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United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 6201

FLOYD B. McKISSICK, SOLOMON REVIS, *et al.*,
Appellants,

against

WILLIAM DONALD CARMICHAEL, JR., President of the University of North Carolina; HENRY P. BRANDIS, JR., Dean of the Law School of the University of North Carolina; LEE ROY WELLS ARMSTRONG, Director of Admissions of the University of North Carolina; ARCH T. ALLEN, Secretary of the Board of Trustees of the University of North Carolina; and THE UNIVERSITY OF NORTH CAROLINA, a Body Incorporate,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, MIDDLE DISTRICT OF NORTH CAROLINA.

BRIEF FOR APPELLANTS

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Appellees.

BRIEF FOR APPELLANTS

Statement of the Case

The instant cause of action was commenced on October 25, 1949, by Harold Epps and Robert Glass, the original complainants in the Court below, as a class suit on behalf of themselves and all other Negroes similarly situated. While the cause was there pending, Floyd B. McKissick, Solomon Revis, James Lassiter, J. Kenneth Lee and several other persons were permitted to intervene as parties-plaintiff. The original plaintiffs and the other intervenors were permitted to withdraw without prejudice for reasons set out

in the record, leaving the four above-named parties as plaintiffs at the trial in the Court below and as appellants in this Court (R. 25, 26).[1]

A trial on the merits took place on August 28-30, 1950, in the Durham Division of the United States District Court for the Middle District of North Carolina before the Court without a jury. On October 9, 1950, appellants' cause of action was dismissed on the grounds that the state afforded them at the law school of the North Carolina College for Negroes in Durham, North Carolina, facilities and opportunities substantially equal to those offered to all other persons at the law school of the University of North Carolina in Chapel Hill. The Court's opinion is reported in 93 F. Supp. 327, and its final decree, entered the same day, is to be found in the record at page 290. From the final judgment dismissing the complaint, appellants brought the cause here. The notice of appeal was filed on October 26, 1950.

The sole issue pressed here, and in the court below, is whether refusal to admit appellants to the University of North Carolina School of Law solely because of their race and color constitutes a deprivation of rights secured under the equal protection clause of the Fourteenth Amendment. Appellants contend that the facilities and opportunities available to them at the College Law School are not equal to those available at the University Law School,[2] and that the only way the rights guaranteed to them under the Fourteenth Amendment can be secured is by their admission to the University Law School on the same basis as other students.

1. The record citations here are the citations of the page numbers as they appear in the appendix to appellants' brief.

2. When the term "College Law School" is used, it will refer to the law school of the North Carolina College for Negroes at Durham, and when the term "University Law School" is used, it will refer to the law school of the University of North Carolina at Chapel Hill.

Statement of Facts

Appellants are citizens of the United States and residents of the State of North Carolina. They are at present attending the law school at the North Carolina College for Negroes, a public institution maintained and supported out of state funds to provide legal training exclusively and solely for Negroes in accord with the state's policy, custom, practice and usage of providing separate educational facilities for Negroes in public institutions within the State of North Carolina.

Appellants made appropriate application for admission to the University of North Carolina School of Law, and were refused admission solely because of race and color. It is conceded that appellants possess all the requisite requirements for admission to the University Law School and would have been admitted except for the fact that they are Negroes (R. 7, 13, 24, 215).

ARGUMENT

The decision of the United States Supreme Court in *Sweatt* v. *Painter* is controlling here, and under the principles enunciated in that case, appellants must be admitted to the University of North Carolina School of Law forthwith.

It is admitted that appellants satisfy all the requirements for admission to the University of North Carolina School of Law and were denied admission thereto solely because of their race and color. Appellees seek to justify this refusal on the grounds that the state is maintaining and operating a law school for Negroes at Durham, North Carolina, which affords to appellants opportunities and facilities substantially equivalent to those offered to all

other persons at the University of North Carolina. It is contended that the maintenance by the state of the College Law School for Negroes satisfies the requirements of the equal protection clause of the Fourteenth Amendment, and that in refusing to admit appellants and all other Negroes to the University Law School no deprivation of constitutional rights has been committed.

