IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

No. 44

HEMAN MARION SWEATT, *Petitioner*

v.

THEOPHILUS SHICKEL PAINTER, ET AL., *Respondents*

## BRIEF FOR RESPONDENTS

PRICE DANIEL
*Attorney General of Texas*

JOE R. GREENHILL
*First Assistant Attorney General*

E. JACOBSON
*Assistant Attorney General*
*Attorneys for Respondents.*

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## BRIEF FOR RESPONDENTS

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### Preliminary Statement

The Court in many decisions has held that the States, which are under no duty under the Federal Constitution to furnish education to anyone, may provide education at their own expense for their white and Negro students in separate schools so long as equal facilities and advantages are offered both groups.

These holdings are eminently correct and should be followed. They rightly interpret the intention of Congress which proposed the Fourteenth Amendment and of the Legislatures of the several States

which adopted it. This Court has correctly decided that the education of the people in schools by State taxation is a matter belonging to the respective States; and that whether a State will furnish education at all, or in classrooms in which white and Negro students are mixed, or whether students will be separated, is to be determined by each State for the best interest of all its people. So long as each student is offered equal facilities and opportunities, none is denied the equal protection of the laws.

This Court's decisions further have correctly recognized that, where the necessity exists, the teaching of white and Negro students in separate classrooms is a reasonable exercise of the State's police power to preserve the public peace, harmony, and general welfare. The people of Texas in their Constitution, and the Legislature in statutes, have declared that such a necessity exists in Texas.

Petitioner here seeks to have the Court overturn its decisions, not only as applied to the graduate schools of universities, but also as applied to all public schools. If the theory of Petitioner and his *amici curiae* were followed, the Court would overrule all of its historic decisions under which the States separate persons of the two races in public sanitariums, schools for the deaf and blind, homes for the aged, and other institutions. He would have this Court annul by judicial decree the police power of the State to separate the races, even though equal facilities are offered both groups.

Petitioner and his *amici curiae* assume that the great justices who wrote or adopted the previous opinions of this Court were unable correctly to under-

stand and interpret the meaning of the Constitution. It is submitted that those justices not only comprehended the law but the thinking, feeling, and sentiments of the people. These decisions, correct in their holdings, have become ingrained into the society of a very large segment of the people of the United States and thousands of institutions have been established and maintained under their principles.

The determination of the desirability, expediency, or necessity of having separate or mixed schools in a particular community or State is a legislative matter. The arguments of Petitioner's sociologists and educators are properly addressable to the Legislative branch or to the people of a State, such as Texas, where the matter is deemed of such importance as to be written into the State Constitution.

Respondents therefore contend that the Constitutional questions in this case have been settled by well reasoned opinions of this Court which should be followed. If the Court decides to look behind those decisions, it will find that they correctly interpret the Fourteenth Amendment. And if the Court should determine to examine anew the question as to whether there is any reasonable basis for the classification of persons in the operation of public schools and colleges, it will find that the reasonableness of and the necessity for such constitutional or legislative action still exists today.

The above are believed to be the controlling, if not the only, issues before this Court for decision. As will be developed, Petitioner, who stated on the trial that he would attend no separate school however

equal it might be, did not present to the appellate courts of Texas the question of the sufficiency of the evidence to support the trial court's findings of fact that he was offered equal facilities. That finding of fact of the trial court as to the equality of the two separate law schools in question must therefore be considered as having been established, leaving only the law questions.

Even assuming the fact question to be before the Court, Respondents say that there is substantial evidence to support the trial Court's findings. Moreover, the supervening facts as to the Negro law school, occurring since the trial of this case, have so altered the situation that the Court may well consider that portion of the case moot.

## Statement of the Case

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

The admission of Petitioner, a Negro, to the Law School of The University of Texas was denied because of the sections of the Texas Constitution requiring separate equal schools.[1] His mandamus was denied by the trial court because of the above hold-

[1] Sections 7 and 14 of Article VII and related statutory provisions set out in Appendix to Respondents' original brief at page 109. To distinguish it from this brief, the brief filed by Respondents in opposition to the granting of the petition for certiorari will be referred to as "Respondents' Original Brief."

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

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

> "It is the purpose of this Act to establish an entirely separate and equivalent university of the first class for Negroes with full rights to the use of tax money and the general revenue fund for establishment, maintenance, erection of buildings, and operation . . ."[2]

With an initial Legislative appropriation of over three million dollars,[3] a grant of 53 acres of land between Rice Institute and the University of Houston, and a grant of other assets of the Houston College for Negroes valued in excess of a million dollars, that University was established at Houston.[4]

[2] S. B. 140, 50th Leg. 1947. Set out at page 110 of Appendix, Respondents' Original Brief.

[3] *Ibid*, Point II.

[4] Report of State Auditor to Governor, Aug. 31, 1948, on Texas State University for Negroes. Appendix to Respondents' Original Brief, page 99. This transfer was made pursuant to H. B. 780, 50th Leg., 1947, being Art. 2643 (c) Tex. Civ. Stat. (Vernon 1948). It is discussed in the Record. (R. 54.)

The Act also provided:

> ". . . the Board of Regents of The University of Texas *is authorized and required to forthwith* organize and establish a separate School of Law at Austin for Negroes, to be known as the 'School of Law of The Texas State University for Negroes' and therein provide instruction in law equivalent to the same instruction being offered in law at The University of Texas. . . ."[5]

With an additional appropriation of $100,000.00 that Law School was established (R. 36, 43, 86).[6]

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

> "From his own testimony, Relator would not register in a separate law school no matter how equal it might be and not even if the separate school affords him ~~identical~~ equal advantages . . ."[7]

On March 3, 1947, the Registrar wrote Petitioner that the School of Law would be open March 10, 1947, and that his application theretofore made (to The University of Texas) and his qualifications would entitle him to enter.[8]

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[5] Italics are added throughout this brief unless otherwise indicated.

[6] Before the school was established, Petitioner testified by deposition that he would attend a separate equal law school. (R. 179.) On the trial, he stated that he had changed his mind. (R. 182.)

[7] R. 440.

[8] R. 159, 372; Respondents' Exhibit 13.

The letter informed Petitioner that his instructors would be *the same professors* who were and are teaching at the School of Law of The University of Texas; that the courses, texts, collateral readings, standards of instruction, and standards of scholarship *would be identical* with those prevailing at the School of Law of The University of Texas; that a library was being installed, and that full use of the library of the Supreme Court of Texas was available prior to the delivery of a complete new library then on order; and that the new library would include all books required to meet the standards of the American Association of Law Schools and the American Bar Association.[9]

Although Petitioner received the letter, he did not answer it. Without coming to Austin to talk to the Dean, the Registrar, or any of his prospective professors (R. 186), and without making any personal investigation of the school, the courses, faculty, or physical plant, he decided not to attend.[10] The school was nevertheless ready to receive and instruct him.[11]

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

> ". . . this Court finds . . . that . . . the Respondents herein, . . . have established the School of Law of the Texas State University for Negroes in Austin, Texas, with substantially equal facilities and with the same entrance, classroom study, and graduation requirements, and the same courses and the same instructors

[9] R. 372-374.
[10] R. 174, 175, 177, 186.
[11] R. 86.

> as the School of Law of The University of Texas; that such new law school offered to Relator privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at The University of Texas; that Realtor, although duly notified that he was eligible and would be admitted to said law school March 10, 1947, declined to register . . ."[12]

Petitioner appealed to the Texas Court of Civil Appeals but Petitioner did not invoke the jurisdiction of that Court as to the want or sufficiency of the evidence to support the findings of fact as to the equality of the separate schools.[13] That Court found in its opinion that "*Our jurisdiction in this latter regard was not invoked in this case.* . . . However . . . were our jurisdiction in that regard properly invoked, we would be constrained to hold that its preponderance and overwhelming weight supports the trial court's judgment."[14] Nor was the jurisdiction of the Texas Supreme Court invoked to consider whether there was evidence to support the findings of fact and the judgment. In the absence of such point of error that Court had no jurisdiction to pass on the matter.[15]

So the fact issue of whether Petitioner was offered equal facilities, not having been presented to the ap-

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[12] R. 440.

[13] This is developed in Respondents' Point IV.

[14] R. 461. The opinion of the Texas Court of Civil Appeals is reported in 210 S. W. (2d) 442 (1948).

[15] The Texas Supreme Court refused Petitioners' application for a writ of error. Except on very rare occasions, that Court does not write an opinion on refusing a writ of error. None was written in this case.

pellate courts of Texas, is not properly before this Court.

But assuming the issue to be properly before this Court, there is ample evidence to support the trial court's findings of fact and judgment.

As will be shown in the Addendum to this brief, the Negro Law School, after the trial of this case, was moved to Houston to become a permanent part of Texas State University, as contemplated in the statute. With its fine library of over 24,000 volumes and its up-to-date facilities in the new buildings in which it is housed, it has been found to meet the standards of the American Bar Association and the American Association of Law Schools. It has been granted provisional approval by the American Bar Association. Its accreditation by the American Association of Law Schools is contingent upon the outcome of this suit.

The law question remaining, therefore, is whether the State, which is not obligated by the Federal Constitution to furnish education to anyone, may provide education for its white and Negro students in separate schools providing equal facilities for both.

## First Point

Section 7 of Artice VII of the Texas Constitution and related statutes providing that the State shall furnish equal education to its Negro and white students in separate schools are constitutional. The power of the States to so classify and the reasonableness of this classification have been settled as a matter of law by this Court as not violative of

the equal protection clause of the Fourteenth Amendment.

## Argument and Authorities

The decisions of this Court are uniform in their holding that states may, by Constitution or statute, provide separate establishments for the education of their Negro and white students, provided equal facilities and opportunities are made available to each group. Related to the education cases are transportation cases. They are cited for their holdings on the "equal protection clause."

### United States Supreme Court Decisions

Petitioner and his supporting *amici curiae* would make it appear that *Plessy v. Ferguson* is the only decision of this Court in which the validity of the separation of the races, and the reasonableness of the classification as to race when equal facilities are furnished, has been considered. An examination of the cases will show that both of these related questions have been many times examined and re-examined. The fact that the principles were and are so well established that the Court believed it unnecessary to write extensively on them in each case is certainly not to be taken to mean that this Court did not carefully weight and consider its decision in each case.

The principal decisions of this Court on this point are presented in chronological order.

1. *Hall v. DeCuir*, 95 U. S. 485 (1877). A Louisana statute provided for enforced commingling of

the races in common carriers. A steamboat master operating in interstate commerce, separated Negro and white passengers and was sued for damages for having denied a Negro woman the right to remain in cabins reserved for whites. A judgment against him resulted. In reversing the judgment, this Court held that the Louisiana statute was an interference with interstate commerce and that Congressional inaction left the ship's master free to adopt such reasonable rules as seemed best for all concerned. Said the Court:

> ". . . we think this [Louisana] statute, to the extent that it requires those engaged in the transportation of passengers among the states to carry colored passengers in Louisana in the same cabin with whites, is unconstitutional. . . ." 95 U. S. 490.

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

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

Reviewing the authorities, he wrote:

> "Questions of a kindred character have arisen in several of the States, which support these views in a course of reasoning entirely satisfactory and conclusive. . . . . . equality of rights

does not involve the necessity of educating white and colored persons in the same school any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school; and that *any classification which preserves substantially equal school advantages is not prohibited by either the State or Federal Constitution*, nor would it contravene the provisions of either. . . .

"Separate primary schools for colored and for white children were maintained in the city of Boston. . . . Distinguished counsel insisted that the separation tended to deepen and perpetuate the odious distinction of caste; but the court responded, that they were not able to say that the decision was not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment. . . .

"Age and sex have always been marks of classification in public schools throughout the history of our country, and the Supreme Court of Nevada well held that the trustees of the public schools in that State might send colored children to one school and white children to another. . . ."

". . . and it is settled law there that the (school) board may assign a particular school for colored children, and exclude them from schools assigned for white children, and that such a regulation is not in violation of the Fourteenth Amendment." 95 U. S. at 506.

2. *Plessy v. Ferguson*, 163 U.S. 537 (1896). A later Louisiana statute required that colored and white passengers be furnished separate accommodations on carriers. Plessy, a Negro, was convicted for

refusing to occupy the section set aside for his race. The railroad did not operate in interstate commerce. It was squarely contended by Plessy that the state law, as applied to him, violated the equal protection clause.[16] In overruling the contention, this Court said:

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

[16] Among the questions presented in the brief for plaintiff in error (Plessy) was: "Has the State the power under the provisions of the Constitution of the United States to make a distinction based on color in the enjoyment of chartered privileges within the State?" (Page 5, his Brief.) The Court also had before it *Railway v. Brown,* 17 Wall 445 (1873). Based on a provision of a private charter granted by Congress in 1863 applicable only to one particular line in the District of Columbia, it was held that Negroes could not be excluded from its cars. Petitioner does not rely on the case, but it is cited in some of his *amici* briefs. The Court in the *Plessy* case considered the *Brown* case and expressly distinguished it as dealing with "laws of a particular locality." 163 U. S. at 545.

*legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced. . . .*

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

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

". . . 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."

Petitioner cites Mr. Justice Harlan's vigorous dissent in this case as an indication that he would have thought also that separate schools were violative of the Fourteenth Amendment. It is significant that in his long list of "inequalities" which he said the majority opinion would permit, Mr. Justice Harlan did not mention separation in public education. In view of the obvious omission of the school question from his dissent and his subsequent words in *Cumming v. Board of Education* and *Berea College v. Kentucky, infra,* it is difficult to understand how anyone could conclude that Mr. Justice Harlan believed separate but equal school systems to be unconstitutional.

3. *Cumming v. Board of Education,* 175 U.S. 528 (1899). An action 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 stated that "separate schools shall be provided for the white and colored races" was before this Court and quoted in its opinion. The injunction was denied. It was held that the equitable relief sought was not a proper remedy. Mr. Justice Harlan, speaking for the Court, said:

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

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

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

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

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

> "On writ of error from this court, it was held that no question of interference with interstate commerce could possibly arise, . . . Indeed, the act was not claimed to be unconstitutional as an interference with interstate commerce, but *its invalidity was urged upon the ground* that it

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

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

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

The statute was upheld. Corporations being creatures of the State, it could grant or withhold corporate powers.

The holding was that the State could, within the Fourteenth Amendment, prohibit the teaching of white and Negro students together in the same *private* school or college. It goes much further than the public schools.[17] The breadth of the holding is

[17] Mr. Justice Holmes, who is quoted at several places in Petitioner's brief, was a member of the concurring majority in this case as well as the *Chiles v. Chesapeake & Ohio, McCabe v. A. T. & S. F.*, and *Gong Lum v. Rice*, cases hereinafter discussed.

emphasized in the dissent by Mr. Justice Harlan, who points out that the title of the act read:

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

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

> "It is absolutely certain that the legislature had in mind to prohibit the teaching of the two races in the same *private* institution, at the same time by whomever that institution was conducted." 211 U.S. at 62.

Mr. Justice Harlan made it clear that his dissent was leveled only at the requirement for separation of the races at *private* institutions. As to the *public schools*, Mr. Justice Harlan said:

> *"Of course what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the State and maintained at the public expense."* 211 U.S. at 69.

6. *Chiles v. Chesapeake & Ohio Ry.*, 28 U.S. 71 (1910). Chiles, a Negro traveling in interstate commerce, was required to move to a section set apart for Negroes. The Kentucky courts held that their statute requiring separation of the races was not applicable to interstate passengers. It denied relief on the basis of the regulations of the railway com-

pany requiring separation. The only questions before this Court concerned the validity and reasonableness of those regulations.

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

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

> "The statute was attacked on the ground that it violated the Thirteenth and Fourteenth Amendments of the Constitution of the United States. The opinion of the court . . . reviewed prior cases, and not only sustained the law *but justified as reasonable the distinction between the races on account of which the statute was passed and enforced.* It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, 'the established usages, customs and traditions of the people' and the 'promotion of their comfort and the preservation of the public peace and good order,' this must also be the test of the reasonableness of the regulations of a carrier, made for like purpose and to secure like results. *Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate, cannot be said to be unreasonable.* See also *Chesapeake & Ohio Ry. Company v. Kentucky,* 179 U.S. 388."

The following paragraph clearly indicates that this Court did reconsider the constitutionality of separate

equal facilities and the classification of persons as to race. It also indicates that the Court, after consideration, was satisfied with the opinion of Mr. Justice Clifford in the *DeCuir* case and its decision in the *Plessy* case, and that further writing on the subject was simply unnecessary. The opinion reads:

> "The extent of the difference based upon the distinction between the white and colored races which may be observed in legislation or in the regulations of carriers *has been discussed so much that we are relieved from further enlargement upon it.* We may refer to Mr. Justice Clifford's concurring opinion in *Hall v. DeCuir* for a review of the cases. They are also cited in *Plessy v. Ferguson* at page 550. We think the judgment should be affirmed."

7. *McCabe v. A. T. & S. F. Ry. Co.*, 235 U.S. 151 (1914). Action by Negro citizens to enjoin enforcement of an Oklahoma statute requiring separation of white and colored citizens on trains and in waiting rooms because (1) such statute violated the Fourteenth Amendment, and (2) the statute constituted a burden on interstate commerce.

With reference to the Fourteenth Amendment, this Court, speaking through Mr. Justice Hughes, expressly approved the holding of the Circuit Court:

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

8. *Gong Lum v. Rice*, 275 U. S. 78 (1927) is a case directly in point. The Constitution of Mississippi, the pertinent portion of which is set out in this Court's opinion, read:

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

A Chinese girl, classified as "colored" under Mississippi law, was denied admission to the white school. A direct attack was made on the constitutionality of the separation of the races for schooling purposes, the contention being made that such was a violation of the equal protection clause of the Fourteenth Amendment. The first assignment of error in this Court was:

> "A child of school age and otherwise qualified . . . is denied the equal protection of the laws when she is excluded from such school solely on the ground that she is a Chinese child and not of the Caucasian race." (Brief and Argument for Plaintiff in Error, p. 5.)[18]

Mr. Chief Justice Taft, speaking for a unanimous Court composed of himself and Justices Holmes, Van Devanter, Brandeis, Stone, McReynolds, Sutherland, Butler, and Sanford, clearly stated the question before the Court:

[18] This point is stressed in these cases because of the assertion by Petitioner and his supporting *amici curiae* that this Court his never considered and passed on the question, or that if it did consider it in the *Plessy* case, it has not reconsidered it since then. The assertion is, of course, unfounded and reflects upon the opinions of this Court which plainly recite or clearly show that the matter was before the Court and decided upon.

> "The case then reduces itself to the question whether a state can be said to afford to a child of Chinese ancestry born in this country, and a citizen of the United States, equal protection of the laws by giving her the opportunity for a common school education in a school which receives only colored children of the brown, yellow or black races."

Showing that the Court was especially concerned with the constitutionality of separate schools under the equal protection clause, he stated more specifically:

> "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." *Id.* at page 85.

Again having considered the matter (and having reconsidered the principles of the *Plessy* case) the Court found the previous decisions of *Cumming v. Board of Education* and the *Plessy* case sound. The opinion used Mr. Justice Harlan's words from the *Cumming* opinion:

> "We cannot say that this action . . . was, within the meaning of the Fourteenth Amendment, a denial . . . of the equal protection of the laws. . . . We may add that, while all admit that the benefits and burdens of public taxation must be shared . . . 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 . . ."

The opinion continued,

> "In *Plessy v. Ferguson* . . . in upholding the validity under the Fourteenth Amendment of a statute of Louisiana requiring the separation of the white and colored in railway coaches, a more difficult question than this, this Court, speaking of permitting 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.' "

Finding it unnecessary to write further, the Chief Justice said for the Court,

> ". . . *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."

The Court concluded:

> "The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear. . . ."
>
> "*The decision is within the discretion of the State in regulating its public schools and does not conflict with the Fourteenth Amendment.* The judgment of the Supreme Court of Mississippi is affirmed."

9. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). Gaines, a Negro, was refused admis-

sion to the School of Law of the University of Missouri. The question before this Court was stated at the beginning of the opinion:

> "Asserting that this refusal constituted a denial by the State of the equal protection of the laws in violation of the Fourteenth Amendment . . . petitioner brought this action for mandamus to compel . . . the University to admit him."

The first point raised in this Court in the Petition for Certiorari (p. 17) was:

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

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

Mr. Chief Justice Hughes, speaking for the majority composed of himself, two members of the present Court, Mr. Justice Black and Mr. Justice Reed, and Justices Brandeis, Stone, and Roberts, again announced the considered opinion of this Court on the principles applicable here:

> "In answering petitioner's contention that this discrimination constituted a denial of his constitutional right, the state court has fully

recognized the obligation of the State to provide negroes with advantages for higher education substantially equal to the advantages afforded for white students. The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, *a method the validity of which has been sustained by our decisions.*" (citing with approval the *Plessy*, *McCabe*, and *Gong Lum* decisions.)

"*. . . The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State.*"

"Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the *State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race. . . .*"

"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.*"[19]

The dissent in the case by Justices Butler and McReynolds was not from the announced principles of the validity of separate schools where there are

[19] The cause was remanded to the Missouri Supreme Court. Its subsequent decision, 344 Mo. 1238, 131 S. W. (2d) 217 (1939), recognizes that the Legislature had ~~enact~~ enacted a statute making it mandatory that equal educational opportunities be afforded colored students. It remanded the cause to the trial court for a finding on such equality by the opening of the next school year. No further proceedings occurred.

separate equal facilities within the State, but was on the proposition that Missouri already had complied with the Constitution by making a legal education available to petitioner in out-of-State schools.

The recent case of *Sipuel v. Board of Regents*, 332 U.S. 631 (1948), was a mandamus proceeding by a Negro to compel her admission to the University of Oklahoma law school.[20] The relief was denied by the State court principally on the ground that Sipuel had not made proper demand for the establishment of a separate law school. The brief *Per Curiam* holding of this Court was:

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

In *Fisher v. Hurst*, 333 U.S. 147 (1948) the same petitioner, *nee* Sipuel, brought an original action in this Court to compel compliance with this Court's mandate in the *Sipuel* case. Following the *Sipuel*

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[20] The petition for certiorari did not present the issue of "whether a State might not satisfy the equal protection clause . . . by establishing a separate law school for Negroes" (*Fisher v. Hurst*, 333 U.S. 147, 150). Nevertheless, the Court's disposition of the case is significant in that it approved the same procedure as previous decisions in which the point was specifically raised and decided upon.

decision, the Oklahoma Supreme Court directed the Board of Regents of Oklahoma University:

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

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

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

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

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

This Court explained the *Sipuel* case:

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

The *Sipuel* case, citing the *Gaines* case with approval, therefore took cognizance of the long established principle that separate schools may be provided so long as the facilities are equivalent.[21] It made clear that the opportunities must be provided for the Negro students as soon as they are made available to white students. In this case, the School of Law of the Texas State University was available to Petitioner at the time of this trial and is still available to him.

**Other Federal and State Court Cases**

In *Carr v. Corning* (C.C.A., D.C., decided February 15, 1950, unreported as yet), a mandatory injunction was sought to compel the admission of

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[21] Even Justice Rutledge in his dissent recognized that the separate but equal doctrine had been applied, although he disagreed with the manner of its application by the State Court. In explaining his interpretation of this Court's mandate in the *Sipuel* case he said:

> "It also meant that this should be done if not by excluding all students, then by affording petitioner the advantages of a legal education equal to those afforded to white students. And in my comprehension the equality required was equality in fact, not in legal fiction."

Negro students into the schools designated for white students in the District of Columbia. It was urged, as stated by the Court, that "the separation of the races is itself, apart from the equality or inequality of treatment, forbidden by the Constitution." "The question thus posed," continued the Court, "is whether the Constitution lifted this problem out of the hands of all the legislatures and settled it. We do not think it did." That Court, after reviewing the history of the Amendment and the Civil Rights Acts, said that the contemporaneous legislation by the Congress as to separate schools "conclusively supports our view of the amendment and its effects." It continued,

> "The Supreme Court has consistently held that if there be an 'equality of the privileges which the laws give to the separated groups' the races may be separated. That is to say that constitutional invalidity does not arise from the mere fact of separation but may arise from an inequality of treatment. Other courts have long held to the same effect."

The Court, one judge dissenting, thereupon sustained the validity of the separate schools in the District of Columbia.

Many of the strongest cases upholding the constitutionality of separation of the races have come from the highest courts of states outside the South. These cases, together with the many cases decided in the Southern States are set out in the Appendix beginning on page 211. They form a great body of the law on which thousands of schools and the struc-

ture of other important State functions of many States have been built. They are an important body of cases. They are placed in the Appendix in the interest of brevity. Two of the cases decided out of the South are here set out as illustrative.

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

> "The most that the constitution requires the legislature to do is to furnish a system of common schools where each and every child may be educated,—not that all must be educated in any one school, but that it shall provide or furnish a school or schools where each and all may have the advantages guaranteed by that instrument. If the legislature determined that it was wise for one class of pupils to be educated by themselves, there is nothing in the constitution to deprive it of the right to so provide. It was the facilities for and the advantages of an education that it was required to furnish to all the children, and not that it should provide for them any particular class of associates while such education was being obtained. . . ."[22]

In *State ex rel. Weaver v. Board of Trustees of Ohio State U.*, 126 Ohio St. 290, 185 N. E. 196

[22] New York enacted a statute in 1900 which prohibits separation of the races in schools. 2 N. Y. Laws 1900, ch. 492, p. 1173. The enactment of such statute is fully within the power of the State, just as laws requiring separation. This statute does not change the holding of the Courts where the statutes permit or require separation.

(1933) Ohio State University had offered a home economics course in which female students operated a residence wherein they lived. The course included cooking, buying, etc. A Negro's application for this course was refused, and an equivalent course was offered. She sued to compel her admission. The Ohio Supreme Court wrote in denying the mandamus:

> " 'Any classification which preserves substantially equal school advantages is not prohibited by either the state or federal constitution, nor would it contravene the provisions of either.' . . . the respondents had full authority to prescribe regulations that will prove most beneficial to the university and state and will best conserve, promote, and secure the educational advantages of all races. The purely social relations of our citizens cannot be enforced by law; nor were they intended to be regulated by our own laws or by the state and Federal Constitutions. . . . 'When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed.' "

**PETITIONER'S CASES DISTINGUISHED**

None of the cases cited by Petitioner holds that a State may not constitutionally provide education for its white and Negro students at separate schools where equal education is furnished to both groups. The cases above cited, and those hereinafter mentioned, are uniformly to the contrary.

The cases cited by Petitioner are principally those involving complete exclusion of Negroes or discrimination (as distinguished from separation) against persons of the Negro or Oriental races in matters of civil and political rights, such as jury service, voting in primaries, acquiring and holding property, earning a living, obtaining confessions by duress, and the like. These cases are obviously distinguishable from situations where persons of the white and Negro races are offered, at the State's expense, equivalent opportunities for obtaining an education.

**Pearson v. Murray**

Maryland having no separate law school, a mandamus was granted admitting a Negro to the University of Maryland Law School. The opinion, however, recognized that where equal opportunities are offered, a State may offer education at separate institutions:

> "Equality of treatment does not require that privileges be provided members of the two races in the same place. The state may choose the method by which equality is maintained. 'In the circumstances that the races are separated in the public schools, there is certainly to be found no violation of the constitutional rights of the one race more than the other, and we see none of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense.'" 169 Md. 478, 182 Atl. 590 (1936.)

**Civil and Political Rights Cases**

There are several cases which hold that under the 14th Amendment state action that prevents Negroes from serving on juries, or systematically excludes them, is unconstitutional.

*Strauder v. West Virginia*, 100 U. S. 303, simply holds that where a Negro is convicted of murder upon an indictment by a grand jury upon which no Negro served or could serve, the conviction must be reversed. The case is one of complete exclusion and discrimination, and not one of separation with equivalent facilities. [23]

As will be seen in Part II of this Brief, Congress early interpreted the Fourteenth Amendment to include equal protection in jury service. In 1869, it repealed its laws for the District of Columbia which had made Negroes ineligible for Jury service. [24] And

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[23] One of this group of cases, *Franklin v. South Carolina*, was argued the same week (April 18), and handed down the same day (May 31, 1910) as *Chiles v. Chesapeake & Ohio Ry.* which upheld as reasonable a carrier's regulation separating the races, showing a clear distinction in the minds of the Court. 218 U. S. 71 and 161. Other cases involving jury service are *Carter v. Texas*, 177 U. S. 442 (1900) (grand jury); *Pierre v. Louisiana*, 306 U. S. 354 (1939) (grand jury); *Smith v. Texas*, 311 U. S. 128 (1940) (grand jury); *Hill v. Texas*, 316 U. S. 400 (1942) (grand jury); *Patton v. Mississippi*, 332 U. S. 463 (1947) (grand jury); *Brunson v. North Carolina*, 333 U. S. 851 (1948) (grand jury). But cf. *Akins v. Texas*, 325 U. S. 398 (1945), and *Moore v. New York*, 333 U. S. 565 (1948).

[24] Act of March 18, 1869, 16 Stat. 3: ". . . the word 'white' wherever it occurs in the laws relating to the District of Columbia . . . and operates as a limitation on the right of any elector . . . to hold any office or to be selected and serve as a juror . . . is hereby repealed."

Section 4 of the Civil Rights Act of 1875 provided that no citizen should be disqualified for jury service on account of race. 18 Stat. 335. On the other hand, as will be discussed on pages 46 to 64, Congress maintained separate schools in the District of Columbia before, during, and after the adoption of the Fourteenth Amendment and specifically removed the reference to schools from various proposals including the 1875 Civil Rights Act in order to leave that matter to the States.

The *Strauder* case was considered at length in the *Plessy* case. Mr. Justice Strong, who wrote the *Strauder* case, was among the majority in the *Plessy* case and therefore agreed with that opinion which expressly distinguished the *Strauder* case, saying:

> "The distinction between laws interfering with the political equality of the Negro and those requiring the separation of the races in schools . . . and railroad carriages has been frequently drawn by this Court. Thus in *Strauder v. West Virginia* . . ." 163 U. S. at 545.

The *Strauder* case was also unsuccessfully urged on the Court in the *Gong Lum case*, 275 U. S. at 79, The distinction between exclusion from jury service in a case involving one's life, liberty, or property and cases involving the furnishing of equal education, at the expense of the State, to white and Negro students in different buildings, was clear to the Court.

To the same effect are cases involving voting rights. [25] The right to vote is a political right guaranteed by the Federal Constitution. These cases have nothing to do with offering of equal facilities in education.

There are several cases which have reversed criminal convictions of Negroes where it was shown that the convictions were based on confessions which were obtained under duress. [26] Obviously these duress cases apply to white as well Negro citizens. The obtaining of a confession by whipping and burning, whether applied to Negro or white, has nothing to do with the offering of equivalent facilities for education.

**The Chinese and Japanese Exclusion Cases**

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

*Yick Wo v. Hopkins*, 118 U. S. 356 (1886). A broad city ordinance gave a board unbridled power. The board arbitrarily refused to license 200 Chinese

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

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

laundrymen and licensed 80 non-Chinese similarly situated. It was held that the equal protection clause applied to aliens, and that these Chinese were not afforded equal protection. They were not given equal opportunity but were completely deprived of the right to work and earn a living.

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

*Takashashi v. Fish and Game Comm.*, 334 U. S. 410 (1948), falls under the above ruling. There the California statute kept an alien Japanese from fishing. It was the *right to work* which was protected.

Also among these "right to work" cases are *Steele v. L. & N. Ry.*, 323 U. S. 192 (1944), and *Tunstall v. Brotherhood*, 323 U. S. 210 (1944). The Court held that where Congress made a union the exclusive bargaining agency for railroad employees, that union must represent the Negro as well as white workers and not deprive the Negroes of the opportu-

nity to obtain the better jobs simply because of race, citing the *Yick Wo* case. The union must represent both groups equally. Underscoring the distinction in the types of cases, the *Gaines* case was cited with approval. 323 U. S. at 203.

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

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

**The Property Ownership Cases**

The next group of cases held that the equal protection clause protects the rights to own and occupy land. It protects the person in that property right.

Thus in *Oyama v. California*, 332 U. S. 633 (1948), it was held that land owned in the name of

a U. S. citizen of Japanese extraction could not be escheated simply because it had been purchased for him by an alien Japanese in an alleged violation of the Alien Land Law of California. The citizen of Japenese ancestry was saddled with more onerous burdens in his *property* ownership than other citizens.

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

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

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

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

The Court continued:

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

As will be discussed in Point II of this brief, the right to "purchase, lease, sell, hold, and convey real

and personal property, and to full and equal benefit of all laws and proceedings for the securing . . . of property" was enacted into the Civil Rights Act of 1866. 14 Stat. 27. The first section of the Fourteenth Amendment was generally understood to have embodied the 1866 Act. As stated by Flack, ". . . there seems to be little . . . difference between the interpretation put upon the first section by the majority and by the minorty, for nearly all said that it was but an incorporation of the Civil Rights Bill." *The Adoption of the Fourteenth Amendment*, p. 81.

