BRIEF FOR RESPONDENTS

Supreme Court of the United States

OCTOBER TERM, 1952

No. 413

SPOTTSWOOD THOMAS BOLLING, ET AL.,
PETITIONERS,

v.

C. MELVIN SHARPE, ET AL., RESPONDENTS.

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DIVISION OF PRINTING AND PUBLICATIONS—D. C. GOVERNMENT

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BRIEF FOR RESPONDENTS

A final judgment of the United States District Court for the District of Columbia dismissing a complaint for injunction and declaratory judgment is here for review, by writ of certiorari, before judgment by the United States Court of Appeals for the District of Columbia Circuit. The petitioners, plaintiffs in the District Court, sought admission to the Sousa Junior High School, a junior high school in Division 1 of the public school system of the District of Columbia, which division encompasses the several schools for white pupils, contending that the separation of white and Negro children in the public schools violates Article I, Sec. 9, Clause 3 of the Constitution of the United States, the Fifth Amendment to the Constitution of the United States, Title 8, Sections 41 and 43 of the United States Code, and Chapter I, Article 1, Section 3 and Chapter IX, Articles 55 and 56 of the Charter of the United Nations.

OPINION BELOW

A final order dismissing the complaint of the petitioners, plaintiffs in the United States District Court for the District of Columbia, appears in the record (R. 19). It is not reported in any official reporter system.

GROUNDS OF JURISDICTION

After a final order of dismissal of the complaint was entered by the United States District Court for the District of Columbia on April 9, 1951 (R. 19), notice of appeal to the United States Court of Appeals for the District of Columbia Circuit was filed by petitioners, plaintiffs in the District Court, on April 10, 1951 (R. 20). After briefs were filed in the United States Court of Appeals for the District of Columbia Circuit by both the petitioners and respondents, but before argument was had in that court, this Court, in a Per Curiam opinion dated October 8, 1952 entered jointly in the cases of *Brown* v. *Board of Education of Topeka, Briggs* v. *Elliott,* and *Davis* v. *County School Board of Prince Edward County, Virginia,* Nos. 8, 101 and 191 respectively, October Term, 1952, continued said three cases for argument so that a petition for certiorari might be filed herein under the provisions of 28 U. S. C. § § 1254(1), and 2101(e). A petition for writ of certiorari was filed herein by petitioners on October 24, 1952 seeking review of the judgment of the United States District Court for the District of Columbia, which petition was granted on November 10, 1952. Jurisdiction of this Court is accordingly predicated upon the provisions of Title 28, United States Code, Sections 1254(1) and 2101(e).

QUESTIONS PRESENTED

In the opinion of the respondents the questions presented herein are:

(1) Whether the complaint filed by petitioners in the United States District Court for the District of Columbia states a claim on which relief can be granted.

(2) Whether Acts of Congress providing for the establishment and maintenance of a dual school system in the District of Columbia are constitutional.

STATEMENT OF THE CASE

The statement of the case incorporated in the brief filed by petitioners sets forth as facts most of the allegations of their complaint filed in the District Court rather than stating them merely as allegations. There are also a few statements which are in error and, accordingly, respondents believe that the following is a correct presentation of the facts:

A complaint filed in the United States District Court for the District of Columbia alleges in substance the following:

> The corporate petitioner, Consolidated Parent Group, Inc., is an organization having for its objective, among others, "abolition of segregation and other discriminatory practices now invoked upon minority groups in the public schools and recreational areas of the District of Columbia."
>
> The adult petitioners are taxpayers and citizens of the United States and of the District of Columbia, required by law to send their respective children, minor petitioners, to public schools in the District, and are subject to criminal prosecution for failure so to do. The minor petitioners are Negroes, are residents of the District of Columbia, are within the statutory age limits of eligibility to attend public schools of said District, and were, by the principal of Sousa Junior High School, on the 11th day of September, 1950, and during the time when the respondents were receiving students for enrollment and instruction in Sousa Junior High School, a public school in the District of Co-

lumbia, refused admission and excluded from enrollment and instruction therein solely because of their race or color.

Subsequently, minor petitioners appealed to the Associate Superintendent of Schools in charge of white vocational and junior high schools in the District of Columbia, to the First Assistant Superintendent of Schools, Divisions 1-9 (now Division 1), restricted to white pupils, to the Superintendent of all public schools in the District of Columbia, and to the Board of Education. The several school officials refused admission and excluded the minor petitioners from enrollment and instruction in Sousa Junior High School, solely because of their race and color, and the Board of Education upheld the action of these school officers.

Defendants in the action filed in the District Court, who are now the respondents, are members of the Board of Education, the several school officers heretofore mentioned, and the First Assistant Superintendent of Schools, Division 10-13 (now Division 2), restricted to colored pupils.

The minor and adult petitioners, allegedly on their own behalf and on behalf of others similarly situated, together with the corporate petitioner, also allegedly acting on behalf of itself and all Negro citizens of the United States residing in the District of Columbia, "similarly situated", on November 9, 1950 filed the complaint (R. 1-14), in the District Court, against the respondents in their respective official capacities. The suit sought a declaratory judgment that the respondents are without right to construe certain Acts of Congress so as to exclude the minor petitioners from Sousa Junior High School on account of their race or color, and sought interlocutory and permanent injunctions restraining the respondents from so excluding the minor petitioners and requiring them to admit the minor petitioners to said school. The complaint is based upon alleged violation of Article 1, Section 9, Clause 3 of the Constitution, the Fifth Amendment to the Constitution, Sections 41

and 43 of Title 8 of the United States Code, and Chapter 1, Article 1, Section 3 and Chapter IX, Articles 55 and 56 of the Charter of the United Nations.

The complaint alleges that the minor petitioners "do now attend a junior high school in said District."

Contrary to the allegation in paragraph 4 of the complaint (R. 4), the compulsory school attendance law of the District of Columbia, 43 Stat. 806 (set out in Appendix B of petitioners' brief), does not require attendance upon a *public* school.

Subsequently, the respondents, through counsel, filed a motion to dismiss the complaint (R. 18).

The District Court granted the motion to dismiss (R. 19).

SUMMARY OF ARGUMENT

Petitioners brought this action in the district court to require respondents, members of the Board of Education and school officials, to admit Negro children to Sousa Junior High School, a school established and maintained for white children. The complaint charges that the minor petitioners are deprived of "enjoyment of the educational opportunities afforded" in Sousa Junior High School in violation of the Civil Rights Act, the United Nations Charter, Article I, Section 9, Clause 3 of the Constitution, and the due process clause of the Fifth Amendment. The complaint admits, however, that the minor petitioners "do now attend a junior high school" in the District and contains no allegation that any educational opportunity available in Sousa Junior High School is not available in the junior high school which minor petitioners "do now attend." These fatal deficiencies of the complaint not only justified the district judge in dismissing the complaint but required that he do so.

A series of Congressional enactments between 1862 and 1866 providing for the establishment of a dual school system in the District of Columbia were reenacted by Congress in 1874 as part of the Revised Statutes of the District. This Court construed these enactments as requiring the maintenance of the dual school system by so referring to them in the case of Plessy v. Ferguson, in 1896.

The highest court of the District of Columbia has on two occasions, in 1910 and in 1950, construed the Revised Statutes of the District as requiring the maintenance separate schools for white and colored children. Indeed, Congress itself in a number of enactments for the District of Columbia between 1874 and 1951 has treated and dealt with the dual school system as an established fact. Since this Court ordinarily accepts the construction and interpretation by the highest court of the District of Columbia of purely local laws, that court's construction and interpretation of these purely local laws should be accepted herein.

Even slavery was constitutional under the Fifth Amendment—it required a constitutional amendment to end it. When slavery in the District of Columbia was abolished by Congress before the adoption of the Thirteenth Amendment, "due process" commanded payment for the property thus taken. Separate schools for white and colored children were set up by the very same legislators who proposed the Fourteenth Amendment and who enacted the Civil Rights Acts. Thus their contemporaneous judgment was that a dual system of schools is constitutional. During the years following the Civil War, when political rights for Negro citizens were being established by constitutional amendments and legislation, an integrated school system for the District was not considered by the Congress to be an essential part of the rights. Indeed, after the dual system had been in operation for over a quarter century, some of the outstanding Negro spokesmen of the community insisted that the continuance thereof is essential to the maximum development of the race.

Dual school systems have been many times decided by this Court to be constitutionally valid under the Fourteenth Amendment, which contains an "equal protection" clause as well as a "due process" clause. In view of these decisions and the oft-enunciated rule that the due process clauses of the two Amendments are similarly construed, the dual system in the District of Columbia cannot be violative of the Fifth Amendment.

Beyond the fact that there was such a close tie between the Fourteenth Amendment, the Civil Rights Acts and the laws set-

ting up the dual school system in the District, efforts to specifically include integration of District schools in an amendment of the Civil Rights Act failed of passage in Congress and, indeed, the enactment of the Revised Statutes in 1874 repealed by implication any concept that the earlier Civil Rights Act denounced the dual school system.

The provisions of the United Nations Charter do not constitute the equivalent of valid congressional enactments nor do such Charter provisions have the effect of repealing by implication federal, State or municipal laws in conflict therewith. The "human rights" and "fundamental freedoms" mentioned in Article 1 and Article 55 of the Charter are not defined anywhere therein, but are no greater than the rights and freedoms guaranteed to Americans by the federal Constitution. These Articles, as well as Article 56, are non-self-executing rather than self-executing provisions and must be implemented by legislation to override established local law.

Since the laws establishing separate schools for white and Negro children in the District of Columbia had for their purpose the giving rather than the denial of educational opportunity, it connot be said that such laws constitute a legislative pronouncement of guilt and punishment of the Negro people without trial. These laws are not, therefore, Bills of Attainder, and certainly the construction thereof so as to require the maintenance of the dual school system cannot be considered violative of the constitutional prohibition against Bills of Attainder.

The duty of the courts is to interpret, not to enact, legislation. The policy or wisdom of the maintenance of a dual school system is beyond the power of courts to even consider. One branch of government should not encroach upon the domain of another and statutes should not be adjudged invalid except for manifest necessity. Since the two parts of the dual school system are conceded to be equal, if the long established policy of their maintenance in the District of Columbia is to be struck down, the Congress and not the Court is the body to make that decision.

ARGUMENT

I

The Complaint Filed Below States No Cause of Action Because, Inter Alia, it Fails to Set Forth Any Injuries To the Petitioners.

The complaint filed by the petitioners in the District Court (R. 1-14) in the name of five minors and their parents, all Negro residents of the District of Columbia, and a corporation known as Consolidated Parent Group, Inc., allegedly on behalf of the named plaintiffs and all other Negro citizens residing in the District of Columbia, and similarly situated, sought a declaratory judgment and temporary and permanent injunctive relief against the members of the Board of Education of the District of Columbia, the Superintendent of Schools, the two First Assistant Superintendents of Schools, an Associate Superintendent of Schools, and the Principal of the Sousa Junior High School. The complaint alleged that the exclusion of the minor plaintiffs from the Sousa Junior High School was solely because of their race and color, and that this exclusion violated Sections 41 and 43 of Title 8 of the United States Code, violated Article I, Section 9, Clause 3 of the Constitution of the United States, violated the Fifth Amendment to the Constitution, and violated Chapter I, Article 1, Section 3, and Chapter IX, Articles 55 and 56 of the Charter of the United Nations.

It is implicit in the complaint, and it is a conceded fact, that the Sousa Junior High School is a part of Division 1 of the local school system, the schools in which division are allocated for the instruction of white children. Although it is complained that the several violations enumerated above result from the failure to admit the minor petitioners to this particular school, it is alleged in paragraph 3 of the complaint that the minor petitioners "do now attend a junior high school in said District" (R. 4).

