In The

Supreme Court of the United States

October Term, 1949

No. 44.

HEMAN MARION SWEATT, Petitioner,

v.

THEOPHILUS SHICKEL PAINTER, ET AL.

On a Writ of Certiorari to the Supreme Court of the State of Texas.

BRIEF OF THE STATES OF ARKANSAS, FLORIDA, GEORGIA, KENTUCKY, LOUISIANA, MISSISSIPPI, NORTH CAROLINA, OKLAHOMA, SOUTH CAROLINA, TENNESSEE and VIRGINIA, AMICI CURIAE IN SUPPORT OF RESPONDENTS.

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HEMAN MARION SWEATT,
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THEOPHILUS SHICKEL PAINTER, ET AL,
Respondents.

Brief of the States of Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee and Virginia, Amici Curiae.

STATEMENT

This brief is filed by the States of Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, and Virginia in accordance with Rule 27 of this Court.

The purpose of this brief is to reply to the argument which is being urged in this case by the petitioner and those organizations amici curiae supporting him, that this Court should reverse all of its former decisions and declare invalid the provisions of the Constitutions and statutes of seventeen States of the Union, as well as Acts of Congress applicable in the District of Columbia, providing for separate but equal public educational facilities.

A. Purpose and Scope of the Brief

These States do not consider that it is appropriate to take sides in the litigation on the question of fact which is, or was at one time, involved in the case as to the substantial equality of the facilities provided at the law schools in the State of Texas. Indeed, it is doubtful if the record in this case presents any fact issue which is not now moot and beyond the necessity of review by this Court. The determination of equality of the separate Negro law school was made by the State Courts upon evidence dealing wholly with an interim law school which no longer exists. Since the trial, an entirely new and enlarged Negro law school has been established in Texas and is available to petitioner. Except for petitioner's contention that separate schools, even if equal, should be held to be unconstitutional, nothing would remain for this Court to do but affirm or remand the case to the State Court for trial on the existing facts. This estimate of the situation is confirmed by the fact that petitioner grounds his whole appeal and most of his brief on the contention that action of the States in furnishing separate schools for white and Negro students is violative of the Fourteenth Amendment regardless of their degree of equality.

Therefore, this brief is to be confined to the basic constitutional question which, after many decisions thereon by this Court and other Federal and State Courts, the petitioner and those organizations supporting him amici curiae, have again presented to this Court. We shall here be concerned only with the question as to whether this Court should overrule a long-settled principle which vitally and crucially affects the whole public school and higher educational systems of one-third of the States of the Union.

B. Interest of These Amici Curiae

This basic constitutional question is of vital importance to the States herein represented. They have spent millions of dollars in the establishment of separate school systems

and other institutions in accordance with the previous Supreme Court decisions which petitioner seeks to have this Court "review" and "overrule." Petitioner does not limit his attack to the Texas situation. He asks this Court to render a decision which would strike down the separate school laws of at least seventeen States and the Acts of Congress as to the District of Columbia.[1]

These States and their local political subdivisions provide for separate grade schools, high schools, colleges, parks, swimming pools, eleemosynary institutions, and other public facilities in accordance with laws and regulations designed (1) to furnish equal opportunities, privileges, and services, and (2) at the same time protect the public comfort, peace, and order. The relief sought by petitioner and supported by his amici curiae would declare all these regulatory measures unconstitutional. As said in the amicus curiae brief of the C.I.O.:

> "Every argument here advanced against the validity of the Texas constitutional requirement of segregated education is equally applicable to all other segregation based on race differences." (p. 8.)

Petitioner argues that State maintenance of separate public facilities for members of the two races, even if equal in every respect, is unconstitutional. He would destroy the long-recognized police power of the States to maintain the public order, peace, and safety of both races, by furnishing equal educational and recreational advantages under circumstances which would preserve public support, and the comfort, peace, and happiness of both races.

To say that these Southern States are deeply concerned is stating it but mildly. The result of such a decision would be a tragedy to the public generally, both white and Negro, in the States concerned. Support for this position is found in the substantial minority report made by the only mem-

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1/ These constitutional provisions and laws are set out in the Appendix, p. 37.

bers of the President's Commission on Higher Education who actually know the conditions in these States, as follows:

> "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]

It is difficult to conceive that this attack on the great body of law upon which the public educational systems of seventeen of our States and the District of Columbia is founded, will gain any support in this Court. Since the certiorari has been granted and the case set down for hearing and argument we find that it is being urged that this Court has "wrongly decided" and should "reconsider" and "reverse" its well considered decisions upholding the right of the States to furnish equal educational opportunities in separate schools.

It is said in the briefs that this Court should "boldly" retrace its steps and give to the Fourteenth Amendment a new meaning, contrary to all contemporary as well as subsequent understanding of it. We can well wonder if the brief-makers could not have more properly used the word

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2/ Members signing this report were: 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.

"recklessly" in the argument they make to this Court. They seem to assume that heretofore great judges and the courts upon which they served were unable to understand and properly construe this fundamental law. They would ignore the conditions of life, the sentiment, thinking, and feelings, of this large segment of our population, with which they are obviously unfamiliar, and futilely, we trust, attempt to change human relationships by getting this Court to adopt a repudiated and doctrinaire construction of the Fourteenth Amendment and infuse in it a meaning never embraced within its scope.

In the seventeen States in which the systems of separate public schools are at stake, the decision in this case is of serious and grave concern. No more important and far reaching question has been presented to this Court in this generation.

ARGUMENT

I.

Equal provisions for both races in separate schools are necessary to maintain public education and public order in the State affected, and they do not constitute discrimination.

The States herein represented recognize that in the operation of their public schools they must not discriminate against any individual, group, or race. They recognize that as long as it is necessary in the interest of public order and safety for them to separate children of the two races in public schools, the separate schools must offer equal facilities so that equal educational opportunities are available to the total student population. This is required by their own laws as well as by the Fourteenth Amendment. These States say that it may be that their own laws have not always been followed in this respect by their educational authorities and local school districts. It may be that in some instances schools for Negroes have fallen below the standards of schools maintained for whites. Yet in some

districts the reverse has been true. In both cases the resulting discrimination to the white or the Negro arises not from the law itself, but from a failure of the authorities to administer the law as its terms require. In either case the individuals affected are entitled to relief through court orders either (1) requiring improvements of the inferior facilities, or (2) admission to the superior facilities.

Thus, discrimination is not implicit in separate schools. If so, a State could not constitutionally maintain separate colleges for men and women. To say that a college for Negroes with equal facilities and an equal number of equally qualified Negro professors is unequal to a corresponding college for whites, is to brand the Negro race with an inferiority to which these States do not subscribe.

Southern laws requiring separate schools apply equally to Negroes and whites. Negroes are not "segregated" any more than the whites are "segregated." In some States and in many cities and school districts Negroes comprise the majority group. The students are given equal educational opportunities in separate schools because these States have determined that to be the only plan by which both public education of their youth and the public support, harmony, and order can be maintained.

Petitioner and his amici curiae beg the question when they argue that separate schools for Negroes and whites, even if equal, are discriminatory and unconstitutional. If they are equal, or substantially so, they are not discriminatory. This is the whole premise upon which previous decisions of this Court approving separate equal facilities have been based. It properly assumes that with the same physical facilities, a given number of Negro students and Negro teachers can have a school offering educational opportunities equal to that of similar physical facilities occupied by the same number of white students and teachers.

As heretofore stated, nothing but a belief in racial inferiority could compel one to doubt the possibility of maintaining equal separate schools. It is safe to say that this

belief is not held by petitioner, his amici curiae, these amici curiae, or this Court. Then of what does petitioner complain in the present system? Is it not a complaint against the lack of personal contact and intermingling of the races socially in Southern schools? Unfortunately, that seems to be the answer; and unfortunately, that brings us to the real necessity for separate schools at this time if public schools and public order are to be maintained simultaneously in these States. Petitioner would ignore and ask this Court to destroy the police power of the States under which they meet the need for separation in public facilities in order to prevent racial conflict, strife, and violence. But this power and the need of its exercise cannot be ignored if the full scope of this case is to be understood.

