SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 44

HEMAN MARION SWEATT,

Petitioner,

vs.

THEOPHILIS SHICKEL PAINTER, *et al.*,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

BRIEF OF AMERICAN VETERANS COMMITTEE, INC. (AVC) Amicus Curiae

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Attorney for American Veterans Committee Amicus Curiae

JANUARY 27, 1950,
Washington, D. C.

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Miscellaneous:

SWEATT v. PAINTER

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No. 44

BRIEF OF AMERICAN VETERANS COMMITTEE, INC. (AVC) Amicus Curiae

The Issue. This case, and the case of *McLaurin* v. *Oklahoma State Regents for Higher Education* (No. 34, this term) (in which AVC has today filed an *amicus curiae* brief), squarely raise the issue, for the first time, whether it is constitutional for a State to refuse to admit a Negro, solely because of his race or color, into a State college to secure graduate education on the same basis as is afforded to white persons.

The Interest of Veterans in this Case

The American Veterans Committee, Inc. (AVC) is an organization of veterans of World War II who have associated themselves to promote the democratic principles for which they fought.[1] AVC believes that the denial of equality of educational opportunity perpetrated in these cases is

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[1] AVC's *amicus curiae* briefs in the following recent civil rights cases in this Court are illustrative of AVC's views: *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Hurd* v. *Hodge*, 334 U. S. 24 (1948); *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410 (1948); *United States* v. *C.I.O.*, 335 U. S. 106 (1948); *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368 (1949); *Henderson* v. *United States*, No. 25, Oct. Term, 1949; *McLaurin* v. *Oklahoma State Regents for Higher Education*, No. 34, Oct. Term, 1949.

repugnant to the constitutional guarantee of equal protection of the laws, incompatible with our democratic faith and the principles for which we fought in battle, and inimical to the welfare of the United States.

Veterans of World War II have a special interest in this Court's definitive decision in this case and the *McLaurin* case. Congress provided educational benefits for veterans of World War II *without distinction as to race.* [Servicemen's Readjustment Act of June 22, 1944 (58 Stat. 284, as amended, 38 U. S. C. 693, Vet. Reg. No. 1, Part VIII, following 38 U. S. C. 793) ("G.I. Bill of Rights").] For almost all these war veterans, the last day they will be allowed to initiate study under this legislation is July 25, 1951; and no education or training will be afforded to them under that act after July 25, 1956. The refusal by certain States to admit Negroes to State institutions of higher learning on the same basis as is afforded to white students frustrates the Congressional purpose that all veterans shall have equal opportunity to obtain the educational benefits which they have earned by their wartime services and sacrifices for the nation.

As this case and the *McLaurin* case demonstrate, the States which impose compulsory distinctions between students solely on the basis of race deny equality of educational opportunity to Negroes in three distinct ways:

(1) Negro applicants, usually under the asserted compulsion of State law, are simply denied admission to schools for higher education maintained by the State.

(2) When a Negro applicant asserts his legal rights through court proceedings, the State authorities then deny him equality of educational opportunity by establishing a "separate and inferior" school for him. The separate school is never equal. In this very case, Dean Pittenger, testifying for the respondent State authorities, stated on

direct examination (R. 333): "I am unable to think for a moment of colored institutions and white institutions which do have equal facilities with which I have been associated."

(3) Where the Negro has obtained a court order upholding his claim to higher education, but the financial burden of establishing a separate school of any sort is too great for the State (as Oklahoma's Governor candidly admits, in *McLaurin,* R. 29), the State admits him, but only under conditions which obviously degrade him, or discriminate against him, or otherwise afford him less educational opportunity than is afforded to white students.

In the meantime, years elapse during which the State fails to provide education to Negro students "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." *Sipuel* v. *Board of Regents of the University of Oklahoma,* 332 U. S. 631, 633 (1948). Petitioner Sweatt applied for admission to the University of Texas Law School four years ago; he is not yet even a law student, while white applicants who applied at the same time are now practicing law. In the *McLaurin* case, eight months elapsed before McLaurin was afforded an opportunity to secure education and then only under humiliating conditions designed to lessen the value of it to him.

Veterans, advanced in years by reason of their military service, must get equality of educational opportunity *now* if at all. They do not have the resources nor the time to file individual suits, carry them to this Court, and then start subsequent suits on the meaning of this Court's mandate, as occurred in *Sipuel, supra,* and *Fisher* v. *Hurst,* 333 U. S. 147 (1948); and in *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1939) and *State ex rel. Gaines* v. *Canada,* 344 Mo. 1238, 131 S. W. (2d) 217 (1939). The constitutional promise of equal protection of the laws and the Congressional grant of education to veterans without distinction as to race can be effectuated only by a clear and complete requirement that no State may, solely because of race or color, refuse to admit a qualified person into any State educational institution on the same basis as is afforded to white students.

