No. 11,310

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WESTMINSTER SCHOOL DISTRICT OF ORANGE COUNTY, *et al.*,

Appellants,

vs.

GONZALO MENDEZ, *et al.*,

Appellees,

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE*

Statement of the Case

Gonzalo Mendez, *et al.*, on behalf of some five thousand persons similarly situated of Mexican or Latin descent, filed a class suit, pursuant to Rule 23 of the Federal Rules of Civil Procedure, against the Westminster, Garden Grove and El Modeno School Districts and the Santa Ana City schools, all of Orange County, California. The complaint alleges a concerted policy and design of class discrimination against persons of Mexican or Latin descent of elementary school age by the defendant school agencies, in the conduct and operation of public schools of the aforesaid districts, which result in the denial of equal protection of the laws to petitioners and the class of persons

whom they represent. The respective defendant agencies have maintained a policy, custom and usage of excluding children or persons of Mexican or Latin descent from attending, using, enjoying and receiving the benefits of the education, health and recreation facilities of certain schools within their respective districts and school systems, and of requiring children or persons of Mexican or Latin descent to attend certain schools in the aforesaid districts reserved for and attended solely and exclusively by persons of this particular racial lineage.

At the same time, defendant school agencies are pursuing a policy, custom and usage of maintaining schools for the exclusive attendance of persons or children purportedly of the white or Anglo-Saxon race. Children of Mexican or Latin extraction are barred and excluded from attending any other school in their district or system except such schools as are exclusively maintained for them solely on the basis of race and national origin.

Although it was stipulated that as between the schools maintained for those of non-Mexican extraction and the schools maintained for those of Mexican and Latin origin, no inequalities existed in the technical facilties, textbooks, and courses of instruction, the court below considered the separation itself violative of the equal protection of the laws as required by the Federal Constitution on the grounds that equality cannot be effected under a dual system of education. "A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage." This conclusion is clearly correct and is demanded by the Constitution and laws of the United States. It is to this point that this brief *Amicus curiae* will be addressed.

ARGUMENT

I

Classifications and Distinctions on the Basis of Race and Color Are Invalid Under Our Fundamental Law.

1.

We assume that there can be no valid objection to the designation of defendants' acts herein as those of the state within the meaning of the Fourteenth Amendment, since clearly defendants are administrative agents of the state charged with the performance of an important state function.[1]

This question has been thoroughly and adequately analyzed by the court below, and its decision that the action of the various defendant boards involved constituted state action is amply supported by overwhelming constitutional authority.[2]

The Fourteenth Amendment to the Federal Constitution was designed primarily to benefit the newly freed Negro,[3]

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[1] Article IX, Constitution of California, *Esberg* v. *Bardaracco*, 202 Cal. 110.

[2] *Ex parte Virginia*, 100 U. S. 339 (1880); *Home Telephone and Telegraph Company* v. *Los Angeles*, 227 U. S. 278 (1913); *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239 (1931); *United States* v. *Classic*, 313 U. S. 299 (1941); *Snowden* v. *Hughes*, 321 U. S. 1 (1944); *Screws* v. *U. S.*, — U. S. —, 88 L. Ed. 1039 (1945). But *cf. Barney* v. *New York*, 113 U. S. 430 (1904).

[3] See Flack, Adoption of the Fourteenth Amendment (1908). See also Cong. Globe Congress, 1st Session.

but its protection has been extended to all persons within the reach of our laws. By its adoption Congress intended to create and assure full citizenship rights, privileges and immunities for this minority as well as to provide for their ultimate absorption within the cultural pattern of American life.

As was said in *Strauder* v. *West Virginia*, 100 U. S. 303, 307 (1879), one of the earlier cases in which the United States Supreme Court was called upon to interpret the intent and meaning of this Amendment:

> "What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discrimination, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

Although the United States Supreme Court has undoubtedly limited the scope of the Fourteenth Amendment more narrowly than its framers intended,[4] from its adoption to the present, the decisions have almost uniformly

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[4] Flack, *op. cit. supra*, note 3. *Twinning* v. *New Jersey*, 211 U. S. 78 (1908).

