IN THE SUPREME COURT OF THE

UNITED STATES NO. 44

HEMAN MARION SWEATT,

PETITIONER

VS.

THEOPHILIS SHICKEL PAINTER, et al

RESPONDENT

BRIEF OF THE ARGUMENT

W. J. Durham
Dallas, Texas

IN THE

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NO. 44

HEMAN MARION SWEATT, PETITIONER

vs

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RESPONDENT

BRIEF OF THE ARGUMENT

The petitioner invokes the jurisdiction of this Court under Title 28, United States Code, Section 1257. This case reached this Court after a judgment had been rendered by the Supreme Court of Texas, the Court of last resort. The issues involved in this case draw into question the validity of Article 2900 of the Texas Civil Statutes and Article 7, Section 7, of the Texas Constitution, on the ground that the state statute and the constitutional provision are repugnant to the Fourteenth Amendment of the Federal Constitution.

The case was originally tried in the District Court of Travis County, Texas, and a judgment there rendered denying the petitioner the relief sought. The case under the procedure provided for in Texas for appeals, was presented to the Third Court of Civil Appeals, and the judgment of the Trial Court was affirmed. (Record 545 to 565).

The petitioner, in accordance with the procedure provided for in Texas, appealed from the judgment of the

at the smallest teachers' college for non-Negroes in Texas. (R.249). In the school year 1943-1944, $11,071,490.00 in state, county and district funds were appropriated for higher education in Texas. Of this amount, $10,000,858.00 was appropriated to non-Negro persons; that is, only $1.98 per capita for every non-Negro citizen. The sum of $213,472.00 was appropriated to Negro schools, or 23¢ per capita. The institution for non-Negroes received during such period of time more than eight times more funds than the money that was allocated to institutions for the training of Negroes. (R.246).

It is significant to notice (R.33-34) that Dean Pittinger of the University of Texas testified that he know of no institution for college training of Negroes, except Wiley, which is a private school, that was comparable to the smallest colleges for non-Negroes in Texas. The record further reflects from the testimony of this witness (R.336-338) that upon an item by item comparison, Prairie View College was below any of the other schools furnished non-Negro persons in Texas.

Thus, the pattern of segregation is presented.

If the judicial mind is focussed upon the record in this case, which shows the result of the operation and effect of the segregation statute, illegal discrimination will be perceived; and when perceived, we believe is in the power of this Court to correct so great an evil.

themselves. The points are sufficient if they, together with the argument and statement in the brief are sufficient to enable the Court to determine the error complained of. All points were fully discussed in petitioner's brief. Therefore, petitioner contends that the issues were properly presented to the Supreme Court of Texas, and are therefore properly before this Court. (Insurance Investment Co. vs. Hargroves, 179 S.W. (2)383; Feldman et al v. Bevil County Judge, 190 S.W. (2) 157; Fambrough vs. Wagner, 169 S.W. (2) 478).

The respondents urge in their written brief that the petitioner inadequately presented his case to the Supreme Court of Texas, and the issues here were not decided by the Supreme Court of Texas, and that therefore, this Court has no jurisdiction. The petitioner contended that the respondents violated rights guaranteed to him by the Fourteenth Amendment to the Federal Constitution. Whether the issues here raised were adequately presented and decided by the state Court is a Federal question itself, and therefore gives this Court jurisdiction to determine for itself that issue. (Lowell v. City of Griffin, Ga., 58 Sup.Ct. Reporter, 666).

THIS COURT HAS THE POWER AND RESPONSIBILITY UNDER THE CONSTITUTION TO REVIEW THE FACTUAL AND POLICY JUDGMENT OF THE TEXAS LEGISLATURE AND CONSTITUTION IN THIS CASE.

The Texas Court of Civil Appeals held, and the

Supreme Court of Texas sustained such holding, that it could not consider the legal merits of segregation as that topic was "outside the judicial function. The people of Texas through their constitutional and legislative enactments, have determined that policy, the factual basis of which are not subjects of judicial review." (R.450).