THE FACTS

Sweatt applied in February 1946 for admission to the University of Texas Law School in Austin, Texas, the only law school maintained by the State of Texas. He measured up to the required standards for admission to the Law School in all respects except that he is a Negro. He was refused admission only because of his race, on the ground that Texas law forbade the admission of Negroes to the University of Texas (R. 40, 55, 56, 425, 445). He then sought a writ of mandamus in a Texas state court. That court ruled that the refusal to admit him was a denial of equal protection of the laws because Texas had no provision for the legal training of colored persons while providing such training for white persons, but ruled that no writ of mandamus would be granted unless Texas failed within six months thereafter to make available legal education to Sweatt "substantially equivalent to that offered at the University of Texas" (R. 424-426). The State then authorized, but did not actually establish, law courses for Negroes at Prairie View University. Upon this showing the Texas court dismissed the petition for writ of mandamus (R. 426-433) but its order was set aside without opinion by the Texas Court of Civil Appeals and the case remanded for further proceedings (R. 434-435). Texas then proceeded to set up in Austin a make-shift "law school" for Negroes which respondents' witnesses freely admitted "is no fair comparison" with the established and recognized Law School of the University of Texas (R. 43, 333). This school was later shifted to Houston, Texas (R. 52-53, 28-29).

It is obvious that there is no equality in fact between the two schools, whether viewed from the standpoint of prestige, size and quality of faculty and law library, courses offered, size of student body, physical facilities, opportunity for moot court, legal aid or law review, and almost every other possible criterion of a good law school. Throughout these proceedings, Texas has justified its refusal to admit Sweatt into the University of Texas Law School on the basis of the requirement in the Texas Constitution that "separate schools shall be provided for white and colored children" (Art. 7, sec. 7), and has relied upon the proposition that such refusal does not violate the Federal Constitution. Sweatt, however, has squarely contested this proposition.

After a hearing and testimony on the merits, the Texas courts dismissed Sweatt's petition on the ground that the State may constitutionally provide education in separate schools and has in fact done so with substantial equality in this case (R. 440, 445-461).

I. THIS COURT SHOULD DECIDE THIS CASE BY HOLDING THAT STATE-IMPOSED COMPULSORY RACIAL SEGREGATION IN EDUCATION IS A DENIAL OF EQUAL PROTECTION OF THE LAWS, RATHER THAN SIMPLY BY MEASURING THE PHYSICAL INEQUALITIES OF THE TWO LAW SCHOOLS.

Perhaps the clearest proof that compulsory racial segregation is always discriminatory is that it is virtually impossible to present a case of enforced racial segregation unaccompanied by inequality in some significant respect. Thus the present case, which directly turns on the validity of

Texas law requiring separate schools for white[2] and colored people, also presents a plain picture of gross inequality between the recognized and honored University of Texas Law School and the make-shift, obviously inferior "law school" which the State now offers for Negroes.

But if this Court simply compares the minutiae of the separate physical facilities and avoids the basic issue as to whether State laws requiring separate schools for white and colored students violate the equal protection clause, this Court's decision would be viewed everywhere as a tacit approval of such State laws. Such a decision would help Sweatt but would encourage the continuance of unequal education for thousands of other students.

This Court can not hope for effective amelioration of educational discrimination simply by strict insistence on "equality" of the separate physical facilities in each case which may come before it.[3] The fact is that relatively few cases can come to this Court. Moreover, the cost and time involved in bringing each case through the courts would render the constitutional promise of equal protection largely illusory. And it is common knowledge that the States which require separate schools are the States which not only are least likely to, but actually do not, provide facilities for colored students equal in any way to those provided for white students.

The importance of effective education to the continuance of our civilization in this atomic age makes it imperative

[2] Perhaps "non-Negro" should be used in lieu of "white" since there are non-white students regularly enrolled in the University of Texas. Thompson, "Separate But Not Equal", 33 *Southwest Review* 105, 106 (Spring, 1948) (Univ. Press, Southern Methodist University, Dallas, Texas); compare *Gong Lum* v. *Rice,* 275 U. S. 78 (1927) (holding that the State of Mississippi which classifies its residents as "white" or "colored," may classify a Chinese as non-white).

[3] Compare *Jones* v. *Board of Education,* 90 Okla. 233, 217 Pac. 400 (1923) with *Patterson* v. *Board of Education,* 11 N.J. Misc. 179, 164 Atl. 892 (1933), aff'd w/o op. 112 N.J.L. 99, 169 Atl. 690 (1934).

that the Court now come to grips with the basic issue whether State laws requiring separate schools for white and colored students are constitutional.

II. THE CONSTITUTIONAL GUARANTEE OF "EQUAL PROTECTION OF THE LAWS" FORBIDS A STATE FROM IMPOSING ON ANY INDIVIDUAL COMPULSORY DISTINCTIONS "BASED WHOLLY UPON COLOR; SIMPLY THAT AND NOTHING MORE."

Chief Justice Vinson, speaking for a unanimous Court, recently said: "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color." *Shelley* v. *Kraemer,* 334 U. S. 1, 23 (1948).

So clear was the proposition that the Fourteenth Amendment was adopted primarily to prevent impairment of the basic rights of Negroes, that the contemporary opinion of this Court doubted whether the Fourteenth Amendment applied to any State action "not directed by way of discrimination against the negroes." *Slaughter-House Cases,* 83 U. S. (16 Wall.) 36, 70-72, 81 (1873). Although the Fourteenth Amendment was later extended to protect other State invasions of private rights, this Court consistently recognized that the Fourteenth Amendment "was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color," *Railway Mail Ass'n* v. *Corsi,* 326 U. S. 88, 94 (1945), and that "the chief inducement to the passage of the Amendment was the desire to extend Federal protection to the recently emancipated race from unfriendly and discriminating legislation by the States." *Buchanan* v. *Warley,* 245 U. S. 60, 76 (1917).