The racial consciousness and prejudices which exist today in the minds of many people if regrettable and unjustified, are a reality and must be dealt with by States which are required to furnish equality of educational opportunities and at the same time preserve harmony and peace between the two races in their midst. This condition is not understood by many who do not live in it and view it from afar. But the possibility of its existence is beyond question even in the Northern States where there is no density of Negro population. Therein have occurred the Harlem, Chicago, and Detroit race riots.[3] More recently, in St. Louis, Missouri, on June 21, 1949, a public swimming pool was opened to both races. *Life* magazine for July 4, 1949, pages 30-31, reported:

> "... But when the city opened all of its swimming pools to Negroes on June 21 for the first time in history, progress stopped. That afternoon police had to escort 40 Negro swimmers through a wall of 200 sullen whites at the Fairground Park pool. After nightfall bands of white hoodlums took off after any Negroes found anywhere near the park, beating and kicking

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3/ Myrdal, *An American Dilemma,* p. 566; Murray, *The Negro Handbook,* 1949, pp. 108-110, 190-191.

> them *(opposite)*. It was 2 a.m. before police got things under control. Miraculously nobody was killed, but 15 persons were hospitalized, 10 of them Negroes. It was St. Louis' first serious race riot, and it underscored the inflexibility of the color-line barrier dramatized by the movie *Lost Boundaries* (pp. 64-66). Mayor Joseph Darst quickly took what for practical reasons was perhaps the only possible action. Segregation was restored to St. Louis swimming pools."

The same kind of thing happened when the races were mixed in public swimming pools operated by the Department of the Interior in Washington, D. C. In the issue of *Time* magazine for July 11, 1949, on page 21 under a picture of the violence, the following was reported under the heading "Not Ready Yet":

> "These pictures show what happened in the nation's capital last week when the Interior Department decided to enforce a non-segregation policy in public pools where only whites had swum before. The result was two days of small-scale rioting at the Anacostia pool, where 17-year-old Joan Sexton suffered two broken toes under the hoofs of a park policeman's mount *(left)* and eight other persons were injured in a series of nasty scrapes which were broken up finally by police. An Interior Department official blamed the rioting on 'Communist agitators,' regretfully closed the pools, 'until further notice.' 'Washington,' observed the *Evening Star,* 'is not ready for non-segregated swimming.' "

In East St. Louis, Illinois, it was decided by the local Board of Education to have mixed schools on January 30, 1950, after exercising their right to have separate schools for 85 years. About 100 Negro students enrolled in schools previously attended only by white children. Two white children transferred to a school which had been all Negro. At one school there was a noticeable decrease in the number of white students. But police authorities even in that Northern State anticipated violence. All police officers were assigned to 12-hour shifts, detectives changed to their

uniforms, and as many as six men rode in one squad car to guard against any outbreak on the first day of the integration. Nine squad cars were on duty, although normally there are only three in East St. Louis, and five cars from the St Clair County sheriff's department stood by.[4]

And in Alton, Illinois, on January 23, 1950, 175 Negro students appeared at the white schools and attempted to secure admission to the classrooms. The Alton Evening Telegraph, in its lead paragraph of the page-one-story said, "An air of tension prevailed throughout the Alton School system today as 175 Negro students appeared at white schools and sought admission . . ." After presenting themselves at white schools for three days, they returned to the schools provided for Negroes and brought suit to stop payment of State funds to the Alton School District. Various forms of racial disturbances followed.[5]

If these conditions exist in the North, it should be understood that they may exist to a greater extent in the more heavily mixed population of the South.

The Southern States trust that this Court will not strike down their power to keep peace, order, and support of their public schools by maintaining equal separate facilities. If the States are shorn of this police power and physical conflict takes place, as in the St. Louis and Washington swimming pools, the States are left with no alternative but to close their schools to prevent violence. The swimming pools were closed for that reason. However, because of this Court's previous decisions on the constitutionality of equal separate facilities, the swimming pools in St. Louis were reopened on a separated basis. If these decisions are overruled, the power to prevent conflict and violence in schools, pools, and other public facilities will be reduced to (1) termination of the facilities or (2) continuation with police protection for the few who elect to use the facilities. Either

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4/ East St. Louis Journal, Jan. 30, 1950; New York Times, Jan. 31, 1950.

5/ Alton Evening Telegraph, Feb. 5 through 8, 1950.

alternative would destroy the public school and recreational systems of the Southern States.

Petitioner and supporting amici curiae have completely ignored the realities and true reasons for separate educational facilities in the States, North and South, which find it necessary contrary to their assertions, segregation laws are not maintained upon any contention of racial superiority of the majority or minority group. White citizens and students are not always in the majority. That is an idea which passed with the last century and is heard of now only in the opposing briefs. Nor are segregation laws based upon discrimination, prejudice, or hatred.

It can safely be said that there exists no desire to discriminate and no prejudice or hatred against Negroes in the minds of a large majority of white people in the South. On the other hand, it must be admitted that there does exist in the minds of majority segments of both whites and Negroes an abiding prejudice against intimate social intermingling of the two races. Experiences of the past have left marks that no laws or court decisions can erase overnight. It is a mistake for any "observer from afar" to assume that prejudice and fear against "crossing the color line" in intimate social contact are limited to the Southern white man alone. They exist just as strongly in the average Negro man of the South. Negro men do not want their daughters, wives, and sweethearts dancing, dating, and playing with white men any more than white men want their women folk in intimate social contact with Negro men. "White trash" is the hated name which Southern Negroes apply to white men who keep the company of their women folk. Worse names are applied to Negro men who "cross the line." The result in the South today is almost universal antipathy toward intimate mixed social relationships. The results of the disregard of these circumstances in the past have been tragic to both races, physically, socially, and politically. Peace and order have been broken here as in St. Louis, Washington, Chicago, and Detroit.

Schools necessarily involve social contact. With mixed classes, recreation, dancing, games, and social relationships being obnoxious to a majority of both races, the Southern States, with Supreme Court approval, have always attempted to furnish the same facilities and advantages to children of both races in separate schools.

One cannot understand the problem of the State governments unless he is willing to know and face the realities connected therewith. Briefly summarized, the Southern States know that intimate social contact in the same schools will lead to withdrawal of public support of the schools, to physical and social conflicts, and to discontent and unhappiness for both races. Yet the States are faced with two duties:

(1) To furnish equal educational opportunities to their youth, both white and Negro; and

(2) To maintain the public welfare, peace, safety, and happiness for all their citizens, both white and Negro.

Today the States herein represented cannot accomplish both of these objectives except by the maintenance of equal separate public facilities. If this is held to be unconstitutional, the States will fail in one or both of these objectives. Anything to the contrary from those who ridicule this condition from afar should be considered most carefully by this Court. They may think they know our conditions or that they can force an immediate change. On this point the Court would serve all concerned by listening to liberal and fair-minded men who have no prejudice but who have been in the South and know the conditions.[6] The conclusions of a few of them follow:

1. Booker T. Washington, outstanding Negro educator and statesman, said in his *Up From Slavery:*

". . . In all things that are purely social we can be

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[6] As said by Booker T. Washington: "As a rule, the place to criticize the South, when criticism is necessary, is in the South—not in Boston." *Up From Slavery,* Booker T. Washington, p. 201.

> as separate as the fingers, yet one as the hand in all things essential to mutual progress." (p. 222)
>
> "The wisest among my race understand that the agitation of questions of social equality is the extremest folly, and that progress in the enjoyment of all privileges that will come to us must be the result of severe and constant struggle rather than of artificial forcing . . ." (*Up From Slavery* p. 223)

2. Dr. Ambrose Caliver, leading Negro educator and a member of the N.A.A.C.P., who was a specialist on education of Negroes in the U. S. Office of Education, 1930 to 1945, and senior specialist in the higher education of Negroes since 1945:[7]

> ". . . 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, *National Survey of Higher Education for Negroes*)

3. Federal District Judge John Paul: (*Simmons v. Atlantic Greyhound,* 75 F. Supp. 166, 1947)

> ". . . 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."