On the other hand, the 1866 Act was amended to delete the general language which might have been construed to require mixed schools. Mr. Sumner's Civil Rights Bill was amended and passed by the Senate in 1872 after deleting reference to schools. The references to schools were deleted from the Civil Rights Act of 1875 to leave the matter to the States. The Congress, before, during, and after the adoption of the amendment operated separate schools in the District. All of this is discussed at length in Point II hereof.

Furthermore, this Court has heretofore distinguished between *property rights* and *privileges*, and between rights of "citizens of the United States" and privileges of "citizens of a State." Under the foregoing, the right of acquiring and holding realty is a *property right* of a *citizen of the United States*. But the receiving of an education, at the expense of the State, especially at the collegiate and professional level, is not a property right. *Hamilton v. Regents of the University of California*, 293 U. S. 245 (1934); *Waugh v. Mississippi*, 237 U. S. 589

(1915). It is referred to in the *Hamilton* case as a privilege given by the State. [27]

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

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

**The Interstate Commerce Cases**

*Morgan v. Virginia*, 328 U. S. 373 (1946) held that a state statute requiring separation in inter-

[27] The 14th Amendment provides: "No state shall make or enforce any law which shall abridge the *privileges* or immunities of *citizens of the United States* . . ." The Court held that attending a state college is not a privilege of a *citizen of the United States* but is a privilege extended by one of the States of the United States, thus again distinguishing the two types of citizenship. *Slaughter House Cases*, 16 Wall. 36.

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

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

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

*Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28 (1948), was also decided wholly under the interstate commerce clause. A steamship operated to and from an island just off shore but across the Canadian line. It refused passage to a Negro. It was held that the application of the Michigan Civil Rights Act to the facts was not a burden on interstate commerce, it being a completely localized transaction.

The case is further distinguishable because, as pointed out by Mr. Justice Rutledge in the majority opinion and by Mr. Justice Douglas concurring, the

carrier did not offer equal facilities; it completely excluded the Negro from passage on the ship. Mr. Justice Douglas continued, citing the *Gaines* case:

> "Nothing short of at least 'equality of legal right' *(Missouri ex rel. Gaines v. Canada . . .)* in obtaining transportation can satisfy the Equal Protection Clause." 333 U. S. at 42.

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

## Argument

The foregoing cases argue themselves. They demonstrate that this Court has uniformly held that the states may furnish education to their white and Negro citizens at separate institutions so long as substantially equal facilities are offered both groups. Petitioner has cited no case to the contrary.

As this Court said in the *Gong Lum* case:

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

In the *Gaines* case Mr. Justice Hughes speaking for the Court, recognized the long-established rule. He wrote: "The state has sought to fulfill that obligation by furnishing equal facilities in separate schools, *a method the validity of which has been sustained by our decisions.*"

The *Sipuel* case, citing the *Gaines* case with approval took cognizance of the long established principles announced therein. And the opinion in *Fisher v. Hurst,* that the subsequent judgments of the Oklahome courts were not inconsistent with its *Sipuel* mandate, is in harmony with the holdings of the *Gong Lum, Plessy, Gaines* and other cases herein set out.

It is therefore respectfully submitted that Article VII, Section 7 of the Texas Constitution and related statutes providing that the State shall furnish equal education to its Negro and white students in separate schools are Constitutional.

## Second Point

The background and contemporaneous construction of the Fourteenth Amendment sustain this Court's interpretation that under the Amendment the States may furnish equal education to their Negro and white students in separate schools.

## Argument and Authorities

Under Point I the State has called attention to nine decisions of this Court, thirteen Federal Court deci-

sions and fifty-eight State Court decisions which interpret the equal protection clause of the Fourteenth Amendment as not prohibiting States from furnishing equal educational advantages to Negro and white students in separate schools.

Petitioner asks that this Court's decisions be re-examined and overruled. He charges that the distinguished members of this Court for the past sixty years have misinterpreted the Fourteenth Amendment. He says that a restudy of its purposes, background and contemporaneous construction is justified in order to place a new and different interpretation thereon in so far as it applies to this case.

We believe that the question has been well settled by this Court, and its decisions so long relied upon by the States and the Congress in the establishment and maintenance of public educational facilities, that re-examination of the cases is unjustified.

It should be enough that such distinguished jurists as Hughes and Holmes concluded

> "That it had been decided by this court, so that the question could no longer be considered an open one, that it was not an infraction of the 14th Amendment for a State to require separate, but equal, accommodations for the two races."[28]

or that such Justices as Taft, Holmes, Brandeis, and Stone concluded

> "that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle

[28] *McCabe v. A. T. & S. F. Ry Co.*, 235 U.S. 151 (1914).

> without intervention of the federal courts under the Federal Constitution."[29]

or that Justices Hughes, Brandeis, Stone, Black and Reed found the separate equal educational system to be one

> "the validity of which has been sustained by our decisions."[30]

However, Respondents have nothing to fear if this Court desires to re-examine its previous interpretations of the Fourteenth Amendment in the light of the background, purpose, and common understanding at the time of its adoption.

In fact, such an examination will but serve to answer conclusively Petitioner's attempt to impeach this Court's former decisions as unwarranted and unsound. It will reveal that this Court's predecessors were better grounded in the purpose, understanding, and intent of the Fourteenth Amendment than Petitioner would lead the unsuspecting to believe.

In his attempt to show a contrary understanding of the Amendment as applied to this case, Petitioner cites only the words of four Senators who argued in 1874-1875 in favor of a law prohibiting separate schools but lost in their attempt.[31] In none of these quotations is there an assertion that the Fourteenth Amendment itself prohibits separate schools. Even if there were, it would be most unusual to give effect to an interpretation of a small and unsuccessful

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[29] *Gong Lum v. Rice*, 275 U.S. 78 (1927).
[30] *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).
[31] Petitioner's brief, 56-60.

minority of the contemporaneous proposers of the Amendment in disregard of the majority interpretation which was actually adopted by Congress, the States, and the Courts.

As stated by Mr. Justice Frankfurter:

> "After all, an amendment to the Constitution should be read in a 'sense most obvious to the common understanding at the time of its adoption.' . . . For it was for public adoption that it was proposed. . . .
>
> "Any evidence of design or purpose not contemporaneously known could hardly have influenced those who ratified the amendment."[32]

## A. Congressional Action Before, During, and After the Adoption of the Fourteenth Amendment Clearly Indicates That the Amendment Was Not Intended to Remove the Power of the States to Provide Separate Equal Facilities for White and Negro Students.

The Acts of Congress and pertinent portions of the debates on the development and contemporaneous construction of the Fourteenth Amendment are set out at length in the Appendix hereto beginning on p. 128. As will be briefly summarized here, a study of this material shows that it was at no time considered by the Congress or by the States that separate equal schools were prohibited by the Fourteenth Amend-

[32] *Adamson v. California,* 332 U.S. 46, 63 and 64.

ment. Congress itself maintained separate schools before, during, and after the adoption of the amendment. It established separate schools for Negroes in 1862 in the District of Columbia and continued them.

After the Civil War, it enacted the Civil Rights Bill of 1866 which gave certain specific rights to the Negro. That bill was specifically amended so as not to apply, *inter alia*, to separate schools. Because of the doubts concerning its constitutionality, and in order to perpetuate the rights which were granted, the Fourteenth Amendment was adopted. The 1866 Act is therefore important for its bearing on the meaning of the Amendment.

During the debates on the Amendment, Congress conveyed land for its separate Negro schools in the District and enacted other laws for such schools. Immediately after the adoption of the Fourteenth Amendment, Congress passed other laws regulating the separate school system of the District. Subsequent attempts by Senator Sumner *et al.* to abolish separate schools in the District were defeated. The Civil Rights Act of 1875 was specifically amended to exclude public schools from its provisions in order to leave the matter to the States. The Congressional interpretation that separate schools may be constitutionally maintained continues today.

It is true that there are speeches by some who ardently advocated the complete intermingling of the races; for example, as set out in Petitioner's brief, those of Senators Sumner, Frelinghuysen, and Boutwell of Massachusetts and some of the Reconstruction Republicans from the South, such as Senator

Pease of Mississippi.[33] But as stated by Mr. Justice Frankfurter,

> "Remarks of a particular proponent of the amendment, no matter how influential, are not to be deemed part of the amendment."[34]

What is most important is what the Congress and the States *did*, and what Congress (or a majority of it) intended as a body.

This background and contemporaneous construction with reference to the public schools is, we think, of extreme importance to an understanding of the real and intended meaning of the Amendment and those who enacted it. It is set out in the Appendix only in the interest of brevity. It will be here summarized.

In 1862, Congress enacted laws to provide schools for Negroes in the District of Columbia[35] under the direction of a "Board of Trustees for Colored Schools." The Statutes were amended in 1864 to require that a proportionate part of all school tax money should go to the Negro schools.[36]

In January, 1866, Senator Trumbull of Ohio introduced the First Supplemental Freedmen's Bureau Bill and the bill which became the Civil Rights Act of 1866.[37] The Freedmen's Bill, which never became

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[33] This gentleman removed from the State to Dakota shortly after the Reconstruction Period, where he was employed by the U. S. Land Office. *Biographical Directory of the American Congress* 1774-1927, p. 1395. He is referred to in Garner's *Reconstruction in Mississippi* as a "carpetbagger." p. 243.

[34] *Adamson v. California*, 332 U.S. 46, 64.

[35] Appendix p. 128. 12 Stat. 394, 407, and 537 (1862). This whole section of the brief is fully footnoted in the Ap-

law because of President Johnson's veto, dealt principally with the government of the South. It authorized the Bureau to procure school buildings, but nothing in the debates indicates any desire to force mixed schools. It had a section on civil rights for Negroes, not including any reference to schools.[38]

### 1. The Civil Rights Act of 1866

The Civil Rights Act of 1866 is particularly important because of the very large number of the members of Congress who intended and believed that its provisions became embodied in the first section of the Fourteenth Amendment.[39] The bill in section one defined who were citizens of the United States. As originally introduced, it followed with very broad language as to civil rights:

> ". . . there shall be no discrimination in the Civil Rights . . . among the inhabitants of any State . . . on account of race . . ."

It continued to provide that

> ". . . the inhabitants of every race . . . shall have the same rights to make and enforce

(Ftn. 35 Cont'd) pendix and in the interest of brevity, references will generally be to the Appendix only.

[36] 13 Stat. 187 (1864).

[37] Appendix p. 130. In their brief the Committee of Law Teachers state that the Civil Rights Act was introduced by Senator Wilson. The bill (S. No. 9) to which they refer was introduced and debated for several days but was superseded by Senator Turnbull's Bill (S. No. 61) which became the Civil Rights Act of 1866.

[38] Appendix p. 131.

[39] Appendix p. 133; 39th Cong., 1st Sess., p. 319. Congressional references in this section are to the *Congressional Globe* through 1873 and to the *Congressional Record* thereafter.

> contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishments, pains, and penalties, and none others, any law, statutes, ordinances, regulations, or customs to the contrary notwithstanding."[40]

The House floor leader for the bill, Rep. Wilson of Iowa, explained the broad language, first set out above, of his bill. He said:

> "By no means can they be construed . . . nor do they mean that . . . their children shall attend the same schools. These are not civil rights or immunities."[41]

But the House was not satisfied with the general language of the bill. Mr. Bingham, in addition to thinking the bill unconstitutional, thought the language too broad.[42] Mr. Wilson replied to Mr. Bingham, who was an attorney:

> "He knows, as every man knows, that this bill refers to rights which belong to men as citizens of the United States and none other; and when he talks of setting aside school laws . . . by the bill now under consideration, he steps beyond what he must know to be the rule of construction which must apply here."[43]

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[40] 39th Cong., 1st Sess., pp. 474, 1117.

[41] Appendix p. 134.

[42] Appendix p. 135; 39th Cong., 1st Sess., p. 1117. He moved to strike the general words. Appendix p. 135; 39th Cong., 1st Sess., p. 1271.

[43] Appendix p. 136; 39th Cong., 1st Sess., p. 1291.

Nevertheless, Mr. Wilson had the bill recommitted, and it was amended to take out the broad language quoted in the first paragraph above. In that form the bill was enacted and passed over the President's veto.[44] The rights sought to be protected were those specifically quoted in the second paragraph above.[45]

**2. The Resolution Proposing the Fourteenth Amendment**

Because of the doubts as to its constitutionality and in order to place the Act of 1866 beyond Congressional repeal, the Republicans desired to put it in the Constitution. The Fourteenth Amendment was therefore proposed. Most of the debates on the resolution are not available because it was discussed and formulated in the caucuses of the Republican party and in the deliberations of the "Joint (Congressional) Committee of Fifteen on Reconstruction."[46]

We do know that broader language as to civil rights was proposed but not adopted. For example:

> "All provisions in the Constitution or laws of any State, whereby any distinction is made in political or civil rights or privileges on account of race, creed or color, shall be inoperative and void."[47]

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[44] Appendix p. 138.

[45] Mr. Justice Black in the appendix to his dissent in the *Adamson* case referred to that Act as one of "certain defined civil rights." 332 U.S. 46 at 99.

[46] Appendix pp. 139 to 151.

[47] Appendix p. 140; Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* (1914), p. 215.

A reading of the Journal of the Committee of Fifteen fails to disclose any reference whatever to the regulation of public schools. There is no inference that the resolution proposed was intended to force mixed schools. The Journal's reports dealt largely with other reconstruction problems. Neither the majority nor minority report of the Committee to Congress contained any reference to schools or any inference that the resolution proposed to cover more than the rights embodied in the Act of 1866.

A great many members of both houses made speeches indicating that they intended to embody the guarantee of the 1866 Act into the Constitution. These included Representatives Thaddeus Stevens, Broomall, Thayer, and Boyer of Pennsylvania, Raymond of New York, Eldridge of Wisconsin, and Eliot of Massachusetts.[48] Mr. Rogers of New Jersey said that the amendment was no more than "an attempt to embody in the Constitution . . . that outrageous and miserable Civil Rights Bill."[49]

Debate in the Senate indicated that the understanding of some Senators was that section one incorporated the Civil Rights Bill into the Constitution; and those who gave it a broader interpretation thought it gave Congress the power to prohibit discriminatory legislation.[50] No Senator indicated that its effect would be to abolish separate schools.

### 3. Acts Relating to Separate Schools in the District

All the time Congress debated the resolution on the Fourteenth Amendment, it was operating separate

[48] See Appendix p. 146 for these references.
[49] 39th Cong., 1st Sess., p. 2537.
[50] Appendix pp. 147 to 149.

schools for white and Negro children in the District.[51] Congress debated the Fourteenth Amendment between February and June, 1866. During that time, on May 21, 1866, Congress enacted a bill donating real estate in the District for the separate Negro schools.[52] Between April and July, 1866, Congress considered and enacted a bill changing the tax support for the separate Negro schools of the District. In 1867 Senator Sumner proposed to require that the Constitutions of the Southern States must provide for "a system of public education open to all, without distinction of race or color," before the State could seat its representatives in the Congress. His proposition was defeated.[53]

### 4. The Period Immediately Following the Adoption of the Fourteenth Amendment in 1868

The Fourteenth Amendment was declared adopted July 28, 1868.[54] A bill which had passed the Senate in July, 1868, was passed by the House on February 5, 1869, changing only the administration of the separate schools in the District. The bill transferred the duties of the Negro trustees of the Negro schools to the (white) trustees of the public schools. The bill, of course, left the schools separate. The Negroes were greatly disturbed, not because the schools were separate, but because they wanted Negro trus-

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[51] Appendix p. 151.

[52] 18 Stat. 343 (1866).

[53] Appendix p. 152; 40th Cong., 1st Sess., p. 170.

[54] Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding,* 2 Stanford Law Rev. 134 (1949).

tees for their separate schools. President Johnson vetoed the bill for that reason.[55]

Thus, almost immediately after the adoption of the Fourteenth Amendment, the Congress re-examined its laws relating to separate schools and merely proposed to change the administration of them by consolidating the duties of the school boards. This is convincing proof that the Congress which proposed the Amendment did not construe it to require the abolition of separate schools.

In May, 1870, the Civil Rights Bill of 1866 was re-enacted in Section 18 of "The Enforcement Act of 1870." It is significant that the 1866 Act was not changed; no new sections or provisions were added.

In 1871 a sustained attempt was made in Congress to require abolition of separate schools in the District. The bill was defeated and Congress adhered to separate schools. The debates on this indicate that the States and their representatives in the Congress clearly believed that the power to provide separate or mixed schools remained in the States. Senator Patterson of New Jersey said that the law of the Northern States was that the boards of education were free "to determine for themselves whether they would mix the whites and blacks or have separate schools."[56] He thought mixed schools would destroy the public school system and that it would cause a loss of public support for their schools because the whites would withdraw. Senator Thurman of Ohio said the common schools were having difficulty enough without saddling the system with

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[55] Appendix p. 153; 40th Cong., 3rd Sess., p. 1164.
[56] Appendix p. 154; 441st Cong., 3rd Sess., pp. 1053-4.

a compulsory mixing of the races. He thought the Government should not force sociological ideas on the people; that communities should be left to choose for themselves separate or mixed schools.

### 5. Mr. Sumner's Recognition in 1871 That Mixed Schools Were Not Required

In October, 1871, Mr. Sumner recognized and said that mixed public schools were not then required and that the Civil Rights Act needed amending in that regard. To a convention of Negroes he wrote,

> "The right to vote will have new security when your equal rights in . . . common schools is at last established. . . . *This defect has been apparent from the beginning;* and, for a long time I have striven to remove it."[57]

### 6. The Senate's Passage of Sumner's Civil Rights Bill in 1872 After Deleting References to Schools and Churches

Another attempt to enact a broad civil rights bill, including a provision for mixed schools, was made by Mr. Sumner in 1871-1872. An amnesty bill to remove disabilities imposed on Southerners by the third section of the Fourteenth Amendment was proposed. It needed a two-thirds majority to pass. In the Senate, Mr. Sumner moved to amend by adding his broad civil rights bill to the amnesty bill. The series of maneuvers and debates on this situation are set out in the appendix, pages 157 to 164. Sumner was successful in two preliminary skirmishes in

[57] Appendix p. 157, note 94.

getting his bill added as an amendment to the amnesty bill in the Senate. But the amnesty bill, after it was added, failed to pass the Senate. Finally the Sumner bill was considered separately; *and after the references to mixed schools and churches was deleted,* it was passed by the Senate.[58] His bill, even as amended, did not pass the House. During the debates, Senator Frelinghuysen, whom Petitioner quotes at length on page 60, proposed to amend the Sumner bill to exempt certain separate schools with a provision that:

> ". . . churches, schools, cemeteries . . . established exclusively for either the white or colored race, should not be taken from the control of those establishing them, *but should remain devoted to their use.*"[59]

And Mr. Sumner accepted the amendment.[60] If separate schools were unconstitutional, those previously established could not be excepted. But the Congress knew separate public schools had not been invalidated by the Fourteenth Amendment.

It is also noteworthy that during the debate, Senator Trumbull of Illinois, who had introduced into the 39th Congress (which proposed the Fourteenth Amendment) the Civil Rights Act of 1866 and the Freedmen's Bureau bill, said,

> "The right to go to school is not a civil right and never was . . . it is a privilege."[61]

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[58] Appendix p. 163.
[59] Appendix p. 159; 42nd Cong., 2nd Sess., pp. 435, 487.
[60] Appendix p. 159; 42nd Cong., 2nd Sess., p. 453.
[61] Appendix p. 161; 42nd Cong., 2nd Sess., p. 3189.

Senator Ferry of Connecticut said that in the Northern States and in the District students were separated by race and by sex and given equal advantages.[62] The general feeling of the majority was expressed by the Senator from Connecticut:

> ". . . in the community where I reside there is no objection to mixed schools . . . and if I were called upon to vote *there*, I should vote for them. It would be a useless expense to establish separate schools for the few colored people in that community. But I cannot judge other communities by that community. . . . I believe the Senator's bill relating to the District of Columbia, for instance, would utterly destroy the school system in this District. . . .
>
> "Take for instance the State of Ohio where I understand the law permits the districts to have mixed or separated schools . . . and I observe a decision of the Supreme Court of Ohio reported in yesterday's newspaper . . . It had (there) been the assertion . . . that compelling the separation of the races into different buildings was a violation of the 14th amendment, notwithstanding that both races . . . enjoyed the same or equal privileges . . . but that Court . . . of judges whose political opinions are like those of the majority of this body . . . 'sustained the constitutionality . . . of the common school laws . . . and held that the organization of separate schools for colored children is not in conflict with the provisions of the fourteenth amendment.' I believe that that decision is good law."

Again in 1872 Mr. Sumner attempted to pass a bill to require mixed schools in the District. Mr.

[62] Appendix p. 161; 42nd Cong., 2nd Sess., p. 3190.

Stockton of New Jersey said that what Mr. Sumner wanted was not equal rights but the forced intermingling of the races.[63] Senator Ferry of Connecticut thought the bill tyrannical and that a vote should be taken to see if the people of the District wanted separate or mixed schools.[64] Mr. Edmunds of Vermont put the matter squarely up to the Senate:

> "It is a matter of great importance that we should determine fairly and squarely whether in the District of Columbia, where we have the power, that we shall exercise it . . ."

The Congress did determine the matter, just as it had in the past: that separate schools were not required. The bill was defeated and Congress continued to maintain separate schools.

### 7. Action and Debates on the Civil Rights Act of 1875

Debates on the two bills (S. R. 1 and H. R. 796) extended from 1873 to 1875. During this period, Congress enacted further legislation regulating the separate schools for white and Negro children in the District. Its Acts provided among other things that:

> "Any white resident shall be privileged to place his or her child . . . at any one of the schools provided for . . . white children . . . and any colored resident shall have the same rights with respect to colored schools."

The bill finally adopted as the Civil Rights Act was H. R. 796. Mr. Sumner's bill, S. R. 1, passed

[63] Appendix p. 160; 42nd Cong., 2nd Sess., p. 2540.
[64] Appendix p. 161; 42nd Cong., 2nd Sess., pp. 3124, 3125.

the Senate but never passed the House. It was the House bill which the Senate ultimately adopted.

It is true that certain amendments were defeated in the Senate during its consideration of S. R. 1 which never became law. But the assertion on page 58 of Petitioner's brief that "the Senate of the 42nd Congress concluded that 'separate but equal' schools if established . . . were a violation of the Fourteenth Amendment" is incorrect. He cites no authority for the statement. What he probably refers to is a vote in the 43rd Congress which defeated a proposed amendment in the Senate to Mr. Sumner's bill (S. R. 1) to specifically except separate schools.[65]

It will be remembered that the Senate earlier (1872) had specifically amended Sumner's Civil Rights bill by deleting reference to schools and churches and had passed it in that form.[66] On this occasion Mr. Sumner was successful in defeating the amendment. But the Senate later adopted H. R. 796 from which the reference to schools was omitted to leave the matter to the States.[67]

The opinions of some of the other Senators are enlightening to show the view which ultimately prevailed in the Senate. Senator Stockton of New Jersey said the regulation of the schools was a matter of State concern. The New Jersey Legislature, he said, would not pass a compulsory mixed school law: "They know their constituents do not desire it. They know it is not right." The Negroes, he said, are entitled to "equal" rights; but equal rights do not mean "the same" facilities.

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[65] 43rd Cong., 1st Sess., p. 4167.
[66] See p. 55, *supra.*
[67] 43rd Cong., 2nd Sess., pp. 997, 1010, 1870.

Senator Alcorn, a Republican of Mississippi, said that the Negroes were in control of his State; and so "self protection, if I had no higher motive would move me to support . . . this bill." But as to mixed schools he said:

> "You say that you do not want the schools mixed. Well, I am not in favor of mixing them; and I consider that this bill does not mix them. . . . How is it in my State? There . . . the colored people control; they make the laws; they levy the taxes; they appoint the school board. The whole machinery is in their hands; yet there is not a mixed school in the State . . . and we have civil rights there. Why is it? Simply because the colored people do not desire it; because they believe the interests of both races will be promoted by keeping the schools separate."

And Senator Saulsbury of Delaware, who had been in the 39th Congress, said that the Fourteenth Amendment did not remove the States' police power to have separate schools. Other speeches of this nature are set out in the Appendix.

### 8. Action on H. R. 796 Which Became the Civil Rights Act of 1875

It was the House Bill, from which the reference to schools was intentionally deleted to leave the matters to the States, which was finally passed by both Houses and became the Civil Rights Act of 1875. The development of the House Bill is most informative. Introduced by General Butler in 1873, it contained broad language, including language which might

have been construed to require mixed schools.[68] The opposition to the mixed school provision was so strong that Butler himself moved to recommit the bill to committee. He said:

> "But there are reasons why I think this question of mixed schools should be carefully considered. The Negroes . . . have never, until the last few years, had an opportunity for education. . . . Therefore in the Negro schools which I established as a military commander during the war, I found that while I had plenty of school boys with 'shining morning faces,' there were none 'creeping unwillingly to school.' . . . *And I shall recommit the bill . . . because I want time to consider whether upon the whole it is just to the negro children to put them into mixed schools.* . . .
>
> "And therefore I am quite content to consider this question in the light of what on the whole is best for the white and colored child before this matter is again before the House."[69]

Mr. Butler, who had been in the 39th Congress which proposed the Fourteenth Amendment, did not construe that amendment to require mixed schools. Otherwise he would not have been willing to consider the expediency of the separate school amendment.

The bill was recommitted and came out of committee specifically amended to allow separate schools. That portion of the bill, as it was debated in the House in February, 1875, contained the original words which were construed by some as prohibiting separate schools. It also contained the Judiciary Committee amendment:

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[68] Appendix p. 167; 43rd Cong., 1st Sess., p. 378.
[69] Appendix p. 172; 43rd Cong., 1st Sess., pp. 455-457.

> "Provided, That if any State or the proper authorities in any State, having the control of common schools or other public institutions of learning aforesaid, shall establish and maintain separate schools and institutions, giving equal educational advantages in all respects for different classes of persons entitled to attend such schools and institutions, such schools and institutions shall be a sufficient compliance with the provisions of this section so far as they relate to schools and institutions of learning."

Three principal amendments were offered from the floor. Mr. *Cessna* of Pennsylvania proposed to substitute the words of the (Sumner) Senate Bill.[70] Mr. *White* of Alabama proposed to allow separation of the races at inns, theaters, schools, and public conveyances.[71] Mr. *Kellogg* of Connecticut moved to strike the words of the original bill as to schools and also the proviso added by the House Judiciary Committee; i. e., to delete all reference to schools.

Mr. Kellogg explained his amendment to the House before the vote:

> "The amendment I have proposed is to strike out of the House bill reported by the Committee on the Judiciary all that part which relates to schools; and I do it, Mr. Speaker, in the interest of education, and especially in the interest of education of the colored children of the Southern States. . . . The proviso to the first section is one that makes a discrimination as to classes of persons attending public schools; and I do not wish to make any such provision in an act of Congress.

[70] Appendix p. 181; 43rd Cong., 2nd Sess., p. 1011.
[71] Appendix p. 181; 43rd Cong., 2nd Sess., p. 939.

"But upon this school question we should be careful that we do not inflict upon the several States of the Union an injury that we ought to avoid. A school system in most of the Southern States has been established since the war of the rebellion, by which the colored children of the South have the advantages of an education that they never could have before that time. I believe, from all the information I can obtain, that you will destroy the schools in many of the Southern States if you insist upon this provision of the bill. You will destroy the work of the past ten years and leave them to the mercy of the unfriendly legislation of the States where the party opposed to this bill is in power. *And besides, this matter of schools is one of the subjects that must be recognized and controlled by State legislation.* The States establish schools, raise taxes for that purpose, and they are also aided by private benefactions; and they have a right to expend the money, so raised, in their own way. . . ."[72]

The *Kellogg* amendment was adopted and the bill passed the House.[73] The Senate passed the House bill as it had been amended,[74] and it became law March 1, 1875.[75]

### 9. The Present Acts of Congress Providing for and Recognizing Separate Schools

The interpretation by the Congress that the Constitution authorizes the maintenance of separate

[72] Appendix p. 184; 43rd Cong., 2nd Sess., p. 997.
[73] Appendix p. 185; 43rd Cong., 2nd Sess., pp. 1010, 1011.
[74] 43rd Cong., 2nd Sess., p. 1870.
[75] *Id.* at 2013. This Court declared section one of this bill invalid. *Civil Rights Cases,* 109 U.S. 3 (1883).

equal schools has continued to the present. It maintains separate schools in the District of Columbia.[76] It provides appropriations for land-grant colleges maintained on a separate basis, the Act specifically recognizing separate colleges for white and Negro students.[77] And it provides appropriations under the National School Lunch Act to be expended in separate schools for white and Negro students.[78]

### B. The Legislatures of the States Contemporaneously Construed the Fourteenth Amendment as Leaving to Them the Power to Maintain Separate or Mixed Schools.

The Fourteenth Amendment was adopted for the people by the Legislatures of the States. The intention and understanding of these bodies is therefore important in interpreting the meaning of the Amendment. An examination of the contemporaneous Acts of the State Legislatures of the "loyal" States, which Acts are summarized in the appendix hereto beginning on page 194, will demonstrate the uniformity of the legislative construction that the Fourteenth Amendment did not lift this problem out of the hands of all the State legislatures and settle it. On the contrary, the Legislatures, which were represented in Congress at the time when the Amendment was adopted, continued to exercise their own sound discretion as to the wisdom of maintaining separate

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[76] D. C. Code, Sec. 31-1110 *et seq.* and 31-109.

[77] These acts are discussed at length, Appendix p. 187; 7 U.S.C. § 323. These colleges include Texas A. & M. (white) and Prairie View A. & M. College (Negro).

[78] Appendix p. 193; 60 Stat. 233 (1946); 42 U.S.C. § 1760(c).

equal schools for their white and Negro students or maintaining mixed schools for the races.[79]

For example, **Indiana**, which ratified the Amendment in 1867, enacted in 1869 a law authorizing school trustees to "organize the colored children into separate schools." **Kansas**, which adopted the Amendment in 1867, authorized the establishment of separate schools in 1868. The statute was continued in force and re-enacted in 1879. **New York**, which continued its separate schools until its legislative act of 1900, enacted legislation as to separate schools as late as 1894. **California**, adopting the Amendment in 1868, authorized in 1869 the establishment of separate schools for Negroes and Indians. **Missouri** wrote into its Constitution in 1875 a provision for "Separate free schools" for Negroes. **Maryland** appropriated money in 1870 for the support of separate schools. The **Kentucky** General Assembly authorized separate schools by statute in 1871 and 1872 and wrote the policy into its Constitution of 1891. **New Jersey** established an industrial school for Negroes in 1895 although in 1881 (15 years after it adopted the Amendment) it enacted a statute that no child should be excluded from any public school on account of color. **Massachusetts** had established a policy of providing mixed schools before the adoption of the Amendment. **West Virginia** established separate schools in 1865, adopted the Fourteenth Amendment in 1867, and enacted a statute in 1871 that "white and colored persons shall not be taught in the same school." **Delaware**, of course, continues to authorize separate schools by Constitution and statute.

[79] See Appendix p. 194, for references to all the acts of the States here listed.

The States above named were of the "loyal" States. To the list of Legislatures must be added those of the Confederate States which likewise construed the Fourteenth Amendment to authorize separate schools. Notwithstanding the fact that Negro and white students did not attend the same schools in those Southern States (a fact well known to the Congress), the representatives of these States were re-seated in the Congress after the adoption of the Fourteenth Amendment. That is understandable since Congress itself maintained separate schools in the District of Columbia. In other words, it was the understanding and meaning of the Congress which proposed the Fourteenth Amendment, and of State Legislatures which adopted the Fourteenth Amendment, that separate equal schools were constitutional under the Amendment.

### C. The Contemporaneous Construction of the State and Other Federal Courts Supports This Court's Opinion as to the Meaning of the Fourteenth Amendment With Reference to Schools

The uniform construction of the Supreme Courts of the States and the Federal Courts during the period immediately following the adoption of the Fourteenth Amendment (and thereafter as well) was that the Fourteenth Amendment did not remove the power of the legislatures to provide separate or mixed schools. And where separate equal schools had been or were established, their establishment and maintenance was upheld. These early interpretations by Courts whose members had the opportunity

to observe the proposal and adoption of the Amendment, and who had the benefit of counsel who were able to argue first hand the meaning of the Amendment so recently adopted, are of considerable significance.

One of the earliest cases after the adoption of the Amendment in 1868 was decided by the Ohio Supreme Court in 1871.[80] That opinion considered at length the effect of the Amendment and concluded that the State's statute providing separate equal schools for white and Negro students was constitutional. In 1872 the New York court held that where the separate schools were equal, the separation did not violate the Fourteenth Amendment.[81]

In 1873 the Pennsylvania court upheld that State's statute providing for separate schools against the contention that it violated the Fourteenth Amendment.[82] The California Supreme Court, in 1874, rendered a similar opinion.[83] Also in 1874, the In-

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[80] *State v. McCann,* 21 Ohio St. 198.