Perhaps one of the most comprehensive analyses of the purpose of the Equal Protection Clause is that in *Strauder* v. *West Virginia,* 100 U. S. 303 (1880), in words which deserve repetition:

"The true spirit and meaning" of the Civil War 13th, 14th and 15th Amendments, this Court said in *Strauder,* "cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an *inferior and subject race,* would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, *and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed.* Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race . . . especially needed protection against unfriendly action in the States where they were resident." 100 U. S. at 306. (Emphasis supplied.)

"The Fourteenth Amendment," continued the *Strauder* opinion, "is to be construed liberally, to carry out the purpose of its framers" in order to guarantee "the equal protection of the laws. *What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States,* and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of *a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,*—exemption from legal discriminations, *implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy,* and discriminations which are steps towards reducing them to the condition of a subject race." 100 U. S. at 307-308 (emphasis supplied).

This Court's opinion in *Strauder* then emphasized: ". . . *The very fact that colored people are singled out . . . is practically a brand upon them, affixed by the law, an assertion of their inferiority,* and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." 100 U. S. at 308. The major aim of the Fourteenth Amendment "was against discrimination because of race or color . . . its design was to protect an emancipated race, and to strike down *all possible legal discriminations* against those who belong to it." 100 U. S. at 310 (emphasis supplied).

Another contemporaneous decision which accurately reflected the true meaning of the Fourteenth Amendment was *Railroad Company* v. *Brown,* 84 U. S. (17 Wall.) 445 (1873) (discussed in detail at pp. 15-16 in AVC's *amicus* brief in *Henderson* v. *United States,* No. 25, this Term, now pending). There, a railroad company which furnished a car for colored people "equal in comfort to the cars reserved for white people" contended that it was not discriminating against colored people by refusing them admittance to the cars reserved for white people. This Court unanimously rejected that early manifestation of the separate but equal theory as "an ingenious attempt to evade a compliance with the obvious meaning of the requirement . . . this discrimination must cease, and the colored and white race, in the use of the cars, be placed on an equality.'' 84 U. S. at 452-453.

Throughout the years, this Court has repeatedly castigated compulsory racial distinctions as ''obviously irrelevant and invidious'' [*Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 203, 208 (1944)], ''at war with our basic concepts of a democratic society'' [*Smith* v. *Texas,* 311 U. S. 128, 130 (1940)], and ''immediately suspect'' [*Korematsu* v. *United States,* 323 U. S. 214, 216 (1944)]. ''Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality'' [*Hirabayashi* v. *United States,* 320 U. S. 81, 100 (1943)], and therefore ''hostility to the race . . . in the eye of the law is not justified . . . is, therefore, illegal'' [*Yick Wo* v. *Hopkins,* 118 U. S. 356, 374 (1886)]. These decisions, and the many other decisions of this Court which have voided racial discriminations, have underscored Justice Harlan's memorable insistence that the Civil War Amendments to the Constitution ''removed the race line from our governmental systems. . . . Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.'' *Plessy* v. *Ferguson,* 163 U. S. 537, 555, 559 (1896) (dissent).

III. THE "SEPARATE BUT EQUAL" THEORY IS AN ABERRATION WHOLLY INCONSISTENT WITH THE FOURTEENTH AMENDMENT, AND HAS NEVER BEEN SQUARELY CONSIDERED AND UPHELD BY THIS COURT WITH RESPECT TO EDUCATION.

The Fourteenth Amendment was incorporated into the Constitution to consolidate the gains of the Civil War against human slavery and its incidents, and to devitalize the "Black Codes" by which the post-war South sought by force of law to retain the Negroes in their status of inferiority. With the rebirth of the Southern whites' political influence after 1876, and the determined efforts of some of them to keep the colored man down, the sophistic "separate but equal" theory became the scalpel to excise the meaning from the Fourteenth Amendment.

At first the impact of this theory in this Court's decisions was indirect—an inarticulate premise for restricting the rights of Negroes in cases not envolving the constitutionality under the Fourteenth Amendment of State statutes requiring separate accommodations. The luster of this Court's resounding rejection of "Jim-Crow" in 1873 (*Railroad Company* v. *Brown, supra*) turned hazy under the muffled but growing homage to the separate but equal theory in *Hall* v. *DeCuir,* 95 U. S. 485 (1877) (State law forbidding racial segregation on common carriers held invalid as burden on interstate commerce); in *Pace* v. *Alabama,* 106 U. S. 583 (1883) (permitting greater punishment for crime of adultery between persons of different races than for adultery between persons of same race); in *Civil Rights Cases,* 109 U. S. 3 (1883) (holding that Congress can prohibit racial discrimination by States but not by private persons); and in *Louisville, New Orleans, and Tex. Ry Co.* v. *Mississippi,* 133 U. S. 587 (1889) (segregation law applicable only to intra-state commerce held not a burden on inter-state commerce). The separate but equal theory reached its full flower in *Plessy* v. *Ferguson,* 163 U. S. 537 (1896) which upheld a State law requiring racial segregation in intra-state transportation and contained *dicta* approving "separation of the two races in schools" (pp. 545, 544).