It is now clear beyond question that once a state undertakes to provide educational facilities for white persons, it must provide equal facilities for Negroes, *Missouri ex rel Gaines* v. *Canada,* 305 U. S. 337, and at the same time, *Sipuel* v. *Board of Regents,* 332 U. S. 631. It is also clear that the mere furnishing of a separate facility for Negroes does not in itself satisfy the requirements which the Fourteenth Amendment imposes, *Sweatt* v. *Painter,* 339 U. S. 629. Indeed, the state's obligations under the Fourteenth Amendment are not met when, because of considerations of race and color, it requires persons to study law in isolation from a substantial and significant segment of the population, or when, at the graduate and professional school levels of state universities, it attempts to impose or to enforce any distinctions or classifications based upon race or color. *Sweatt* v. *Painter, supra; McLaurin* v. *Board of Regents,* 339 U. S. 637.

These decisions are a logical application of long-settled constitutional doctrine as to the purposes and intendment of the Fourteenth Amendment. One of the basic principles of constitutional law is that all persons similarly situated must be treated alike by the state, *Southern Railway Co.* v. *Greene,* 216 U. S. 400; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540; *Maxwell* v. *Bugbee,* 250 U. S. 525, and that a state cannot deny to any person because of race or color any advantage or opportunity it offers to other persons. *Strauder* v. *West Virginia,* 100 U. S. 303; *Missouri ex rel. Gaines* v. *Canada, supra; Sipuel* v. *Board of Regents, supra; Takahashi* v. *Fish and Game Commission,* 334 U. S. 410.

Legislative distinctions and classifications are only permissible when based upon a real or substantial difference which has pertinence to the legislative objective. *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389; *Southern Railway Co.* v. *Greene, supra; Truax* v. *Raich,* 239 U. S. 33; *Mayflower Farms* v. *Ten Eyck,* 297 U. S. 266; *Skinner* v. *Oklahoma,* 316 U. S. 535; *Dominion Hotel* v. *Arizona,* 249 U. S. 265; *Groessart* v. *Cleary,* 335 U. S. 464; *Continental Baking Co.* v. *Woodring,* 286 U. S. 353. A legislative classification or distinction based upon race and color is considered irrational and irrelevant, see *Hirabayashi* v. *United States,* 320 U. S. 81; *Korematsu* v. *United States,* 323 U. S. 214, and such distinctions when imposed by the state have been held to overreach the limitations set by the equal protection clause of the Fourteenth Amendment. *Takahashi* v. *Fish and Game Commission, supra; Oyama* v. *California,* 332 U. S. 633.

Yet, prior to decision by the United States Supreme Court in the *Sweatt* and *McLaurin* cases, it was considered possible for a state to avoid having its racially imposed classifications or distinctions struck down by affording separate facilities for Negroes under the separate but equal theory of *Plessy* v. *Ferguson,* 163 U. S. 537. Whatever may be the impact of this theory on the limitations of a state's power to impose racial classifications and distinctions in general, it is clear that in the area of state graduate and professional educational facilities, the doctrine of *Plessy* v. *Ferguson* is now without significance.

No proper decision, therefore, can now be made as to the legality of segregation laws, practices, customs or usages in the field of legal education without careful analysis of the reach of these two recent Supreme Court pronouncements. The Court attempted to determine appellants' rights in this cause as if the *Sweatt* and *McLaurin* cases had never been decided, and in so doing, we submit, fell into fatal error.

If the Court below had adopted the rationale of the Supreme Court in the *Sweatt* case, no conclusion would have been possible other than that appellants are entitled to admission to the law school of the University of North Carolina.

In that case, the Court in holding that petitioner was entitled to be admitted to the University of Texas School of Law stated at pages 632-635:

> "The University of Texas Law School, from which petitioner was excluded, was staffed by a faculty of sixteen full-time and three part-time professors, some of whom are nationally recognized authorities in their field. Its student body numbered 850. The library contained over 65,000 volumes. Among the other facilities available to the students were a law review, moot court facilities, scholarship funds, and Order of the Coif affiliation. The school's alumni occupy the most distinguished positions in the private practice of the law and in the public life of the State. It may properly be considered one of the nation's ranking law schools.
>
> "The law school for Negroes which was to have opened in February, 1947, would have had no independent faculty or library. The teaching was to be carried on by four members of the University of Texas Law School faculty, who were to maintain their offices at the University of Texas while teaching at both institutions. Few of the 10,000 volumes ordered for the library had arrived; nor was there any full-time librarian. The school lacked accreditation.
>
> "Since the trial of this case, respondents report the opening of a law school at the Texas State University for Negroes. It is apparently on the road to full accreditation. It has a faculty of five full-time professors; a student body of 23; a library of some 16,500 volumes serviced by a full-time staff; a practice court and legal aid association; and one alumnus who has become a member of the Texas Bar.