considered classifications and discrimination on the basis of race as contrary to its provisions. *Ex parte Virginia,* 100 U. S. 339 (1879); *Strauder* v. *West Virginia, supra; Civil Rights Cases,* 109 U. S. 1 (1883); *Neal* v. *Delaware,* 100 U. S. 370 (1881); *Yick Wo.* v. *Hopkins,* 118 U. S. 356 (1886); *Buchanan* v. *Warley,* 245 U. S. 60 (1917); *Truax* v. *Raich,* 239 U. S. 33 (1915); *Yu Cong Eng.* v. *Trinidad,* 271 U. S. 500 (1926); *Nixon* v. *Condon,* 286 U. S. 73 (1932); *Pierre* v. *Louisiana,* 306 U. S. 354 (1939); *Missouri ex rel Gaines* v. *Canada,* 305 U. S. 337 (1938); *Hill* v. *Texas,* 316 U. S. 400 (1942). Thus the acts of state agencies which have effected distinctions on racial lines have been struck down as violative of its provisions. *Yick Wo.* v. *Hopkins, supra; Yu Cong Eng.* v. *Trinidad, supra; Truax* v. *Raich, supra.* Under a variety of factual circumstances our highest Court has repeatedly held racial criteria arbitrary and unconstitutional. *Strauder* v. *West Virginia, supra; Yick Wo.* v. *Hopkins, supra; Truax* v. *Raich, supra; Nixon* v. *Condon, supra; Guin* v. *United States,* 238 U. S. 347 (1915); *Lane* v. *Wilson,* 307 U. S. 268 (1939); *Pierre* v. *Louisiana (supra)*; *Alston* v. *Norfolk School Board,* 112 F. (2d) 992 (C. C. A. 4th, 1940); cert. den., 311 U. S. 693 (1940); *Smith* v. *Allwright,* 321 U. S. 649 (1944).

Despite the absence of a requirement for equal protection of the laws in the Fifth Amendment, even our national government is prohibited from making distinctions on the basis of race and color since such distinctions are considered arbitrary and inconsistent with the requirements of due process except where national safety and the perils of war render such measures necessary. *Hirabayashi* v. *United States,* 320 U. S. 81 (1943); *Korematsu* v. *United States,* 323 U. S. 214 (1944); *Ex parte Endo,* 323 U. S. 283 (1944); and see

Steele v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210 (1944).

Thus, since the Civil War a body of constitutional law has developed which proscribes both our national and state governments from making distinctions and classifications and from discriminating on the basis of race, color or national origin.

2.

The United States has duly ratified and adopted the Charter of the United Nations as a part of our fundamental law. Under its provisions, and specifically by virtue of Article 55c thereof, our government is obligated to promote "uniform respect for, and the observance of, human rights and fundamental freedoms for all without distinctions as to race. . . ."

Previous to this our national government on March 6, 1945 signed the Act of Chapultepec in Mexico City in which we, along with the Latin American nations, undertook "to prevent . . . all that may provoke discrimination among individuals because of racial or religious reasons." International obligations, such as these, are declared by Article VI, Clause 2 of the Federal Constitution to be a part of our fundamental body of law and as such the supreme law of the land. *Foster & Elan* v. *Neilson*, 2 Pet. 253, 314 (1829); *Kenneth* v. *Chambers*, 14 How. 38 (1852); *Gondolfo* v. *Hartman*, 49 Fed. 191 (S. D. Cal., 1892); *Missouri* v. *Holland*, 252 U. S. 416 (1920).

A Canadian decision *In the Matter of Drummond Wren,* rendered in Ontario on October 29, 1945 involving a restrictive covenant running against persons of Jewish extraction, provides an instructive precedent on this point. In declaring the covenant invalid the Court relied heavily on the obligations that all member nations in adopting the United Nations Charter had assumed to prohibit racial discrimination and distinctions within their boundaries.

Since the Herbert Hoover Administration, we have been pursuing the policy of the "good neighbor" in our relations with other nations in the Americas. We have attempted to forge an iron ring of solidarity among the nations in this hemisphere by means of peaceful association on the basis of equality. Yet if our aims are to be accomplished, it is essential that persons of Latin and Mexican origin be accorded on our domestic scene the equality which we profess to accord Mexico and the Latin American nations in our international relations. We cannot preach equality abroad successfully unless, in actuality, we effect such equality at home.

3.

Segregation on a racial basis in the public school system is a type of arbitrary ad unreasonable discrimination which should be forbidden under our laws. Both our national constitution and the terms of our international commitments demand that this Court invalidate the acts of defendants in setting aside in their respective jurisdictions separate schools for children of Mexican or Latin origin.

