

## Racial Segregation in Public Education: Gong Lum v. Rice

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over regard for rules merely technical or procedural. From the very structure of our local government it is apparent that dissension among individual office-holders could, if unchecked, lead to great public inconvenience. Those who have from time to time participated in the formulation of our system of municipal regulation have, it would seem, laid their plans in the assumption that the requisite co-operation would, at all times, be forthcoming. That the Court has, in the instant case, taken a hand in obviating a difficulty, technical at best, is worthy of commendation.

J. A. M.

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RACIAL SEGREGATION IN PUBLIC EDUCATION: *GONG LUM v. RICE*.—A young Chinese girl of good moral character is denied the privilege of attending the public high school maintained for the district in which she resides with her parents, upon the sole ground that she is of Chinese descent and not a member of the white or Caucasian race, although her father is a taxpayer helping to support the school. The petition alleges undue discrimination against the girl by the Board of Trustees of the school. The Supreme Court of Mississippi had held that since their state constitution provided that "Separate schools shall be maintained for children of the white and colored races," there was a consequent division of the educable children into those of the pure white or Caucasian race on the one hand, and the brown, yellow and black on the other; that the legislature is not compelled to provide schools for each of the colored races; that a colored public school exists in every county, in which every colored child is entitled to obtain an education; and that if the plaintiff desires, she may attend the colored school of her district or go to a private school

This was attacked as unconstitutional on the theory that a state cannot be said to afford 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 education in a school which receives only colored children of the brown, yellow or black races. Unfortunately, the plaintiff did not allege in her petition that she would be subject to great inconvenience in being compelled to travel a greater distance were she to attend the colored school, and the Court did not consider the point. It did intimate vaguely that, under those circumstances, a different question might have been presented, but whether or not that would change the ruling is very doubtful from the tenor of the decision.

In expressing the opinion of the Supreme Court, Chief Justice Taft held that any citizen not of the white or Caucasian race, may be classed

with the black race, subject to the laws governing the latter. Whether or not, when so classed, they are denied equal protection, presents an old question which the Supreme Court did not attempt to reconsider. The Court was satisfied that this classification has been held to be within the constitutional power of the state legislature to settle without intervention of the Federal Courts under the federal constitution.<sup>2</sup> Justice Taft further stated that, although most of the cases arose over the establishment of separate schools as between white and black pupils, there should be no difference in attempted segregation of white pupils and yellow pupils.

In the light of the advanced and progressive spirit of our western states, which do not deny scholars admission to any common school on the ground of color,<sup>3</sup> the holding in the principal case is deplorable.

The decisions of the state courts to which Justice Taft makes reference were rendered prior to the adoption of the last amendments to the Constitution, when colored people had the few rights which the dominant race felt obliged to respect, and public opinion was dominated by the institution of slavery; when it would not have been safe to do justice to the black man. Surely those decisions cannot be guides in the era introduced by the amendments of the Supreme Law which established universal civil freedom, giving citizenship to all born or naturalized in the United States and residing here, obliterating the race line from our system of governments, national and State, and placing our free institutions upon the broad and sure foundation of the equality of all men before the law. Is not the statute of Mississippi, which has been held constitutional, hostile to the full spirit and law of the Constitution of the United States? If laws of like character should be enacted in every state of the Union, 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

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<sup>2</sup>*Roberts v. City of Boston*, 5 Cush. (Mass.) 198, 208, 209 (1849); *Commonwealth v. Dedham*, 16 Mass. 141, 146 (1819); *Withington v. Eveleth*, 7 Pick. 106 (1828); *Perry v. Dover*, 12 Pick. 206, 213 (1831); *State v. McCann*, 21 Ohio State 198, 210 (1871); *People v. School Board*, 161 N. Y. 598 (1900); *Ward v. Flood*, 48 Cal. 36 (1874); *Wysinger v. Crookshank*, 82 Cal. 588, 590 (1890); *Reynolds v. Board of Education*, 66 Kans. 672, 72 Pac. 274 (1903); *McMillan v. School Committee*, 107 N.C. 609, 12 S.E. 330 (1890); *Cory v. Carter*, 48 Ind. 327 (1874); *Lehew v. Brummell*, 103 Mo. 546, 15 S.W. 765 (1891); *Dameron v. Bayless*, 14 Ariz. 180 (1912); *State v. Duffy*, 7 Nev. 342, 355 (1872); *Bertonneau v. Board*, 3 Woods 177, Fed. Cas. No. 1361 (1878); *Wong Him v. Callahan*, 119 Fed. 381 (C.C. Cal. 1902). Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia. Rev. Stat. D. C. Secs. 281, 282, 283, 310, 319.

