IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 667

HEMAN MARION SWEATT, *Petitioner*

v.

THEOPHILUS SHICKEL PAINTER, ET AL., *Respondents*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPENDIX THERETO

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PRELIMINARY STATEMENT

Based on a long line of decisions by this Court, the courts of Texas have held that the State may provide education for its white and Negro students at different institutions where it is shown as a fact that the facilities offered both groups are substantially equal.

The admission of Petitioner, a Negro, to The University of Texas was denied because of the sections of the Texas Constitution which are to the effect that separate schools shall be provided.[1] Petitioner's

[1]Secs. 7 and 14, Art. VII, and related statutory provisions set out in Appendix at page 109.

mandamus was denied by the trial court because of the above holdings of this Court and because it found as a fact that the separate law school for Negroes offered Petitioner "privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at The University of Texas." (R. 440.)

Petitioner stated on the trial that even if the Negro law school was the absolute equivalent of the Law School of The University of Texas, he would not attend it. (R. 188.) The trial court's judgment recites that:

> "From his own testimony, Relator would not register in a separate law school no matter how equal it might be and not even if the separate school affords him identical advantages . . ." (R. 440.)

No exception was taken by Petitioner to such finding.

As will be further discussed, Petitioner did not invoke the jurisdiction of the Texas Court of Civil Appeals as to the want or sufficiency of the evidence to support the findings of fact as to the equality of the schools. That Court nevertheless wrote that "*Our jurisdiction in this latter regard was not invoked in this case.* . . . However . . . were our jurisdiction in that regard properly invoked, we would be constrained to hold that its preponderance and overwhelming weight supports the trial court's judgment." (R. 461.) Nor was the jurisdiction of the Texas Supreme Court invoked to consider whether there was evidence to support the findings

of fact and the judgment. In the absence of such point of error, that Court has no jurisdiction to pass on the matter.[2]

So Petitioner is asking this Court to grant certiorari on the assignment of error that "the Court erred in finding that the law school for Negroes at Austin was the 'equivalent or substantial equivalent of the law school of (The) University of Texas,' "[3] where he did not invoke the jurisdiction of the Texas appellate courts on that issue. It is submitted that this case is not a proper one for review by certiorari in this Court.

The Texas Courts have not decided a federal question of substance not heretofore determined by this Court, nor have they decided this case under the facts in a way not in accordance with the applicable decisions of this Court.[4] To the contrary, they have expressly followed such decisions, as will be more fully discussed. For that additional reason, this case is not a proper one for review by certiorari by this Court.

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[2]Petitioner's points of error are set out in the appendix, page 106. This matter was called to the attention of Petitioner and the Texas Supreme Court in Respondent's reply in that Court. Respondent's second point in that Court read in part, "No assignment of error was made as to such fact finding in Petitioner's motion for rehearing in the Court of Civil Appeals. There is no assignment in this Court that there is no evidence to support such findings." Petitioner did not reply to such point. Rule 476 (Tex. Rules Civ. Pro.) provides: "Trials in the Supreme Court shall be only upon the questions . . . raised by the assignments of error in the application for writ of error . . ."

[3]Petitioner's fourth "Error Relied Upon," page 16 of his Petition in this Court.

[4]Rule 38-5(a) of this Court.

STATEMENT OF THE CASE

The Texas Legislature in 1947 provided for the mandatory establishment of The Texas State University for Negroes to be located at Houston, and for the immediate establishment of one of its branches, the School of Law, to be located at Austin until the university at Houston was ready to assume the responsibility.[5] The statute states that:

> "It is the purpose of this Act to establish an entirely separate and equivalent university of the first class for Negroes with full rights to the use of tax money and the general revenue fund for establishment, maintenance, erection of buildings, and operation . . ."

Two million dollars was appropriated for the acquisition of land and other property for The Texas State University for Negroes, and five hundred thousand dollars was appropriated for its operation and maintenance for each year of the following biennium. In addition, the buildings, 53 acres of grounds in Houston between Rice Institute and The University of Houston, and other assets of the Houston College for Negroes, having a net value of over $1,000,000, were turned over to this university.[6]

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[5]Senate Bill 140, 50th Leg., 1947, Ch. 29, p. 36, carried as Art. 2643(b) Tex. Civ. Stat., Vernon 1948, set out in the Appendix at page 110.

[6]Report of State Auditor to Governor, Aug. 31, 1948, on the Texas State University for Negroes. This transfer was made pursuant to H. B. 780, 50th Leg. 1947, being Art. 2643(c) Tex. Civ. Stat. (Vernon 1948). It is discussed in the Record. (R. 54.)

With reference to the Law School at Austin, the Act provides:

> ". . . the Board of Regents of The University of Texas *is authorized and required to forthwith* organize and establish a separate School of Law at Austin for Negroes, to be known as the 'School of Law of The Texas State University for Negroes' and therein provide instruction in law equivalent to the same instruction being offered in law at The University of Texas. . . . There is hereby appropriated, as an emergency appropriation, the sum of One Hundred Thousand ($100,000.00) Dollars . . . to be expended by the Board of Regents of the University of Texas in order to establish and operate the separate Law School."

Such Law School was and is established. (R. 36-43, 86.)

On March 3, 1947, the Registrar wrote Petitioner that the School of Law would be open March 10, 1947, and that his application theretofore made (to The University of Texas) and his qualifications would entitle him to enter. (R. 159; Exhibit 13, R. 372.)

The letter informed Petitioner that his instructors would be *the same professors* who were and are teaching at the School of Law of The University of Texas; that the courses, texts, collateral readings, standards of instruction, and standards of scholarship *would be identical* with those prevailing at the School of Law of The University of Texas; that a library was being installed, and that full use of the library of the Supreme Court of Texas was available

prior to the delivery of a complete new library then on order; and that the new library would include all books required to meet the standards of the American Association of Law Schools and the American Bar Association. (R. 372-374.)

Although Petitioner received the letter, he did not answer it. (R. 175.) Without coming to Austin to talk to the Dean, the Registrar (R. 175), or any of his prospective professors (R. 186), and without making any personal investigation of the school (R. 174), the courses, faculty, or physical plant, he decided not to attend. (R. 177, 186.) The school was nevertheless ready to receive and instruct him. (R. 86.)

After hearing the evidence, the trial court found in its judgment:

> ". . . this Court is of the opinion and finds from the evidence that during the appeal of this cause and before the present hearing, the Respondents herein, . . . have established the School of Law of the Texas State University for Negroes in Austin, Texas, with substantially equal facilities and with the same entrance, classroom study, and graduation requirements, and the same courses and the same instructors as the School of Law of The University of Texas; that such new law school offered to Relator privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at The University of Texas; that Relator, although duly notified that he was eligible and would be admitted to said law school March 10, 1947, declined to register; . . ." (R. 440.)

After the trial of the case,[7] three students applied for and were admitted to the School of Law, Texas State University for Negroes in September, 1947.[8] There are now 23 students in the School of Law, including two of the above who are now finishing their second year. The Law School now is established as a part of the Texas State University for Negroes located in Houston, the home of Petitioner. That law school, as of January 1949, had in its shelves 16,371 bound volumes of law books and 772 volumes in the warehouse awaiting transfer. Orders for 1,046 additional volumes have been placed.[9] The minimum standards of the American Bar Association require 7,500 volumes (R. 6). The law school has a dean who is paid $7,500 a year and five full-time professors[10] who are paid $500 a month or more,[11] and a full-time librarian. While the school is adequately housed in the main building of the

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[7]This Court may consider any change in facts supervening since the judgment was entered. *Gulf C. & S. F. Ry. v. Dennis,* 224 U. S. 503 (1912); *Watts, Watts & Co. v. Unione Austriaca,* 248 U. S. 9 (1918); *Missouri ex rel. Wabash Ry. v. Public Service Comm.,* 273 U. S. 126 (1927); *Patterson v. Alabama,* 294 U. S. 600 (1935); *Villa v. Van Schaick,* 299 U. S. 152 (1936).

[8]Report of the Dean of the School to the Governor of Texas on Jan. 27, 1948, set out in the Appendix on page 103.

[9]State Auditor's Report to Governor and Legislature, Appendix, page 99.

[10]O. H. Johnson, Dean, B.S. Kansas State, M.S. Iowa, LL.B. Temple U.; Earl L. Carl, B.A. Fisk, LL.B. Yale; Everett Bell, B.A., LL.B. University of Kansas; William A. George, B.A. Lane College, LL.B. Western Reserve; J. E. Thomas, B.A., LL.B. Western Reserve; and William B. Harris, B.A., LL.B. Temple, professors; and R. L. King, J.D. University of Chicago, Librarian.

[11]*Ibid.,* Note 8.

Texas State University for Negroes, the Texas Board of Control has recommended the erection of a $250,000 law building on that campus. The Legislature is now in session. As of this time, this item stands approved in both the Senate and House Appropriation Bills.[12] The school has been approved by the State Board of Bar Examiners.[13]

As to the Texas State University for Negroes, in addition to its present buildings, construction is in progress on buildings including a $1,637,000 Administration and Classroom Building. Its completion date is September 1949.[14] The present appropriation bills of the House and Senate include $1,800,000 for additional buildings and over two million dollars for operation and maintenance during the next biennium. The University is also empowered to retain and expend all fees and other receipts collected by it, a sizeable factor. (H. B. 546, 51st Leg. 1949.)

The Legislature has also enacted a statute empowering the University for Negroes, through the issuance of bonds, to erect student activity buildings, student and faculty dormitories, gymnasia, stadia, dining halls, and other buildings for the health and welfare of the students and faculty.[15] Of course these buildings are for the whole student body and faculty, including those in the law school.

As of February 12, 1949, that University had an enrollment of 2,032 students, 211 of which are in its

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[12]H. B. 319, S. B. 134, 51st Leg., 1949.

[13]*Ibid.*, note 9; Appendix, page 99.

[14]Regents Report to Governor, Appendix, page 88.

[15]H. B. 545, 51st Leg., 1949.

graduate school. It has a teaching faculty of 115 in addition to administrative and operative personnel.[16] Its president[17] and 17 members of the faculty hold Doctors degrees. The University has been approved and given a Class "A" rating by the Southern Association of Colleges and Secondary Schools.[18]

That University awarded 36 Bachelors degrees and 30 Masters degrees in June 1948. It awarded 68 Bachelors of Arts, 19 Bachelors of Science, and 65 Masters degrees in August 1948.[19] The Texas State University for Negroes is very much alive; it is certainly not something on the drawing boards.

FIRST POINT

Section 7 of Article VII of the Texas Constitution and other related constitutional and statutory provisions providing that the State shall separately educate its Negro and white students are constitutional. They do not violate the equal protection clause of the Fourteenth Amendment.

ARGUMENT AND AUTHORITIES

The decisions of this Court are uniform in their holding that states may, by constitution or statute,

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[16]*Ibid.*, Note 14; Appendix, page 95.

[17]Raphael O'Hara Lanier, American Minister to Liberia, 1946, until he was installed as president; Assistant Director of Negro Affairs N.Y.A., Washington, D. C. 1938-40; Special Assistant Bureau of Services U.N.R.R.A. 1945-46. (From *Who's Who in America*, 1948-49, page 1420.)

[18]Report to Governor by Board of Regents, Feb. 12, 1949, Appendix, page 95.

[19]*Ibid.*, Note 18; Appendix, page 94.

provide separate establishments for the education of their Negro and white students, provided each group receives substantially equal facilities and opportunities. Related to the education cases are transportation cases. The transportation cases are cited for their holdings on the "equal protection clause."

United States Supreme Court Decisions

Because the doctrine of stare decisis has had an important part in the development of this line of cases, the decisions are presented in chronological order.

Hall v. DeCuir, 95 U. S. 485 (1877). A Louisiana statute provided for enforced commingling of the races in common carriers. A steamboat master, operating in interstate commerce, was arrested for having denied a Negro woman the right to remain in cabins reserved for whites. In reversing the conviction, this Court held that the Louisiana statute was an interference with interstate commerce. Congressional inaction left the ship's master free to adopt such reasonable rules as seemed best for all concerned. Said the Court:

> ". . . We think it may safely be said that State legislation which seeks to impose a direct burden upon inter-state commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. . . .
>
> ". . . If each State was at liberty to regulate the conduct of carriers . . . the confusion likely to follow could not but be productive of great

> inconvenience and unnecessary hardship. . . . . we think this (Louisiana) statute, to the extent that it requires those engaged in the transportation of passengers among the states to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional. . . ." 95 U. S. at 490.

Justice Clifford concurring, went into the matter more fully, including the reasonableness of the classification:

> ". . . Substantial equality of right is the law of the State and of the United States; but equality does not mean identity, as in the nature of things identity in the accommodation afforded to passengers, whether colored or white, is impossible. . . ." 95 U. S. at 503.

Reviewing the authorities, he wrote:

> "Questions of a kindred character have arisen in several of the States, which support these views in a course of reasoning entirely satisfactory and conclusive. . . . equality of rights does not involve the necessity of educating white and colored persons in the same school any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school; and that *any classification which preserves substantially equal school advantages is not prohibited by either the State or Federal Constitution*, nor would it contravene the provisions of either. *State v. McCann*, 21 Ohio St. 198.
>
> "Separate primary schools for colored and for white children were maintained in the city

> of Boston. . . . Distinguished counsel insisted that the separation tended to deepen and perpetuate the odious distinction of caste; but the court responded, that they were not able to say that the decision was not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment. *Roberts v. City of Boston*, 5 Cush. (Mass.) 198.
>
> "Age and sex have always been marks of classification in public schools throughout the history of our country, and the Supreme Court of Nevada well held that the trustees of the public schools in that State might send colored children to one school and white children to another. . . ."
>
> ". . . and it is settled law there that the (school) board may assign a particular school for colored children, and exclude them from schools assigned for white children, and that such a regulation is not in violation of the Fourteenth Amendment." 95 U. S. at 506.

Plessy v. Ferguson, 163 U. S. 537 (1896). A later Louisiana statute required that colored and white passengers be furnished separate accommodations on carriers. Plessy, a Negro, was convicted for refusing to occupy the section set aside for his race. The railroad did not operate in interstate commerce. It was squarely contended by Plessy that the state law, as applied to him, violated the equal protection clause.[20] In overruling the contention, this Court wrote:

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[20] Among the questions presented in the brief for plaintiff in error (Plessy) was: "Has the State the power under the provisions of the Constitution of the Untied States to make a distinction based on color in the enjoyment of chartered privileges within the State?" (Page 5, his Brief.)

"The object of the (14th) Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. *The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.* . . .

"The distinction between laws interfering with the *political equality* of the Negro and *those requiring the separation of the two races in schools*, . . . and railway carriages *has been frequently drawn by this court.* . . .

"*So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation*, and with respect to this there must necessarily be a large discretion on the part of the Legislature. *In determining the question of reasonableness* it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their com-

> fort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures. . . .
>
> ". . . When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed."

Cummings v. Board of Education, 175 U. S. 528 (1899). An injunction to compel the withholding of all assistance to a white high school, where the board failed to provide a Negro high school, was denied as an inappropriate action. It was held that the board's action did not violate any rights of plaintiffs under the Fourteenth Amendment. Mr. Justice Harlan (who dissented in the *Plessy* case) wrote the following often-quoted language:

> "Under the circumstances disclosed, we cannot say that this action of the state court was, within the meaning of the Fourteenth Amendment, a denial by the State to the plaintiffs, and to those associated with them of the equal protection of the laws, or of any privilege belonging to them as citizens of the United States. 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. . . ."

This language is quoted with approval by this Court in *Gong Lum v. Rice*, 275 U. S. 78 at 85, hereinafter discussed.

Chesapeake & Ohio Ry. v. Kentucky, 179 U. S. 388 (1900). A Kentucky statute required railways to furnish separate cars for white and Negro passengers. Upon being convicted for violations of the act, the railway appealed. After determining that the Kentucky act applied only to its domestic and not interstate commerce, this Court concluded that under the *DeCuir* and other cases, there could be no doubt as to its constitutionality.