II

The Requirements of Due Process and the Equal Protection of the Laws Under the Fourteenth Amendment Cannot Be Achieved Under a System of Segregation.

The equality demanded by the Constitution and laws of the United States cannot be realized under a system of segregation. As one eminent authority, Dr. Alain Locke, declared:[5]

> "In the first place few if any communities can afford the additional expense of entirely equal accommodations, and it would require as much and the same kind of effort at the removal of the social bias of the community and the reform of its conscience to secure general admission of the principle of complete equity as to secure the abolition of the dual system. Up to a certain point, communities will pay a price for prejudice, but not such an exhorbitant price as complete economic equality requires. Assuming that such parity could be reached and consistently maintained, the moral damage of the situation of discrimination would still render the situation intolerable. But the argument can and will doubtless be settled or fought out on the practical plane of the school budget. Whenever the standards of Negro public schools are raised to the point that the budget expense approaches parity, there will be less resistence to educational segregation, for one of the main but concealed reasons for discrimination lodges in the idea that the Negro is not entitled to the same educational facilities as the white community."

Racial segregation in education originated as a social weapon to keep the Negro citizen in an inferior status to that of the white. *As an instrument of public policy it*

[5] Locke, Dilemma of Segregation, 4 Journal of Negro Education, 407, 408, 409.

serves the same ends. The mere fact that one particular school in one particular area provides equal facilities despite the fact of segregation, does not invalidate this statement. In fact, the existence of such instances is doubly menacing because they can be pointed to as justification for the existence of segregation. The fact is that where segregation is a *general pattern* it is an instrument to enforce inequality.

The areas of this country in which the educational opportunities of the Negro are the smallest are the same areas in which strict segregation, in schools as well as in every other phase of social life, is enforced with the sanction of the laws of the sovereign states. That a clear correlation exists between segregation and the deprivation of equal educational opportunities will be demonstrated below.

This correlation is no accident. Discrimination is the direct result of segregation. To decree or to enforce segregation in the school system, between any two racial groups, whether by state law, local ordinance or permissive group action, is to grant to the administrative official or other governing group *the power* to discriminate. By enforcing the separation of facilities, the state has the means, the wherewithal and the weapon with which to favor the white man and to slight the minority group it sets apart.

It is this power which is the crux of the matter. It matters not that in an isolated case or in a number of isolated cases there are as many washrooms for segregated children as for white. Since all available experience, all existing data prove conclusively that where the power is granted it is uniformly used for the purpose of discrimination, it is important that such power not be granted freely.

The record of experience is equally clear in this case. The educational record and standards of the State of Cali-

fornia are extremely high—they are a model for most of the states in this country. Yet if in California the principle of segregation is permitted to remain, those standards will most certainly fall, at least insofar as they relate to those of Mexican and Latin American descent or to any other segregated minority. This will follow just as certainly as it is now the fact that the worst educational discrimination exists in those states in which segregation is already a matter of policy or of law.

In seventeen states and the District of Columbia,[6] racial segregation in education is a universal policy. All these states maintain separate schools for Negroes and whites. The educational record of these states clearly shows the result of this policy.

This result is applicable not only to one particular minority, but to any group subjected to the practices of racial segregation—be that group Negro, Mexican, Latin American or Japanese in its origins. We use the Negro as an example only, in this particular case, because the consequences of a policy of racial segregation can be most clearly demonstrated by reference to the historical and cultural record of the one area in this nation where it is practiced on a large scale—the South.

The taxpayers' dollar for public education in the South was so appropriated as to deprive the Negro schools of their proportionate share of federal, state, county and municipal tax funds. The average expense per white pupil in nine Southern states in 1939-1940 was almost 212% greater than the average expense per Negro pupil.[7]

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[6] Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia, and the District of Columbia.

[7] *Statistics of the Education of Negroes: A Decade of Progress*, by David T. Blose and Ambrose Caliver, 1944, Part I, p. 6, Table 8.