<sup>3</sup>*Clark v. Board of School Directors*, 24 Iowa 266 (1868); *People v. Detroit*, 18 Mich. 400 (1869).

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

The thin disguise of "equal facilities" will not atone for the wrong now augmented by this decision.

By a technical construction of the constitution, our Supreme Court has again held that the most that the constitution requires the legislature to do is to furnish a system of common schools where each and every child may be educated, not that all must be educated in any one school, nor that any particular class of society will be provided while such education is being obtained.<sup>4</sup> Such construction very subtly overlooks the fact that the advantages of social equality are not demanded to be furnished, but only that they be not denied. The power to regulate is not the power to prohibit.<sup>5</sup> An opportunity for complete education is offered with one hand, but gratification of the acquired cultural desires which are its natural concomitants, is withheld with the other. This latter situation becomes apparent in the many decisions which uphold as constitutional, laws enacted compelling colored passengers to occupy only designated cars.<sup>6</sup>

In the case of *Plessy v. Ferguson*, Justice Harlan, voicing his dissent, says: "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."

In most of the states a distinction is drawn between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages. A law of West Virginia limiting to white male persons the right to sit upon juries was held unconstitutional as a discrimination implying a legal inferiority in civil society which lessened the security of the right of the colored race and was a step toward reducing them to a condition of servility.<sup>7</sup> Courts of states where the political rights of the colored race have been

<sup>4</sup>*People v. Gallagher*, 93 N. Y. 438 (1883)—"Equality and not identity of privileges and rights is what is guaranteed to the citizen."

<sup>5</sup>*Yick Wo v. Hopkins*, 118 U. S. 356 (1886)—"Every exercise of the police power must be reasonable,"; *Railroad Co. v. Husen*, 95 U. S. 465 (1877); *Louisville & Nashville Railroad v. Kentucky*, 161 U. S. 677 (1896); *Daggett v. Hudson*, 43 Ohio St. 548, 3 N.E. 538 (1885); *Capen v. Foster*, 12 Pick. 485 (1832); *State ex rel. Wood v. Baker*, 38 Wis. 71 (1875).

<sup>6</sup>*Plessy v. Ferguson*, 163 U. S. 537, 544, 545 (1896).

<sup>7</sup>*Virginia v. Rives*, 100 U. S. 313 (1879); *Neal v. Delaware*, 103 U. S. 370 (1880); *Bush v. Kentucky*, 107 U. S. 110 (1882); *Gibson v. Miss.* 162 U. S. 565 (1896); *Strouder v. West Va.*, 100 U. S. 303 (1879); *State v. Gibson*, 36 Ind. 389 (1871).

longest and most earnestly enforced, nevertheless have held that laws permitting and even requiring the separation of the races in places where they are liable to be brought into contact, are within the competency of the state legislatures, in the exercise of their police power.<sup>8</sup>

Evidently, the government feels that when it 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. This, despite the fact that if the separation of scholars on the color line can be sustained, force is lent to the contention that pupils of different nationalities can be divided. The term colored race is but another designation for African. Clearly, then, if a Board of Directors is clothed with a discretion to exclude African children from the common schools and require them to attend, if at all, a school composed wholly of children of that nationality, it may do likewise with any nationality. Sustaining any such action would be to sanction a plain violation of the spirit of our laws, and would tend to perpetuate the national differences of our people and stimulate constant strife, if not a war of races.

Upon inquiring into the validity of a statute, the Supreme Court says that it will not consider the motive in fact actuating the state legislature in voting for its enactment. If the law does not conflict with some constitutional limitation of the powers of the state legislature, it cannot be declared invalid. Concerning the authority of the state over matters pertaining to public schools within its limits, and the validity of legislation of the character of that under consideration, the state has the right to provide separate schools for the children of different races, and such action is not forbidden by the fourteenth amendment to the constitution, provided the schools so established make no discrimination in educational facilities. Of the practical inconvenience of traveling many miles to a colored school when a public school for white children is within a stone's throw, the Court is silent, the question not having been raised.

Will the Supreme Court of the United States say, with Rosseau, when again faced with a similar situation, "It is precisely because the force of things tends always to destroy equality that the force of legislation ought always to tend to maintain it," and if there be any doubt, incline in favor of equality?

J. M.

RIGHT OF LABOR UNION TO SOLICIT MEMBERS.—The recent decision at the New York County Special Term in the suit of Interborough

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<sup>8</sup>*Supra* note 6.