Erroneously, the complaint alleges that adult petitioners are required by law to send their children to *public* schools and are subject to prosecution for failure so to do. The law (43 Stat. 806, Secs. 31-201 and 31-207 D. C. Code, 1951), set out in petitioners' brief, Appendix B, requires only that adult petitioners shall cause their children to be instructed, publicly or privately, and does not require them to go to *any* school.

There is a total absence from the complaint of any allegation that the minor petitioners are not receiving in the junior high school in the District of Columbia which they now attend all of the educational opportunities afforded in the Sousa Junior High School. From this failure to negative enjoyment of educational opportunities, it may be assumed that the minor petitioners are, in fact, enjoying the same or equal educational opportunities as are afforded in the Sousa Junior High School. There is also a total failure to enumerate educational opportunities enjoyed at the Sousa Junior High School. Without specific allegations to the contrary it must be assumed that the minor petitioners who "do now attend a junior high school in said District" enjoy all of the educational opportunities afforded in any junior high school in the District of Columbia.

In *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, this Court said:

> "When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.' *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 209. The burden is not sustained by making allegations which are merely the general conclusions of law or fact."

No directly comparable case has been found, but a closely analogous allegation to those made by the petitioners is the oft-used allegation of arbitrary and capricious action. In *Wilkinson* v. *Hines,* 64 App. D. C. 5, 73 F. 2d 514, the United States Court of Appeals for the District of Columbia, said at page 8:

> "We are of the opinion also that the allegations in appellant's petition that the 'respondent acted arbitrarily and capriciously, without evidence to support his decision, and beyond the scope of his authority', are not averments of fact, but conclusions of law, and are not sustained by the other allegations of the petition."

Again in *National War Labor Board* v. *Montgomery Ward & Co.,* 79 U. S. App. D. C. 200, 144 F. 2d 528, certiorari denied, 323 U. S. 774, this same court, speaking through Judge Edgerton, said:

> "Judicial interference with administration is sometimes necessary but always serious. * * * A plaintiff cannot confer jurisdiction to review even commonplace administrative action by a mere forecast that he will be irreparably injured if the court does not intervene. He must allege facts which support his forecast."

This Court in *Silberschein* v. *United States,* 266 U. S. 221, 225 used language particularly applicable to the case at bar, as follows:

> "The general allegations of the petition that the Director's decision was arbitrary, unjust and unlawful, and a usurpation of power, are merely legal conclusions. Clearly, the petition does not present a case where the facts are undisputed and the only conclusion properly to be drawn is one favorable to petitioner, or where the law was misconstrued, or where the action of the executive officer was arbitrary or capricious."

If it be argued that the liberality of the Federal Rules of Civil Procedure has obviated the necessity for pleading facts to show arbitrariness or, as in this case, denial of educational opportunity, the answer may be found in *Sheridan-Wyoming Coal Co., Inc.* v. *Krug*, 83 U. S. App. D. C. 162, 168 F. 2d 557, where the court said:

> "The rules of Civil Procedure provide that a complaint shall contain 'a short and plain statement of the claim showing that the pleader is entitled to relief'. The Rule was intended to obviate the technicalities of pleading and, particularly, long and verbose allegations of evidentiary facts. With that objective we are in unqualified accord. However, a 'claim' cannot be stated in the form of a legal conclusion, without more. * * *. The minimum under the Rule is that the adversary party must be sufficiently advised to prepare his defense, *and that the court must be sufficiently informed to determine the question presented.* Defenses cannot be made to legal propositions in the abstract, *nor do mere legal conclusions present questions upon which the court can pass.* Justiciable cases and controversies arise upon facts." (Emphasis supplied.)

See, to the same effect, *Marranzano* v. *Riggs National Bank*, 87 U. S. App. D. C. 195, 184 F. 2d 349, 351.

In *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, Mr. Justice Brandeis said at page 346:

> "The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."

Justice Brandeis then listed seven items constituting the series of rules. The fifth, found at page 347, is as follows:

> "5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation."

To the same effect see *Heald* v. *District of Columbia*, 259 U. S. 114, 123; *Corporation Commision* v. *Lowe*, 281 U. S. 431, 438.

II

A. Acts of Congress Providing for Education of Children of the District of Columbia Require such Education in a Dual School System and have been so Construed by this Court.

B. Construction of Locally Applicable Laws by the Highest Court of the District of Columbia is Normally Accepted by this Court.

A.

Among the contentions of petitioners is one that the several Acts of Congress providing for the establishment and maintenance of schools in the District of Columbia do not require the maintenance of a dual system.

The enactments of Congress which in unambiguous terms specifically direct that separate schools be maintained for the education of white and colored children of the District of Columbia begin with the Act approved May 20, 1862. That Act and others on the same subject enacted prior to June 22, 1874 were carried into the Revised Statutes of the District of Columbia, approved on that date.[1] Thus, although the requirement for separate schools was originally decreed by Congress at a time when the Negro was not a citizen, Congress reenacted that requirement six years

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[1] Act of May 20, 1862, 12 Stat. 394; Act of May 21, 1862, 12 Stat. 407; Act of July 11, 1862, 12 Stat. 537; Act of June 25, 1864, 13 Stat. 187; Act of July 23, 1866, 14 Stat. 216; Act of July 28, 1866, 14 Stat. 343.

Sections 281, 282, 283, 306, 310, 314 and 1296 of the Revised Statutes D. C (Act of June 22, 1874, 18 Stat. Part. 2) embodying the foregoing Acts are set out in Appendix A.)

after the adoption in 1868 of the 14th Amendment. So conclusively was the requirement stated that this Court, in *Plessy* v. *Ferguson*, 163 U. S. 537, 544-545, cited the pertinent sections of the Revised Statutes of the District of Columbia as an illustration of laws requiring such separation.

In legislation enacted by Congress for the District of Columbia subsequent to the Revised Statutes, Congress dealt with the system of separate schools as an established fact. Thus, the Act approved June 6, 1900, 31 Stat. 564 (enacted by the 56th Congress, which also enacted the D. C. Code of 1901), established a paid Board of Education of seven members and provided for two assistant superintendents, "one of whom, under the direction of the superintendent, shall have charge of schools for colored children; * * *." The Act of June 20, 1906,[2] which established the present Board of Education, authorized the Board, upon recommendation of the Superintendent of Schools, to "* * * appoint one white assistant superintendent for the white schools and one colored assistant superintendent for the colored schools * * *." In the District of Columbia Teachers' Salary Act of 1945 (59 Stat. 488), approved July 21, 1945, the provisions of the Act of 1906 with respect to assistant superintendents were repeated and extended in Title V, page 498, Section 12, and in addition, separate boards of examiners and separate chief examiners for the white and colored schools were provided for by Sections 13 and 14 of that Title. The District of Columbia Teachers' Salary Act of 1947,[3] approved July 7, 1947, contained almost identical provisions in Title V, Sections 11, 12 and 13. As late as the Act approved October 24, 1951, by which the District of Columbia Teachers' Salary Act of 1947 was amended, Congress in Section 8 thereof[4] provided for appointment by the Board of Education, on

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[2] 34 Stat. 316.
[3] 61 Stat. 258.
[4] 65 Stat. 605.

the recommendation of the Superintendent of Schools, of "a chief examiner for the board of examiners for white schools and a chief examiner for the board of examiners for colored schools."

B.

The United States Court of Appeals for the District of Columbia Circuit has directly passed upon these Acts of Congress in three cases, *Wall* v. *Oyster,* 36 App. D. C. 50, *Carr* v. *Corning* and *Browne* v. *Magdeburger,* the latter two decided jointly, 86 U. S. App. D. C. 173, 182 F. 2d 14. Reference to the record and briefs in the case of *Wall* v. *Oyster*[5] shows that, contrary to the characterization of that case set out in petitioners' brief, the question of the requirement for a dual system of schools in the District was raised and the consitutional validity thereof was attacked. In paragraphs 8 and 9 of the amended petition (for writ of mandamus) filed May 7, 1910, it was alleged that Sections 281 to 285, 293 and 294 of the Revised Statutes of the United States Relating to the District of Columbia do not expressly, but only by implication, prohibit the attendance of colored children at white schools, and that insofar as said legislation attempts to exclude colored children from white schools it is unconstitutional and void because it violates the Fifth Amendment to the Constitution. True, the appellant's brief devotes but one sentence to this proposition, but the appellees, as members of the Board of Education, fully briefed the point and the opinion of the court specifically decided:

> "A statute enacted in 1864, and afterwards carried into the Revised Statutes of the District,

[5] Bound volume available in the Clerk's Office of the United States Court of Appeals for the District of Columbia Circuit and in the Bar Association Library, United States Court House, Washington, D. C.

> provided for the maintenance of separate free schools for white and 'colored' children, affording like facilities and advantages to each. D. C. Rev. Stat. secs. 281, 282, 306, 310, 314."

The court thereupon declared that the power of Congress, exercising all the functions of a state legislature in the District of Columbia, to provide for separation of white and colored children in the public schools has been effectually settled by this Court and cited *Plessy* v. *Ferguson, supra.*

In the *Carr* and *Browne* opinion Judge Prettyman for the Court of Appeals reviewed in extenso the history of the enactments by which separate schools were created and maintained in the District, and concluded, commencing on page 18, that the enactments cannot be read with any meaning except that the schools for white and colored children were then intended to be separate. The opinion then goes on to dispose of the contention that the provisions of the Revised Statutes have since been repealed and demonstrates that no subsequent enactment by the Congress can be so construed. Indeed, by pointing to a number of later Acts, the court demonstrates the continuing intention of Congress to maintain the dual school system in the District. Since these statutes are purely local in scope and confined in their operation to the District of Columbia, the oft-expressed rule of this Court that it will ordinarily accept the construction and interpretation thereof by the highest court of the District of Columbia should be applied. *Del Vecchio* v. *Bowers,* 296 U. S. 280, 285; *D. C.* v. *Pace,* 320 U. S. 698, 702. *Cf. American Security and Trust Co.* v. *District of Columbia,* 224 U. S. 491; *United Surety Co.* v. *American Fruit Products Co.,* 238 U. S. 140; *Busby* v. *Electric Utilities Union* 323 U. S. 72; *Fisher* v. *United States,* 328 U. S. 463.

III

The Dual School System in the District of Columbia is Not Violative of the Fifth Amendment to the Constitution of the United States.

There is no doubt that Congress, under the provisions of Article I, Section 8 of the Constitution, has exclusive legislative authority over the District of Columbia. The nature, extent, and breadth of that power is nowhere better delineated and better documented than in the opinion of the United States Court of Appeals for the District of Columbia in *Neild* v. *District of Columbia,* 71 App. D. C. 306, 110 F. 2d 246. Therein it is pointed out that the power of Congress to legislate for the District of Columbia is not subject to the restrictions placed on State legislatures and is as extensive as is the power of Congress to legislate generally for the nation.

Acting under that broad authority this member of the Trinity which makes up the Government of the United States enacted laws providing for the establishment and maintenance of a dual school system in the District.[6] These enactments stem from the period before the Thirteenth, Fourteenth and Fifteenth Amendments. At that time the due process clause of the Fifth Amendment was regarded as a bulwark for the protection of the property rights of the white and colored slave owners.[7]

When Congress undertook to abolish slavery in the District of Columbia,[8] it appropriated a million dollars to purchase from their owners the freedom of the approximately 3100 slaves in the District.[9]

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[6] See Sections of Revised Statutes, D. C., Appendix A.

[7] See *Emancipation in the Dist. of Col.* Ex. Doc. No. 42, 38th Cong. 1st Sess. for evidence that free Negroes were slave owners in the District of Columbia although, it appears, some bought freedom of relatives.

[8] Act of April 16, 1862, 12 Stat. 376.

[9] $993,406.35 was expended for 3100 slaves according to report of Commission on purchase of freedom of slaves, 38th Cong. 1st Sess., House of Representatives, Ex. Doc. No. 42.