[81] *People ex rel. Dietz v. Easton,* 13 Abb. (N.Y.) Pr. (N.S.) 159. The New York Court had held in 1869 that the Civil Rights Act of 1866 did not invalidate the separate schools for Negro and white students in Buffalo, N. Y. It said, "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. . . It is clear that the right or privilege of attending a school provided for white children is not among those included in this section." *Dallas v. Fosdick,* 40 How. Prac. 249. The highest court of New York reaffirmed this interpretation of the Fourteenth Amendment as to schools in *People v. Gallagher,* 93 N. Y. 438 (1883) and in *People v. Borough of Queens,* 161 N. Y. 598, 56 N. E. 81 (1900).

[82] *Commonwealth v. Williamson,* 30 Legal Int. 406.

[83] *Ward v. Flood,* 48 Cal. 36.

diana Court, considering the effect of the Amendment on Indiana's separate schools, said:

> "In our opinion, the classification of scholars, on the basis of race or color, and their education in separate schools, involve questions of domestic policy which are within the legislative discretion and control, and do not amount to an exclusion of either class. . . ."

The Indiana Court, even at that early date, went back to consider contemporaneous construction:

> "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 aftermatured 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 . . . in different schools. . . ."[84]

Other cases of a similar nature during that period are set out in the Appendix beginning on page 200.

## Argument

In the light of the foregoing history and contemporaneous construction of the Fourteenth Amendment, the opinions of this Court on the meaning of the Fourteenth Amendment as applied to the public schools are eminently correct. The Congress did not intend in the Civil Rights Acts or in the proposal of

[84] *Cory v. Carter*, 48 Ind. 327.

the Fourteenth Amendment to take from the States the power to decide for themselves whether it was best for the education of the children of the State that white and Negro students should be taught in the same classroom or in separate buildings with equal facilities for all. That Congress had such intention is clearly evidenced by the fact that all during that period (and even today) it maintained separate schools in the District of Columbia.

The same construction was placed on the Fourteenth Amendment by the Legislatures of the States which adopted the Amendment for the people of the United States. This is unquestionably shown by their contemporaneous legislation establishing or continuing to maintain separate or mixed schools for Negro and white students.

Furthermore, the State and Federal Courts, in the period immediately following the adoption of the Amendment, agreed that the Amendment meant that the States could constitutionally maintain separate schools where equal facilities were furnished to all groups.

All of the foregoing: the intended construction of Congress which proposed the Amendment, the understanding of the State Legislatures in adopting it, the construction of the State and Federal Courts, and the opinions of this Court set out in Section I of this brief, lead to the inescapable conclusion that it was and is the law of the land that States have the constitutional power to separate their white and Negro students for educational purposes where they furnish equal facilities and opportunities for both races. The opinions of this Court, which have correctly decided this proposition, should be followed in this case.

## Third Point

The power of the States to classify and the reasonableness of the classification in this case have been determined by this Court. Based on those decisions, the trial Court properly refused to go behind the Texas Constitution and the Legislative Acts to determine the reasonableness of or necessity for such classification. The trial Court therefore properly excluded evidence thereon.

A. The classification has been determined by this Court to be reasonable. The trial Court therefore correctly limited the testimony to the fact question of the equality of the schools in question.

B. If this Court disagrees with its previous decisions, or deems it proper to make a new, independent determination of the reasonableness and necessity for the classification made by the people of Texas in their Constitution and by the Legislature, then there is ample evidence to support such determination.

C. If the Court goes behind its own decisions and the Constitution and Statutes of Texas on the question of reasonableness, and if it decides that it has not sufficient material from the record, the briefs, and its judicial knowledge to find any reasonableness in the classification made by Texas, the Southern States, and the Congress, then, and only in that event, Respondents are entitled on a new trial to fully develop that proposition.

## Preliminary Statement

This Court in its opinions herein set out under Point I has considered and decided that the States have the power, in the furnishing of education, to separate their students, and that such a classification is not unreasonable.

The desirability and expediency of maintainting separate schools for white and Negro students or mixing them in the same classroom are matters for legislative determination.[85] The pedagogical arguments of sociologists and educators, which occupy much of Petitioner's brief, are properly to be addressed to those forming the policies of the State as to the manner in which it, at its own expense, will provide education. As this Court has properly held, such matters are for the States themselves to decide. When equal facilities are offered, the Federal Courts may intervene only if it can be said that, as a matter of law, the classification is so completely unreasonable as to be violative of the Federal Constitution. The Federal Courts, as said by Mr. Justice Jackson, should not be induced to "accept the role of a super board of education for every school district in the nation."[86]

A school district may separate its students by their height, by their names, by sex, et cetera. Such separation is not the exercise of its police power, at least as that term is ordinarily understood. It is but the

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[85] "We must remember that on this particular point we are interpreting a constitution and not enacting a statute." *Carr v. Corning,* U. S. Ct. of App., D. C., Feb. 14, 1950.

[86] *McCollum v. Board of Education,* 333 U.S. 203 at 237 (1948).

exercising of the inherent power of the State to manage its own schools. And so long as each is given substantially the same facilities and advantages, each is given "the equal protection of the laws."

It is that inherent power to operate its schools in the manner deemed best for all the students, *together* with the State's police power to preserve and maintain the public welfare, peace, safety, and happiness of the people, that is the basis for the provision in the Texas Constitution.

It is respectfully submitted that this Court should follow its former decisions.[87] But if it deems it proper to put aside those precedents and examine the question anew, it will find that there is today ample evidence to support the classification the people of Texas have written into their Constitution and supplemented by Legislative Acts. With that in view, the reasonableness of and the necessity for the exercise of the police power, ably developed in the *Amicus* brief of the Southern States, will be discussed.

**A. The Classification Has Been Determined by This Court to be Reasonable. The Trial Court Therefore Properly Limited the Testimony to the Fact Issue of the Equality of the Schools in Question.**

The decisions of this Court set out under Point I clearly demonstrate that this Court has carefully

[87] As stated by Mr. Justice Reed: "This Court cannot be too cautious in upsetting practices embedded into our society by many years of experience. A state is entitled to have great leeway in its legislation when dealing with the important social problems of its population." *Id.*, note 1 at 256.

and repeatedly held that the States may separate their white and Negro students and provide equal education for them at separate schools. The holding is expressly made in some and is necessarily implicit in others that the classification of the students is not unreasonable. In the interest of brevity, only short quotations from a few of the cases will be set out as illustrative.

Mr. Justice Clifford's concurring opinion in the *DeCuir* case which was cited with approval in this Court's opinion in the *Chiles* case:

> ". . . equality of rights does not involve the necessity of educating white and colored persons in the same school any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school; and that *any classification which preserves substantially equal school advantages is not prohibited by either the State or Federal Constitution,* nor would it contravene the provisions of either." 95 U.S. at 504.

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

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

In the *Chiles* case, this Court said that the *Plessy* case not only sustained the law,

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

This Court then concluded anew that:

> "Regulations which are induced by the general sentiments of the community for whom they are made and upon whom they operate, cannot be said to be unreasonable.
>
> "The extent of the differences based upon the distinction between the white and colored races which may be observed in legislation or in the regulation of carriers has been so much discussed that we are relieved from further enlarging upon it." 217 U.S. 71 at 77.

Similarly in *Gong Lum v. Rice*, the matter was squarely before this Court. Mr. Chief Justice Taft stated the problem and the Court's answer thereto:

> "The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that afforded to all. . . ."
>
> "Were this a new question it would call for full argument and consideration, but we think it is the same question which has been many times decided to be within the constitutional power of the state legislature. . . ."

> ". . . The decision is within the discretion of the State in regulating its public schools and does not conflict with the Fourteenth Amendment." 275 U. S. at 85 and 87.

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

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

With these decisions before it and with the *Sipuel* case which cited with approval the *Gaines* case, it is submitted that the trial Court correctly refused to go behind the provision of the Texas Constitution requiring separate impartial schools for whites and Negroes, and correctly excluded testimony as to the necessity for and the reasonableness of the classification.[88] The question as understood by the trial Court,

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[88] Respondents of course object to the use by Petitioner in his brief of evidence not introduced or which was introduced and stricken, *e. g.*, that of Dr. Thompson on pages 67-71 of Petitioner's brief. The observations of this Petitioner's witness (whose evidence was excluded) was reduced to writing and published in a magazine. What is substantially his excluded testimony and that of other of Petitioner's witnesses is then cited to the Court in another form. Thompson, *Separate But Not Equal, The Sweatt Case,* cited in his brief, pp. 22, 30, 36, and 52. That and some 54 other of Petitioner's texts, surveys, reports, et cetera, were not offered in evidence. Most of the material in the Appendix to Petitioner's Petition for Certiorari was not even offered in evidence. To answer such "evidence," Respondents have felt it necessary to include some material of the same character in their Reply.

and upon which basis the case was tried, was: "Were the facilities offered Petitioner at the time of trial substantially equal . . ." That was the question and the trial Court correctly limited the testimony thereto.

**B. If the Court Disagrees With its Previous Decisions or Deems it Proper to Make an Independent Determination of the Reasonableness of and Necessity for the Classification Made by the People of Texas in the Constitution and by the Legislature, Then There Is Ample Evidence to Support Such Determination.**

Respondents submit that the Court should follow its previous opinions which have decided that the furnishing of equal facilities at separate schools to white and Negro students does not violate the provisions of the Fourteenth Amendment. Stated differently, the Court has previously decided that this classification of students is a reasonable exercise of the powers of the State. Should the Court, however, decide to go behind its decisions and behind the Constitution and Statutes of Texas as to the reasonableness of the action and the necessity therefor, it will find today ample evidence to support such classification.[89]

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[89] By setting out these matters Respondents do not withdraw from their position that this question had been settled by the Court and that the trial court correctly excluded evidence as to what happened at other places and at different times, and that such evidence should not be considered here. But Petitioner has included so much material of this sort in his brief that it was considered necessary to reply thereto.

At the outset, the findings and enactments of the Congress and of the Legislatures of 17 states should be taken as some evidence that the classification is not without reason.[90] The Court is of course aware of the delicacy of one of the branches of the government saying to the Congress and the State Legislatures of 17 States, who have heard much of the same arguments, that their findings and enactments are completely without reasonable justification.

The Texas Legislature as late as February 28, 1950, enacted a statute providing for separation of the races in State parks.[91] The Legislature found in the preamble to that statute that:

> "Whereas the necessity for such separation still exists in the interest of public welfare, safety, harmony, health, and recreation . . ."

and the emergency clause in the bill recites that:

> "The fact that the policy of the State in requiring separate park facilities for white and Negro citizens is necessary to preserve the public peace and welfare, and to protect the privi-

[90] The *amicus* argument of the Attorneys General of the Southern States ably presents the views of that section of the United States.

[91] S. B. 19, 51st Leg., 1st Call. Sess. 1950, is set out in the Appendix at page 234. The bill passed the Senate with 29 yeas and no nays, was amended and passed by the House, 88 to 20. The Senate on February 28, 1950, agreed to the House Amendments, 27 to 0. It was signed by the Governor on March 14, 1950. Showing the extent of the necessity for the separation, the bill authorizes the closing of any facilities where separate equal accommodations cannot be furnished, the facilities to be reopened when the equal facilities are available.

leges of both white and Negro citizens in the use of the State parks . . ."

Regardless of how one would vote in a Legislative hall on the question of mixed or separate schools, it is submitted that those Legislators, educators, and other persons who hold that the furnishing of equal facilities at separate schools is best for both races and is necessary to preserve the public peace and welfare, are not completely without reason. For in order for Petitioner to prevail, it must be decided as a matter of law, that those who feel that mixed schools for the races in the South should not be required have no reasonable support whatsoever for their convictions.

In addition to the consideration by the Legislatures, many fair-minded citizens, both Negro and white, North and South, have considered the problem, its reasonableness, and its solution. Some of their findings and opinions, which Respondents say demonstrate the reasonableness of the classification, are here briefly set out.

### 1. The U. S. Department of Education's National Survey of Higher Education of Negroes

This series of United States government publications[92] was prepared by Dr. Ambrose Caliver, (R. 268) a Negro who was Senior Specialist on Negro Education in the U. S .Office of Education from 1930 to 1945, a specialist in higher education of

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

Negroes since 1945, and a member of the N.A.A.C.P.[93] That survey concluded that:

> "Equality of educational opportunity for white persons and for Negroes at the level of higher education can be achieved, in theory, by either of two methods: (1) By admitting both white persons and Negroes to the same institution, or (2) by establishing parallel and equal facilities for members of the two races. In several of the States which maintain a dual educational system, however, neither of these methods is actually feasible. In some of the States the *mores* of racial relationships are such as to rule out, for the present at least, any possibility of admitting white persons and Negroes to the same institutions. . . ." Misc. No. 6, Vol. II, p. 17.

Dr. Caliver then showed what a large proportion of the Northern Negroes voluntarily came South to attend separate Negro colleges:

> "The erroneous assumption that northern universities are carrying an unduly large responsibility for the higher education of Negroes may be accounted for, in part at least, by two common misconceptions. In the first place, the size of the northern Negro population is generally underestimated and, in the second place, it is not always known that large numbers of northern Negroes go South to attend Negro colleges." Id. at 82.
>
> "Whereas very few southern Negroes were attending these eight northern universities in 1939-40, in the year preceding nearly 4,000

[93] *Who's Who in America* 1950-51, page 409.

northern Negroes attended [separate] Negro colleges. Almost 3,000 of this number attended colleges in Southern States. The majority of these Negro students were residents of eight Northern States which rank high in economic resources. Thus instead of the Northern States carrying an undue burden in the higher education of Negroes, it appears that the Southern States, which have the least wealth, are providing educational facilities for Negro residents from economically more favored regions." (Id. at 90.)

He continued, giving reasons why the Negroes themselves preferred to go to a separate college:

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

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

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

"A common reason given for the choice of the Negro college was the desire for a more normal

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

To the same effect is an article in the *Atlantic Monthly*, "The Negro and His Schooling," by Virginius Dabney:[94]

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

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[94] Editor, Richmond Times-Dispatch; Author, "Liberalism in the South," B.A. and M.A., University of Virginia; Litt.D., University of Richmond; LL.D., William and Mary, (*Who's Who in America*, 1948-49, page 575.) The article appeared in the April 1942 issue.

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

A minority of highly respected men whose views are certainly entitled to consideration on the question of whether or not the classification in question is wholly unreasonable filed a minority report to the President. These men were: Dr. 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.

Their report read in part:

> "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."[95]

[95] *Higher Education for American Democracy* (1947), Vol. II, p. 29.

### 3. The President's Committee on Civil Rights

This group of nationally known responsible citizens, all of whom the President must have considered to be reasonable persons, was divided on the question of education. The majority of the Committee recommended that *the State legislatures* enact "fair educational practice laws," with boards and bureaus for enforcement purposes.[96] As to separation of the races, however, the feeling of some of these highly respected persons is recorded as follows:

> "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 . . . 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."

[96] *To Secure These Rights,* U. S. Gov. Print. Off. 1947, p. 168: "There is a substantial division within the Committee on this recommendation. A majority favors it."

It is significant that the President has not recommended those sections of the report of the majority of his Civil Rights Committee or the Committee on Higher Education regarding the elimination of separate schools in the South.

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

In 1944, a study was made at the direction of the Bi-Racial Conference on Education for Negroes in Texas.[97] The personnel on the Committee, representing educators of both races, was of very high calibre.[98] It considered five alternatives for improving Negro education at the graduate and professional level: (1) Admit Negroes to the white universities; (2) Provide subsidies for out-of-state study; (3) Regional education; (4) *Establish a new state university for Negroes;* (5) Add graduate and professional schools to existing colleges. The Committee's recommendation for the establishment of a new State university was followed by the State Legislature. (Ex. 16, R. 83.)

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

> "Admission of Negroes to existing state universities for whites is not acceptable as a solution of the problem of providing opportunity

[97] Respondents' Original Exhibit 16, R. 322, 323.

[98] 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.)

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."

### 5. The Texas Poll

About the time the Legislature convened in 1947 to consider the establishment of the Texas State University for Negroes, and before the trial of this case in May 1947, the Texas Poll, an independent statewide survey of public opinion which was and is carried in most of the Texas leading newspapers, published the following results of a poll of Texas opinion *on this very subject:*

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

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

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

" 'Under a Supreme Court ruling, Texas is faced with the problem of either setting up a first-class university for Negroes or allowing them to enter the University of

Texas. What do you think ought to be done?'

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

| | *White* | *Negro* |
|---|---|---|
| Set up separate university | 79% | 8% |
| Allow them in U.T. | 3 | 5 |
| Ignore court ruling | 1 | — |
| Don't Know | 3 | 1 |
| | 86% | 14%[99] |

The Texas Poll in its survey released March 18, 1950, found that "the general attitude of the adult public [was] much the same as it was two years ago." The poll, which is set out in full in the Appendix, continues:

"The results show that only Negroes, as a group, give a majority vote to the idea of teaching both races in the same universities. A substantial minority of college-trained adults supports this view, but the lower educational levels who make up the greater portion of the population are strongly opposed.

"Some who favor the general policy of barring Negroes from the University say they would not object if one or two were admitted

[99] The poll is set out in full on p. 86, Appendix to Respondents' Original Brief. The report continued, "In this survey, as in all scientific samplings by The Texas Poll, every person gave his opinion in strict confidence. To encourage Negro respondents to voice their opinions freely, the Poll uses trained colored interviewers to contact a cross section of their race."

to the law school or if advanced students were allowed to enroll in graduate courses not available elsewhere in Texas. But the majority of Texas adults is opposed even to these exceptions."

### 6. The Position of the Federal Council of Churches

The Federal Council of Churches of Christ has by *amicus* brief stated to the Court its position that separation of the races is "unnecessary and undesirable." To support its position it has introduced documents and opinion evidence not in the record.[100] It is therefore considered necessary to answer that brief by pointing out one of the strongest arguments in favor of the reasonableness of the classification in question.

The churches who comprise the membership of the Federal Council, of their own choosing, maintain in the South churches, church schools, and denominational colleges which are in fact separate for the white and Negro races.[101] This is true only in a

[100] The State's reply to the Council's request for permission to file an *amicus* brief on the merits of this case is set out on page 228 of the Appendix. The fact of the operation of separate schools by the churches was of course recognized by Respondents before. But it was not introduced into the case until the Federal Council itself raised it. Because Respondents feared that the Court might be misled by the Council's statement, it was felt necessary to reply thereto. The Council's practice is as important as its preachment.

[101] As an example in Texas, Southern Methodist University and Southwestern University are supported by the Methodist Church and attended by white students, whereas Samuel Huston and Wiley College are both Methodist-Episcopal schools for Negroes. In Tennessee the University of

lesser degree in the North.[102] They are fine schools and excellent churches, but they are separate just as the public schools are separate. The compelling reasons which caused the people of Texas to adopt such a policy undoubtedly were and are apparent to those forming the policy of the churches and their schools.

It certainly cannot be said that the policy of the churches in maintaining separate schools is based upon racial hatred and antagonism. The practice of the churches in the South and the policy of the State are the same with regard to schools and colleges.

### 7. Statement of Dr. Charles W. Eliot

While President of Harvard University, Dr. Charles W. Eliot addressed the Twentieth Century Club of Boston on the consequences of the *Berea College* decision, *supra*. Among other things he said,

> "If the numbers of whites and blacks were more nearly equal [in Boston] we might feel like segregating the one from the other in our

(Ftn. 101 Cont'd) the South (Sewanee) is a white, Protestant-Episcopal school; Maryville College for white students and Knoxville College, for Negro students are both Presbyterian. In Georgia, Wesleyan College is for white students and Paine College for Negroes; both are Methodist schools. In North Carolina Presbyterian-supported Johnson C. Smith University is for Negro students and Davidson is for whites. This is also generally true in the schools of churches not members of the Federal Council; *e. g.*, Baylor and Wake Forest Universities (Baptist) and T.C.U. (Christion). See Loescher, *The Protestant Church and The Negro*, 90-105 (1948).

[102] Loescher, *op. cit., supra*, at 51 *et seq.;* 36 Survey Graphic 59-62, January, 1947; Myrdal, *An American Dilemma* 636, 868-872 (1944).

own schools. It may be that as large and generous a work can be done for the Negro in this way as in mixed schools. . . .

"Perhaps if there were as many Negroes here as there, we might think it better for them to be in separate schools. At present Harvard has about 5,000 white students and about 30 of the colored race. The latter are hidden in the great mass and are not noticeable. If they were equal in numbers or in a majority, we might deem a separation necessary."[103]

After a tour of the South on which he made first-hand observations, Dr. Eliot concluded:

"The complete segregation of the colored people does not seem to me necessary in the Northern states, or wherever the proportion of negroes is small. It is unnecessary, for example, in the public schools of Boston and Cambridge. If, however, in any Northern state the proportion of negroes should become large, I should approve of separate schools for negro children." II *Charles W. Eliot* by Henry James (1930), p. 168.

### 8. Members of the Federal Judiciary

Federal District Judge John Paul[104] in December of 1947 considered anew the question of the reason-

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[103] Stephenson, *Race Distinctions in American Law,* D. Appleton & Co., 1910, p. 164.

[104] Republican member of 67th Congress; Special Assistant to U. S. Atty. Gen. 19244-25; U. S. Dist. Atty., W. D. of Va., 1929-31; Federal District Judge since 1932; Phi Beta Kappa. (*Who's Who in America* 1950-51, p. 2125.)

ableness of a company rule separating the races on a common carrier. He said that,

> "It may be conceded that a regulation . . . which was deemed reasonable a generation ago, may not necessarily be so at the present time."

He concluded, after having heard witnesses on both sides of the question that:

> ". . . I am unable to say that as of today the prevailing practice in the Southern states of the separation of white and colored passengers on common carriers is arbitrary and without reasonable basis. . . . Among the witnesses in this case were the President of the defendant company and the Presidents of two other bus companies operating in Virginia, North Carolina and other Southern states. There was testimony also from public officials of the states of Virginia and North Carolina whose duties related to the supervision of motor carriers operating in those states. All of these witnesses agreed in the opinion that the separation of white and colored persons traveling by bus within the territory named was desirable and in the interest of both races. There is no ground for charging these witnesses personally with the harboring of racial prejudices and they testified with evident sincerity in expressing the view, born of their observation and experience, that the seating of white and colored passengers indiscriminately would increase the occasions for arguments, altercations and disturbances among passengers leading to annoyance, discomfort and possible danger to passengers of both races. The opinion of these men whose activities are concerned with the operation of

these carriers cannot be ignored in determining whether the rules adopted for the seating of passengers are reasonable ones. No matter how much we may deplore it, the fact remains that racial prejudices and antagonisms do exist and that they are the source of many unhappy episodes of violence between members of the white and colored races. If it is the purpose of the defendant here to lessen the occasions for such conflicts by adoption of a rule for the separate seating of whites and colored passengers, this court cannot say that such a rule is purely arbitrary and without reasonable basis.

". . . The fact that such separation has long been enforced in a number of states by custom and by the rules of common carriers operating in such states is a matter of public knowledge of which the members of Congress are fully aware. In fact, although efforts have been made over some years to induce Congress to enact legislation on this subject, it has consistently refused to attempt such regulation. There can be no other inference than that Congress has thought it wise and proper that the matter should be left for determination to such reasonable rules as the carriers might themselves adopt and that it considered that rules providing for the segregation of passengers in those sections where they were applied were reasonable ones. By its refusal to nullify the practices and regulations of these carriers in respect to the separation of passengers, Congress has by the strongest implication given its approval to them. This is a field of Congressional duty and responsibility. This court cannot invade it and, by usurping the powers of Congress, lay down rules by which this defendant must guide the operation of its business—rules which Congress, in the

> exercise of power specifically and solely entrusted to it, has refused to lay down."[105]

The members of the Fourth Circuit Court of Appeals in December, 1948, considered and affirmed a judgment holding that the regulations of a carrier separating the races were reasonable, saying:

> "The adoption of a reasonable regulation by an interstate carrier for the segregation of passengers does not violate the law as laid down by the Supreme Court; and *in this case both the reasonableness of the regulation and the manner in which it was enforced were fairly submitted to the jury* and determined against the plaintiff."[106]

### 9. The People of Texas and Their Legislature Consider the Separation of the Races as a Necessary Exercise of the Police Power

Implicit in the material heretofore set out is that, among other reasons for the separation of white and Negro students, the people of Texas and its Legislature have considered such action to be a necessary exercise of the police power. Finding a necessity "to preserve the public peace and welfare" the Texas Legislature, as noted, enacted a statute in February, 1950, providing for a separation in the public parks. Underscoring the seriousness of the matter the statute authorized the closing of any facilities in the parks which are not equal until such time as the facilities are equal. Not a single vote was cast again the bill in the Senate of Texas.

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[105] *Simmons v. Atlantic Greyhound Co.*, 75 F. Supp. 166 at 175.

[106] *Day v. Atlantic Greyhound*, 171 F. (2d) 59.

That this legislation is supported by the great majority of the people of Texas is shown by the Texas Poll of March 18, 1950, above referred to.

The examples of the recent breaches of the peace in Washington, D. C., and St. Louis, Missouri, set out in the *amicus* brief of the Southern States on pages 7-11 are illustrative.[107] Alfred H. Stone in his *Studies in the American Race Problem* relates how Kansas at one time operated its schools in Kansas City on a mixed basis. When what is described as occasional clashes culminated in the killing of a white student, the Kansas Legislature enacted a statute authorizing the separation of white and Negro students in that city.[108] That law is still in effect.

Texas has had no serious breaches of the peace in recent years in connection with its schools. The separation of the races has kept the conflicts at a minimum. The Texas Legislature, as evidenced by its 1950 enactment above referred to, believes that such separation is still necessary for the benefit of all.

Undoubtedly one of the things which gives rise to necessity for separation of the races is a historic antipathy of many of both races for a forced close personal, social contact. Beside the daily association in the classroom, at least some of which is social, universities and public schools officially maintain and sponsor extracurricular activities which do in-

[107] That brief cites the events recently occurring in those cities when public swimming pools were opened to the races on a mixed basis and relates that because of the violence which followed, the Washington pool was closed and the St. Louis pools were returned to the policy of separation.

[108] Doubleday, Page & Co., p. 69, referring to Kan. Laws 1905, c. 414, p. 676.

volve close personal social contacts. For example, there are school dances, rooms or halls for visiting, dancing, for playing various games, swimming, and so forth. Also connected with colleges are dormitories where the living together is on a more or less intimate plane.[109]

The racial consciousness and feeling which exists today in the minds of many people may be regrettable and unjustified. Yet they are a reality which must be dealt with by the State if it is to preserve harmony and peace and at the same time furnish equal education to both groups.

In addition to the Constitutional and Legislative findings of the necessity for the separation of the races in order to preserve the peace, there is another ground of necessity for their separation not adequately stressed in the material heretofore set out. In the maintenance of the public schools, the State needs the support of all its people, both white and Negro. But as stated by Dean Benjamin Pittinger, if the power to separate the students were terminated,

> ". . . it would be as a bonzana to the private white schools of the State, and it would mean the migration out of the schools and the

[109] The point is illustrated in the case arising on the mixed campus of Ohio State University where the Home Economics Department maintained a house in which the students lived. In it they learned some of the many things necessary in the operation of a home. The college officials declined to register a Negro for that course and offered her an equivalent course. The highest court of that Northern State sustained the University's position. *State ex rel. Weaver v. Ohio State University,* cited and discussed p. 30, *supra.*

> turning away from the public schools of the influence and support of a large number of children and of the parents of those children . . . who are the largest contributors to the cause of public education, and whose financial support is necessary for the continued progress of public education."[110]

It has been the policy of Texas to educate as many of its youth as possible in the public schools. The system, with the separation of the races, has grown and flourished with all classes of persons attending. Should the State be required to mix the public schools, there is no question but that a very large group of students would transfer, or be moved by their parents, to private schools with a resultant deterioration of the public schools. And among those white students in the low income group who could not afford private schooling, are many who are most likely to give physical expression to their racial feelings. The need for the exercise of police power

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[110] R. 325-326. The fact of separation of the races has been a potent influence in encouraging attendance and support of the public schools in the South and it has contributed materially to their development and maintenance. Historically, the Peabody Foundation, a philanthropic organization of Massachusetts which contributed to the establishment of public schools in the South during the Reconstruction period, urged Congress to defeat the Civil Rights Bill of 1875 in so far as it provided for mixed schools. It was stated by Trustees of the Fund that mixed schools would "be most pernicious to the interests of education in the communities to be affected by it, and that the colored population will suffer the greater share of this disastrous influence." *Proceedings of the Trustees of the Peabody Educational Fund,* Oct., 1874 (1875), p. 403; Bond, *The Education of the Negro in the American Social Order* (1934), pp. 53-57; Boyd, *Some Phases of Educational History in the South Since 1865,* Studies in Southern History (1914), p. 262.

would continue to exist and the necessity for separate schools would become infinitely more apparent.

The above says in a plainer language a part of what is meant by many of the authorities and persons whose guarded and conservative conclusions have been set out heretofore as to the necessity for the separation of the races.

To summarize, there is ample evidence today to support the reasonableness of the furnishing of equal facilities to white and Negro students in separate schools. After much study for the United States Government, Dr. Ambrose Caliver concluded that "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." He found that a very large group of Northern Negroes came South to attend separate colleges, suggesting that the Negro does not secure as well-rounded a college life at a mixed college, and that the separate college offers him positive advantages; that there is a more normal social life for the Negro in a separate college; that there is a greater opportunity for full participation and for the development of leadership; that the Negro is inwardly more "secure" at a college of his own people.

Then there are the recommendations of the minority of those highly respected Americans who were appointed by the President of the United States to serve on his Committees on Higher Education and Civil Rights which believed it to the best interest of both races and their education, that the races continue, at least for the present, to be educated in separate schools. The views of these outstanding cit-

izens may not lightly be regarded as unreasonable. The President has not recommended the action of the majority of the Committee advocating mixed schools.

Closer to the situs of this case, the Texas Bi-Racial Committee, composed of outstanding white and Negro educators, concluded that the admission of Negroes to existing State universities for whites "is not acceptable as a solution of the problem." Its recommendation for the establishment of a new State university for Negroes was followed by the Legislature. The Texas Poll taken before that Legislature met found that "most Negroes agreed with the overwhelming sentiment of the white population in Texas that the Legislature should provide colored students with a first-class university of their own."

That the separation of persons of the Negro and white races in Texas is not based on racial hatred and antagonism is shown by the fact that churches, at least of the South, have separate congregations for white and Negro members, and operate church schools and colleges which are attended on a separate basis.

Dr. Charles William Eliot, President of Harvard for forty years, concluded after a tour of the South that "if in any Northern state the proportion of Negroes should become large, I should approve of separate schools for Negro children."

The Congress and the Legislatures of 17 states consider it desirable and necessary to provide separate schools. The legislative acts are based not only on the belief that it is the best way to provide education for both races, and the knowledge that separate

schools are necessary to keep public support for the public schools, but upon the necessity to maintain the public peace, harmony, and welfare. In addition to the material herein set out, the *amicus* brief of the Southern States ably develops the necessity for the exercise of the police power. The 1950 act of the Texas Legislature conclusively shows that it believes and finds that the necessity still exists.

The matter of the reasonableness of the classification has been considered and upheld recently by Federal judges and by a Federal jury. The members of this Court including many of its most outstanding jurists, in considering and deciding the cases set out in Point I, considered the classification to be reasonable.

It is respectfully submitted that there is ample evidence to sustain the reasonableness of the classification in question and that the prior decisions of this Court holding the classification to be reasonable should be followed.

**C. If the Court Goes Behind Its Own Decisions and the Constitution and Statutes of Texas on the Question of Reasonableness, and If It Decides That It Has Not Sufficient Material From the Record, the Briefs, and Its Judicial Knowledge to Find Any Reasonableness in the Classification Made by Texas, the Southern States, and the Congress, Then, and Only in That Event, Respondents Are Entitled on a New Trial to Fully Develop That Proposition.**

As heretofore stated, the trial court was of the opinion, based on the decisions of this Court, that the

sole question to be determined was whether the facilities offered Petitioner were substantially equal to those offered white students similarly situated .

That Court thus refused to go behind the provisions of the Texas Constitution and statutes on the question of the reasonableness of, or necessity for, those provisions. He excluded much of Petitioner's proffered testimony as to what happened at other places and at different times. His inquiry was limited to the particular facts of this *case.*

Respondents, also believing that the decisions of this Court were correct and were controlling, did not attempt to put on a complete case in defense of the Texas Constitutional provisions and statutes. Those provisions, with the decisions of this Court, were believed to be the law of the case; and it was tried accordingly.

If, however, this Court determines not to follow its former decisions or feels the necessity of an independent evaluation of the question of the reasonableness of the classification, it is believed and submitted that the matter herein present is ample to support the provisions of the Texas Constitution and Statutes which are involved.