Reproduced in part from Table 8 of *Statistics of the Education of Negroes: A Decade of Progress*, by David T. Blose and Ambrose Caliver (1944), Part I, p. 6

State or District of Columbia	*Current expense per pupil in average daily attendance * 1939-40*		*Percent cost per white pupil is greater than that per Negro pupil 1939-40*
	White	*Negro*	
Total	$58.69	$18.82	211.8
Alabama	47.59	14.63	225.3
Arkansas	36.87	13.73	168.5
Delaware	....	....	....
Dist. of Col.	....	....	....
Florida	69.76	26.95	158.8
Georgia	55.56	16.95	227.8
Kentucky	....	....	....
Louisiana	77.11	20.49	276.3
Maryland	....	....	....
Mississippi	52.01	7.36	606.6
Missouri	....	....	....
North Carolina	46.02	28.30	62.6
Oklahoma	....	....	....
South Carolina	57.33	15.42	271.8
Tennessee	....	....	....
Texas	72.72	28.49	155.2
Virginia	....	....	....
West Virginia	....	....	....

* Less interest.

The preceding table shows the results of this policy of racial segregation in education insofar as such a simple criterion of equal citizenship rights as proportionate allocation of tax monies is concerned. While the average expenditure per Negro pupil was $18.82 and the same average per white pupil was $58.69, in specific instances the deprivation of the Negro citizen is even greater. In Mississippi, the expense per white pupil was 606.6% greater than the expense per Negro pupil. A comparatively progressive state like North Carolina shows a discrepancy of 62.6%![8]

The expenditure per pupil is only one index, although the best single one, to the quality of education. Others are the number of pupils per teacher, the length of the school term, and the number of days each pupil is enabled to attend school (an important factor in rural areas where pupils depend on free public transportation). The salaries teachers are paid is also important in determining the calibre of personnel and hence the quality of education.

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[8] *Ibid.*

Again the record of those states where segregation is part of public educational policy clearly demonstrates the inequities and the second-class citizenship such a policy creates. These states in 1939-1940 provided one teacher for every 28.6 white pupils, but one teacher for every 36.1 Negroes.[9] And the average salary for a white teacher was $1,046 a year, while the average Negro teacher's salary was only $601.[10] The percentage of Negroes between the ages of 5 and 24 attending schools was 53.1,[11] but Negro absences were 1.2 times as high as absences for whites.[12] The average length of the school term in 1941-42 in these states was 171 days for whites, but only 156 days for Negroes.[13]

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[9] *Biennial Surveys of Education in the United States. Statistics of State School Systems,* 1939-40 and 1941-42 (1944) p. 37.

[10] *Statistics of the Education of Negroes: A Decade of Progress,* by David T. Blose and Ambrose Caliver (1944), Part I, p. 6, Table 7.

[11] *Ibid,* p. 5, Table 5.

[12] Biennial Surveys, op. cit., *supra,* p. 36.

[13] *Ibid.*

Reproduced in part from Table 7 of *Statistics of the Education of Negroes: A Decade of Progress,* by David T. Blose and Ambrose Caliver (1944), Part I, p. 6

State or District of Columbia	*Average salary per member of instructional staff 1939-40*		*Percent white instructional salaries is greater than Negro instructional salaries 1939-40*	*Negro pupil-teacher load in elementary and high schools 1939-40*
	White	*Negro*		
Total	$1,046	$ 601	74	38
Alabama	878	412	113	42
Arkansas	636	375	70	44
Delaware	1,715	1,500	14	29
Dist. of Col.	2,350	2,350	..	34
Florida	1,148	585	96	31
Georgia	924	404	129	39
Kentucky	853	522	63	27
Louisiana	1,197	509	135	42
Maryland	1,689	1,446	17	35
Mississippi	776	232	234	46
Missouri	1,153	1,258	8	32
North Carolina	1,027	737	39	37
Oklahoma	1,016	993	2	28
South Carolina	953	371	157	38
Tennessee	909	580	57	37
Texas	1,138	705	61	34
Virginia	987	605	63	35
West Virginia	1,189	* 885	..	27

* Based on 1933 salaries the last available.

The results of such educational inequities brought about as a consequence of the policy of segregation has been to deprive the individual Negro citizen of the skills necessary to a civilized existence, the Negro community of the leadership and professional services it so urgently needs, and the nation as a whole of the full potential embodied in the intellectual and physical resources of its Negro citizens.

In the most critical period of June-July 1943, when the nation was crying for manpower, 34.5% of the rejections of Negroes from the armed forces were for educational deficiency. Only 8% of the white selectees rejected for military service failed to meet the educational standards.[14]

The official War Department report on the utilization of Negro manpower in the postwar Army says that "in the placement of men who were accepted, the Army encountered considerable difficulty. Leadership qualities had not been developed among the Negroes, due principally to environment and lack of opportunity. These factors had also affected his development in the various skills and crafts."[15]

The result of racial inequalities in education has also been to deprive the Negro community of the professional services it desperately needs. In 1940 there was one physician for every 735 white citizens, but only one for every 3,651 Negroes.[16] And one lawyer served 670 whites, but there was only one lawyer for every 12,230 Negro citizens.[17]

One consequence which has not been stressed because it would seem to be almost obvious in the preceding com-

[14] The Black and White of Rejections for Military Service. Montgomery, Ala., American Teachers Association, 1944, p. 5.