For seventy-five or eighty years after the adoption of the Constitution and its first ten Amendments in 1789, civil and political rights for the Negro, while advocated by many, were not thought to be required by the Fifth Amendment. Indeed, slavery flourished thereunder. Not until the adoption of the Fourteenth and Fifteenth Amendments and the passage of the first Civil Rights Act did our forebears believe that there was legal foundation for the extension of any of the rights of citizenship to the colored man in this country. Even then, as will be pointed out hereinafter, his education in separate schools was not inveighed against by legislation. Quite the contrary was true.

At just about the time when the Fourteenth Amendment, containing, as it does, prohibitions upon the States against deprivation of life, liberty or property without due process of law and against denial to any person of the equal protection of the laws, was proposed in 1866, the same Congress which proposed it enacted some of the laws providing for separate schooling for the white and colored children in the District of Columbia. Judge Prettyman of the United States Court of Appeals for the District of Columbia Circuit thus commented thereon in his opinion for the court in the *Carr* and *Browne Junior High* cases, *supra*, 86 U. S. App. D. C. 173, 182 F. 2d 14, 18:

> "These various enactments by the Congress cannot be read with any meaning except that the schools for white and colored children were then intended to be separate. Moreover, it is significant, in respect to the constitutional points made here, that two of these statutes were enacted by the same Congress which proposed the Fourteenth Amendment and at almost the same time as that proposal. The Amendment was proposed by the Congress on June 16, 1866, and these acts were dated July 23, 1866, and July 28, 1866."

At page 16-17 in the *Carr* and *Browne* opinion, *supra,* the court said:

> "It is urged that the separation of the races is itself, apart from equality or inequality of treatment, forbidden by the Constitution. The question thus posed is whether the Consitution lifted this problem out of the hands of all legislatures and settled it. We do not think it did. Since the beginning of human history, no circumstance has given rise to more difficult and delicate problems than has the coexistence of different races in the same area. Centuries of bitter experience in all parts of the world have proved that the problem is insoluble by force of any sort. The same history shows that it is soluble by the patient processes of community experience. Such problems lie naturally in the field of legislation, a method susceptible of experimentation, of development, of adjustment to the current necessities in a variety of community circumstance. *We do not believe that the makers of the first ten Amendments in 1789 or of the Fourteenth Amendment in 1866 meant to foreclose legislative treatment of the problem in this country.*"
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> * * * * * * * * *
>
> "The Supreme Court has consistently held that if there be an 'equality of the privileges which the laws give to the separated groups', the races may be separated. That is to say that constitutional invalidity does not arise from the mere fact of separation but may arise from an inequality of treatment. Other courts have long held to the same effect."

Cited for these propositions are a number of federal and State decisions and a number of cases in this Court, among which is *Plessy* v. *Ferguson, supra,* 163 U. S. 537. In the recent case of *Adamson* v. *California,* 332 U. S. 46, 53, the Court uses language which might well have been written to describe the decision of *Plessy* v. *Ferguson, supra*:

> "It is the construction placed upon the amendment by justices whose own experience had given them contemporaneous knowledge of the purposes that led to the adoption of the Fourteenth Amendment."

In their brief in the Court of Appeals in this cause counsel for petitioners laid great stress upon the *Sweatt* [10] and *McLaurin* [11] decisions of this Court. Here they have scarcely mentioned these two recent decisions dealing with education of colored youth. Undoubtedly they have come to the realization that both cases were decided solely on the proposition that the educational opportunities afforded to the respective Negro appellants therein were not equivalent or substantially equal to those furnished to white students. Indeed, some of the language used in the opinions by the Chief Justice actually supports the position of the respondents herein. In the *Sweatt* opinion, at page 635-636, the following is found:

> "In *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 351 (1938), the Court, speaking through Chief Justice Hughes, declared that 'petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders *facilities for legal education substantially equal* to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.' * * *
> In accordance with these cases, petitioner may claim *his full constitutional right*: legal *education equivalent to that offered by the State to students of other races.* Such education is not available to him in a separate law school *as offered by the State.* We cannot, therefore, agree with respondents that the doctrine of *Plessy* v. *Ferguson,* 163 U. S. 537 (1896), requires affirmance of the judg-

[10] *Sweatt* v. *Painter,* 339 U. S. 629.
[11] *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637.

> ment below. Nor need we reach petitioner's contention that *Plessy* v. *Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation." (Emphasis supplied.)

Thus is there a reaffirmation of the long line of decisions of this Court sustaining the constitutional validity of the dual school system provided the facilities available to white and colored children are substantially equal.[12]

Decisions in *McCabe* v. *Atchison T & SF Ry., Gong Lum* v. *Rice, and Missouri ex rel. Gaines* v. *Canada,*[13] were enunciated by jurists who were either at the time of the decision or were later to become Chief Justices of the United States.

In the *McCabe* case in 1914 Mr. Justice Hughes affirmed the correctness of the proposition:

> "* * * the question could no longer be considered an open one, that it was not an infraction of the Fourteenth Amendment for a state to require separate, but equal, accommodations for the two races."

In the *Gong Lum* case in 1924 Mr. Chief Justice Taft, for the Court, quoted from *Cumming* v. *Richmond County Board of Education,*[14] *Plessy* v. *Ferguson, supra,* and a number of federal and State decisions to arrive at the conclusion that separate schools for white and colored children are not in violation of the Constitution and that the requirement that a Chinese child should attend a colored school was constitutionally a question for each State to decide for itself.

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[12] *Plessy* v. *Ferguson* (1896), 163 U. S. 537; *Cumming* v. *Board of Education* (1899), 175 U. S. 528; *McCabe* v. *Atchison T. & SF Ry.* (1914), 235 U. S. 151; *Gong Lum* v. *Rice* (1927), 275 U. S. 78; *Missouri ex rel. Gaines* v. *Canada* (1938), 305 U. S. 337; *Mitchell* v. *United States* (1941), 313 U. S. 80; *Sipuel* v. *Board of Regents* (1948), 332 U. S. 631; *Sweatt* v. *Painter* (1950), 339 U. S. 629.

[13] See footnote 12 for citations.

[14] Ibid.

And in *Gaines* v. *Canada*, *supra*, which was cited with approval in the later cases of *Sipuel* v. *Board of Regents* and *Sweatt* v. *Painter*, Mr. Chief Justice Hughes, in 1938, relying on the *Plessy*, *McCabe* and *Gong Lum* cases, said:

> "The State has sought to fulfill that obligation [providing advantages for higher education to Negroes] by furnishing equal facilities in separate schools, a *method the validity of which has been sustained by our decisions.*" (Emphasis supplied.)

Mr. Justice Black and Mr. Justice Reed concurred in the opinion written by the Chief Justice in the *Gaines* case.

This case was decided scarcely fourteen years ago with only a single dissent by Mr. Justice McReynolds, who thought that equal facilities even outside the State were constitutional. What has changed the Constitution in the past fourteen years?

Considerable emphasis is placed by petitioners upon language used by this Court in *Hirabayashi* v. *United States*, 320 U. S. 81, *Korematsu* v. *United States*, 323 U. S. 214, and *Ex parte Endo*, 323 U. S. 283. They also quote from the cases of *Meyer* v. *Nebraska*, 262 U. S. 390, *Pierce* v. *Society of Sisters*, 268 U. S. 510, *Farrington* v. *Tokushige*, 273 U. S. 284, and *Oyama* v. *California*, 332 U. S. 633. Examination of these and other cases cited by petitioners shows that they fall into three classes:

1. Cases in which there was a clear invasion of rights protected by *specific* provisions of the Civil Rights Acts;

2. Cases in which there were *complete* denials of rights or privileges secured by the equal protection clause of the Fourteenth Amendment or in one case, the due process clause of the Fifth Amendment; and

3. Cases in which confinement in concentration camps and other extreme restrictions were practiced upon Japanese citizens purely as war emergency measures.

Taking their cue from three cases involving citizens of Japanese descent who were completely denied every semblance of equality of treatment for security reasons during World War II (*Hirabayashi* v. *United States, supra, Korematsu* v. *United States, supra,* and *Ex parte Endo, supra*), petitioners assert that since there is no issue of national security present, in order to justify separate schools for white and colored pupils respondents are required to show that there is some more pressing public necessity which requires a dual school system in the District of Columbia. There are several answers to this proposition.

In the first place, petitioners are not deprived of anything as were the parties in the cases they have cited. *Hirabayashi* was subjected to a curfew regulation while his white brothers were not. *Korematsu* and *Endo* involved incarceration in concentration camps solely because of race. In *Meyer* v. *Nebraska* complete denial of the right to teach German to pupils was involved. *Pierce* v. *Society of Sisters* concerned the outlawing of parochial and private schools, and the *Farrington* case involved an attempt to put out of business foreign language schools in Hawaii. The complete denial of the right to own land was concerned in the *Oyama* case and freedom to engage in one's chosen occupation concerned the Court in *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410, and *Yick Wo* v. *Hopkins,* 118 U. S. 356. In the case at bar the complaint recites in paragraph 3 thereof that the minor petitioners "do now attend a junior high school in said District" (R. 4), and on page 34 of their brief petitioners assert unequivocally "Here there is no question of equality of facilities."

Secondly, petitioners charge that separation in the public schools is "*aimed* at Negroes," that (as set forth in italics on page 21 of their brief) "* * * no legitimate educational purpose is served by the classification and distinction of pupils solely on the basis of race and color * * *," and that separation stamps them with a "badge of inferiority."

There can be no doubt that among a large segment of the people of the District of Columbia, which is almost 100 miles south of the Mason and Dixon line, there are attitudes which are antipathetical to the co-mingling of the races in schools or otherwise. Indeed, the Court can take judicial notice that racial tensions exist and racial clashes have occurred considerably further north in New York, Detroit, Chicago, and other communities in which there is no separation in schools. This being so, upon what basis do petitioners assume and assert that separate schools for white and colored pupils are maintained solely to stigmatize the colored children? Why do they quote from a brief filed in the *Sweatt* case (petitioners' brief 41): "the institution of segregation is designed to maintain the Negro race in a position of inferiority. It drastically retards his educational * * * development * * *"? The facts are otherwise. Even Gunnar Myrdal in his work "An American Dilemma," so often quoted by the opponents of separation, acknowledges in Chapter 41 thereof that some Negroes prefer the separate school even for the North. He quotes Dr. W. E. B. Du Bois, a prominent Negro educator and publisher and former officer of the National Association for the Advancement of Colored People, " * * * A mixed school with poor and unsympathetic teachers, with hostile opinion, and no teaching concerning black folk, is bad." It is not felt that the Court will be burdened by repeating here the quotation from Dr. Du Bois found at page 33-34 of appellees' brief in the companion case of *Briggs* v. *Elliott* (No. 101):

> "It is difficult to think of anything more important for the development of a people than proper training for their children; and yet I have repeatedly seen wise and loving colored parents take infinite pains to force their little children into schools where the white children, white teachers, and white parents despised and resented the dark child, made mock of it, neglected or bullied it, and literally

> rendered its life a living hell. Such parents want their child to 'fight' this thing out,—but, dear God, at what a cost! Sometimes, to be sure, the child triumphs and teaches the school community a lesson; but even in such cases, the cost may be high, and the child's whole life turned into an effort to win cheap applause at the expense of healthy individuality. In other cases, the result of the experiment may be complete ruin of character, gift, and ability and ingrained hatred of schools and men. For the kind of battle thus indicated, most children are under no circumstances suited. It is the refinement of cruelty to require it of them. Therefore, in evaluating the advantage and disadvantage of accepting race hatred as a brutal but real fact or of using a little child as a battering ram upon which its nastiness can be thrust, we must give greater value and greater emphasis to the rights of the child's own soul. We shall get a finer, better balance of spirit; an infinitely more capable and rounded personality by putting children in schools where they are wanted, and where they are happy and inspired, than in thrusting them into hells where they are ridiculed and hated." *Does the Negro Need Separate Schools?*, 4 J. of Negro Ed. 328, 330-31 (1935)."