4. Dr. Benjamin Floyd Pittenger, educated in the public schools of Michigan, graduated from Michigan State Normal and the University of Chicago, who taught in the Michigan public schools, in the Universities of Minnesota and Colorado, and became dean of the School of Education of The University of Texas (R. 319) said:

7/ *Who's Who in America* 1950-51, p. 409.

" . . . my fundamental feeling (fol. 536) about the matter rests in what I conceive to be the effect of the elimination of segregation on the higher level upon segregation upon the lower level. . . . I am unable to see how segregation could be constitutionally maintained below the college level and be unconstitutional at the college level, and so my feeling is that the—my principal fear of the breakdown of segregation on the higher level is what I conceive to be the breakdown, the influence upon segregation in the lower level . . ."

"My judgment is that if segregation were abandoned in the lower level, that it would become as a bonanza to the private white schools of the State, and that it would mean the migration out of the schools and the turning away from the public schools of the influence and support of a large number of children and of the parents of those children, and that those migrants and their parents are necessary because there would be additional tuition involved coming from a group of citizens who are the largest contributors to the cause of public education, and whose financial and moral support is necessary for the continued progress of public education." (R. 325, 326)

"However, that question, I have no means of knowing, but I think it is reasonable to believe that at the present time the attitude of Texas people being what it is to a very considerable degree, that the effect of the abandonment of segregation on the lower level would set back the public school movement in this state, and as one who has devoted his life to an attempt to improve it, I can't regard that with equanimity. If the teachers are not moved with the students, then what becomes of the colored teaching profession in Texas?" (R. 327)

5. Bi-Racial Conference on Education for Negroes in Texas, a committee composed of outstanding educators in Texas, including Dr. J. J. Rhodes, Negro, President of Bishop College; Dr. W. R. Banks, Negro, Principal of Prairie View College; Dr. H. E. Lee, Negro; Dr. T. D. Brooks, Dean of Graduate School, Texas A. & M.; Mrs. Joe E. Wessendorf, past president of the Texas Parent

Teachers Association; and Dr. T. W. Currie of the Austin Theological Seminary: (R. 323)

> "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." (Respondents' Original Exhibit 16, R. 322, 323)

6. Southern Members of President Truman's Committee on Civil Rights, including Senator Frank P. Graham of North Carolina, formerly President of the University of North Carolina and a liberal educator of national recognition living in the midst of this problem:

> "A minority of the committee favors the elimination of segregation as an ultimate goal but . . . opposes the imposition of a federal sanction. It believes that federal aid to states for education, health, research and other public benefits should be granted provided that the states do not discriminate in the distribution of the funds. It dissents, however, from the majority's recommendation that the abolition of segregation be made a requirement, until the people of the states involved have themselves abolished the provisions in their state constitutions and laws which now require segregation. Some members are against the nonsegregation requirement in educational grants on the ground that it represents federal control over education. They feel, moreover, that the best way to ultimately end segregation is to raise the educational level of the people in the states affected; and to inculcate both the teachings of religion regarding human brotherhood and the ideals of our democracy regarding freedom and equality as a more solid basis for genuine and lasting acceptance by the people of the states." (To Secure These Rights, pp. 166-167)

See also the minority report by Southern members of President Truman's Commission on Higher Education, quoted at page 4 supra, in which it was concluded:

> " . . . 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."

It is also worthy of note that both Presidents Franklin D. Roosevelt and Harry S. Truman, outspoken foes of racial discrimination and inequalities, apparently recognized the realities which require separate educational facilities in Southern States and that the system was not discriminatory. Neither advocated abolition of the system. This is especially significant in the case of President Truman because he has not submitted to the Congress the recommendation of the majority of his Civil Rights Committee as to mixed schools. Since he is from Missouri, which maintains separate schools and colleges, it is possible that he understands the reasonableness of local determination to meet local needs so long as the separate schools are equal.

As heretofore shown, loss of the right to furnish equal educational opportunities in separate schools would effectively destroy public education in many Southern States. This result would injure our Negro citizens as much if not more than our white citizens. Far more white people would be able to send their children to private schools and church schools. Without segregation the development of the public school systems of these various States would have been an impossibility. This would have been to the disadvantage of none more than the Negroes.

The tremendous strides which have been made in bringing about the equality of school facilities, teachers' salaries, and all other needs of the schools in these areas are disclosed in the records of these achievements. The fine and friendly relationships between the white and Negro people of the South result from mutual respect for each other and a realistic understanding by two different racial groups,

living side by side, of the problems involved in this situation.

The petitioner's contention in this case, if upheld by this Court, would not solve the problem. To suggest that by a decision in this Court our Negro citizens can be benefitted by changing the established law of this country is unrealistic. Indeed the reverse of the results sought would necessarily follow.

To illustrate this point—it may be stated that if the Meharry Medical School at Nashville, Tennessee, which is now operated on a separate basis for Negroes, were discontinued, only a small percentage of the students there enrolled could gain admission to the other medical colleges or schools even if all such schools of this country were operated upon a non-segregated basis. As now operated, this institution provides for medical education for about 650 students whose services as doctors are greatly needed in this country. The statement has been made by those well acquainted with the facts that upon discontinuance of this school only a very small percentage of the students could possibly get a medical education elsewhere. This is admitted by petitioner in his Appendix to his Brief on Certiorari, page xii, in which he condemns the "quota" system of Northern colleges.

In the many Negro colleges maintained throughout the South, students are trained for the teaching profession to be employed in our separate Negro schools and colleges. If these separate institutions should be discontinued in consequence of a decision of this Court, the result would be a real calamity for Negro education in this country. Actual experience in Northern mixed colleges shows that only a very small number of Negro students are able to meet admission requirements. The Northern college quota system would limit the admission of Negroes to less than 10 per cent of the student body in Texas and other Southern

States. Far more than that number now receive education in separate colleges.[8]

The only solution is the continuance of the system which permitted public schools to be maintained originally in both Northern and Southern States. The furnishing of equal educational privileges and opportunities to all through separate schools does not involve discrimination. If particular schools are unequal, proper relief is available to the individuals affected. If admittance to a separate grade school or university for whites is obtained by individual Negroes because of unequal facilities for their own race, it will be understood by those who are at fault. It will not cause a breakdown in public education generally. This is true because Southern people know and appreciate the fact that Negroes are entitled to equal educational opportunities, and they will share without conflict or resentment the result of any failure on their own part to provide equality.

On the other hand, the continued constitutionality of the separate system furnishes an incentive to Southern States to provide more and better schools, especially in higher education, as the only way in which separation can be maintained for peace, harmony, and the general welfare.

8/ Of the estimated 75,000 Negroes in colleges in 1947, 85 per cent were attending segregated schools and only 15 per cent were in mixed schools. *Religion and Race*: *Barriers For College,* Public Affairs Pamphlet No. 153. Likewise, 85 per cent of all Negro doctors and 90 per cent of all Negro dentists are trained in separate schools. *The Saturday Evening Post,* January 24, 1948. The operation of the quota system in the Northern colleges is explained in *Higher Education for American Democracy,* A Report of the President's Commission on Higher Education, Government Printing Office, 1947, p. 35.

II.

The constitutionality of separate equal schools has been settled by previous decisions of this Court, and they should not be overruled.

Petitioner's attack upon the decisions of this Court on this extremely important principle proceeds upon the contention that the decisions were based upon unconsidered action. It is charged that the constitutionality of separation of the races in equal facilities was not passed on by this Court. The mistake in this contention is evidenced by petitioner's later argument that these former cases should be "reviewed" and "overruled." An examination of some of these cases, reveals that the same constitutional question was before the Court and that the opinions were well considered.

In *Plessy v. Ferguson,* 163 U. S. 537, 41 L. ed. 256, the constitutionality of separation of the races in intrastate public conveyances was in issue. This Court said:

> "The object of the (fourteenth) 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. . . . 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 political rights of the colored race have been longest and most earnestly enforced." (p. 544)

> "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 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, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures."