From the above language, in the opinion of the Court of Civil Appeals, it is obvious that the Court of Civil Appeals refused to consider the evidence of the petitioner. The Supreme Court of Texas affirmed such action.

This holding, we submit, is wrong; for the State of Texas cannot turn into a matter of fact, or of local judgment, or legislative enactment the expressed principles of the Federal Constitution that the rights of citizens of the United States are dependent upon race or color. The subject matter here presented for judicial determination is a fit subject, not only for judicial review, but for strict judicial review, for it is conduct which strikes at the heart of the democratic processes. (United States v. Carolene Product Co. 304 U.S. 144-153). It appears that this Court in the past has strictly reviewed any effort, whether by legislature or the judiciary, to make the rights guaranteed by the Constitution depend upon race and color. (West Virginia State Board vs. Barnette, 319 U.S. 624).

THE PATTERN OF SEGREGATION UNDER THE TEXAS STATUTE AND CONSTITUTION HAS NOT TENDED TO PROMOTE THE PEACE AND WELFARE OF THE CITIZENS OF TEXAS, AND HAS NOT PRODUCED A HARMONIOUS RELATION BETWEEN RACES AS THE COURT ASSUMED IN PLESSY vs. FERGUSON.

The respondents contend in their written brief that a continuation of the segregation statute in Texas is imperative in order to maintain the peace and welfare of the state, and to promote harmony in maintaining a public school system in Texas.

The enforcement of the segregation statute, as well as the constitutional provision of the Texas Constitution, has increased tension among both races, thus becoming progressively destructive of the democratic processes in the United States. The reasoning of the majority in the case of Plessy vs. Ferguson was that the institution of segregation if left alone would better subserve the interest of all, and that judicial intervention in such segregated pattern under the Fourteenth Amendment would accentuate the present difficulties. Thus, the Court clearly implied the idea that harmonious relations would gradually adjust themselves, if let alone. History has proven that such philosophy was not the correct solution. The enactment and enforcement of segregated statutes in Texas has stimulated more or less brutal agitation by members of one race against the other. Such statutory enactment has encouraged the belief of those in whose favor such statute was enacted that a state enactment gives to the non-Negro citizens a preferred status of citizenship superior to the citizenship of the Negro.

Such assumed preferred citizenship is a presumptive citizenship based upon a false premise created by state action. This false presumption creates in the minds of the non-segregated citizens the belief that the beneficent purposes of the Fourteenth Amendment can be circumvented by the segregation statute, that their rights are paramount, thereby causing resentment in the minds of the segment of the citizens against whom the segregation statute operates, and in many instances, actual hate arises, causing and perpetuating a feeling of distrust between the races, which in many instances result in wholesale violations of the law.

We are not unmindful that the state may exercise police power in order to secure the general welfare and to prevent crime. There is no claim that the petitioner, or the Negro citizens of Texas, will disturb the peace and welfare of the state if segregation is not enforced. The claim is that non-Negro citizens will not obey the law if segregation is not enforced. This Court has never held that the rights guaranteed by the Federal Constitution may be curtailed under the disguise of police power to protect the rashness of a citizen, or a group of citizens, from acts of rashness. If there is any danger in the disturbance of the peace of the citizens of Texas, that danger does not come, and it is not claimed by the respondent such will come, from the petitioner.

The segregation statute is aimed solely at the petitioner on account of his color, not because of his dangerous propensities.

The respondents here invoke the jurisdiction of this Court to condone the exercise of police power against the petitioner solely on account of his color and against the imagined rash act of a segment of non-Negro citizens of Texas; for it is obvious that if any rash act is committed, it will come from the segment of the citizens of Texas who are favored by the segregation law. (Morgan vs. _____, 58 Pacific 1061 --- 47 L.R.A.) The petitioner is not as presumptious as the respondents to believe that the non-Negro citizens of Texas will disregard themandates of this Court or the provisions of the Federal Constitution.