But if, and only if, the Court here decides not to follow its former decisions, and if the Court determines that the classification must be struck down unless more is shown the Court, then the State is entitled to a new trial in which to fully develop the proposition.

Respondents do not wish to be misunderstood. While they confidently expect that this Court will follow its previous decisions, the principle in ques-

tion is too important to the State of Texas for any contingency or possibility, however remote, to be overlooked. It is only against the remote possibility that this Court may decline to follow its former decisions and be of the opinion that the matter here presented fails to show any reasonableness whatsoever that this point is preserved.

## Fourth Point

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

### 1. The Fact Question As to the Equality of the Two Law Schools is Not Properly Before This Court.

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

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

> ". . . this court is of the opinion and finds from the evidence that . . . the Respondents herein . . . have established the School of Law of the Texas State University for Negroes in Austin, Texas, with substantially equal facilities and with the same entrance, classroom study, and graduation requirements, and the same courses and the same instructors as the School of Law of The University of Texas; that

> such new law school offered to Relator privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at The University of Texas. . . . " (R. 440.)

The Court further found that:

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

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

The same position was taken on appeal. The findings of fact of a court sitting without a jury, under the laws of Texas, have the same force and are entitled to the same weight as the verdict of a jury.[111] These findings will not be disturbed by a Texas appellate court where there is evidence to support them, even though the evidence may be conflicting.[112]

The Texas Courts of Civil Appeals have the power to reverse and remand where the evidence so pre-

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[111] *Bird v. Pace,* 26 Tex. 487 (1863); *Jordan v. Brophy,* 41 Tex, 283 (1874); *Rich v. Ferguson,* 45 Tex. 396 (1867); *Baldridge v. Scott,* 48 Tex. 178 (1877).

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

ponderates against the judgment that it should be set aside. Where there is no evidence to support the findings and judgment, the Courts of Civil Appeals and the Texas Supreme Court are empowered to reverse the case and render the proper judgment. [113]

Under Texas procedure it is necessary to invoke the jurisdiction of the appellate courts in this regard.[114] Petitioner did not do so.[115] As stated by the Court of Civil Appeals:

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

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

The Texas Supreme Court is empowered to reverse and render a case where there is no evidence

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

[114] *Wisdom v. Smith,* 146 Tex. 420 (1948); *DeWitt v. Brooks,* 143 Tex. 122 (1944); Rule 476, Tex. Rule Civ. Pro., *infra,* note 117.

[115] See Petitioner's points of error in the Court of Civil Appeals, Appendix, to Respondents' Original Brief, p. 105. The only assignment even approaching a challenge of the sufficiency of the evidence to support the fact finding was his 4th point which complained of the holding that "the proposal to establish a racially segregated law school afforded the equality required by the equal protection clause . . ." That assignment says that even if the two schools are identical, the fact that they are separate violates the 14th Amendment. It does not raise the question of the equality of the two "separate" schools.

to support the findings of fact and judgment.[116] But this point must first be made in the Motion for Rehearing in the Court of Civil Appeals.[117] There is no assignment of error in Petitioner's Application for Writ of Error to the Texas Supreme Court on the want of evidence to support the fact findings.[118] So in this case, the question of evidence to support the finding of fact as to the equality of the schools was not before the Texas Supreme Court.[119] It had no jurisdiction to consider this point.

It follows that the refusal of the application for writ of error by the Supreme Court of Texas was based solely on the law point as to the power of the State to provide separate facilities. Its jurisdiction on the question of whether there was evidence to support the fact finding of equality of facilities of the two separate schools was not invoked. Its refusal of the application for writ of error, therefore, could not be construed as a holding on whether there

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[116] *Schelb v. Sparenberg,* 133 Tex. 17 (1939); *Sovereign Camp W.O.W. v. Patton,* 117 Tex. 1, (1927).

[117] *Moore v. Dilworth,* 142 Tex. 538 (1944); *Railroad Comm. v. Mackhank Pet. Co.,* 144 Tex. 393 (1945). Rule 476 (Tex. Civ. Pro.) provides:

> "Trials in the Supreme Court shall be only upon the questions . . . raised by the assignments of error in the application for writ of error."

[118] Petitioner's Assignments of Error in the Texas Supreme Court are set out in the Appendix to Respondents' Original Brief page 106.

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

was evidence to support that determinative finding of fact; the court had no jurisdiction as to that point.

With regard to cases involving disputed fact issues, this Court has announced that it accords great respect to the conclusions of the State judiciary. It has said:

> "That respect leads us to accept the conclusion of the trier of disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with . . . equal protection.'"[120]

At the same time, the Court has announced that in cases arising under the Fourteenth Amendment the Court feels that its duty "calls for our examination of the evidence to determine for ourselves whether a federal constitutional right has been denied."[121]

It is submitted that the Court is under no duty to make such an examination where Petitioner himself has not raised the point for the appellate courts of the State to pass upon.

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

> "But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and

[120] *Akins v. Texas*, 325 U. S. 398, 402, (1945).
[121] *Ibid.*, note 120.

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

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

Those "reasons of peculiar force" are particularly applicable here since Petitioner attacks the constitutional validity of the Texas Constitution as well

as its statutes. This Court has been unwavering in the application of the doctrine that it will not consider points not presented to the highest State court.[122]

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

It is therefore respectfully submitted that this Court should accept the fact findings of the State court that the education offered Petitioner in this case was substantially equal to that offered white students similarly situated and that the decision in this case should be affirmed.

Petitioner asserts in his Point IV that this Court should strike down its previous decisions because separate schools can never be equal. In the first place, that assumes the answer to the question as to whether or not Petitioner was offered equal facilities in *this* case. The trial court found that he was. And before he can be heard to say that no facilities anywhere can ever be equal, it was incumbent on him to have the trial court's findings in *this* case set aside if he could. That he did not do in the Appellate Courts of Texas.

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

By the assertion that separate schools or separate institutions of any kind, can never be equal, Petitioner expects this Court to judicially know all the facts as to all the places where separate facilities are now being offered to any groups, or which may hereafter be offered. Respondents say that the assertion is not only unfounded, but that there is no precedent for the use of judicial notice on such a scale on disputed facts. Discussing the exercise of judicial knowledge this Court said in *Brown v. Piper*, "Every reasonable doubt upon the subject should be resolved promptly in the negative." 91 U. S. 37, 43 (1875).

Furthermore the assertion that no separate Negro college with equal facilities could be equal to one for white students is to brand the Negro race with an inferiority to which Respondents cannot subscribe.

**2. Assuming the Fact Question of the Equality of the Schools is Properly Before the Court for Determination, There is Substantial Evidence to Support the Fact Findings of the State's Trial Court.**

An examination of the Record will show that there is substantial evidence to support the trial court's fact finding. As set out in the discussion by the Texas Court of Civil Appeals (R. 449), it is not required that the accomodations be identical. The test is whether they are substantially equal.[123]

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

The point may be illustrated by assuming a situation applicable only to white students. In most large cities in the South, there are several white primary schools. They generally differ in age, in beauty, in amount of playground available (depending on how far in town they are), et cetera. Some have more of this and less of that. Of course the white students are entitled to "equal protection." Yet parents cannot successfully demand the admission of their children to any particular school so long as the school to which their children are assigned is "substantially equal."

The principle is applicable here. The operation of the public schools, including publicly-owned colleges, requires the test to be "substantial equality." Identical facilities and physical plants are not required in assigning white students to schools for white children. Nor should it be required that white schools should be identical with Negro schools. All are schools furnished at the State's expense; and so long as each student is offered substantially equal facilities, he is afforded the equal protection of the laws.

As set out above, whether substantially equal facilities are offered students in different schools is a question of fact. Assuming the question to be properly before the Court, there is substantial evidence to support the State court's finding of fact. The following evidence in that regard was adduced in this case:

**Entrance, Examination, Graduation, and Similar Requirements**

The requirements for admission and fees, and regulations relating to the classification of students,

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

**The Faculty**

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

**Curriculum**

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

**Classroom**

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

**Library**

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

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

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

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

On the other hand, the Supreme Court Library does not have as many textbooks, legal periodicals, or English reports as the University Law Library. (R. 131-132.) The Court's Library contains the Harvard, Columbia, Yale, and Texas Law Reviews, and the American Bar Association Journal. (R. 132.) It has the English Reports up to 1932.[124] The Law Library of The University of Texas and that of the Supreme Court are substantially equal except for the texts, legal periodicals, and English Reports. (R. 132-134.)

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

In addition, a complete law library was being procured. Of such number 1,281 books were immedi-

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

ately available (R. 158), and 8,727 had already been requisitioned. (R. 155.) Orders had been placed for 5,702 of the books (R. 156), all deliverable within ten to sixty days. (R. 156.) Wherever new books were available, they were ordered; second-hand books were only ordered where new ones were not available. (R. 156.) The library requisitioned included 20 Law Reviews, Indices of Legal Periodicals, Citations, Digests, Restatements, textbooks, statutes, the complete West Publishing Company Reporter System, etc. (Respondents' Original Exhibit 8, R. 130.) The undisputed evidence is that the books ordered were sufficient to meet the requirements of the American Association of Law Schools. (R. 115.)

**The Physical Facilities**

Whereas The University of Texas Law School has three classrooms for 850 students,[125] the Negro Law School had two classrooms, a reading room, toilet facilities, and an entrance hall (R. 77; Respondents' Original Exhibit 4; R. 67), for a much smaller student body. The two law schools possessed approximately the same facilities for light and ventilation (R. 77, 88), though most law schools, including The University of Texas, need artificial light in the day-

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

time. (R. 89.) The Negro Law School, assuming at that time a class of ten students, had a greater floor space per student.[126]

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

The building housing the Negro Law School was a three-story building of brick construction. (R. 164-170.) The first floor (not a basement) was occupied by the School at the time of trial (R. 41), but the upper two stories of the building were available as needed. (R. 47.) Before March 10, 1947, the premises were cleaned and painted. (R. 39.) The building had ample space to house the 10,000 volume library and leave sufficient space for classrooms and reading rooms. (R. 166.)[127]

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

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

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

With reference to the membership requirements of the Association of American Law Schools,[128] it was shown that the Negro Law School, at the time of this trial, met the great majority of the nine requirements:

(1) It was a school not operated as a commercial enterprise, and the compensation of none of the officers or members of its teaching staff was dependent on the number of students or the fees received. (R. 114.)

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

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(Ftn. 127 Cont'd) It is a separate legal entity, a private corporation (R. 306). It was founded by the lawyers of Texas and financed by their contributions (R. 106, 112). Considerably more than half of the articles (as distinguished from case notes) are written by persons who are not University students (R. 306, 307). There is no rule which would permit the consideration or publication of an article written by a Negro (R. 307). Not all accredited schools have law reviews; for example, the Baylor Law School (R. 307). (At the time of trial.) Neither Sweatt nor any other first-year law student would be eligible to write for the law review (R. 105, 315-316).

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

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

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

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

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

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

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

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

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

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

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

(9) The requirement reads: "It shall be a school which possesses reasonably adequate facilities and which is conducted in accordance with those standards and practices generally recognized by member schools as essential to the maintenance of a sound educational policy." Dean Charles T. McCormick, President of the American Association of Law Schools in 1942 (R. 76), testified that in his opinion the Negro Law School met this requirement. (R. 116.)

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

Regarding the Law School at the time of trial, Mr. D. A. Simmons, President of the American Judicature Society 1940-1942, and President of the American Bar Association 1944-45 testified:

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

Dean Charles T. McCormick, President of the Association of American Law Schools, 1942 (R. 76), testified that facilities at the Law School for Negro citizens furnished to Negro citizens an equal op-

portunity for study in law and procedure (R. 85); that considering the respective use by the respective number of students, the physical facilities offered by the Negro Law School were substantially equal to those offered at The University of Texas Law School. (R. 78, 79.) He stated that:

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

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

> "What we set up there was a plant fully adequate to give the very best of legal instruction for the only man of the Negro race who had ever applied for instruction in law at the University in about 63 years of the life of the School." (R. 48.)

> "I am talking as a man familiar with what it takes to provide a thorough training in law in the state of Texas, and I stated the facts within my own personal knowledge, that the facilities which the Board of Regents of the University set up in accordance with Senate Bill 140 are such as to provide the Relator in this case the opportunity for the study of law unsurpassed any time elsewhere in the State of Texas, and fully equal to the opportunity and instruction we are offering at the University any day." (R. 42,43.)

It is submitted that these facts constitute sufficient evidence to support the State court's finding of

fact that the education offered Petitioner was substantially equal to that offered white students similarly situated.

## Addendum

The facts regarding the School of Law of Texas State University have materially changed since the trial of this case.[129] They have changed to such an extent that even assuming the fact question of the equality of the two schools is before the Court, it might well consider that such issue is moot. In this connection it will be remembered that Petitioner testified that no matter how equal the separate Law School might be, he would not attend it. (R. 188.)

These facts are set out to show the good faith of Respondents and the State of Texas, and to refute the statements and insinuations of Petitioner and his *amici curiae* that the State is offering a "basement" type of legal education to its Negro students.[130] They are also set out because this is a mandamus ac-

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

[130] The good faith of the State is further evidenced by the teaching of a Negro at the Medical School of The University of Texas at Galveston. Since the State has no separate medical school for Negroes, he is being taught there pursuant to a contract between The University of Texas and Texas State University. The State is simply following the *Gaines* case.

tion in which equitable principles are applicable.[131] In this case the Petitioner is seeking an order from this Court directing his admission to The University of Texas. As stated under Section C of Respondents' Point III, Respondents confidently expect that this Court will follow its previous decisions; and even assuming the fact issue of the equality of the schools to be before the Court, that it will agree that there is substantial evidence to support the State Court's fact findings. But, as stated, the case is too important to the State to leave unconsidered any contingency, however remote. Should the Court therefore disagree with courts of Texas and with respondents on the issues regarding the facts in this case, these supervening facts should be before the Court to assist it in arriving at its judgment as to the proper disposition to be made of the case.

**Supervening Facts**

1. **Accreditation.** The Law School of Texas State University has been granted provisional approval by the American Bar Association. The "provision" is that it continue to maintain its present high standards for a reasonable length of time. It has been found to meet the Standards of the American Bar Association.[132]

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[131] *United States v. Dern,* 289 U. S. 352 (1933) and cases therein cited.

[132] "The Council has found your school not to be in full compliance with its standards but to exceed those standards in many respects. We have no doubt that your school will continue to comply . . . " Letter of John G. Hervey, Advisor of American Bar Association, Section on Legal Education and Admissions to the Bar, to the Dean of the T.S.U. Law School set out in the Appendix, p. 225. See also the announcement of approval. Appendix p. 224.

The school, including of course its faculty, has also been found by the American Association of Law Schools to meet its standards.[133] Its accreditation was delayed pending the outcome of this lawsuit and for that reason only. Petitioner, who brought this suit, cannot complain about that condition.

2. **Library.** The testimony on the trial of the case was that some 10,000 volumes of law books had been ordered (R. 155, 158.) As of the time of Respondents' reply brief on Petition for Certiorari, some 16,300 volumes (including those listed as ordered on the trial) were in its shelves.[134] The latest official catalogue of that law school shows that over 23,000 volumes are in its library. It is still growing.

3. **Student Body.** As of the time of the latest report of the State Auditor, there were 23 Negro students in the law school.[135] The school maintains a practice court, bar association, and legal aid clinic for its law students.[136]

Henry Doyle, who enrolled in the law school shortly after the trial of this case in May, 1947, has successfully passed the Texas Bar Examinations and is licensed to practice law in all the State Courts of Texas.[137] The same opportunities were of course avail-

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[133] Appendix p. 227.

[134] See the Report of the Auditor and the Report of the Regents of that University to the Governor of Texas set out on pages 99 and 95 of Appendix to Respondents' Original Brief.

[135] See Report of the Auditor to the Governor of Texas in the Appendix to Respondents' Original Brief, p. 100.

[136] Bulletin of Texas State University School of Law, 1949-50, pages 6, 7.

[137] Appendix p. 227.

able to Petitioner who could have had his license to practice by now. Others will become eligible to take those examinations in the near future. Over 2,000 students are in other divisions on the campus of this university.[138]

4. **Physical Facilities.** The law school has moved into exclusive possession of an entire floor of one wing of a new two-million-dollar-building. The attached pictures will show that the building is modern in design and that the equipment is first-class.[139]

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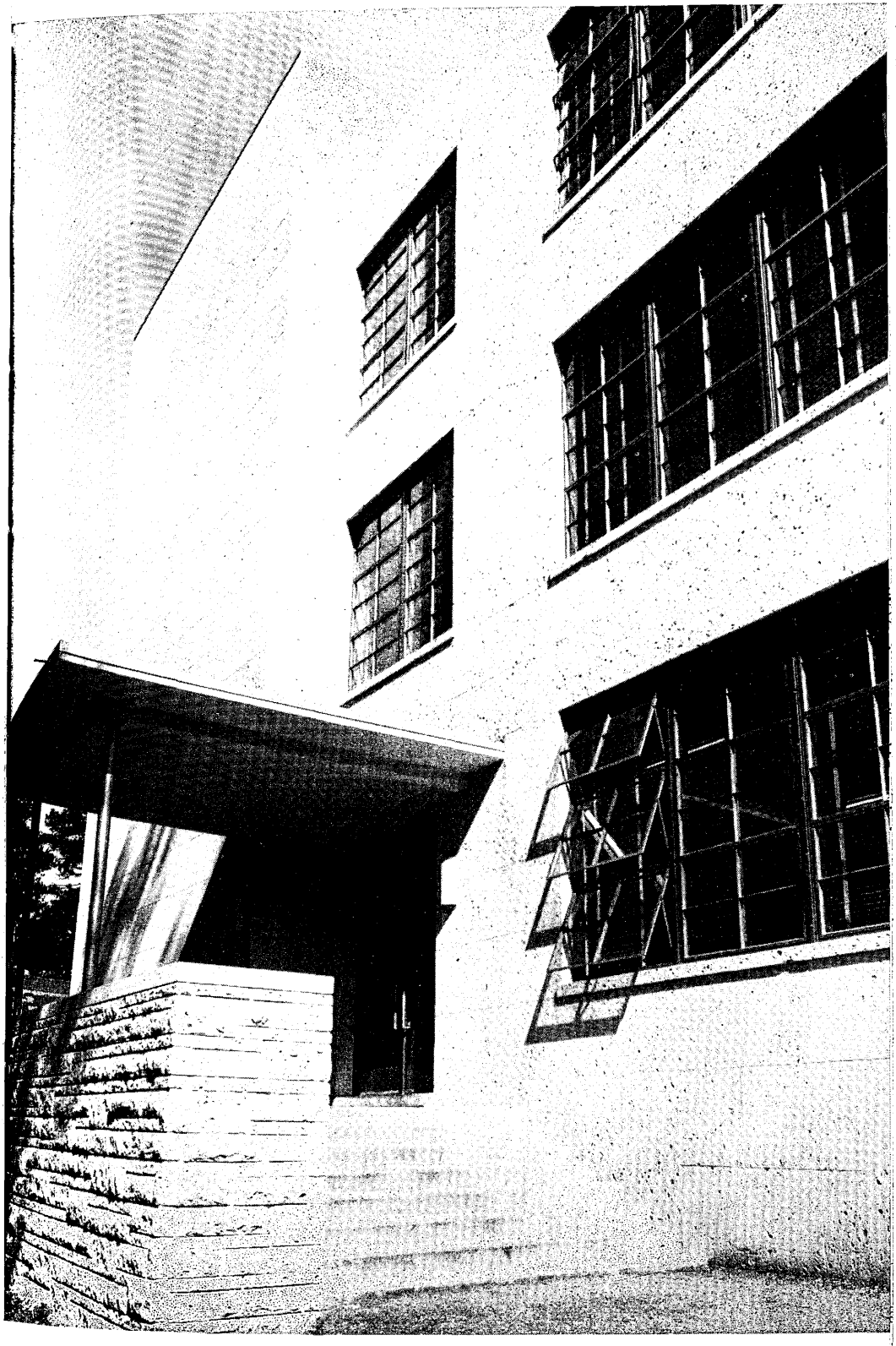
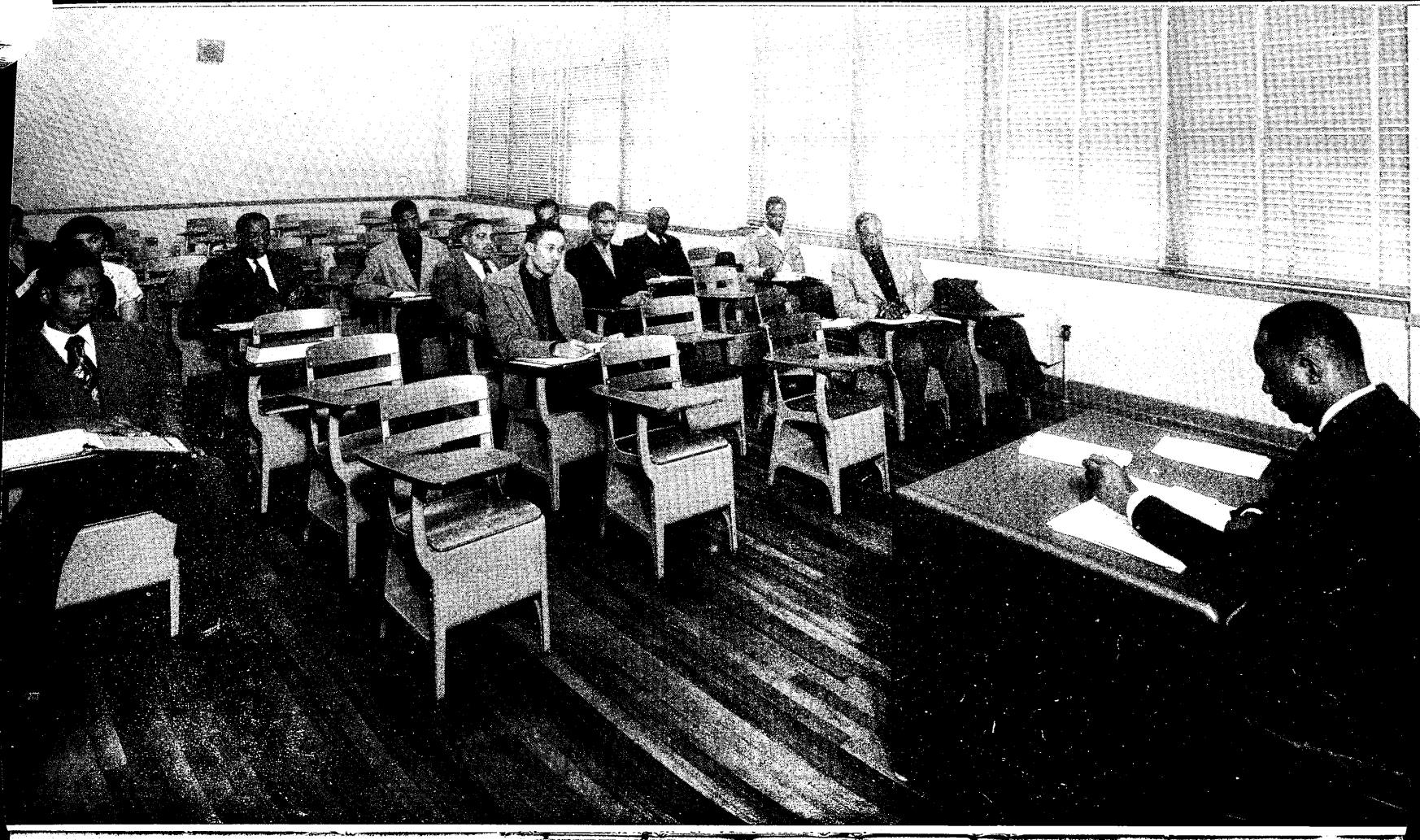
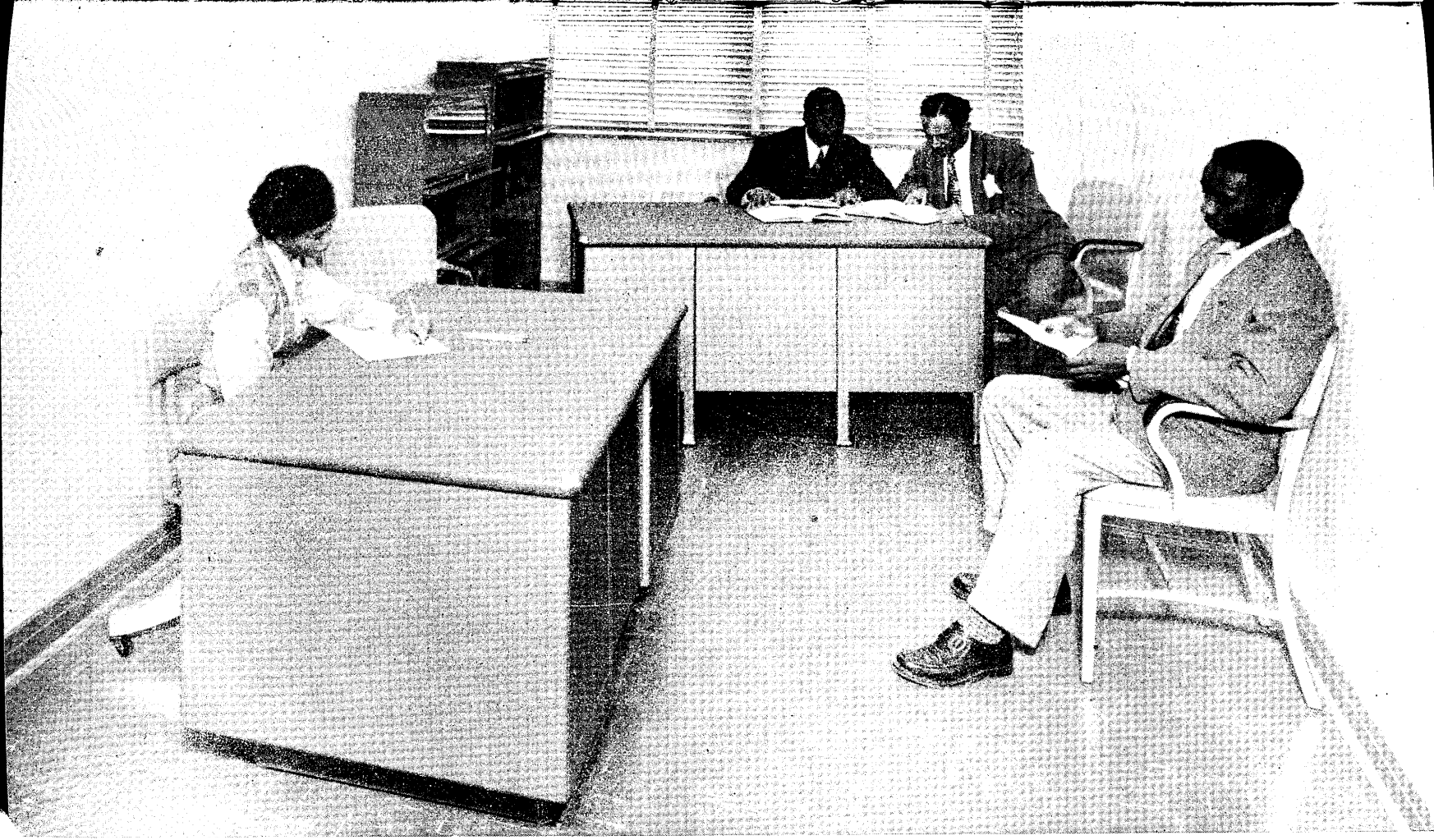
[138] *Ibid.* note 135, *supra.*

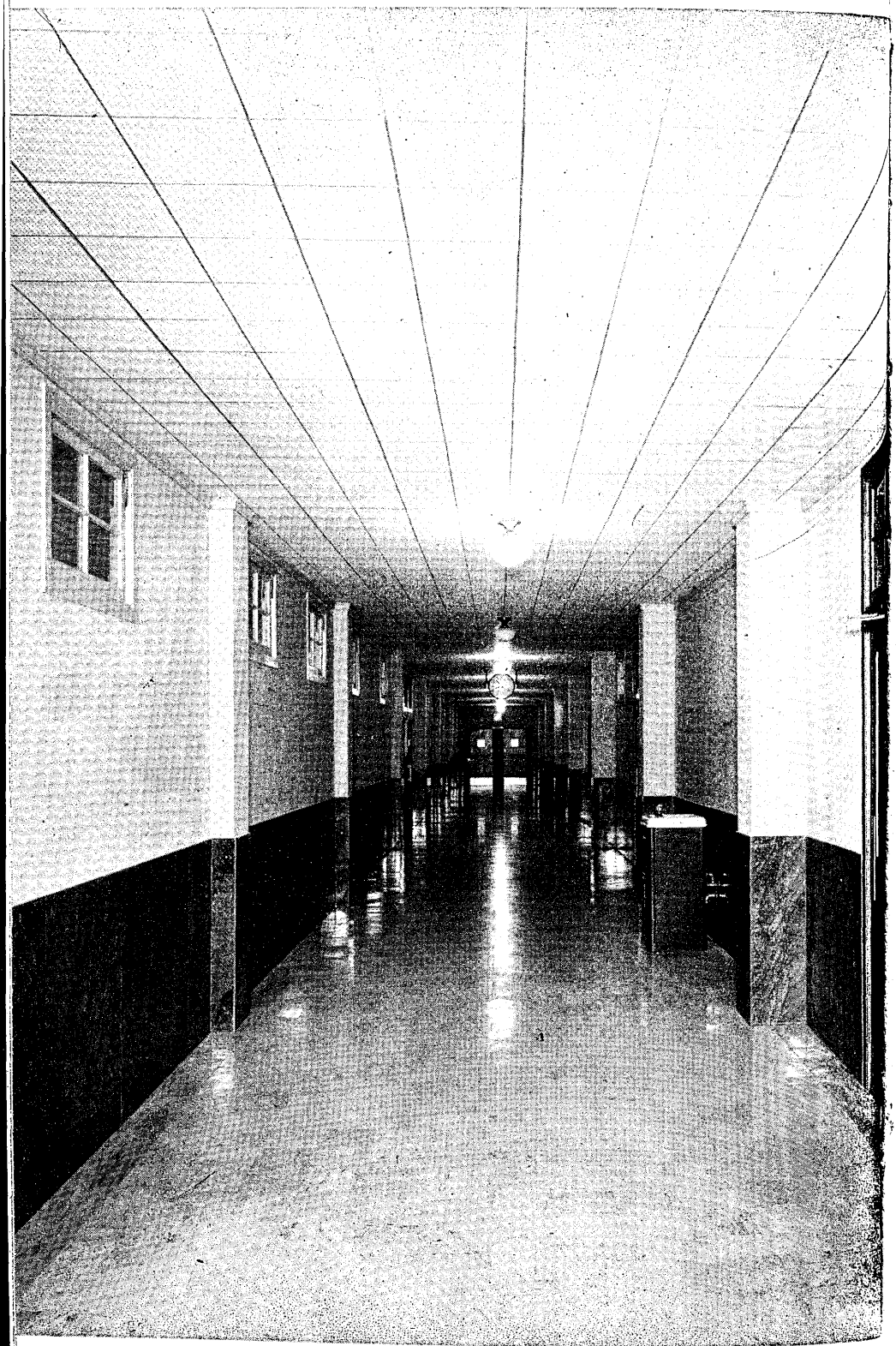
[139] The pictures are of a portion of the exterior of the building in which the Law School is housed, p. one of photographs which follow; a classroom in the Law School, p. two of photographs; a law professor's office, p. three of photographs; and the hall between the law classroom and the law library, p. four of photographs.



Entrance to T. S. U. Law School.







Hall Between Law Classrooms and Law Library. (Page Four)

## Summary and Conclusion

The previous decisions of this Court have announced the law applicable to this case: that the States, which are not required by the Federal Constitution to maintain any schools, may provide education to white and Negro students in separate schools so long as equal education is offered to both groups. Attending a public school or university is a *privilege* extended by the State. It is not a *right* of a citizen of the United States. So long as the privileges extended to all groups are equal, no one is deprived of the equal protection of the laws.[140]

The principle was summarized by this Court in the *Gong Lum* decision:

> "The question here is whether a . . . 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,

[140] Mr. Justice Clifford in the *DeCuir* case: ". . . equality of rights does not involve the necessity of educating white and colored persons in the same school any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school; . . . any classification which preserves substantially equal school advantages is not prohibited by either the State or Federal Constitution, nor would it contravene the provisions of either."

Mr. Justice Harlan in the *Cumming* case: ". . . 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. . . ."

> 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."

This Court in the *Gaines* case, following its former decisions, referred to the system of furnishing equal education in separate schools as "a method the validity of which has been sustained by our decisions."

Those opinions correctly interpret the meaning of the Fourteenth Amendment and the intention of the Congress which proposed it and of the Legislatures of the States which adopted it. The review herein set out clearly shows that the Amendment was not intended to require mixed schools. On the contrary, as unmistakable evidence of its interpretation of the amendment, the Congress which proposed the amendment enacted legislation continuing its separate schools both during and after the adoption of the amendment. The State Legislatures likewise, with the exception of the very few states which preferred mixed schools of their own volition, continued to operate their separate schools.

