[#2]

No. 273 1951 Term

BRIGGS V. ELLIOT

Appeal from DC for ED So. Car. (Parker, Timmerman; Waring, dissenting).

This case raises the question whether the equal protection clause of the 14th Amendment prohibits segregation of white and negro pupils in South Carolina public schools. Plaintiffs are Negro children of school age, their parents and guardians; defendants are school officials of School District 22 in Clarendon County. The complaint, seeking both a declaratory judgement and an injunction, alleged (a) that the educational facilities provided for negro children in District 22 are inferior to those provided for white children, in violation of the 14th Amendment, and (b) that the segregation of negro and white children in the public schools, as required by South Carolina constitution and statute, is itself a violation of the 14th Amendment. [Art. II, § 7 of the So. Car. constitution provides:

> "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."

§5377 of the So. Car. Code provides:

> "It shall be unlawful for pupils of one race to attend the schools provided by boards of trustees for persons of another race."]

C.J.

In Dipuel we said shared admit her now - hence 6 months portion of order is unusual in light of it -

Exhaustion of State remedy:-

S.C. order puts controversy in school authorities - no exhaustion of this remedy yet. In state of suspension here as in Tenn. case; #120 until Dec. 21. no enforcement of order

Black - Note

Reed :- no exhaustion of state remedy here -

F.F.:- If this was a case on Gaines doctrine rule only we would not take this case; but does it make any difference that the attack here is on Plessy also? Does not to me. I have heard expressions around here of the ominous consequences to so hold. We should wait on 3 judge Const action in December. This is a nation shaking problem - Should hold & do nothing

Douglas :- Note

Jackson :-

A 3-judge DC was convened under 28 USC §§ 2281 and 2284. At the beginning of the hearing the defendants admitted 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." Hence the only issue remaining before the 3-judge DC was whether segregation is as such unconstitutional. A majority of the court held that it is not, on the authority of Plessy v. Ferguson, 163 US 537 (1896), in which this Court held that segregation on intrastate railroads does not violate the equal protection clause, and Gong Lum v. Rice, 275 US 78 (1927), in which this Court applied the Plessy doctrine to segregation in public schools. Therefore the majority ordered the defendants to "proceed at once" to furnish Negro pupils of the district educational facilities equal to those furnished white pupils, but did not enjoin segregation as such. One member of the 3-judge court dissented, distinguishing Plessy on the ground that it involved railroad accomodations rather than schools, and not bothering to mention the Gong Lum case.

I would suggest that ~~cert. be granted~~ probable jurisdiction be noted in this

case. Unlike the dissenting judge, I don't think it makes much sense to attempt to distinguish this case from Plessy. However, I do think that it is time for this Court -- regardless of how it feels on the merits of the question -- to reconsider the Plessy holding, especially in light of the Court's recent decisions in Sweatt v. Painter, 339 US 629 (1950) and McLaurin v. Okla. State Regents, 339 US 637 (1950). Of course those cases did not decide the issue in the instant case. However, just as the Court found that the restrictions imposed upon McLaurin "impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general to learn his profession," in violation of the equal protection clause, the Court might find that segregation in So. Carolina schools so impairs the ability of both white and negro children to intermingle, to engage in mutual discussions, and to exchange views, as to violate the equal protection clause. At any rate, it seems to me that the question is worth reconsidering.

~~GRANT~~ NPJ SWT

Supplemental Memo on No. 273

1. This case is here on appeal. However, in the last line on p. 2 of my memo and in my recommendation at the bottom of p. 3 of the memo, I talked as though the case were here on cert. My statement should have read: "I suggest that probable jurisdiction be noted in this case," and my recommendation should have been: "NPJ".

2. If the Court should want to avoid the Plessy question at this time, there is a procedural ground on which this case probably can be disposed of. The typewritten record in the Chief's office shows that there is present here a problem of exhaustion of administrative remedies. Under 3 So. Car. Code (1942) § 5317, complaints about the local school administration are to be made first to the local Bd. of Trustees. If the complaint deals with "a matter of local controversy," and the Trustees do not satisfy the complainant, he can have the decision reviewed by the County Bd. of Education of Clarendon County. From the decision of the County Bd., there is a right of appeal to the State Bd.

The plaintiffs in this case are objecting to an order of the local Bd. of Trustees which

denied them admission to the white schools. The defendants' answer alleges that the plaintiffs did not seek any review before the County Bd. or the State Bd., and asks that the complaint be dismissed. This allegation stands undenied on the record, and is probably true as a matter of fact. If the "exhaustion" doctrine is to be applied here, that would probably dispose of the case.

Stuart

Of course one argument against applying the "exhaustion" doctrine here is that the County and State Bds. lack the power to grant plaintiffs the relief which they seek, since the So. Car. constitution explicitly requires segregation.