

Racial Minorities and the Schools: A Look at the Early Decisions of the California Supreme Court

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INTRODUCTION

With justification the state of California has always prided itself on its commitment to universal free public education. That commitment was symbolized in the state's first constitution, the constitution of 1849, which committed the legislature to provide a system of common schools for the education of the state's children.¹ Subsequent constitutional revisions only reinforced and strengthened that pledge.² With respect to California's racial minorities, however, the promise of access to the benefits of education proved for a long time partial and incomplete. This article examines the history of legislation affecting the education of minority schoolchildren in California and the first instances in which the state's highest court, operating within the framework of the state constitutional commitment, was called upon to apply and interpret that legislation.

Ground rules, albeit incomplete, for the treatment of nonwhite schoolchildren were established in a series of laws enacted in the first two decades of the state's history. California's first general school law, enacted in 1855, made no mention of race, but a statute passed in 1860 flatly forbade the admission of "Negroes, Mongolians, and Indians" into the public schools. The 1860 law permitted, though it did not require, school districts to establish separate schools for the education of these children.³ Then in 1866 the legislature made it mandatory for the trustees to establish such schools if the parents or guardians of 10 such children should apply for them. It also allowed districts to admit nonwhite children to white schools when it was impracticable for them to establish separate schools, but only if a majority of the white parents did not object.⁴ Finally, in 1870 the state enacted a new comprehensive school law. One provision stated that the schools should be open for the admission "of all white children between five and 21 years of age, residing in the district." Like its predecessors, the law provided for the education of children of African and Indian descent in separate schools but, unlike

them, it contained no provision permitting nonwhite children to attend integrated schools when it was infeasible to establish separate schools for them. The new law failed to make any explicit provision for the education of Asian children.⁵

WARD v. FLOOD

With the law in this posture an African American family in San Francisco determined in the fall of 1872 to test the validity of state-mandated segregation. Harriet and A. J. Ward had lived in San Francisco since 1859 and were the parents of an elementary school child who was denied admission to the school nearest her home on account of race (the city maintained a separate school for black schoolchildren). To press their case in court they retained John W. Dwinelle, a prominent San Francisco lawyer and onetime state assemblyman. He is today perhaps best remembered for the fact that he was a chief sponsor of the legislation that created the University of California and was a member of its first board of regents.⁶

Dwinelle made a variety of arguments but relied mainly on the equal protection clause of the newly enacted Fourteenth Amendment. He contended, as had Charles Sumner before the Massachusetts Supreme Court in the famous 1850 case of *Roberts v. City of Boston*,⁷ that the forcible segregation of black schoolchildren by the state stamped them with the badge of inferiority, thus reinforcing popular prejudices and that this amounted to a denial of the equal protection of the laws (Sumner had made his argument under the "free and equal" clause of the Massachusetts constitution).

The California tribunal took seriously the equal protection claim. "The education of youth is emphatically their protection," it declared. And it would be a clear denial of equal protection if the legislature were to exclude children from the benefits of education solely because of their race. Having said that, however, it rejected the argument, as had the Massachusetts court in the *Roberts* case, that segregation of schoolchildren by race, in and of itself, amounted to a denial of equal protection. If blacks were the objects of odious caste distinctions, the maintenance of separate schools was not responsible for that, it said, quoting liberally from the *Roberts* case.⁸ It did go out of its way, however, to affirm that the state was under a solemn obligation to provide an

education at public expense for all its schoolchildren. Education in the common schools, it said, was "a right—a legal right—as distinctively so as the vested right in property owned is a legal right." And it went on to rule that, notwithstanding the absence of any statutory mandate to that effect, the exclusion of nonwhite schoolchildren from white schools would only be countenanced where separate schools were actually maintained; otherwise these children would have the right to attend the white schools.⁹

TAPE v. HURLEY

In 1880 a revision in the state's education law repealed those sections of the Political Code having to do with the segregation of children of African and Indian descent (in 1872 the state's education laws had been codified in the Political Code). It also omitted the word "white" from the open admissions provision of the state school law referred to above so that that section now read: "Every school, unless otherwise provided by law, must be open for the admission of *all children* [emphasis added] between six and twenty-one years of age residing in the district." This change in the law's wording opened the way for the Chinese to seek access to the state's public schools.