Those decisions of this Court also properly refused to strike down, as an unreasonable exercise of the State's police power, the State Constitutions and Statutes providing for equal education of white and Negro students in separate schools. There is ample evidence today for the reasonableness of and neces-

sity for such separation.[141] The Texas Legislature found that such a necessity existed as late as February, 1950.[142] Dr. Ambrose Caliver of the United States Office of Education concluded that in some of the States, the *mores* of race relationships ruled out for the present at least the possibility of admitting white persons and Negroes to the same institutions; that there was much evidence that Negroes had a more normal social life and had a better chance to develop leadership at a separate college. Dean Pittenger pointed out that forced mixed schools would be a bonanza to the private schools of Texas, and would cause large withdrawals from the public schools; that the public schools need the continued support of all citizens; and that a great amount of that public support would be lost by a mixing of the races in the schools. The Texis Bi-racial Committee concluded that the admission of Negroes to existing state universities for white students was not acceptable at this time for the solution of providing opportunity for graduate and professional work. The

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[141] It will be remembered that the question of the reasonableness of the classification was not tried out in this lawsuit because the trial court, correctly we think, considered that this Court had settled the matter. If, and only if, the Court disagrees with its former decisions and feels that it has not sufficient material before it to sustain the classification, then Respondents are entitled to a new trial to fully develop that proposition.

[142] That the Legislature has accurately reflected the feelings of the Texas people is shown by the Texas Poll surveys of 1947 and 1950. The 1947 poll showed that the great majority favored a first-class university for the Negroes rather than the mixing of the races. Those feelings had not changed in 1950.

maintenance by the churches in the South of separate schools and colleges demonstrates that the policy of separation is not based on hatred and antagonism. A substantial minority of those outstanding citizens appointed by the President on his Committees on Higher Education and Civil Rights were not in favor or forced mixed schools at this time.[143] This and the other evidence set out in the brief demonstrate that the policy of the people of Texas is not wholly without reason.

The trial court found as a fact that Petitioner was offered facilities and advantages substantially equal to those offered white students at The University of Texas. Petitioner did not present that fact issue to the appellate courts of Texas. The fact question is therefore not properly before this Court. But assuming that it is, there is substantial evidence to support the fact finding.

The supervening facts all of which are not now before the Court, show that the law school of Texas State University has grown and expanded since the trial of this case. It has been found by the American Bar Association and the American Association of Law Schools to meet their standards.

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[143] That group includes Dr. Arthur H. Compton, Chancellor, Washington University, St. Louis; Douglas S. Freeman, Editor, Richmond Times-Dispatch; Lewis Jones, President, University of Arkansas; Goodrich C. White, President, Emory University, and Senator Frank P. Graham of North Carolina, formerly President of the University of North Carolina. Dr. Charles W. Eliot, former President of Harvard, said that if the proportion of Negroes in the North should become large, he would approve of separate schools.

It is therefore respectfully submitted that this case should be affirmed.

PRICE DANIEL
*Attorney General of Texas*

JOE R. GREENHILL
*First Assistant Attorney General*

E. JACOBSON
*Assistant Attorney General*
*Attorneys for Respondents.*

# APPENDIX

## FIRST SECTION

## The Background and Contemporaneous Construction of the Fourteenth Amendment Sustain the States in Their Power to Regulate Their Schools, Including the Right to Have Separate Equal Schools for White and Negro Students.

### I. CONGRESSIONAL ACTION: HISTORY OF STATUTES RELATING TO SCHOOLS AND CIVIL RIGHTS AND OF THE ADOPTION OF THE FOURTEENTH AMENDMENT.

#### A. The Period 1861-1865 Preceding the Proposal of the Fourteenth Amendment During Which Time Congress Established Separate Schools in the District of Columbia.

The policy of the Congress from the beginning has been to provide separate schools for white and Negro children. After the abolition of slavery in the District in April, 1862, the Congress on May 20, 1862, enacted a bill to provide instruction for Negro and white youth outside the cities in Washington County.[1] A board of commissioners was empowered to provide schools for Negro children to be supported by a tax on Negro property. On May 21, 1862, a bill was enacted "providing for the education of colored children in the cities of Washington and George-

[1] 12 Stat. 394 (1862); Statutes 1861-62, Ch. 77. All numbers in parentheses refer to page numbers in the Congressional Globe through 1873 and to the Congressional Record thereafter. All material in this portion of the Appendix is from those sources unless otherwise indicated.

town," to be supported by a tax on Negro property in the cities.[2]

On July 11, 1862, an Act was approved "relating to schools for the education of colored children in the District of Columbia" which created another board, known as the "Board of Trustees for Colored Schools," to manage the Negro schools and handle their funds.[3]

Edward Ingle observed that these Acts were ineffectual because insufficient funds were raised, and that it was not until March, 1864, that the first Negro school was opened in the District.[4]

On June 25, 1864, Congress enacted a law repealing the portions of the Acts of May 20, 1862, supporting Negro schools by taxation on Negro property only. It provided that a proportion of all school funds raised in Washington and Georgetown should be set aside for Negro schools in the proportion that the number of Negro children bore to the number of white children.[5]

### B. The Period of the Adoption of the Fourteenth Amendment 1866-1868.

On January 5, 1866, Senator Trumbull introduced the first supplemental Freedmen's Bureau Bill, pro-

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[2] 12 Stat. 407 (1862); Statutes 1861-62, Ch. 83. No public provision for the Education of Negro children of the District of Columbia was made prior to these acts. H. R. Exec. Doc. No. 315; 41st Cong., 2nd Sess. (1869-70).

[3] 12 Stat. 537 (1862).

[4] Ingle, *The Negro in the District of Columbia*, Johns Hopkins University, 11th Series (1893), p. 25.

[5] Special Report of Commissioner on Education 1871, p. 65; 13 Stat. 187 (1864).

viding, among other things, for certain civil rights for Negroes "such as the right to enforce contracts, sue, give evidence, inherit, and to sell, lease, or convey realty."[6] On the same day he introduced what became the Civil Rights Act of 1866. Unlike the Freedmen's Bill which was applicable only to the South, it was applicable to all the States.

1. *The First Supplemental Freedmen's Bureau Bill.*

This bill was one of the forerunners of the 14th Amendment, and is important in examining the intended effect of the Amendment. It provided certain specific civil rights for the recently emancipated Negroes. However, most of its provisions dealt with the government of the defeated South.[7] Section 6 empowered a Commissioner to provide buildings for

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[6] II James G. Blaine, *Twenty Years in Congress* (1874), pp. 209-210; Cong. Globe, 39th Cong., 1st Sess., p. 129; Flack, *The Adoption of the Fourteenth Amendment,* p. 12. The first Freedmen's Bureau Bill was enacted in March 1865. It made no reference to education. 38th Cong., 2nd Sess., p. 96. Lee had surrendered in April of 1865. Lincoln, who was assassinated in April, 1865, had been succeeded as President by Andrew Johnson of Tennessee. Almost from the beginning, Johnson and the Congress were at odds on Reconstruction policy. The feud ended in an unsuccessful attempt to impeach Johnson. It will be remembered that all during this period, the Representatives and Senators from most of the Southern States were not allowed to take their seats in Congress. So of course the South had no voice in the passage of these acts.

[7] 39th Cong., 1st Sess., pp. 209, 314, 339, 362, 392, 415. The bill was debated in the Senate January 19-25, 1866.

asylums and schools for the freedmen.[8] There is nothing in the debates that indicated that Congress intended these schools to be mixed schools. A few members, speaking against the bill, expressed the fear that it might be construed to force mixed schools.[9]

Sections 7 and 8 dealt with specific civil rights of the freedmen. Section 7 provided that if, because of any State or local law, custom, or prejudice "any of the civil rights or immunities belonging to white persons, including the right to make and enforce contracts, to sue, be parties, and give evidence; to inherit, purchase, lease, sell, hold and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate, are refused or denied to negroes . . . on account of race . . . it shall be the duty of the President of the United States, through the Commissioner, to extend military protection . . . over all cases affecting such persons so discriminated against."[10]

Section 8 provided that if any person subjected any Negro or other person, on account of race, "to

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[8] *Id.* at 395. It was provided that no contracts for such buildings should be let until congressional appropriation had been made therefor.

[9] Dawson of Pennsylvania, speaking more of the theories of certain radical Republicans, indicated that they would like to force mixed schools. 39th Cong., 1st Sess., p. 541. Rousseau of Kentucky informed the House that in Charleston, S. C., the four public schools had been taken over for the exclusive benefit of Negroes. The person in charge of the schools said, "The white children, of course, do not attend." 39th Cong., 1st Sess., Appendix, p. 71.

[10] *Id.* at 318; these sections are discussed in Flack, *The Adoption of the Fourteenth Amendment* (1908), p. 13 *et seq.*

the deprivation of any civil right secured to white persons, or to any different punishment . . ." he should be guilty of a misdemeanor.[11]

The bill passed the Senate January 25, 1866,[12] and passed the House with amendments not relevant here, on February 6, 1866.[13] There was some discussion of Section 6 with reference to schools, but it had to do with providing some type of education for the Negro. Rep. Donnelly made it plain that the Negro should be educated by Northern teachers so they wouldn't be educated to glorify Robert E. Lee and the Southern tradition.[14]

President Johnson vetoed the Act on February 19, 1866.[15] The bill failed to get the necessary two-thirds vote to override the veto.[16]

As was the case with the Civil Rights Bill, there were many members of Congress who thought the Act unconstitutional. Flack says, "There seems to

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[11] 39th Cong., 1st Sess., at 319.

[12] *Id.* at 421.

[13] *Id.* at 688. The Senate agreed to the House Amendments and made an additional amendment on February 8, 1866 (p. 748). The House agreed to the Senate Amendment February 9, 1866 (p. 775). The bill was debated in the House from Jan. 26 through Feb. 2. (*Id.* at pp. 512, 538, 585, 618.)

[14] *Id. at* 585.

[15] *Id.* at 915.

[16] *Id.* at 943, February 20, 1866; a similar bill was enacted over the President's veto in July, 1866, after the resolution proposing the 14th amendment had been enacted. 14 Stat. 173 (1866); See Flack, *The Adoption of the Fourteenth Amendment,* pp. 18, 19.

be little doubt but that it was unconstitutional and that it could scarcely be justified even as a war measure."[17]

### 2. *The Civil Rights Act of 1866*

In interpreting the intent and scope of the 14th Amendment, this bill, another forerunner, is particularly important because its provisions had a definite bearing on the adoption and meaning of the first section of that amendment.

On January 29, 1866, Senator Trumbull explained the extent of his Civil Rights Act of 1866:

> "The right to make and enforce contracts, to sue and be sued, to give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property and to full and equal benefit to all laws and proceedings for the security of person and property."[18]

The bill, in section one, defined citizenship in the United States:

> "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."[19]

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[17] Flack, *The Adoption of the Fourteenth Amendment* (1908), p. 14. Flack observed that "the measure was unwise and inexpedient to say the least of it, for it retarded rather than aided reconstruction."

[18] 39th Cong., 1st Sess., pp. 476, 599.

[19] 14 Stat. 27 (1866).

It continued, as originally introduced, with broad general provisions as to civil rights:

> "That there shall be no discrimination in the civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color . . . shall have the same rights to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none others, any law, statutes, ordinance, regulation, or custom to the contrary notwithstanding."[20]

When this bill was before the House on March 1, 1866, its floor leader was Rep. James F. Wilson of Iowa, Chairman of the Judiciary Committee, to which the bill had been committed. He explained the broad language of the bill, and assured the House that the bill did not refer to schools and did not require mixed schools:

> "This part of the bill will probably excite more opposition than any other. . . . What do these terms mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? *By no means can they be so construed. . . . Nor*

[20] 39th Cong., 1st Sess., pp. 474, 1117.

> *do they mean that . . . their children shall attend the same schools. These are not civil rights or immunities.*"[21]

Wilson therefore moved that the bill be recommitted to committee.[22]

Rep. Bingham of Ohio also thought the language of the bill was too broad.[23] He moved to amend the motion to recommit the bill to add instructions to the committee:

> "to strike out of the first section the words 'and there shall be no discrimination in the civil rights or immunities among citizens of the United States . . . on account of race, color, or previous condition of slavery . . .' "[24]

[21] 39th Cong., 1st Sess., p. 1117. An illustration of the opposition to the broad language was shown in the speech of Rep. Rogers of New Jersey. He pointed out that Pennsylvania had separate schools for white and Negro children. He opposed Federal intervention into the State's affairs. He characterized the language of the bill as "broad and dangerous." 39th Cong., 1st Sess., p. 1121, March 1, 1866. Rep. Thayer of Pennsylvania was of the same view as Wilson on the limited extent of the bill: that the same general words of the bill were limited to the specific rights mentioned therein. (*Id.* at 1151.) Rep. Kerr of Indiana was alarmed at the possibility that the bill might force the mixing of whites and Negroes in public schools and churches (*Id.* at 1268). Senator Cowan of Pennsylvania said his State provided separate schools for the races and that it would be monstrous to have his school officials tried as criminals. (*Id.* at 500.)

[22] *Id.* at 1115, 1162.

[23] 39th Cong., 1st Sess., p. 1291. March 9, 1866.

[24] *Id.* at 1271-1272. His amendment also proposed the deletion of the criminal penalties and inserted civil liability in the Federal Courts. The amendment was defeated, but the bill was recommitted to committee. His suggestions were adopted by the committee.

In answer to Bingham and other representatives who objected to "the glittering generalities" of the bill, Wilson said that his bill did not "invade the States to enforce equality of rights in respect to those things which properly and rightfully depend on State regulations and laws." Referring to Bingham, Wilson said,

> "He knows, as every man knows, that this bill refers to those rights which belong to men as citizens of the United States and none other; *and when he talks of setting aside school laws . . . of the States* by the bill now under consideration, he steps beyond what he must know to be the rule of construction which must apply here."[25]

After the discussion, the bill was recommitted to committee on March 9, 1866.[26]

On March 13, 1866, Wilson brought the Civil Rights Bill out of committee. It had amended the bill as Bingham had suggested: *i. e.*, it took out the broad, general language as to civil rights and named certain specific rights. Schools were not mentioned. The Committee Amendment read:

> "Strike out . . . the following words:
>
> " 'Without distinction of color, and there shall be no discrimination in civil rights or im-

[25] 39th Cong., 1st Sess., p. 1294.
[26] *Id.* at 1296.

munities among citizens of the United States . . . on account of race, color, or previous condition of slavery.'

"So that the section will read as follows:

" 'That all persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.' "

Wilson explained the committee's action:

". . . the amendment . . . proposes to strike out the general terms relating to civil rights. I do not think it materially changes the bill. . . ."[27]

". . . Some members of the House thought, in the general words of the first section relating to civil rights, it might be held by the courts

[27] 39th Cong., 1st Sess., p. 1366.

> that the right of suffrage was included in those rights. To obviate that difficulty *and the difficulty growing out of any other construction beyond the specific rights named in the section,* our amendment strikes out all of those general terms and leaves the bill with the rights specified in the section."[28]

With a few other changes immaterial here, the bill passed the House March 13, 1866.[29] When the bill was returned to the Senate, it was referred to the Judiciary Committee. On March 15, 1866, Senator Trumbull reported the bill to the Senate with the committee's recommendation that the bill be passed as amended in the House. The Senate adopted the House amendments without debate on March 15, 1866.[30]

President Johnson returned the bill to Congress with a veto accompanied by a long veto message on March 27, 1866. It was passed over the veto in the Senate on April 6, 1866, and in the House on April 9, 1866.[31] The bill thus became law on April 9, 1866.[32]

That Congress did not interpret this Act as prohibiting separate equal schools for whites and Negroes is evidenced by the fact that separate schools for children of the two races continued to be maintained by Congress in the District of Columbia after its effective date. (The New York Court in 1869

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[28] 39th Cong., 1st Sess., p. 1367.
[29] *Id.* at 1367.
[30] *Id.* at 1413-1416.
[31] *Id.* at 1679, 1808, 1861.
[32] 14 Stat. 27 (1866).

held that this Act did not invalidate separate schools for white and Negro students in Buffalo, N. Y. *Dallas v. Fosdick*, 40 How. Prac. 249. The Indiana Court in 1874 ruled to the same effect. *Cory v. Carter*, 48 Ind. 327.)

There were many in the Congress who believed the Civil Rights Bill of 1866 to be unconstitutional.[33] Mr. Bingham of Ohio, an anti-Southern leader and a member of the Reconstruction Committee, thought the bill unconstitutional because, among other things, it invaded the rights reserved to the States.[34] He therefore advocated the adoption of an amendment to the Federal Constitution.

### 3. *The Congressional Resolution Proposing the Fourteenth Amendment*

Many Republicans, either because they doubted the constitutionality of the Civil Rights Bill or because they feared that it might be repealed by some subsequent Congress, were desirous of writing some guarantee of this nature into the Constitution.[35] The result was their proposal of the Fourteenth Amendment. Because of the disagreement between Congress and President Johnson (who was carrying forward Lincoln's plan of reconstruction) there had

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[33] *E. g.*, Representatives Saulsbury of Delaware, Van Winkle of West Virginia, Cowan of Pennsylvania, Reverdy Johnson of Maryland, Davis of Kentucky, Guthrie of Kentucky, *et al.* See Flack, *op. cit. supra*, pp. 22-25.

[34] 39th Cong., 1st Sess., p. 1291.

[35] Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* (1914) p. 215.

been established "The Joint (Congressional) Committee of Fifteen on Reconstruction," in which numerous reconstruction matters were decided upon, including the question of the (non) representation of the Southern States in the Congress.[36] So the resolution proposing the amendment was first considered in and approved by this policy-making committee.[37] During the course of the deliberations the committee rejected a resolution which contained a provision that

> ". . . all provisions in the Constitution or laws of any State, whereby any distinction is made in political or civil rights or privileges, on account of race, creed or color, shall be inoperative and void."[38]

After extended deliberation a resolution was finally agreed upon by a vote of 7 to 6 on February 3, 1866, which provided that

> "The Congress shall have power to make all laws which shall be necessary and proper to

[36] The "Committee of Fifteen," established at the insistence of Mr. Thaddeus Stevens and other extreme anti-Southerners, was composed of 12 Republicans: Senators Fessenden of Maine, Grimes of Iowa, Williams of Oregon, Harris of New York, and Howard of Michigan, and Representatives Stevens of Pennsylvania, Bingham of Ohio, Conkling of New York, Boutwell of Massachusetts ,Washburne of Illinois, Morrill of Vermont, and Blow of Missouri. The Democrats were Senator Johnson of Maryland and Representatives Grider of Kentucky and Rogers of New Jersey. For an excellent history of the background and personnel of the Committee see Kendrick, *op. cit., supra,* at 133-197.

[37] *Id.* at 46 *et seq.*

[38] *Id.* at 50.

> secure to the citizens of each state all privileges and immunities of citizens in the several states; and to all persons in the several states equal protection in the rights of life, liberty and property."

On February 13, 1866, this resolution was introduced in the Senate by Senator Fessenden,[39] and in the House by Mr. Bingham.[40]

Mr. Bingham argued that the proposed resolution simply would grant Congress the authority to enforce existing Federal Statutes (including the 1866 Civil Rights Act) and the rights already guaranteed in the Federal Constitution.[41] This is in accord with the view he had previously expressed that he doubted the constitutionality of the Civil Rights Bill. Rep. Rogers, a Democrat of New Jersey, who was a member of the Joint Committee of Fifteen, arguing against the resolution, stated that Congress would have the power, in the future, to legislate with regard to schools.[42] The tenor of some other speeches was the same. Those in favor of the amendment argued that it merely gave Congress power to enforce existing constitutional and statutory provisions, and

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[39] 39th Cong., 1st Sess., p. 806. No action was immediately taken by the Senate.

[40] *Id.* at 813.

[41] 39th Cong., 1st Sess., p. 1033. He brought the matter before the House on Feb. 26, 1866, and after three days of debate it was deferred until April. *Id.* at 1033, 1095.

[42] 39th Cong., 1st Sess., Appendix, p. 133.

those opposed arguing that its grant of legislative power to Congress was too broad.[43]

Their first proposal having failed, the Joint Committee attempted to draft one which would secure the approval of Congress. After debating from April 21, 1866, the committee on April 28 decided upon a resolution, containing in Section 1 the provision:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[44]

No provision was offered in the meetings of the Joint Committee as reported in the Journal which would indicate that it was the intent of the Committee to enforce mixed educational facilities.[45] Along with the proposed amendment, the Joint Committee on Reconstruction prepared for Congress a majority and a minority committee report, neither of which made any reference to schools or indicated that the

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[43] 39th Cong., 1st Sess., pp. 1054-1067, 1083-1095. Mr. Higby (Cal.) 1054-1056; Mr. Randall (Pa.) 1056; Mr. Kelley (Pa.) 1057-1063; Mr. Hale (N. Y.) 1063-1066; Mr. Price (Iowa) 1066-1067; Mr. Davis (N. Y.) 1083-1087; Mr. Woodbridge (Vt.) 1087-1088; Mr. Bingham (Ohio) 1088-1094; Mr. Conkling (N. Y.) 1094-1095; Mr. Hotchkiss (N. Y.) 1095.

[44] Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* (1914), p. 106.

[45] *Id.* at 37-129.

proposed resolution was to cover anything more than the civil rights already discussed and embodied in the Act of 1866.[46] The report for the majority[47] after reciting a history of the measures of reconstruction up to the time of the report, states that instead of being mere chattels, the former slaves had become free men and citizens. The report continues with regard to the freedmen stating that

> "It was impossible to abandon them, without securing them their rights as free men and citizens. . . . Hence it became important to inquire what could be done to secure their rights, civil and political. It was evident to your committee that adequate security could only be found in appropriate constitutional provisions. . . ."[48]

The majority then reviews the evidence on the state of affairs in the former Confederate States, and on the basis of this evidence the opinion of the majority of the committee was that

> "Congress would not be justified in admitting such communities to a participation in the government of the country without first providing

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[46] II *Reports of the Committees of the House,* 39th Cong., 1st Sess., VI-XXI, 1-13.

[47] Signed by Fessenden, Grimes, Harris, Howard, Williams, Stevens, Morrill, Bingham, Conkling, and Boutwell.

[48] II *Reports of the Committees of the House,* 39th Cong., 1st Sess., XIII.

such constitutional or other guarantees as will tend to secure the civil rights of all citizens of the republic . . ."[49]

In summary the conclusions of the majority were:

"The conclusion of your committee therefore is, that the so-called Confederate States are not, at present, entitled to representation in the Congress of the United States; that, before allowing such representation, adequate security for future peace and safety should be required; that this can only be found in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic, shall place representation on an equitable basis, shall fix a stigma upon treason, and protect the loyal people against future claims for the expenses incurred in support of rebellion and for manumitted slaves, together with an express grant of power in Congress to enforce those provisions. To this end they offer a joint resolution for amending the Constitution of the United States, and the two several bills designed to carry the same into effect, before referred to."[50]

The minority report[51] is devoted mainly to the legal proposition that the States which had seceded had never actually left the Union and were, therefore, entitled to immediate representation in Congress. Regarding representation the report stated:

"What danger to the government, then, can possibly arise from southern representation?

[49] II *Reports of the Committees of the House*, 39th Cong., 1st Sess., XVIII.

[50] II *Id.* at XXI.

[51] Signed by Reverdy Johnson, Rogers, and Grider.

> Are the present senators and representatives fearful of themselves? Are they apprehensive that they might be led to the destruction of our institutions by the persuasion or any other influence of southern members? . . . Whatever effect on mere party success in the future such a representation may have we shall not stop to inquire."[52]

Speaking of the plan of representation and the fact that the Negro was not granted suffrage, it was stated:

> "That would be obnoxious to most of the northern and western states, so much so that their consent was not anticipated; but as the plan adopted, because of the limited number of negroes in such states, will have no effect on their representation, it is thought it may be adopted, while in the southern states it will materially lessen their number . . ."[53]

This new resolution was introduced in both Houses of Congress on April 30.[54] Mr. Thaddeus Stevens opened debate in the House on May 8 and in reply to the contention that the Civil Rights of 1866 secured the same things as were placed in Section 1 of the resolution, he said that the bill was repealable and that repeal should be placed beyond the power of Con-

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[52] II *Reports of the Committees of the House,* 39th Cong., 1st Sess., p. 7.

[53] *Id.* at 9.

[54] 39th Cong., 1st Sess., pp. 2265, 2286.

gress.[55] Mr. Finck of Ohio stated that if the first section were necessary then the Civil Rights Bill was unconstitutional.[56]

Mr. Garfield of Ohio pointed out in answer to Mr. Finck that the reason for placing the provisions of the Civil Rights Bill in the Constitution was so that if the Democrats ever returned to power the bill could not be repealed.[57] Mr. Thayer of Pennsylvania concurred in the views of the previous speakers as to the effect of Section 1.[58] Mr. Boyer of Pennsylvania, a Democrat, also agreed that Section 1 only incorporated the Civil Rights Bill in the Constitution.[59]

Mr. Broomall of Pennsylvania spoke the next day, May 9, and reiterated the view that Section 1 of the amendment incorporated the Civil Rights Bill in the Constitution.[60] Mr. Henry J. Raymond of New York, a conservative or Johnson Republican, who had voted against the Civil Rights Bill because he doubted its constitutionality, stated that Section 1 of the amendment had been before Congress in the Civil Rights Bill.[61] Similarly, Mr. Eldridge, of Wisconsin, and Mr. Eliot, of Massachusetts, expressed the views of the previous speakers on Section 1.[62]

On the last day of debate Mr. Rogers of New Jersey declared that the amendment was no more

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[55] 39th Cong., 1st Sess., p. 2459.
[56] *Id.* at 2461.
[57] *Id.* at 2462.
[58] *Id.* at 2464.
[59] *Id.* at 2465.
[60] *Id.* at 2498.
[61] *Id.* at 2501.
[62] *Id.* at 2506, 2511.

than "an attempt to embody in the Constitution of the United States that outrageous and miserable Civil Rights Bill."[63] Mr. Bingham, who had opposed the Civil Rights Bill, spoke in favor of the amendment, repeating that it was necessary in order for Congress to protect the people from oppressive State laws.[64] Mr. Stevens closed the debate; the previous question was moved and seconded; and, the joint resolution passed the House, 128 yeas, 37 nays.[65] It is thus apparent that nearly all of the members of the House agreed that Section 1 of the proposed amendment incorporated the provisions of the Civil Rights Bill into the Constitution.

The Senate started consideration of the joint resolution on May 23.[66] Senator Howard of Michigan substituted for Senator Fessenden in presenting the measure and made the opening address. With regard to the meaning of the first section he discussed the rights of "citizens of the United States" and the rights in the first eight amendments. He stated:

> ". . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and to compel them at all times to respect these great fundamental guarantees."[67] (Those guarantees he had mentioned earlier, none of which included mixed schools, although separate schools were being main-

[63] 39th Cong., 1st Sess., p. 2537.
[64] *Id.* at 2541-2544.
[65] *Id.* at 2544-2545.
[66] *Id.* at 2765.
[67] *Id.* at 2766. *Cf. Adamson v. California,* 332 U.S. 46 (1947).

tained both by Congress and the great majority of the States then represented in Congress.)

Mr. Wade proposed an amendment which would have defined "citizens of the United States," his purpose being to assure protection to the Negro in the event the Civil Rights Bill was held unconstitutional.[68] No action was taken by the Senate on the joint resolution from May 24 to May 29, this period being devoted to a caucus of the Republican party. Upon returning to consideration of the resolution on May 29, Senator Howard offered a series of amendments, the first of which added the definition of citizenship which is now the first sentence of the Fourteenth Amendment.[69] Senator Doolittle charged that the first section was intended to validate the Civil Rights Bill and Senator Howard replied that a purpose of the committee was to put the Civil Rights Bill beyond the legislative power.[70]

The final debate started on June 4 with Senator Hendricks remarking about the caucus of the Republican majority.[71] Senator Poland of Vermont stated that Congress by passing the Civil Rights Bill had indicated its feeling toward certain legislation in some Southern States and that this amendment would remove any doubt as to the power of Congress to provide remedial legislation in this regard.[72] Senator Howe of Wisconsin mentioned several rights and

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[68] 39th Cong., 1st Sess., p. 2768.
[69] *Id.* at 2869.
[70] *Id.* at 2896.
[71] *Id.* at 2938.
[72] *Id.* at 2961-2964.

privileges of citizens and cited as an example of law impossible under the amendment, a Florida statute which provided that in addition to being taxed to support the white schools only the Negroes were taxed to support their own schools.[73]

Senator John B. Henderson, of Missouri, indicated by the tenor of his speech that he believed that Section 1 was an attempt to place the Civil Rights Act in the Constitution.[74] The resolution passed the Senate June 8, 1866, 33 yeas, 11 nays.[75]

Summarizing, the legislative intent indicated by the Senate in debate revealed that the understanding of some Senators was that Section 1 incorporated the Civil Rights Bill in the Constitution, and even those who gave the amendment a broader scope thought that it gave Congress power to legislate against discriminatory State legislation. No Senator indicated that it was effective to abolish separate schools; indeed, this was not even hinted.

The House concurred in the Senate amendments to the joint resolution on June 13, 1866.[76] after several short speeches, including one by Mr. Rogers in which he objected to the Constitution being amended as a result of a party caucus.

That the people shared in the belief of the majority of Congressmen as to the effect of Section 1 of the proposed amendment is indicated by a review of the newspapers and political speeches made during the

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[73] 39th Cong., 1st Sess., Appendix 217.
[74] 39th Cong., 1st Sess., pp. 3031-3036.
[75] *Id.* at 3042.
[76] *Id.* at 3148.

period of the adoption of the amendment. The country understood that the Civil Rights Bill was being made a part of the Constitution. Those who gave Section 1 a greater effect thought that it, along with Section 5, vested great legislative powers in the Congress. There was no indication that the amendment would enforce mixed schools.[77] The contemporaneous construction of the amendment by the States, which manifests that same construction, is considered in another portion of this Appendix.[78]

The intent manifested by the Congress, the people, and the States with regard to the Fourteenth Amendment was for the most part that Section 1 made the Civil Rights Bill of 1866 a part of the Constitution. An examination of this Civil Rights Bill reveals, as has been shown in this Appendix, that it covered certain specifically named rights which did not include mixed schools. Actually, it had been amended by its House sponsor, Mr. Wilson of Iowa, to make certain that it did not relate to or require mixed schools. See pages 133 to 139, *supra*. Taking the broadest interpretation given the resolution proposing the Fourteenth Amendment (that in addition to putting the Civil Rights Bill beyond legislative power it made the Bill of Rights applicable to the States), separate schools would still not be made unlawful. Hence, the manifested intent in the adoption of the Fourteenth Amendment was not to deprive the

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[77] Flack, *The Adoption of the Fourteenth Amendment* (1908), pp. 140-160; Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stanford Law Rev. 5 (1949).

[78] See page 194, *infra*.

States of the power to regulate their schools or to require them to have mixed schools. Any other intent would have appeared directly in the Amendment, Congressional debates, or public discussions, because separate schools were then being maintained by the States and the Congress.

4. *Acts of Congress Relating to Separate Schools in the District of Columbia*

During the consideration of the resolution proposing the Fourteenth Amendment (February through June, 1866) and immediately thereafter, the Congress enacted legislation furthering the separate schools it had previously established in the District of Columbia for white and Negro students.

On May 21, 1866, during the time that the Congress was debating the Fourteenth Amendment, the Senate passed a bill to donate real estate in the District of Columbia for Negro schools.[79] The Act, which became effective July 28, 1866, provided that

> "The Commissioner of public buildings . . . is hereby authorized and required to grant . . . to the trustees of colored schools for the cities of Washington and Georgetown . . . *for the sole use of schools for colored children* in said District of Columbia . . . lots 1, 2, and 18 in square 985 in . . . Washington, said lots having been designated and set apart by the Secretary of the Interior to be used for colored schools. . . ."[80]

[79] 39th Cong., 1st Sess., p. 2719. The bill (S. No. 247) had been introduced on April 4 (*id.* at 1753), and reported from Committee on May 2 (*id.* at 2331).

[80] 14 Stat. 343 (1866).

Similarly between April, 1866, and July 23, 1866, the Congress considered and enacted a bill changing the tax support for separate Negro schools in the District of Columbia.[81] It amended the Act of June 25, 1864, so as to require the cities of Washington and Georgetown

> "to pay over to the trustees of colored schools of said cities such a proportionate part of all monies received or expended for school or educational purposes . . . as the colored children . . . in the respective cities bear to the whole number of children, white and colored. . . ."

On March 16, 1867, Senator Sumner of Massachusetts proposed an amendment to a reconstruction bill making it a prerequisite to seating in Congress of Southern Congressmen that:

> "The Constitution shall require the Legislature to establish and sustain a system of public schools open to all, without distinction of race or color."