"We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People v. Gallagher,* 93 N. Y. 438, 448, 'this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. 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.' " (pp. 550-551)

The dissenting opinion of Mr. Justice Harlan, in *Plessy v. Ferguson, supra,* is quoted and extensively relied upon in the briefs filed on behalf of the petitioner. Mr. Justice Harlan's later opinion in the case of *Cummings v. Richmond County Board of Education,* 175 U. S. 528, 545 (1899) has been overlooked. There an injunction was brought to restrain the board from maintaining a high school for white children without maintaining one for Negro children. The Constitution of Georgia, which provided " . . . separate schools shall be provided for the white and colored races" was before this Court and quoted in its opinion. It was held that the equitable relief sought was not a proper remedy. In denying the relief Mr. Justice Harlan said:

> "Under the circumstances disclosed, we cannot say that this action of the state court was, within the meaning of the 14th 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 privileges 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 can not be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

Both of these opinions were cited by Mr. Chief Justice Taft in writing the unanimous opinion in *Gong Lum v. Rice,* 275 U. S. 78, 72 L. ed. 172 (1927). This was a suit for entrance of a "colored child" to the separate school for white children. Mississippi, unlike most States, had classified Chinese as a "colored race." The Mississippi constitutional provision that "separate schools shall be maintained for children of the white and colored races" is set out in this Court's opinion. This Court concluded:

"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. . . .

"In Plessy v. Ferguson, . . . in upholding the validity under the 14th Amendment of a statute of Louisiana requiring the separation of the white and colored races in railway coaches, a more difficult question than this, this court, speaking of permitted race separation, said:

" '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 case of Roberts v. Boston, supra, in which Chief Justice Shaw of the supreme judicial court of Massachusetts, announced the opinion of that court upholding the separation of colored and white schools under a state constitutional injunction of equal protection, the same as the 14th Amendment, was then referred to, and this court continued:

" 'Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia, D. C. Rev. Stat. §§ 281-283, 310, 319, as well as by the legislatures of many of the states, and have been generally, if not uniformly, sustained by the courts' . . . citing many of the cases above named.

"Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils, but we can not think that the question is any different or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white

pupils and the pupils of the yellow races. The decision is within the discretion of the state in regulating its public schools and does not conflict with the 14th Amendment. The judgment of the Supreme Court of Mississippi is affirmed."

Since every argument which is advanced by the petitioner in this case is answered by the language of this Court, and is so completely responsive to the contentions here made, we can do nothing more than to call the Court's attention to it.

These holdings are in harmony with others of this Court:

In *Hall v. DeCuir,* 95 U. S. 485, 24 L. ed. 547 (1877) the reconstruction government of Louisiana enacted a statute in 1869 regarding rules of common carriers which contained this clause: "Provided said rules and regulations make no distinction on account of race or color . . ." A steamship master was convicted for removing a Negro from a white cabin in accordance with the ship's rule separating the races. This Court held that the statute was void and that the master was free to make reasonable regulations. Mr. Justice Clifford discusses at length (95 U. S. 504-506) the analogy to school cases, citing cases decided before and immediately after the adoption of the Fourteenth Amendment, holding that the maintenance of separate equal schools was a matter which might be constitutionally decided by each State.[9] In the same opinion on page 508 he discusses the recently adopted Fourteenth Amendment and the Enforcement (Civil Rights) Acts of 1866 and 1870. This contemporaneous construction is entitled to great weight.

Later cases upheld the separate coach laws of Mississippi and Kentucky as to intrastate commerce. *Louisville N.O. & T. Ry. v. Mississippi,* 133 U. S. 587, 33 L. ed. 784 (1890);

9/ *State v. McCann,* 21 Ohio St. 198 (1871); *Roberts v. Boston,* 5 Mass. 198 (1849); *State v. Duffy,* 7 Nev. 342 (1872); *Clark v. Board of Directors,* 24 Iowa 266 (1868); *Dallas v. Fosdick,* 40 How. (N.Y.) Pr. 249 (1869); *People v. Gaston,* 13 Abb. (N.Y.) Pr. N.S. 160 (1869)

Chesapeake & Ohio Ry. Co. v. Kentucky, 179 U. S. 388, 45 L. ed. 244 (1900). And the regulations of a private carrier separating the races in interstate commerce were held to be reasonable and enforceable. *Chiles v. Chesapeake & Ohio Ry.,* 218 U. S. 71, 54 L. ed. 936 (1910).

The provisions of the Fourteenth Amendment were specifically before this Court in *McCabe v. A.T. & S.F. Ry.,* 235 U. S. 151, 59 L. ed. 169 (1914). That was an action to restrain the railroad defendants from making and distinction in service on account of race. The points of error (set out in the report, 235 U. S. 152-156) were that the Oklahoma statute violated the equal protection clause; that it was an invalid exercise of the police power; and that the statute was discriminatory against one class of persons, citing *Yick Wo v. Hopkins,* 118 U. S. 356, 30 L. ed. 220, *Ex Parte Virginia,* 100 U. S. 339, 25 L. ed. 676, *Neal v. Delaware,* 103 U. S. 370, 26 L. ed. 567, *Strauder v. West Virginia,* 100 U. S. 303, 24 L. ed. 664, and others here relied on by petitioner and his amici curiae. The Court below found:

> "2. That it has 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 Fourteenth Amendment for a State to require separate, but equal accommodations for the two races. . . ."

This Court said, "In view of the decisions of this court . . . there is no reason to doubt the correctness of the . . . second . . . of these conclusions." (235 U. S. 160)

This Court had separate school provisions before it again in *Berea College v. Kentucky,* 211 U. S. 45, 53 L. ed. 81 (1908). A Kentucky statute prohibited the teaching of white and Negro students in the same school or college, and penalties were attached for violation of the statute. The college, a private corporation, was convicted for violating the act. Mr. Justice Harlan, dissenting, pointed out that the trial court refused an instruction to the effect that the statute violated the Fourteenth Amendment. 211 U. S. 60. This Court upheld the conviction. The dissent of Mr.

Justice Harlan is particularly informative of his views as to *separate public schools.* Berea College was a private corporation, not a public school. He thought that a statute making it unlawful to teach the races separately at a private institution would be void. But he added,

> "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 public expense." 211 U. S. 69.

These principles were reaffirmed in *Missouri (Gaines) v. Canada,* 305 U. S. 337, 83 L. ed. 308 (1938), an action to compel the admission of a Negro to the University of Missouri Law School, which was then and is now maintained as a separate institution for white students. In a decision in which *Yick Wo v. Hopkins, Supra, Ex Parte Virginia Supra, Neal v. Delaware Supra, Carter v. Texas,* 177 U. S. 442, 44 L. ed. 839, *Norris v. Alabama,* 294 U. S. 587, 79 L. ed. 1097, and other of petitioner's cases were discussed, this Court said with reference to the constitutional provisions in question:

> "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. 344.
>
> "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 separate groups within the State." Ibid. 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.*" Ibid. 352. (Emphasis provided throughout.)

This doctrine was not departed from in *Sipuel v. Board of Regents,* 332 U. S. 631, 92 L. ed. 247 (1948) or *Fisher v.*

Hurst, 333 U. S. 147, 92 L. ed. 604 (1948). In the *Sipuel* case the Court, citing the *Gaines* case, said:

> "The state must provide it (education) for her (a Negro citizen) in conformity with the equal protection clause . . . as soon as it does for applicants of any other group" (white students). (words in parentheses added.)

And in the *Fisher* case, the trial Court, after the *Sipuel* decision, instructed the school to (1) enroll the Negro with the white students until a separate school is established, or (2) not enroll any students until that time. If further ordered that if a separate school was established, the Negro was not to be enrolled in the white school. This Court refused to disturb the trial Court's judgment.

We content ourselves with the declaration of this Court in these and other cases cited in the Texas brief, as much for the reasoning of these cases as for the conclusive nature of them upon the question which the petitioner seeks to revive.

In the petitioner's brief the cases of *Shelley v. Kraemer,* 334 U. S. 1, 92 L. ed. 1161 (1948), *Oyama v. California,* 332 U. S. 633, 92 L. ed. 249 (1948), *Takahashi v. Fish and Game Commission,* 334 U. S. 410, 92 L. ed. 1478 (1948) are cited and relied upon with a contention that these cases indicate a trend of thought in this Court which would lead it to overrule this Court's many former decisions on the question of equal separate public facilities.