> "Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.
>
> "Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. 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. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we can not conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.

> "It may be argued that excluding petitioner from that school is no different from excluding white students from the new law school. This contention overlooks realities. It is unlikely that a member of a group so decisively in the majority, attending a school with rich traditions and prestige which only a history of consistently maintained excellence could command, would claim that the opportunities afforded him for legal education were unequal to those held open to petitioner. That such a claim, if made, would be dishonored by the State, is no answer. 'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.' "

If we apply the same standards of measurement to this case which were applied in the *Sweatt* case, we are faced with the following uncontroverted facts:

The Two Law School Plants

The University Law School commenced in 1845 when a professorship of law was established. It was not formalized into a law school until 1900 (R. 40, 41, 282). It is situated at Chapel Hill, North Carolina, and is part of the University of North Carolina. The law school is housed in a brick building, which was originally planned and designed as a law school (R. 47) at an original cost of approximately $120,000. Additions to the law school costing approximately $400,000, were in process at the time of trial and were planned and designed specifically to meet the needs and specifications for law school teaching (R. 47). The additions were promised completion by December, 1950 (R. 47). There are study halls for students and space where they can use typewriters (R. 50). Each member of the faculty has a private office and none have offices in the classroom (R. 57).

The College Law School was opened in 1939 but had to close because of lack of students. It reopened in 1940 and has been in operation since that date (R. 97, 282). It is

situated in Durham, North Carolina, and is a part of the North Carolina College for Negroes. The Law School is housed in a frame building, originally built as an auditorium of the College (R. 110). The College general library is to be converted into a law school at an estimated cost of $20,000 as soon as the new library is completed (R. 110). There are no study halls for students and no separate space for students to study with typewriters (R. 102). Students must study and type in the library (R. 102). One of the members of the faculty uses his classroom as an office (R. 102).

Accreditation

The University Law School is a member of the Association of American Law Schools and is approved by the American Bar Association and North Carolina Board of Examiners (R. 42, 283). The College Law School is approved provisionally by the American Bar Association and North Carolina Board of Examiners and has filed application for admission to the Association of American Law Schools (R. 101, 283).

Degrees and Courses

The University Law School is offering 38 courses of instruction during the 1950-1951 school term (R. 65). It awards an LL.B. degree and a J.D. degree (R. 61), and holds summer sessions (R. 62).

The College Law School is offering 27 courses of instruction during the 1950-1951 school term, and awards only the LL.B. degree and holds no summer sessions (R. 104).

Student Body

The University Law School has a student body of approximately 288 students. These students are a cross sec-

tion of the state's population representing racial groups comprising approximately 74% of the state's population (R. 55, 286). From this group comes most of the judges, lawyers, witnesses and jurors with whom a member of the North Carolina bar must deal. It has a law review maintained since 1923 (R. 46), a chapter of the Order of the Coif (R. 52), and other student activities (R. 63).

The College Law School had an enrollment of 28 students. They are all Negroes and come from a racial group representing 26% of the state's population. It has no law review, no chapter of the Order of the Coif (R. 104), and there was no testimony of any other student activities.

The Faculty

The University Law School has a full-time staff of ten teachers including the Dean, and in addition a full time librarian and assistant librarian. Nine of the ten teachers are full professors, and the tenth and latest addition to the faculty is an assistant professor (R. 44). Faculty members have done a considerable amount of research and writing in their fields, and a summary of their publications may be found at pages 268, 269, 270 in the record. Members of their staff have had extensive teaching experience (R. 45), and experience in government service (R. 42) and are recognized authorities in their field. Members of the faculty serve on the North Carolina Legislative Commissions (R. 51).

