THE LOST EPISODE OF *GONG LUM V. RICE*

G. Edward White

GONG LUM V. RICE[1] has virtually disappeared from contemporary constitutional law discourse. Of the five constitutional law casebooks most frequently adopted in current constitutional law courses, none includes a full or even partial text of the decision. Two provide one-sentence summaries of its holding in notes on the constitutional status of racial segregation laws prior to *Brown v. Board of Education*,[2] two provide excerpts from the *Brown* opinion that cite the case,[3] and one ignores it altogether.[4] One might predict, from the current treatment of *Gong Lum*, that the decision will soon become relegated to the category of Court precedents that were subsequently overruled and are best forgotten.

G. Edward White is a David and Mary Harrison Distinguished Professor of Law at the University of Virginia School of Law.

[1] 275 U.S. 78 (1927).

[2] Daniel Farber, William N. Eskridge, Jr., & Philip Frickey, *Cases and Materials on Constitutional Law* 75 (4th ed., 2009); Geoffrey R. Stone et al., *Constitutional Law* 475 (7th ed., 2013).

[3] Jesse H. Choper et al., *Constitutional Law* 1333 (11th ed., 2011); Ronald D. Rotunda. *Modern Constitutional Law* 672 (10th ed., 2012).

[4] Kathleen M. Sullivan & Noah Feldman, *Constitutional Law* (18th ed., 2013).

That status seems particularly likely for *Gong Lum* because, as we will see, not a single doctrinal feature of the Supreme Court's opinion in the case remains part of the Court's current approach to cases raising issues of racial discrimination.

The confinement of *Gong Lum* to obscurity may be inevitable, but it is also unfortunate. First, the multi-racial context in which the case emerged was unusual in the history of racial segregation in America, and has been mainly neglected in accounts of that history.[5] Second, the opinion in *Gong Lum* provides a snapshot of the Supreme Court's late nineteenth- and early twentieth-century constitutional jurisprudence of race relations cases at the apogee of its influence. By then that jurisprudence had been refined and solidified to the point where the justices deciding *Gong Lum*, who included Oliver Wendell Holmes, Louis Brandeis, and Harlan Fiske Stone, considered the case an "easy" example of a state's police power trumping private rights, whether based on the Due Process or Equal Protection Clauses.

Finally, the Court's opinion in *Gong Lum* reveals how much of the impetus for its validation of *de jure* segregation in the years between *Plessy v. Ferguson* and the 1930s came from the disinclination, on the part of most white Americans in that period, to probe beneath the surface of two assumptions on which segregationist policies had been erected. One assumption was that differences in skin color were proxies for foundational, and meaningful, differences between races. The other was that rhetorical commitments by states to provide "equal" facilities for members of races who were segregated from one another meant that those facilities were in fact equal. In all these respects *Gong Lum* is a memorable episode in American constitutional and race relations history, one worthy of lingering over before its possible confinement to oblivion.

---

[5] Those inclined to learn more about the history of the Chinese community in the Mississippi Delta region in the years leading up to *Gong Lum* should consult John W. Loewen, *The Mississippi Chinese: Between Black and White* (1971; 2nd ed. 1988); Robert Seto Quan, *Lotus Among the Magnolias: The Mississippi Chinese* (1982); and John G. Thornell, "A Culture in Decline: The Mississippi Delta Chinese," www.uky.edu/Centers/Asia/SECAAS/Seras/2008/24_Thornell_2008.pdf

At the close of the Civil War the vast plantations of the Mississippi Delta region, which in the antebellum years had sustained the profitable production of cotton and other crops featuring slave labor, underwent something of a labor crisis. The reconstruction of confederate slave states was underway in Congress, and Mississippi, which had the largest percentage of African-Americans of any of those states, was being run by a combination of federal military troops and legislatures whose membership included both African-Americans and non-residents. By 1870 the Thirteenth, Fourteenth, and Fifteenth Amendments had been passed, along with the Civil Rights Acts of 1866 and 1870 and other enabling legislation. Against this backdrop, there were few incentives for African-American agricultural laborers in Mississippi to continue working on cotton or other "plantations" under anything like the terms of their antebellum employment. When white plantation owners tried to revive their operations after the war ended, many of their former workers had disappeared or made themselves unavailable.