[15] Report of Board of Officers on Utilization of Negro Manpower in the Post-War Army (February 1946), p. 2.

[16] Journal of Negro Education (1945), Vol. XIV, Fall number, p. 511.

[17] *Ibid*, p. 512.

parisons is that maintenance of segregated schools puts an additional burden on the *white* pupil as well as the Negro in these states. The additional cost of two school systems, two pupil transportation systems, and all the other duplication involved in maintaining segregation results in a drain on the public treasury which cannot but be reflected in the deprivation of *both* Negroes and whites.

All these statistics are an index to the consequences of segregation in education as a public policy. And, while they do indicate the social and economic inequities such a policy creates and perpetuates, they cannot do more than suggest one of the most important inequities of all—the effect of such a policy on the attitudes of those whom it most directly affects, the minority citizen, be he Negro, Mexican, Latin American, or Japanese.

Even in the hypothetical case where a segregated school offers better facilities than the white school, the fact that such segregation is compulsory can have a dangerous effect on the citizenship of that community and deprive the state of the full value of the minority group's citizenship. It was never the intent of any law or decision to create a situation which inevitably becomes the breeding-ground for criminality and dangerous anti-social tendencies. Yet the effect of segregation on the minority citizen sometimes results in the creation of just such an attitude—a feeling of "second-class citizenship" which expresses itself in criminality and rebellion against constituted authority.[18]

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[18] See Sterner, The Negro's Share (1943), Chaps. 9 & 10; Johnson, Patterns of Segregation (1943), Part II, p. 231 *et seq.*, Myrdal, An American Dilemma (1944), Chaps. 28, 29, 30 and also Chaps. 24-27.

The segregated citizen cannot give his full allegiance to a system of law and justice based on the proposition that "all men are created equal" when the community denies that equality by compelling his children to attend separate schools. Nor can the white child learn this fundamental of American citizenship when his community sets a contradictory example.

Educational segregation creates still another barrier to American citizenship. It promotes racial strife by teaching the children of both the dominant and minority groups to regard each other as something different and apart. And one of the great lessons of human history is that man tends to fear and hate that which he feels is alien.

It is essential for the successful development of our country as a nation of free people that the sympathies and tolerance which we wish practiced in later life be fostered in the classroom. "And since according to our institutions, all classes meet, without distinction, in the performance of civil duties, so should they all meet, without distinction of color, in the school, beginning there those relations of equality which our Constitution and laws promise to all."[19]

The statistics show that segregation in our public schools has failed to provide the equality required. This has been so, primarily because segregation itself evidences a color-caste attitude and a feeling on the part of those who enforce it that the group set apart has inferior characteristics which justify his separation from the majority. It requires a duplication of facilities which makes equality in terms of economics all but impossible. Further, even

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[19] Argument of Charles Sumner Esq., Against the Constitutionality of Colored Schools in the case of *Sarah C. Roberts* v. *Boston*, 1849, pp. 29-30.

if there were no statistics or if it were economically possible for segregation and equality in terms of school facilities to coexist, at the very core of our system is a doctrine of equality without distinction of race or color. If this be true, and it is, then segregation here must be invalidated as are classifications and distinctions in other areas of our national life.

III

No Decisions of the United States Supreme Court Prevent This Court from Declaring Segregation in a State Public School System Unconstitutional.

Prior to the adoption of the Fourteenth Amendment a case arose in the Supreme Court of Massachusetts which was destined to have considerable influence in the development of American law. The case, *Roberts* v. *City of Boston*,[20] involved the constitutionality of the maintenance of separate schools for Negroes in the City of Boston apart from the regular common school. Sarah C. Roberts, a Negro, filed suit to force the school officials to admit her in the regular common school and thereby raised the question of the constitutionality of the segregated system. Charles Sumner represented petitioner and argued the cause before the Massachusetts Court. In arguing that the maintenance of a racially segregated school system was violative of the state constitution, Mr. Sumner said:[21]

> "The equality which was declared by our fathers in 1776, and which was made the fundamental law of

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[20] 5 Cush. (Mass.) 198 (1849).