There is nothing in the record in this case to show that the admission to the University of Texas of the petitioner will disturb the peace of the citizens of Texas, or that the health of the citizens of Texas will be impaired, nor that public education will be affected by the petitioner's admission to the University of Texas. If the peace and tranquility of the State of Texas is disturbed, it finds no support in this record, and the Court will not presume race or color a danger in order to sustain the police power of the state. There can never be any presumption of danger because of color in order to sustain the police power of a state. The likelihood, however great, that a substantive

evil will result cannot form the basis, nor justify the restriction, of the rights guaranteed by the Fourteenth Amendment against discrimination on account of color. The fact that the Legislature of Texas, or the Constitution of Texas expresses a preference or belief that there is justification for such class legislation is not sufficient without supporting facts to warrant the curtailment of equal protection of laws on account of race or color.

The respondents would have the Court believe, according to their written brief, that the petitioner because of his color extends into that special catagory marked off by history as inherently dangerous. The facts in this record refute such contention. It has been recognized through all ages that the mark of nobility of the ancient and living is devotion to native land. This Court judicially knows the history of devotion of the petitioner and those whom he represents to native land. Nobility connotes respect for law and order, peace and tranquility.

Then, we present the proposition that the color of petitioner's skin is not inherently dangerous. The undisputed evidence in this case (R.194-195) completely shows the ill effect that segregation has upon the petitioner and the total community. The evidence shows that segregation intensifies suspicion and distrust between non-Negro and Negro citizens, that such suspicion and distrust are not favorable conditions either for the acquisition and conduct of an education or for the discharge of duties of a citizen.

Segregation affects the total community in an unfavorable way, in that it accentuates imagined differences between Negroes and whites; segregation is against the will of the segregated; it produces favorable situations for the increase of bad feelings between the races, which result in conflict.

Not all white citizens desire or favor segregation. Hence, segregation is not only against the will of the segregated, but is an imposition upon a large segment of non-Negro citizens who do not condone segregation or its principles. Thus it deprives large segments of non-Negro citizens of personal liberty in subordination to the will of those who desire and sanction the pattern of segregation.

The operation of segregation and its ill effects completely refutes the proposition of the respondent that the enforcement of the segregation statute and constitutional provision promotes the peace and welfare of the state; for it cannot be presumed that an act which creates bad feelings in the minds of citizens against each other, which results in conflict, is an agency for the promotion of the peace, happiness and health of a community. On the basis of this record, it is shown that segregation tends to feed itself and grow increasingly malignant. It is not a promoter of peace, but it is a progressive agent of death of the very life of democracy.

IT IS THE POWER AND DUTY OF THIS COURT TO EXAMINE THE SUBSTANCE RATHER THAN THE FORM OF THE SEGREGATION STATUTE AND PROVISION OF THE TEXAS CONSTITUTION, AND TO DETERMINE ITS CONSTITUTIONALITY FROM ITS OPERATION AND EFFECT.

It has been the rule of this Court in the construction of the constitutionality of a statute to examine the substance rather than the mere form, and to test the constitutionality of such statute by its operation and effect. An examination of the operation and effect of the segregation statute and constitutional provision will demonstrate the operation and effect upon the constitutional rights of the petitioner. The evidence in this case (R.239-241) reveals that the combined assets of the plant facilities of the thirteen non-Negro state-supported schools above the high school level were in excess of 72 million dollars; that Prairie View College, the only Negro school of higher learning, was slightly more than four million dollars (R.239-241). The amount expended upon plant facilities for the education of Negroes under the segregation pattern is less than one-half of the amount that would have been allocated to Negroes on the basis of population.