The amendment was defeated "to his bitter disappointment."[82]

Again on July 11, 1867, Sumner unsuccessfully attempted to amend a Reconstruction Act to require mixed schools.[83]

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[81] This bill, S. No. 246, was introduced April 4, passed the Senate May 21, passed the House July 18, and was approved by the President July 23, 1866. 39th Cong., 1st Sess., pp. 1753, 2719, 3906. 14 Stat. 216 (1866).

[82] Storey, *Charles Sumner,* American Statesmen, Vol. 30, p. 334; 40th Cong., 1st Sess., p. 170.

[83] *Works of Charles Sumner,* Vol. 11, pp. 397-401; Pierce, *Memoirs and Letters of Charles Sumner* (1893), pp. 316-317.

### C. The Period Immediately Following the Adoption of the Fourteenth Amendment in 1868.

#### 1. *Acts of Congress Relating to Separate Schools in the District of Columbia*

Soon after the adoption by the States of the Fourteenth Amendment the Congress enacted a bill transferring the duties of the Negro trustees of the Negro schools of Washington and Georgetown, D. C., to the (white) trustees of the public schools of those cities. It left the schools separate for white and Negro students. The bill passed the Senate July 10, 1868, and the House on February 5, 1869.[84] Its passage greatly disturbed the Negro citizens who wanted control of their schools left with Negro trustees. Several Negro meetings were held and resolutions adopted by them condemning the bill for removing the control of the Negro schools from the Negro trustees. So on February 13, 1869, President Johnson vetoed the bill because he said no good reason was shown why the Negro board should be abolished. The veto was not overridden.[85]

In February, 1871, the question of whether mixed or separate schools would be maintained in the District of Columbia was again thoroughly discussed.

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[84] 40th Cong., 2nd Sess., p. 3900; 40th Cong., 3rd Sess., p. 918 (S. No. 609).

[85] 40th Cong., 3rd Sess., p. 1164; Special Report of Commissioner of Education 1871, p. 260; H. R. Exec. Doc. No. 315, 41st Cong., 2nd Sess. (1869-1870); Ingle, *The Negro in the District of Columbia,* Johns Hopkins University Studies, 11th Series, p. 28 (1893).

Senate Bill 1244, to reorganize the school system of the District, was proposed. Ingle summarized the move in this way:

> "It was at this time . . . that the question of mixed schools was incontinently agitated, culminating in a debate in Congress in . . . 1871, in which the effort was unsuccessfully made to remove all restrictions on account of color from all the public schools . . ."[86]

The Committee on the District of Columbia had amended Section 6 of the bill to provide that

> "No distinction on account of race, color, or previous condition of servitude shall be made in the admission of pupils to any of the schools . . . or in the mode of education or treatment of pupils in the schools."[87]

Senator Patterson of New Hampshire moved to strike out the above words. He thought mixed schools would destroy the public schools of the city. He pointed out that "the Law of the District of Columbia as it now stands enforces a separation of whites and blacks in the schools." He felt that to mix the common schools would greatly injure Negro education because white withdrawal from the schools would cause a loss of support for public schools. "This bill (with the clause omitted) is precisely like the law as it stands in our Northern States . . . (it)

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[86] Ingle, *The Negro in the District of Columbia,* Johns Hopkins University Studies, 11th Series, p. 29 (1893).

[87] 41st Cong., 3rd Sess., pp. 1053-4.

simply leaves it to the board of education to determine for themselves whether they will mix the whites and blacks or have separate schools. . . ."[88]

Senator Thurman of Ohio said the common schools were having enough difficulties without saddling the system with a compulsory mixing of the races. He thought the Government should not force sociological ideas on people; that communities should be left to choose separate or mixed schools for themselves.[89]

Senator Tipton of Nebraska said that in his community there were only two or three Negro students; they were taken in and separated within the school building. But if there had been sufficient Negroes, separate schools would have been established.[90]

Senator Revels, a Negro Republican of Mississippi, Senator Sawyer of South Carolina, and Senator Wilson of Massachusetts advocated mixed schools.[91]

Senator Hill of Georgia moved to amend Patterson's amendment to read that no distinction should be made in providing *the means or mode* of education of white and Negro pupils.

The bill did not pass, and the schools of the District remained as they had been from the beginning, with separate schools for white and Negro students.

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[88] 41st Cong., 3rd Sess., pp. 1054-1057.

[89] *Id.* at 1057.

[90] *Id.* at 1059.

[91] *Id.* at 1059-1061.

## 2. *The First and Second Enforcement Acts, 1870 and 1871*

On May 30, 1870, "The Enforcement Act of 1870" was enacted. It dealt with the right of the Negro to vote and to the protection of that right. It also re-enacted in Section 18 the Civil Rights Act of 1866. It added in Section 17 that if different punishment were administered to any person because of race, it would constitute a misdemeanor.[92] It is significant to note that after the adoption of the Fourteenth Amendment, Congress did not enlarge on the rights enumerated in the Civil Rights Act of 1866. It simply reenacted that Act.

On February 28, 1871, the Second Enforcement Act was passed.[93] It dealt wholly with elections and voting rights.

On October 24, 1871, a letter of Charles Sumner addressed to a national Negro convention in Columbia, S. C., was read there. In it Sumner recognized

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[92] 16 Stat. 140 (1870); 41st Cong., 2nd Sess., p. 3480; McPherson, *Political History of the U. S.* (2d ed. 1875), p. 546. The first 11 sections dealt with Negro suffrage. Other sections dealt with penalties for interfering with the voting. Sections 19-23 dealt with elections. See Fleming, *Documentary History of Reconstruction,* Vol. II, p. 102. During this period, also, Senator Sumner introduced several "Supplementary Civil Rights Bills"; *e. g.*, S. R. 916, May 13, 1870; Jan. 20, 1871, reported adversely by Committee. 41st Cong., 3rd Sess., pp. 619, 1263; March 9, 1871, 42nd Cong., 1st Sess., p. 21. They were not enacted.

[93] 41st Cong., 3rd Sess., p. 45, amending the First Enforcement Act of May 31, 1870; discussed Annual Cyclopedia 1871, pp. 148, 153.

and said that mixed schools were *not* required and that the Civil Rights Act needed amendment in that regard. The letter read in part:

> "The right to vote will have new security when your equal right in public conveyances, hotels, and common schools is at last established; but here you must insist for yourselves by speech, petition, and by vote. Help yourselves, and others will help you also. The Civil Rights law needs a supplement to cover such cases. This defect has been apparent from the beginning; and, for a long time I have striven to remove it."[94]

In January, 1872, Sumner again urged his civil rights bill, saying to the Senate that: "Without the amendment the original law is imperfect."[95]

3. *The Unsuccessful Attempt to Enact Forced Mixed Schools as Part of a Civil Rights Amendment to The General Amnesty Bill.*

In December, 1871 and in 1872 a sustained attempt was made to enact a civil rights bill, including a provision for mixed schools, by amendment to an amnesty bill removing legal and political disabilities imposed by the third section of the Fourteenth Amendment. The amnesty bill required a two-thirds majority to pass while the civil rights bill, by itself, required only a simple majority. Sumner was suc-

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[94] Annual Cyclopedia 1871 (Appleton & Co. 1872), Vol. 11, pp. 752-753.

[95] 42nd Cong., 2nd Sess., p. 383, January 15, 1872.

cessful on two occasions in getting his civil rights bill adopted as an amendment to the amnesty bill in the Senate. But the amnesty bill, on which the civil rights bill then depended, failed to get two-thirds majority and failed to pass the Senate as thus amended. Finally, the Sumner civil rights bill, as a separate measure, was amended by deleting the reference to schools and churches and was passed by the Senate. The amnesty bill then passed. But the Sumners bill was not passed by the House.

A brief reference to the debates will emphasize that the matter of mixed schools was thoroughly discussed and that a majority of the Congress recognized that mixed schools were not required by the Fourteenth Amendment, and that the majority of Congress did not favor Congressional action which would attempt to abolish separate schools.

On December 20, 1871, the Senate took up the Amnesty bill. Sumner moved to amend it with his Civil Rights Bill which provided:

> "That all citizens . . . without distinction of race . . . are entitled to the equal and impartial enjoyment of accommodations, advantages, facilities or privileges furnished by common carriers . . . innkeepers . . . theaters . . . common schools . . . church organizations . . . cemetery associations . . . and this right shall not be denied or abridged on any pretence of race . . ."

It further provided that wherever the word "white" appeared in a statute with reference to race,

the statute was thereby repealed.[96] This amendment was defeated in the Senate 29 to 30.

On January 15, 1872, the amnesty bill was again brought up in the Senate and Sumner again offered his bill as an amendment.[97] He spoke vigorously for his amendment including arguments in favor of compulsory mixed schools.[98] Vickers of Maryland and others thought the civil rights bill unconstitutional.[99] Frelinghuysen of New Jersey moved to amend by providing "that churches, schools, cemeteries . . . exclusively for either the white or colored race, should not be taken from the control of those establishing them, but shall remain devoted to their use."[100] Sumner accepted the amendment.[101] There were many speeches for the Sumner amendment.[102] and many against it.[103] Much of the opposi-

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[96] Annual Cyclopedia 1872 (Appleton), pp. 143-144. See also 42nd Cong., 2nd Sess., p. 381. Sumner was reminded that Congress could not repeal a State law.

[97] 42nd Cong., 2nd Sess., p. 381.

[98] *Id.* at 381-384; 434; 726; 822.

[99] *Id.* at 386; others of the same view included Thurman of Ohio (p. 525); Morrill of Maine, who had been in the 39th Congress (p. 730 and Appendix, p. 1); Carpenter of Wisconsin (p. 759); Davis of Kentucky, who had also been in the 39th Congress (p. 763). This Court declared the Sumner bill which was enacted in 1875 (the references to schools and churches having been deleted) unconstitutional. *Civil Rights Cases,* 109 U.S. 3 (1883).

[100] *Id.* at 435, 487.

[101] 42nd Cong., 2nd Sess., p. 453.

[102] *E. g.,* Sawyer of South Carolina (p. 488); Morton of Indiana (p. 522); Flanagan, a Reconstruction Republican of Texas (p. 585); Wilson of Massachusetts (p. 819).

[103] *E. g.,* Hill of Georgia (p. 492); Morrill of Maine (appendix, p. 4); Davis of Kentucky (p. 763); Stevenson of Kentucky (p. 912).

tion to the bill was centered on the mixed school provision. For example, Saulsbury of Delaware thought it would definitely injure the common schools.[104] Thurman of Ohio didn't think Congress could require mixed schools.[105] Ferry of Connecticut said,

> "With regard to . . . schools and churches, I clearly am of the opinion that the Federal Government ought not to interfere."[106]

His motion to strike out the reference to churches was agreed to.[107]

On the question of accepting the Sumner amendment to the amnesty bill, the vote in the Senate was tied and Vice President Colfax voted in favor of the amendment.[108] But the amnesty bill as thus amended failed to pass on February 9, 1872.[109]

The matter was again debated in the Senate in May, 1872, The Senate took up the amnesty bill which had passed the House. Again Sumner proposed his Civil Rights Bill as an amendment. And again there were extended debates for[110] and against[111] the Sumner amendment.

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[104] 42nd Cong., 2nd Sess., Appendix, p. 7.

[105] 42nd Cong., 2nd Sess., Appendix, pp. 25-27. See also Flack, *The Adoption of the Fourteenth Amendment*, p. 255.

[106] 42nd Cong., 2nd Sess., p. 893.

[107] *Id.* at 896.

[108] *Id.* at 919.

[109] *Id.* at 928.

[110] Edmunds of Vermont (p. 3190).

[111] Trumbull (p. 3189); Boreman (p. 3195).

Senator Trumbull of Illinois, who had introduced the Civil Rights Act of 1866 and the First Supplemental Freedmen's Bureau Bill in the 39th Congress, said "The right to go to school is not a civil right and never was . . . it is a privilege."[112] Senator Ferry of Connecticut said that in the Northern states and in the District of Columbia students were separated by race and by sex and given equal advantages.[113]

Again the mixed school provision was a center of heated debate. Boreman of West Virginia said that the common schools in his State would be severely handicapped by forced mixed schools.[114] Blair of Missouri thought it would be good policy to separate the races.[115]

Ferry of Connecticut moved to delete the reference to mixed schools.[116] He said:

> ". . . in the community where I reside there is no objection to mixed schools . . . and if I were called upon to vote *there*, I should vote for them. It would be a useless expense to establish separate schools for the few colored people in that community. But I cannot judge other communities by that community. . . . I believe the Senator's bill relating to the District of Columbia, for instance, would utterly destroy the school system in this District. . . .
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> "Take for instance the State of Ohio where I understand the law permits the districts to have

[112] 42nd Cong., 2nd Sess., p. 3189.
[113] *Id.* at 3190.
[114] 42nd Cong., 2nd Sess., p. 3195.
[115] *Id.* at 3251.
[116] *Id.* at 3256.

> mixed or separated schools . . . and I observe a decision of the Supreme Court of Ohio reported in yesterday's newspaper . . . It had (there) been the assertion . . . that compelling the separation of the races into different buildings was a violation of the 14th amendment, notwithstanding that both races . . . enjoyed the same or equal privileges. . . . that Court . . . of judges whose political opinions are like those of the majority of this body, . . . 'sustained the constitutionality . . . of the common school laws . . . and held that the organization of separate schools for colored children is not in conflict with the provisions of the fourteenth amendment.' I believe that that decision is good law."[117]

His amendment was defeated[118] although his proposal was later adopted in another amendment, as hereinafter related. Senator Blair's amendment to allow each city, county, or state to decide at an election whether to have separate schools was defeated.[119]

Continuing the debate, Senator Casserly of California spoke vigorously against mixed schools. He referred to the decision of the Massachusetts Court in *Roberts v. City of Boston* upholding the constitutionality of separate schools in the light of the wording of the Massachusetts Bill of Rights which was similar to the words of the Fourteenth Amendment.[120]

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[117] 42nd Cong., 2nd Sess., p. 3257, May 9, 1872. The case referred to is *State v. McCann,* 21 Ohio St. 198.
*v. McCann,* 21 Ohio St. 198.

[118] *Id.* at 3285, May 9, 1872.

[119] *Id.* at 3258, 3262.

[120] *Id.* at 3261.

Again the vote on Sumner's amendments to the amnesty bill was tied 28 to 28, and the Vice President voted in its favor. And again the main bill, the amnesty bill, was defeated on May 10, 1872.[121]

On May 21, 1872, the Senate took up the Sumner Civil Rights Bill as a separate measure. This time, the motion of Senator Carpenter of Wisconsin to amend the bill by deleting the reference to public schools, churches, cemeteries, and juries was adopted.[122] In this form the Civil Rights Bill passed the Senate.[123]

Mr. James G. Blaine of Maine, later Speaker of the House of Representatives, in his book *Twenty Years of Congress* (1886) says this concerning Senator Sumner, who was absent when his bill passed with the reference to schools and churches omitted:

> "The Amnesty Bill was immediately taken up; while it was pending Mr. Sumner returned and warmly denounced the fundamental change that had been made in the Civil Rights Bill . . . Mr. Sumner's denunciations of the emasculated Civil Rights Bill were extremely severe; *but he was pertinently reminded by Senator Anthony of Rhode Island that the bill was all that could be obtained in the Senate at this session,* and perhaps more than could be enacted into law. *The senator from Rhode Island had correctly estimated the probable action of the House . . .*" (p. 514.)

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[121] 42nd Cong., 2nd Sess., p. 3270.

[122] *Id.* at 3734, 3735. See also Pierce on *Charles Sumner,* p. 503 and Moorfield Storey on *Charles Sumner,* p. 405.

[123] *Id.* at 3736.

4. *Debates on the Federal Aid to Education Bill*

A majority of the members of the House, many of whom had been in Congress when the Fourteenth Amendment was adopted, again showed that they did not think the Fourteenth Amendment required mixed schools. On January 15, 1872, H. R. 1043 was reported out of committee. It proposed to give financial aid to education in the States out of receipts of public land sales.[124] The bill was silent as to separate or mixed schools, but some members feared that it might be construed to require mixed schools.[125] So on February 8, 1872, Mr. Hereford of West Virginia offered an amendment providing

> "That no moneys belonging to any State . . . under this act shall be withheld . . . for the reason that the laws thereof provide for separate schools for white and black children or refuse to organize a system of mixed schools."

The amendment was adopted 115 to 81.[126] The bill as amended passed the House[127] and was brought out of committee in the Senate.[128] But it was not called up for debate in the Senate during the session.[129] The

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[124] 42nd Cong., 2nd Sess., p. 396.

[125] Representatives Storm, Kerr, and Harris; *id.* at 569, 791, 855.

[126] 42nd Cong., 2nd Sess., p. 882.

[127] *Id.* at 903.

[128] 42nd Cong., 3rd Sess., p. 869.

[129] This bill was unsuccessfully urged in the 43rd Congress, 1st Session (December 1873), pp. 104, 149.

subsequent history of this act (never passed) is set out in the footnotes. The policy of Congress as to separate schools has not changed.[130]

### 5. *Sumner's Attempt to Force Mixed Schools in the District*

During the same period, Senator Sumner attempted unsuccessfully to pass through the Senate a bill to require mixed schools in the District of Columbia. Reported from committee in April, 1872,[131] the bill proposed to abolish the separate schools and separate school funds created by act of July 11, 1862, and subsequent acts. Senator Stock-

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[130] The bill as introduced in the 43rd Congress, was silent as to separate schools, leaving that decision for local districts. Kasson of Iowa spoke against Federal interference in local education (43rd Cong., 1st Sess., p. 468). Butler of Tennessee said it wouldn't interfere (p. 490). Cox of New York made a blistering speech against mixed schools and said this bill was just an entering wedge (p. 612). The bill was before the 44th Congress, 1st Session, 1876 (p. 1767); the 45th Congress, 2nd Session, 1878 (pp. 4119 and 3834); and the 46th Congress, 2nd Session, 1879-80 (pp. 309, 109, 1495).

The bill as reported from committee of the House of the 47th Congress (1882) contained a provision that funds would not be withheld because of the operation of separate schools. (47th Cong., 1st Sess., p. 3839). Again containing authorization for expenditure in separate schools, the bill passed the Senate at the 50th Congress (p. 1223), but did not pass the House. During the first session of the present Congress, the amendment of Senator Lodge to deny funds to States having separate schools was defeated. 81st Cong., 1st Sess., p. 5593, May 3, 1949.

[131] 42nd Cong., 2nd Sess., p. 2484; S. B. 365 "to secure equal rights in the public schools of Washington and Georgetown."

ton of New Jersey argued that what Sumner wanted was not equal rights (for the Negro schools in the District were equal, he said) but forced intermingling of the races. He said:

> "I think in the condition the two races are before the law . . . we are bound to legislate on all subjects . . . with equality toward them. But when you leave the appropriate subjects of legislation and tell me . . . (where) my children shall go to school, when you attempt really an enforced system of education, you are then treading on the bounds of that civil liberty which our ancestors came to this country to establish."[132]

Senator Bayard of Maryland said he saw no necessity for the bill and that he had not been shown that the people of the District wanted the bill.[133] Senator Ferry of Connecticut offered an amendment which would have called for an election for the people of the District to determine whether or not they wanted mixed schools. He thought to force mixed schools on them would be tyrannical.[134] Senator Edmunds of Vermont said that,

> "It is a matter of great importance that we should determine fairly and squarely whether in the District of Columbia, where we have the power, that we will exercise it in the protection of equal rights. . . ."[135]

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[132] 42nd Cong., 2nd Sess., p. 2540.
[133] *Id.* at 2541.
[134] *Id.* at 3124, 3125. May 7, 1872.
[135] *Id.* at 3123.

The matter died in the Senate on May 8, 1872, clearly indicating again that the Senate did not think that the policy of the Fourteenth Amendment required mixed schools.

### D. Action and Debates on the Civil Rights Bill of 1875, from the Operation of Which Public Schools Were Excepted.

While Mr. Sumner had been unsuccessfully urging his Civil Rights Bill for many years, a portion of a similar bill was enacted in 1875, after the reference to public schools was omitted. This is the Act the first section of which was declared unconstitutional in the *Civil Rights Cases*, 109 U.S. 3. The debates and action on these bills (H. R. 796 and S. No. 1) clearly show that a majority of the Congress did not think that the Fourteenth Amendment required mixed schools.

#### 1. *In the House of Representatives 43rd Congress, 1st Session, 1873-1874*

As introduced into the House of Representatives of the 43rd Congress in December, 1873, the bill (H. R. 796) provided:

> "That whoever, being . . . in charge of any public inn . . . public amusement . . . stage-coach, railroad . . . cemetery or other benevolent institution, or any public school supported . . . at public expense . . . shall make any distinction as to admission or accommodation therein, of any citizen of the United States be-

> cause of race, color . . . shall be fined not less than one hundred dollars nor more than five thousand dollars . . ."[136]

The bill was debated at great length; and, in the interest of brevity, all of the speeches cannot be referred to. The mixed school provision was again one of the main points of division.

The bill was sponsored by Rep. Butler of Massachusetts. He and others of the Massachusetts delegation at first insisted on the mixed school provision.[137] They were joined by Negro representatives of the then governments of some of the Southern States.[138] It was pointed out that mixed schools had worked well in Massachusetts. Other representatives of some of the Northern States spoke for the bill including the provisions for mixed schools.[139]

But the bill received strong opposition, particularly the provision requiring mixed schools. Almost all of those who spoke against the bill pointed out its unconstitutionality. Rep. Hamilton of New Jersey thought it an unauthorized usurpation of the Federal Government for it to attempt to regulate the schools of New Jersey.[140] The Southern representatives (except the Negro representatives and a Republican of Florida, Mr. Purman) were of the opin-

[136] 43rd Cong., 1st Sess., p. 378, Dec. 19, 1873. See Flack, *op. cit. supra*, pp. 318, 322; 260-264.

[137] *Id.* at 340; Rep. Dawes, p. 342.

[138] Rainey of South Carolina, p. 343; Ransier of South Carolina, p. 382, 407, 1311; Elliott of South Carolina, pp. 407-410; Cain of South Carolina, pp. 566, 901; Walls of Florida, p. 417.

[139] Frye of Maine, *id.* at 375; Lawrence of Ohio, pp. 412-415; Monroe of Ohio, p. 414.

[140] *Id.* at 740.

ion that to force mixed schools would cause the abandonment or ruin of public schools in their district; would deprive poor white citizens, who could not afford private schools, of an education; would deprive the Negro of a good public education because white support, which furnished practically all the tax money, would be withdrawn from the public schools; and, in short, would mean the end of public education in that region.[141]

On the question of constitutionality, frequent references were made to the *Slaughter House Cases* where the distinction was pointed out between a person's rights (1) as a citizen of the United States, and (2) as a citizen of a State. A free school education at the State's expense was not a right of "a citizen of the United States," but a "privilege" of a citizen of a State.[142]

Representative Mills of Texas made a scholarly argument as to the meaning of the Fourteenth Amendment:[143]

> "It was for the reason given by the committee that the 14th amendment was adopted, not to

[141] Beck and Durham of Kentucky, pp. 342, 406; Harris and Whitehead of Virginia, pp. 375, 427; Buckner of Missouri, p. 427; Stephens, Blount, and Harris of Georgia, pp. 381, 410, 725; Roger Q. Mills and Herndon of Texas, pp. 383, 419; Bright and Atkins of Tennessee, pp. 414, 453. (All references are to pages in the Congressional Record, 43rd Congress, 1st Session.)

[142] *E. g.*, Herndon of Texas, p. 421; Buckner of Missouri, pp. 428, 429; Atkins of Tennessee, pp. 414, 453; Stevens of Georgia, p. 378; Durham of Kentucky, p. 406; Harris of Virginia, p. 376.

[143] 43rd Cong., 1st Sess., pp. 384-386. The speech is noted in Flack, *The Adoption of the Fourteenth Amendment*, p. 261.

enlarge the privileges and immunities already conferred, but simply to prohibit the states from abridging them as they existed. . . . These words have been again and again subjected to the most learned critical investigation. They have been construed by the judicial . . . the legislative . . . and by the executive department, and the interpretation has always been the same. If there is any virtue in the rule *stare decisis* . . . I hold that all the departments of government should stand decided and refuse to go behind the interpretation of these words, so universally acknowledged, and disturb the decision when the rights of millions hang upon it. . . .

"From the authority of adjudged cases it is clear that the privileges and immunities mentioned in the fourteenth amendment are only such as are conferred by the Constitution itself as the supreme law over all . . .

"The States have always exercised the right to fix the status of their citizens, and they will continue to do so. It is their own unquestioned right to make and unmake their constitutions and laws for the government of their people; to establish universities, colleges, academies, and common schools, and govern them according to their own pleasure; to prescribe who may be admitted to share their bounty and on what conditions.

"The great evil this bill has in store for the black man is found in the destruction of the common schools of the South. His children have been enjoying all the benefits of liberal education, paid for by the white people of the South. . . .

"We all in the South know that the white people and black before the war belonged to the

> same churches, often had the same pastors; but now of their own volition they have separated everywhere from the white people, and have their own bishops and ministers and churches and congregations—all separate from the white people. . . ."

Representative Harris of Virginia said:

> "Our constitution, adopted by what was known as the Underwood convention, composed of Republicans, provided that we should inaugurate the free-school system by 1877. But a conservative legislature in 1870, at its first meeting, inaugurated the separate school system. . . . The passage of the civil-rights bill . . . would immediately wipe out, or practically destroy, the public school system of Virginia."[144]

Representative Durham of Kentucky said, ". . . the most objectionable part of this bill is that which forces the children of the freedmen into our common schools."[145]

Numerous amendments were offered to the bill including an amendment stating that separate schools might be maintained for the races.[146] Apparently convinced that his bill could not pass, Representative Butler of Massachusetts moved to recommit his bill to Committee to consider the amendments pro-

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[144] 43rd Cong., 1st Sess., pp. 376, 377.

[145] *Id.*, at 406. These same sentiments were expressed by many of the Representatives. *Id.* at 415, 419, 421, 427, 429.

[146] *Id.* at 407.

posed. He was impressed with the arguments as to mixed schools. On this matter he said,

> "But there are reasons why I think this question of mixed schools should be carefully considered. The Negroes . . . have never, until the last few years, had an opportunity for education. . . . Therefore in the Negro schools which I established as a military commander during the war, I found that while I had plenty of school boys with 'shining morning faces,' there were none 'creeping unwillingly to school.' . . . *And I shall recommit the bill . . . because I want time to consider whether upon the whole it is just to the negro children to put them into mixed schools.* . . .
>
> "And therefore I am quite content to consider this question in the light of what on the whole is best for the white and colored child before this matter is again before the House."[147]

The above indicates that even General Butler of Massachusetts, who was in the 39th Congress which adopted the Fourteenth Amendment, did not really believe that the Fourteenth Amendment would prohibit separate schools. Otherwise he would not have been willing to consider the expediency of the separate school amendment. The bill was recommitted to his Committee on January 7, 1874, and came out on February 3, 1875, amended to allow separate schools.[148]

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[147] 43rd Cong., 2nd Sess., pp. 455-457.

[148] 43rd Cong., 2nd Sess., pp. 900, 1010.

## 2. *In the Senate, 43rd Congress, 1st Session*

On January 27, 1874, Sumner again introduced his Civil Rights Bill into the Senate. The bill passed the Senate at this session, but did not pass the House of Representatives. The House Bill (H. R. 796) which finally passed the House in 1875, after all reference to schools had been deleted, ultimately passed the Senate in that form and became the Civil Rights Act of 1875.

The Sumner bill proposed that no citizen of the United States should, because of race, be excluded from the full and equal enjoyment of any accommodation or facility furnished by any inn keeper, common carrier, theater, "common schools and other public institution of learning . . ." or cemetery associations; "provided that private schools, cemeteries, and institutions of learning established exclusively for white or colored persons . . . shall remain according to the terms of the original establishment." The bill provided also that no citizen should be disqualified for jury service because of race. Section 5 provided that "every discrimination against any citizen on account of color by the use of the word 'white' . . . in any law, statute, ordinance or regulation, national or State, is hereby repealed and annulled."[149]

Senator Edmunds of Vermont moved that the bill be sent to committee because "in some respects" the bill was too "strong." Senator Stewart of Nevada agreed. Sumner urged immediate passage, but the

[149] 43rd Cong., 1st Sess., p. 945.

bill was sent to committee. In March, 1874, Senator Sumner died.[150] On April 29, 1874, Senator Frelinghuysen of New Jersey reported Sumner's bill from Committee. The Committee draft of the bill differed from Sumner's draft. The original bill provided that "no citizen should be excluded" from common schools, et cerera, and purported to repeal all state laws containing the word "white" referring to race. The Committee's bill provided that "all persons . . . shall be entitled to full and equal enjoyment of accommodations . . . and privileges of inns, public conveyances, . . . theaters . . . common schools . . . cemeteries . . . subject only to the conditions and limitations established by law, and applicable alike to citizens of every race, . . ." It omitted the reference to private schools and omitted the section purporting to repeal State laws.[151]

Asked if it was a denial of equal rights to have separate schools, Senator Frelinghuysen of New Jersey discussed two cases: *State v. McCann* by the Supreme Court of Ohio holding separate schools constitutional under the then recently adopted Fourteenth Amendment, and *Clark v. Board of Directors,* by the Iowa Court striking down separate schools under the provisions of the *Iowa* Constitution (not the Federal Constitution). He pointed out that the cases were distinguishable because of different constitutional provisions of the States. He further conceded that it was not a privilege of a "citizen of the United States" to have an education at a State's

[150] Blaine, *Twenty Years in Congress,* p. 544.

[151] 43rd Cong., 1st Sess., p. 3451.

expense. He nevertheless said the object of this bill was to prohibit the exclusion of anyone from a school because of race.[152]

The bill was taken up again in May, 1874 and passed the Senate after an all-night session. There were many speeches for the bill[153] and against it, particularly on the question of mixed schools.[154]

Senator Stockton of New Jersey argued that the regulation of public schools was a matter of State concern only. He said the Legislature of New Jersey would not pass a compulsory mixed school law: "They know their constituents do not desire it. They know it is not right." He said that Negroes were entitled to "equal" rights; but "equal" rights did not mean "the same" facilities. He referred to the equal, separate schools in the District of Columbia, saying that Negroes and whites had equal rights when they had equal separate schools. He said the Fourteenth Amendment did not purport to tell a local community whether it should organize a school district, pay taxes to support it, and whether it would divide its students by age, sex, or race.[155]

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[152] 43rd Cong., 1st Sess., p. 3452.

[153] Alcorn of Mississippi (except the provision for forced mixed schools), Appendix, p. 305; Pease of Mississippi, p. 4153; Edmunds of Vermont, p. 4171; Boutwell of Massachusetts (except that he wanted to except separate white and Negro schools previously established), p. 4169; Frelinghuysen of New Jersey, p. 3452.

[154] Stockton of New Jersey, pp. 4117, 4144-4146; Bogy of Missouri, Appendix, pp. 318-323; Saulsbury of Delaware, p. 4159; Sargent of California, pp. 4167, 4175; Stewart of Nevada, p. 4167; Gordon of Georgia, p. 4169; Johnston of Virginia, p. 4114; Cooper of Tennessee, p. 4155.

[155] 43rd Cong., 1st Sess., pp. 4144-4146. This argument is referred to in Flack, *The Adoption of the Fourteenth Amendment*, p. 268.

Senator Howe of Wisconsin thought the first and fifth sections of the Fourteenth Amendment were broad enough to support Congressional legislation. He said, "Let justice be done though the common schools and the very heavens fall."[156]

Senator Alcorn of Mississippi had a novel approach. He said that the Negroes were in control of his State and so "self protection, if I had no higher consideration, would move me to support . . . this bill . . . I declare myself in favor of that policy which the colored man declares as necessary." But as to mixed schools he said,

> "You say that you do not want the schools mixed. Well, I am not in favor of mixing them; and I consider that this bill does not mix them. . . . How is it in my State? There . . . the colored people control; they make the laws; they levy the taxes; they appoint the school board. The whole machinery is in their hands; yet there is not a mixed school in the State . . . and we have civil rights there. Why is it? Simply because the colored people do not desire it; because they believe the interests of both races will be promoted by keeping the schools separate."[157]

Senator Saulsbury of Delaware, who had been a Senator in the 39th Congress which proposed the Fourteenth Amendment, said that the Fourteenth Amendment did not remove the State's police power

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[156] 43rd Cong., 1st Sess., pp. 4147-4152.