Beginning in 1869, some of those owners in the Delta began efforts to attract a new source of agricultural labor to the region. A June 30 editorial in the Vicksburg, Mississippi *Times* in that year put the case baldly: "Emancipation has spoiled the negro and carried him away from fields of agriculture. Our prosperity depends entirely upon the recovery of lost ground, and we therefore say let the Coolies come, and we will take the chance of Christianizing them." By "Coolies" the writer meant the class of Chinese laborers who had arrived on the west coast to work on transcontinental railroads. It was anticipated by enthusiasts for the immigration of Chinese agricultural laborers to Mississippi that Chinese "coolies" would be apolitical, docile, and hardworking, and that "[o]ur colored friends who have left the farm for politics and plunder" would eventually be "crowd[ed] from the American farm" by the new workers.[6]

[6] "The Coming Laborer," *Vicksburg Times*, June 30, 1869.

That expectation was swiftly dashed. In 1870 the *Bolivar County Times* reported that two planters had "recently imported direct from Hong Kong, a lot of Chinese, sixteen in number, with whom as laborers, they are well pleased." That report was circulated in a Jackson newspaper, which added a comment from a planter that Chinese laborers were "easily controlled, . . . and [can] be made to work without the interference of . . . the military."[7] But three years later the same paper reported that of "[o]ver 200 Chinamen" brought from China to Louisiana, "there are none left on the plantations at the present time" because Chinese workers had revolted when they learned that they had been misled about the terms of their employment.[8]

In fact almost none of the Chinese who came to Mississippi in the Reconstruction years remained plantation laborers for any length of time. They came for different reasons and entered a different occupation. The Chinese who came to the United States after the Civil War were young male "sojourners," most of them from rural areas southwest of Canton, whose purpose was to find work, earn wages, save money, and remit some of their earnings to family members in China. Chinese citizens residing in the United States were initially protected by the 1868 Burlingame Treaty, but in 1882 the Chinese Exclusion Act placed a 10-year moratorium on the entry of Chinese "laborers," and restrictions on the entry of Chinese women already existed. This meant that in addition to sending money to relatives, most Chinese workers in America needed to return to China in order to get married and father children. Because of the large discrepancy between the wage scales of the United States and rural China in the late nineteenth and early twentieth centuries, many Chinese workers sought to return to the United States without their families. A "merchant wife" exception to the Chinese Exclusion Act allowed Chinese workers who could establish their employment and meet income level thresholds to import wives.

Most of the Chinese who settled in the Mississippi Delta in the late nineteenth and early twentieth centuries had entered the United States

---

[7] "More Chinese Coming," *Jackson Weekly Clarion*, August 12, 1870.

[8] "John in the South," *Jackson Weekly Clarion*, November 20, 1873.

with some financial resources and family connections. Many were the relatives of Chinese already residing in Mississippi, and many were given financial support to pay their passage and help establish them in businesses.[9] And the business that the overwhelming number of Mississippi Delta Chinese entered was the grocery business.

The percentage of the Mississippi Chinese working in grocery stores was striking. As early as 1881 Chinese were recorded as owners of business in Rosedale, in Bolivar Country, and in the 1970s 97% of the Chinese population in the Mississippi Delta were in or had retired from the grocery business.[10] The orientation of Mississippi Chinese to grocery stores was a product of factors that were distinctive in the social and economic structure of the Mississippi Delta.

As African-American agricultural laborers gained some independence and mobility after the Civil War, the "furnish" system, where laborers used their wages to purchase food and clothing at plantation commissaries, typically incurring debts that bound them to continued labor, began to weaken. Black sharecroppers, who continued to work on cotton farms after the experiment with Chinese agricultural labor failed, were no longer required to purchase goods from commissaries. A market niche for stores selling food, clothing, and other goods to African-Americans was thus created. That niche was strengthened by the unwillingness of most white merchants to sell goods to black customers and the barriers prospective African-American owners of grocery stores faced, which included the resources to start a store and the absence of any legacy of experience in working in the grocery business.[11]

Into this social and economic vacuum moved the Mississippi Delta Chinese. They opened small grocery stores in buildings that amounted to shacks, with the proprietors and their families living in the backs of the stores. Renting or purchasing such businesses required capital, but not in large amounts, and prospective storekeepers drew on Chinese

---

[9] Loewen, *The Mississippi Chinese*, 38.