We do not contend, however, that the allocation of money for educational facilities should be made on the basis of population. On the basis of per capita expenditures $28.66 was invested in plant assets for every Non-Negro person; while only $6.40 was expended in plant assets for Negro persons (R. 241). The per capita student appropriation at Prairie View, the only public-supported institution for higher learning for Negroes, was shown to be less than that found to exist

at the smallest teachers' college for non-Negroes in Texas. (R.249). In the school year 1943-1944, $11,071,490.00 in state, county and district funds were appropriated for higher education in Texas. Of this amount, $10,000,858.00 was appropriated to non-Negro persons; that is, only $1.98 per capita for every non-Negro citizen. The sum of $213,472.00 was appropriated to Negro schools, or 23¢ per capita. The institution for non-Negroes received during such period of time more than eight times more funds than the money that was allocated to institutions for the training of Negroes. (R.246).

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Thus, the pattern of segregation is presented.

If the judicial mind is focussed upon the record in this case, which shows the result of the operation and effect of the segregation statute, illegal discrimination will be perceived; and when perceived, we believe is in the power of this Court to correct so great an evil.

SEGREGATION SANCTIONED BY STATE ACTION SHOULD NOT BE EXTENDED TO EDUCATION.

In Plessy vs. Ferguson, the issue of segregation on common carriers was raised, but this Court did not endorse segregation generally. It was urged in that case in the argument that if segregation on carriers was valid, states might legally require white and Negro persons to use different sides of the street, paint their houses different or business signs of a different color, on the grounds that one side of the street or one color of paint was as good as another. Such action, the Court said, would be invalid, and held that even segregation must be reasonable.

The petitioner here contends that the segregation enforced against him is unreasonable. The Court has held in prior decisions that segregation of whites and Negroes in different city blocks is unreasonable (Buchanan vs. Worley, 245 U.S. 60). But the Court has never squarely faced the question presented in this record, whether segregation in education is unreasonable. We do not contend that the problem of the validity of segregation in education has never been referred to in the opinions of this Court, but we do contend that it has never been seriously argued or deliberately considered upon a record such as the record in this case. In the Berea College vs. Kentucky, 211 U.S. 45, the issue was the validity of a Kentucky statute forbidding the teaching of Negro and non-Negroes in the same college -- private college. The sole question raised and decided

in that case was that such statute was not a violation of due process clause as an interference with property rights of an educational institution. The question of the rights of individuals was carefully excluded from the consideration of the Court (54). In Cummings vs. Richmond County School Board, 175 U.S. 528, from the language used by the Court, the legality of segregation ineducationwas excluded from the Court's decision. In Gong Lum vs. Rice, 275 U.S. 78, the Court treated segregation in education as legitimate on the basis and theory of the case of Plessy vs. Ferguson and Cummings vs. Richmond County Board Cases, despite the language in the opinion of the Court in each case, and the fact that the basic problem presented here was not argued in the Gong Lum Case, and that it was not involved or decided in the Plessy or the Cummings Case. We,therefore, submit that if segregation in education is constitutional, it became so in a decision of this Court in which the issue was not squarely presented to this Court.

In Missouri Exrel Gaines vs. Canada, 305 U.S. 327, the Court did observe that segregation in education had been "sustained by the decisions of this Court," but an examination of the cases cited in the Gaines case will show that the precise issue presented here was not involved in either of the cases cited in the Gaines case; nor was the issue presented to the Court and decided by the Court. (Sipuel vs. Board of Regents,332, U.S. 631).

SEGREGATION BY STATE ACTION UNDULY RESTRICTS THE ASSIMILATION OF INFORMATION, IDEAS, PHILOSOPHIES AND ATTITUDES, AND IS THEREFORE UNCONSTITUTIONAL.

The record reflects that the petitioner was qualified in every respect for admission to the University of Texas Law School, except his color. The respondents do not contend that the petitioner's ability to acquire information was not equal to the ability of those admitted to the University of Texas Law School. That petitioner was refused admission solely because of his race and color.