History shows that such concerns as these expressed by Dr. Du Bois are quite probably the reason for the establishment and maintenance of the dual school system in the District. Certainly they were important considerations.

According to Dr. William S. Montgomery, a distinguished Negro educator,[15] appointed Assistant Superintendent in charge of colored schools in the District of Columbia September 1, 1900 and retired in 1924 after serving 47 years in the colored school system,

> "It was natural at the beginning for the great majority of the teachers in colored schools to be

[15] *Washington—Past and Present, a History*, Vol. 1, pp. 443-444.

> white, but in 1869 the instructors were half and half—as many colored as white—and as competent colored ones came forward they were given the preference in employment, not because of greater fitness from an intellectual or professional point of view, *but on account of an element, mighty in its force and results, sympathy with and ability and willingness to enter into and appreciate the feelings and aspirations of the learner.* * * * Of the early colored teachers words of eulogy fail; *their monument is the system to-day.*" (Emphasis supplied.) [16]

The monument of which Dr. Montgomery wrote is the system of separate but equal schools for colored children which petitioners would destroy!

In the hearings preceding the passage of the Act of June 20, 1906,[17] the organic act of the present school system in the District, many distinguished Negro citizens and educators insisted on autonomy for the colored schools. Professor William A. Joiner of Howard University, chairman of a committee of colored leaders, after presenting to the House Committee a letter from his group, said, in part,[18]

> "I think, Mr. Chairman, that that embodies the main sentiment as expressed by that organization, an organization composed of those whose minds have led them into literary pursuits and those who have given attention to the best welfare and interest of their people. It may seem strange that this particular word 'colored' or the idea of colored schools thrusts itself into this argument. I would it where not so. Facts are stubborn things, and

[16] "Historical Sketch of Education for the Colored Race in the District of Columbia, 1807-1905" which is incorporated as part of the "Report of the Commissioners of the District of Columbia for the year ended June 30, 1905," Vol. IV (Report of Board of Education), Washington Government Printing Office, 1905, pp. 118-119.

[17] 34 Stat. 316.

[18] Report of hearings before the Sub-Committee on the several school bills relating to the reorganization of the schools of the District of Columbia. Washington: Government Printing Office 1906, p. 200.

> when we deal with facts we must deal with them as they exist and not as we would that they were; and so, Mr. Chairman, it becomes our province and our duty to do what we can to see that in the administration of school affairs in that most precious birthright of equality of opportunity spoken of by President Eliot (of Harvard) that there will not be the slightest divergence from the division, 'unto him who needs, and most unto him who needs most.' "

Professor Lewis B. Moore, of Howard University, testifying before the Commitee said, in part:[19]

> "* * * Give us what is being asked for here by the colored citizens, give us that, and we shall conduct under the guidance of the board of education the colored schools of the District of Columbia in such a way as to produce just as good results as are produced anywhere else in this country."

Following this and other testimony of like import, the House Committee reported on the Act of 1906,[20] in part:

> "The bill does not change the number of assistant superintendents, merely enlarging the power of the colored superintendent so that he shall, besides having jurisdiction over the colored grade schools, also have entire jurisdiction over the colored normal, high, and manual-training schools. This was done at the earnest solicitation of the colored educators who appeared before the committee and was heartily indorsed by the superintendent of Howard University. The hearings developed that a great deal of friction had arisen between the director of high schools and the teachers in the colored high school, and to avoid this it was the unanimous opinion and desire of all who testified that not only should the colored superintendent have entire con-

[19] Ibid, p. 217.
[20] House Report No. 3395, 59th Congress, 1st Session, p. 3.

trol, but that the colored schools in every instance should be designated as colored schools, so that no possible mistake could arise in that regard."

The views expressed by these eminent Negro educators were accorded sympathetic and enlightened recognition by Congress in the enactment of the Act of 1906, and by every succeeding Congress which legislated on the subject until 1951.[21] *Clearly the purpose of Congress was to serve the cause of the Negro in education rather than the contrary.* The wisdom of the course pursued by Congress to achieve that purpose is not for the courts to decide. As was said in the License Tax Cases,[22] at page 469, "This court * * * cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the legislature. Questions of policy determined there are concluded here." *Hilton* v. *Sullivan,* 334 U. S. 323, 339; *Teamsters Union* v. *Hanke,* 339 U. S. 470, 478-479; *Secretary of Agriculture* v. *Central Roig Refining Co.,* 338 U. S. 604, 618-619; *Wickard* v. *Filburn,* 317 U. S. 111, 129; *Polish National Alliance* v. *National Labor Relations Board,* 322 U. S. 643, 650-651; *United States* v. *Butler,* 297 U. S. 1, 62-63; *Home Building & Loan Asso.* v. *Blaisdell,* 290 U. S. 398, 447-448; *Sunshine Coal Co.* v. *Adkins,* 310 U .S. 381, 394. In the very recent case of *Hurd* v. *Hodge, supra,* 334 U. S. 24, cited by petitioners, the Court, at page 34, alludes to the fact that public policy can be ascertained only by reference to statutes. In footnote 15 the Court cites *United States* v. *Hutcheson,* 312 U. S. 219, 235, and *Johnson* v. *United States,* 163 F. 30, 32. In the latter case, the court said:

"The Legislature has the power to decide what the policy of the law shall be, and if it has intimated

[21] See Acts of July 21, 1945, 59 Stat. 488, July 7, 1947, 61 Stat. 258 and Oct. 24, 1951, 65 Stat. 605, more fully described in Point II A of this brief.
[22] 5 Wall. 462.

> its will, however indirectly, that will should be recognized and obeyed."

When in 1910 the question of constitutional validity of separate schools was first presented to the District of Columbia Court of Appeals in *Wall* v. *Oyster,* 36 App. D. C. 50, and hardship or injustice was pleaded, Mr. Chief Justice Shepherd, for that court, said at page 58:

> "It has been urged that a cruel hardship will be inflicted upon the petitioner by the conclusion at which we have arrived. It may be, however, that greater evils would result from a different one. *Be that as it may, our province is to interpret legislation, not to enact it."* (Emphasis supplied.)

Judge Prettyman of that court in the recent case of *Carr* v. *Corning, supra,* said:

> "*Such problems* [the co-existence of different races in the same area] *lie naturally in the field of legislation,* a method susceptible of experimentation, of development, of adjustment to the current necessities in a variety of community circumstance." (Emphasis supplied.)

And Mr. Justice Frankfurter for this Court in *Secretary of Agriculture* v. *Central Roig Refining Co., supra,* said as late as February 6, 1950:

> "but the issue was thrashed out in Congress; Congress is the place for its reconsideration."

Finally, while this Court has tacitly approved the dual system of schools in the District of Columbia in but one case, *Plessy* v. *Ferguson, supra,* it has many times cited that case in support of its uniform holdings over many years that the Fourteenth Amendment, which applies only to the States and which contains an equal protection clause, does not

prohibit the maintenance of dual school systems. It is settled that the equal protection clause of the Fourteenth Amendment does not apply to the District of Columbia, "* * * that Amendment being directed to the States. The Fifth Amendment, of course, does apply, but contains no equal protection clause."[23]

Mr. Chief Justice Stone in *Detroit Bank* v. *United States*, 317 U. S. 329, which cites, among others, *Currin* v. *Wallace*, 306 U. S. 1, and *Steward Machine Co.* v. *Davis*, 301 U. S. 548, said:

> "Unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and *it provides no guaranty against discriminatory legislation by Congress.*" (Emphasis supplied.)

Moreover, it is well established that the Fourteenth Amendment does not incorporate the provisions of the first eight Amendments, *Louisiana ex rel Francis* v. *Resweber*, 329 U. S. 459; *Adamson* v. *California*, 332 U. S. 46, *Wolf* v. *Colorado*, 338 U. S. 25. Conversely, it has been held that the general scope of the prohibitions of the Fifth Amendment as against the Federal Government is measured by the scope of the Fourteenth Amendment as against the states. "* * * the legal import of the phrase 'due process of law' is the same in both amendments." *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 329. See also *Twining* v. *New Jersey*, 211 U. S. 78, 101. In *Heiner* v. *Donnan*, 285 U. S. 312, the court said at p. 326:

> "The restraint imposed upon legislation by the due process clauses of the two amendments is the same."

Cf. Farrington v. *Tokushige, supra*, 273 U. S. 284; *Ellis* v. *United States*, 206 U. S. 246; *Bromley* v. *McCaughn*, 280 U. S. 124.

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[23] *Hamilton National Bank* v. *District of Columbia*, 81 U. S. App. D. C. 200, 156 F. 2d. 843, 846.

In *Hurd* v. *Hodge, supra,* 334 U. S. 24, 35, the Court concluded its opinion by saying:

> "We are here concerned with action of federal courts of such a nature that if taken by the courts of a State would violate the prohibitory provisions of the Fourteenth Amendment. . . . It is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws. We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against descriminatory action of federal courts than against such action taken by the courts of the States."

If the public policy of the United States prohibits action or limitation of action in the District of Columbia because it is prohibited in the States, public policy as pronounced in Acts of the Congress applying to the District of Columbia certainly ought to prevent the invalidation in the District of the purpose of those Acts unless there is an unequivocal finding that identical action by the several States is prohibited by the Constitution.

In fine, not only was integration in schools not required by the Fifth Amendment, but slavery was lawful thereunder. It required an Amendment of the Constitution to rid the country of that evil practice. The Fifth Amendment contains no "equal protection" clause and does not prohibit Congress from passing discriminatory laws so long as constitutional due process is preserved. Contemporary legislative history demonstrates that the Fourteenth Amendment, which does contain an "equal protection" clause, was not at the time of its proposal or adoption thought to be a bar to a dual school system in the District

of Columbia. Numerous decisions of this and other courts over the years have sustained the view of the framers of the Fourteenth Amendment, of the Civil Rights Acts, and of the laws providing for the District's dual school system that the last are not in conflict with the first two. Since the Fourteenth Amendment contains a "due process" clause and decisions of this Court hold that the "due process" provisions of the Fifth and Fourteenth Amendments must be measured by the same standards, mere separation for educational purposes in schools, where facilities are substantially equal, cannot be struck down by the Court in the light of history and of prior decisions. If it be the will of the people that separate schools be abolished, then the people, and they alone, through their elected representatives or through constitutional convention, should express that will. The people of the United States through the legislative process have heretofore expressed themselves upon this most serious problem. The Court, if it follows its own precedents, should not presume to trespass upon the domain of another branch of government of equal dignity with it.

IV

The Dual School System of the District of Columbia Does not Violate the Civil Rights Acts.

In their complaint filed in the District Court petitioners allege that the refusal by respondents to admit the minor petitioners to Sousa Junior High School violates Sections 41 and 43 of Title 8 of the United States Code relating to civil rights. Section 41 of Title 8, U. S. C., according to *Hurd* v. *Hodge,* 334 U. S. 24, 30, Footnote 7, and to the Historical Note appearing thereunder in the United States Code Annotated, was revised from the Civil Rights Act of May 31, 1870, which was from the Civil Rights Act of April 9, 1866, and reads as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Section 43 of Title 8 of U. S. C., which, according to the Historical Note appearing thereunder in the United States Code Annotated, is from the Act of April 20, 1871, reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Petitioners cite *Hurd* v. *Hodge,* 334 U. S. 24, in support of their position that the Civil Rights Acts are violated by the laws establishing the dual school system of the District, but they admit in their brief that this case involved Section 42 of Title 8, U. S. C., and not Sections 41 or 43 of that title. Section 42 relates specifically and solely to the right "to inherit, purchase, lease, sell, hold, and convey real and personal property." That, on the basis of Section 42, the restrictive covenant was held to be unenforceable in a federal court, is no ground for a contention that separate schools for the races violates the Civil Rights Acts when schools are not mentioned therein at all. Indeed, as will be pointed out hereinafter, all

references to schools were specifically deleted from bills which became the Acts, and the *Carr* and *Browne Junior High* cases, *supra*, 86 U. S. App. D. C. 173, 182 F. 2d 14, decided subsequent to *Hurd* v. *Hodge*, eloquently set forth why the Civil Rights Acts do not apply to District of Columbia schools.