[10] Id., 33, 36.

[11] For an extended contrast between the "causes of Chinese success" and those of "Negro failure" in the grocery store market in the Mississippi Delta, see id., 37-48.

networks for their resources. Once a grocery store was established, the proprietors would seek to bring in relatives or friends from China to work in the store and learn the grocery business. The stores were typically located in black neighborhoods, and their customers were almost exclusively African-Americans, who were discouraged from patronizing white stores. In the early years of the stores pointers were used for customers to identify the items they wanted to purchase, as often the only English the storekeepers knew was the price of articles. The very lack of connections between the storekeepers and their customers redounded to the storekeepers' advantage: transactions were almost never on credit and business relations were relatively formal. When Chinese grocers learned to speak English, they typically addressed their African-American customers as "Mr." or "Mrs.," unlike Delta whites, who invariably called blacks by their first names.

Over time, the industry, frugality, and financial reliability of Chinese grocers in the Mississippi Delta became defining features of their occupation. Grocery stores often stayed open for 18 out of 24 hours. By living in their store buildings and obtaining their food and clothing from the stores' stock, grocers were able to meet their needs and have money left over for savings. When they entered into credit transactions with wholesalers, local banks, or other institutions, they inevitably paid their obligations, sometimes relying on the support of other members of Chinese communities.

By the first decade of the twentieth century one of the Chinese grocer families in Rosedale, Mississippi, the Gong Lum family, had become prosperous. It is not known when Gong Lum first came to the Mississippi Delta, but early in the century he had acquired sufficient resources to acquire a "merchant wife," an "educated lady from Hong Kong."[12] Two daughters were born to the Lums in Mississippi, and, in keeping with the practice of Chinese families with social ambitions for their children in the United States, were given "American" first names, Berta and Martha. Martha was born in 1915.

[12] Quoted in Quan, *Lotus Among the Magnolias*, 46, based on an interview with "one old [Chinese] woman" in the 1970s.

The schooling options for Chinese families in the Mississippi Delta in the early twentieth century were limited. Mississippi did not pass a compulsory school law until 1918, and the Mississippi Constitution of 1890 had provided that separate schools were to be provided for the "white" and "colored" races. Virtually no Chinese families chose to educate their children in "colored" schools, educating them at home, hiring private tutors, or sending them out of state or even to China for schooling. Some, however, were able to enroll their children in white public schools. One Chinese resident of the Delta described the educational climate for Chinese in the 1920s:

> By law the Chinese weren't allowed to go to the *Bok Guey* [white] schools, but . . . some went anyway. If you lived in a small town and you mixed with the *Bok Guey*, . . . they would let the Chinese go to their schools 'cause they don't know no better. But as soon as . . . somebody said [a child was] colored, she's Chinese, then you have to be dismissed. . . . [T]hat's what happened to Mrs. Gong Lum.[13]

When the Rosedale Consolidated High School opened its school year in 1924, the Lums attempted to enroll Martha. At the noon recess on that day the superintendent of the school notified Martha that under an order of the school's board of trustees she was excluded from the school on the ground that she was of Chinese descent, and thus "colored" and ineligible to attend. "Mrs. Gong Lum," the same Chinese resident recalled, "got very angry with the Rosedale School board . . . [S]he tried to bring a lawsuit to make them let her children go to school. She thought she could bluff them . . . ."[14]

Gong Lum hired a white law firm from Clarksdale, and filed a writ of mandamus in the Bolivar County district court against the Rosedale trustees on October 24, 1924. He argued that Martha Lum

[13] Id.

[14] Id.

was "not a member of the colored race," but "of Chinese descent," and that since there was "no school maintained in the District for the education of children of Chinese descent," she should be admitted to the Rosedale school.[15] The trial judge agreed, and the trustees, represented by board member Greek Polan Rice, Jr., appealed to the Supreme Court of Mississippi.