If the seventeen States and the District of Columbia *prohibited* Negroes from attending public schools, these cases would have some application. In the absence of such a prohibition, which does not and cannot exist, there is not the slightest analogy or precedent provided by these cases in favor of the petitioner.

Restrictive covenants (*Shelley v. Kraemer, supra*) in deeds to real property do not profess to equalize for any racial group the right to acquire property. On the contrary,

such covenants are for the purpose of excluding racial groups from the acquisition of the property involved.

Restrictions upon the right of a racial group to fish in the territorial waters of California (*Takahashi v. Fish and Game Commission, supra*) did not purport to provide the Japanese separate but substantially equal facilities. The law provided only for their exclusion.

Discriminatory presumptions in California's Alien Land Law (*Oyama v. California, supra*) were totally unrelated to the question discussed in this case.

An examination of these cases discloses that none of the justices of this Court considered that the established law of the United States as to separate but equal educational facilities was in any way, even by analogy, involved. This principle was not concerned and could not be so considered. They do not support those who now seek to foster a new doctrine on the country in utter disregard of the chaos which would result therefrom.

In like manner, the cases holding that long standing and systematic exclusion of Negroes from juries is a violation of constitutional rights (*Patton v. Mississippi,* 332 U. S. 463, 92 L. ed. 76 (1947) and similar cases) are entirely inapplicable to this situation. It is one thing to *exclude* from jury service and quite another to *furnish* equal education in separate schools.

The contention that these decisions "portend" action favorable to petitioner by this Court in the instant case, is, we trust, without foundation. All of the so-called "portension" cases are distinguishable from this Court's continuous line of decisions upholding the constitutionality of educational systems which furnish equal privileges and opportunities to all in separate schools. The latter decisions more nearly resemble this Court's recent actions in the *Sipuel* and *Fisher* cases rather than the *Shelley, Takahashi, Oyama,* and *Strauder* cases.

Petitioner contends that the long line of decisions by this Court, by other Federal Courts, and by the State Courts are all wrong because their interpretation of the Fourteenth

Amendment is contrary to the interpretation intended by the Congress and the people when it was submitted and approved. Petitioner and his amici curiae would have this Court believe that they now perceive the intent of the writers and adopters of the Amendment more clearly than the Congressmen, Courts, and Legislatures which were comprised of those who voted upon the Amendment and who gave it contemporaneous interpretation.

There is nothing in contemporary legislation or in Federal and State decisions which indicates any belief that the Fourteenth Amendment required mixed schools for all races, or that it prohibited the furnishing of equal educational privileges to all through separate schools. On the contrary, there is a great amount of contemporary construction and interpretation which points only in one direction: that equality of educational opportunities may be furnished in separate schools for children of the white and Negro races when deemed necessary to preserve the public peace, harmony, and welfare.

Before examining contemporary interpretation of the Amendment, proposed by Congress in 1866 and ratified by two-thirds of the States in 1868, a word should be said about the historical setting. It is interesting to note that separate schools for white and Negro students had been established in Northern States prior to the Civil War.[10] In Massachusetts, the State which furnished the most ardent advocates of freedom, equal protection, and civil rights,[11] an equal protection clause in the State Constitution, the same as the Fourteenth Amendment, had been held not to prohibit the City of Boston from maintaining separate schools for the white and Negro races.[12] Similar separate systems were in effect when the Fourteenth Amendment was voted upon in: Connecticut (Laws of

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10/ *The Education of the Negro Prior to 1861,* p. 18, Carter S. Woodson, 1919.

11/ These included John Quincy Adams, Charles Sumner, Henry Wilson, George S. Boutwell.

12/ *Roberts v. Boston,* 5 Mass. 198 (1849)

Conn., 1835, p. 321; separate schools abolished by Laws of Conn., 1868, p. 206); Illinois (Laws of Ill., 1846, p. 120; Id., 1874, p. 983); Indiana (Laws of Ind., 1869, p. 41); Iowa (Laws of Iowa, 1858, p. 65); Kansas (Laws of Kan., 1868, p. 146); Michigan (abolished, Laws of Mich., 1871, p. 274); Minnesota (abolished, Revised Laws, 1905, sec. 1403); Nevada (Laws of Nevada, 1864-65, p. 426); New Jersey (Laws of New Jersey, 1881, p. 186); New York (Laws of New York, 1864, p. 1281); Ohio (Laws of Ohio, Vol. XLVI, 1847-8, p. 81; Id. 1848-49, p. 17; Revised Stats., 1880, Vol. I, p. 1005); Pennsylvania (Laws of Pa., 1854, p. 623; Id. 1881, p. 76). They continued in operation after the Amendment was adopted, were upheld by State courts,[13] cited with approval by the Supreme Court,[14] and ended only when the people of those States determined that conditions were ready for the change.[15]

After the Civil War, the Federal Government, through the Freedmen's Bureau of the War Department, established the first schools in the South in which Negroes were taught. *These were separate schools exclusively for Negroes.*[16]

During the reconstruction era when many bills were enacted which were considered by Southern people as "Force Bills," no legislation was adopted by Congress which attempted to compel the mixture of the races in the public schools or colleges of this country, although it was many times proposed and defeated.[17]

The Fourteenth Amendment was declared to be duly

13/ Brief of Respondents in Opposition to Petition for Writ of Certiorari, Appendix, pp. 74-85.

14/ *Plessy v. Ferguson,* 163 U. S. 537, 41 L. ed. 256 (1896); *Hall v. DeCuir,* 95 U. S. 485, 24 L. ed. 547 (1877); *Gong Lum v. Rice,* 275 U. S. 78, 72 L. ed. 172 (1937).

15/ New York, 1909; New Jersey, 1948; Michigan, 1871.

16/ Semi-Annual Reports on Schools and Finances of Freedmen, 1866-1870, J. W. Alvord.

17/ Cong. Globe, 42nd Cong., 2nd Sess., p. 396 (1866); J. G. Blaine, *Twenty Years of Congress* (1886) p. 514 et seq.; Pierce, *Memoirs and Letters of Charles Sumner* (1893) pp. 72 and 179 et seq.; Storey, *Charles Sumner* (1900) p. 402 et seq.

ratified on July 28, 1868. Contemporaneous construction of the Amendment by the adopting States was almost unanimous that it permitted continuation of separate equal schools for white and Negro students. Many Northern States retained statutory or constitutional provisions authorizing or requiring school districts to provide separate schools: e.g., Illinois, Indiana, Kansas, Nevada, New Jersey, New York, Ohio, Pennsylvania.

The Southern States ratifying the Amendment included the States of Tennessee, North Carolina, South Carolina, Missouri, Arkansas, Louisiana, Alabama, Georgia, and Florida. Virginia, after first rejecting, ratified on October 8, 1869. Texas ratified February 18, 1870. All of these eleven States within a short time thereafter adopted constitutional and statutory provisions for separate but equal schools for white and Negro children, thereby demonstrating the contemporary understanding of these States that there was no conflict with the Fourteenth Amendment and the principle of separate schools.

The schools of the District of Columbia, before, during, and after the adoption of the Fourteenth Amendment, were maintained by the Congress on a separate basis for white and Negro children. Thus, the very Congressmen who proposed the Fourteenth Amendment could not well have interpreted it to prohibit separate equal schools in the States.[18]

Subsequently the Congress gave contemporaneous construction to the Fourteenth Amendment in its actions on the bill which became the Civil Rights Act of 1875. The original bills in both Houses (S. No. 1 and H.R. 796) prohibited separate schools for white and Negro students. All reference to schools was stricken in the House[19] and this action was concurred in by the Senate.[20]

18/ Lillian G. Dabney, *The History of Schools for Negroes in the District of Columbia,* 1870-1947, Catholic University of America Press 1939, pp. 21 and 111 et seq.

19/ Congressional Record, 43rd Cong., 2nd Sess., p. 1010.

20/ Ibid. p. 1870.