[21] Charles Sumner, *op. cit, supra,* note 19 at p. 10.

Massachusetts in 1780, was *equality before the law.* Its object was to efface all political or civil distinctions, and to abolish all institutions founded upon *birth.* All men are *created* equal, says the Declaration of Independence. 'All men are *born* free and equal', says the Massachusetts Bill of Rights. These are not vain words. Within the sphere of their influence no person can be *created,* no person can be *born,* with civil or political privileges, not enjoyed equally by all his fellow citizens, nor can any institution be established recognizing any distinctions of birth. This is the great charter of every person who draws his vital breath upon this soil, whatever may be his condition, and whoever may be his parents. He may be poor, weak, humble, black—he may be of Caucasian, of Jewish, of Indian, or of Ethiopian race—he may be of French, of German, of English, of Irish extraction—but before the Constitution of Massachusetts all these distinctions disappear. He is not poor, or weak, or humble or black—nor Caucasian, nor Jew, nor Indian, nor Ethiopian—nor French, nor German, nor English, nor Irish; he is a *Man,*—the equal of all his fellowmen. . . . The State, imitating the divine justice, is no respecter of persons.

"Here nobility cannot exist, because it is a privilege from birth. But the same anathema which smites and banishes nobility, must also smite and banish every form of discrimination founded on birth.

. . . . . .

"The separation of children in the Public Schools of Boston, on account of color or race, is in the nature of *Caste,* and is in violation of Equality.

"We abjure nobility of all kinds; but here is a nobility of the skin. We abjure all hereditary distinctions; but here is an hereditary distinction, founded not on the merit of the ancestors, but on his color. We abjure all privileges derived from birth; but here

> is a privilege which depends solely on the accident, whether an ancester is black or white. We abjure all inequality before the law; but here is an inequality which touches not an individual, but a race. We revolt at the relation of caste; but here is a caste which is established under a Constitution, declaring that all men are born equal.'' [22]

Defendant contended that no constitutional requirements had been contravened by requiring Negro children to attend schools established exclusively for them inasmuch as competent instruction was provided, and facilities equal to those in the regular common school were offered in the schools provided for Negroes. To this contention Mr. Sumner answered:

> "The second [answer] is that the schools are not equal . . . it is the occasion of inconveniences to the colored children and their parents, to which they would not be exposed, if they had access to the nearest public schools, besides inflicting on them the stigma of Caste. Still further, and this consideration cannot be neglected, the matters taught in the two schools may be precisely the same; but a school, exclusively devoted to one class, must differ essentially, in its spirit and character, from that public school known to law, where all classes meet together in equality. It is a mockery to call it an equivalent.
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> "But there is yet another answer. Admitting that it is an equivalent, still the colored children cannot be compelled to take it. Their rights are Equality before the law; nor can they be called upon to renounce one jot of this. They have an equal right with white children to the general public schools. A separate school, though well endowed, would not secure to them that precise

[22] *Ibid,* at p. 16.

> Equality, which they would enjoy in the general public schools. The Jews in Rome are confined to a particular district, called the Ghetto. In Frankfort they are condemned to a separate quarter, known as the Jewish quarter. It is possible that the accommodations allotted to them are as good as they would be able to occupy, if left free to choose through Rome and Frankfort; but this compulsory segregation from the mass of citizens is in itself an *inequality* which we condemn with our whole souls. It is a vestige of ancient intolerance directed against a despised people. It is of the same character with the separate schools in Boston." [23]

The Court, despite the persuasiveness of this reasoning decided the case against petitioner and held that separate schools for Negroes could be maintained consistent with the Constitution of the state which declared that all men were equal before the law without distinction of race and color.

Subsequent to this decision and to the adoption of the Fourteenth Amendment, two other states upheld the right of the state to segregate the races in their public school systems, as not contravening the state or federal Constitution as long as the separate facilities maintained for the minority were equal to those set aside for the dominant race.[24]

In 1896 the United States Supreme Court in *Plessy* v. *Ferguson*, 163 U. S. 537, was faced with the necessity of determining the constitutionality of a Louisiana statute which required railroads to provide equal but separate

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[23] *Ibid*, at pp. 24-25.