The posture of *Gong Lum* had already been established when the Supreme Court of Mississippi heard that appeal. Counsel for Gong Lum did not argue that it was a violation of the Equal Protection Clause for Mississippi to have separate schools for whites and Chinese, but that it was a violation to classify Chinese as members of the "colored" race. And although they argued that there was no school for Chinese in the Rosedale district or even in Bolivar County, they did not argue – nor could they have – that there were no "colored" schools in that county, although the only such schools were a considerable distance from where the Lums resided. Consequently the argument that the Lums had been denied equal opportunities to educate Martha in the Mississippi public schools because of the inconvenience of her having to attend a distant "colored" school was not raised in the Mississippi courts.

The Supreme Court of Mississippi had no difficulty reversing the trial court's decision.[16] It held that the police power of the state enabled it to make racial classifications in public education, and that making a classification between members of the "white" race and members of the "brown, yellow, and black" races was reasonable. And it held that Martha Lum, as a "colored" child, was not denied an equal opportunity to attend school because although there were no "colored" schools in the Rosedale district, there were such schools in Bolivar County. At no point in the Mississippi courts was the issue of whether white and "colored" schools in early twentieth-century Mississippi were "substantially equal," as the post-*Plessy v. Ferguson*[17] jurisprudence of race relations cases seemed to require, raised.

[15] The argument is quoted in Gong Lum v. Rice, 275 U.S. at 80-81.

[16] Rice v. Gong Lum, 139 Miss. 763 (1925).

[17] 163 U.S. 537 (1896).

White and "colored" schools clearly were not "substantially equal" in Mississippi at the time.[18]

When *Gong Lum* was argued, on a writ of error, to the Supreme Court of the United States, Gong Lum's lawyers made an additional equal protection argument, one revealing of the racialist attitudes swirling around the case. They argued that the white race in Mississippi was "the law-making race," and that it had created separate schools for white students to avoid their mixing with blacks. They then reasoned, "[i]f there is danger in the association [with blacks], it is a danger from which one race is entitled to protection just the same as another." It was "discrimination" for "[t]he white race [to] create . . . for itself a privilege that it denies to other races."[19] In other words, it was a violation of the Equal Protection Clause for whites to segregate black from white children for fear that the former would contaminate the latter, and then expose *Chinese* children to that contamination by classifying them as "colored" and relegating them to "colored" schools. Gong Lum was in effect arguing that he was happy for his children to go to school with white children, but did not want them exposed to the "dangers" of having to go to school with black children.

---

[18] The following is a description of a Mississippi "colored school" based on a visit to a Tate County, Mississippi school in 1912. Tate County bordered on the Delta region, and was three counties northwest of Bolivar County. The description appears in Thomas Pierce Bailey, *Race Orthodoxy in the South* 274-76 (1914).

> There were no desks. The children sat on wooden benches . . . Some of the children were atrociously filthy and ragged . . . [T]he range of ages in the three or four approximate grades was between four and eighteen . . . The teacher was very methodical as to ritual, and absolutely without intellectual method . . . . I did not see any blackboard work. There was a very small piece of blackboard of some description in one corner of the room. Here, as in other respects educational, the negro gets his minimum – "good enough for niggers." If the white men of the county were asked whether the schools of the negroes had enough blackboard space, they would be likely to reply – as some have replied: "Enough for the kind of pupils and teachers that use them."

[19] 275 U.S. at 79.

Counsel for Gong Lum had emphasized equal protection arguments in asking that Martha be permitted to enroll in a white school. But the Supreme Court's received jurisprudence in cases involving racial segregation in schools had not emphasized equal protection issues. Instead racial segregation cases had primarily been seen as police power/due process cases. To understand why that might have been so, it is necessary briefly to review the Court's late nineteenth- and early twentieth-century race relations jurisprudence.

After Reconstruction the Court's initial decisions involving racial segregation in public facilities had been concerned with transportation and had focused on Commerce Clause issues. It was not until *Plessy* that the Court squarely held that states could constitutionally require segregated accommodations for black and white passengers on intrastate journeys.[20] And when the Commerce Clause issues were removed, transportation cases were not converted into Equal Protection cases. Homer Plessy had not argued that the car he was required to ride in was inferior to the cars reserved for whites; he had argued that he had a property right, based on a combination of holding a first-class ticket and having his reputation damaged by being dispatched to a "colored" car, to ride in the first-class, whites-only, coach.[21] The Court acknowledged that he had a property right of a sort, but not one based on reputation, because he was, after all, a "colored" man.[22] It then considered whether that right could be