It is significant to note that the trustees of the George Peabody Fund (a foundation having assets of over $2,000,000, created by George Peabody of Massachusetts, which fund was instrumental in the establishment of many schools in the South) were influential in having the mixed schools provisions taken out of the Civil Rights Act of 1875.[21] More positive interpretation by Congress came with passage of the Act of June 11, 1878 (20 Stat. 107, Chapter 180) which specifically provided for the operation of the public schools of the District of Columbia upon an equal but separate system for white and Negro children. Since their origin in 1862 (12 Stat. 407) the schools of the District of Columbia have continued to be operated in that way[22] under direct authority of the Congress of the United States, the branch of the Government authorized by the Fourteenth Amendment to enforce its provisions.

Contemporaneous interpretation by State courts was the same as that of the Congress and State Legislatures. For example, the New York Court, in *Dallas v. Fosdick,* 40 How. Pr. 249 (1869), stated:

> "It was claimed upon the argument of the appeal taken in this cause, that the provisions of the charter, if they were to be so construed as to exclude colored children from the schools provided for white children, were inconsistent with the act of Congress called the 'civil rights bill,' and had, therefore, become inoperative. But that is very clearly not the case. It was no part of the civil rights bill to regulate or provide for the enjoyment of rights or privileges of the nature of those in controversy in this case." (p. 256)

Similarly, the Indiana Court in *Cory v. Carter,* 48 Ind. 327 (1874) wrote:

21/ Curry, *Biographical Sketch of George Peabody;* Boyd, *Educational History in the South Since 1865,* Studies in Southern History, p. 262.

22/ Public Law 254 of the Fifty-Ninth Congress, H.R. 11,442, passed June 20, 1906 under which separate schools continue to be maintained in the District.

> "The action of Congress, at the same session at which the fourteenth amendment was proposed to the states, and at a session subsequent to the date of its ratification, is worthy of consideration as evincing the concurrent and after-matured conviction of that body that there was nothing whatever in the amendment which prevented Congress from separating the white and colored races, and placing them, as classes, in different schools, and that such separation was highly proper and conducive to the well-being of the races, and calculated to secure the peace, harmony and welfare of the public . . . (The court then cites several Acts of Congress relating to separate schools in the District of Columbia)
>
> "The legislation of Congress continues in force, at the present time, as a legislative construction of the fourteenth amendment, and as a legislative declaration of what was thought to be lawful, proper and expedient under such amendment, by the same body that proposed such amendment to the states for their approval and ratification." (pp. 364-366)

See also *State v. McCann,* 21 Ohio St. 198 (1871); *State v. Duffy,* 7 Nev. 342 (1872); *People v. Gaston,* 13 Abb. (N.Y.) Pr. N.S. 160 (1869); *Ward v. Flood,* 48 Cal. 36 (1874); *State v. Board of Education,* 7 Ohio Dec. 129 (1876); *Commonwealth v. Williamson,* 30 Leg. Int. 406 (Pa. 1873).

Contemporaneous construction by this Court is found in *Hall v. DeCuir* (1877), supra, where this Court struck down a State statute requiring a commingling of the races on a steamboat operating in interstate commerce. The contemporaneous construction of the State courts is discussed at length by Mr. Justice Clifford.

Other contemporaneous expressions of this Court upheld the State's police power. For example in *Bartemeyer v. Iowa,* 18 Wall. 129, 21 L. ed. 929 (1873), Mr. Justice Field, concurring said:

> "No one has ever pretended . . . that the fourteenth amendment interferes in any respect with the police power of the state . . ."

Following this decision this Court said of the Fourteenth Amendment in *Barbier v. Connolly,* 113 U. S. 27, 28 L. ed. 923 (1885):

> "But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, morals, *education,* and good order of the people. . ."

What could be clearer than the statement by Mr. Justice Clifford in *Hall v. DeCuir,* 95 U. S. at 506 (1877):

> "And it is well 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."

This doctrine has been re-emphasized in the many cases heretofore cited. It is respectfully submitted that to overthrow the systems built up over a period of almost a century and following the plan first used by the Northern States and the Freedmen's Bureau as an agency of the Federal Government, would result in utter chaos and confusion which would fully nullify the progress in public education and race relations which the States have made during this period.

All contemporaneous interpretation indicates that separate schols, if equal, were not considered discriminatory against either race and that the system does not contravene the equal protection clause as then or now understood and interpreted.

It is further submitted, as pointed out elsewhere in this brief, that this is a problem for the individual States to solve. Many Northern States which originally followed this plan have, at times when they believed conditions justified their action, provided by statute and in their Constitution for mixed schools. Colorado, Connecticut, Idaho,

Illinois, Massachusetts, Michigan, Minnesota, New Jersey, New York, Pennsylvania, Rhode Island, and Washington are numbered in this group. It was noted, however, in an article by Reid F. Jackson, "The Development of Permissive and Partly Segregated Schools," *Journal of Negro Education,* Vol. 16, p. 301, that in spite of these provisions, separation in some form has arisen in these States. Other States have provided by statute for permissive separation while some are silent on the subject.

From this brief summary, it would seem that the logical conclusion which follows is that it should remain within the power of the individual States to decide their educational policies. If and when conditions justify a change, they may alter their policies, but due to the varied conditions and relations of the races within the borders of the States, the problem is not one which can be solved by the Federal Government and certainly not by the Court.

To extend the interpretation of the Fourteenth Amendment so far beyond its well settled construction, now or at any time in the future, would seem only to invite disaster for public education in the States which would be affected.

> "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now." *South Carolina v. United States,* 199 U. S. 437, 448, 50 L. ed. 261, 264.

III.

The reasonableness of the separate school laws has been settled by this Court, and the need therefor is a question for the States to decide. If this Court ever goes behind State statutes to make a judicial determination of the reasonableness and need, it should not do so on this record.

Petitioner and his amici curiae urge that the Court should re-examine the question of the need and reasonableness of the classification as to race in the separation of

students. The brief of Texas fully demonstrates that this Court has many times considered this question and approved the classification as reasonable when determined necessary by State Legislatures. This Court has never gone behind the legislative acts to make its own determination of need and reasonableness. It was with this in mind that the record in this case was made in the trial court.

One amicus curiae, the Federal Council of Churches of Christ in America, furnishes one of the strongest arguments for the reasonableness and need of the rule. That is, that the people making up the member churches, both North and South, as a general rule, maintain in actual practice, separate churches, separate church schools, and many separate colleges and universities. The churches and their schools are fine and not the slightest criticism is intended or inferred. But the church schools and colleges, as a general rule, acting on the same compelling reasons that caused the Southern people to write the practice into their Constitutions and laws, have provided for a separation of the races, at least in their colleges in the South. For example, The University of the South (Sewanee), Wake Forest, Baylor, Southern Methodist University, Randolph-Macon, Hardin Simmons University, Howard Payne College, Texas Christian University, College of the Ozarks, Georgetown College, Centenary College, and Furman University. The Federal Council's thesis is against separation of the races. Yet the practice of the members, in the South and only to a lesser degree in the North, is to separate the races not only in education but in worship.

Should the Court determine to examine the reasonableness and need of the classification, it should not do so without giving Texas and these States an opportunity to present their evidence. There should be a fully developed record of the situation in the whole area of this nation in which it is such a basic principle. This case, as we read the record, was tried on the theory that the reasonableness of the rule had been established by this Court in the *Gong Lum, Plessy, Gaines* and other decisions. The need was

left to the discretion of State Legislatures. Indeed the trial court excluded most of the evidence of petitioner in this regard. With such testimony being excluded, it is reasonably inferred that Texas justifiably did not feel called upon to introduce evidence to refute the excluded testimony. Since all these States will be bound by the decision of this case, they should certainly be allowed to present their witnesses and other evidence before an issue on the reasonableness of and necessity for such laws are determined by this Court. Our contention is that the question is properly legislative. But we desire to present our views in separate cases with fully developed records if this Court ever should decide to go behind the legislative acts to determine such questions.

CONCLUSION

The decisions of this Court, rendered by some of the ablest justices in its history, have firmly established the principle that the States, in the exercise of their police power for the safety, harmony, and welfare of all their citizens, may furnish education to their white and Negro students at separate institutions where substantially equal facilities and opportunities are offered both groups.

The exercise of this police power of the States has been necessary, and this Court has found its exercise to be reasonable and constitutional. The necessity still exists.