In the annotations found in the United States Code Annotated there are but two cases cited under the subdivision of "Education" in connection with application of these two sections of Title 8, U. S. C. One is a state decision, *Cory* v. *Carter*, 48 Ind., 327, 17 Am. Rep. 738, decided in 1874, and the other is *Bluford* v. *Canada*, decided by the District Court of the United States for the Western District of Missouri in 1940 and found in 32 Fed. Supp. 707.[24]

In the Indiana case the court had before it a statute which provided for the levying of school taxes on a uniform basis without regard to race or color of the owner of the property taxed, but further provided that the enumeration of children for school purposes should be in separate lists of white and colored children and that they should be educated in separate schools. The court pointed out that the Congress which submitted the Fourteenth Amendment to the States for ratification had, within a few days of that action, passed two acts providing for separate schools in the District of Columbia and that a later Congress, in 1873, passed an amendment to the separate school laws of the District but continued the dual system in effect. Commenting thereon the court said,

> "The action of Congress * * * is worthy of consideration as evincing the concurrent and after-matured conviction of that body that there was nothing whatever in the amendment which pre-

[24] While two other cases *Davis* v. *Cook*, 80 F. Supp. 443 and *McLaurin* v. *Oklahoma*, 87 F. Supp. 526, are cited under this subdivision in the 1951 Supplement to U.S.C.A., neither mentions Title 8, Secs. 41 or 43 or the Civil Rights Acts.

> vented congress from separating the white and colored races, and placing them, as classes, in different schools, and that such separation was highly proper and conducive to the well-being of the races, and calculated to secure the peace, harmony, and welfare of the public; * * *.
>
> "This legislation of congress continues in force, at the present time, as a legislative construction of the fourteenth amendment, and as a legislative declaration of what was thought to be lawful, proper, and expedient under such amendment, by the same body that proposed such amendment to the States for their approval and ratification."

Similarity of the foregoing statement by the Supreme Court of Indiana in 1874 with the observation of Judge Prettyman in *Carr* v. *Corning* and *Browne Junior High School Parent Teachers Association* v. *Magdeburger, supra,* is noteworthy. The Indiana court, at page 752, speaking of what is now known as Section 41, Title 8 of the United States Code, said:

> "* * * admitting it to be valid, that it does not relate to or bear upon the right claimed in this case, for it purports only to confer upon negroes and mulattoes the right, in every State and Territory, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and the full and equal benefit of all laws and proceedings for the security of person and property as enjoyed by white citizens, and subjects them to like pains and penalties. * * *. In this nothing is left to inference. Every right intended is specified."

The court concluded that the Indiana statute violated neither the Constitution nor the Civil Rights Act.

In the modern case of *Bluford* v. *Canada, supra,* 32 F. Supp. 707, the action was grounded specifically upon Section

43 of Title 8 of the United States Code. It was brought by a Negro citizen of Missouri against the Registrar of the University of Missouri for his refusal to admit the plaintiff into the University to pursue a course in journalism. District Judge Collett, citing cases in this Court, said:

> "The State has the constitutional right to furnish equal facilities in separate schools if it so desires."

The Court then quoted from *Cumming* v. *Board of Education,* 175 U. S. 528, 545:

> "We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

In dismissing the complaint Judge Collett said (p. 711):

> "Until and unless plaintiff alleges facts which demonstrate an unlawful deprivation of her constitutional rights defendant may not be held liable therefor."

It will be remembered that the complaint in the instant case shows on its face that the minor petitioners "do now attend a junior high school in said District."

But reliance on State or district court decisions is not necessary. This Court and the United States Court of Appeals for the District of Columbia Circuit have both alluded to the close tie between the Civil Rights Act and the Fourteenth Amendment, and the latter court has pointed

out why the dual school system of the District does not offend against the Act. In *Hurd* v. *Hodge, supra,* 334 U. S. 24, 32-33, Mr. Chief Justice Vinson for the Court said:

> "In considering * * * the kind of governmental action which the first section of the Civil Rights Act of 1866 was intended to prohibit, reference must be made to the scope and purposes of the Fourteenth Amendment; for that statute and the Amendment were closely related both in inception and in the objectives which Congress sought to achieve.
>
> "Both the Civil Rights Act of 1866 and the joint resolution which was later adopted as the Fourteenth Amendment were passed in the first session of the Thirty-ninth Congress. Frequent references to the Civil Rights Act are to be found in the record of the legislative debates on the adoption of the Amendment. It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guarantees of the Civil Rights Act of 1866 in the organic law of the land. Others supported the adoption of the Amendment in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States."

In the *Carr* and *Browne* cases, *supra,* Judge Prettyman, for the District of Columbia Circuit Court, said at page 17:

> "We are not unmindful of the debates which occurred in Congress relative to the Civil Rights Act of April 9, 1866, the Fourteenth Amendment, and the Civil Rights Act of March 1, 1875. But the actions of Congress, the discussion in the Civil Rights Cases, and the fact that in 1862, 1864, 1866 and 1874 Congress * * * enacted legislation which

> specifically provided for separation of the races in the schools of the District of Columbia, conclusively support our view of the Amendment and its effect."

While Judge Prettyman's conclusion needs no buttressing, it is interesting to note that opponents of the dual school system have pointed to the fact that bills introduced to accomplish the outlawing of separate schools in the District of Columbia failed of passage in the 40th, 41st and 42nd Congresses.[25] They also point out that the Civil Rights Act of 1875, as originally introduced by Senator Charles Sumner, forbade segregation throughout the United States in and outside the District of Columbia, "in conveyances, theaters, inns and *schools*," but that, as finally passed, the restriction against separation in schools was stricken therefrom.[26]

Moreover, Section 43 of Title 8, U.S.C. provides a right of action for "the *deprivation* of any rights, privileges, or immunities *secured by the Constitution and laws.*" The *Carr* and *Browne Junior High* cases, *supra,* rightfully hold that education of colored children in separate schools of the District is *not* a deprivation of rights, privileges or immunities secured by the Constitution or laws. Hereinbefore it has been demonstrated that separate schools for colored children were intended to serve rather than deprive them.

Petitioners apparently regard or attempt to dignify the Civil Rights Act as a constitutional provision. At best the Civil Rights Act is only an Act of Congress. In effect then, they are saying that certain Acts of Congress violate other Acts of Congress. Unless, therefore, one accepts the unwarranted conclusion of petitioners that the series of enactments providing for the dual school system in the District does not require such separate-

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[25] Brief amicus curiae for the Committee of Law Teachers Against Segregation in Legal Education, filed in the Supreme Court of the United States in *Sweatt* v. *Painter*, October Term, 1949, pages 12 et seq.

[26] Ibid., page 14. See Act of Mar. 1, 1875, 18 Stat. 335, Chap. 114.

ness, their position regarding the alleged violation of the Civil Rights Act is untenable. Not only is there the presumption that Congress when legislating knows of and takes into account existing laws but, as hereinbefore pointed out, the resolution submitting the Fourteenth Amendment to the States, the Civil Rights Act, the separate school laws, and amendments to the latter two, were considered and enacted by the same sessions of Congress which necessarily had intimate knowledge of the problem. The last amendment of the Civil Rights Act was in 1870 and shortly thereafter in 1874 the Revised Statutes of the District of Columbia were enacted. If, therefore, the provisions of the Civil Rights Acts of 1866 and 1870, upon which petitioners rely, ever required integration in the schools, that requirement was repealed by implication upon the passage by Congress of the Revised Statutes in 1874 reaffirming its conclusion that the District should have a dual school system.

V

The Dual School System of the District is Not in Violation of the Charter of the United Nations.

Petitioners contend that refusal to admit the minor petitioners to the Sousa Junior High School deprives them of fundamental freedoms in violation of certain sections of the Charter of the United Nations.

At the outset it must be noted that, in their brief, they have limited their charge to a violation of paragraph (c) of Article 55 of the Charter, whereas in their complaint filed in the District Court they made no such limitation but charged generally a violation of Article 55. This variation from the complaint to the brief is not accidental. When Article 55 is read as it appears in Chapter IX of the Charter with Sections (a) and (b) preceding Section (c), an entirely different view is obtained of the real pur-

pose of the Section. Section 3 of Chapter I is also slightly misquoted in petitioners' brief. This, like Article 55(c), should be read in context with its surrounding sections for proper perspective. For clarity, Article 1, Chapter I, and Articles 55 and 56 of Chapter IX are set out in the margin in their entirety [27] exactly as they appear in 59 Stat. 1035 et seq., and in Department of State Publication 2353, International Organization and Conference Series 74.

Petitioners assert and emphasize that the United Nations Charter is a treaty to which the United States is a signatory and that under Article VI, Clause 2 of the Constitution, it is "the supreme Law of the Land."

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[27] "Chapter I—Purposes and Principles—*Article 1*—The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggresion or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends."

"Chapter IX—International Economic and Social Cooperation—*Article 55*—With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56—

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

But, according to the Constitution and the decided cases, treaties are only a part of the supreme law of the land. As was said by this Court in *Edye* v. *Robertson*, 112 U.S. 580, at page 599:

> "A treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an Act in which all three of the bodies participate."

It is fundamental in international law that there are two kinds of treaties — self-executing and non-self-executing. The latter does not supersede local laws which are inconsistent with it. In *Foster* v. *Neilson*, 2 Pet. 253, 314, Chief Justice Marshall said:

> "* * * Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract — when either of the parties engages to perform a particular act — the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract before it can become a rule for the court."

To the same effect see:

Edye v. *Robertson* (1884) 112 U. S. 580
Robertson v. *General Electric Co.* (1929) 32 F.2d 495
Ex parte Dove (1925) 49 F.2d 816
Aguilar v. *Standard Oil Co.* (1943) 318 U.S. 724

In *Robertson* v. *General Electric Co.*, *supra*, Judge Parker, Senior Judge of the Fourth Circuit, on pages 500 and 501 of 32 F. 2d, cites and quotes from leading authorities on interpretation of treaties, including that of *Foster* v. *Neilson, supra*, an opinion of Attorney General William H. H. Miller, and the case of *Rousseau* v. *Brown*, 21 App. D.C. 73, and arrives at the same conclusion.

The latest decision on the point is that of *Fujii* v. *State*, 242 P. 2d 617. In that case the Supreme Court of California sitting en banc decided on April 17, 1952 that the same provisions of the United Nations Charter here relied on by petitioners were not intended to supersede existing domestic legislation. The opinion by Chief Justice Gibson of that court carefully analyzes and documents its discussion of the law of treaties and concludes, as do respondents, that Articles 1, 55 and 56 of the Charter are non-self-executing.

In the language of the court (p. 620):

> "It is clear that the provisions of the preamble and of Article 1 of the charter which are claimed to be in conflict with the alien land law are not self-executing. They state general purposes and objectives of the United Nations Organization and do not purport to impose legal obligations on the individual member nations or to create rights in private persons. It is equally clear that none of the other provisions relied on by plaintiff is self-executing. * * * Although the member nations have obligated themselves to cooperate with the international organization in promoting respect for, and observance of, human rights, it is plain that it was contemplated that future legislative action by the several nations would be required to accomplish the declared objectives, and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country upon the ratification of the charter.

> "The language used in Articles 55 and 56 is not the type customarily employed in treaties which have been held to be self-executing and to create rights and duties in individuals."