[20] In Hall v. DeCuir, 95 U.S. 485 (1878), the Court held that a Louisiana Reconstruction-era statute *prohibiting* common carriers from engaging in racial discrimination, when invoked by a passenger on a steamship voyage from New Orleans to Vicksburg, Mississippi, cut too deeply into Congress's power to regulate interstate commerce. Then, twelve years later, when a Mississippi statute *required* interstate carriers to provide separate cars for blacks and whites on the intrastate portions of their trips, the Court sustained it against a Commerce Clause challenge, suggesting that the statute was merely an example of requirements imposed by states on railroads, such as compelling them to stop at railroad crossings, and was not an effort to compel interstate passengers to sit in one car or another. Louisville, New Orleans & Texas Railway v. Mississippi, 133 U.S. 587 (1890).

[21] See Brief for Plaintiff in Error, 9, 163 U.S. 537.

[22] Id. at 549. "If he be a colored man . . . he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man."

overcome by some state police power, and concluded that it could, states having the power to provide for the "safety and comfort" of intrastate passengers.[23] So long as the state's supposition that the safety and comfort of passengers might be adversely affected should black and white passengers be freely permitted to mingle on public conveyances was "reasonable," the police power trumped the private right. The doctrinal framework governing racial segregation cases was the same as that governing the Court's "liberty of contract" cases, such as *Lochner v. New York*.[24]

After *Plessy* came two cases involving racial segregation in education, *Cumming v. Richmond County Board of Education*[25] and *Berea College v. Kentucky*.[26] In the first case a Georgia school board decided to shut down the only black high school in its district in order to use that school's facilities to remove overcrowding in the district's black elementary school. In the second case the Kentucky legislature sought to prevent a private college from enrolling both black and white students. The *Cumming* decision turned on the Court's recognition that since states had no obligation to provide free public education at all, they could condition the terms on which it was provided. *Berea College* at first glance seemed more difficult, because the Kentucky statute, which made it a crime "to operate any college, school, or institution where persons of the white and negro races are both received as pupils for instruction,"[27] interfered with the "liberty" of students and teachers to enter into educational contracts. Since the rationale for the Kentucky statute was the "safety and comfort" allegedly achieved by separating blacks and whites in educational settings,[28] *Berea College* appeared to pit the rationale for *Lochner* squarely against the police power justifications advanced in *Plessy*. But the Court avoided that conflict by deciding the case on the ground that

[23] Id. at 550.

[24] 198 U.S. 45 (1905).

[25] 175 U.S. 528 (1899).

[26] 211 U.S. 45 (1908).

[27] 1904 Kentucky Acts 181.

[28] Berea College v. Commonwealth, 94 S.W. 623, 626 (Ky. 1906).

the college was a corporation chartered by the legislature, which could establish the terms of its charter.[29]

Thus by the time *Gong Lum* came to it, the Court could cite several precedents from federal and state courts, dating back to 1849, upholding segregation in state public schools.[30] But *none* of those cases had done so on the ground that the separate facilities provided were substantively equal. They had all turned on the police power of the states to segregate the races in educational settings. Moreover, the posture of *Gong Lum* enabled Chief Justice William Howard Taft, writing for all his colleagues, to avoid both of the significant equal protection issues it raised. One was whether Mississippi could place Chinese children in a category that required them to go to "colored" schools, along with other members of "yellow," "brown," and "black" races, solely because their skin color was not white. The other was whether Mississippi could create color-conscious school districts in a fashion that restricted the educational opportunities of Chinese children while not restricting those of similarly situated white children.

Had those issues actually been explored, they would have, as Taft acknowledged, "call[ed] for very full argument and consideration."[31] But Taft treated the issue of whether Chinese children could be classified as "colored" as solely within the state's discretion, and the issue of whether Martha Lum's educational opportunities had been restricted by the requirement that she attend a "colored" school outside the Rosedale district as not worthy of closer scrutiny.

Taft apparently concluded that the first issue had already been resolved by the series of cases he cited upholding racial segregation in education. But those cases had advanced justifications for offering *separate facilities*, not for the initial classification of students on the basis of their race. They provided no support for the decision to classify Chinese students as "colored," which Taft treated, without any discussion, as within the discretion of states.[32]

---

[29] 211 U.S. at 45, 56-57.