Almost a half century ago an eminent sociologist wrote: "The problem of the twentieth century is the problem of the color line." W. E. Burghardt Du Bois, "The Freedmen's Bureau", 87 *The Atlantic Monthly* 354 (March 1901). Much of the blame for the perpetuation of the problem rests with the Nineteenth Century Supreme Court's coddling and to some extent cynical acquiescence in the proposition that enforced racial segregation can be accompanied by equality —a proposition theoretically conceivable but utterly at war with the practical realities of life. The *Plessy* decision signified the highest sanction to racial segregation enforced by law. It therefore encouraged, and became the touchstone and rationalization for, further segregation under compulsion of law, not only in the fields of transportation and education, but in every aspect of human relations.

Plessy's rationale, however, has never been judicially re-examined. Its language sanctioning compulsory racial segregation by State law as justified by "the established usages, customs and traditions of the people" (163 U. S. at 550) has been applied almost blindly. In our *amicus* brief in *Henderson* v. *United States* (No. 25, this Term, pending), AVC has demonstrated at pp. 14-20, that no decision by this Court, except *Plessy,* supports compulsory segregation in transportation as against a challenge under the Fourteenth Amendment, and, at pp. 21-30, that the rationale and assumptions of *Plessy* were erroneous and inconsistent with the Fourteenth Amendment and with this Court's decisions that racial distinctions are "by their very nature odious," "immediately suspect," "obviously irrelevant and invidious," "at war with our basic concepts of a free society," and "in the eye of the law . . . not justified." *Supra,* p. 10. We shall now show that neither *Plessy,* nor *any other* decision by this Court, has upheld the validity of racial segregation in schools, or, more precisely, the validity of laws requiring separate schools for white and colored people, as against a challenge by an individual under the

Equal Protection Clause. If separate schools for different races are constitutional, it is not because this Court has so held. *Dicta* erecting a chambered Nautilus on a non-existent foundation, and failure to meet and analyze the precise constitutional issue, serve as the only bases for application of the "separate but equal" theory in education.

The first time that segregation in schools was judicially discussed in this Court was in Justice Clifford's concurring opinion in *Hall* v. *De Cuir, supra.* A colored woman passenger on a steamboat on the Mississippi River was ejected from a room set apart by the carrier for white passengers. She sued the carrier for damages under a Louisiana statute requiring common carriers in their "rules covering service to passengers" to "make no discrimination on account of race or color." The Supreme Court invalidated the statute on the ground that it was an unconstitutional regulation of interstate commerce. Justice Clifford's concurring opinion, in which no other justice joined, viewed segregation as proper, and, referring to several State decisions concerning segregation in education, stated: "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." 95 U. S. at 504. His observations were clearly *dicta.*

Plessy v. *Ferguson, supra,* upholding a Louisiana statute requiring separate coaches for whites and Negroes on an intrastate train, is commonly regarded as the leading case holding that State laws requiring "separate but equal" facilities do not violate the Equal Protection clause of the Fourteenth Amendment. But *Plessy* did not sanction all "separate but equal" requirements based on race. The *Plessy* standard was that only *reasonable* distinctions based on race are constitutional. It regarded as unreasonable, and therefore unconstitutional, any law "requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color." (pp. 549-550.)

The references in the majority opinion to separate schools for colored children were obviously *dicta,* the opinion itself expressly stating that:

> ". . . the *only issue* made is as to the unconstitutionality of the act, so far as it requires the railway to provide separate accommodations, and the conductor to assign passengers according to their race." (163 U. S. 537, 549.) (Emphasis supplied.)

Furthermore, *Plessy* did not even purport to uphold the reasonableness and constitutional validity of laws requiring separate schools, but said only that racial segregation in *public conveyances* is not unreasonable, or "more obnoxious to the Fourteenth Amendment than 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." (p. 551.) (Emphasis supplied.)

However, most of *Plessy's* reliance even for this limited *dictum* was on cases such as *Roberts* v. *Cushman,* 59 Mass. (5 Cush.) 198 (1849), decided *before* the Civil War and *before* the adoption of the Fourteenth Amendment. Moreover, separation on a train, however obnoxious, cannot be equated with, nor its previous tolerance permitted to justify, racial discrimination in the opportunity to acquire a professional education, to raise one's status through education, and with that education to serve the community and the Nation. Here, Sweatt is not being permitted to ride on the same train to the same destination—he is being *excluded* from the only real Law School in Texas, solely because at least one of his parents was a Negro. In addition, whereas the Court which decided *Plessy* was not presented with factual evidence either as to the reasonableness of distinctions based solely on race or as to the inequalities which result from racial segregation, the evidence in this case conclusively demonstrates that there is no reasonable basis for Sweatt's exclusion from the University of Texas Law School and that the so-called segregation here involved results in gross inequalities in the opportunity to acquire a legal education. Even if the very standard adopted in *Plessy*—that *reasonable* distinctions between white and colored people are constitutional—is here adopted, the unreasonable exclusionary law of Texas should be invalidated, not upheld.