To emphasize that this Court did consider and pass upon the separation of the races under the equal protection clause, the following is quoted from Mr. Justice Brown's opinion. It refers to the *Plessy* case:

> "On writ of error from this court, it was held that no question of interference with interstate commerce could possibly arise, since the East Louisiana Railway was purely a local line, with both its termini within the State of Louisiana. Indeed, the act was not claimed to be unconstitutional as an interference with interstate com-

> merce, but *its invalidity was urged upon the ground* that it abridged the privileges or immunities of citizens, deprived the petitioner of his property without due process of law, and also *denied him the equal protection of the laws. His contention was overruled, and the statute held to be no violation of the Fourteenth Amendment.*" 179 U. S. at 393.

Berea College v. Kentucky, 211 U. S. 45 (1908). A private college, a Kentucky corporation, was convicted of violation of a Kentucky statute which made it unlawful for a person or corporation to operate a school or college which received both white and Negro students. Wrote Mr. Justice Brewer:

> ". . . the single question for our consideration is whether it (the statute) conflicts with the Federal Constitution. . . . That the Legislature of Kentucky desired to separate the teaching of white and colored children may be conceded. . . ." 211 U. S. at 53, 55.

It was decided that the statute should be upheld. Corporations being creatures of the State, it could grant or withhold corporate powers.

The holding was that the State could, within the Fourteenth Amendment, prohibit the teaching of white and Negro students together in the same private school or college. It goes much further than the public schools. The breadth of the holding is emphasized in the dissent by Mr. Justice Harlan, who points out that the title of the act read:

> "An Act to prohibit white and colored persons from attending the same school."

He further pointed out that the trial court overruled the objection that the statute violated the Fourteenth Amendment, and that the highest court of Kentucky held that it was entirely competent for the State to adopt the policy of the separation of the races. He wrote:

> "It is absolutely certain that the legislature had in mind to prohibit the teaching of the two races in the same private institution, at the same time by whomever that institution was conducted." 211 U. S. at 62.
>
> "Of course what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the State and maintained at the public expense." 211 U. S. at 69.

Chiles v. Chesapeake & Ohio Ry., 218 U. S. 71 (1910). Chiles, a Negro traveling in interstate commerce, was required to move to a section set apart for Negroes. The Kentucky courts held that their statute requiring separation of the races was not applicable to interstate passengers. It denied relief on the basis of the regulations of the railway company requiring separation. The sole questions before this Court were the validity and reasonableness of those regulations.

This Court first considered the commerce clause. *Hall v. DeCuir* was followed in its holding that in the absence of Congressional regulation of interstate commerce, carriers may make *reasonable* regulations for the safety and comfort of its passengers.

Regarding the reasonableness of the regulation, this Court turned to *Plessy v. Ferguson:*

> "The statute was attacked on the ground that it violated the Thirteenth and Fourteenth Amendments of the Constitution of the United States. The opinion of the court . . . reviewed prior cases, and not only sustained the law *but justified as reasonable the distinction between the races on account of which the statute was passed and enforced.* It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, 'the established usages, customs and traditions of the people' and the 'promotion of their comfort and the preservation of the public peace and good order,' this must also be the test of the reasonableness of the regulations of a carrier, made for like purpose and to secure like results. *Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate, cannot be said to be unreasonable.* See also *Chesapeake & Ohio Ry. Company v. Kentucky,* 179 U. S. 388.
>
> "The extent of the difference based upon the distinction between the white and colored races which may be observed in legislation or in the regulations of carriers has been discussed so much that we are relieved from further enlargement upon it. We may refer to Mr. Justice Clifford's concurring opinion in *Hall v. DeCuir* for a review of the cases. They are also cited in *Plessy v. Ferguson* at page 550. We think the judgment should be affirmed."

McCabe v. A. T. & S. F. Ry. Co., 235 U. S. 151 (1914). Action by Negro citizens to enjoin enforce-

ment of an Oklahoma statute requiring separation of white and colored citizens on trains and in waiting rooms because (1) such statute violated the Fourteenth Amendment, and (2) the statute constituted a burden on interstate commerce.

With reference to the Fourteenth Amendment, this Court expressly approved the holding of the Circuit Court:

> "That it had been decided by this court, so that the question could no longer be considered an open one, that it was not an infraction of the 14th Amendment for a State to require separate, but equal, accommodations for the two races."

Gong Lum v. Rice, 275 U. S. 78 (1927). A Mississippi statute provided that separate schools should be maintained for white and colored students. A Chinese girl was denied admission to a white school. A direct attack was made on the separation of the children for schooling purposes, the contention being made that such was a violation of the Fourteenth Amendment. The first assignment of error in this Court was:

> "A child of school age and otherwise qualified . . . is denied the equal protection of the laws when she is excluded from such school solely on the ground that she is a Chinese child and not of the Caucasian race." (Brief and Argument for Plaintiff in Error, p. 5.)

Mr. Chief Justice Taft wrote:

> "The case then reduces itself to the question whether a state can be said to afford to a child of

Chinese ancestry born in this country, and a citizen of the United States, equal protection of the laws by giving her the opportunity for a common school education in a school which receives only colored children of the brown, yellow or black races.

"The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear. . . .

"The question here is whether a Chinese citizen of the United States is denied equal protection of the laws *when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black.* Were this a new question, it would call for very full argument and consideration, but *we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts* under the Federal Constitution."

Mr. Chief Justice Taft then adopted the following from *Plessy v. Ferguson:*

" 'The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.' "

He concluded:

"The decision is within the discretion of the state in regulating its public schools and does

> *not conflict with the Fourteenth Amendment.* The judgment of the Supreme Court of Mississippi is affirmed."

Missouri ex rel. Gaines v. Canada, 305 U. S. 337 (1938). Action by Gaines, a Negro, to compel his entrance to the University of Missouri School of Law. The first point raised in the Petition for Certiorari (p. 17) was:

> "The State of Missouri denied petitioner the equal protection of the laws in excluding him from the School of Law of the University of Missouri solely because he is a Negro."

Upon a finding that there was no established school of law for Negroes, and that there was no mandatory duty upon any official to establish such a school, this Court held that "*in the absence of other and proper provisions for his legal training within the State,*" Gaines would be entitled to enter the University of Missouri Law School.[21] Mr. Chief Justice Hughes wrote:

> "In answering petitioner's contention that this discrimination constituted a denial of his constitutional right, the state court has fully recognized the obligation of the State to provide negroes with advantages for higher education

[21]The cause was remanded to the Missouri Supreme Court. Its subsequent decision, 344 Mo. 1238, 131 S. W. (2d) 217 (1939), recognized that the Legislature had enacted a statute making it mandatory that equal educational opportunities be afforded colored students. It remanded the cause to the trial court for a finding on such equality by the opening of the next school year.

substantially equal to the advantages afforded to white students. *The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions.*" 305 U. S. at 334.

"Here, 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."

". . . *The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State.* . . . By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. 305 U. S. at 349.

"We are of the opinion . . . that petitioner was entitled to be admitted to the law school of the State University *in the absence of other and proper provision for his legal training within the State.*"

Sipuel v. Board of Regents, 332 U. S. 631 (1948). Mandamus by a Negro to compel her admission to the Oklahoma law school.[22] The relief was denied

[22]The question was there presented to this Court: "Does the Constitution of the United States prohibit the exclusion of a qualified Negro applicant solely because of race from attending the only law school maintained by the State?"

by the State court principally on the ground that Sipuel had not made proper demand for the establishment of a separate law school. The brief Per Curiam holding of this Court was:

> "The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. *Missouri ex rel. Gaines v. Canada.* . . ."

Fisher v. Hurst, 333 U. S. 147 (1948). Following the *Sipuel* decision, the Oklahoma Supreme Court directed the Board of Regents of Oklahoma University:

> ". . . to afford to plaintiff, and all others similarly situated, an opportunity to commence the study of law at a state institution as soon as citizens of other groups . . . in conformity with the equal protection clause . . . and with the provisions of the Constitution and statutes of this State requiring segregation. . . ." 333 U. S. at 148.

(Petition for Certiorari, page 5.) The headnote of Argument read, "This Court should re-examine the constitutionality of the doctrine of 'separate but equal facilities.'" (*Ibid.*, p. 18.) The arguments were there made as here that, "The doctrine of 'separate but equal' is without legal foundation." And: "Classifications and distinctions based on race or color have no moral or legal validity. They are contrary to our Constitution and laws . . ." (Ibid., p. 27.)

Pursuant thereto, the trial court ordered that unless the separate law school was established and ready to function at the designated time applicable to any other group, the Board of Regents must:

> "(1) enroll plaintiff . . . in the first-year class of the School of Law of the University of Oklahoma, in which school she will be entitled to remain . . . until such a separate law school for negroes is established. . . .
>
> "(2) not enroll any applicant of any group . . . until said separate school is established. . . .
>
> "It is further ordered . . . that if such a separate law school is so established . . . the defendants . . . are hereby ordered . . . to *not* enroll plaintiff in the first-year class of the School of Law of the University of Oklahoma. . . ." 333 U. S. at 149.

Although this Court's opinion states that the question as to whether the equal protection clause could be satisfied by the establishment of a separate law school was not in issue (and we do not, of course, question the statement), Mrs. Fisher contended in her brief that: "Equality under a segregated system is a legal fiction and a judicial myth." And the American Civil Liberties Union, as amicus curiae, argued that "segregation of Negroes from whites violates the equal protection clause."[23]

The question before this Court was whether its mandate in the *Sipuel* case had been followed. This Court concluded that:

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[23]This information is taken from Comment (1949), 17 George Washington Law Review 208 at 225, footnote 97.

> "It is clear that the District Court . . . *did not depart from our mandate.*"

The Court explained the *Sipuel* case:

> "The Oklahoma Supreme Court upheld the refusal to admit petitioner on the ground that she failed to demand establishment of a separate school. . . . On remand, the District Court correctly understood our decision to hold that the equal protection clause permits no such defense."

The *Sipuel* case, citing the *Gaines* case with approval and as authority, therefore continued the long established holding that separate schools may be provided so long as the facilities are equivalent. It made clear that the opportunities must be provided for the Negro students as soon as they are made available to white students. In this case, the School of Law of the Texas State University for Negroes was available to Petitioner at the time of this trial and is still available to him.

This Court's holdings that the States may provide separate facilities for white and Negro students are recognized and set out in many texts, including 2 Warren (Rev. Ed. 1926), *The Supreme Court in United States History* 608 (commending the Court on its decisions); Warsoff, *Equality and the Law* (1938), page 207; Brannon, *The Fourteenth Amendment*, pages 89-92; Sutherland, *Notes on the United States Constitution*, pages 702-705; 10 *Am. Jur.* 904, Civil Rights, Sec. 11; 14 *Corpus Juris Secundum* 1171, Civil Rights, Section 11; 5 *R.C.L.* 596, Civil Rights, Sections 20 and 21.

Other Federal and State Court Cases

Many of the strongest cases upholding the constitutionality of separation of the races have come from the highest courts of states outside the South. These cases, together with the many cases decided in the Southern States are set out in the Appendix beginning on page ____. They form a great body of the law on which the structure of important state functions of many states have been built. They are an important body of cases. They are placed in the Appendix in the interest of brevity.

Two of the cases decided out of the South are here set out as illustrative.

In *People v. School Board of Borough of Queens*, 161 N. Y. 598, 56 N. E. 81 (1900), the only question was "whether the borough of Queens is authorized to maintain separate schools for the education of colored children within the borough." In upholding such action, the highest New York Court declared:

> "The most that the constitution requires the legislature to do is to furnish a system of common schools where each and every child may be educated,—not that all must be educated in any one school, but that it shall provide or furnish a school or schools where each and all may have the advantages guaranteed by that instrument. If the legislature determined that it was wise for one class of pupils to be educated by themselves, there is nothing in the constitution to deprive it of the right to so provide. It was the facilities for and the advantages of an education that it was required to furnish to all the

children, and not that it should provide for them any particular class of associates while such education was being obtained. . . ."[24]

State ex rel. Weaver v. Board of Trustees of Ohio State U., 126 Ohio St. 290, 185 N. E. 196 (1933).[25] Ohio State University offered a Home Economics course in which female students operated a residence wherein they lived. The course included cooking, buying, cleaning, etc. A Negro's application for this course was refused, and an equivalent course was offered. She sued to compel her admission. The Ohio Supreme Court wrote in denying the mandamus:

"'Any classification which preserves substantially equal school advantages is not prohibited by either the state or federal constitution, nor would it contravene the provisions of either.' . . . the respondents had full authority to prescribe regulations that will prove most beneficial to the university and state and will best conserve, promote, and secure the educational advantages of all races. The purely social relations of our citizens cannot be enforced by law; nor were they intended to be regulated by our own laws or by

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[24]The Legislature of New York in 1909 enacted a statute which prohibits separation of the races in schools. (Thompson's Laws of N. Y., Acts 1909, Ch. 14, sec. 40, p. 250.) The enactment of such statute is fully within the power of the State, just as laws requiring separation. This statute does not change the holding of the Courts where the statutes permit or require separation.

[25]The Hon. John W. Bricker, then Attorney General of Ohio, represented the Board of Trustees in this case.

> the state and Federal Constitutions. . . . 'When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed.' Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempts to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically."

Petitioner's Cases Distinguished

The cases cited by Petitioner are principally those involving discrimination (as distinguished from separation) against persons of the Negro race in matters of civil and political rights, such as jury service, voting in primaries, obtaining confessions by duress, property rights, and the like. These cases are obviously distinguishable from situations where persons of the Negro race are offered equivalent opportunities for obtaining an education. As said by this Court in the *Plessy* case:

> "The distinction between laws interfering with *political equality* of the negro and those requiring separation of the races in schools . . . has been frequently drawn by this court. . . ." 163 U. S. 537 at 545.

Pearson v. Murray

In *Pearson v. Murray*, 169 Md. 478, 182 Atl. 590 (1936), the Court granted a mandamus admitting a Negro student to the University of Maryland law school. That State had no separate law school. In the absence of equivalent facilities, Murray was held entitled to enter the University of Maryland.

The opinion, however, recognizes that where equal opportunities are offered, a State may offer education at separate institutions. The decision reads:

> "Equality of treatment does not require that privileges be provided members of the two races in the same place. The state may choose the method by which equality is maintained. 'In the circumstances that the races are separated in the public schools, there is certainly to be found no violation of the constitutional rights of the one race more than the other, and we see none of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense.'"

Civil and Political Rights Cases

There are several cases which hold that under the 14th Amendment state action that prevents Negroes from serving on juries, or systematically excludes them, is unconstitutional. *Strauder v. West Virginia*, 100 U. S. 303, simply holds that where a Negro is convicted of murder upon an indictment by a grand jury upon which no Negro served or could serve, the conviction must be reversed. The case is

one of discrimination, and not one of separation with equivalent facilities.[26]

To the same effect are cases involving voting rights.[27] The right to vote is a political right guaranteed by the Federal Constitution. These cases have nothing to do with offering of equal facilities in education.

There are several cases which have reversed criminal convictions of Negroes where it was shown that the convictions were based on confessions which were obtained under duress.[28] Obviously these duress cases apply to white as well as Negro citizens. The obtaining of a confession by whipping and burning, whether applied to Negro or white, has nothing to do with the offering of equivalent facilities for education.

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[26]Other cases involving jury service, with the same holding, are *Carter v. Texas,* 177 U. S. 442 (1900) (grand jury); *Pierre v. Louisiana,* 306 U. S. 354 (1939) (grand jury); *Smith v. Texas,* 311 U. S. 128 (1940) (grand jury); *Hill v. Texas,* 316 U. S. 400 (1942) (grand jury); *Patton v. Mississippi,* 332 U. S. 463 (1947) (grand jury); *Brunson v. North Carolina,* 333 U. S. 851 (1948) (grand jury). But cf. *Akins v. Texas,* 325 U. S. 398 (1945), and *Moore v. New York,* 333 U. S. 565 (1948).