The argument that the Fourteenth Amendment was intended to abolish all distinctions based on race in the public schools is completely without foundation. The contemporaneous and later construction by this and other Courts, by the Congress, in maintaining separate schools in the District of Columbia, and by the Legislatures of the various States is to the contrary. The debates on the Fourteenth Amendment, the Civil Rights Acts of 1866, 1870, and 1875, all show that the majority of the very men who proposed the Fourteenth Amendment and the other acts believed the States continued to have the power to establish

and maintain separate schools. They were in fact maintained in a majority of the States.

It is therefore respectfully submitted that this Court should follow its well considered opinions that the States may, in the exercise of their police power, furnish separate equal educational facilities to their white and Negro citizens.

Respectfully submitted,

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APPENDIX

Constitutional and Statutory Provisions Requiring Segregation in Public Education

ALABAMA

Constitution of Alabama, Article XIV, Section 256:

The Legislature shall establish, organize and maintain a liberal system of public schools throughout the State for the benefit of the children thereof between the ages of seven and twenty-one years. The public school fund shall be apportioned to the several counties in proportion to the number of school children of school age therein, and shall be so apportioned to the schools in the districts or townships in the counties as to provide, as nearly as practicable, school terms of equal duration in such school districts or townships. Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race.

CODE OF 1940, Chapter 52, Section 93.

Free Separate Schools For White And Colored.—The county board of education shall provide schools of two kinds, those for white children and those for colored children. The schools for white children shall be free to all white children over six years of age. The schools for colored children shall be free to all colored children over six years of age.

ARKANSAS

ARKANSAS STAT. 1947, ANN., Article 80, Section 509.

Duties And Powers Of School Directors—Budgets,—Indebtedness.—The board of school directors of each district in the State shall be charged with the following powers and perform the following duties:

(c) Establish separate schools for white and colored persons.

DELAWARE

Constitution of Delaware, Article X, Sections 1 and 2.

Section 1. The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools, and may require by law that every child, not physically or mentally disabled, shall attend the public school, unless educated by other means.

Section 2. In addition to the income of the investments of the Public School Fund, the General Assembly shall make provision for the annual payment of not less than one hundred thousand dollars for the benefit of the free public schools which, with the income of the investments of the Public School Fund, shall be equitably apportioned among the school districts of the State as the General Assembly shall provide; and the money so apportioned shall be used exclusively for the payment of teachers' salaries and for furnishing free text books; provided, however, that in such apportionment, no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained. All other expenses connected with the maintenance of free public schools, and all expenses connected with the erection or repair of free public school buildings shall be defrayed in such manner as shall be provided by law.

REVISED CODE OF DELAWARE, 1935, Chapter 71, Section 2631.

Shall Maintain Uniform School System; Separate Schools For White Children, Colored Children, And Moors; Elementary Schools.—The State Board of Education is authorized, empowered, directed and required to maintain a uniform, equal and effective system of public schools throughout the State, and shall cause the provisions of this Chapter, the by-laws or rules and regulations and the policies of the State Board of Education to be carried into effect. The schools provided shall be of two kinds; those for white children and those for colored children. The schools for white children shall be free for all white chil-

dren between the ages of six and twenty-one years, inclusive; and the schools for colored children shall be free to all colored children between the ages of six and twenty-one years, inclusive. The schools for white children shall be numbered and the schools for colored children shall be numbered as numbered prior to the year 1919. The State Board of Education shall establish schools for children of people called Moors or Indians, and if any Moor or Indian school is in existence or shall be hereafter established, the State Board of Education shall pay the salary of any teacher or teachers thereof, provided that the school is open for school sessions during the minimum number of days required by law for school attendance and provided further that such school shall be free to all children of the people called Moors, or the people called Indians, between the ages of six and twenty-one years. No white or colored child shall be permitted to attend such a school without the permission of the State Board of Education. The public schools of the State shall include elementary schools which shall be of such number of grades as the State Board of Education shall decide after consultation with the Trustees of the District in which the school is situated.

FLORIDA

Constitution of Florida, Article XII, Section 12.

White And Colored—Separate Schools.—White and colored children shall not be taught in the same school but impartial provisions shall be made for both.

FLORIDA STATUTES OF 1941, Section 228.09.

Separate Schools For White And Negro Children Required.—The schools for white children and the schools for Negro children shall be conducted separately. No individual, body of individuals, corporation or association shall conduct within this State any school of any grade (public, private or parochial) wherein white persons and Negroes are instructed or boarded in the same building or taught in the same classes or at the same time by the same teachers.

GEORGIA

Constitution of Georgia, Article VIII, Section 2.6601.

System Of Common Schools; Free Tuition.—There shall be a thorough system of common schools for the education of children as nearly uniform as practicable, the expenses of which shall be provided for by taxation, or otherwise. The schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races.

CODE OF 1933, Section 32-909.

School Term, School Property And Facilities.— . . . It shall also be the duty of said Board of Education to make arrangements for the instruction of the children of the white and colored races in separate schools. They shall as far as practicable, provide the same facilities for both races in respect to attainments and abilities of teachers and for a minimum six months of term time, but the children of the white and colored races shall not be taught together in any common or public school.

KENTUCKY

Constitution of Kentucky, Section 187.

In distributing the school fund no distinction shall be made on account of race or color and separate schools for white and colored shall be maintained.

KENTUCKY REVISED STATUTES, Section 158-020.

Separate Schools For White And Colored Children.—(1) Each Board of Education shall maintain separate schools for the white and colored children residing in its district.

(2) No person shall operate or maintain any college, school or other institution where persons of both the white and colored races are received as pupils.

(3) No instructor shall teach in any college, school or institution where persons of both the white and colored races are received as pupils.

(4) No white person shall attend any college, school or

institution where colored persons are received as pupils or receive instruction.

(5) No colored person shall attend any college, school or institution where white persons are received as pupils or receive instruction.

LOUISIANA

Constitution of Louisiana, Article XII, Section 1.

Educational system of state—White and colored schools —Kindergartens.—The educational system of the State shall consist of all free public schools, and all institutions of learning, supported in whole or in part by appropriation of public funds. Separate free public schools shall be maintained for the education of white and colored children between the ages of six and eighteen years; provided, that kindergartens may be authorized for children between the ages of four and six years.

MARYLAND

ANNOTATED CODE OF MARYLAND, 1939, Chapter 9, Section 111.

All white youths between the ages of six and twenty-one years shall be admitted into such public school of the State, the studies of which they may be able to pursue; provided, that whenever there are grade schools, the principal and the county superintendent shall determine to which school pupils shall be admitted.

ANNOTATED CODE OF MARYLAND, 1939, Chapter 18, Section 192.

It shall be the duty of the county board of education to establish one or more public schools in each election district for all colored youths, between six and twenty years of age, to which admission shall be free, and which shall be kept open not less than one hundred and eighty (180) actual school days or nine months in each year; provided, that the colored population of any such district shall, in the judgment of the county board of education, warrant the establishment of such school or schools.

MISSISSIPPI

Constitution of Mississippi, Article VIII, Section 207.

Separate schools shall be maintained for the children of the white and colored races.

MISSISSIPPI CODE, 1942, ANNOTATED, Chapter 5, Section 6276.

Separate districts for the races—descriptions of districts. —Separate districts shall be made for the schools of the white and colored races, and the districts for each race shall embrace the whole territory of the county outside the separate school districts. A regular school district shall not contain less than forty-five educatable children of the race for which the district is established, except where too great distance or impassable obstructions would debar children from school privileges. . . .

MISSOURI

Constitution of Missouri, Article XI, Section 3.

Separate free public schools shall be established for the education of children of African descent.

REVISED STATUTES OF MISSOURI, Section 10, 349.

Separate Schools For White And Colored Children.—Separate free schools shall be established for the education of children of African descent; and it shall hereinafter be unlawful for any colored child to attend any white school or for any white child to attend a colored school.

NORTH CAROLINA

Constitution of North Carolina, Article IX, Section 2.

General Assembly Shall Provide For Schools; Separation Of The Races.—The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one

years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race.

GENERAL STATUTES OF NORTH CAROLINA, Section 115-2.