At the commencement of the 1884 school year Joseph Tape, a self-described westernized Chinese (he wore western dress and was a member of a local Protestant congregation) attempted to enroll his daughter in San Francisco's Spring Valley Elementary School. Upon being rebuffed by the school authorities he determined to challenge the decision in court and through his attorney sought a writ of mandate from the superior court ordering the school principal to admit his daughter. That court issued the writ but its decision was appealed to the state Supreme Court. It affirmed the decision of the superior court. The 1880 law was plain and unambiguous, said the court, and was broad enough to include all children who were not precluded by some other law from attending the public schools. And there was no other law it was aware of that forbade the entrance of children on the basis of race or nationality.¹⁰

The court in *Tape* had based its decision solely on its interpretation of the relevant statute. In ordering the Tape child admitted to the San Francisco school it was, it said, simply giving effect to the intention of the legislature as manifested in the language of the 1880 school law

(something of a stretch, it must be said; the session that produced that law was the most Sinophobic in the state's history).¹¹ By implication, then, it had left the way open for the legislature to make whatever special provisions it chose for the education of Chinese or other nonwhite schoolchildren. This it forthwith proceeded to do. A few months after the decision it amended the political code to read:

Trustees shall have the power to exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish separate schools for children of Mongolian or Chinese descent. When such separate schools are established Chinese or Mongolian children must not be admitted into any other schools.¹²

On the authority of this provision the San Francisco Board of Education established a separate primary school for Chinese children in Chinatown.

WYSINGER v. CROOKSHANK

The political code as amended in the wake of *Tape*, it should be noted, failed to make any provision for the segregation of children of African descent, and in the fall of 1888 Arthur Wysinger, a black schoolchild living in the small rural town of Visalia, brought a legal action through his father and legal guardian, Edmond, to challenge anew the practice of segregating children of African descent. He sought admission to a public school in that town, but the principal refused to admit him on the grounds that he was colored and that there was a separate school for colored schoolchildren established in the district. He applied for a writ of mandate to the superior court but was turned down. The decision was then appealed to the state supreme court on the sole question whether it was within the authority of the school board to establish a separate school for children of African descent and to exclude them from the schools established for white children.

If the statutes were in the same posture that they had been when *Ward v. Flood* or for that matter *Tape v. Hurley* was decided, said the court, there could be no doubt of the board's authority in the matter. But it pointed out that the law had been changed in 1885 and that in its present wording gave no authority to school boards to establish separate schools for children of African descent. Indeed, said the court, the legislative revision had taken that power away. The powers of school

boards were limited to the passing and enforcement of rules that were consistent with law.¹³ The high court therefore ordered the judgment reversed and directed the court below to issue a writ compelling the admission of the petitioner. Following the decision, the legislature did not bother to reinstate the segregation of African American schoolchildren, but the laws permitting school districts to segregate Asian schoolchildren (Japanese were later added to Chinese) and children of Native American descent remained on the books until well into the twentieth century.

PIPER v. BIG PINE SCHOOL DISTRICT

Several decades later, in 1924, the California Supreme Court was again asked to confront the question of school segregation but this time in the context of a third ethnic minority's claims. Under the education law then in force the governing bodies of school districts were given the power "to establish separate schools for Indian children, and for children of Chinese, Japanese or Mongolian parentage." When such schools were established the children in question could not be admitted to any other schools. The statute then went on to provide that in California school districts where the United States government had established a school for Indian children these children should not be admitted to the district school.¹⁴

Alice Piper, a Native American child of 15, sought admission to a school in the Big Pine School District in Inyo County, the district where she lived, but she was refused admission by the board of trustees on grounds of ancestry. (The school district provided no separate schools for Indian children.) The board justified its action on the authority of the political code, pointing to the fact that the federal government maintained a school for Indian children within the territorial boundaries of the school district. This school, it claimed, corresponded with respect to curriculum and hours of study to the public school and otherwise afforded equal educational opportunities. Having been rebuffed by the board, Piper's parents brought a mandamus proceeding in the Supreme Court to compel the school district to admit her. The court had no difficulty deciding that the writ should issue.