[27]*Nixon v. Herndon,* 273 U. S. 536 (1927); *Nixon v. Condon,* 286 U. S. 73 (1932); *Lane v. Wilson,* 307 U. S. 268 (1939); *U. S. v. Classic,* 313 U. S. 299 (1941); *Smith v. Allwright,* 321 U. S. 649 (1944), overruling *Grovey v. Townsend,* 295 U. S. 45; *Chapman v. King* (C.C.A. 5th, 1946), 154 F. (2d) 460, cert. den. 327 U. S. 800; and *Rice v. Elmore* (C.C.A. 4th, 1947), 165 F. (2d) 387, cert. den. 333 U. S. 875 (1948).

[28]*Brown v. Mississippi,* 297 U. S. 278 (1936); *Chambers v. Florida,* 309 U. S. 227 (1940); *White v. Texas,* 309 U. S. 631, 310 U. S. 530 (1940); *Ward v. Texas,* 316 U. S. 547 (1942); and *Lee v. Mississippi,* 332 U. S. 742 (1948). But cf. *Lyons v. Oklahoma,* 322 U. S. 596 (1944).

The Chinese and Japanese Exclusion Cases

A short summary of the facts of these cases will show their distinction.

Yick Wo v. Hopkins, 118 U. S. 356 (1886). A broad city ordinance gave a board unbridled power. The board arbitrarily refused to license 200 Chinese laundrymen and licensed 80 non-Chinese similarly situated. It was held that the equal protection clause applied to aliens, and that these Chinese were not afforded equal protection. They were not given equal opportunity but were completely deprived of the right to work and earn a living.

Truax v. Raich, 239 U. S. 33 (1915). An Arizona statute required employers to employ at least 80% qualified electors or citizens. Raich, an alien cook, was about to be fired simply because he was not a citizen. As in the *Yick Wo* case, it was held that the statute did not give Raich equal protection of the laws. The Court said that the Legislature does not have the power "to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood . . . *the right to work . . . is the very essence of personal freedom and opportunity that it was the purpose of the 14th Amendment to secure.*"

Takahashi v. Fish and Game Comm., 334 U. S. 410 (1948), falls under the above ruling. There the California statute kept an alien Japanese from

fishing. It was the *right to work* which was protected.[29]

These cases hold that a person may not be deprived of earning a living and kept from working at his trade simply because of race. They are clearly distinguishable. Texas is not denying education to any race. It is offering equal educational opportunities to white and Negro students at separate institutions.

Hirabayashi v. U. S., 320 U. S. 81 (1943) and *Korematsu v. U. S.*, 323 U. S. 214 (1944), were cases holding that citizen Japanese could be made to respect curfew regulations and vacate war zones on the West Coast as a war measure. But in *Ex Parte Mitsuye Endo*, 323 U. S. 283 (1944), where a U. S. citizen of Japanese extraction, whose loyalty was not questioned, was moved out of her home and sent to a "relocation center" in another state, and had been awarded a "leave" to go by the civilian authorities in charge—and was yet arbitrarily detained, it was held that such citizen was entitled to habeas corpus to be released. The case on its facts is obviously distinguishable.

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[29]Among these "right to work" cases are *Steele v. L. & N. Ry.*, 323 U. S. 192 (1944), and *Tunstall v. Brotherhood*, 323 U. S. 210 (1944). The Court held that where Congress made a union the exclusive bargaining agency for railroad employees, that union must represent the Negro as well as white workers and not deprive the Negroes of the opportunity to obtain the better jobs simply because of race, citing the *Yick Wo* and *Gaines* cases. The union must represent both groups equally.

The Property Ownership Cases

The next group of cases held that the equal protection clause protects the rights to own and occupy land. It protects the person in that property right. Thus in *Oyama v. California*, 332 U. S. 633 (1948), it was held that land owned in the name of a U. S. citizen of Japanese extraction could not be escheated simply because it had been purchased for him by an alien Japanese in an alleged violation of the Alien Land Law of California. The citizen of Japanese ancestry was saddled with more onerous burdens in his *property* ownership than other citizens.

Similarly, in *Shelley v. Kraemer*, 334 U. S. 1 (1948), the Court held in voiding state enforcement of restrictive covenants on realty that the equal protection clause protected the Negro against state action in his *right to own and occupy property.* The Court stated:

> "We have noted that freedom from discrimination by the States *in the enjoyment of property rights* was among the basic objectives . . . of the Fourteenth Amendment." 334 U. S. at 20.

Referring to the *Oyama* case, above, the Court said:

> "Only recently this Court had occasion to declare that a state law which denied *equal enjoyment of property rights* . . . was not a legitimate exercise of the state's police power. . . ." 334 U. S. at 20.

The Court continued:

> ". . . it would appear beyond question that the power of the State to create and enforce *property interests* must be exercised within the boundaries defined by the Fourteenth Amendment." 334 U. S. at 22.

In 1866, at the time Congress was deliberating on the form in which the Fourteenth Amendment was to be submitted to the Legislatures of the States, it was expressly understood by all the members that the right "to take, hold and dispose of property either real or personal" was to be protected. Flack, *The Adoption of the Fourteenth Amendment* (1908), page 85. Further, property rights were specifically mentioned in the Civil Rights Act which Congress enacted to give effect to the Fourteenth Amendment after it was adopted. 14 Stat. 27, 8 U.S.C.A. Sec. 42; 16 Stat. 144, 8 U.S.C.A. Sec. 41. *Hurd v. Hodge*, 334 U. S. 24 (1948). On the other hand, an amendment to the Act striking out all reference to common schools was adopted. Flack, *The Adoption of the Fourteenth Amendment*, page 275.[30] Thus the first Congress to interpret the Fourteenth Amendment recognized the distinction between the right to own and enjoy property and the furnishing of an education.

These cases deal with a complete denial of the enjoyment of *property rights*. But the furnishing of

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[30]"The amendment of Mr. Kellogg, striking out all reference to common schools was agreed to, however, by a vote of 128 to 48." Flack, *Adoption of the Fourteenth Amendment*, page 275; 3 Cong. Rec. 43rd Cong., 2nd Sess. (Feb. 4, 1875), p. 1010.

an education, especially at the collegiate and professional level, is not a property right. *Hamilton v. Regents of the University of California*, 293 U. S. 245 (1934); *Waugh v. Mississippi*, 237 U. S. 589 (1915). It is referred to in the *Hamilton* case as a privilege given by the State.[31]

The distinction between the denial of the right to own and occupy property and the furnishing of equal facilities was drawn by this Court in *Buchanan v. Warley*, 245 U. S. 60 (1917). There a white citizen contracted to sell residential property in a white area to a Negro. A city ordinance prohibited the sale. The Negro attempted to avoid the sale claiming the validity of the ordinance. This Court held the ordinance void under the Fourteenth Amendment. The Negro insisted that the *Plessy* case was controlling. The Court, distinguishing between right to own property and the furnishing of equal facilities, said:

> "It will be observed that in that (*Plessy*) case, there was no attempt to deprive persons of color of transportation . . . and the express requirements were for equal though separate facilities. . . . In *Plessy v. Ferguson*, classification of accommodation was permitted upon the basis of equality for both races." 245 U. S. at 79.

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[31]The 14th Amendment provides: "No state shall make or enforce any law which shall abridge the *privileges* or immunities of *citizens of the United States* . . ." The Court held that attending a state college is not a privilege of a *citizen of the United States* but is a privilege extended by one of the States of the United States, thus again distinguishing the two types of citizenship.

The Interstate Commerce Cases

Morgan v. Virginia, 328 U. S. 373 (1946) held that a state statute requiring separation in interstate carriers was invalid as a burden on interstate commerce. The shifting of passengers upon crossing state lines at night or in the daytime was an undue burden. The case is rooted in the *DeCuir* case. In the *DeCuir* case, the statute required commingling of the races. The *Morgan* case required separation of the races. Both were struck down. This Court based its decision in the *Morgan* case squarely on the interstate commerce clause. The Fourteenth Amendment and the cases construing it were not mentioned.

Regarding the interstate commerce clause, Mr. Justice Burton dissented, saying in part:

> "It is a fundamental concept of our Constitution that where conditions are diverse the solution of problems arising out of them may well come through the application of diversified treatment matching the diversified needs as determined by our local governments. Uniformity of treatment is appropriate where a substantial uniformity of conditions exists."

Bob-Lo Excursion Co. v. Michigan, 333 U. S. 28 (1948), was also decided wholly under the interstate commerce clause. There a steamship operated to and from a sort of "Coney Island" just off shore but across the Canadian line. It refused passage to a Negro because of a company rule. It was held that the application of the Michigan Civil Rights Act to

the situation was not a burden on interstate commerce, it being a completely localized transaction. The case is further distinguishable because, as pointed out by Mr. Justice Douglas, the carrier did not offer the prosecuting witness transportation with equal facilities; it completely denied her passage.

On the other hand, where no interstate commerce is involved, state statutes requiring separation have been held not to violate the equal protection clause. *Plessy v. Ferguson*, supra; *Chesapeake & O. Ry.*, supra. Similarly where no state action is involved, similar regulation of private carriers have been upheld as reasonable. *Chiles v. Chesapeake & O. Ry.*, supra.

ARGUMENT

The foregoing cases argue themselves. They demonstrate that this Court has uniformly held that the states may furnish education to its white and Negro citizens at separate institutions so long as substantially equal facilities are offered both groups. As this Court said in the *Gong Lum* case:

> "The right and power of the State to regulate the method of providing for the education of its youth at public expense is clear. . . . The decision (to separate the races) is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment." 275 U. S. at 85 and 87.

In the *Gaines* case Mr. Justice Hughes, speaking for the Court, recognized the long-established rule. He wrote: "The state has sought to fulfill that ob-

ligation by furnishing equal facilities in separate schools, *a method the validity of which has been sustained by our decisions.*"

The *Sipuel* case cited the *Gaines* case with approval. And in refusing the mandamus in *Fisher v. Hurst* (to compel her admission to Oklahoma University), the Court by implication at least, recognized the validity of separate schools so long as they are equal. Otherwise, it would simply have ordered her admitted and would not have held that the subsequent judgments of the Oklahoma Courts in the *Fisher* case were consistent with its mandate.

It is therefore respectfully submitted that Article VII, Section 7 of the Texas Constitution and other related constitutional and statutory provisions providing that the State shall separately educate its Negro and white students are constitutional.

POINT II

The fact question of whether Petitioner was offered equal facilities is not properly before this Court because Petitioner did not present it to the Texas appellate courts for review. But assuming the issue to be properly before the Court, there is ample evidence to support the trial court's findings of fact and judgment.

ARGUMENT AND AUTHORITIES

It is elementary that whether two things are substantially equal to each other is a question of fact.

The trial court found as a fact, after hearing considerable evidence from all parties, that:

> ". . . this Court is of the opinion and finds from the evidence that . . . the Respondents herein . . . have established the School of Law of the Texas State University for Negroes in Austin, Texas, with substantially equal facilities and with the same entrance, classroom study, and graduation requirements, and the same courses and the same instructors as the School of Law of The University of Texas; that such new law school offered to Relator privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at The University of Texas. . . ." (R. 440.)

The Court further found that:

> "From his own testimony, Relator would not register in a separate law school no matter how equal it might be and not even if the separate school affords him identical advantages. . . ." (R. 440.)

No exception was taken to such finding. In view of Petitioner's statement that he would not attend the separate school even if it were absolutely equivalent, it would appear that he is not in a position to argue about the equality of the facilities. He stated himself that as to him it made no difference. (R. 188.)

The same position was taken on appeal. The findings of fact of a court sitting without a jury, under the laws of Texas, have the same force and are en-

titled to the same weight as the verdict of a jury.[32] These findings will not be disturbed by a Texas appellate court where there is evidence to support them, even though the evidence may be conflicting.[33]

The Texas Courts of Civil Appeals have the power to reverse and remand where the evidence so preponderates against the judgment that it should be set aside. Where there is no evidence to support the findings and judgment, the Courts of Civil Appeals and the Texas Supreme Court are empowered to reverse the case and render the proper judgment.[34]

Under Texas procedure it is necessary to invoke the jurisdiction of the appellate courts in this regard.[35] This Petitioner did not do so.[36] As stated by the Court of Civil Appeals:

> "Our jurisdiction in the latter regard was not invoked in this case." (R. 461.)

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[32]*Bird v. Pace,* 26 Tex. 487 (1863); *Jordan v. Brophy,* 41 Tex. 283 (1874); *Rich v. Ferguson,* 45 Tex. 396 (1876); *Baldridge v. Scott,* 48 Tex. 178 (1877).

[33]*Gray v. Luther,* 195 S. W. (2d) 434 (Tex. Civ. App. 1946, error refused); *Highsmith v. Tyler State B. & T. Co.,* 194 S. W. (2d) 142 (Tex. Civ. App. 1946, error refused).

[34]*Patrick v. Smith,* 90 Tex. 267, 38 S. W. 17 (1896); *Eastham v. Hunter,* 98 Tex. 560, 86 S. W. 323 (1905); *Sonora Realty Co. v. Fabens Townsite & Improvement Co.,* 13 S. W. (2d) 965 (Tex. Civ. App. 1929).

[35]*Wisdom v. Smith* (Tex. Sup.), 209 S. W. (2d) 164 (1948); *DeWitt v. Brooks,* 143 Tex. 122, 182 S. W. (2d) 687 (1944); Rule 476, note 2, supra.

[36]See Petitioner's points of error in the Court of Civil Appeals, Appendix, p. 105.

Similarly, an examination of Petitioner's assignments of error on Motion for Rehearing in the Court of Civil Appeals will show that again he presented no assignment of error with regard to the fact finding of substantial equality. (R. 461-464.)

The Texas Supreme Court is empowered to reverse and render a case where there is no evidence to support the findings of fact and judgment.[37] But this point must first be made in the Motion for Rehearing in the Court of Civil Appeals.[38] There is no assignment of error in Petitioner's Application for Writ of Error to the Texas Supreme Court on the want of evidence to support the fact findings.[39] So in this case, the question of evidence to support the finding of fact as to the equality of the schools was not before the Texas Supreme Court.[40] It had no jurisdiction to consider this point.

It follows that the refusal of the application for writ of error by the Supreme Court of Texas was based solely on the law point as to the power of the

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[37]*Schelb v. Sparenberg,* 133 Tex. 17, 124 S. W. (2d) 322 (1939); *Sovereign Camp W.O.W. v. Patton,* 117 Tex. 1, 295 S. W. 913 (1927).

[38]*Moore v. Dilworth,* 142 Tex. 538, 179 S. W. (2d) 538 (1944); *Railroad Comm. of Texas v. Mackhank Pet. Co.,* 144 Tex. 393, 190 S. W. (2d) 802 (1945); Rule 476, Note 2 supra, page 3 hereof.

[39]Petitioner's Assignments of Error in the Texas Supreme Court are set out in the Appendix, page 106.

[40]This fact was pointed out by Respondents in their reply in the Texas Supreme Court. Their second point read in part, "No assignment of error was made as to such findings in Petitioner's Motion for Rehearing in the Court of Civil Appeals. There is no assignment in this Court that there is no evidence to support such findings." Petitioner did not reply to such point.

State to provide separate facilities. Its jurisdiction on the question of whether there was evidence to support the fact finding of equality of facilities was not invoked. Its refusal of the application for writ of error, therefore, could not be construed as a holding on whether there was evidence to support that determinative finding of fact; the Court had no jurisdiction as to that point.

This Court has stated many times that it will not review matters not presented to the State Courts. The statement by Mr. Chief Justice Stone in *McGoldrick v. Compagnie Generale Transatlantique*, 309 U. S. 430 (1940), is particularly applicable here:

> "But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. . . . In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality

> of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court.
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> ". . . In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented. Similarly their erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds which suitors have failed to urge before them, or which, in the course of proceedings there, have been abandoned."

Those "reasons of peculiar force" are particularly applicable here since Petitioner attacks the constitutional validity of the Texas Constitution as well as its statutes. This Court has been unwaivering in the application of the doctrine that it will not consider points not presented to the highest state court.[41]

Since the fact question of substantial equality was decided by the trial court contrary to Petitioner's contentions, and he failed to present his point to the State appellate courts, he is not now in a position to ask this Court to review that matter. For that reason it is submitted that this is not a proper case for review by certiorari in this Court.