[30] 275 U.S. at 86.

[31] Id.

[32] Id. at 87.

Taft avoided an obligation to look more searchingly into the second issue by noting that "[h]ad the petition alleged specifically that there was no colored school in Martha Lum's neighborhood to which she could conveniently go, a different question would have been presented." Since no such allegation had been made, "[w]e must assume . . . that . . . there is . . . a colored school . . . in a different district . . . which . . . Martha Lum may conveniently attend."[33] None of the justices who decided *Gong Lum* knew whether in fact that was so. They simply assumed that "a Chinese citizen of the United States" had been "classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow, or black."[34] The "equal facilities" issue was not investigated.

Gong Lum was thus an "equal protection" case at a time when the Equal Protection Clause was, as Holmes put it in *Buck v. Bell*, the "usual last resort of constitutional arguments."[35] The two major equal protection issues that surfaced in the Court's equal protection cases from *Brown* on – whether classifications based on race could survive strict scrutiny and whether "separate but equal" racially segregated facilities could ever satisfy the Equal Protection Clause – were both assumed away by the justices who decided *Gong Lum*. They treated classifications based on race as presumptively reasonable rather than presumptively suspect because they believed that race and skin color were proxies for a host of salient differences among humans. They also either took states at face value when they asserted that facilities provided whites and non-whites were "separate but equal," or, if they suspected they were not, were disinclined to probe further. They understood the "reasonableness" of segregating whites and non-whites because they thought racial differences were meaningful.

---

[33] Id. at 84.

[34] Id. at 85.

[35] 274 U.S. 200, 207 (1927).

So did most Americans at the time *Gong Lum* was decided, including the Gong Lum family. They believed that the Mississippi Delta Chinese were a different "race" from both their white and African-American neighbors; in fact they had asked the courts to affirm that difference by invalidating the classification of Chinese students as "colored." And they believed that "colored" schools in Mississippi were inferior to white schools. They had no intention of accepting Mississippi's offer to educate the Lum daughters in such schools. After the Supreme Court handed down *Gong Lum* they moved to Elaine, Arkansas, where Berta and Martha could attend white schools.[36]

Between the 1950s and the 1970s the race relations jurisprudence of the Supreme Court sharply pivoted from the direction it had assumed from *Plessy* through *Gong Lum*. As other branches of the federal government sought to enforce racial integration in the public schools and elsewhere, states such as Mississippi resisted, and in many southern communities the slow dismantling of segregation was accompanied by dramatic increases in racial tension. Many African-Americans in the Mississippi Delta region reacted to the situation in the same manner as the Gong Lum family had two decades earlier: the black population of Bolivar County dropped by nearly 45% in the 1950s.[37]

A comparable decline in the Chinese Mississippi Delta population took place in the same time period. In his interviews in the late 1970s, James Loewen found that although most Delta Chinese remained in the grocery business, nearly all the young adults were planning to leave the state, attend colleges, and work in other occupations, and

---

[36] Loewen, *The Mississippi Chinese* 68, citing an interview with "Mrs. Harry Ogden." Loewen adds that after *Gong Lum* came down

> [O]ther Chinese families with children went to Memphis or left the South entirely. Delta Chinese sent their children to live with relatives in other states so they could obtain an education, and other families employed private tutors at home. In general, however, the [Chinese] children who came of age in the Delta before 1936 [when a Chinese Mission school was built in the town of Cleveland] received little formal schooling of any kind.

[37] Id. at 172.

their parents were encouraging them to do so.[38] The loss of black customers, and the emergence of chain grocery stores, augured a hazardous future for independent Chinese grocers in the Delta, and they anticipated, correctly as it turned out, that their stores would be targets for damage if racial unrest turned violent. When Loewen charted the depopulation of Bolivar County in 1975, the exodus of African-Americans and Chinese was roughly comparable.[39] As civil rights came to the Delta, younger generations of Chinese and African-Americans left. Their departure was another, this time ironic, legacy of *Gong Lum v. Rice*.

GB

[38] Id., 179-182.

[39] Compare Figures 5 and 6 in id., 173, 179.