In *Cummings* v. *Richmond County Board of Education*, 175 U. S. 528 (1899), the county school board, while continuing to maintain two white high schools, closed the only county high school accommodating 60 colored children in order to use the building to provide primary school instruction for more than 200 Negro children who were then being denied primary school education. An injunction was sought to restrain the school board from using public tax funds to maintain the white high schools. The plaintiff did not attack the validity of the segregation statute. This Court, referring to argument at the bar that ". . . the vice in the common school system in Georgia was the requirement that the white and colored children of the state be educated in separate schools", said: "But we need not consider that question in this case. No such issue was made in the pleadings. Indeed, the plaintiffs distinctly state that they have no objection to the tax in question so far as levied for the support of primary, intermediate and grammar schools, in the management of which the rule as to separation of the races is enforced. We must dispose of the case as it is presented by the record.'' 175 U. S. 528, 543-544. This Court upheld the State court's refusal to grant the requested injunction because ''. . . if that were done, the result would only be to take from white children educational privileges enjoyed by them, without giving to colored children additional opportunities for the education furnished in high schools'' (p. 544). This Court expressly stated that ''different questions might have arisen'' if the plaintiffs had instituted ''some appropriate proceedings'' (p. 545).

Nine years later came *Berea College* v. *Kentucky,* 211 U. S. 45 (1908), affirming the conviction of Berea College for the violation of a Kentucky statute which prohibited any corporation or person from operating a school with both white and Negro students. This Court upheld the conviction on the ground that since Berea College was incorporated in Kentucky under a charter which reserved to the State the power to amend the corporate charter, the statute merely amended the corporation's charter, and did not deprive the corporation of any property rights. This Court said: ''. . . it is unnecessary for us to consider anything more than the question of its validity as applied to corporations. . . . Even if it were conceded that its assertion of power over individuals cannot be sustained, still it must be upheld so far as it restrains corporations.'' 211 U. S. 45, 54.

In *Buchanan* v. *Warley,* 245 U. S. 60 (1917), invalidating racial segregation in housing, this Court recognized that the constitutionality of laws requiring separate schools for white and colored children had never been decided by the Supreme Court, stating (245 U. S. 45, 81):

> ''As we have seen, *this court* has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and *courts of high*

authority have held enactments lawful which provide for separation in the public schools of white and colored pupils where equal privileges are given." (Emphasis supplied.)

In *Gong Lum* v. *Rice,* 275 U. S. 78 (1927), a Chinese resident in Mississippi, whose constitution requires the maintenance of separate schools for "white" and "colored" children, was refused admission to a white high school on the ground that she was not a Caucasian. There was no school for Chinese children. She sought a writ of mandamus to compel her admittance to the white school. No question was raised as to the constitutionality of maintaining separate schools. She agreed with the policy of segregation of white people and Negroes, but argued (1) that "because there are no separate public schools for Mongolians . . . she is entitled to enter the white public schools" (275 U. S. at 82); and (2) that "colored" meant "Negro" and hence the State could not classify her as "colored". The following excerpts from her brief indicate the nature of her argument:

> "If there is danger in the association [of white and Negro] it is a danger from which one race is entitled to protection just the same as another. The White race may not legally expose the Yellow race to a danger that the dominant race recognizes and, by the same laws, guards itself against. The White race creates for itself a privilege that it denies to other races; exposes the children of other races to risks and dangers to which it would not expose its own children. This is discrimination." (P. 10, Brief of Plaintiff in Error, No. 29, Oct. Term, 1927.)
>
> "Color may reasonably be used as a basis for classification only in so far as it indicates a particular race. Race may reasonably be used as a basis. 'Colored' describes only one race and that is the negro." (P. 14, Brief.)

"... No child can complain that he is required to associate in school with children of his own race." (P. 16, Brief.)

"But here, the State of Mississippi ignores the generally accepted meaning of the word 'colored' as denoting a peculiar race, and applies it as a simple adjective describing all persons who do not belong to the white race." (P. 16, Brief.)

This Court rejected Miss Lum's allegation that there was no other school for her by pointing out that there were schools for colored children, and rejected her contention that she should be classified as "white" rather than "colored".

Although the question of the constitutional validity of laws requiring separate schools was not raised, this Court said: "Were this a new question, it would call for very 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 to settle without intervention of the Federal courts under the Federal Constitution." 275 U. S. 78, 85. The only decisions cited in support of this statement were *Plessy* v. *Ferguson*, *Cumming* v. *Board of Education*, and several State and lower Federal court decisions. As already shown, the constitutionality of separate schools for white and colored people was not involved in *Plessy* or in *Cumming*, or in *Gong Lum*. Moreover, the court's statement in *Gong Lum* shows that that issue was not examined and decided on the basis of "full argument and consideration".

In *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1939), this Court merely assumed that laws providing separate schools are constitutional when it said that the State "sought to fulfill" its constitutional obligation "by furnishing equal facilities in separate schools, a method the validity of which has been sustained *by our decisions*. *Plessy* v.

Ferguson, 163 U. S. 537, 544; *McCabe* v. *Atchison, T. & S. F. Ry. Co.,* 235 U. S. 151, 160; *Gong Lum* v. *Rice,* 275 U. S. 78, 85, 86. Compare *Cumming* v. *Board of Education,* 175 U. S. 528, 544, 545." (305 U. S. 337, 344.) (Emphasis supplied.)

But the constitutional validity of separate schools for white and colored students was not involved in the *Gaines* case. There were no separate law schools; there was only a white law school in Missouri to which a Negro was denied admission solely because of his color. The State contended that there was no denial of equal protection because the statute provided that Negro residents of Missouri be given tuition assistance in law schools in other States. This Court said (305 U. S. 337, 348):

> ". . . the question whether the provision for the legal education in other states of negroes resident in Missouri is sufficient to satisfy the constitutional requirement of equal protection . . . [is] the pivot upon which this case turns."