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[41] *Wilson v. Cook*, 327 U. S. 474 (1946); *Hunter Co., Inc. v. McHugh*, 320 U. S. 222 (1943); *Clark v. Williard*, 294 U. S. 211 (1935); *New York v. Klienert*, 268 U. S. 646 (1925); *Chicago, B. & Q. R. Co. v. Railroad Commission*, 237 U. S. 220 (1915); *Willoughby v. Chicago*, 235 U. S. 45 (1914); *Robinson & Co. v. Belt*, 187 U. S. 41 (1902); *Bolln v. Nebraska*, 176 U. S. 83 (1900).

But even assuming the issue of fact to be properly before this Court, an examination of the record will show that there is ample evidence to support the trial court's finding of fact.

As set out in the opinions of this Court, and as discussed by the Texas Court of Civil Appeals (R. 449), it is not required that the accommodations offered to persons of different races be identical. The test is whether they are substantially equal.[42]

Evidence Supporting Fact Finding of Equality[43]

Entrance, Examination, Graduation, and Similar Requirements

The requirements for admission and fees, and regulations relating to the classification of students, classwork, examinations, grades and credits, stand-

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[42]*McCabe v. A. T. & S. F. Ry.*, 235 U. S. 151: ". . . if facilities are provided, *substantial equality* of treatment of persons traveling under like conditions cannot be refused." *Hall v. DeCuir*, 95 U. S. 485: "*Substantial equality* of right is the law of the State and the United States; but equality does not mean identity. . . ." *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337: ". . . the state is bound to furnish him within its borders facilities for legal education *substantially equal* to those which the the state afforded for persons of the white race. . . ." 16 C.J.S. 1100; 10 Am. Jur. 905.

[43]The evidence here is that produced on the trial in May, 1947. On August 31, 1948, the School of Law was moved to Houston as a permanent part of The Texas State University for Negroes. Evidence regarding the facilities there offered are not in the record. The Reports of the Regents and the State Auditor (Appendix, pages 88, 89) briefly describe the subsequent growth of the School of Law.

ards of work required, and degrees awarded **were exactly** *the same* as those published in the latest catalogue of The University of Texas and used at such institution. (Ex. 7, R. 85, 371-372; 82, 114, 160.)

The Faculty

The instructors at the School of Law of the Texas State University for Negroes at the time of trial were the *same professors* who had taught or were teaching the same courses at The University of Texas Law School. (R. 82-84, 113-114, 369-371, 83.) They were the same instructors Petitioner would have had if he had been enrolled in The University of Texas. (R. 113-114.) The instructions from the Board of Regents were to use all of the faculty of the University Law School, so far as necessary, in order to maintain a full curriculum at the Negro Law School until other full-time professors could be employed for the Negro Law School. (R. 121.) The budget provided for four professors at $6,000 per year, the same pay base for professors at The University of Texas. (R. 70.) Each of the instructors devoted all of his time to teaching; each a full-time professor. (R. 59-60.) With the small enrollment at the Negro Law School, the instructors would have been more available to the students for consultation than they would have been to students at The University of Texas with its large classes of 150 to 175 students. (R. 121-122.) The Dean and Registrar of the two law schools were respectively the same persons. (R. 372, 85.)

Curriculum

The curriculum at the Negro Law School and at The University of Texas *was exactly the same.* (R. 81, 82.) The courses offered beginning students at the Negro Law School *were identical with those offered beginning students at the University:* Contracts, Torts, and Legal Bibliography. (R. 84.) These courses, with the same professors, are set out in Respondent's Exhibit 7. (R. 85, 371-372.)

Classroom

The classroom requirements were identical. (R. 82.) With much smaller classes, the Negro Law School would have provided the student with more opportunity to participate personally in classroom recitations and discussions. (R. 306.) In an average law class at The University of Texas Law School, a student would be called upon to recite only an average of 1½ times a semester. (R. 305.) In a smaller class the students would receive better experience and education; they would be called on more frequently, and would be more "on their toes." (R. 306.) The students would come to class better prepared because their chances of being called upon would be much greater; there would be a greater pressure to keep up their daily work. (R. 315.) Dean McCormick testified that "in the Negro Law School he (Sweatt) would have gotten a good deal more personal attention from the faculty than he would have had he been in the large entering class in The University of Texas." (R. 117.)

Library

At the time of trial, there were on hand in the Negro Law School books customarily used by the first-year class of the University, and other books which Miss Helen Hargrave, Librarian of the University Law School, thought would be useful. (R. 131.) There were about 200 of these books. (R. 21.) There were also available for transfer to the Negro Law School between 500 and 600 books from the University (R. 147), plus gifts of between 900 and 950 books. (R. 147.) In addition, the entire library of the Supreme Court of Texas was specifically made available to the Negro Law School by the Legislature. (R. 45.) The Supreme Court Library is located in the State Capitol Building on the second floor. (R. 6.) The Capitol grounds are some 20 feet from the Negro Law School, and the entrance is only about 300 feet from that School. (R. 37, 80.)

The Supreme Court Library contains approximately 42,000 volumes (R. 133), which number is far in excess of the 7,500-book minimum requirement of the American Bar Association. (R. 6.) Excluding duplicates, The University of Texas Law Library contains 30,000 to 35,000 books. Counting duplicates, it contains around 65,000. (R. 133.) These books serve 850 law students of The University of Texas. (R. 147.)

In some respects the Supreme Court Library is stronger than that of the University. Being a Governmental Depository, the Supreme Court Library automatically receives many reports, such as those

of administrative bodies. It is the strongest library in the South on State Session Laws. It contains Attorney General's Opinions, Tax Board Opinions, Workmen's Compensation Reports, and other items not carried by the University. (R. 132, 133.) The Supreme Court Library is more spacious for a student body of ten students than are the facilities at The University of Texas Law School Library, which are exceedingly crowded. (R. 79.) There is no more confusion, and in most instances, less confusion in the Supreme Court Library than at the Law Library of the University because of the large number of persons using the latter. (R. 146.)

On the other hand, the Supreme Court Library does not have as many textbooks, legal periodicals, or English reports as the University Law Library. (R. 131-132.) The Court's Library contains the Harvard, Columbia, Yale, and Texas Law Reviews, and the American Bar Association Journal. (R. 132.) It has the English Reports up to 1932.[44] The Law Library of The University of Texas and that of the Supreme Court are substantially equal except for the texts, legal periodicals, and English Reports. (R. 132-134.)

However, all of such texts, periodicals, and English Reports were readily available to the Negro Law School on a loan basis from the Law Library of The University of Texas. (R. 63-64.)

In addition, a complete law library was being procured. Of such number 1,281 books were immediately available (R. 158), and 8,727 had already been

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[44]The evidence showed that first-year law students rarely used the English Reports (R. 147-149).

requisitioned. (R. 155.) Orders had been placed for 5,702 of the books (R. 156), all deliverable within ten to sixty days. (R. 156.) Wherever new books were available, they were ordered; second-hand books were only ordered where new ones were not available. (R. 156.) The library requisitioned included 20 Law Reviews, Indices of Legal Periodicals, Citators, Digests, Restatements, textbooks, statutes, the complete West Publishing Company Reporter System, etc. (Respondent's Original Exhibit 8, R. 130.) The undisputed evidence is that the books ordered are sufficient to meet the requirements of the American Association of Law Schools. (R. 115.)[45]

The Physical Facilities

Whereas The University of Texas Law School has three classrooms for 850 students,[46] the Negro Law School had two classrooms, a reading room, toilet facilities, and an entrance hall (R. 77; Respondent's Original Exhibit 4; R. 67), for a much smaller student body. The two law schools possessed approximately the same facilities for light and ventilation (R. 77, 88), though most law schools, including The University of Texas, need artificial light in the daytime. (R. 89.) The Negro Law School, assuming

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[45]There are now 16,371 books on hand. State Auditor's Report, Appendix, page 101.

[46]The Law School building at The University of Texas was built in 1902 for 400 students (R. 21); it now has 850 students (R. 79). The Texas Bar Association has been trying for years to get the building torn down and an adequate one built (R. 21).

at that time a class of ten students, had a greater floor space per student.[47]

The location of the Negro Law School at the time of the suit was particularly good. It was directly north of the State Capitol, separated only by a 20-foot street. (R. 37.) It was within 100 yards of the Supreme Court of Texas, the Court of Civil Appeals, the Attorney General's Office, and the Legislature. (R. 65.) It was between the business district of Austin and The University of Texas, eight blocks south of the University, and eight blocks nearer the business district. (R. 37.)

The building housing the Negro Law School was a three-story building of brick construction. (R. 164-170.) The first floor (not a basement) was occupied by the School at the time of trial (R. 41), but the upper two stories of the building were available as needed. (R. 47.) Before March 10, 1947, the premises were cleaned and painted. (R. 39.) The building had ample space to house the 10,000 volume library and leave sufficient space for classrooms and reading rooms. (R. 166.)[48]

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[47]The Negro school, first floor, had 1060 square feet, or 106 square feet per student. The University Law School has 46,518 square feet for 886 students, or 53 square feet per student. And this did not take into account the upper two stories of the Negro School which were available when needed (R. 47). The floor plan shows a classroom 12′ x 12′8″; a classroom 16′6″ x 11′6″, a reading room and office 19′10″ x 15′7″, and entrance hall and toilet facilities. Respondent's Original Exhibit 4.

[48]There are certain minor features of a law school greatly emphasized by Petitioner. As they would have been applicable to Sweatt himself, the evidence showed:

1. *The Law Review.* The Texas Law Review is not an official function of the State of Texas or the University.

With reference to the membership requirements of the Association of American Law Schools,[49] it was shown that the Negro Law School, at the time of this trial, met the great majority of the nine requirements:

(1) It was a school not operated as a commercial enterprise, and the compensation of none of the officers or members of its teaching staff was dependent on the number of students or the fees received. (R. 14.)

(2) It satisfied the entrance requirements; i. e., pre-legal training, etc. (R. 114.)

It is a separate legal entity, a private corporation (R. 306). It was founded by the lawyers of Texas and financed by their contributions (R. 106, 112). Considerably more than half of the articles (as distinguished from case notes) are written by persons who are not University students (R. 306, 307). There is no rule which would prevent the consideration or publication of an article written by a Negro (R. 307). Not all accredited schools have law reviews; for example, the Baylor Law School (R. 307). (At the time of trial). Neither Sweatt nor any other first-year law student would be eligible to write for the law review (R. 105, 315-316).

2. *Scholarships:* All the scholarships offered at The University of Texas Law School are contributed from private sources; they do not come from the State (R. 103, 112).

3. *The Order of the Coif* is a private and not a public organization (R. 104, 112). First-year students are not entitled to admission. Students are eligible only on graduation (R. 112).

4. *The Legal Aid Clinic:* First-year students are not eligible to assist therein. Practically all the work is done by third-year students (R. 105, 112).

5. *Moot Court:* No first-year students are entitled or required to participate (R. 112, 102). Any one of the classrooms at the Negro Law School could be used for that purpose (R. 102).

[49]These requirements are set out in Relator's Exhibit 1 (R. 375-384; R. 5).

(3) The school was a "full-time law school." The school work was arranged so that substantially the full working time of the student was required at the school. (R. 114-115.)

(4) The conferring of its degrees was conditioned upon the attainment of a grade of scholarship attained by examinations. (R. 115.)

(5) No special students were admitted. In this, the School's requirement was stronger that that of the Association which permits such students under certain considerations. (R. 115.)

(6) The 10,000 volume library ordered for the School was sufficient to meet the library requirements. (R. 115.) The selection of the books was such as to conform with the Association's requirements. In addition, the Supreme Court Library of 40,000 volumes was available, plus loan privileges from the Law Library of The University of Texas. (R. 115; 63, 64.)

(7) The seventh requirement is that the "faculty shall consist of at least four full-time instructors who devote substantially all of their time to the work of the school." The professors in this case were full-time professors in the sense that all of their time was devoted to teaching. However, all of their teaching was not done at the Negro school; they were also teaching at Texas University. (R. 116, 117.)

(8) Provision was made for keeping a complete and readily accessible individual record of each student. (R. 115.)

(9) The requirement reads: "It shall be a school which possesses reasonably adequate facilities and which is conducted in accordance with those stand-

ards and practices generally recognized by member schools as essential to the maintenance of a sound educational policy." Dean Charles T. McCormick, President of the American Association of Law Schools in 1942 (R. 76), testified that in his opinion the Negro Law School met this requirement. (R. 116.)

The testimony was that a two-year period is generally required before any law school may be admitted to membership in the Association of American Law Schools. Dean McCormick testified that he knew of no reason why the Negro Law School could not comply with all of those standards within that two-year period—before any entering student (including Petitioner) could graduate from the school. (R. 118.)

Regarding the Law School at the time of trial, Mr. D. A. Simmons, President of the American Judicature Society 1940-1942, and President of the American Bar Association 1944-1945, testified:

> "In my opinion, the facilities, the course of study, with the same professors, would afford an opportunity for a legal education equal or substantially equal to that given the students at The University of Texas Law School." (R. 8.)

Dean Charles T. McCormick, President of the Association of American Law Schools, 1942 (R. 76), testified that facilities at the Law School for Negro citizens furnished to Negro citizens an equal opportunity for study in law and procedure (R. 85); that considering the respective use by the respective number of students, the physical facilities offered

by the Negro Law School were substantially equal to those offered at The University of Texas Law School. (R. 78, 79.) He stated that:

> "I would say . . . the Negro student has at least equal and probably superior facilities for the study of law." (R. 108.)

Mr. D. K. Woodward, Jr., Chairman of the Board of Regents of The University of Texas, testified:

> "What we set up there was a plant fully adequate to give the very best of legal instruction for the only man of the Negro race who had ever applied for instruction in law at the University in about 63 years of the life of the School." (R. 48.)
>
> "I am talking as a man familiar with what it takes to provide a thorough training in law in the State of Texas, and I stated the facts within my own personal knowledge, that the facilities which the Board of Regents of the University set up in accordance with Senate Bill 140 are such as to provide the Relator in this case the opportunity for the study of law unsurpassed any time elsewhere in the State of Texas, and fully equal to the opportunity and instruction we are offering at the University any day." (R. 42, 43.)

As an addendum to the above facts, the Negro Law School at its present location in Houston had on its shelves, as of January 31, 1949, 16,371 bound volumes and many pamphlets, journals, et cetera, for its 23 students. In addition to 772 volumes awaiting transfer from warehouses, 1,046 additional volumes

have been ordered.[50] These facts attest not only to the size of the library, but also to the good faith of those who testified for Relators that 10,008 volumes had been ordered at that time.

As listed in footnote 10 on page 7, the Negro Law School has a very creditable faculty. It is located with and is a part of The Texas State University for Negroes in Houston. As discussed on page 9 hereof, that University is already one of which Texas and the Nation can be justly proud. With its 2,032 students, 115 professors, 17 of whom hold Doctors degrees, and its fine physical facilities, it has been accredited as "Class A" by Southern Association of Colleges and Secondary Schools.[51]

POINT III

Prior to the trial, the power of the States to classify, and the reasonableness of the classification as applied in this case, had been settled as a matter of law by this Court. Based thereon, evidence on the point was properly limited by the trial court.

Argument and Authorities

Because this Court, in the long line of decisions mentioned under Point I, had determined that the type of classification herein was reasonable and within the constitutional authority of the states, the trial court limited the evidence almost wholly to the question of the equality of the two schools. Much of

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[50]State Auditor's Report, page 101 of Appendix.
[51]Report to Governor by the Regents, Appendix, page 95.

the evidence here cited by Petitioner was actually stricken by the Court; other portions were not offered in evidence.[52] Most of the material in Petitioner's Appendix was not presented to the trial court and is not properly before this Court.[53] We object to this large departure from the record.

Because Petitioner has devoted so much of his brief in an attempt to show that the matter has not been decided, and that this Court has not heretofore seriously considered the question of the reasonableness of the classification, it is deemed appropriate to make some further reply to his contentions.