The respondents do not contend that the constitution does not protect the rights of a citizen to disseminate information, ideas, philosophies and attitudes without restriction to any person or persons, and whenever such person desires to disseminate information, ideas, philosophies and attitudes, but contend that the state may restrict the right of a person to receive, assimilate and make use of a cross section of a community information, ideas, philosophies, opinions and attitudes. That the petitioner is not entitled to receive, assimilate and make use of a cross section of community information; that he has equality of opportunities and equality of educational facilities when he is restricted in his pursuit of an education to the assimilation of ideas, information, philosophies and attitudes of one segment of a total citizenship, while all non-Negro citizens of Texas are permitted to have the unrestricted benefit of assimilating, using and making use of a cross section of a community

information, ideas, philosophies, attitudes and opinions in their pursuit of an education. Free discussions, free exchange of ideas, free dissemination of opinions, ideas, philosophies and attitudes must be had and analyzed by a student on the community level before a well-rounded legal education is acquired. In the University of Texas, all non-Negro citizens, irrespective of race or color, are given the unrestricted right to attend the Law School, and to assimilate and make use of a cross section of community opinions, ideas, discussion, philosophies and attitudes for use in life after school. Such unrestricted right given all non-Negro citizens in Texas and denied the petitioner because of race and color, deprives the petitioner of an education that will enable him to meet the responsibility of his profession. The lawyer, in order to be fully prepared to meet his professional responsibilities, must have a vital sense of the culture of the community in which he lives and works. The segregation formula of Texas denies this right to the petitioner. The lawyer is perpetually engaged in trying to anticipate, prevent, settle or win human disagreement involving alleged rights recognized under the law and the Constitution. His thinking, planning, and actions are framed and limited by what he understands to be the prevailing principles and doctrines of the law; what the judges or the legislators have decided in similar situations before; or what he contemplates the judges or legislators would

determine in similar situations in the future. The knowledge required for these professional duties are received in part from books, but a great portion of this information must come from intimate knowledge of the ways and thoughts of the total community.

The petitioner in a large sense is lost unless he can sense the interest, ability and the weakness of those adversaries with whom he must deal, whether they are lawyers, witnesses, judges, clients or plain citizens. The citizens trained in a segregated law school will not find segregated courts in which to practice, and he will not find a clientele or community life in which all citizens have been restricted to the assimilation of ideas, information, philosophies and attitudes of one segment of the citizenry; but he will be compelled to meet and match wits with lawyers trained in an unrestricted and unsegregated institution, who have had the benefit and the privilege of assimilating and making use of a cross section of community information, ideas, philosophies, opinions and attitudes.

In the class room the student ispermitted to know the thinking of the neighborhood by discussion, which is a vital part of education. He draws a cross section of opinions, ideas and philosophies of his contemporaries from enumerable localities and environment. He is privileged to note them all; he will imbibe the lessons not only of character but obtain knowledge of human beings from a larger portion of that cross section of his contemporaries with whom he must

come in contact in his pursuit of a livelihood after school days. The restriction because of color by Texas in the assimilation of ideas, information, philosophies and attitudes eliminates from the reach of the petitioner much of the cross fertilization of ideas. It is not sufficient to say that the petitioner may read the same books that the non-Negro students read; for the information which constitutes a part of the quality of education offered at the University of Texas does not come from books. When the petitioner is required to study, discuss and observe with only one segment of the cross section of citizenship, he is circumscribed in his effort to achieve any real understanding of total community thinking or the community conception of justice and equity; for he has lost that essential element of total education of the exchange of ideas with a cross section of community fellowship. Such restriction of the assimilation of ideas, information, philosophies, opinions and attitudes on a total community basis handicaps the attorney in advising his clients and in dealing with other attorneys and judges who constitute a part of the great stream of Texas jurisprudence. Education is in the sphere of intellect; segregation by Texas transcends constitutionality limits, in that it invades the sphere of intellect in its restriction upon the assimilation of information, ideas, philosophies and attitudes on a community-wide basis, which is the purpose of the Constitution to protect.