This Court held that the provision for paying tuition fees of Missouri Negroes to study outside the State, while providing education directly to whites inside the State, did not satisfy the equal protection clause.

Moreover, the "decisions" cited do not support the Court's statement. *Plessy* v. *Ferguson* involved transportation, not education. *McCabe* v. *Atchison, T. & S. F. R. Co.,* 235 U. S. 151 (1914), involved "separate" transportation accommodations deemed by this Court to violate the constitution, but did not even mention the constitutionality of separate schools. *Gong Lum* v. *Rice* did not involve the issue of the constitutionality of State laws requiring separate schools; and its *dictum* that such laws were constitutional was made without "full argument and consideration" and was based solely on State and lower Federal court decisions and on two decisions by this Court which did not involve that issue. And in *Cumming* v. *County Board of Education* this Court specifically stated that the constitutionality of laws requiring separate schools was not an issue in the case.

Sipuel v. *Board of Regents,* 332 U. S. 631 (1948), like the *Gaines* case, involved a State's refusal to admit a qualified Negro applicant to the only Law School maintained by the State. This Court held that such refusal denied Miss Sipuel equal protection of the laws and that the State was obliged to provide law school facilities for her "as soon as it does for applicants of any other group." The constitutionality of laws requiring separate schools was not involved. This is shown by the subsequent history of this case. After the issuance of this Court's mandate, the State promptly established a "separate" law school for Miss Sipuel. She thereupon filed a motion in this Court seeking to compel the State to abide by this Court's mandate. In denying this motion, this Court specifically stated: "The petition for certiorari in *Sipuel* v. *Board of Regents* did not present the issue whether a state might not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes. On submission, we were clear that it was not an issue here." *Fisher* v. *Hurst,* 333 U. S. 147, 150 (1948).

IV. THE SEPARATE BUT EQUAL THEORY IS INCONSISTENT WITH THE BASIC AIMS OF OUR NATION. ITS APPLICATION ADVERSELY AFFECTS OUR NATIONAL WELFARE AND OUR INTERNATIONAL RELATIONS. IT HAS BEEN ESPECIALLY DETRIMENTAL BY ITS SANCTION OF A SEGREGATED EDUCATIONAL SYSTEM WHICH HAS UNIFORMLY RESULTED IN INFERIOR EDUCATION FOR COLORED PEOPLE AND ALSO FOR WHITE PEOPLE. IN THE LIGHT OF THESE HARMS THIS COURT SHOULD NOT EXTEND CONSTITUTIONAL APPROVAL TO THE THEORY, PARTICULARLY AS APPLIED TO PUBLIC EDUCATION.

(1) **The American Ideal is wholly inconsistent with compulsory segregation.** Our basic aim of equality of opportunity for all without regard to race was pithily expressed in the Declaration of Independence: "all men are created equal." President George Washington expressed it in another way when he characterized this Nation as one which "gives to bigotry no sanction, to persecution no assistance."[4] Time and again we, the people, fought bloody war to preserve this ideal. We enshrined it in the Constitution after the internecine holocaust of Civil War. The guarantee of "equal protection of the laws" became the epitome of our national policy against racial and religious discrimination. This persistent core of hostility against racial discriminations has been embodied in numerous acts of Congress,[5] decisions of this Court, orders and pronouncements

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[4] Geo. Washington's letter of Aug. 1790 to Hebrew Congregation in Newport, Rhode Island, 30 Washington's Letter Books 19.

[5] *E.g.*, 12 Stat. 805; 13 Stat. 329, 351, 537; 14 Stat. 27, 379, 457; 16 Stat. 3, 67, 140; 18 Stat. 336; 21 Stat. 44; 40 Stat. 1201; 48 Stat. 23; 50 Stat. 320, 357; 52 Stat. 815; 53 Stat. 856, 937, 1148; 54 Stat. 593, 623, 1214; 55 Stat. 363, 405, 491; 56 Stat. 575, 643; 57 Stat. 153; 58 Stat. 536, 874; 59 Stat. 473; 60 Stat. 1030.

of the President,[6] and solemn treaties and international agreements to respect and observe "human rights and fundamental freedoms for all without distinction as to race."[7]

The theory of "separate but equal", imposing on groups the "brand of inferior status," is inconsistent with this American Ideal. Experience, understanding, and logic have all demonstrated that when people are forbidden by law, solely because of their race or religion, from using or doing what others may use or do, they are being treated separately, but not equally. And the facilities which are so separated are not, and cannot, in the light of the realities of life, be regarded as equal.

(2) **The "separate but equal" theory has adversely affected the welfare of our whole Nation, to the detriment of white people as well as colored people.** Its application to support laws requiring separation of people on the basis solely of race has, as Justice Harlan foresaw (*Plessy* v. *Ferguson,* 163 U. S. 537, 560), deepened the divisions between our white and colored population. It stimulates guilt feelings, tensions, hate and fear—whites are afraid of Negroes whom they wrong, just as Negroes hate and fear those who under the rationalization of white supremacy oppress the Negro. It forces too many people to think of

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[6] *E.g.,* Exec. Orders 8587 (5 F.R. 4445); 8802 (6 F.R. 3109); 9346 (8 F.R. 7183, 15419); 9808 (11 F.R. 14153); 9980 (13 F.R. 4311); 9981 (13 F.R. 4313). See President Truman's speech at Lincoln Memorial June 29, 1947 (93 Cong. Rec. A-3505) and Messages to Congress, January 7, 1948 (H. Doc. 493, 80th Cong., 2nd sess.); Feb. 2, 1948 (H. Doc. 516, 80th Cong., 2nd sess.); Jan. 5, 1949 (H. Doc. 1, 81st Cong., 1st sess.); Jan. 4, 1950 (H. Doc. 389, 81st Cong., 2nd sess.).