[157] *Id.* at Appendix, p. 305.

to have separate schools. He read from the opinion of Mr. Justice Field of this Court in *Bartemeyer v. Iowa:*

> "No one has ever pretended . . . that the 14th amendment interferes in any respect with the police power of the State. Certainly no one who desires to give to that amendment its legitimate operation has ever asserted for it any such effect. It was not adopted for any such purpose. The judges who dissented from the opinion of the majority of the Court in the Slaughter-House Case never contended for any such position. But on the contrary, they recognized the power of the State in its fullest extent. . . ."[158]

He referred to separate schools in Maryland and Delaware as being best for both races, and said that to force mixed schools would destroy the common schools. In fact, he said, ". . . I say that, sooner than see mixed schools in the State of Delaware, I would be glad to see the Legislature destroy the common school system in the State."[159]

Senator Stewart of Nevada, who was also in the 39th Congress, said he thought Congress had the power to legislate. But it is evident that he did not believe the Fourteenth Amendment required mixed schools because he argued against that provision:

> "If by voting for mixed schools I thought I could accomplish that purpose (educating the Negro) . . . I would vote for them; but I am

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[158] 43rd Cong., 1st Sess., p. 4159, May 22, 1874; 18 Wall. 129, 138 (1873).

[159] *Id.* at 4157-4162.

> afraid they would not have that precise effect. Consequently I think it ought to be left optional to have schools mixed or separate as the people themselves desire. I do not think at all events we should take the step to compel mixed schools."

He said he thought the Constitution should be amended to require the States to maintain common schools (and he had offered the amendment twice). "But while it is left to the States to have systems of free schools or not, and while the several States are wavering in the balance . . . I say it is endangering, in many of the States the education of the present generation . . ."[160]

Senator Stewart of Nevada said that the Senator from Massachusetts (Boutwell) was thinking of the 800,000 Negro votes, and he rejoiced with him that the Republican party had them. But he said, "No political consideration can make me vote in a manner which I fear will deny to any child the right to be educated."[161]

Senator Sargent of California said that the Fourteenth Amendment did not prohibit mixed schools any more than it prohibited the separation of boys and girls."[162]

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[160] 43rd Cong., 1st Sess., p. 4167.

[161] *Id.* at 4169. Boutwell of Massachusetts foresaw the Negro voting Republican out of gratitude, p. 4115. Flack, in his *Adoption of the Fourteenth Amendment*, observed that the "prime motive of a majority of those who voted for the bill was political. . . ." p. 271.

[162] *Id.* at 4172, 4175.

The advocates of the bill were successful in defeating amendments to the bill. Senator Boutwell of Massachusetts, who had been in the 39th Congress, wanted to amend the bill to except common schools or other institutions of learning theretofore established from the operation of the bill.[163] Senator Thurman of Ohio wanted the $500 fine payable to the person whose civil rights were offended.[164] Senator Gordon of Georgia moved to omit the reference to common schools.[165] (It will be remembered that the bill as finally enacted at the next session did delete the reference to common schools.)[166] Other amendments as to the enforcement of the Act, not material here, were also rejected.[167] The bill was passed by the Senate on May 22, 1874.[168]

[163] 43rd Cong., 1st Sess., p. 4115. His amendment would make the bill read: "And also of every common school . . . that *may hereafter* be endowed by any State or supported in whole or in part by public taxation." His amendment was defeated, p. 4169. He was particularly anxious about schools of a private nature which were supported in part by the State.

[165] Defeated, p. 4170.

[166] 43rd Cong., 2nd Sess., pp. 1010, 1011 in the House; *id.* at 1870 in the Senate.

[167] 43rd Cong., 1st Sess., pp. 4170-4171; 4175.

[168] *Id.* at 4176. As passed, Section 1 of the bill read: "That all citizens and other persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; and also of common schools and public institutions of learning or benevolence supported, in whole or in part, by general taxation, and of cemeteries so supported, and also the institutions known as agricultural colleges endowed by the United States, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." Section 4 of the bill prohibited exclusion from jury service because of race.

### 3. *In the 43rd Congress, 2nd Session, 1875*

The House of Representatives had returned H. R. 796 to committee at the close of the first session of the 43rd Congress. On February 1, 1875, Mr. Butler of Massachusetts was successful in getting the bill considered again.[169] The bill as reported by Committee was amended specifically authorizing separate schools.[170] Apparently the Committee, of which Butler was chairman, felt that Congress should affirmatively make separate schools an exception to the Civil Rights Act. Others, as will be shown in the amendment proposed by White of Alabama, thought the bill should go further and also affirmatively allow, separate accommodations in inns and on public transportation. Others thought (Rep. Cessna) that the wording of the Senate's bill by Mr. Sumner, requiring mixed schools, should be substituted. Still others, (Kellogg) thought that the Congress should enact the bill as to its other provisions and just not legislate as to schools, thus leaving the matter to the individual States. This latter view was ultimately adopted.

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[169] The rules of the House were amended in order to get the bill brought up. 43rd Cong., 2nd Sess., pp. 900-902. Butler had reported the bill on December 16, 1874, but it was again recommitted (*id.* at 116). On January 25, 1875, he attempted to bring the bill up again but failed to get the necessary two-thirds vote (*id.* at 704).

[170] Flack, *The Adoption of the Fourteenth Amendment* at page 272 says that the bill was almost identical with the one passed by the Senate. In most respects, his statement is correct. But it is erroneous as to the school provision.

The Committee after the reference to common schools in the bill added the following:

> "Provided, That if any State or the proper authorities in any State, having the control of common schools or other public institutions of learning aforesaid, shall establish and maintain separate schools and institutions, giving equal educational advantages in all respects for different classes of persons entitled to attend such schools and institutions, such schools and institutions shall be a sufficient compliance with the provisions of this section so far as they relate to schools and institutions of learning."[171]

The following amendments were offered (and they will hereafter be referred to by the name of the Representative proposing the amendment):

1. *White* of Alabama: to add the following proviso:

   > "Provided that nothing in this act shall be construed to require mixed accommodations, (by sitting together) facilities, and privileges at inns, in public conveyances . . . theaters, . . . for persons of different race or color, nor to prohibit separate accommodations, facilities and privileges at inns, in public conveyances . . . theaters . . . And provided further that nothing in this act shall be construed to require mixed common schools . . ."[172]

2. *Cessna* of Pennsylvania moved to substitute the words of the Senate bill.[173]

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[171] 43rd Cong., 2nd Sess., p. 1010.
[172] *Id.* at 939.
[173] *Id.* at 938; defeated p. 1011.

3. *Kellogg* of Connecticut moved to strike out the words of the original bill as to schools and also the proviso added by the House Judiciary Committee; *i. e.*, to pass the bill omitting all reference to schools.[174]

Representative Finck of Ohio, who had been in the 39th Congress which proposed the Fourteenth Amendment, cited with approval the then recent decision of the Ohio Supreme Court in *State v. McCann*, 21 Ohio St. 198. He said it was rendered by "a full court . . . every member of who was a prominent member of the republican party . . . in which it was held that it was no infringement of the 14th article to the Constitution to prohibit Negro children from attending the same school with white children."[175] He also discussed the *Slaughter House Cases*.

There were again many speeches on the bill, particularly with reference to the school clauses. In the interest of brevity, they cannot be summarized here. Some favored the broad Senate version proposed by the *Cessna* amendment.[176] Others were

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[174] 43rd Cong., 2nd Sess., p. 1010.

[175] *Id.* at 948. Finck thought the whole bill unconstitutional and an unwarranted interference with the powers of the State. His speech is referred to in Flack, pp. 272-273.

[176] Rainey, Negro Representative of South Carolina, p. 959; Hoar of New York, p. 979; Roberts of New York, p. 980; Lewis, a Republican from Tennessee, p. 998; Burrows of Michigan, p. 1000; Phillips of Kansas, p. 1003; Shanks of Indiana, p. 1003; Garfield of Ohio, p. 1004; Williams of Wisconsin, p. 1002; Lynch, Negro Representative from Mississippi, p. 945. (All references are to Congressional Record, 43rd Cong., 2nd Sess.)

against the whole bill but favored the *White* amendment to allow separate accommodations in carriers, inns, schools; and many were against compulsory mixed schools.[177]

Cain, a Negro Representative from South Carolina, suggested that for the sake of peace within the Republican Party, they might accept the school clause of the Committee.[178] Blount of Georgia reminded the House that the majority of the House was made up of "lame ducks" and that the country had spoken against the Civil Rights measure at the recent elections.[179] Phelps, a Republican of New Jersey, also reminded the House of the recent Republican defeat at the polls. He said:

> "To pass this bill, we defy the opinion of the people of the United States recently and emphatically declared; for if there was one issue on which we went to the country it was this . . . Upon this issue the two great parties went to judgment. And the people last fall declared their judgment, and *with a thunder that shook one hundred members out of their seats.*"

He spoke against forcing mixed schools on the South.[180] Stanard of Missouri said his State had sep-

[177] Storm of Pennsylvania, pp. 950-952; Lamar and Hunter of Virginia, *id.* at Appendix, pp. 119 *et seq.*; Whitehead of Virginia, pp. 952-957; Smith of Virginia, p. 960 and Appendix p. 156; Blount of Georgia, p. 977; Phelps of New Jersey, p. 1001; Finck of Ohio, p. 948; Southard of Ohio, p. 996; Brown of Kentucky, p. 938; Small of New Hampshire, p. 981.

[178] 43rd Cong., 2nd Sess., p. 957.

[179] *Id.* at 977.

[180] *Id.* at 1002.

arate schools, and that they were necessary for the education of both races.[181] Chittenden of New York thought the bill unduly vexatious to both races.[182] Small of New Hampshire said he didn't think the Senate bill required mixed schools "only that they shall have equal privileges."[183]

Since the *Kellogg* amendment was adopted, his explanation of his amendment to the House is pertinent:

> "The amendment I have proposed is to strike out of the House bill reported by the Committee on the Judiciary all that part which relates to schools; and I do it, Mr. Speaker, in the interest of education, and especially in the interest of the education of the colored children of the Southern States. . . . The proviso to the first section is one that makes a discrimination as to classes of persons attending public schools; and I do not wish to make any such provision in an act of Congress.
>
> "But upon this school question we should be careful that we do not inflict upon the several States of the Union an injury that we ought to avoid. A school system in most of the Southern States has been established since the war of the rebellion, by which the colored children of the South have the advantages of an education that they never could have before that time. I believe, from all the information I can obtain, that you will destroy the schools in many of the Southern States if you insist upon this provision of the bill. You will destroy the work of

[181] 43rd Cong., 2nd Sess., p. 981.
[182] *Id.* at 982.
[183] *Id.* at 981.

> the past ten years and leave them to the mercy of the unfriendly legislation of the States where the party opposed to this bill is in power. *And besides, this matter of schools is one of the subjects that must be recognized and controlled by State legislation.* The States establish schools, raise taxes for that purpose, and they are also aided by private benefactions; and they have a right to expend the money, so raised, in their own way. . . ." 43rd Cong., 2nd Sess., p. 997.

After adopting the amendment of Mr. Kellogg of Connecticut[184] the House passed the bill on February 4, 1875.[185] The bill then went to the Senate.

The House Bill (H. R. 796) was taken up by the Senate on February 26, 1875. There were few speeches, and most of the discussion was with reference to the jury service provision.[186] There was some debate on the constitutionality of the bill.[187] After this short debate, the bill was passed the same day.[188] It was signed by President Grant on March 1, 1875.[189]

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[184] 43rd Cong., 2nd Sess., p. 1010.

[185] *Id.* at 1011.

[186] Thurman of Ohio moved to amend the bill to limit its jury provisions to Federal Courts (*id.* at 1791); his amendment was defeated, p. 1867.

[187] That it was unconstitutional: Carpenter of Wisconsin, p. 1861; Dennis of Maryland, p. 1865; Thurman of Ohio, p. 1791. That it was constitutional: Boutwell of Massachusetts, p. 1792; Morton of Indiana, p. 1794.

[188] *Id.* at 1870.

[189] *Id.* at 2013.

### E. The Present Acts of Congress Providing for and Recognizing Separate Schools

1. *Congress Has Continued to Maintain Separate Schools in the District of Columbia.*

In 1874, as part of the Revised Statutes for the District of Columbia, Congress provided that:

> "It shall be the duty of the school board to provide suitable and convenient . . . schools for colored children . . . and to endeavor to promote a thorough, equitable, and practicable education of colored children . . . of the district.
>
> "Any white resident shall be privileged to place his . . . child . . . at any one of the schools provided for . . . white children . . . and any colored resident shall have the same right with respect to colored schools."[190]

The same Act in Section 294 provided that "there shall be a board of trustees of schools for colored children in the cities of Washington and Georgetown . . ." and Section 304 stated that "there shall be a superintendent of schools for colored children. . . ."

[190] Sections 281 and 282 of Revised Statutes Relating to the District of Columbia, U. S. Gov. Printing Office 1875. There have been other changes, not relevant here, in the number and composition of the school boards or Commissioners in charge of the schools. See Ingle, *The Negro in the District of Columbia,* Johns Hopkins University Studies, 11th Series (1893), pp. 29 *et seq.* and the opinion of the Circuit Court of Appeals for the District of Columbia in *Carr v. Corning,* decided February 14, 1950 (unreported yet). The major Acts are: 20 Stat. 107 (1878); 22 Stat. 142 (1882); 28 Stat. 693 (1895); 34 Stat. 316 (1906).

The Congressional Acts presently in force include the following provisions:

> "It shall be the duty of the Board of Education to provide suitable and convenient . . . schools for colored children . . ."
>
> "Any white resident shall be privileged to place his or her child . . . at any one of the schools provided for the education of white children . . . and any colored resident shall have the same rights with respect to colored schools."
>
> "It shall be the duty of the proper authorities of the district to set apart . . . from the whole fund received . . . such a proportionate part of all moneys received . . . as the colored children . . . bear to the whole number of children, white and colored . . ."[191]
>
> "It is the duty of the Board of Education to provide suitable rooms and teachers for such a number of schools . . . as, in its opinion, will best accommodate the colored children of the District of Columbia."[192]

2. *Grants to Separate Land-Grant Colleges*

The present acts of Congress[193] recognize the validity of separate colleges for white and Negro students by providing funds for separate land-grant agricultural and mechanical colleges (including Texas A. & M. College for white students and Prairie View

[191] District of Columbia Code (1940 ed.), Sec. 31-1110, 1111, 1112.

[192] D. C. Code 31-1113; Sec. 31-109 provides for one white and one colored first assistant superintendents for the respective schools.

[193] 7 U.S.C., § 323.

A. & M. College for Negro students of Texas). The history of this act (known as the Morrill Act) is pertinent, particularly in view of the fact that Senator Morrill of Vermont, after whom the bill is named, had not only been a member of the 39th Congress but a Republican member of the Committee of Fifteen which proposed the Fourteenth Amendment.

Land-grant colleges were established in the States to take advantage of an Act of July 2, 1862, which granted certain lands to the States, the proceeds from the sale of which were to be applied to agricultural and industrial education.[194] The original act provided that those States which were "in rebellion or insurrection against the government of the United States" were to receive no benefits.

On March 25, 1890, Senator Morrill of Vermont introduced a bill to apply the proceeds of the sale of public lands to public education and the support of the land-grant colleges.[195]

As reported from the Senate Committee, Section 2 of the bill read in part:

> "*Provided,* That no money shall be paid out from the college fund arising under this act to any State or Territory for the support and maintenance of a college where a distinction of race or color is made in the admission of students, but the establishment and maintenance

[194] 12 Stat. 503 (1862); this act was supplemented in 1870 to establish "agricultural experimental stations" at colleges established under the original act. 24 Stat. 440 (1887).

[195] 51st Cong., 1st Sess., p. 2595. These colleges were those teaching "Agriculture and the Mechanic Arts" the same as those established under the Act of 1862.

> of such colleges separately for white and colored students shall be held to be a compliance with the provisions of this act."[196]

Objection was made that the bill attempted to interfere with the internal operation of the land-grant colleges, which, it was argued, is a State function.[197] This was the principal objection to the bill and most of the debate was confined to this point and to the amount of money to be granted.

Senator Pugh of Alabama offered the following amendment to be added to Section 2:

> "*Provided further*, That the Legislature of any State in which institutions of like character have been established and are now being aided by such State out of its own revenue for the education of colored students in agricultural or the mechanical arts, whether styled colleges or not, and whether they have or not received any money heretofore under the act to which this is an amendment, may appropriate any portion of the fund received under this bill to such institutions so established and aided by such State as a compliance with the provision in reference to separate colleges for white and colored students."[198]

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[196] 51st Cong., 1st Sess., p. 6085. A committee amendment deleted the words "from the college fund arising." A substitute bill had previously been considered. *Id.* at 4003 and 6083.

[197] 51st Cong., 1st Sess., pp. 6332-6336. Morgan of Alabama, Reagan of Texas, Hawley of Connecticut, and Plumb of Kansas indicated vigorously their belief in this proposition.

[198] 51st Cong., 1st Sess., p. 6431. A similar amendment had been proposed by Senator Hoar of Massachusetts. *Id.* at 6345.

The purpose of this amendment was, it was stated, to overcome a difficulty created by the Act as reported from the committee in that it provided that only one college could be benefited, thus prohibiting benefits to the second college in those States which had one for Negro students and one for white students.[199]

Senator Morrill offered to accept the proposed amendment.[200] The debate on the amendment offered by Senator Pugh was concerned primarily with the determination of an equitable distribution of the funds within the States and an apprehension that perhaps the fund might be dissipated by the establishment of too many schools. Senator Hoar of Massachusetts, who had been outspoken in favor of the civil rights of Negroes as a member of the House in previous Congresses, stated that

> ". . . in the institution in my State colored and white youth study together . . . wherever colored and white youth do not study together the bill should secure equal provision for colored youth. . . ."[201]

Senator Hawley of Connecticut stated:

> "I will not object to the provision . . . which forbids any distinction of race or color . . . but allows the establishment and maintenance of such colleges separately for white and colored students. . . ."[202]

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[199] 51st Cong., 1st Sess., p. 6344.
[200] *Id.* at 6341.
[201] *Id.* at 6345.
[202] *Id.* at 6346.

Senator Ingalls of Kansas, after remarking that his State had only one school, stated, with reference to the Southern States, that

> "I believe that it is inappropriate and improper, in various ways detrimental to the interests of both races, that coeducation should be conducted."[203]

As a compromise the following was offered in lieu of the amendment of Senator Pugh of Alabama:

> "*Provided further*, That in any State in which there has been one college established in pursuance of the act of July 2, 1862, and also in which an educational institution of like character has been established and is now aided by such State from its own revenue for the education of colored students in agriculture and the mechanic arts, however named or styled, or whether or not it has recevied money heretofore under the act to which this act is an amendment, the Legislature of such State may propose and report to the Secretary of the Interior a just and equitable division of the fund to be received under this act between one college for white students and one institution for colored students established as aforesaid, which shall be divided into two parts and paid accordingly. And thereupon such institution for colored students shall be entitled to the benefits of this act and subject to its provisions as much as it would have been included under the act of 1862; and the fulfillment of the foregoing provisions shall

[203] 51st Cong., 1st Sess., p. 6349.

> be taken as a compliance with the provision in reference to separate colleges for white and colored students."[204]

The amendment was accepted[205] and the bill was passed by the Senate containing both the amendment and the original provision with regard to separate schools for Negroes.[206]

Thus, as it then passed in the Senate (and as it reads today), Senator Morrill's bill provided:

> "*Provided,* That no money shall be paid out under this act to any State or Territory for the support and maintenance of a college where a distinction of race or color is made in the admission of students, but the establishment and maintenance of such colleges separately for white and colored students shall be held to be a compliance with the provisions of this act. . . . *Provided,* That in any State in which there has been one college established in pursuance of the act of July 2, 1862, and also in which an educational institution of like character has been established, or may be hereafter established, and is now aided by such State from its own revenue, for the education of colored students in agriculture and the mechanic arts . . . the Legislature of such State may propose and report to the Secretary of the Interior a just and equitable division of the fund to be received under this act between one college for white students and one institution for colored stu-

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[204] 51st Cong., 1st Sess., p. 6369, Section 1.
[205] *Id.* at 6370.
[206] *Id.* at 6372.

> dents . . . and the fulfillment of the foregoing provisions shall be taken as a compliance with the provision in reference to separate colleges for white and colored students."[207]

Passage of the bill by the House was completed with no debate on the provision allowing donations to separate schools on August 19, 1890.[208] The Senate concurred in the House amendment to that part of the bill which named the type of instruction to be given.[209] The bill was signed by the President on August 30, 1890.[210]

Thus, by virtue of a bill introduced by a Senator who had been a member of the committee which proposed the Fourteenth Amendment, the 51st Congress, by making appropriations to separate schools, interpreted the Fourteenth Amendment and the civil rights legislation as not prohibiting separate schools for white and Negro students.

### 3. *Grants from National School Lunch Act to Separate Schools*

The present National School Lunch Program Acts recognize separate schools and authorize payments to the separate schools. The act provides in part:

> ". . . If a State maintains separate schools for minority and for majority races, no funds

[207] 51st Cong., 1st Sess., p. 8828.

[208] *Id.* at 8839. The bill had been referred to the Committee on Education, reported favorably, and debated in the House. *Id.* at 6464, 7228, 8828.

[209] *Id.* at 8874.

[210] *Id.* at 9388; 26 Stat. 417 (1890).

made available pursuant to this chapter shall be paid or disbursed to it unless a just and equitable distribution is made within the State, for the benefit of such minority races, of funds paid to it under this chapter."[211]

## II. CONSTRUCTION OF THE FOURTEENTH AMENDMENT BY THE STATE LEGISLATURES

An examination of the contemporaneous Acts of the Legislatures of the States will show that the Legislatures did not construe the Fourteenth Amendment, which was proposed in 1866 and became effective in 1868, to abolish the police power of the States to provide equal education for their white and Negro students in separate institutions.

In addition to the Acts of Congress providing separate schools in the District of Columbia, and the Acts of the legislatures of the 17 Southern States which still require separate schools,[212] the Legislatures of the Northern States considered that they had the power to legislate separate or mixed schools. The acts of these States which were represented in the 39th Congress when the resolution submitting the Fourteenth Amendment was adopted will be briefly set out:

**California.**—In 1869, almost immediately after the adoption of the Fourteenth Amendment in 1868, a statute was enacted which provided for the educa-

[211] 60 Stat. 233, 42 U.S.C., § 1760(c) (1946).

[212] These Acts are set out in the Appendix of the Amicus Curiae brief of the Southern States.

tion of "children of African descent, and Indian children" in separate schools.[213] In 1872 the law provided that the schools must be open to all "white children between five and twenty-one years of age," and the above law of 1869 was codified.[214]

**Delaware.**—In 1857 the school committee of each district was delegated the power to provide for schools "free to all white children of the district."[215] Since that time separate schools for white and Negro students have been provided by the Constitution and statutes.[216]

**Indiana.**—The joint resolution proposing the Fourteenth Amendment was ratified by Indiana in 1867. In 1869, after the adoption of the Fourteenth Amendment, the Legislature enacted a law providing that the trustees "shall organize the colored children into separate schools."[217] This statute was reenacted with some changes in 1877.[218]

**Kansas.**—The Fourteenth Amendment was ratified by Kansas in 1867. By a statute of 1868, the boards of education in cities of the first class were given the power to establish separate schools for white and

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[213] Cal. Laws, 1869-70, c. 145, Sec. 56, p. 839.
[214] Cal. Political Code, 1872, Secs. 1662, 1669.
[215] Del. Rev. Stat., c. 42, Sec. 11(3), p. 207 (1852).
[216] Del. Const., Art. X, Sec. 2 (1897); Del. Laws 1881, c. 362, p. 385; Del. Laws 1889, c. 540, p. 651; Del. Rev. Stat., c. 66, p. 341 (1852 as amended 1893).
[217] Ind. Laws 1869, p. 41.
[218] Ind. Laws 1877, p. 124.

Negro children.[219] This statute was amended in 1879 and 1905 but the provisions relating to separate schools were reenacted each time.[220]

**Kentucky.**—Several statutes providing for separate schools in the cities were enacted in 1871 and 1872.[221] This policy was continued when the public school systems were established.[222] A constitutional provision in 1891 and a statute covering the educational system of the entire State in 1892 both provide for separate schools.[223]

**Maryland.**—A statute providing finances for separate schools was passed in 1870.[224] Subsequent statutes carried forward this policy of separation in education.[225]

**Missouri.**—A provision in the Constitution of 1865 required separate schools for "children of African descent."[226] With this provision in the Constitution the Fourteenth Amendment was ratified by Missouri in 1867. The Constitution of 1875 contained a sim-

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[219] Kan. Laws 1868, c. 18, Sec. 75, p. 146.

[220] Kan. Laws 1879, c. 81, Sec. 1, p. 163; Kan. Laws 1905, c. 414, Sec. 1, p. 676.

[221] 1 Ky. Laws 1871-72, c. 594, Sec. 10, p. 62; 2 Ky. Laws 1871-72, c. 112, p. 194; 2 Ky. Laws 1871-72, c. 520, Sec. 8, p. 598.

[222] Ky. Laws 1879, c. 894, p. 273; Ky. Laws 1879, c. 377, Sec. 9, p. 340.

[223] Ky. Const., Sec. 187 (1891); Ky. Laws 1891-92-93, c. 260, Art. XIV, p. 260.

[224] Md. Laws 1870, c. 18, p. 555.

[225] Md. Laws 1872, c. 18, p. 650; Md. Laws 1874, c. 463, p. 690; 2 Md. Rev. Stat., c. 18, Secs. 124-127 (1904).

[226] Mo. Const., Art. IX, Sec. 2 (1865).

ilar provision for "separate free schools" for Negroes.[227] Similarly the statutes provided for separate schools and the procedure for their operation.[228]

**New Jersey.**—The Fourteenth Amendment was there ratified in 1866. In 1881 a statute was enacted that "no child . . . shall be excluded from any public school . . . on account of . . . color."[229] An industrial school for Negroes was established in 1895, and it remains in operation.[230] Separate schools were in existence[231] until they were specifically prohibited by a provision in the new Constitution in 1949.

**New York.**—In 1864, the school boards were empowered to establish separate schools for "youth of African descent."[232] The Fourteenth Amendment was there ratified in 1867. In 1894, additional legislation was passed providing for separate schools for Negroes.[233]

**Ohio.**— The law in 1848 and 1849 provided for separate schools for Negroes.[234] Ratification of the Fourteenth Amendment was there completed in 1867. In

[227] Mo. Const., Art. XI, Sec. 3 (1875).

[228] Mo. Laws 1874, Sec. 74, p. 164; 2 Mo. Rev. Stat., c. 150, Sec. 7052 (1879); 2 Mo. Rev. Stat., c. 143, Sec. 8002 (1889); 2 Mo. Rev. Stat., c. 154, Sec. 9774 (1899); 2 Mo. Rev. Stat., c. 106, Sec. 10793 (1909).

[229] N. J. Laws 1881, c. 149, p. 186.

[230] 3 N. J. Gen. Stats., Schools, Secs. 315-320, p. 3073 (1709-1895); N. J. Laws 1904, c. 1, Secs. 201-204, p. 76.

[231] Murray, *Negro Handbook*, p. 132 (1949).

[232] N. Y. Laws 1864, Title 10, p. 1281.

[233] 2 N. Y. Laws 1894, Art. 11, p. 1289.

[234] Ohio Laws 1847-8, p. 81; Ohio Laws 1848-9, p. 17.

1878 a statute provided that the boards of education might "organize separate schools for colored children."[235] Similarly in 1880 the power to establish separate schools was again legislated.[236]

**West Virginia.**—In 1865 the Legislature provided for separate schools.[237] In 1867 the Fourteenth Amendment was ratified. In 1871 the Legislature provided that "white and colored persons shall not be taught in the same school."[238] This mandate was repeated in 1872,[239] 1881,[240] and 1884.[241]

Oregon,[242] Vermont,[243] Rhode Island,[244] New Hampshire,[245] and Nebraska[246] having small Negro populations did not specifically legislate as to separate or mixed schools. The Constitution of Iowa prohibited separate schools; and in the same year of the adoption of the Fourteenth Amendment, its Supreme Court held a statute providing for separate schools unconstitutional under the Iowa (not the United States) Constitution.[247] Massa-

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[235] Ohio Laws 1878, p. 513.
[236] Ohio Rev. Stats. 1880, c. 9, Sec. 4008, p. 1005.
[237] W. Va. Laws 1865, c. 59, Sec. 17, p. 54.
[238] W. Va. Laws 1871, c. 152, Sec. 19, p. 206.
[239] W. Va. Laws 1872-3, c. 123, Sec. 17, p. 391.
[240] W. Va. Laws 1881, c. 15, Secs. 17, 18, p. 176.
[241] W. Va. Code, Art. 12, Sec. 8, p. 35 (Worth 1884).
[242] Ore. Laws 1855, p. 466; Ore. Laws 1887, p. 23.
[243] Vt. Laws 1865-66, p. 94; Vt. Laws 1892, p. 251.
[244] R. I. Laws 1882, c. 50, p. 139.
[245] N. H. Laws 1867, c. 78, Sec. 19, p. 165; N. H. Laws 1878, c. 86, Sec. 19, p. 208.
[246] Neb. Rev. Stat., c. 79, Sec. 2, p. 664; Neb. Rev. Stat., c. 69, Sec. 2, p. 982 (1873).
[247] Iowa Laws 1858, c. 52, p. 65; *Clark v. Board of Directors,* 24 Iowa 266 (1868).

chusetts had mixed schools before the adoption of the Fourteenth Amendment.[248] Connecticut,[249] Maine,[250] Michigan,[251] Minnesota,[252] and Wisconsin,[253] each having maintained separate schools for whites and Negroes before the adoption of the Fourteenth Amendment, continued such policy after their ratification of the amendment until the policy was later changed by their own statutes, thereby evidencing their interpretation that the Fourteenth Amendment did not accomplish that purpose.

Illinois, which maintained separate schools prior to its ratification of the Fourteenth Amendment in 1867, continued that policy thereafter until 1874 when it enacted a statute discontinuing separate schools. Separate schools continued to exist, however, in sections of the State.[254]

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[248] Mass. Laws 1854-55, pp. 674-75; Mass. Laws 1904, c. 498, Sec. 4, p. 608; Mass. Rev. Stat., c. 498, Sec. 11, p. 1160 (Supp. 1889-1895).

[249] Conn. Laws 1835, Title 53, p. 321; Conn. Laws 1866, 1867, 1868, c. 58, p. 206.

[250] Me. Laws 1873, c. 124, Sec. 4, p. 78; Me. Laws 1887, c. 100, Sec. 31, p. 74; Me. Rev. Stat., Supplement 1885-1895, c. 11, Sec. 31, p. 132.

[251] Mich. Laws 1871, No. 170, Sec. 28, p. 274; 2 Howell's Ann. Stat., c. 3, Sec. 5070, p. 1334; 2 Mich. Comp. Stats., c. 136, Sec. 18, p. 1478.

[252] Minn. Laws 1864, c. 4, Sec. 33, p. 26; Minn. Stat., c. 14, Secs. 2998, 2999 (Mason 1927); Minn. Stat., c. 245, Sec. 10 (Mason 1927).

[253] Wisc. Rev. Stats. 1878, c. 27, Sec. 494, p. 185.

[254] Ill. Laws 1847, p. 120; Ill. Rev. Stat., c. 122, Sec. 100, p. 983; Ill. Rev. Stat. (Cathran 1883), c. 122, Sec. 101, p. 1406; Ill. Laws 1949, p. 53. Although cases arising in Alton, Illinois have been before the Illinois courts in 1886 and 1899, this city continues to maintain separate schools for white and Negro students. Alton Evening Telegraph, Jan. 23-26, 1950, p. 1, col. 1; Bond, *Education of the Negro in the American Social Order*, 382 (1934).

Nevada continued separate schools for Negroes by statute in 1867, the same year the Fourteenth Amendment was ratified, but in 1872 these statutes were declared unconstitutional under the Nevada Constitution.[255] In Pennsylvania the statutes providing for separate schools were retained after the Fourteenth Amendment was ratified. They were not repealed until 1881.[256]

Nowhere has any State statute requiring separate equal schools been declared to be in violation of the Fourteenth Amendment or any other provision of the Constitution of the United States. Where separate schools were abandoned, it was done on the voluntary action of the State Legislature.

### III. CONTEMPORANEOUS CONSTRUCTION OF THE FOURTEENTH AMENDMENT AND THE CIVIL RIGHTS ACTS BY THE STATE AND FEDERAL COURTS

The Fourteenth Amendment, the Civil Rights Acts of 1866 and 1875, and the other similar enactments were construed by the State and Federal courts during the period of their consideration and enactment. These cases may be looked to in order to determine the contemporary construction by the courts and thereby to ascertain from another source the status of separate schools under the Reconstruction enactments.

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[255] Nev. Laws 1864-65, c. 145, Sec. 50, p. 426; Nev Laws 1867, c. 52, Sec. 21, p. 95; *State ex rel. Stoutmeyer v. Duffy*, 7 Nev. 342 (1872).

[256] Pa. Laws 1854, p. 623; Purdon's Digest, Common Schools, Sec. 54, p. 244 (Brightly 1700-1872); Pa. Laws 1867, p. 9; Pa. Laws 1872, p. 1048 repealing Pa. Laws 1855, Sec. 14, p. 12; Pa. Laws 1881, p. 76.