THE PRESUMPTIVE BASIC POLICIES UNDERLYING THE COURT'S APPROVAL OF SEGREGATION IN PLESSY vs. FERGUSON ARE UNDISPUTABLY REFUTED BY THE RECORD IN THIS CASE, AND IF THE COURT CONSIDERS THE DOCTRINE IN PLESSY vs. FERGUSON APPLICABLE HERE, THAT CASE SHOULD BE OVERRULED.

There were two fundamental judgments of fact and policy announced through the decision by the majority of this Court in Plessy vs. Ferguson. One was that legislation is powerless to eradicate rash instincts, or to abolish distinctions based upon physical differences, in that it was impossible to eliminate segregation founded in theusages, customs, and tradition of the community; therefore, the Constitution must bow to the opinion of the community based upon usages, customs and traditions. The other was the Court's assumption that the Legislature and Courts were powerless to correct the evil that the existing condition should be left alone and let the events take their course, and that governmental intervention could only accentuate the difficulties of the present.

More than a half century has passed since the decision in Plessy vs. Ferguson. In these intervening years much that was obscure about the effect of segregation has been clarified. As years have passed, the evil of segregation has been unfolded as trends have become more distinct. Knowledge has been gained as to the evil effect of segregation, and the impact of segregation upon American life has been clearly demonstrated. In the light of the differences

during the years since the Plessy Case, it is obvious that the basic judgments made by the Court in the Plessy Case were erroneous. If the factual and policy judgments in the Plessy Case were correct at the time rendered, which fact petitioner does not admit, such presumptive policy judgment would be incorrect upon the record in this case; for the presumptive declarations made by the Court in the Plessy Case, so far as they relate to the facts in this record, are inapplicable. The Court is not at liberty to shut itseyes to an obvious mistake when the validity of the segregation law depends upon the truth of such declaration. So far as the declarations in the Plessy Case are concerned, they were declarations looking to the future. It could have been no more than prophecy, and is controlled by future events. The segregation law must of necessity depend upon the existence of certain state of facts to uphold its validity, and if those facts do not exist now, (that is, if the facts have changed) such changed facts would not be sufficient ground on which to rest the judgment of this Court, to sustain the constitutionality of the segregation law in this case. The record clearly shows that such prophetic declaration in Plessy vs. Ferguson does not apply to the factual situation in this case. A law valid when passed because of a certain state of facts will become invalid when such state of facts cease to exist. (Chastleton, Inc. vs. Sinclair, 44 Sup. Ct. Reporter, 405.)

The Court held in the Plessy Case: "in determining the question of reasonableness (the Court) is at liberty to act with reference to established usages, customs, and traditions of the people and with a view to the promotion of their comfort and the preservation of public peace and good order."

This prophecy has proven to be incorrect. In Maryland these very customs have been defied and overridden in that Negro students have for more than four (4) years been in attendance in the law school of the University of Maryland. Since the filing of this case, a Negro student has been admitted to the University of Texas Medical School, in the face of such customs, traditions and usages. Likewise, Negro students are now in the University of the State of Arkansas and the University of the State of Oklahoma. There has been no repercussions, no disturbances of the peace, no abolishing of public school facilities for the education of the citizens of these states as the result of the admission of Negroes to such schools. These facts completely refute the prophetic declarations in Plessy vs. Ferguson, that the constitution must bow to the will of the community. The further declaration of the Court in the Plessy Case was to let events take their course and restrain governmental intervention, which would result only in accentuating the then present difficulties. This prophetic declaration has been refuted in the very state where the case of Plessy vs. Ferguson arose.

For more than fifty years the overwhelming community sentiment among the non-Negro people in Louisiana was to pay Negro teachers less salary than white teachers were paid with similar professional training and professional qualification, and for similar services rendered.