[7] *E.g.,* Charter of the United Nations, 59 Stat. 1031, 1045-1046, 1213; Potsdam Agreement, Aug. 2, 1945; Treaties of Feb. 10, 1947 with Italy, Rumania, Bulgaria and Hungary (93 Cong. Rec. 6307, 6567, 6573, 6578); Resolution 41 of March 7, 1945 at Inter-American Conference on War and Peace at Mexico City which adopted the Act of Chapultepec (Dept. of State Publ. 2497, p. 109).

themselves as Negroes or as whites, rather than as Americans.

By institutionalizing prejudice, it obstructs efforts to dissolve prejudices through the processes of education and voluntary adjustments. It is "the cornerstone of the elaborate structure of discrimination against some American citizens" and has practically always resulted in "separate and *unequal* facilities for minority peoples." *To Secure These Rights*, Report of the President's Committee on Civil Rights, pp. 81, 166 (Govt. Printing Off., Oct. 29, 1947) (emphasis supplied). It weakens our military strength by preventing maximum competence in our soldiers and defense industry workers, for modern warfare requires not only skilled technicians but a high order of learning ability. It fosters a spirit of violence to civil rights which renders less secure the position of all Americans against other threats to American liberty and freedom. It obstructs economic progress and drags down the whole economic level by reducing markets, curtailing production, and preventing full use of all our potential talents and productive abilities. It causes wasteful duplication of many facilities and services. The color line cannot protect any group from the grave effects and high costs of crime, poverty, relief burdens and disease which it supports. "Bacteria are broad-minded."

The greatest damage of all, however, is the damage to the soul. "The pervasive gap between our aims and what we actually do is creating a kind of moral dry rot which eats away at the emotional and rational bases of democratic beliefs." *To Secure These Rights, supra,* p. 139.

(3) **Our international relations are impaired.** The "separate but equal" theory gravely imperils our relations with the peoples of the world. "It is a day . . . when the eyes of men of all races the world over are turned upon us to see

how the people of the most powerful of the United Nations are dealing *at home* with a major problem of race relations." Foreword by President, Carnegie Corporation, in Gunnar Myrdal *An American Dilemma, The Negro Problem and Modern Democracy* p. viii (1944). Racial segregation in the United States is widely advertised throughout the world. It was utilized by the Nazis and Japanese during World War II in their anti-American propaganda. It has aroused the ire of nations otherwise friendly to us. And it is now continuously and vociferously flaunted by the communist countries in their propaganda against us in this period of the "cold war". See *To Secure These Rights, supra,* pp. 146-148; *Segregation in Washington,* Report of the National Committee on Segregation in the Nation's Capital, pp. 4-10 (Dec. 10, 1948); *Final Report,* FEPC (June 28, 1946), p. 6. Secretary of State Dean Acheson has given expert witness that "the existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries. . . . An atmosphere of suspicion and resentment in a country over the way a minority is being treated in the United States is a formidable obstacle to the development of mutual understanding and trust between the two countries." Letter to FEPC, May 8, 1946, quoted in *To Secure These Rights, supra,* 146-147. And former Secretary of State George C. Marshall, a General of the Army and certainly no starry-eyed dreamer, emphasized at the opening session of the United Nations General Assembly in Paris in the fall of 1948: "Systematic and deliberate denial of basic human rights lies at the root of most of our problems and threatens the work of the United Nations." Quoted in Benjamin V. Cohen, "Human Rights under the United Nations Charter," 14 Law and Contem. Probl. 430, 436 (Summer, 1949). The ugly paint of Jim-Crow obscures the commodity of democracy which we seek to export.

(4) **Segregated education is inferior.** The "separate but equal" theory has been particularly evil in its impact on education. The President's Commission on Higher Education, consisting of 28 eminent civic and educational leaders, said in its Report (*Higher Education for American Democracy*, Vol. II, p. 31; Dec. 1947): ". . . the separate and equal principle has nowhere been fully honored. Educational facilities for Negroes in segregated areas are inferior to those provided for whites. Whether one considers enrollment, over-all costs per student, teachers' salaries, transportation facilities, availability of secondary schools, or opportunities for undergraduate and graduate study, the consequences of segregation are always the same, and always adverse to the Negro citizen." Even the four minority members of the Commission who shrank from the Commission's condemnation of segregation in education, admitted that "gross inequality of opportunity, economic and educational, is a fact." *Ibid.*, p. 29.

The 1944-46 Biennial Survey of Education in the United States, released by the Office of Education, Federal Security Agency, on July 29, 1949 (*Statistical Summary of Education, 1945-46*, pp. 28-29) contains the following illustrative comparisons for the jurisdictions which require separate schools for white and Negro pupils:

	White Schools	Negro Schools
Average length, school term	175 days	170 days
Average pupil-teacher load	28 pupils	35 pupils
Current expense per pupil in average daily attendance	$ 104.66	$ 57.57
Average salary of teachers	$1640.	$1134.