It was contended in a New York Court in 1869[257] that the provisions of the City charter in Buffalo, New York, providing for separate schools for white and Negro students "were inconsistent with the Act of Congress called the 'civil rights bill' and had therefore become inoperative." With regard to this contention the New York Court stated:

> "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. A principal object of that act was to confer citizenship upon the colored people, and . . . to abrogate the rule . . . in . . . the Dred Scott case. . . . In addition to that, this act was intended to confer upon the colored people all the substantial rights of the citizen. And these, so far as they are affected by the act, are enumerated in the first section. . . . *It is clear that the right or privilege of attending a school provided for white children is not among those included in this section.* Nothing is contained in either of the succeeding sections of this act from which it is or can be claimed, that such a right or privilege can be derived, and it is, therefore, unnecessary that any particular reference should be made to them for the purpose of disposing of this case. They were enacted for the purpose of more effectually securing and maintaining the rights conferred by and enumerated in the first section." (p. 256.) (Italics are added throughout.)

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[257] *Dallas v. Fosdick,* 40 How. Prac. 249.

In Ohio in 1871 the statutory provision regarding separate schools was attacked as in contravention of the Fourteenth Amendment.[258]

The Ohio court stated:

> "Unquestionably all doubts, wheresoever they existed, as to the citizenship of colored persons, and their right to the 'equal protection of the laws,' are settled by this amendment. But neither of these was denied to them in this State before the adoption of the amendment. At all events, the statutes classifying the youth of the State for school purposes on the basis of color, and the decisions of this court in relation thereto, were not at all based on a denial that colored persons were citizens, or that they are entitled to the equal protection of the laws. It would seem, then, that these provisions of the amendment contain nothing conflicting with the statute authorizing the classification in question, nor the decisions heretofore made touching the point in controversy in this case.
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> ". . . conceding that the 14th amendment not only provides equal securities for all, but guarantees equality of rights to the citizens of a State, as one of the privileges of citizens of the United States, it remains to be seen whether this privilege has been abridged in the case before us. The law in question surely does not attempt to deprive colored persons of any rights. On the contrary it recognizes their right, under the constitution of the State, to equal common school advantages, and secures to them their equal proportion of the school fund. It only regulates the mode and manner

[258] *State ex rel. Garnes v. McCann,* 21 Ohio St. 198.

in which this right shall be enjoyed by all classes of persons. The regulation of this right arises from the necessity of the case. Undoubtedly it should be done in a manner to promote the best interests of all. But this task must, of necessity, be left to the wisdom and discretion of some proper authority. The people have committed it to the general assembly, and the presumption is that it has discharged its duty in accordance with the best interests of all.

"At most, the 14th amendment only affords to colored citizens an additional guaranty of equality of rights to that already secured by the constitution of the State.

"The question, therefore, under consideration is the same that has, as we have seen, been heretofore determined in this State, that a classification of the youth of the State for school purposes, upon any basis which does not exclude either class from equal school advantages, is no infringement of the equal rights of citizens secured by the constitution of the State."

One year later (1872) the question as to whether separate schools violated the Fourteenth Amendment was again before the New York courts.[259] It was again held that so long as the separate schools were equal, the separation did not violate the Fourteenth Amendment.

In *State ex rel. Stoutmeyer v. Duffy*, 7 Nev. 342 (1872) the court held that the particular statute providing for separate schools for Negroes was invalid under the Nevada Constitution (not the Fed-

[259] *People ex rel. Dietz v. Easton*, 13 Abb. (N. Y.) Pr. (N. S.) 159.

eral Constitution). As to the Fourteenth Amendment, however, the dissenting opinion pointed out that

> "The case of the relator was sought to be maintained on the ground that the statute was in violation of the fourteenth amendment to the constitution of the United States. *I fully agree with my associates that this position of counsel is utterly untenable.*"

All the judges agreed that separate schools were not in violation of the Fourteenth Amendment. They were also agreed that if equal, separate schools were provided for Negroes, the school trustees could assign Negroes to them and white students to other schools.

In 1873 the Pennsylvania court, in upholding a statute providing for separate schools, said:

> "In the case before us, we fail to discover that any great constitutional question is involved, or that any right of the relator, or his children, growing out of the Fourteenth Amendment of the Constitution of the United States, or under the Civil Rights Bill, has been challenged, invaded or denied. . . ."[260]

The contention that separate schools violated the Fourteenth Amendment and the Civil Rights Bill was also contemporaneously decided in the negative by the highest court of Indiana in 1874.[261] That court

[260] *Commonwealth v. Williamson,* 30 Legal Int. 406.
[261] *Cory v. Carter,* 48 Ind. 327.

interpreted the Civil Rights Bill of 1866 as granting only specifically named rights, not including the privilege of attending a State school:

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

Then with regard to the Thirteenth, Fourteenth, and Fifteenth Amendments,

> "In our opinion, such amendments have not in any other respect imposed restrictions or limitations upon the sovereign power of the State. From this it results that there is no limitation upon the power of the State, within the limits of her own constitution, to fix, secure, and protect the rights, privileges, and immunities of her citizens, as such, of whatever race or color they may be, so as to secure her own internal peace, prosperity, and happiness.
>
> "In our opinion, the classification of scholars, on the basis of race or color, and their education in separate schools, involve questions of domestic policy which are within the legislative discretion and control, and do not amount to an exclusion of either class. . . .

"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 aftermatured 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; and if no obligation was expected to be or was imposed upon Congress by the amendment, to place the two races and colors in the same school, with what show of reason can it be pretended that it has such a compelling power upon the sovereign and independent states forming the Federal Union?

"We refer to the legislation of Congress relative to schools in the District of Columbia, at the first session of the Thirty-Ninth Congress, and the third session of the Forty-Second Congress."

After reviewing Congressional Acts on separate schools in the district, the opinion continued,

"This legislation of Congress continues in force, at the present time, as a legislative construction of the fourteenth amendment, and as a legislative declaration of what was thought to be lawful, proper, and expedient under such amendment, by the same body that proposed such amendment to the states for their approval and ratification."

Again in 1874, the question of separate schools being violative of the Fourteenth Amendment was decided in the negative by the California Supreme Court in *Ward v. Flood,* 48 Cal. 36:

> ". . . nor do we discover that the statute is, in any of its provisions, obnoxious to objections of a constitutional character. It provides in substance that schools shall be kept open for the admission of white children, and that the education of children of African descent must be provided for in separate schools."

Continuing, the Court said:

> ". . . our duties lie wholly within the much narrowed range of determining whether this statute, in whatever motive it originated, denies to the petitioner, in a constitutional sense, the equal protection of the laws; and in the circumstances that the races are separated in the public schools, there is certainly to be found no violation of the constitutional rights of the one race more than of the other, and we see none of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense."

The Federal Circuit Court was presented with the problem of interpreting the Fourteenth Amendment in a case involving separate schools in 1878, *Bertonneau v. Board of Directors,* 3 Fed. Cases 294 (1878). There the court said:

> "Is there any denial of equal rights in the resolution of the board of directors of the city

schools, or in the action of the subordinate officers of the schools, as set out in the bill? Both races are treated precisely alike. White children and colored children are compelled to attend different schools. That is all. The state, while conceding equal privileges and advantages to both races, has the right to manage its schools in the manner which, in its judgment, will best promote the interest of all.

"The state may be of opinion that it is better to educate the sexes separately, and therefore establishes schools in which the children of different sexes are educated apart. By such a policy can it be said that the equal rights of either sex are invaded? Equality of right does not involve the necessity of educating children of both sexes, or children without regard to their attainments or age in the same school. Any classification which preserves substantially equal school advantages does not impair any rights, and is not prohibited by the constitution of the United States. Equality of right does not necessarily imply identity of rights."

In *People, ex rel. King v. Gallagher*, 93 N. Y. 438 (1883) the validity of the separation of white and Negro students in the schools was before the court. The court held that if an equal separate school was established the separation was not repugnant to the Fourteenth Amendment. It was stated:

"The highest authority for the interpretation of this amendment is afforded by the action of those sessions of Congress which not only immediately preceded, but were also contemporaneous with the adoption of the amendment in ques-

tion." (The court then discusses several Acts of Congress on the District of Columbia.)

"If regard be had to that established rule for the construction of statutes and constitutional enactments which require courts, in giving them effect, to regard the intent of the law-making power, it is difficult to see why the considerations suggested are not controlling upon the question under discussion.

"The question here presented has also been the subject of much discussion and consideration in the courts of the various States of the Union, and it is believed has been, when directly adjudicated upon, uniformly determined in favor of the proposition that the separate education of the white and colored races is no abridgement of the rights of either."

And further:

"The argument of the appellant's counsel, which is founded upon that clause of the constitutional amendment granting to every citizen the equal protection of the law, must fall with his main argument as being founded upon the unwarranted assumption that this protection has been denied to the relator in this case. Equality and not identity of privileges and rights is what is guaranteed to the citizen, and this we have seen the relator enjoy."

Similar cases arose in other States, the courts in these cases holding separate schools repugnant to some State Constitutional or statutory provision, but never holding separate schools prohibited by the

Fourteenth Amendment.[262] It will thus been seen that in those cases which arose during the period contemporary with the adoption of the Reconstruction measures, the courts were all of the opinion that the Fourteenth Amendment had no effect on the power of the States to provide separate schools for white and Negro students.

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[262] *Clark v. Board of Directors,* 24 Iowa 266 (1868); *People v. Board of Education,* 18 Mich. 400 (1869); *Chase v. Stephenson,* 71 Ill. 383 (1874); *Smith v. Board of Directors,* 40 Iowa 518 (1875); *Dove v. Ind. School Dist.,* 41 Iowa 689 (1875). See also *Martin v. Board of Education,* 42 W. Va. 514 (1896) upholding separation under the Fourteenth Amendment.

SECOND SECTION

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

*Corbin v. School Board*, 177 F. 2d 924 (C.C.A. 4th 1949). The Court stated that the question of the validity of separate schools was foreclosed against plaintiffs "by decisions of the United States Supreme Court, and no useful purpose could be served by adding to the able discussion of the problem in the opinion below." 84 F. Supp. 253 (W.D. Va. 1949).

*Brown v. Board of Trustees, LaGrange Ind. School Dist.*, S. D. Tex., Feb. 16, 1950, denied an injunction against alleged discrimination in providing separate schools. Following the *Gaines* and *Sipuel* cases, the Court concluded that maintaining separate schools for white and Negro students does not violate the Fourteenth Amendment.

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

to furnish separate, but impartial and substantially equal facilities to both Negro and white students."

*Pitts v. Board of Trustees*, 84 F. Supp. 975 (E.D. Ark., 1949) held that the Fourteenth Amendment does not require mixed schools, and that "such a course of action" would not be "for the best interest of the children of either race."

*Boyer v. Garrett*, D.C. Md., Dec. 30, 1949, held that it was proper, under the Fourteenth Amendment, for the State to provide separate recreation facilities for the white and Negro citizens.

*Carter v. School Board*, 87 F. Supp. 745 (E.D. Va., 1949). In holding that there was no discrimination in equal separate schools, the Court stated: "We find that the segregation in the public functions of the State, including education in public schools, is exclusively a State matter and . . . is not questionable save to assure equality."

*Johnson v. University of Kentucky*, 83 F. Supp. 707 (E.D. Ky., 1949). Citing the *Sipuel* and *Gaines* cases the Court held separate school facilities are valid under the Fourteenth Amendment, provided the facilities are equal.

*Wrighten v. University of South Carolina*, 72 F. Supp. 948 (E.D. S.C., 1947). The Circuit Court (unreported) returned the case to the District Court for a fact finding of equality of the separate

law school established after the first trial. In July, 1948, the trial court found that the Negro law school was substantially equal and denied Wrighten's injunction. (Opinion unreported.)

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

*State (Bluford) v. Canada,* 348 Mo. 298 (1941) denied mandamus to admit Bluford to Missouri Journalism School.

*State (Michael) v. Witham,* 179 Tenn. 250 (1942), following the *Gaines* case, denied a mandamus to compel the admission of a Negro to Tennessee University.

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

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

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| Arkansas: | | |
| State v. Board of Directors, 242 S. W. 545, Cert. Den. 264 U. S. 567 (1922) | To obtain admission to white school; plaintiff claimed no Negro blood. | Separation is proper and ruling of school board supported by evidence will not be disturbed. |
| Maddox v. Neal, 45 Ark. 121 (1885) | Constitutionality of separate schools for Negroes. | The separate school being equal, the separation does not violate the 14th Amendment. |
| Arizona: | | |
| Burnside v. Douglas School, 261 Pac. 629 (1928) | Constitutionality of separate school for Negroes. | The separate school being equal, the separation does not violate the 14th Amendment. |
| Dameron v. Bayless, 126 Pac. 273 (1912) | Same as above. | Same as above. |
| Harrison v. Riddle, 36 P. 2d 984 (1934) | Mandamus to compel separation by school board. | Where substantially equal school is provided school board must separate pupils. |
| California: | | |
| Ward v. Flood, 48 Cal. 36 (1874) | Constitutionality of separate schools for Negroes. | The separate school being equal, the separation does not violate the 14th Amendment. |
| Dist. of Columbia: | | |
| Wall v. Oyster, 36 App. D.C. 50 (1910) | To contest being sent to separate school when there was no notice of statute providing for separate schools. | Statute is not invalid for lack of notice. Board may assign to separate school. |

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

| State | Case | Issue | Decision |
|---|---|---|---|
| Florida: | | | |
| | State v. Bryan, 39 So. 929 (1905) | To test the constitutionality of the white university, when there was no similar Negro institution. | As long as Negroes have a State Normal, it is not unconstitutional to place the white normal in a university. |
| Georgia: | | | |
| | Blodgett v. Bd. of Ed., 30 S. E. 561 (1898) | To restrain appropriation for white high school when there was no appropriation for Negro high school. | Wrong action. No benefit to Negroes by attacking white high school. Action should be to compel a high school for Negroes. |
| | Bd. of Ed. v. Cumming, 29 S. E. 488, Aff'd 175 U.S. 528 (1898) | Same as above. | Same as above. |
| Indiana: | | | |
| | Cory v. Carter, 48 Ind. 327 (1874) | To contest separate schools. | A classification which does not exclude either class from equal accommodations is no infringement of rights. |
| | Greathouse v. School Board, 151 N. E. 411 (1926) | To prevent construction of separate high school as unlawful expenditure. | The separate school being equal, the separation does not violate the 14th Amendment. |

| | | |
|---|---|---|
| State v. Gray, 93 Ind. 303 (1884) | To obtain admission to white high school. | The constitutionality of the law for the establishment of separate schools for white and Negro children is settled. |
| State v. Grubbs, 85 Ind. 213 (1882) | To compel town to organize school for Negroes. | To require Negro to attend near-by separate school was proper. |
| State v. Wirt, 177 N. E. 441 (1931) | To contest an alleged discrimination in separate schools. | Organization of separate schools must not result in denying equal privileges; but here no denial is shown. |
| Kansas: | | |
| Reynolds v. Board of Education, 72 Pac. 274 (1903) | To test constitutionality of separate schools. | Separate schools do not violate the 14th Amendment. |
| Richardson v. Board of Education, 72 Kan. 629 (1906) | Same as above. | Same as above. |
| Wright v. Board of Education of Topeka, 284 Pac. 363 (1930) | To prevent transfer to Negro school because plaintiff had to pass white school to reach Negro school. | Separate schools, substantially equal are constitutional; inequality shown by plaintiff. |
| Kentucky: | | |
| Board of Education v. Bunger, 41 S. W. 2d 931 (1931) | To contest the establishment of separate schools. | Board of Education has the power to establish separate schools. |

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

| State | Case | Issue | Decision |
|---|---|---|---|
| Kentucky—Cont'd. | | | |
| | Daviess Co. Bd. v. Johnson, 200 S. W. 313 (1918) | To obtain identical facilities. | Facilities need not be identical if they are equal. |
| | Grady v. Bd. of Education, 147 S. W. 928 (1912) | To contest the establishment of separate schools. | Board of Education has the power to establish separate schools. |
| | Mullins v. Belcher, 134 S. W. 1151 (1911) | To test constitutionality of separate schools. | The separate schools being equal, the separation does not violate the 14th Amendment. |
| | Prowse v. Board of Education, 120 S. W. 307 (1909) | To contest the establishment of separate schools. | Board of Education has the power to establish separate schools. |
| Maryland: | | | |
| | Williams v. Zimmerman, 192 Atl. 353 (1937) | To obtain admission to white school. | Negro student cannot be admitted to white school; substantially equal Negro school being provided. |
| Massachusetts: | | | |
| | Roberts v. City of Boston, 5 Cush. (Mass.) 198 (1849) | To obtain admission to a white school. | School Board has the power to separate Negro and white students. Admission denied. |

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| Mississippi: | | |
| Barrett v. Cedar Hill S. D., 85 So. 125 (1920) | To contest bond issue for consolidated school because discriminatory. | Since there are ample substantially equal schools for Negroes they cannot contest establishment of school for whites. |
| Bond v. Tij Fung, 114 So. 332 (1927) | To obtain admission of Chinese boy in white school. | The separate school being equal, the separation does not violate the 14th Amendment. |
| Bryant v. Barnes, 106 So. 113 (1925) | To contest an alleged discrimination in establishing school districts. | Court will prohibit discrimination between races in the operation of the schools, but no discrimination is shown by separation. |
| Chrisman v. Town of Brookhaven, 70 Miss. 477 (1893) | To test the constitutionality of separate schools. | The separate school being equal, the separation does not violate the 14th Amendment. |
| Missouri: | | |
| Lehew v. Brummell, 15 S. W. 765 (1891) | To set up discrimination between white and Negro schools. | Schools being substantially equal there was no discrimination. |
| State v. Cartwright, 99 S. W. 48 (1907) | To test constitutionality of separate schools. | Separate schools do not violate 14th Amendment. |

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

| State | Case | Issue | Decision |
|---|---|---|---|
| New York: | People v. Gallagher, 93 N. Y. 438 (1883) | To contest separate schools. | When statute provides for separate, equal schools, excluding Negroes from white schools is constitutional. |
| | People v. School Board 161 N. Y. 598 (1900) | Same as above. | Same as above. |
| | People v. Easton, 13 Abb. (N. Y.) Pr. N. S. 160 (1872) | Same as above. | Same as above. |
| | Dallas v. Fosdick 40 How. Prac. 249 (1869) | Same as above. | Same as above. |
| North Carolina: | Bonitz v. Trustees, 70 S. E. 735 (1911) | To test constitutionality of tax for white schools only. | Separate schools are constitutional when substantially equal hence tax must be construed as applying to both white and Negro schools. |
| | Johnson v. Bd. of Education, 82 S. E. 832 (1914) | To contest constitutionality of separate schools. | Advantages being equal separate schools are constitutional. |

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| Lowery v. Sch. Trustees, 52 S. E. 267 (1905) | To contest alleged discrimination in separate schools. | Separate schools, substantially equal, are constitutional; no discrimination shown. |
| McMillan v. School Committee, 107 N. C. 609 (1890) | To compel school committee to admit Negroes. | Statute requiring separate schools was binding on Committee. |
| North Carolina—Cont'd. | | |
| Whitford v. Bd., 74 S. E. 1014 (1912) | To get interpretation of constitutional provisions of separate schools. | Statute providing for substantially equal school would be constitutional. |
| Puitt v. Gaston Co., 94 N. C. 709 (1886) | To test constitutionality of separate schools. | Advantages being equal, separate schools are constitutional. |
| Smith v. Robersonville, 53 S. E. 524 (1906) | To contest alleged discrimination in separate schools. | Separate schools, substantially equal, are constitutional; no discrimination shown. |
| Nevada: | | |
| State v. Duffy, 7 Nev. 342 (1872) | To restrain board from separating white and Negro students. | The separate school being equal, the separation does not violate the 14th Amendment. |
| Ohio: | | |
| State v. Bd. of Education, 7 Ohio Dec. 129 (1876) | To contest alleged discrimination in separate schools. | Separate schools, substantially equal, are constitutional; no discrimination shown. |
| State v. McCann, 21 Ohio St. 198 (1871) | To contest separate schools. | Establishment of separate schools substantially equal is constitutional. |

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

| State | Case | Issue | Decision |
|---|---|---|---|
| Oklahoma: | | | |
| | School District v. Board, 275 Pac. 292 (1928) | To recover State Aid Funds from Board of County Commissioners. | Separate schools with like conditions must be provided and impartially maintained. |
| | Jumper v. Lyles, 185 Pac. 1084 (1921) | To prevent certain schools being designated Negro schools. | The Board has the power to determine which separate school shall be attended by white or Negro students. |
| | State v. Albritton, 224 Pac. 511 (1924) | To test constitutionality of separate schools. | Facilities being substantially equal, separate schools are constitutional. |
| Pennsylvania: | | | |
| | Commonwealth v. Williamson, 30 Leg. Int. 406 (Pa. 1873) | To contest exclusion from public schools. | Under statute if twenty Negro children appeared for admission a separate school may be established. |
| South Carolina: | | | |
| | Tucker v. Blease, 81 S. E. 668 (1914) | To prevent exclusion of Negro from white school. | School Board may set up separate school for these persons and if substantially equal it is constitutional. |
| Tennessee: | | | |
| | Greenwood v. Rickman, 235 S. W. 425 (1921) | To test separate schools as discriminatory, for tax purposes. | When equal opportunities are given in free schools there is no discrimination in taxes. |

| | | |
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| Virginia: | | |
| Eubank v. Boughton, 36 S. E. 529 (1900) | To compel admission to white schools. | The duty is upon the school board to provide separate schools. Admission denied. |
| West Virginia: | | |
| Martin v. Board of Education, 26 S. E. 348 (1896) | To test constitutionality of separate schools. | The separate school being equal, the separation does not violate the 14th Amendment. |

## THIRD SECTION

## ANNOUNCEMENT OF APPROVAL OF NEGRO LAW SCHOOL BY AMERICAN BAR ASSOCIATION

AMERICAN BAR ASSOCIATION

Section of Legal Education and Admissions to the Bar

September 14, 1949

Dean Ozie Harold Johnson
Texas State University For Negroes
School of Law
Austin, Texas

My dear Dean Johnson:

This will advise you that your school was granted provisional approval, subject to an annual inspection until full approval be granted, at the annual meeting of the American Bar Association in St. Louis last Thursday, September 8th. This approval was granted upon the recommendation of the Council of the Section of Legal Education and Admissions to the Bar.

Our heartiest congratulations not only on the approval but on the splendid record which you have made to date.

Respectfully yours,

(Sgd) JOHN G. HERVEY,
Adviser.

## STATEMENT OF AMERICAN BAR ASSOCIATION REGARDING APPROVAL OF NEGRO LAW SCHOOL

AMERICAN BAR ASSOCIATION

Section of Legal Education and Admissions to the Bar

March 9, 1950

Dean Ozie Harold Johnson
Texas State University for Negroes
School of Law
Houston, Texas

My dear Dean Johnson:

I have just received copy of catalogue of the University of Texas Law School, made a comparison with that of your school, and the thought occurred to me that you probably may want to make some mention in your new catalogue of approval of your school by the American Bar Association. No objection would be made to the inclusion of a statement in your catalogue that "The school is approved by the American Bar Association."

I advised you last September that the school had been granted provisional approval by the House of Delegates subject to an annual inspection until full approval be granted. So far as it affects your school the distinction between provisional approval and full approval is a technical one. The standards exacted are identical whether approval be provisional or full. This for the reason that the distinction was created some years ago when applications came be-

fore the Council from law schools which were not attached to established universities or colleges or which did not have endownment funds. You can appreciate that the absence of an endownment fund and the absence of attachment to an established institution can influence scholarship standards. In that situation the Council voted to grant provisional approval and watch for a period of time to ascertain what influence, if any, was had on scholarship standards. The policy of the Council since that date, however, has been to recommend provisional approval of applicant schools which are found to be in full compliance with the standards and to make annual inspections until full approval be granted. This was done in the case of your school. Like action was taken as respects the University of New Mexico Law School and the University of California Law School at Los Angeles.

The Council found your school not only to be in full compliance with its standards but to exceed those standards in many respects. We have no doubt but that your school will continue to comply and your situation is in no way similar to that of those schools which have no endowment fund or are not parts of established, accredited institutions. Thus I can assure you that no objection would be taken, as stated above, to the reference indicated in future imprints of your catalogue.

Respectfully yours,
JOHN G. HERVEY,
Adviser.

## ANNOUNCEMENT BY AMERICAN ASSOCIATION OF LAW SCHOOLS THAT THE NEGRO LAW SCHOOL MET ITS STANDARDS

Chicago, Illinois
December 29, 1949

The School of Law of the Texas State University for Negroes applied for admission. The Committee has investigated its qualifications and finds that the school complies with our requirements and standards at this time. In view, however, of the pendency in the Supreme Court of a case which may well re-examine the validity of the constitutional test for such an institution as hitherto understood, the Committee and the school have agreed that action on the application be deferred.

For the Executive Committee of the Association of American Law Schools.

(Sgd) F. D. G. RIBBLE
Secretary-Treasurer

## CERTIFICATE OF TEXAS SUPREME COURT CONCERNING THE ADMISSION TO THE BAR OF HENRY E. DOYLE

THE SUPREME COURT OF TEXAS

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the records of this office show that Henry E. Doyle took and successfully passed the State Bar Examination in October, 1949, and was duly admitted and licensed as an attorney and counselor at law by the Supreme Court of Texas on the 1st. day of December, 1949.

I further certify that the records on file in this office show that the said Henry E. Doyle was a student of the Law School of The Texas State Univer-

sity for Negroes, having begun his studies in said University on September 10, 1947.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of Texas at the City of Austin, this, the 6th day of March, 1950.

(Sgd) GEO. H. TEMPLIN,
[Seal] Clerk of the Supreme Court of Texas.

**ANSWER OF ATTORNEY GENERAL OF TEXAS TO REQUEST OF FEDERAL COUNCIL OF CHURCHES FOR CONSENT TO FILE AMICUS CURIAE BRIEF**

December 28, 1949

Hon. Charles H. Tuttle
15 Broad Street
New York 5, N. Y.

Dear Mr. Tuttle: Re: Sweatt v. Painter, et al.

This will acknowledge your request for our consent to your filing in the above case an amicus curiae brief on behalf of The Federal Council of Churches. Your proposed brief undertakes to support the contention of the petitioner, Heman Marion Sweatt, that it is unconstitutional for State governments to provide separate schools for students of the white and Negro races even if the separate facilities are equal.

Your brief, purporting to speak for all of the Council's member denominations (except the Presbyterian Church, which "disassociated" itself from the brief) contains and undertakes to support the following statement:

> "The Federal Council of the Churches of Christ in America hereby renounces the pat-

tern of segregation in race relations as unnecessary and undesirable and a violation of the Gospel of love and human brotherhood. . . ."

As my First Assistant, Mr. Joe R. Greenhill, told you by telephone, we will consent to your filing the brief if you will add thereto a disclosure of the fact that the religious denominations represented by the Federal Council maintain separate churches, separate church schools, separate denominational colleges, and segregated congregations for white and Negro citizens in Texas and fourteen other Southern States.

On the point you seek to cover as to "necessity and desirability" of separate physical facilities, your practice is equally as important as your preachment, and I would not voluntarily consent to your presentation of the latter without a full and frank disclosure of the former.

Some of these denominations have fine schools and excellent churches for white and Negro citizens in Texas, but they are separate just as the State schools are separate. The compelling reasons which caused the people of Texas to adopt such a policy in their constitution undoubtedly were and are apparent to those forming the policies of the churches.

It is doubtful if the Federal Council speaks the true sentiment of the Southern congregations or the *actual practice* of the Northern congregations on this issue. Be that as it may, a full disclosure of the actual practice of the Council's member churches in Texas should be made so the Court will have the true and complete picture. Otherwise, the Court might

be led to believe from your statement of Council policy that the member churches no longer maintain separate schools and congregations in this State and that they are no longer thought to be "necessary and desirable."

In all fairness to my State, to Texas' congregations of the fine churches which belong to the Federal Council, and to previous Supreme Court decisions on this subject, I must say that you are mistaken in your belief that segregation has been maintained or permitted here because of a contention of racial superiority or inferiority. It has been based solely upon the right of a State or a church to offer the same education or worship in separate schools or separate churches if the segregated system would better preserve the peace, welfare, opportunities and happiness of a majority of both races.

If you will advise the Court in your brief of the policy and practice now being followed by your member churches in Texas and other Southern States, I will gladly consent to the filing of your brief. Otherwise, I must decline.

I wish you Godspeed in the work of the church and regret that I must differ with you in this regard.

Very truly yours,

(Sgd) PRICE DANIEL
Attorney General of Texas

## THE TEXAS POLL

The Statewide Survey of Public Opinion, Austin, Texas

Austin, Texas, March 18.—The case for opening the doors of The University of Texas to Negro students is making little headway in the court of public opinion.

In its latest survey, The Texas Poll finds the general attitude of the adult public much the same as it was two years ago. The Poll's finding is based on comparable statewide surveys in which representative cross sections of the population were asked this question:

> "Generally, are you for or against Negroes and whites going to the same universities?"

| | March 1948 | Now |
|---|---|---|
| Against | 76% | 76% |
| For | 20 | 20 |
| No opinion | 4 | 4 |
| | 100% | 100% |

Even the pattern of opinion by races and educational levels was found relatively unchanged. A comparison of the percentages favoring Negroes and whites in the same universities follows:

| | March 1948 | Now |
|---|---|---|
| Whites | 11% | 12% |
| Negroes | 78 | 74 |
| By Education: | | |
| College-Trained adults | 29% | 31% |
| High school trained | 15 | 15 |
| Grade school or less | 17 | 19 |

The results show that only Negroes, as a group, give a majority vote to the idea of teaching both races in the same universities. A substantial minority of college-trained adults supports this view, but the lower educational levels who make up the greater portion of the population are strongly opposed.

Some who favor the general policy of barring Negroes from the University say they would not object if one or two were admitted to the law school or if advanced students were allowed to enroll in graduate courses not available elsewhere in Texas. But the majority of Texas adults is opposed even to these exceptions.

In the latest survey, conducted February 20-25, The Texas Poll put these specific issues before a cross section of 1,000 adults of all walks of life:

> "Would you object if one or two Negro law students were allowed to study in The University of Texas at Austin?"

| | Negroes | Whites | All |
|---|---|---|---|
| Would object | 8% | 69% | 60% |
| Would not object | 84 | 28 | 36 |
| No opinion | 8 | 3 | 4 |
| | 100% | 100% | 100% |

| Breakdown By Education | %Who Would Not Object |
|---|---|
| Adults who have been to college | 47% |
| Adults who have been to high school, but not to college | 33 |
| Adults who have been no higher than grade school | 33 |

"What about Negroes who have finished college and want to study advanced courses that are offered nowhere else in Texas except at The University in Austin. Should they be allowed to enter the University?"

| | Negroes | Whites | All |
|---|---|---|---|
| Yes, they should | 89% | 34% | 42% |
| No, they shouldn't | 1 | 60 | 52 |
| No opinion | 10 | 6 | 6 |
| | 100% | 100% | 100% |

| Breakdown by Education | %Who Vote "Yes" |
|---|---|
| Adults who have been to college | 56% |
| Adults who have been to high school, but not to college | 38 |
| Adults who have been no higher than grade school | 38 |

Negroes are included in each Texas Poll in their correct proportion to the white population.

## THE 1950 ACT OF THE TEXAS LEGISLATURE REQUIRING SEPARATION OF WHITE AND NEGRO CITIZENS IN THE STATE PARKS [1]

WHEREAS, It has been the policy of the State of Texas to provide separate accommodations and facilities in the system of the State parks; and

WHEREAS, The necessity for such separation still exists in the interest of public welfare, safety, harmony, health, and recreation; and

WHEREAS, The State of Texas desires to continue separate accommodations and facilities for both white and Negro citizens; now, therefore,

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[1] S. B. 19, Acts 51st Leg., 1st C. S. 1950. The title is omitted in the interest of brevity.

*Be It Enacted By The Legislature Of The State Of Texas:*

Section 1. Separate facilities shall be furnished in the system of State parks for the white and Negro races, and impartial provision shall be made for both races.

Sec. 2. The State Parks Board is authorized:

(a) To make rules and regulations for the use of the State Parks and the facilities therein by the white and Negro races by providing separate parks or separate facilties within the same parks, on such basis as will furnish equal recreational opportunities and at the same time protect and preserve harmony, peace, welfare, health, and safety of the State and the community;

(b) To close any park or facility or facilities or areas in the State parks where separate equal facilities for the white and Negro races cannot be furnished, and to reopen them when such facilities are available;

(c) (Omitted as not relevant here).

Sec. 3. The fact that the policy of the State in requiring separate park facilities for white and Negro citizens is necessary to preserve the public peace and welfare, and to protect the privileges of both the white and Negro citizens in the use of the State parks; and the further fact that such policy should be set forth by statutory enactment giving additional powers to the State Parks Board to carry out such policy, create an emergency . . ."