The following excerpts from this Court's decisions will demonstrate that it has seriously considered the question and has ruled thereon, not once but many times.

Plessy v. Ferguson, 163 U. S. 537 at 550:

> "So far, then, as a conflict with the Fourteenth Amendment is concerned, *the case reduces itself to a question whether the statute of Louisiana is a reasonable regulation,* and with respect to this there must necessarily be a large

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[52]Testimony of Dr. Thompson and Donald Murray (cited pp. 11 and 12 of Petition) was stricken in the judgment (R. 441. All testimony concerning facilities furnished by other States or colleges was also stricken in the judgment (R. 440-441). Much of Relator's witness Pittenger's testimony, qualifiedly offered, was also ruled inadmissible. (R. 328, 329, 340.) The source material cited in footnotes pp. 18, 19, 22 of Petition was not offered.

[53]Of the approximately 18 texts, reports, surveys, et cetera, cited, only two (*16th Census* and *Statistics of Higher Education,* 1943-44) were introduced in the record.

> discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia. . . ."

In *Chiles v. Cheaspeake & Ohio Ry.*, 217 U. S. 71 at 77, this Court said that the *Plessy* case not only sustained the law,

> ". . . but justified as reasonable the distinction between the races on account of which the statute was passed and enforced."

This Court then concluded anew that:

> "Regulations which are induced by the general sentiments of the community for whom they are made and upon whom they operate, cannot be said to be unreasonable.
>
> "The extent of the differences based upon the distinction between the white and colored races which may be observed in legislation or in the regulation of carriers has been so much discussed that we are relieved from further enlarging upon it."

Similarly in *Gong Lum v. Rice*, the matter was

squarely before this Court. Mr. Chief Justice Taft stated:

> "The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that afforded to all. . . ."

This Court held:

> "Were this a new question it would call for full argument and consideration, but we think it is the same question which has been many times decided to be within the constitutional power of the state legislature. . . ." 275 U. S. 85.
>
> ". . . The decision is within the discretion of the State in regulating its public schools and does not conflict with the Fourteenth Amendment."

The reasonableness of the rule was recognized by Chief Justice Hughes when he wrote in the *Gaines* case in 1938:

> "The State has sought to fulfill the obligation by furnishing equal facilities in separate schools, a method *the validity of which has been sustained by our decisions.*" 305 U. S. at 344.

The *Gaines* case is cited with approval in the *Supiel case.* 332 U. S. 631, 633.

It is submitted that this Court, in the above and other holdings, has determined and redetermined that the classification involved is a reasonable one.

The question has been long settled and is not in doubt.

The Texas trial court and appellate courts so found the law to be. The trial was conducted in accordance with these holdings. Upon evidence being adduced that a separate law school had been established, the Court considered that the only question before it was the fact question: Were the facilities offered Petitioner at the time of trial substantially equal? It therefore excluded evidence of what facilities had been and were being offered to white and Negro citizens at other places and at other times.

Since the trial court excluded the evidence as irrelevant and immaterial (and it is submitted that it was correct in doing so), and because the matter was considered as settled by this Court, the State did not put on a full case to rebut the proferred testimony.

While the State does not here attempt to refute all the extraneous arguments and statistics set forth by Petitioner, there are hereinafter set out some readily apparent grounds for the present reasonableness of the classification. These excerpts are at least suffiicient to show substantial evidence in support of the present reasonableness of the classification. In setting out these matters, Respondents do not withdraw from their position that the law is settled that the State may furnish education to its white and Negro citizens in separate establishments so long as substantially equal facilities are afforded to both groups. That being the law, all of the extraneous matter in this Court on what happened in other

states and at different times is irrelevant and immaterial. It was properly excluded by the trial court and should not be considered here.

1. *Recommendations of the President's Commission on Higher Education*

It is significant that the President did not recommend those sections of the Civil Rights Committee's report regarding the elimination of separate schools in the South.[54] In the report of that Committee with regard to education, it states that, "There is a substantial division within the Committee on this recommendation."[55]

The matter has recently been before the United States Senate, and it refused to withhold educational aid to states providing education at separate establishments.[56]

There was a substantial minority report[57] by the President's Commission on Higher Education. It states, among other things:

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[54]94 Cong. Rec. 960 (Feb. 2, 1948).

[55]"To Secure These Rights," The Report of the President's Committee on Civil Rights, U. S. Gov. Printing Office, 1947, p. 168.

[56]Senator Henry Cabot Lodge's amendments to deny federal funds for education to states where the races are educated separately was defeated 65 to 16 on May 3, 1949. 95 Cong. Rec. 5593 (May 3, 1949). The Congress itself provides for separate facilities in the schools of Washington, D. C. Title 31, Dist. of Col. Code, Sections 1110-1113.

[57]By Arthur H. Compton, Chancellor Washington University, St. Louis; Douglas S. Freeman, Editor, Richmond Times-Dispatch; Lewis Jones, President, University of Arkansas; and Goodrich C. White, President Emory University. Volume II, "Higher Education for American Democracy," U. S. Gov. Printing Office, 1947, p. 29.

"The undersigned wish to record their dissent from the Commission's pronouncements on segregation *especially as related to education in the South.* . . . We believe that efforts toward these ends must, in the South, be made within the established patterns of social relationships, which require separate educational institutions for whites and Negroes. We believe that pronouncements such as those of the Commission on the question of segregation jeopardize these efforts, impede progress, and threaten tragedy to the people of the South, both white and Negro. . . . But a doctrinaire position which ignores the facts of history and the realities of the present is not one that will contribute constructively to the solution of difficult problems of human relationships."

2. *The Texas Bi-Racial Committee's Recommendations*

In 1944, a study was made at the direction of the Bi-Racial Conference on Education for Negroes in Texas.[58] The personnel on the Committee representing both races, as listed in the report, was of very high calibre. It considered five alternatives for improving Negro education at the graduate and professional level: (1) Admit Negroes to the white universities; (2) Provide subsidies for out-of-state study; (3) Regional education; (4) *Establish a new state university for Negroes;* (5) Add graduate and professional schools to existing colleges. The Committee's recommendation for the establishment of

[58]Respondent's Original Exhibit 16; R. 322, 323.

a new State university has been followed. (Ex. 16, R. 83.)

With regard to the first alternative, the admission of Negroes to existing State universities for white students, the report stated at page 83:

> "Admission of Negroes to existing state universities for whites is not acceptable as a solution of the problem of providing opportunity for graduate and professional study for Negroes, on two counts: (1) public opinion would not permit such institutions to be open to Negroes at the present time; and (2) even if Negroes were admitted they would not be happy in the conditions in which they would find themselves."

3. *The Texas Poll*

About the time the Legislature convened in 1947 to consider, among other things, the establishment of the Texas State University for Negroes, and before the trial of this case in May 1947, the Texas Poll, an independent statewide survey of public opinion which was and is carried in most of the Texas leading newspapers, published the results of a poll of Texas opinion on this very subject. It is set out in the Appendix on page 86. It states:

> "Most Negroes agree with the overwhelming sentiment of the white population in Texas that the Legislature should provide colored students with a first-class university of their own instead of allowing them to enter the University of Texas.

"Negroes vote 8 to 5 in favor of a separate university, as compared with a ratio of more than 25 to 1 among eligible white voters.

"The Texas Poll put the question to a representative cross section of adults in this form:

> " 'Under a Supreme Court ruling, Texas is faced with the problem of either setting up a first-class university for Negroes or allowing them to enter the University of Texas. What do you think ought to be done?'

"Here are the results, broken down to show the opinions of the 86 per cent of the people who are white and the 14 per cent who are Negroes:

	White	*Negro*
Set up separate university	79%	8%
Allow them in U.T.	3	5
Ignore court ruling	1	—
Don't Know	3	1
	86%	14%

"Allegiance to Southern traditions and fear of racial troubles are the main reasons why whites favor a separate university for Negroes. Negroes who prefer a university of their own say: (1) Negroes aren't interested in going to school with whites; (2) Negroes should be by themselves, anyway; (3) Negroes want good training and where they get it doesn't matter.

"In this survey, as in all scientific samplings by The Texas Poll, every person gave his opinion in strict confidence. To encourage Negro respondents to voice their opinions freely, the Poll uses trained colored interviewers to contact a cross section of their race."

4. *The Gallup Poll*

The Gallup Poll of July 25, 1948, with reference to the President's Civil Rights program indicated that 84 per cent of the people of the South thought that separate facilities should be furnished in interstate transportation. Forty-two per cent of the nation as a whole favored separation of the races and nine per cent had no opinion. That is a sizeable segment of the people.

5. *The U. S. Department of Education's National Survey of Higher Education of Negroes*

This series of United States government publications[59] was prepared by Dr. Ambrose Caliver. (R. 268), a Negro who was Senior Specialist on Negro Education in the U. S. Office of Education from 1930 to 1945, a specialist in higher education of Negroes since 1945, and a member of the N.A.A.C.P.[60] A few brief excerpts will be here set out:

> "Equality of educational opportunity for white persons and for Negroes at the level of higher education can be achieved, in theory, by either of two methods: (1) By admitting both white persons and Negroes to the same institutions, or (2) by establishing parallel and equal facilities for members of the two races. In several of the States which maintain a dual educational system, however, neither of these methods

[59]Respondents' Original Exhibit 15, particularly pp. 77-91, Misc. No. 6, Vol. II.

[60]Who's Who in America 1948-49, page 375.

is actually feasible. In some of the States the *mores* of racial relationships are such as to rule out, for the present at least, any possibility of admitting white persons and Negroes to the same institutions. . . ." Vol. II Misc. No. 6, p. 17.

"The erroneous assumption that northern universities are carrying an unduly large responsibility for the higher education of Negroes may be accounted for, in part at least, by two common misconceptions. In the first place, the size of the northern Negro population is generally underestimated and, in the second place, it is not always known that large numbers of northern Negroes go South to attend Negro colleges." Id., p. 82.

"Whereas very few southern Negroes were attending these eight northern universities in 1939-40, in the year preceding nearly 4,000 northern Negroes attended (separate) Negro colleges. Almost 3,000 of this number attended colleges in Southern States. The majority of these Negro students were residents of eight Northern States which rank high in economic resources. Thus instead of the Northern States carrying an undue burden in the higher education of Negroes, it appears that the Southern States, which have the least wealth, are providing educational facilities for Negro residents from economically more favored regions." Id., p. 90.

"It is not possible, of course, to know how much of this southward migration is due to conditions within the northern institutions which make the Negro student feel that he does not secure a well-rounded college life in a mixed university, and how much is due to the positive

advantages he feels are offered him in the Negro college. Id., p. 89.

"Some of the graduate students replying to the questionnaires were northern residents who had gone South to take their undergraduate work in Negro colleges. . . . *Some students said frankly that the Negro college offered a more normal social life.*" Id., p. 89.

". . . the lack of opportunity for full participation in campus activities in the North adds attraction to the opportunities for leadership in such activities on a southern Negro college campus." Id., p. 90.

"A common reason given for the choice of the Negro college was the desire for a more normal social life. The Negroes in northern institutions seldom live on the campus and seldom participate in the social activities of the University. Outside of college the Negro's social life is largely limited to association with his own people. Although southern Negro colleges operate in an area in which the total life of Negroes is restricted, the college campus itself is a small world in which the Negro student is relatively secure and in which he can achieve status among his own people." Id., p. 90.

To the same effect is an article in the *Atlantic Monthly* (April 1942), "The Negro and His Schooling," by Virginius Dabney:[61]

"Would a handful of Negro students registered at a Southern university for whites be apt

[61]Editor, Richmond Times-Dispatch; Author, "Liberalism in the South," B.A. and M.A., University of Virginia; Litt.D., University of Richmond; LL.D., William and Mary. (Who's Who in America 1948-49, page 575.)

> to find themselves in congenial surroundings? It seems highly doubtful. They probably would suffer no violence, but they would almost certainly be happier at an all-Negro institution providing work of equal excellence. Evidence of this is seen in the fact that 42 per cent of the student body at Fisk University, Nashville, comes from the North, and evidently prefers the homogeneity of the Fisk all-Negro student body to the mixed student bodies available to them in their home states. Moreover, about one fourth of these Northern Negroes remain in the South after graduation. . . ."

The matter was recently considered in *Simmons v. Atlantic Greyhound Corp.*, 75 F. Supp. 166 (W.D. Va. 1947) where the Federal Court had before it the regulation of an interstate bus company which provided for the separation of white and Negro passengers. The question was the reasonableness of the rule. After referring to this Court's opinions in the *Plessy* and *Chiles* cases, the Court wrote:

> ". . . But I am unable to say that as of today the prevailing practice in the Southern states of the separation of white and colored passengers on common carriers is arbitrary and without reasonable basis. . . . Among the witnesses in this case were the President of the defendant company and the Presidents of two other bus companies operating in Virginia, North Carolina and other Southern states. There was testimony also from public officials of the states of Virginia and North Carolina whose duties related to the supervision of motor carriers operating in those states. All of these witnesses agreed in the opinion that the separation of white and colored

persons traveling by bus within the territory named was desirable and in the interest of both races. There is no ground for charging these witnesses personally with the harboring of racial prejudices and they testified with evident sincerity in expressing the view, born of their observation and experience, that the seating of white and colored passengers indiscriminately would increase the occasions for arguments, altercations and disturbances among passengers leading to annoyance, discomfort and possible danger to passengers of both races. The opinion of these men whose activities are concerned with the operation of these carriers cannot be ignored in determining whether the rules adopted for the seating of passengers are reasonable ones. No matter how much we may deplore it, the fact remains that racial prejudices and antagonisms do exist and that they are the source of many unhappy episodes of violence between members of the white and colored races. If it is the purpose of the defendant here to lessen the occasions for such conflicts by adoption of a rule for the separate seating of whites and colored passengers, this court cannot say that such a rule is purely arbitrary and without reasonable basis.

". . . The fact that such separation has long been enforced in a number of states by custom and by the rules of common carriers operating in such states is a matter of public knowledge of which the members of Congress are fully aware. In fact, although efforts have been made over some years to induce Congress to enact legislation on this subject, it has consistently refused to attempt such regulation. There can be no other inference than that Congress has thought it wise and proper that the matter should be left for determination to such reasonable rules as the carriers might themselves adopt

> and that it considered that rules providing for the segregation of passengers in those sections where they were applied were reasonable ones. By its refusal to nullify the practices and regulations of these carriers in respect to the separation of passengers, Congress has by the strongest implication given its approval to them. This is a field of Congressional duty and responsibility. This court cannot invade it and, by usurping the powers of Congress, lay down rules by which this defendant must guide the operation of its business—rules which Congress, in the exercise of power specifically and solely entrusted to it, has refused to lay down."

Day v. Atlantic Greyhound, 171 F. (2d) 59 (C. C.A. 4th 1948), is a similar case on the facts. The equal protection clause was again invoked against the reasonableness of the carrier's regulation. This opinion concludes:

> "The adoption of a reasonable regulation by an interstate carrier for the segregation of passengers does not violate the law as laid down by the Supreme Court; and *in this case both the reasonableness of the regulation and the manner in which it was enforced were fairly submitted to the jury* and determined against the plaintiff."

To summarize, the Texas Poll taken before the trial of this case found that "most of the Negroes agreed with the overwhelming sentiment of the white population in Texas that the Legislature should provide Negro students with a first-class university of their own instead of allowing them to

enter The University of Texas." The Gallup Poll of July 25, 1948, showed that 84% of the people in the South thought separate accommodations should be furnished on interstate carriers, with 42% of the Nation as a whole feeling the same way with 9% undecided. The President has not recommended to the Congress the elimination of segregation in public schools as recommended by his Committee on Civil Rights. In that Committee itself there was a substantial division. There was also a substantial minority report from the President's Commission on Higher Education which dissented from the Committee's findings "especially as related to education in the South." The Texas Bi-Racial Commission found that admission of Negroes to State universities for whites "is not acceptable as a solution of the problem." Many reasons for separate schools appear in the U. S. Government's Office of Education publications on "The National Survey of the Higher Education of Negroes." That government survey, prepared under the direction of an outstanding Negro educator, concludes that, "In some states the *mores* of racial relationships are such as to rule out, for the present at least, any possibility of admitting white persons and Negroes to the same institution."