The College Law School has a full-time staff of five teachers including the Dean and the librarian (R. 97). There is no established professorial ranking although the Dean is given a title of full Professor and the other full-time teachers that of Assistant Professor (R. 100). All members of the faculty have had a limited amount of teaching experience (R. 99), the greatest amount of experience, except for the Dean who has been at the college

since 1941, is three years (R. 99). There is no evidence of any legal research having been done by the faculty, and none of them has written or published any legal treatises (R. 101, 111). With exception of the Dean its faculty has no ascertainable reputation (R. 217). No members of the faculty have ever served on the North Carolina Legislative Commission (R. 100).

The Library

The University Law School has a law librarian and assistant librarian, and between five to eight part-time student assistants (R. 80). The library holds approximately 64,000 volumes (R. 82), but only 47,000 were available on the shelves at the time of the trial, pending completion of additions to the law school building (R. 287). The library has an upper and lower reading room, and several detached reading rooms, all of which contain various reports (R. 85, 86).

The College Law Library has a full-time librarian and two part-time student assistants. The College owns approximately 30,000 volumes, but only 23,000 were on the shelves (R. 267). It has only one reading room (R. 106).

Reputation and Alumni

Witnesses for appellants testified that the University of North Carolina is considered one of the leading educational institutions in the South (R. 146), and that the University Law School has an excellent reputation (R. 217), and is considered one of the leading law schools in the country (R. 146, 192). The alumni of the University Law School occupy some of the most prominent positions in the private practice of law and in the public life of the state. Among its alumni are governors of the state, state and federal judges, state and federal legislators (R. 270, 271). The majority of the practicing attorneys and legis-

lators in the state received their training at the University of North Carolina School of Law (R. 272-280).

The College Law School has no graduates of equal prominence either in the private practice of law, or in the public life of the state. Neither North Carolina College for Negroes, nor the College Law School has any ascertainable reputation other than as state schools for Negroes in North Carolina (R. 146, 217).

In comparing these above facts with those set forth by the Court in the *Sweatt* case, it is difficult to perceive how any conclusion can be reached other than that appellants must be admitted to the University of North Carolina Law School for the same reasons that the Court ordered petitioner's admission to the University of Texas Law School in the *Sweatt* case.

It is true that there are minor differences between the two cases. In this case the state has maintained and operated the College Law School for Negroes continuously since 1940, and in the *Sweatt* case the law school was established in 1947. The Supreme Court, however, recognized the Texas Law School for Negroes as a going concern, and that the training offered was adequate to enable its graduates to successfully pass the State Bar Examination, but the issue before it for decision was whether that school could be considered the equal to the University of Texas. It found it could not be.

Thus, in this case neither the good intentions of the state, the adequacy of legal training offered at the College Law School, nor its ten years' existence can be considered relevant. The issue which must be met is whether the College Law School is the equivalent of the University Law School. The facts, we submit, compel the conclusion that the University Law School in this case, as the Texas University Law School in the *Sweatt* case, is far superior to the separate institution which the state has established

for the legal training of Negroes. It seems clear that when the Court places such emphasis on the fact that the petitioner in the *Sweatt* case would have been required to study at the Texas Law School for Negroes in isolation from 85% of the population as evidence of inequality, that here an indicia of inequality must be found in the fact that appellants are required to take their training at a segregated law school in isolation from 74% of the population of the State of North Carolina. When the *Sweatt* case is considered along with the decision in *McLaurin* v. *Board of Regents, supra,* where it was held to be a denial of the equal protection of the laws to require a Negro graduate student, admitted to the state university, to sit at a specially designated seat or desk in the classroom and at a special table in the cafeteria and library, the conclusion is inescapable that in respect to graduate and professional training offered by the state, the requirements of the Fourteenth Amendment can only be met by according to Negroes the same training accorded to all other persons and on the same basis.

Conclusion

Any consideration as to the desirability of North Carolina's policy of maintaining separate institutions for the legal training of Negroes has been foreclosed by the United States Supreme Court's decision in the *Sweatt* case. It has been determined by that Court that to require a person to attend a racially segregated law school in "isolation from the individuals and institutions with which the law interacts" is to deny that person rights which are guaranteed by the equal protection clause of the Fourteenth Amendment. Appellees, therefore, in refusing appellants admission to the University of North Carolina School of Law because of race and color are guilty of an unconstitutional deprivation of appellants' rights.

Wherefore, it is respectfully submitted that the judgment of the Court below should be reversed.

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Attorneys for Appellants.

Dated: February 15, 1951