The legislature was constitutionally bound, it said, to provide for the education of the state's children. It again affirmed that education was a (state) constitutional right and a matter of paramount importance. "The

public school system of this state," said the court, indulging perhaps in some mild hyperbole, "is a product of the studied thought of the eminent educators of this and other states of the Union, perfected by years of trial and experience." It was calculated to open doorways "into chambers of science, art and the learned professions, as well as into fields of industrial and commercial activities."¹⁵ The state constitutional mandate was not satisfied, as the school district sought to argue, by the existence of a federal school in the neighborhood. The constitutional obligation inhered in the state alone and was one that it could not delegate to anyone else, even to the federal government. It could satisfy its constitutional obligation by providing separate schools for Indian children (the doctrine of separate but equal was still alive and well) but not by relying on the existence of a federal school. "To argue that petitioner is eligible to attend a school which may perchance exist in the district but over which the state has no control is to beg the question," the court declared.¹⁶

CONCLUSION

The cases discussed above span some 50 years. They were decided by different courts in different eras and revolved around the claims of different racial groups. One should be cautious then in generalizing about them. Nonetheless, one cannot fail to be struck by certain common themes that run through them, it seems to me. One is impressed by their relative liberality and sympathy for minority claims—this in a period of time when courts were not generally noted for their liberality in matters of race. In all of the cases the California Supreme Court made clear that its point of departure and ultimate touchstone for decision making was the child's right to an education. The education of the state's schoolchildren was a duty imposed on the legislature by the state constitution, the court said in one way or another in each of them, the opportunity to acquire the benefits of education a corresponding right. And it saw itself as duty bound to enforce that right for all children regardless of color. To that end school board regulations and even state laws were to be narrowly construed in favor of the child's access to the schools. The power to segregate, the court said more than once, was never to be implied or read into legislation but rather was to be allowed only when clearly expressed in statutory language. In none of the decisions is there detectable any of that sense that one often encounters in southern courts in the pre-*Brown*

era that racial segregation was part of the state's social fabric and as such deserving of the strong protection of the court. Of course these decisions could only go so far in making real the rights of minority children to equal educational opportunity. The reverse side of the court's line of analysis was that if the legislature wished to segregate, it merely needed to make that clear in explicit statutory language. If it did so, the court had no doctrinal barrier to put in its way (like virtually all courts, state and federal, in the years under discussion, the California Supreme Court never saw fit to question the received doctrine of "separate but equal"). The rights of minority schoolchildren in California and elsewhere would be put on a much more secure basis in 1954 when the U.S. Supreme Court at long last decided to accept the argument that had been advanced more than a century earlier by the Massachusetts lawyer Charles Sumner and in 1872 by California's own John W. Dwinelle.

NOTES

¹Cal. Const. 1849, Art IX, Sec. 3.

²See, e.g., the Constitution of 1879, Art. IX.

³Stats. of California, 1860, Chap. 329, pp. 321- 22.

⁴Stats. of California, 1866, Chap. 342, at p. 398.

⁵Stats. of California, 1869-70, Chap. 66, pp. 838-39.

⁶For further information on the background of the case see B. Gordon Wheeler, *Black California: The History of African-Americans in the Golden State* (New York, 1973), 136-37.

⁷59 Mass. (5 Cush.) 198 (1850).

⁸There was another issue in the case, namely whether the plaintiff in the case was old enough to attend the school in question. The court thought she was not but chose to address the constitutional claim anyway.

⁹*Ward v. Flood*, 48 Cal. 36, at 50, 56-57 (1874). Later in the year the state's education law was changed to reflect this ruling. *Amendments to the Codes of California, 1873-74*, 97.

¹⁰*Tape v. Hurley*, 66 Cal. 473 (1885). For an interesting account of the long struggle of California's Chinese to gain equal access to public education see Victor Low, *The Unimpressible Race: A Century of Educational Struggle by the Chinese in San Francisco* (San Francisco, 1982).

¹¹A discussion of the anti-Chinese measures that came out of the 1880 legislative session would be beyond the scope of this article. Suffice it to say that the list was long and harsh. One, for example, gave cities the power to expel all their Chinese inhabitants or segregate them in designated ghettos.

¹²Act of March 12, 1885, Stats. of California, 1885, Ch. 97, at 99-100.

¹³*Wysinger v. Crookshank*, 82 Cal. 588, at 593 (1890).

¹⁴Sec. 1662 Cal. Polit. Code, 1921 Cal. Stats. 1160.

¹⁵*Piper v. Big Pine School Dist.*, 193 Cal. 664, at 673 (1924).

¹⁶*Id.*, 672-4.