[24] *Ward* v. *Flood*, 48 Cal. 36 (1874); *People* v. *Gallagher*, 93 N. Y. 438 (1883).

coach accommodations for the white and colored passengers. The Court held the statute constitutional as a valid exercise of the state's authority on grounds that the Fourteenth Amendment was satisfied as long as the separate accommodations were equal and cited the three state cases, *supra*, to support its conclusion. With this decision the "equal but separate doctrine" became a part of our constitutional law but only with regard to carrier accommodations.

Mr. Justice HARLAN exposed the fallacious basis of the Court's reasoning in his dissent and set forth clearly the real issues involved in a separation or classification by a state agency on a racial basis at pages 554, 557:

> "In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed such legislation as that here in question is inconsistent, not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by every one within the United States.
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> . . . . . .
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> "The white race deems itself to be the dominant race in this county. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not that it will continue to be for all time, if it remains true to its great heritage and holds fast to the

> principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.
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> . . . . . .
>
> "The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds."

Plessy v. *Ferguson* constitutes a departure from the main current of constitutional law and cannot be brought in line with the other decisions of the United States Supreme Court which have almost uniformly considered classifications and distinctions on the basis of race contrary to our fundamental law. *Yick Wo.* v. *Hopkins; Strauder* v. *West Virginia; Neal* v. *Delaware; Truax* v. *Raich; Buchanan* v. *Warley; Nixon* v. *Condon; Smith* v. *Allwright; Alston* v. *Norfolk School Board; Yu Cong Eng.* v. *Trinidad; Missouri ex rel. Gaines* v. *Canada; Pierre* v. *Louisiana, supra.*

Only with regard to carrier accommodations and recent war measures affecting citizens of Japanese extraction has

a different conclusion been reached. The latter measures were reluctantly upheld by the Court as measures necessary for the safety of the United States during our late war with Japan.[25]

Plessy v. *Ferguson* has been followed by the Court only in cases regarding separate carrier accommodations.[26] The Supreme Court has not yet specifically decided the question of whether a state may maintain separate schools for members of the various races without violating the constitutional requirements of the Fourteenth Amendment.

In *Plessy* v. *Ferguson*, although the Court devotes a considerable portion of its opinion to a recital of state cases in which racial segregation in schools has been approved, no question of schools was then before the Court. It had before it only the question of the constitutionality of enforced segregation of the races in railroad accommodations.

Subsequently in *Cummings* v. *County Board of Education of Richmond County*, 175 U. S. 528 (1899) the question

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[25] Compare *Clark* v. *Deckebach*, 274 U. S. 392 (1927) where the Supreme Court upheld a city ordinance requiring the licensing of pool and billiard rooms and prohibiting the issuance of licenses to aliens. The ordinance was sustained on grounds that these activities had harmful and vicious tendencies of which the Court took judicial notice and that regulation and prohibition of such businesses was not forbidden. In the regulation or control of an apprehended evil, the city could choose to exclude aliens as a class. Here the apprehended evil was considered sufficiently great to warrant control in any manner considered reasonable by the city authorities.

[26] The effect of the decision in *Plessy* v. *Ferguson* appears to have been considerably weakened by the recent United States decision in *Morgan* v. *Commonwealth of Virginia*, October term, 1945, decided June 3, 1946. From that decision it would appear that if the Court finds that either the carrier or the passenger is engaged in *interstate* commerce, state statutes requiring the segregation of the races will be considered a burden on interstate commerce and therefore invalid.

presented was whether a school board which had suspended support of a high school for colored children for the purpose of using the building for instruction in the lower grades without making any other provisions for high school instruction for Negroes, while at the same time maintaining two white high schools, could be restrained from using public funds for the support of the white high schools until equal provision for the high school education of colored children had been provided. Said Mr. Justice HARLAN who delivered the majority opinion at pages 543-544:

> "It was said at the argument that the vice in the common-school system of Georgia was the requirement that the white and colored children of the state be educated in separate schools. But we need not consider that question in this case. No such issue was made in the pleadings. Indeed, the plaintiffs distinctly state that they have no objection to the tax in question so far as levied for the support of primary, intermediate, and grammar schools, in the management of which the rule as to the separation of races is enforced. We must dispose of the case as it is presented by the record."

