public schools.[4] Surely the Constitution does not recognize the right of the prejudiced to be free from the sight of those against whom they are prejudiced, or justify the imposition of restraints upon one segment of the community in order to satisfy the desire of some that there be such restraints.

Another difference between segregation in the public schools and segregation in the graduate schools is that the former affects the students at a younger and therefore more impressionable age. Students are not only unable to avoid segregation in the public schools, as by not attending, but are more adversely affected by it because they are younger. The testimony of sociologists is uniform as to the deleterious effects of segregation on Negro children, and in a different way, on white, and the younger the children the more these effects are accentuated.

3. *Threatened resentment by some whites is no basis for denying to Negroes the equal protection of the laws.* The District Court in this case made a finding of fact, based on evidence submitted to it, that the very fact of segregation reduced the educational opportunity of children required by the state to attend Negro schools. Similar evidence was offered in the South Carolina case, *Briggs* v. *Elliott*, No. 101. The Court there, however, refused to consider such evidence. It said that this question is not a question of constitutional right but of legislative policy, "which must be formulated not *in vacuo* or with doctrinaire disregard of existing conditions but in a realistic approach to the situations to which it is to be applied" (R. 180). The issue as to the effect of segregation upon educational opportunity, raised by the plaintiffs, it said, was on the same footing as the issue of "racial friction and tension" which was raised by the defendant. Neither question, it believed, should properly be resolved by the courts; both considerations were appropriate matters only for legislative judgment.

The essential error in this approach is that it reserves for

[4] If the defendants in the *Briggs* case are right in their contention that Negroes will prefer Negro schools, the "compulsion" will be zero—since there will be no Negro students in the white schools. The extent to which they are wrong is exactly the extent of the discrimination which is practiced against the Negroes under a segregated system.

legislative judgment by the states the balancing of rights protected by the Constitution, on the one hand, against other objectives presumably desired by the state, on the other. It is no answer to a claim that segregation creates inequality, and hence violates a constitutionally protected right, to say that the state, as a matter of legislative judgment, regards other considerations as more important.

There is no claim here that the elimination of segregation, and of the inequality which is created thereby, in the public schools would do more than create a "violent emotional reaction" in the communities (R. 114). There is no claim that there would be any immediate danger of open disturbances of the public peace. But even if there were such claims, they would be irrelevant. The Constitution does not say that all persons shall be given the equal protection of the laws insofar as it is convenient to do so. As this Court said in *Buchanan* v. *Warley,* 245 U.S. 60, in answer to an argument that segregation would promote the public peace by preventing race conflicts:

> "Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution."

Prediction is hazardous. Insofar, however, as the actual history of the integration of educational facilities in the past can shed light on the effect of a decision enjoining segregation today, it leads to the conclusion that the vague threats of grave unrest which are always relied upon in these cases to justify the continued denial of equality of rights have as much substance, and no more, than the claims made in *Buchanan* v. *Warley,* thirty-five years ago, that an injunction against compulsory residential segregation would lead to vast racial conflagrations.

Certainly the experience of the Congress of Industrial Organizations supports the view that the dire consequences which are so often predicted are merely phantoms. The CIO, through its Southern Organizing Committee, is proving daily that the myth of incompatability between white and Negro is but a

myth. There are frictions and tensions, to be sure. But they are not nearly of the magnitude usually pictured. We have proved that it is possible for free men, white and Negro, to associate themselves together voluntarily without conflict, in the absence of compulsion by the state.

CONCLUSION

For the reasons stated we respectfully urge that the judgment of the court below should be reversed.

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