In Mississippi, the white and Negro schools compare as follows:

	White Schools	Negro Schools
Average length, school term	182.6 days	140.7 days
Average pupil-teacher load	30 pupils	42 pupils
Current expense per pupil in average daily attendance	$ 75.19	$ 14.74
Average salary of teachers	$1165.	$427.

And in Texas, where this case arises, the comparisons are as follows:

	White Schools	Negro Schools
Average length, school term	175 days	169 days
Average pupil-teacher load	28 pupils	31 pupils
Current expense per pupil in average daily attendance	$ 123.14	$ 91.22
Average salary of teachers	$1695.	$1315.

The President's Commission on Higher Education noted that "nowhere" in the 17 States which require separate schools for whites and Negroes "did there appear a single institution that approximated the undergraduate, graduate, and professional offerings characteristic of a first-class State university." *Higher Education for American Democracy, supra,* vol. II, p. 31; see also *To Secure These Rights, supra,* pp. 63-64.

These inequalities are not coincidental. ". . . segregation, which is the proclaimed purpose of the Jim Crow legislation, is financially possible and, indeed, a device of economy only as long as it is combined with substantial discrimination." Gunnar Myrdal, *supra,* p. 629. "No small part of the motive back of the South's legal separation of the races in transportation and education is the fact that services for the two races can be made unequal only when administered to them separately. The phrase 'separate and equal' symbolizes the whole system, fair words to gain unfair ends." Gunnar Myrdal, *supra,* vol. II, p. 1353.

(5) **Discrimination in Education breeds discrimination in many other fields.** Educational qualifications are often the basis for exercising citizenship rights and participating in civil government and military affairs. One's educational level also generally affects his opportunity to secure better employment and housing, to enjoy improved recreation, to create in literature and science, to achieve success in business and industry, and to obtain the decencies and amenities of social relations in a democracy. It goes without saying,

therefore, that those whom discrimination denies equal opportunity for education generally find themselves subjected to disadvantages, frequently of a discriminatory nature, in other aspects of life.

(6) **The "separate but equal" doctrine should be rooted out of education NOW.** In the light of the detrimental effects of the "separate but equal" theory, and the widespread inequalities between white and Negro public schools there is no valid justification for subjecting public education to the cancerous myth of "separate but equal". That myth should be rooted out NOW. The United States, having twice fought in World Wars "to make the world safe for democracy", is ready for democracy at home. The first place for democracy rightly ought to be the tax-supported school, which is "perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people" and "is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools . . ." Justices Frankfurter, Jackson, Rutledge and Burton, concurring in *McCollum* v. *Board of Education,* 333 U. S. 203, 216, 228 (1948).

Those of small and closed minds, who see the end of the white race in America if white and colored students are permitted to attend the same school, are increasingly in the minority, in the South as well as in the North. They are the same type of people who predicted "chaos" when Negro children were first allowed to be educated (see W. E. B. DuBois, *Souls of Black Folk* (1903), p. 32); when this Court ruled that no State may deny to Negroes, solely because of their race, the right to sit on a jury, or to vote, or to purchase and occupy a home, or to work for a living; when this Court ruled Jim Crow laws inapplicable to interstate travel; and, in fact, whenever the Negro made any advance toward first-class citizenship. Their phobias turned out to be fantasies. There were no riots or revolutionary disturbances.

Similarly, there is no foundation for such phobias with respect to the achievement of democracy in education. Experience has shown that integration in education can be successful, in the South as well as the North. The University of Maryland Law School; Catholic University and Georgetown University in the District of Columbia; West Virginia State University; Union Theological Seminary in Richmond, Virginia; Black Mountain College in North Carolina; and the Armed Forces officers' schools at Fort Benning in Georgia, Randolph Field in Texas, Fort Sill in Oklahoma, Fort Knox in Kentucky, Fort Bragg in North Carolina—all of these are in the South. All of them have Negro and white students, some wholly integrated, some partially integrated, all without untoward incident. (Thompson, *op. cit.* footnote 2 *supra,* at p. 111). These, and many other experiences with segregation and integration have proven "that where the artificial barriers which divide people and groups from one another are broken, tension and conflict begin to be replaced by cooperative effort and an environment in which civil rights can thrive." *To Secure These Rights, supra,* p. 83; *Final Report,* FEPC, p. viii (1946).

The unfortunate truth is that segregated and unequal education will not disappear overnight. The backlog of deficiency, the habits of the people, the accumulated patterns of residential segregation, and other factors are not insignificant obstacles. But the elimination of the State-imposed restrictions of law will provide opportunity for voluntary adjustment by the people. Intercultural problems which the abolition of segregation in education will raise in some schools will not be insoluble problems. Democratic education has the capacity to meet them. In any event, none of those possible intercultural problems will be anywhere as great as those raised by enforced segregation.

The future of democracy itself is at stake. The welfare of our Nation, the dictates of religion, the logic of reason, the Constitutional promise of equal protection and equal opportunity, all make it clear that the relations of our various racial and cultural groups must rest, not merely on employment and philanthropy, but on their integration into the democratic whole. Education and the removal of arbitrary restrictions are two of the best tools to accomplish such integration. It cannot be accomplished while States are permitted to discriminate in education, in violation of the Constitutional guarantee of "equal protection of the laws".

Respectfully submitted,

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