The above summary, of course, does not wholly develop the situation. But it is submitted as being sufficient to show that the classification is not without substance and reason.

Conclusion

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in

this Court, and that the Petition for a Writ of Certiorari should be denied.

PRICE DANIEL
Attorney General of Texas

E. JACOBSON
Assistant Attorney General

JOE R. GREENHILL
First Assistant Attorney General

Attorneys for Respondents

Dated May 16, 1949.

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 667

HEMAN MARION SWEATT, *Petitioner*

v.

THEOPHILUS SHICKEL PAINTER, ET AL., *Respondents*

APPENDIX

To Brief of Respondents in Opposition to Petition for Writ of Certiorari

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PRICE DANIEL
Attorney General of Texas
E. JACOBSON
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JOE R. GREENHILL
First Assistant Attorney General
Attorneys for Respondents

Other Federal and State Court Decisions That the State May Furnish Education to White and Negro Students at Separate Institutions

Wrighten v. University of South Carolina, 72 F. Supp. 948 (E.D. S.C. 1947). The Circuit Court (unreported) returned the case to the District Court for a fact finding of equality of the separate law school established after the first trial. In July, 1948, the trial court found that the Negro law school was substantially equal and denied Wrighten's injunction. (Opinion unreported.)

Bluford v. Canada, 32 F. Supp. 707 (W.D. Mo. 1940; appeal dism. 119 F. (2d) 779) denied damages for refusal to admit Bluford to U. of Missouri School of Journalism.

State (Bluford) v. Canada, 348 Mo. 298, 153 S. W. (2d) 12 (1941) denied mandamus to admit Bluford to Missouri Journalism School.

State (Michael) v. Witham, 179 Tenn. 250, 165 S. W. (2d) 378 (1942), following the Gaines case, denied a mandamus to compel the admission of a Negro to Tennessee University.

Jennings v. Board of Trustees, Hearne Ind. School Dist. (W.D. Tex. 1948, unreported). A suit to compel entrance of Negro students to white high school. A declaratory judgment was entered considering the Texas Constitutional provisions for separate schools and the equal protection clause of the 14th Amendment. It concludes, "Under the above provisions, the defendants are required to furnish separate, but impartial and substantially equal facilities to both Negro and white students."

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

State	Case	Issue	Decision
Federal:			
	Wong Him v. Callahan 119 Fed. 381	Constitutionality of separate schools for Chinese children.	The separate school being equal, the separation does not violate the 14th Amendment.
	U. S. v. Buntin 10 Fed. 730	Indictment for deprivation of right to attend non-segregated school.	Ohio statute providing for separate schools, if schools are substantially equal, does not violate 14th Amend.
	Bertonneau v. Board of Directors 3 Fed. Cases 294	Constitutionality of separate schools for Negroes.	The separate school being equal the separation does not violate the 14th Amendment.
Alabama:			
	State v. Bd. of School Commissioners, 145 So. 575 (1933)	To obtain admission to white school.	Separation of children in schools is mandatory under statute.
Alaska:			
	Sing v. Sitka School Bd., 7 Alaska 616 (1927)	Constitutionality of separate schools for Negroes and Indians.	The separate school being equal the separation does not violate the 14th Amendment.

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

State	Case	Issue	Decision
Arkansas:			
	State v. Board of Directors, 242 S. W. 545, Cert. Den. 264 U. S. 567 (1922)	To obtain admission to white school; plaintiff claimed no Negro blood.	Separation is proper and ruling of school board supported by evidence will not be disturbed.
	Maddox v. Neal, 45 Ark. 121 (1885)	Constitutionality of separate schools for Negroes.	The separate school being equal the separation does not violate the 14th Amendment.
Arizona:			
	Burnside v. Douglass School, 261 Pac. 629 (1928)	Constitutionality of separate school for Negroes.	The separate school being equal, the separation does not violate the 14th Amendment.
	Dameron v. Bayless, 126 Pac. 273 (1912)	Same as above.	Same as above.
	Harrison v. Riddle, 36 P. 2d 984 (1934)	Mandamus to compel separation by school board.	Where substantially equal school is provided school board must separate pupils.
California:			
	Ward v. Flood, 48 Cal. 36 (1874)	Constitutionality of separate schools for Negroes.	The separate school being equal, the separation does not violate the 14th Amendment.

Dist. of Columbia:		
Wall v. Oyster, 36 App. D.C. 50 (1910)	To contest being sent to separate school when there was no notice of statute providing for separate schools.	Statute is not invalid for lack of notice. Board may assign to separate school.
Florida:		
State v. Bryan, 39 So. 929 (1905)	To test the constitutionality of the white university, when there was no similar Negro institution.	As long as Negroes have a State Normal, it is not unconstitutional to place the white normal in a university.
Georgia:		
Blogett v. Bd. of Ed., 30 S. E. 561 (1898)	To restrain appropriation for white high school when there was no appropriation for Negro high school.	Wrong action. No benefit to Negroes by attacking white high school. Action should be to compel a high school for Negroes.
Cummings v. Bd. of Ed., 29 S. E. 488, Aff'd 175 U. S. 528 (1898)	Same as above.	Same as above.

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

State	Case	Issue	Decision
Indiana:			
	Cory v. Carter, 48 Ind. 327 (1874)	To contest separate schools.	A classification which does not exclude either class from equal accommodations is no infringement of rights.
	Greathouse v. School Board, 151 N. E. 411 (1926)	To prevent construction of separate high school as unlawful expenditure.	The separate school being equal, the separation does not violate the 14th Amendment.
	State v. Gray, 93 Ind. 303 (1884)	To obtain admission to white high school.	The constitutionality of the law for the establishment of separate schools for white and Negro children is settled.
	State v. Grubbs, 85 Ind. 213 (1882)	To compel town to organize school for negroes.	To require Negro to attend near-by separate school was proper.
	State v. Wirt, 177 N. E. 441 (1931)	To contest an alleged discrimination in separate schools.	Organization of separate schools must not result in denying equal privileges; but here no denial is shown.
Kansas:			
	Reynolds v. Board of Education, 72 Pac. 274 (1903)	To test constitutionality of separate schools.	Separate schools do not violate the 14th Amendment.
	Richardson v. Board of Education, 72 Kan. 629 (1906)	Same as above	Same as above.

Kansas—Cont'd.		
Wright v. Board of Education of Topeka, 284 Pac. 363 (1930)	To prevent transfer to Negro school because plaintiff had to pass white school to reach Negro school.	Separate schools, substantially equal are constitutional; inequality shown by plaintiff.
Kentucky:		
Board of Education v. Bunger, 41 S. W. 2d 931 (1931)	To contest the establishment of separate schools.	Board of Education has the power to establish separate schools.
Davies Co. Bd. v. Johnson, 200 S. W. 313 (1918)	To obtain identical facilities.	Facilities need not be identical if they are equal.
Grady v. Bd. of Education, 147 S. W. 928 (1912)	To contest the establishment of separate schools.	Board of Education has the power to establish separate schools.
Mullins v. Belcher, 134 S. W. 1151 (1911)	To test constitutionality of separate schools.	The separate school being equal, the separation does not violate the 14th Amendment.
Prowse v. Board of Education, 120 S. W. 307 (1909)	To contest the establishment of separate schools.	Board of Education has the power to establish separate schools.

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

State	Case	Issue	Decision
Maryland:			
	Williams v. Zimmerman, 192 Atl. 353 (1937)	To obtain admission to white school.	Negro student cannot be admitted to white school; substantially equal Negro school being provided.
Massachusetts:			
	Roberts v. City of Boston, 5 Cush. (Mass.) 198 (1849)	To obtain admission to a white school.	School Board has the power to separate Negro and white students. Admission denied.
Mississippi:			
	Barrett v. Cedar Hill S. D., 85 So. 125 (1920)	To contest bond issue for consolidated school because discriminatory.	Since there are ample substantially equal schools for Negroes they cannot contest establishment of school for whites.
	Bond v. Tij Fung, 114 So. 332 (1927)	To obtain admission of Chinese boy in white school.	The separate school being equal, the separation does not violate the 14th Amendment.

Mississippi—Cont'd.		
Bryant v. Barnes, 106 So. 113 (1925)	To contest an alleged discrimination in establishing school districts.	Court will prohibit discrimination between races in the operation of the schools, but no discrimination is shown by separation.
Chrisman v. Town of Brookhaven, 70 Miss. 477 (1893)	To test the constitutionality of separate schools.	The separate school being equal, the separation does not violate the 14th Amendment.
Missouri:		
Lehew v. Brummell, 15 S. W. 765 (1891)	To set up discrimination between white and Negro schools.	Schools being substantially equal there was no discrimination.
State v. Cartwright, 99 S. W. 48 (1907)	To test constitutionality of separate schools.	Separate schools do not violate 14th Amendment.
New York:		
People v. Gallagher, 93 N. Y. 438 (1883)	To contest separate schools.	When statute provides for separate, equal schools, excluding Negroes from white schools is constitutional.

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

State	Case	Issue	Decision
New York—Cont'd.	People v. Gaston, 13 Abb. (N. Y.) Pr. N. S. 160 (1872)	Same as above.	Same as above.
North Carolina:	Bonitz v. Trustees, 70 S. E. 735 (1911)	To test constitutionality of tax for white schools only.	Separate schools are constitutional when substantially equal hence tax must be construed as applying to both white and negro schools.
	Johnson v. Bd. of Education, 82 S. E. 832 (1914)	To contest constitutionality of separate schools.	Advantages being equal separate schools are constitutional.
	Lowry v. Sch. Trustees, 52 S. E. 267 (1905)	To contest alleged discrimination in separate schools.	Separate schools, substantially equal, are constitutional; no discrimination shown.
	McMillan v. School Committee, 107 N. C. 609 (1890)	To compel school committee to admit Negroes.	Statute requiring separate schools was binding on Committee.

North Carolina—Cont'd.		
Whitford v. Bd., 74 S. E. 1014 (1912)	To get interpretation of constitutional provisions of separate schools.	Statute providing for substantially equal school would be constitutional.
Puitt v. Gaston Co., 94 N. C. 709 (1886)	To test constitutionality of separate schools.	Advantages being equal, separate schools are constitutional.
Smith v. Robersonville, 53 S. E. 524 (1906)	To contest alleged discrimination in separate schools.	Separate schools, substantially equal, are constitutional; no discrimination shown.
Nevada:		
State v. Duffy, 7 Nev. 342 (1872)	To restrain board from separating white and Negro students.	The separate school being equal, the separation does not violate the 14th Amendment.
Ohio:		
State v. Bd. of Education, 7 Ohio Dec. 129 (1876)	To contest alleged discrimination in separate schools.	Separate schools, substantially equal, are constitutional; no discrimination shown.
State v. McCann, 21 Ohio St. 198 (1871)	To contest separate schools.	Establishment of separate schools substantially equal is constitutional.

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

State	Case	Issue	Decision
Oklahoma:			
	School District v. Board, 275 Pac. 292 (1928)	To recover State Aid Funds from Board of County Commissioners.	Separate schools with like conditions must be provided and impartially maintained.
	Jumper v. Lyles, 185 Pac. 1084 (1921)	To prevent certain schools being designated Negro schools.	The Board has the power to determine which separate school shall be attended by white or Negro students.
	State v. Albritton, 224 Pac. 511 (1924)	To test constitutionality of separate schools.	Facilities being substantially equal, separate schools are constitutional.
Pennsylvania:			
	Commonwealth v. Williamson, 30 Leg. Int. 406 (Pa. 1873)	To contest exclusion from public schools.	Under statute if twenty Negro children appeared for admission a separate school may be established.
South Carolina:			
	Tucker v. Blease, 81 S. E. 668 (1914)	To prevent exclusion of Negro from white school.	School Board may set up separate school for these persons and if substantially equal it is constitutional.

Tennessee:		
Greenwood v. Rickman, 235 S. W. 425 (1921)	To test separate schools as discriminatory, for tax purposes.	When equal opportunities are given in free schools there is no discrimination in taxes.
Virginia:		
Eubank v. Boughton, 36 S. E. 529 (1900)	To compel admission to white schools.	The duty is upon the school board to provide separate schools. Admission denied.
West Virginia:		
Martin v. Board of Education, 26 S. E. 348 (1896)	To test constitutionality of separate schools.	The separate school being equal, the separation does not violate the 14th Amendment.

THE TEXAS POLL

The Statewide Survey of Public Opinion
Joe Belden, Director
Release Sunday, January 26, 1947
Austin, Texas

Austin, Texas, Jan. 25.—Most Negroes agree with the overwhelming sentiment of the white population in Texas that the Legislature should provide colored students with a first-class university of their own instead of allowing them to enter the University of Texas.

Negroes vote 8 to 5 in favor of a separate university, as compared with a ratio of more than 25 to 1 among eligible white voters.

The Texas Poll put the question to a representative cross section of adults in this form:

> "Under a Supreme Court ruling, Texas is faced with the problem of either setting up a first-class university for Negroes or allowing them to enter the University of Texas. What do you think ought to be done?"

Here are the results, broken down to show the opinions of the 86 per cent of the people who are white and the 14 per cent who are Negroes:

	White	*Negro*
Set up separate university	79%	8%
Allow them in U. T.	3	5
Ignore court ruling	1	---
Don't Know	3	1
	86%	14%

Allegiance to Southern traditions and fear of racial troubles are the main reasons why whites favor a separate university for Negroes. Negroes who prefer a university of their own say: (1) Negroes aren't interested in going to school with whites; (2) Negroes should be by themselves anyway; (3) Negroes want good training and where they get it doesn't matter.

Whites and Negroes who think the University of Texas' doors should be opened to colored students maintain that the establishment of a separate university for Negroes would be too great a financial burden on the state.

Representative comments: White—"Too much money would be spent to benefit too few." Colored—"To have one university would be cheaper for the state."

Among the few who think Texas should ignore the Supreme Court's ruling, opinion seems to be that Negroes ought not to go to universities at all, or that there are not enough Negroes who want higher education for anyone to worry about.

In this survey, as in all scientific samplings by The Texas Poll, every person gave his opinion in strict confidence. To encourage Negro respondents to voice their opinions freely, the Poll uses trained colored interviewers to contact a cross section of their race.

Report of Regents of Texas State University for Negroes to Governor

Houston 2, Texas, February 12, 1949.

Hon. Beauford H. Jester,
Governor of Texas,
Austin, Texas.

Dear Governor Jester:

As Chairman of the Board of Directors of The Texas State University for Negroes, I submit a report on the operation of this University from its founding in 1947 to the present time.

Creation of the University

The University was created by an Act of the Fiftieth Legislature known as Senate Bill 140, which was approved on March the 3rd, 1947. This Act provided for the following basic items:

(1) "The establishment, support, maintenance and direction of a University of the first class for the instruction and training of the colored people of this State."

(2) Expressed the policy that the Legislature deemed it impractical to establish a college or branch of the University of Texas for the instruction of colored youth. "Therefore, it is the purpose of this Act to establish an entirely separate and equivalent University of the first class for Negroes, with full rights to the use of tax money and the general revenue fund for establishment, maintenance, erection

of buildings and operation of such institution as provided in Section 48, Article III of the Constitution of the State of Texas."

(3) Courses in Agriculture, the Mechanic Arts and Engineering shall be offered at the Prairie View Agricultural and Mechanical College. "The Texas State University for Negroes shall offer all other courses of higher learning, including, but without limitation (other than as to those professional courses designated for the Prairie View Agricultural and Mechanical College), Arts and Sciences, Literature, Law, Medicine, Pharmacy and other professional courses, all of which shall be equivalent to those offered at the University of Texas."

(4) "The Directors are hereby authorized and required to organize said University as soon as practicable and to take such action as may be deemed necessary in perfecting the organization of said institution as a University of the first class for the instruction and training of the colored people of this State."