While the decision of the Supreme Court of California was not unanimous, all the judges concurred in the conclusion regarding the ineffectiveness of the United Nations Charter to supersede local laws.

The language concurred in by the two late Justices of this Court, Justice Rutledge and Justice Murphy, quoted by petitioners from *Oyama* v. *California*, 332 U. S. 633, when read in context, shows that it is but one paragraph, unnecessary to the conclusion, in a concurring opinion covering twenty-four printed pages, that the opinion of the Court covering fourteen printed pages and several dissenting opinions covering fifteen more printed pages failed to even mention the United Nations Charter, that the proposition involved in the case was the *complete denial* to Japanese aliens of the right to own land in California, and that while the late Justices Rutledge and Murphy allude to the provisions of the United Nations Charter as being a national pledge to which the alien land law of California does violence, they studiously avoided even suggesting that the federal law completely denying citizenship to the same persons is at all affected by these Charter provisions. Considered thus the expressions of these late lamented liberal justices lose the force that petitioners attribute to them. Neither do Justices Black and Douglas, in their mention of the provisions of Articles 55 and 56 of the Charter and the relationship of those provisions to the alien laws of California, make any reference to the federal law similarly discriminatory so far as Japanese aliens are concerned. It would be a strange construction, indeed, if the provisions of the Charter could be held to repeal a State law but not to repeal a federal statute having an identical basis for discrimination.

Parenthetically it may be noted that all distinctions for naturalization based on race have been repealed by Public Law 414, 82nd Congress, Chapter 477, 2nd Session (66 Stat. 163), which becomes effective December 24, 1952, but that law excludes from admission to the United States "(11) Aliens who are polygamists or who practice polygamy or advocate the practice of polygamy,"[28a] and makes less stringent the requirements for admission to this country of those who are the subject of religious persecution in other lands, "whether such persecution be evidenced by overt acts or by laws or governmental regulations that discriminate against such alien or any group to which he belongs because of his religious faith."[28b] Thus, the Congress, to whom ought to be made all applications for changes in law to meet modern concepts, has, long after the adoption of the United Nations Charter and after court decisions actually[29] are allegedly[30] holding that the provisions of the Charter strikes down existing local law and requires this country to take "separate action" to promote observance of "human rights," enacted legislation establishing limitations for admission into this country based on polygamy, a subject which may well, to other signatories of the Charter, be considered one of the "human rights," and making a distinction based on religion, albeit the intention is to help those persecuted.

On page 58 of their brief petitioners refer to the case of *Balfour, Guthrie and Company* v. *United States*, 90 F. Supp. 831. Reference to this opinion by District Judge Goodman of the Northern District of California, Southern Division, shows that the United Nations Organization was permitted to maintain a suit against the United States for loss of merchandise shipped by the UNO on a United States owned vessel under the "Suits in Admiralty Act" authorizing this type of suit against the United States, and by

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[28a] 66 Stat. 163, Sec. 212 (11).
[28b] 66 Stat. 163, Sec. 212 (31) (b).
[29] *Fujii* v. *State* (Intermediate Appellate Court decision), 217 P. 2d 481.
[30] Various cases cited pp. 57-61 petitioners' brief.

virtue of the existence of the United Nations Charter. The effect of the decision is simply that the United Nations Organization is an entity which may sue in its own name. As a matter of fact, in *Curran* v. *City of New York*, 77 N. Y. S. 2d 206 (affirmed 88 N.Y.S. 2d 924), also cited by petitioners, the Supreme Court of New York specifically held that the United Nations Organization cannot be sued by virtue of the provisions of the International Organizations Immunities Act, although that court also held that the United Nations Organization is a legal entity by virtue of the provisions of the Charter and is capable of owning land in the United States.

Judge Manley O. Hudson, one of the outstanding authorities in the field of international law,[31] after the decision of the *Fujii* case by the intermediate appellate court in California, 217 P. 2d 481, wrote an article thereon which is extremely critical of the opinion of the court which rendered the earlier decision. The article appears at page 543 et seq. of the American Journal of International Law for July 1950.

Judge Hudson, after pointing out that the Preamble of the United Nations Charter states that "'We the peoples of the United Nations' are determined 'to reaffirm faith in fundamental human rights,'" and, reciting the provisions of Article I, Section 3 of the Charter, says:

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[31] Chairman of the International Law Commission of the United Nations (over which he presided at Lake Success and, in June 1950, at Geneva); President of the American Society of International Law; since 1923 the Bemis Professor of International Law at the Harvard Law School; from 1923 to 1945 a Judge of the Permanent Court of Arbitration at The Hague, under appointments by the President of the United States; from 1936 to 1946 a Judge of the Permanent Court of International Justice at The Hague, elected by the Assembly and Council of the League of Nations; Consultant on International Law to the Naval War College at Newport; author of "Cases on International Law," texts and many treatises and articles on this and related subjects; member of the *Institut de Droit International;* Director of the Harvard Research in International Law in its draft convention on territorial waters; Advisor to the United States Delegation at The Hague Conference on Codification of International Law in 1930; Lecturer in Academy of International Law at The Hague 1925; Editor of American Journal of International Law since 1924.

"This statement of a general purpose of the Organization does not impose an obligation on the United States as a Member of the United Nations to take any specific action.

"Article 13 (1) provides that the General Assembly shall initiate studies and make recommendations for the purpose of

> "b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

"This article relates entirely to the powers of the Assembly rather than to obligations of Members, and recommendations by the General Assembly do not have a binding character."

With reference to Article 56, he has the following to say:

> "* * * The obligation imposed by Article 56 is limited to cooperation with the United Nations. The extent and form of its cooperation are to be determined by the government of each Member."

It is obvious from the Charter itself that the framers did not intend that the provisions with reference to human rights and fundamental freedoms, as set forth in Article 55, should be self-executing or should have any binding effect upon Member nations. In Article 61 there is provision for the establishment of an Economic and Social Council to consist of 18 Members elected by the General Assembly. Article 62 provides for the Functions and Powers of the Economic and Social Council. The language of Section 2 of Article 62 is significant. It provides:

> "(2). It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all."

Sections 3 and 4 of Article 62 authorize the Economic and Social Council to prepare Draft Conventions for submission to the General Assembly, and to call international conferences on the subject.

Commenting on the provisions of Article 62 (2), supra, Judge Hudson says:

> "* * * This provision, like Article 13 (1), refers only to the competence of a principal organ of the United Nations, whose recommendations are not obligatory."

and goes on to point out that similar language in Article 76 relating to the trusteeship system "merely states an objective of the trusteeship system."

After reciting the general law as laid down in *Foster* v. *Neilson, supra*, 2 Pet. 253, and other cases, Judge Hudson continues:

> "* * * Of course a single treaty may contain both kinds of provisions—some which are, and some which are not, self-executing. This view was taken by Chief Justice Stone in *Aguilar* v. *Standard Oil Co.* (New Jersey) (1943), 318 U. S. 724, 738.
>
> "The Charter is a treaty to which the United States is a party; it is 'made under the authority of the United States,' within the provision of Article 6 (2) of the Constitution. Some of its provisions may have been incorporated into the municipal law of the United States as self-executing provisions; this has been thought to be true, for example, of provisions in Articles 104 and 105 concerning the legal capacity of the Organization and its privileges and immunities. (*Curran* v. *City of New York* (1947), 77 N. Y. S. (2d) 206, 212).
>
> *Clearly, however, the Charter's provisions on human rights have not been incorporated into the municipal law of the United States so as to supersede inconsistent State legislation, because they are not self-executing.* They state general pur-

> poses and create for the United States only obligations to cooperate in promoting certain ends. Insofar as the United States is concerned, they address themselves 'to the political, not to the judicial department; and the legislature must execute the contract before it can become a rule for the Court.' Apart from action taken by Congress to implement them, the application of the Charter's human rights provisions is not for a court to undertake. * * *
>
> "The 'human rights and fundamental freedoms' referred to in Article 1 (3) and 55 (c), 62 (2), and 76 (c) are not defined in the Charter of the United Nations. In the effort to promote 'respect for and and observance of' them, no organ of the United Nations has been endowed with legislative power. * * *" (Emphasis supplied.)

A commission created under Article 68 of the Charter drafted what is denominated the Universal Declaration of Human Rights which was adopted by the General Assembly on December 10, 1948.[32] The General Assembly proclaimed this Declaration:

> "as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."

Mrs. Franklin D. Roosevelt, the representative of the United States, speaking about the Declaration on the day before its adoption said: [33]

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[32] Official Records, 3rd Session, Part I, pp. 71-77; Dept. of State pub. 3381, Int. Org. and Conf. Series III, 20.

[33] Dept. of State Bulletin, Vol. 19, No. 494, Dec. 19, 1948, p. 751.

> "* * * my Government has made it clear in the course of the development of the declaration that it does not consider that the economic and social and cultural rights stated in the declaration imply an obligation on governments to assure the enjoyment of these rights by direct governmental action. * * *"

Previously, before the Third Committee of the General Assembly, Mrs. Roosevelt stated that "the draft Declaration was not a treaty or international agreement," and that if it was adopted it would not be "legally binding."[34]

Commenting in his article on these official proclamations and statements, Judge Hudson said:

> "After these official statements, no doubt can exist as to the character of the Declaration. It is in no sense binding on the Government of the United States, and its provisions have not been incorporated in our national law."

Judge Hudson reaches the following conclusions concerning the first *Fujii* (intermediate appellate court) decision:

> "The Human Rights Commission of the United Nations is now engaged in drafting a second instrument—a Covenant on Human Rights. If this Covenant is signed and ratified by the United States, and if it is brought into force by a sufficient number of nations, it will be on a wholly different basis from that of the Declaration. It is designed to be a treaty between various nations. As such, depending on a text which has not yet been finalized, its self-executing provisions might be incorporated into American law; *the United States is currently insisting that its provisions should not be self-executing. The California court would seem to have anticipated events which may or may not transpire in the future.*" (Emphasis supplied.)

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[34] Official Records, Third Committee, 3rd Session, Part I, p. 32.

"Clearly a court is not the appropriate agency to determine for the Government of the United States the particular way in which it should 'cooperate with the United Nations.' * * *"

Not only, as has been demonstrated, are the provisions of the Charter themselves indicative that they are not binding upon Member Nations so far as the statements therein contained relate to "human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," but the statement of Edward R. Stettinius, Jr., Chairman of the United States Delegation to the San Francisco Conference which drafted the Charter, in his report to the President of the United States bears this out. The report, dated June 26, 1945,[35] by the then Secretary of State, says in part:

"The pledge as finally adopted was worded to eliminate such possible interpretation. It pledges the various countries to cooperate with the organization by joint and separate action in the achievement of the economic and social objectives of the organization *without infringing upon their right to order their national affairs according to their own best ability, in their own way, and in accordance with their own political and economic institutions and processes.* (Emphasis supplied.)

"To remove all possible doubt on this score the following statement was unanimously approved and included in the record of the Conference (Report of the Rapporteur of Committee 3 of Commission II):

'The members of Committee 3 of Commission II are in full agreement that *nothing contained in Chapter IX* (which contains Articles 55 and 56) *can be construed as giving authority to the Organization to intervene in the*

[35] Dept. of State Pub. 2349, Conference Series 71 pp. 115-116.

domestic affairs of member states."[36] (Emphasis supplied.)