Speaking further of the decision of the school board to discontinue the high school for some sixty colored children in order to give primary school education to 300 colored children the Court said at pages 544, 545 of its opinion:

> "We are not permitted by the evidence in the record to regard that decision as having been made with any desire or purpose on the part of the board to discriminate against any of the colored school children of the county on account of their race. But if it be assumed that the board erred in supposing that its duty was to provide educational facilities for the 300 colored children who were without an opportunity in primary schools to learn the alphabet and to read and

> write, rather than to maintain a school for the benefit of the 60 colored children who wished to attend a high school, that was not an error which a court of equity should attempt to remedy by an injunction that would compel the board to withhold all assistance from the high school maintained for white children."

The Court finally concluded with this phrase:

> "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. We have here no such case to be determined; . . ."

Later *Gong Lum* v. *Rice,* 275 U. S. 78 (1927) was decided by the Supreme Court. Here again no question of the constitutionality of segregation in public schools was before the Court. Martha Lum, a Chinese descendant and a resident of Mississippi, desired to attend the Rosedale Consolidated High School but was refused admission to said school on the grounds that she was not a member of the Caucasian race. No school was maintained for the education of children of Chinese descent Petition for a writ of mandamus was filed to force school authorities to admit her to the Rosedale Consolidated High School, as the only school in the district available for her to attend since she was not a member of the colored race. Chief Justice TAFT, speaking for the Court, said at page 85:

> "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."

In *Berea College* v. *Kentucky*, 211 U. S. 45 (1908) the question before the Court was the constitutionality of a state statute which made it unlawful for any person, corporation, or association to maintain or operate any college, school or institution where whites and Negroes were received as pupils and imposed a fine of $1,000.00 for convictions thereunder. Berea College, incorporated under the laws of Kentucky, was convicted and fined for violating the statute. The Court made no decision concerning the constitutionality of the statute as applied to individuals who might violate its provisions. It merely looked at the situation with which it was presented, that involving a corporation, and said:

> "The statute is clearly separable, and may be valid as to one class, while invalid as to another. Even if it were conceded that its assertion of power over individuals cannot be sustained, still it must be upheld so far as it restrains corporations."

The Court then went on to consider the power of the state to control the operation of a corporation and considered this statute a lawful exercise of the State's reserved power over corporations. It left unanswered the question of the validity of the statute as applied to individuals.

The more recent case to come before the Supreme Court involving the question of education was *Missouri ex rel Gaines* v. *Canada, supra.* In that case, Gaines, petitioner, a Negro was refused admission to the School of Law in the State University of Missouri. On the theory that this re-

fusal constituted a denial by the State of the equal protection of the laws, Gaines brought an action for mandamus to compel the curators of the university to admit him. The State court denied the writ and the Supreme Court reversed on the grounds that the State University was under an obligation to admit Gaines since no provisions had been made in the State for the education of Negroes in law as had been provided for whites. Even in this case, however, no question of the constitutionality of the segregated system was before the Court. The Court then held that the State was under a duty to admit Gaines into the State Law School since it had made no provision for the education of Negroes.

The Supreme Court in *Plessy* v. *Ferguson* accepted the "equal but separate doctrine" but has limited its application to carrier accommodations. Because of the language used, however, in subsequent cases it has been assumed that decisions have applied this theory to validate segregation in public schools.[27] This, however, has not been the case, and in none of the decisions has this question actually been determined.

This Court, therefore, is not bound by decisions of the Supreme Court to validate a segregated school system. On

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[27] See *Gong Lum* v. *Rice, supra,* at page 85 where the Court said: "Where 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." (Cites *Roberts* v. *Boston, Ward* v. *Flood, People* v. *Gallagher, supra* and other state cases.) And the Court's opinion in the *Gaines* case, *supra* at page 344: "The state court has fully recognized the obligation of the State to provide negroes [sic] with advantages for higher education substantially equal to the advantages afforded to white students. The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions."

the contrary, it is required by other decisions discussed in the earlier part of this brief which are more in line with our principles and represent a major development under our laws, to strike down segregation in public schools since such discrimination contravenes our constitutional requirements.

Conclusion.

We have developed and practiced a theory of government which finds distinctions on racial grounds inimical to our best interests and contrary to our laws. Our Democracy is founded in an enlightened citizenry. It can only function when all of its citizens, whether of a dominant or of a minority group, are allowed to enjoy the privileges and benefits inherent in our Constitution. Moreover, they must enjoy these benefits together as free people without regard to race or color. It is clear, therefore, that segregation in our public schools must be invalidated as violative of the Constitution and laws of the United States.

Wherefore, the decision of the lower court should be affirmed.

Respectfully submitted,

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