(5) In declaring the existence of an emergency, the Act noted "the fact that the people of Texas desire that the State meet its obligation of equal educational opportunities for its Negro citizens." Thus not only is an emergency technically declared but the actual emergency is recognized and the acceptance by the State of its obligation to its Negro citizens is definitely declared and accepted by the Legislature.

Pursuant to the provisions of the Act of Establishment of the University, the Governor appointed

a Board of Directors which was sworn into office on May 7, 1947.

Development of Plans for Opening The University

Among the items which had to be handled very rapidly to be prepared for the opening of the University, the following problems had to be met:

(1) The arrangements had to be made for the transfer of the properties of the Houston College for Negroes to this University. In addition to the task of negotiating a satisfactory contract with the University of Houston, arrangements had to be made for a complete audit of the financial status of the Houston College for Negroes by a firm of Certified Public Accountants. The Accountants required that a recognized firm of appraisal engineers be employed to evaluate the real estate, buildings and equipment being transferred.

(2) The faculty and staff of administrators and other employees of the Houston College had to be built up to meet the needs of a University of the first class in so far as it was possible to do so for the first year.

(3) Orders and requisitions had to be prepared for the purchase of necessary equipment and supplies for the establishment of the University.

(4) Arrangements had to be made for additional buildings to meet the anticipated enrollment demands, for the construction of roads and walkways, and for the expansion of utilities on the campus.

(5) Accounting procedures and methods of operating the institution had to be changed from the methods used by private educational institutions to those used in State Institutions. . . .

Opening of the University

(1) While the transfer of the Houston College to this University was not actually effective until September 1, 1947, excellent cooperation was had from the University of Houston in the working out of many problems prior to that date by the use of Local Funds of the Houston College for Negroes. The net value of assets so transferred amount to $1,020,007.81.

(2) Registration began on September 8, 1947 and 2303 students enrolled for the first semester. When the Bill was before the Legislature for the appropriation of funds for the University, it was estimated that the enrollment would be between 750 and 1000.

(3) With the beginning of classes on September 15, 1947, the teacher problem had been solved with a very few minor exceptions which were worked out as soon as possible after the student load had been determined. A large part of the faculty for the first year was taken over from the Houston College. It was difficult to employ personnel of high experience and rank because of the fact that people of those qualifications usually complete their contracts for the following year in the months of April and May.

(4) With the opening of school, the University had accessible for use the following buildings: The Fairchild Building, which had been completed about six months previously at a cost of approximately $320,000; one large corrugated metal automobile shop instruction building, which had been erected at a cost of approximately $22,000; five shop buildings which had been built by the Vocational Section of the Houston College for their use; twelve frame buildings which had been moved from Camp Wallace.

Plant Improvements Since the Opening of the University

(1) Arrangements were made with the Federal Housing Administration for the immediate erection of eighty-four apartments for housing of married Veteran students. These were completed in January of 1948.

(2) Contract was let for the building of an Administration & Class Room Building and Auditorium on June 7, 1948, at a cost of $1,637,000, which does not include architect's fees or equipment. Progress on this building has been up to schedule, and a portion of it may be ready for occupancy by September 1, 1949. This building will provide facilities for the Library and the Law School until such time as special buildings for these can be provided. Among the new buildings presently recommended by the Board of Directors and approved by the State Board of Control is a separate law school building.

(3) On June 14, 1948, contract was let for a five-room residence to be used as temporary residence for the President, and as the permanent residence for the Superintendent of Buildings and Grounds. This residence was completed and occupied on September 15th.

(4) Contract was let for the construction of a Home Economics Practice Building on November 16, 1948, at a contract price of $30,944. Progress on this building is very satisfactory with completion scheduled for April 1, 1949. The building was designed to meet the requirements of the Home Economics Division of the State Board for Vocational Education.

(5) On December 14th, contract was let for the construction of the permanent home for the President, at a cost of approximately $40,000.

(6) Seven additional buildings were secured from Camp Wallace through the War Assets Administration, and were re-erected on the campus during the summer and early fall of 1948. Two other buildings were also secured and were dismantled so that materials would be available for remodeling, improving and expanding the units moved in and the frame units already on the campus.

(7) Large quantities of permanent equipment have been provided through both Local Funds and State Appropriated Funds. Additional equipment is needed to meet the rapidly expanding demands for courses of all kinds, particularly in the field of Sciences.

Graduates From the University

(1) At the close of the Long Session of 1947-48, sixty-six students received diplomas, thirty-six for Bachelors degrees and thirty for Masters of Science in Education.

(2) At the close of the summer session in August of 1948, degrees were awarded to 68 Bachelors of Arts, 19 Bachelors of Science and 65 Masters of Science in Education. The total enrollment for the summer school was 1747 for the first term and 1619 for the second term.

Registration, 1948-1949

(1) The total registration for the first semester of the scholastic year 1948-49 was 2032, 211 being registered in the Graduate School and 25 in the School of Law, which was moved to Houston on September 1st, 1948.

(2) In the School of Law, the total enrollment is now 23 students consisting of 21 first year and 2 second year students. The faculty of the School of Law consists of a full time Dean, four full time professors, and a Librarian.

(3) Registration is now in process for the second semester and indications are that there will be a higher enrollment of new students than we have had any reason to expect. This is an indication of the trend of the attitude of the Negro people of Texas toward the University and its ultimate accomplishment of the purpose for which it was created.

Faculty of the University

At the present time the University has a total of one hundred fifteen persons on the teaching staff in addition to the administrative and operative personnel. The President of the University is a Doctor of Education, and there are seventeen Doctors of Philosophy on the staff. We do not know of another educational institution with a student body of two thousand that has eighteen faculty members holding Doctors degrees on its staff.

Inspections and Approval

(1) The representatives of the Southern Association of Colleges and Secondary Schools made a formal inspection of the University on November 9th and 10th, 1948. The University was notified under date of December 13th that it had been approved by the Association as a Class "A" Four-Year Educational Institution. This approval was accomplished in one year and three months from the effective date of the establishment of the University.

(2) The State Board of Law Examiners made an inspection of our Law School in September of 1948 and recommended approval as a first class Law School in October, 1948. The letter of notification said, in part: "That in all respects it complied with requirements of the rules; that is, the Library was far in excess of such requirements and in fact was a very fine one; also, that it had a splendid faculty."

Negotiations are under way for a formal inspec-

tion at an early date by representatives of the American Bar Association. The Board has reason to believe that the Law School will meet all of the requirements of the American Bar Association when this inspection is made, for Mr. John G. Hervey, Advisor to the Section of Legal Education of the American Bar Association, stated in a recent letter:

> "Certainly your institution has an opportunity to develop a law school the like of which exists in no other state—an outstanding, top-notch institution, which, through the years, should attract outstanding teachers and students of ability from all parts of the Union. The legislature and regents appear to have been most generous in their appropriation for library materials and I gather from what Dean Johnson tells me that the plant now under construction will be eminently satisfactory. There is no reason why your institution cannot and should not enjoy full approval by the American Bar Association because you certainly have no insuperable problems."

Establishment of the University An Expensive Process

This Board of Directors has found that establishment of this University has been more expensive than would have been expected normally because of a number of factors which do not enter into the establishment and growth of the ordinary school, some of which are as follows:

(1) Whole departments had to be established in a full grown status rather than expanded over a

period of years, the School of Law and the School of Pharmacy being typical examples of this situation.

(2) Since the Legislature specified that "upon demand being made by any qualified applicant for any present or future course of instruction offered at the University of Texas or its branches, such course shall be established or added to the curricula of the appropriate division of the school hereby established," limitation cannot be placed on the minimum number of students in any particular class. Some of the higher classes are small but must be and are taught by highly qualified teachers.

(3) In keeping with the obligation that the University shall be substantially equal to the University of Texas, the Board of Directors adopted the following resolution as expressing the policy of this University in regard to the scale of pay:

> "RESOLVED That the Board of Directors instructs the Finance Committee to use the minimum salary scale of the University of Texas for all Instructional employees and apply the same as a minimum in the building of the budget for The Texas State University for Negroes for the year 1947-48; it is the sense of this Board that given equality of training, experience, professional attainment and responsibility, there shall be equality of financial remuneration."

This policy established the scale of pay as well above that paid by most other Negro educational institutions. To offset the additional expense we

were enabled to employ outstanding teachers in the various fields.

(4) The necessity for having qualified persons in all the major departments made it essential that we have a Doctor of Philosophy as the head of each of the major departments in the University. This definitely increased the unit cost of instruction, particularly in the third and fourth years and in graduate work, above the cost of other comparative institutions.

(5) In order to operate a University of the First Class, it was necessary that our Library be built up. This has been accomplished in so far as the Law School is concerned, and the Southern Association has given us approval of our Main Library for under-graduate work.

(6) In addition to the facilities offered here, approximately $33,000 was expended during the year 1947-48 in grants of Scholarship Aid which have been made to Negro students for graduate and professional study outside of Texas.

Very truly yours,

(Sgd) CRAIG F. CULLINAN,
Chairman.

Report of State Auditor to Governor

February 11, 1949.

Honorable Beauford H. Jester, Governor
Members of the Legislature, and
Board of Directors of
The Texas State University for Negroes

Gentlemen:

We are pleased to present this report on the operations of

The School of Law
of
The Texas State University
For Negroes

To January 31st, 1949

This audit was required under the General Provisions of House Bill No. 246 as passed by the 50th Legislature, and our authorization is in Article 4413a-13, Revised Civil Statutes of Texas.

For the period from March 3rd, 1947, until August 31st, 1948, the affairs of the School of Law were administered by the Board of Regents of The University of Texas, and the School was conducted in the City of Austin, Texas. On September 1st, 1948, the School of Law and its physical assets were moved to the campus and buildings of The Texas State University for Negroes at Houston, Texas, which has its own Board of Directors.

The School of Law for The Texas State University for Negroes was established pursuant to Sen-

ate Bill No. 140 of the 50th Legislature (1947). Section 11 of that Act provides: (Quotation of statute omitted since it is copied in full herein at page 110.)

The formal announcement of courses promulgated by the Dean of the School stated that: (These are omitted because they are set out in full R. 371-372.)

Although this School of Law was formally opened for registration on March 10, 1947, no students presented themselves for enrollment. Nevertheless, the School was kept in order and at the beginning of the Fall Term in September, 1947, three applicants presented themselves for enrollment. All were accepted and work was begun. Thereafter, for personal reasons one student withdrew. The others continued their studies in the School of Law until it was moved to Houston, as directed by the statute, at the end of the Summer Session in August, 1948.

While the Law School was located in Austin, the students were taught (as "announced" above) by professors who were teaching or had taught the same courses in the School of Law at The University of Texas, and the curriculum was the same as that for students beginning in the School of Law of that University. In addition to the law books on hand at the School, the State Library (of the Supreme Court of Texas) and the library of The University of Texas were readily available to and were used by the students.

There were 2,303 students who registered at the Texas State University for Negroes in Houston in September, 1947. In September 1948 the total enrollment was 2,032 of whom 23 were in the School of Law. There are now 21 in that School—of these, 16

hold college degrees and the other 5 are otherwise properly qualified students.

On January 31st, 1949, there were 1,981 students in The Texas State University for Negroes, and there was a teaching staff of 110, of whom 37 were teachers of Industrial and Vocational-Technical Education. There is also a full complement of administrative and operative personnel. The University's President is a Doctor of Education, and there are 17 Doctors of Philosophy on the staff. On December 13th, 1948, the University was notified that it had been approved by the Southern Association of Colleges and Secondary Schools as a Class "A" institution. Further details of the operation of the University as a whole are contained in our audit report thereon which was released under date of January 15th, 1949.

The University for Negroes School of Law, in addition to clerical employees, has a Dean, four professors, and a librarian who also teaches one course. All of them are employed full time. All of the professors of the School of Law, as well as the Dean, hold LL.B. Degrees. They are paid salaries as follows: Dean (12-month basis), $7,500.00; 3 professors, $550.00 per month for 9 months; 1 professor, $500.00 per month for 9 months; and the librarian, $4,000.00 for 9 months. By resolution of its Board of Directors, The Texas State University for Negroes uses the same minimum salary scale for instructional employees as is used by The University of Texas.

There are 16,371 bound volumes and numerous pamphlets, journals, etc., now in the Law School Library at Houston, and 772 volumes in warehouses

are awaiting transfer to it. Orders have been placed for approximately 1,046 additional bound volumes, together with various subscriptions and periodicals. For these books, etc., invoices in the amount of $48,843.27 have been paid and purchase orders amounting to an additional $21,128.35 have been issued (to be paid partly from the remaining original appropriation and partly from the University for Negroes funds).

In October 1948 the Texas State Board of Law Examiners approved the School of Law at the Texas State University for Negroes. The following is quoted from the Minutes of the October 1948 meeting of that Board:

> "Mr. Neathery reported having investigated, as provided by the rules, the Law School of the State University for Negroes and that he found that in all respects it complied with the requirements of the rules; that its library was far in excess of such requirements and in fact was a very fine one; also, that it had a splendid faculty. Thereupon, a motion was duly made and carried by unanimous vote that such school be approved by the Board and that the Chairman be directed to write Dean Ozzie L. Johnson to that effect, with copy to President Lanier."

Expenditures by The University of Texas out of the original appropriation of $100,000.00 for the School of Law have been as follows: (Details of audit are omitted in the interest of brevity.)

Expended for	Total
Salaries and Wages:	
Teaching	$ 9,600.57
Librarian and Assistants	2,503.93
Other	593.60
Materials, Labor and Supplies	291.90
Office Expense	149.89
Telephone and Telegraph	114.71
Rent	2,250.00
Library Books	48,695.42
Equipment	593.17
Insurance	81.60
Total Expended	$ 64,874.79

It appears that the money appropriated for this University's School of Law has been and is being expended substantially in accordance with the intent of the Legislature.

Very truly yours,
C. H. Cavness,
State Auditor.

Letter From Dean to Governor

The Texas State University for Negroes
School of Law
Austin, Texas
January 27, 1948.

Hon. Beauford H. Jester
Governor of the State of Texas
Austin, Texas.

My dear Governor Jester:

In reply to your request of January 23, 1948, I submit the following report concerning the status

of the Law School for the Texas State University for Negroes.

The School of Law was organized and ready to begin its program of instruction on March 10, 1947, but no qualified applicants presented themselves until the opening of the current semester on September 22, 1947. At that time applications were received from three students eligible for admission, all of whom were registered. One of these students withdrew during the semester for personal reasons so that our present enrollment is two. It is anticipated that two or more beginning students will register for the second semester on February 2, 1948.

The program of work given during the winter semester included Contracts, Torts, Personal Property, Procedure I and Legal Bibliography, being the same courses offered to beginning students at the University of Texas Law School.

All instructors are assigned from the faculty of the University of Texas and with one exception, indicated by administrative convenience, teach the same courses currently given by them at the University of Texas. Effort is exerted toward the full realization of such pedagogical advantages as inhere in a high teacher-student ratio. The same casebooks and other materials are used in each course at the University of Texas and this school.

The school occupies the first floor of a building adjoining the grounds of the State Capitol. There are three rooms sufficiently large to meet all anticipated needs for the current year and adequate restroom facilities are provided both men and women.

Professors were asked to select out of books on hand those desired for instruction in the first year work and these books have been shelved in the building. Other books purchased and in storage will be moved to the building as and when desired by instructors.

The Texas Supreme Court Library containing approximately 42,000 volumes and the State Library containing several thousand law books are used by our students when the need arises. The Library of the University of Texas Law School lends any materials desired and maintains a messenger service for delivering and returning such materials.

With highest esteem and best regards,

Yours sincerely,

/s/ C. T. McCormick, Dean.

Filed, Paul H. Brown, Secretary of State
Jan. 31, 1948

Points of Error Assigned in the Texas Court of Civil Appeals by Petitioner

"Points Upon Which the Appeal Is Predicated

"First Point: The error of the Court in sustaining appellees' special exception to allegation 3 of appellant's second supplemental petition.

"Second Point: The error of the Court in excluding the testimony of the witness, Dr. Charles H. Thompson, with reference to the quantity and quality of education offered at the universities and colleges, other than Prairie View College, maintained

by the State of Texas (S. F. beginning with the last question on p. 387 to p. 469, inclusive).