Mr. Stettinius also stressed this point in the hearings on the Charter before the Senate Committee on Foreign Relations in 1945, as follows:

> "Because the United Nations is an organization of sovereign states, the General Assembly does not have legislative power. It can recommend, but it cannot impose its recommendations upon the member states." [37]

The same point was emphasized by Mr. Leo Pasvolsky, one of the American draftsmen of the Charter, who gave the following explanation of the Chapter of the Charter which contains Articles 55 and 56:

> "The objective here is to build up a system of international cooperation in the promotion of all of these important matters. The powers given to the Assembly in the economic and social fields in these respects are in no way the powers of imposition; they are powers of recommendation; powers of coordination through recommendation."[38]

The fact that, under the United Nations Charter, provision in made for an Economic and Social Council and that action has been taken to adopt a Declaration of Human Rights, indicates, of itself, that the pledges in the Charter by the signatory powers requiring them to promote "universal respect for, and observance of, human

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[36] Hearings before the Committee on Foreign Relations, United States Senate—Revised—July 9-13, 1945, pp. 105-106.

[37] Hearings before the Committee on Foreign Relations, United States Senate 1945—Part I, p. 45.

[38] Hearings before the Committee on Foreign Relations, U. S. Senate 1945—Part I, p. 133.

rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," is nothing more than a statement of principles not binding on the signatory powers without individual action by the legislative authority of each. The further fact that the United Nations Organization is now preparing for submission to the Member nations a Covenant on Human Rights to further implement the provisions of the Charter is additional evidence of this fact. In a recent address, David A. Simmons, Esq., former President of the American Bar Association, a member of the Committee on the United Nations of the American Bar Association, and, with Judge Joseph M. Proskauer, the draftman at San Francisco of the original Human Rights provisions in the United Nations Charter, said:

> "The particular rights that had been discussed by the consultants, and those that at least this consultant had in mind, were the ones declared in our Bill of Rights. These include the right to life, liberty and property, equality before the law, immunity from torture and inhuman punishment, presumption of innocence, a fair and open trial, the right to counsel, no *ex post facto* laws, and, of course, freedom of speech, freedom of religion, and the right of assembly. *Our concern was that other people of the globe, who were subjects with no assertable rights, should be entitled to the same rights which our forefathers attained for us and which, by several wars, we have preserved for ourselves and extended to others.*"[39] (Emphasis supplied.)

This statement indicates that the intention was to protect only the human rights and fundamental freedoms protected by the American Constitution and, since dual school systems have been held to be constitutional, the elimination

[39] Report by Committee on United Nations, International Law Section, American Bar Association, filed Sept. 1950, p. 7.

of separate schools was not among the items the drafters had in mind.

Articles 55 and 56 of the Charter contain no definitions of "human rights" or "fundamental freedoms." In Article 55 the signatory powers pledge themselves to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." But the civil and social standards and the ideals of the fifty-odd Member Nations are widely divergent. The United States, for instance, considers polygamy to be contrary to its ideology and social standards. Another nation may consider polygamy to be a human right and a fundamental freedom.

It is understood that some of the nations of the near east separte their children in schools by sexes. Is this a "fundamental freedom" with them, and, as used in Article 55, does fundamental freedom without distinction as to sex mean that a member nation must or must not separate its children by sex?

How divergent are political rights for women among the many nations that comprise the United Nations Organization? The United States considers political rights for women as being a fundamental freedom. Yet it is recognized that sharp distinctions between the sexes may be made by legislatures. "Just a short time ago the State of Connecticut adopted a law barring women from standing at bars even if they are not drinking[40] *** the State of Washington passed a law making it unlawful to sell liquor to women except when seated at tables. * * *."[41] Such distinctions would not be held violative of the Constitution, yet, if petitioners be right in their contention, all these laws would be struck down by Article 55 of the United Nations Charter. In upholding a law of Michigan deny-

[40] "Danger to America: The Draft Covenant on Human Rights" by William Fleming, Am. Bar Asso. Jour. Vol. 37, No. 11, pp. 816-817, quoting from the New York Times, July 12, 1951; ("To the same Effect see Laws of the State of Washington, 1949, Chap. 5, p. 13").

[41] Ibid.

ing a license as a bartender to any female unless she be the wife or daughter of the male owner of a licensed liquor establishment, Mr. Justice Frankfurter for the Court in *Goesaert* v. *Cleary*, 325 U. S. 464, 465-466 (a case decided more than three years after the ratification by the United States of the United Nations Charter) said:

> "Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. * * * The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards."

Without extended research, it may be asserted without fear of contradiction that the right of a man to rid himself of an unwanted wife is as easy or as difficult among the many Member nations as it is among the 48 States of the United States. Again without extended research, there is strong likelihood that among the human rights and fundamental freedoms of some nations of the world who are members of the United Nations all property must be held by males and cannot be titled in females, all of which is contrary to our concept.

The provisions contended for by the petitioners as being the law of the land and invalidating laws prescribing a dual school system in the District of Columbia relate to distinctions as to sex as well as race. If they be correct, then the laws in the District of Columbia providing limited working hours[42] and minimum pay [43] for females are also violative of the United Nations Charter, and the provisions of the local law giving preference to women in the allow-

[42] Act. of Feb. 14, 1914 (38 Stat. 291) as amended; Title 36, Chap. 3, D. C. Code 1951.

[43] Act of Sept. 19, 1918 (40 Stat. 960) as amended; Title 36, Chap. 4, D. C. Code 1951.

ance of alimony,[44] maintenance,[45] and counsel fees[46] would be now in violation of the law of the land. These may seem to be absurdities, but they are necessary implications from the position assumed by petitioners. If they are absurdities, then the proposition that provisions of the United Nations Charter make invalid Acts of Congress providing for a dual school system in the District of Columbia is no less absurd.

VI

Laws Providing for a Dual School System Do Not Constitute a Bill of Attainder.

Paragraph 14 of the complaint filed by petitioners in the District Court reads as follows:

> "14. The defendants, and each of them, are construing and applying Acts of Congress so as to require them to deny to the minor plaintiffs, and other Negro children similarly situated, admission to and to exclude them from attendance as pupils at the Sousa Junior High School for no other reason than because of their race or color, in violation of Article I, Section 9, Clause 3, of the Constitution of the United States which forbids a Bill of Attainder."

Although the charge in the complaint is that the *construction* of certain Acts of Congress by the respondents requires them to engage in conduct which violates the constitutional provision against a Bill of Attainder, the contention in their brief is that there is a direct violation of Article I, Section 9 of the Constitution. It is undisputed that Article I, Section 9 of the Constitution relates to

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[44], [45] and [46] Act of Mar. 3, 1901 (31 Stat. 1346) as amended; Title 16, Secs. 410, 411 and 412, D. C. Code 1951.

powers denied to Congress and not to powers denied to District school officials or to the Board of Education of the District of Columbia. Nowhere in the complaint is there a charge that Congress, against whom the prohibition of Article I, Section 9 of the Constitution is directed, has passed a Bill of Attainder. The complaint in this regard is, therefore, deficient, and this deficiency affords the Court ground for disregarding the contention that Article I, Section 9 of the Constitution has been violated.

Respondents have, however, a complete answer to the proposition on its merits. The Acts of Congress allegedly unlawfully construed are not specified, but obviously the allusion is to the Acts of Congress set forth in Appendix A and referred to in the case of *Carr* v. *Corning, supra,* 86 U. S. App. D. C. 173, 182 F. 2d 14, which provide for a dual school system in the District of Columbia.

The constitutional prohibition against Bills of Attainder so far as the Federal Government is concerned (and, indeed, so far as the States are concerned as that prohibition is set forth in Article I, Section 10 of the Constitution) has existed from the time of the adoption of the Constitution in 1789. It is remarkable that, with the numerous attacks on dual school systems over the years, no one has ever suggested heretofore that laws establishing them constitute a Bill of Attainder. This Court has remarked upon an analogous situation in *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368. In passing upon the question of the invocation of a three-judge court in the case of an attack upon the constitutionality of an act of the legislature of the Territory of Hawaii, the Court said at page 379:

> "While it is sometimes said that action, where the power to act is unquestioned, can hardly be said to be a precedent for a future case, where as here the responsibility was on the courts to see that the

> three-judge rule was followed, we think it significant that no one sought to apply § 266 to Hawaii."

Two recent cases decided by this Court on the subject of Bill of Attainder are *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716, and *United States* v. *Lovett, et al.*, 328 U. S. 303, in both of which the Court reviewed and analyzed at length the law and early decisions concerning Bills of Attainder.

The *Garner* case relates to a municipal ordinance requiring loyalty oaths and affidavits.

United States v. *Lovett* was an appeal from a judgment of the Court of Claims allowing to Robert M. Lovett, Goodwin B. Watson and William E. Dodd, Jr., recovery against the United States for services rendered the Federal Government. Congress, in the Urgent Deficiency Appropriation Act of 1943, provided that no part of the funds made available under that or any other Act should be used to pay any part of the salary or compensation of Watson and Dodd after November 15, 1943 unless, prior to that date, they were appointed to positions in the government service by the President, by and with the advice and consent of the Senate. In the opinion by Mr. Justice Black, the Court affirmed the judgment of the Court of Claims, holding that the above provision of the Urgent Deficiency Appropriation Act of 1943 constituted a Bill of Attainder. It was pointed out that, from the hearings and debate which preceded the passage of the Act, the purpose of Congress was (p. 314)

> "clearly * * * to 'purge' the then existing and all future lists of Government employees of those whom Congress deemed guilty of 'subversive activities' and therefore 'unfit' to hold a federal job. What was challenged, therefore, is a statute which, because of what Congress thought to be their political beliefs, prohibited respondents from ever engaging in any government work, except as jurors or soldiers."

The Court, (p. 315) quoting from *Cummings* v. *Missouri*, 4 Wall. 277, 323, defined a Bill of Attainder as follows:

> "A bill of attainder is a legislative Act, which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties."

Further referring to the *Cummings* case and the case of *Ex parte* Garland, 4 Wall. 333, the Court said:

> "Neither of these cases has ever been overruled. They stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

Applying this rule to the situation then before the Court in the *Lovett case,* Mr. Justice Black said (p. 316):

> "This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type. It is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes, such as treason, * * * acceptance of bribes by members of Congress, * * * or by other government officials, * * * and interference with elections by Army and Navy officers * * *."

There is nothing in the complaint which shows, as to these petitioners, punishments of any kind or conditions such as those which prompted the Court to declare an Act of Congress a Bill of Attainder in the *Lovett* case or in any of the cases alluded to in that opinion. Lovett, Watson

and Dodd were singled out by name for attainder by Congress and were absolutely prohibited, to all intents, from thereafter working for the Federal Government, because Congress decided, without a judicial trial, that these three men were guilty of subversive activities and unfit to hold a federal job. They were convicted without judicial proceedings, which is the very abuse against which the prohibition was written into the Constitution.

The petitioners herein and others similarly situated have not been convicted nor has punishment been inflicted upon them without judicial trial; neither have they been denied the right to receive education. The attention of the Court is again invited to the allegation in paragraph 3 of the complaint that the minor petitioners "do now attend a junior high school in said District," and to the fact that, for aught that appears of record, they therein receive all the educational opportunities afforded to any child in any junior high school.

The *Cummings* case, *supra,* involved a Catholic priest who was convicted of preaching as a minister without taking an oath of loyalty as a prerequisite to practicing his profession, and the *Garland* case, *supra,* involved an attorney who sought leave to practice his profession without taking a similar oath.

In the *Garland* case, Mr. Justice Field, who wrote the opinion for the Court in both that case and the *Cummings* case, said, at p. 377:

> "As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."

The full description of a Bill of Attainder as found at page 323 in the *Cummings* case is as follows:

> "A bill of attainder is a legislative act, which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense."

Referring to the requirement of an oath of loyalty from members of the clergy, the Court in the *Cummings* case said (p. 320):

> "The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties who had committed them of some of the rights and privileges of the citizen."

Further, on the same page, the Court made the observation:

> "The deprivation of any rights, civil or political, *previously enjoyed,* may be punishment; * * *."

In the very recent *Garner* case, *supra,* 341 U. S. 716, 722, Mr. Justice Clark for the Court affirmed this observation of Mr. Justice Field in 1867, holding that "punishment is a prerequisite." To constitute punishment, he said, there is a requirement of deprivation of "a privilege previously enjoyed."