Separation Of Races.—The children of the white race and the children of the colored race shall be taught in separate public schools, but there shall be no discrimination in favor of or to the prejudice of either race. All white children shall be taught in the public schools provided for the white race, and all colored children shall be taught in the public schools provided for the colored race; but no child with negro blood, or what is generally known as Croatan Indian blood, in his veins, shall attend a school for the white race, and no such child shall be considered a white child. The descendants of the Croatan Indians, now living in Robeson, Sampson, and Richmond counties, shall have separate schools for their children.

GENERAL STATUTES OF NORTH CAROLINA, Section 115-3.

Schools Provided For Both Races; Taxes.—When the school officials are providing schools for one race it shall be a misdemeanor for the officials to fail to provide schools for the other races, and it shall be illegal to levy taxes on the property and polls of one race for schools in a district without levying it on all property and polls for all races within said district.

OKLAHOMA

Constitution of Oklahoma, Article XIII, Section 3.

Separate Schools For White And Colored Children.

Separate schools for white and colored children with like accommodation shall be provided by the Legislature and impartially maintained. The term "colored children," as used in this section, shall be construed to mean children of African descent. The term "white children" shall include all other children.

OKLAHOMA STATUTES ANNOTATED, Chapter 15, Section 451.

Separation Of White And Colored Races.—The public schools of the State of Oklahoma shall be organized and maintained upon a complete plan of separation between the white and colored races, with impartial facilities for both races.

SOUTH CAROLINA

Constitution of South Carolina, Article XI, Section 7.

Separate Schools.—Separate schools shall be provided for children of the white and colored races and no child of either race shall ever be permitted to attend a school provided for children of the other race.

CODE OF SOUTH CAROLINA, Section 5377.

Mixed Schools Unlawful.—It shall be unlawful for pupils of one race to attend the schools provided by boards of trustees for persons of another race.

TENNESSEE

Constitution of Tennessee, Article 11, Section 12.

Sec. 12. Education to be cherished; common school fund; poll tax; whites and negroes; colleges, etc., rights of.— . . . The state taxes, derived hereafter from polls shall be appropriated to educational purposes, in such manner as the general assembly shall from time to time direct by law. No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. The above provisions shall not prevent the legislature from carrying into effect any laws that have been passed in favor of the colleges, universities or academies, or from authorizing heirs or distributees to receive and enjoy escheated property under such laws as may be passed from time to time.

CODE OF TENNESSEE, Section 2377.

Schools designated for children; separate schools for white and negro children.—The county board of education

shall designate the schools which the children shall attend; provided, that separate schools shall be established and maintained for white and for negro children.

TEXAS

Constitution of Texas, Article VII, Section 7.

Separate schools shall be provided for the white and colored children and impartial provisions shall be made for both.

VERNON'S TEXAS STATUTES, 1936, Chapter 19, Article 2900.

Separate Schools.—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.

VIRGINIA

Constitution of Virginia, Article VII, Section 140.

White and colored children shall not be taught in the same schools.

CODE OF VIRGINIA, Article 22, Section 221.

White And Colored Persons.—White and colored persons shall not be taught in the same schools, but shall be taught in separate schools, under the same general regulations as to management, usefulness, and efficiency.

WEST VIRGINIA

Constitution of West Virginia, Article XII, Section 8.

Mixed Schools Prohibited.—White and colored persons shall not be taught in the same school.

WEST VIRGINIA CODE OF 1943, ANNOTATED, Section 1775.

Schools For Colored Pupils.—White and colored pupils shall not receive instruction in the same school, or in the same building. The board shall establish one free school, or more if necessary, in any part of the county where there are ten or more colored children of school age living within two miles of a point where a school might be established. And when such schools are established for colored children, the teachers thereof shall be supplied from members of their own race. The board may, if practical, establish a school in a part of the county where there are less than ten colored children of school age.

DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA CODE, Title 31, Section 1110.

It shall be the duty of the Board of Education to provide suitable and convenient houses or rooms for holding schools for colored children, to employ and examine teachers therefor, and to appropriate a proportion of the school funds, to be determined upon number of white and colored children, between the ages of 6 and 17 years, to the payment of teachers' wages, to the building or renting of schoolrooms, and other necessary expenses pertaining to said schools, to exercise a general supervision over them, to establish proper discipline, and to endeavor to promote a thorough, equitable and practical education of colored children in the District of Columbia.

THE NEGRO: NORTH AND SOUTH

By DAVIS LEE

Publisher of The Newark Telegram, Newark, N. J., A Weekly Negro Newspaper

I have just returned from an extensive tour of the South. In addition to meeting and talking with our agents and distributors who get our newspapers out to the more than 500,000 readers in the South, I met both Negroes and whites in the urban and rural centers.

Because of these personal observations, studies and contacts, I feel that I can speak with some degree of authority. I am certainly in a better position to voice an opinion than the Negro leader who occupies a suite in downtown New York and bases his opinions on the South from the distorted stories he reads in the Negro Press and Daily Worker.

The racial lines in the South are so clearly drawn and defined there can be no confusion. When I am in Virginia or South Carolina I don't wonder if I will be served if I walk into a white restaurant. I know the score. However, I have walked into several right here in New Jersey where we have a civil rights law, and have been refused service.

The whites in the South stay with their own and the Negroes do likewise. This one fact has been the economic salvation of the Negro in the South. Atlanta, Georgia, compares favorably with Newark in size and population. Negroes there own and control millions of dollars worth of business. All the Negro business in New Jersey will not amount to as much as our race has in one city in Georgia. This is also true in South Carolina and Virginia.

New Jersey today boasts of more civil rights legislation than any other State in the Union, and the State government itself practices more discrimination than Virginia, North Carolina, South Carolina or Georgia. New Jersey employs one Negro in the Motor Vehicle Department. All of the States above mentioned employ plenty.

No matter what a Negro wants to do, he can do it in the South. In Spartanburg, South Carolina, Ernest Collins, a

young Negro, operates a large funeral home, a taxicab business, a filling station, grocery store, has several buses, runs a large farm and a night club.

Collins couldn't do all that in New Jersey or New York. The only bus lines operated by Negroes are in the South. The Safe Bus Company in Winston-Salem, North Carolina, owns and operates over a hundred. If a Negro in New Jersey or New York had the money and attempted to obtain a franchise to operate a line, he would not only be turned down, but he would be lucky if he didn't get a bullet in the back.

Negroes and whites get along much better together in the South than Northern agitators would have you believe. Of course, I know that there are some sore spots down there, and we have them up here also. But it is not as bad as it is painted. The trouble in the South stems from dumb, ignorant whites and Negroes, not from the intelligent, better class element of the two races.

The attitude of the Southerners toward our race is a natural psychological reaction and aftermath of the War Between the States. Negroes were the properties of these people. They were not the peers, and were not even considered human in the true sense. The whole economy of the South was built around slavery. The South was forced by bloodshed and much harm to its pride, to give up slavery. Overnight these slaves became full fledged American citizens enjoying the same rights as their former owners.

Certainly you couldn't expect the South to forget this in 75 or even 150 years. That feeling has passed from one generation to another, but it is not one of hatred for the Negro. The South just doesn't believe that the Negro has grown up. No section of the country has made more progress in finding a workable solution to the Negro problem than the South. Naturally Southerners are resentful when the North attempts to ram a civil rights program down their throats.

I have pointed out in dozens of editorials that the white

people of this country are not only our friends, but they want to see us get ahead as a race. As a matter of fact, we are more prejudiced than those whom we accuse of being prejudiced.

The entire race problem in America is wrong. Our approach is wrong. We expend all our energies, and spend millions of dollars trying to convince white people that we are as good as they are, that we are an equal. Joe Louis is not looked upon as a Negro but the greatest fighter of all time, loved and admired by whites in South Carolina as much as by those in Michigan. He convinced the world, not by propaganda and agitation, but by demonstration.

Our fight for recognition, justice, civil rights and equality should be carried on within the race. Let us demonstrate to the world by our living standards, our conduct, our ability and intelligence that we are the equal of any man, and when we shall have done this the entire world, including the South, will accept us on our terms. Our present program of threats and agitation makes enemies out of our friends.