"Third Point: The error of the Court in excluding the evidence of the appellant as to the admission of Donald Murray to the law school of the University of Maryland and the results thereof in a situation analogous to the instant case, as shown in appellant's bill of exception, as fully set out (S. F. pp. 478-482).

"Fourth Point: The error of the Court in holding that the proposal of the State to establish a racially segregated law school afforded the equality required by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and thus justified the denial of appellant's petition for admission to the law school of the University of Texas."

Points of Error Assigned by Petitioner in the Supreme Court of Texas on Application for Writ of Error

"Points of Error

"FIRST POINT: The error of the Court of Civil Appeals in sustaining respondent's special exception to Allegation 3 of petitioner's second supplemental petition (paragraph 3 of petitioner's second supplemental petition) (Tr. page ——). (Germane to Assignment of Error No. 1.)

"SECOND POINT: The error of the Court of Civil Appeals in sustaining the trial court's action in excluding the testimony of the witness, Dr. Charles H. Thompson, with reference to the quantity and quality of education offered at the universities and

colleges, other than Prairie View College, maintained by the State of Texas. (S. F. beginning with the testimony on page 380 and ending on page 469, inclusive.) (Germane to Assignment of Error No. 2.)

"THIRD POINT: The error of the trial court in excluding the evidence of the petitioner as to the admission of the witness, Donald Murray, to the Law School of the University of Maryland, and the results thereof in a situation analogous to the instant case as shown in petitioner's bill of exceptions as fully set out. (S. F. beginning on page 478 to page 482, inclusive.) (Germane to Assignment of Error No. 3.)

"FOURTH POINT: The error of the Court of Civil Appeals in holding that the proposal of the State of Texas to establish a racially-segregated law school afforded the equality required by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; and thus, justified the denial of petitioner's application for admission to the Law School of the University of Texas. (Germane to Assignment of Error No. 4.)

"FIFTH POINT: The error of the Court of Civil Appeals in affirming the trial court's judgment, and not holding that Article VII, Section 7 of the Constitution of Texas was not unconstitutional, in that the enforcement thereof against petitioner denied to the petitioner that equality required by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; and thus held that respondents had the legal authority, under such Article of the Constitution, to deny petitioner admission to the Law School of the University of Texas. (Germane to Assignment of Error No. 5.)

"SIXTH POINT: The error of the Court of Civil Appeals in failing to hold that Article VII, Section 7 of the Texas Constitution and the Laws of Texas

enacted pursuant thereto, segregating races solely on account of race and color, were based upon no real distinction or actual difference; and, therefore, violated the petitioner's rights under the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. (Germane to Assignment of Error No. 6.)

"SEVENTH POINT: The error of the Court of Civil Appeals in ignoring the expert testimony introduced by petitioner, and merely adopting respondents' interpretation of the evidence by attaching to its opinion, an appendix copied in the main from respondents' brief, basing its opinion and judgment on said respondents' brief without making an independent evaluation of the record as to the comparative values of the two law schools as a basis for its opinion and judgment. (Germane to Assignment of Error No. 7.)

"EIGHTH POINT: The error of the Court of Civil Appeals in holding that the question of whether segregation in a state-supported school is a denial of the due process of law is no longer an open question because in so holding, the Court thereby erred in not considering petitioner's contention that the action of the respondents denied petitioner the equal protection of law guaranteed by the Fourteenth and Fifteenth Amendments to the Constitution of the United States. (Germane to Assignment of Error No. 8.)

"NINTH POINT: The error of the Court of Civil Appeals in holding that petitioner was not entitled to the relief sought, and that the judgment of the court below should be affirmed; and citing as a basis for said judgment and opinion, the opinions of the Supreme Court in the cases of Plessy vs. Ferguson and Hall vs. DeCuir as the grounds for said judgment and opinion, for the reason that said decisions

were based upon records in which there was no evidence of the inequality interest in segregated facilities, and were predicated upon a purely abstract and theoretical hypothesis, wholly unrelated to the realities, and for the further reason that the record in this case demonstrates, for the first time in any case presented for decision, the inevitable inequalities in a segregated public school system. (Germane to Assignment of Error No. 9.)"

Constitutional and Statutory Provisions of Texas Providing for Separate Schools for White and Negro Students

Constitutional Provisions

Article VII, Section 7: "Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both."

Article VII, Section 14: "The Legislature shall also when deemed practicable, establish and provide for the maintenance of a College or Branch University for the instruction of the colored Youths of the State, to be located by a vote of the people: Provided, that no tax shall be levied, and no money appropriated, out of the general revenue, either for this purpose or for the establishment, and erection of the buildings of the University of Texas."

Statutory Provisions[1]

Article 2719: "Said board (of education) shall provide schools of two kinds; those for white children and those for colored children. Such schools re-

[1]Texas Civil Statutes (Vernon 1948). There are other related statutes. The above are representative.

spectively, shall be free to all such children over six years of age. . . ."

Article 2900: "All available public school funds of this State shall be appropriated in each county for the education alike of white and colored children, and impartial provisions shall be made for both races. No white children shall attend schools supported for colored children, nor shall colored children attend schools supported for white children. The terms 'colored race' and 'colored children,' as used in this title, include all persons of mixed blood descended from negro ancestry."

Article 2643b (referred to in the brief as S. B. 140, 50th Leg., 1947, Ch. 29):

"Section 1. The Legislature of Texas deems it impracticable to establish and maintain a college or branch of the University of Texas for the instruction of the colored youths of this state without the levy of taxes and the use of the general revenue for the establishment, maintenance and erection of buildings as would be required by Section 14 of Article VII of the Constitution of Texas, if such institution were established as a college or branch of the University of Texas. Further, the Legislature of Texas deems that establishment of a negro university with such limitations as to funds and operation would be unfair and wholly inadequate for the purpose of providing an equivalent university of the first class for negroes of this state. Therefore, it is the purpose of this Act to establish an entirely separate and equivalent university of the first class for negroes with full rights to the use of tax money and the general revenue fund for establishment, maintenance, erection of buildings and operation of such institution as provided in Section 48, Article III of the Constitution of the State of Texas.

"Sec. 2. To provide instruction, training, and higher education for colored people, there is hereby established a university of the first class in two divisions: the first, styled 'The Texas State University for Negroes' to be located at Houston, Harris County, Texas, to be governed by a Board of Directors as provided in Section 3 hereof; the second, to be styled 'The Prairie View Agricultural and Mechanical College of Texas' at Prairie View, Waller County, Texas, formerly known as Prairie View University, originally established in 1876, which shall remain under the control and supervision of the Board of Directors of The Agricultural and Mechanical College of Texas. At the Prairie View Agricultural and Mechanical College shall be offered courses in agriculture, the mechanic arts, engineering, and the natural sciences connected therewith, together with any other courses authorized at Prairie View at the time of the passage of this Act, all of which shall be equivalent to those offered at The Agricultural and Mechanical College of Texas. The Texas State University for Negroes shall offer all other courses of higher learning, including, but without limitation, (other than as to those professional courses designated for The Prairie View Agricultural and Mechanical College), arts and sciences, literature, law, medicine, pharmacy, dentistry, journalism, education, and other professional courses, all of which shall be equivalent to those offered at The University of Texas. Upon demand being made by any qualified applicant for any present or future course of instruction offered at The University of Texas, or its branches, such course shall be established or added to the curriculum of the appropriate division of the schools hereby established in order that the separate universities for Negroes shall at all times offer equal educational opportunities and training as that available to other persons of this state. The Board of Directors of The Agricultural

and Mechanical College of Texas in administering The Prairie View Agricultural and Mechanical College of Texas shall in all respects have the same powers and perform the same duties in reference to this college as those conferred upon it by statute with reference to the government of The Agricultural and Mechanical College of Texas.

"Sec. 3. The government of the Texas State University for Negroes is hereby vested in a Board of Directors to be composed of nine (9) persons and to consist of both white and negro citizens of this state. (The balance of this Section is omitted since it deals only with tenure of Directors.)

"Sec. 4. (Omitted because it deals only with expenses of Board members.)

"Sec. 5. The Directors are hereby given the power and authority to select a site for the location of said University at the City of Houston, and are given the power, for and in behalf of the state, to acquire, take, appropriate, hold, and enjoy the title to such land and other property they may deem necessary for such purpose, either by purchase or otherwise. (The balance of the Section on eminent domain is omitted.)

"Sec. 6. As soon as a site for the location of said University is determined upon and acquired, it shall be the duty of the Directors to proceed with the construction of all necessary buildings and other permanent improvements thereon. . . . (Omitting provision relative to employment of architects and letting of contracts for construction.) The Directors are hereby authorized and required to organize said University as soon as practicable and to take such action as may be deemed necessary in perfecting the organization of said institution as a University of the first class for the instruction and training of the colored people of this state. The Directors shall

also have the authority to make proper arrangements by contract with other educational institutions, hospitals, and clinics at Houston for the use of such facilities and the services of qualified personnel as they may deem necessary and expedient for the proper training and education of students in professional courses.

"Sec. 7. The Directors shall establish the several departments in said University, determine the offices, professorships, and other positions at said institution, appoint a President, appoint the professors and other officers and employees and prescribe their duties, and fix their respective salaries; and they shall enact such by-laws, rules and regulations as may be deemed necessary for the successful management and government of the institution. They shall have the power, by and with the advice of the faculty, to prescribe and regulate the course or courses of instruction to be given at said institution, and to confer such degrees and to grant such diplomas as are now or may hereafter be granted by The University of Texas or any of its branches. The Directors shall have the power to remove any professor, instructor, tutor, or other officer or employee connected with the institution when, in their judgment, the best interests and proper operation of the institution shall require it.

"Sec. 8. The Directors are hereby authorized to accept, for and in behalf of the state, in connection with said University for Negroes, grants or gifts of property or money for the use of said institution from other than state sources.

"Sec. 9. There is hereby appropriated out of the State Treasury from any moneys not otherwise appropriated, the sum of Two Million ($2,000,000.00) Dollars or so much thereof as may be necessary, to be expended in the acquisition of land and other

property as a site for and in the establishment of the Texas State University for Negroes and for the construction, erection, acquisition, and equipping of buildings and other permanent improvements. There is further appropriated the sum of Five Hundred Thousand ($500,000.00) Dollars or so much thereof as may be necessary, for the support, operation, and maintenance of such institution, including the payment of salaries of its officers and employees, for each of the fiscal years of the biennium ending August 31, 1949.

"Sec. 10. In the interim between the effective date of this Act and the organization, establishment and operation of the Texas State University for Negroes at Houston, upon demand heretofore or hereafter made by any qualified applicant for instruction in any course (except law) offered at the University of Texas or any of its branches, the Board of Directors of the Agricultural and Mechanical College of Texas, acting as the governing board of the Prairie View Agricultural and Mechanical College, is authorized and required to provide forthwith such instruction, through courses, equivalent to the same instruction being offered at the University of Texas or any of its branches.

"There is hereby appropriated, as an emergency appropriation, the sum of One Hundred Thousand ($100,000.00) Dollars, or so much thereof as may be necessary, to be expended by the Board of Directors of the Agricultural and Mechanical College of Texas in order to make immediately available the facilities and personnel necessary to carry out the requirements of this section. Such emergency appropriation is for the remainder of the fiscal year ending August 31, 1947.

"At the end of the first term or semester of any course offered hereunder, after the organization and

establishment of the Texas State University for Negroes and the equivalent organization and establishment of such courses of instruction therein as may be offered during the interim at the Prairie View Agricultural and Mechanical College in accordance with the provisions of this Act, the direction, conduct, operations, location and property purchased hereunder for such courses shall be transferred to the Texas State University for Negroes, and its Board of Directors shall thenceforth continue such course as a part of the curriculum of such University and discharge all responsibility therefor.

"Regardless of the other provisions of this Act, the requirement for establishment of interim courses at the Prairie View University by the Board of Directors of the Agricultural and Mechanical College of Texas shall terminate on September 1, 1947. In the meantime, the Board of Directors of the Texas State University for Negroes shall make necessary temporary or permanent provisions to offer such courses beginning not later than September 1, 1947. For this purpose, and to cover all other expenses that may be necessary in the prompt establishment of the above and all other interim courses and the permanent establishment of such courses, as well as the organization and establishment of the Texas State University for Negroes, there is hereby appropriated as an emergency appropriation the sum of One Hundred Fifty Thousand ($150,000.00) Dollars, or so much thereof as may be necessary, to be expended by the Board of Directors of the Texas State University for Negroes during the remainder of the fiscal year ending August 31, 1947.

"Sec. 11. In the interim between the effective date of this Act and the organization, establishment and operation of the Texas State University for Negroes at Houston, upon demand heretofore or hereafter made by any qualified applicant for instruction in

law at the University of Texas, the Board of Regents of the University of Texas is authorized and required to forthwith organize and establish a separate school of law at Austin for negroes to be known as the 'School of Law of the Texas State University for Negroes' and therein provide instruction in law equivalent to the same instruction being offered in law at the University of Texas. The Board of Regents of the University of Texas shall act as the governing board of such separate law school until such time as it is transferred to the control of the Board of Directors of the Texas State University for Negroes.

"There is hereby appropriated, as an emergency appropriation, the sum of One Hundred Thousand ($100,000.00) Dollars, or so much thereof as may be necessary, to be expended by the Board of Regents of the University of Texas in order to establish and operate the separate law school. The total of such emergency appropriation is for the remainder of the fiscal year ending August 31, 1947 and for the fiscal year ending August 31, 1948, or for such lesser time as the school is operated prior to the transfer hereinafter provided for. Students of the interim School of Law of the Texas State University for Negroes shall have use of the State Law Library in the Capitol Building in addition to other special library facilities which shall be made available, but the entire school shall be operated separately and apart from the campus of the University of Texas as provided in the Texas constitutional requirement of separate schools for white and colored youths.

"At the end of the first term or semester of any law course offered in said school after the organization and establishment of the Texas State University for Negroes at Houston, and the equivalent organization and establishment of a law course by such University for Negroes, the direction, conduct, oper-

ation, location, the unexpended balance of this appropriation, and all property purchased for the separate school out of the appropriation hereunder, shall be transferred to the Texas State University for Negroes at Houston, and its Board of Directors shall thenceforth continue such law courses as a part of the curriculum of such University and discharge all responsibility therefor. After such transfer the separate law school for negroes shall no longer operate in Austin or as a function of the Texas University Board of Regents, it being deemed impracticable to continue such operation in Austin after establishment of an equivalent school in Houston.

"Sec. 12. The term 'qualified applicant' as used in this Act shall mean any colored person who meets the educational requirements for entrance to the same course or courses in the University of Texas or any of its branches. The term 'colored person' has the same meaning as contained in the provisions of the Texas Constitution requiring separate schools, being the same interpretation placed thereon by the Legislature and administrative officials of this state since 1876, to-wit: a negro or person of African descent.

"Sec. 13. (Repealing clause.)

"Sec. 14. The fact that the people of Texas desire that the state meet its obligation of equal educational opportunities for its negro citizens from state supported institutions, and the fact that a separate and equivalent university of the first class for negroes cannot be established and maintained under the limitations and restrictions contained in Section 14, Article VII of the Constitution of Texas if such institution were made a college or branch of the University of Texas, and the fact that the only means of establishing an equivalent university of the first class for negroes with use of tax money and the gen-

eral revenue is to create a separate university entirely independent of the University of Texas, and the fact that interim courses must be established immediately by existing schools for the education of negroes prior to the establishment and operation of said separate university of the first class for negroes, create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three separate days in each House be, and the same is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted."

Article 3221. "The Board (of Control) shall make all necessary rules and regulations for the government of the Deaf, Dumb and Blind Asylum for Colored Youths and Colored Orphans to comport as nearly as may be practicable with the rules and regulations of the asylums for like purposes in this State. . . ."

(The name of the above institution was changed from "The Deaf, Dumb, and Blind Asylum for Colored Youths and Colored Orphans" to "The Texas Blind, Deaf and Orphan School" in 1947. (Acts 50th Leg., Ch. 292.)