How can there possibly be claimed to be punishment in the sense required for a Bill of Attainder where the minor petitioners have never "previously enjoyed" education in the District of Columbia in an integrated school system?

Petitioners attempt to torture the definition of a Bill of Attainder to establish their point. On some four pages, commencing with page 37 of their brief, they cite and quote from a substantial number of publications to draw respondents into a psychological, anthropological and sociological discussion on the effects of social and other distinctions between the white and colored pupils of America. Among these are names of psychologists and references found in "Appendix to Appellants' Brief" filed jointly in the pending companion cases of *Brown* v. *Board of Education of Topeka, Briggs* v. *Elliott* and *Davis* v. *County School Board of Prince Edwards County,* Nos. 8, 101 and 191, respectively. Respondents neither concede as true that which is attempted to be established by the references, nor take issue therewith. They point out, however, that statements[47] and writings[48] of other scientists do take issue with those

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[47] Testimony of Dr. H. E. Garrett, *Davis* v. *County School Bd.,* No. 191, pp. 550, 551-553 and 559-560.

[48] *The Cult of Equality,* by S. O. Landry; *A Comparison of Negro and White College Students by Means of the American Council Psychological Examination,* by A. M. Shuey, Dept. of Psychol., N. Y. Univ., Jour. of Psychol., 14, 1942, 35-52; *The Problem of Equating the Environment of Negro-White Groups of Intelligent Testing in Comparative Studies,* by H. G. Canady, Dept. of Psychol., W. Va. State College, Jour. of Soc. Psychol., 17, 1943, 3-15; *Trends in Discussions of Intelligence; Race Differences,* by P. Witty and S. Garfield, Northwestern Univ., Jour. of Ed. Psychol., 33, 1942, 584-95; *Negro-White Differences in Mental Ability in the United States,* by H. E. Garrett, Prof. of

cited by petitioners and those set forth in the "Appendix". Analysis of the social-scientific references cited in opposition to the dual school system shows that much of the material cannot even be classified as scientific conclusion. It is nothing more than expression of opinion. The senior circuit judge of the United States characterized it in *Briggs* v. *Elliott*, 98 F. Supp. 529, 537 as "theories advanced by a few educators and sociologists." In this connection, the attention of the Court is invited to the testimony of Dr. Henry E. Garrett, head of the department of psychology of Columbia University, at the trial before the district court in Richmond in the *Davis* case, that psychology is a very young science,[49] that results of psychological tests are subject to interpretation by the testor, and that, accordingly, the predilection of the psychologist conducting a test may strongly influence the conclusion to be derived therefrom.[50] Accordingly, the theories of the social scientists relied upon by petitioners are not entitled to consideration as the coldly impartial findings of objective searchers for truth. But even if they had that dignity, it is respondents' position

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Psychol., Columbia Univ., Scientific Monthly, 65, 1947, 329-333; *The Intelligence of Jewish College Freshmen as Related to Parental Occupation*, by A. M Shuey, Dept. of Psychol., N. Y. Univ., Jour. of Applied Psychol. Vol. XXVI. No. 5, Oct. 1942, 659-668; *Non-Academic Development of Negro Children in Mixed and Segregated Schools*, by I. B. Prosser, Univ. of Cinn., Unpublished Doctors Thesis available in D. C. Public Library on Interlibrary loan from Univ. of Cinn. Library; *Personality Difference Between Negro and White College Students, North and South*, by J. R. Patrick and V. M. Sims, Jour. of Abnorm. and Soc. Psychol. 29, 1934-35, 181-201; *A Racial Comparison of Personality Traits*, by O. W. Engleson, Jour. of Applied Psychol. 22, 1938, 271-274; *Further Data on the Influence of Race and Social Status on the Intelligence Quotient*, by A. H. Arlitt, Phychological Bulletin, 18, 1921, 95-96; *Intelligence and Nationality of Wisconsin School Children*, by R. Byrnes, Jour. of Soc. Psychol., 7, 1936, 455-470; *Implications of Military Selection and Classification in Relation to Univ. Mil. Train.*, by R. K. Davenport, Jour. of Negro Ed., 15, 1946, 585-594; *A Study of the Relation Between Mental and Physical Status of Children in two Counties, of Ill.*, by G. A. Kempf and S. D. Collins, U. S. Pub. Health Rep. 44, 1929, 1743-1784; *Intelligence of Chinese and Japanese Children*, by P. Sandiford and R. Kerr, Jour. of Ed., Psychol., 17, 1926, 361-367; *The Settlement of Negroes in Kent County, Ontario, and a Study of the Mental Capacity of their Descendants*, by H. A. Tanser, Chatham, Ont.: Shepherd Pub. Co., 1939, p. 187; *A Study of Natio-Racial Mental Differences*, by N. D. M. Hirsch, Genetic Psychol. Monographs, 1, 1926, 231-406.

[49] Record p. 547, *Davis* v. *County School Bd.*, No. 191.

[50] Ibid. p. 561 and 563-564.

that such theories do not constitute a valid basis for the reversal by this Court of the long line of its holdings ever since the Civil War, and the necessary result of such reversal: amendment of the Constitution of the United States by construction.

Even if there are ill effects, as contended by petitioners, they cannot be classified as punishments as that term is used in the definition of a Bill of Attainder. The laws requiring a dual school system were not enacted with any idea of deprivation or of denial or of punishment, nor was there any intention to take away something which formerly was had by the "easily ascertainable group." On the contrary, the laws setting up schools for colored were enacted at a time when members of that race were afforded no schooling whatsoever. The purpose of the laws was to give rather than to take away, was to afford opportunity rather than deny opportunity, was to aid rather than to punish. Twist, turn and torture the words as they may, petitioners cannot make bills of pains and penalties or bills of attainder out of laws setting up schools for a people who were once deprived of education.

CONCLUSION

The position of the respondents with regard to the attack upon the maintenance of a dual school system in the District of Columbia is, (1) that sections of the Revised Statutes and subsequent enactments by Congress require the maintenance of that system, (2) that this Court and the highest court of the District have so held, (3) that the principle of separation of the races in schools and otherwise does not violate the Civil Rights Act nor the United Nations Charter and does not violate either the Fourteenth Amendment, which provides for "equal protection of the laws," nor the Fifth Amendment which has no equal protection clause, (4) that if the time has come to integrate

the schools of the District of Columbia the reasons therefor and the arguments in favor thereof should be placed before the Congress who made the laws, and (5) the Court should not be asked to, nor should it when asked, disturb the situation as it finds it, however strongly the Justices may be impressed with arguments for the need of change.

The position which the Court should take in this controversy, it seems to respondents, is best summed up by expressions made or concurred in by such eminent jurists as Justices Cardozo, Brandeis and Stone. In *United States* v. *Constantine*, 296 U. S. 287, 298-299, all three concurred in this dissenting language by Mr. Justice Cardozo:

> "The judgment of the court, if I interpret the reasoning aright, does not rest upon a ruling that Congress would have gone beyond its power if the purpose that it professed was the purpose truly cherished. The judgment of the court rests upon the ruling that another purpose, not professed, may be read beneath the surface, and by the purpose so imputed the statute is destroyed. Thus the process of psychoanalysis has spread to unaccustomed fields. There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body or assume them to be wrongful. *Fletcher* v. *Peck*, 6 Cranch 87, 130; *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 44. There is another wise and ancient doctrine that a court will not adjudge the invalidity of a statute except for manifest necessity. Every reasonable doubt must have been explored and extinguished before moving to that grave conclusion. *Ogden* v. *Saunders*, 12 Wheat. 213, 270. The warning sounded by this court in the *Sinking-Fund Cases*, 99 U. S. 700, 718, has lost none of its signifiance. 'Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our in-

> stitutions depends in no small degree on a strict observance of this salutary rule.' I cannot rid myself of the conviction that in the imputation to the lawmakers of a purpose not professed, this salutary rule of caution is now forgotten or neglected after all the many protestations of its cogency and virtue."

In *United States* v. *Butler*, *supra*, 297 U. S. 1, Mr. Justice Stone said at page 78-79:

> "The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government."

Finally, respondents adopt the language of Chief Judge Parker in one of the latter paragraphs of *Briggs* v. *Elliott*, *supra*, 98 F. Supp. 529:

> "To this we may add that, when seventeen states and the Congress of the United States have for more than three quarters of a century required segregation of the races in the public schools, and when this has received the approval of the leading appellate courts of the country including the unanimous approval of the Supreme Court of the United States at a time when that court included Chief Justice Taft and Justices Stone, Holmes and Brandeis, it is a late day to say that such segrega-

tion is violative of fundamental constitutional rights. It is hardly reasonable to suppose that legislative bodies over so wide a territory, including the Congress of the United States, and great judges of high courts have knowingly defied the Constitution for so long a period or that they have acted in ignorance of the meaning of its provisions. The constitutional principle is the same now that it has been throughout this period; and if conditions have changed so that segregation is no longer wise, this is a matter for the legislatures and not for the courts. The members of the judiciary have no more right to read their ideas of sociology into the Constitution than their ideas of economics."

It is respectfully submitted that the judgment of the District Court is correct and should be affirmed.

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APPENDIX A

APPENDIX A

Revised Statutes of the District of Columbia

Sec. 281. It shall be the duty of the school-board to provide suitable and convenient houses or rooms for holding schools for colored children, to employ and examine teachers therefor, and to appropriate a proportion of the school-funds, to be determined by the numbers of white and colored children, between the ages of six and seventeen years, to the payment of teachers' wages, to the building or renting of school-rooms, and other necessary expenses pertaining to said schools, to exercise a general supervision over them, to establish proper discipline, and to endeavor to promote a thorough, equitable, and practical education of colored children in said portion of the district.

Sec. 282. Any white resident shall be privileged to place his or her child or ward at any one of the schools provided for the education of white children in said portion of the district he or she may think proper to select, with the consent of the school-board; and any colored resident shall have the same rights with respect to colored schools.

Sec. 283. The school-board is authorized to receive any donations or contributions that may be made for the benefit of the schools for colored children by persons disposed to aid in the elevation of the colored population in the District, and to apply the same in such manner as in their opinion shall be best calculated to effect the object of the donors; the school-bard to account for all funds so received, and to report the same to the legislative assembly.

Sec. 306. It shall be the duty of the proper authorities of the District to set apart each year from the whole fund received from all sources by such authorities applicable to purposes of public education in the cities of Washington and Georgetown such a proportionate part of all moneys received or expended for school or educational purposes

in said cities, including the cost of sites, buildings, improvements, furniture, and books, and all other expenditures on account of schools, as the colored children between the ages of six and seventeen years in the respective cities bear to the whole number of children, white and colored, between the same ages, for the purpose of establishing and sustaining public schools in said cities for the education of colored children; and such proportion shall be ascertained by the last reported census of the population of said cities made prior to such apportionment, and shall be regulated at all times thereby.

Sec. 310. It is made the duty of the trustees to provide suitable rooms and teachers for such a number of schools in Washington and Georgetown as, in their opinion, will best accommodate the colored children in the various portions of said cities.

Sec. 314. The funds obtained for educational purposes in accordance with the preceding section shall be applied to the education of both white and colored children, in the proportion of the numbers of each between the ages of six and seventeen years, as determined by the latest census report that shall have been made prior to such apportionment.

Sec. 1296. All acts of Congress passed prior to the first day of December, one thousand eight hundred and seventy-three, relating to the District of Columbia, any portion of which is embraced in the foregoing revision are hereby repealed; and the section applicable thereto shall be in force in lieu thereof; and this revision of the acts of Congress relating to the District of Columbia shall be subject to, and governed by the provisions of chapter seventy-four of the Revised Statutes of the United States, entitled "Repeal Provisions."

Approved June 22, 1874.