The "let events take their course and restrain governmental intervention" doctrine had been pursued for more than fifty years without result. Governmental intervention was invited. The evil was corrected through governmental intervention without disturbing the peace, the tranquility, or affecting the morals and welfare of the State of Louisiana, but in truth and in fact, the relationship was improved. This same policy or governmental intervention has been followed in practically every southern state, and especially in the states filing an Amicus Curiae Brief in support of respondents' position in this case.

For more than fifty years in each of the states which filed an Amicus Curiae Brief in this case supporting the position of the respondents' position, it has been the overwhelming opinion of the non-Negro citizens, and it has been the custom, practice, and tradition of such group of citizens, to exclude the Negro citizens from the electorial process of government. Such custom, tradition and usage has been condoned by legislative act. Governmental intervention was resorted to and in this Court in Smith vs. Albright, this Court was advised by the Attorney General of Texas

that if segregation was broken down in the Texas primary case, that chaos would reign in Texas; that customs, usages and traditions in Texas should not be disturbed; if so, the peace, the happiness, tranquility and the welfare of Texas citizens would be disturbed. The powers of this Court restrained the enforcement of such customs, practice and community sentiment, and the citizens of Texas obeyed the mandates of this Court as they will obey the mandates of this Court in the future, and the peace and happiness of citizens of Texas were not disturbed, chaos did not reign in Texas, but the relationship between the races has steadily improved since that decision. Such prevailing conditions followed in the southern states which have filed Amicus Curiae Briefs in this case.

The learned Trial Court excluded testimony attacking the constitutionality of the Texas segregation statute. The constitutionality of the segregation statute depends upon facts beyond the sphere of judicial notice, and such facts were proper subjects for judicial inquire. (Bordens Farm Products Co. vs. Baldwin, 55 Sup. Ct. Reporter, 187); for this Court has long since laid down the rule that the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the Court that those facts have ceased to exist. (United States vs. Carolene Products Co., 58 Sup.Ct. Reporter 778).

THE RACIAL SEGREGATION STATUTE AND CONSTITUTIONAL PROVISION OF TEXAS IS UNCONSTITUTIONAL IN THAT IT DOES NOT BEAR A FAIR AND SUBSTANTIAL RELATION TO THE LEGISLATIVE OBJECTIVE.

Under the segregation law in Texas all racial groups other than Negroes, irrespective of origin of birth and color of skin, may attend the University of Texas Law School. The record is without dispute that the petitioner had the academic qualifications, and that the only reason why he was refused admission was the fact that he was a Negro (R.161). We do not admit that there are any circumstances in which a state has power to make race or color the basis of legislative classification, but assuming that such power rested in the state, we contend that the difference in the treatment of the petitioner in his pursuit of an education is one which bears no fair or substantial relation to any valid legislative act. We contend that classification on account of race and color is never a valid act. Legislative classification, in order to avoid constitutional prohibition must be founded upon some pertinent and real difference as distinguished from an irrelevant and artificial one. We think the test to be applied in this case is: Does the statute and provision of the Constitution arbitrarily and without any genuine reason withhold from this petitioner rights and advantages which it furnishes to non-Negro citizens, both the non-Negro citizens and Negro citizens pursuing the same objective and occupying substantially the same relation towards the subject matter of the legislation.

We submit that these facts cannot be denied; that is, that the petitioner is arbitrarily segregated and discriminated against without any genuine reason for such segregation and discrimination. There is no difference in their purpose, and one cannot be found; a different application of the legislation cannot be applied to the Negro from the application that must inevitably be applied to the non-Negro student; their sole and only purpose is education -- nothing more and nothing less. The Legislature restricts the rights of the Negro by such legislation in rights and advantages that are granted the non-Negro students, both pursuing the same objective and occupying the same relation towards the subject matter of legislation. Education to non-Negro and to Negro students is the same, except in the segregated formula prescribed and set up by the State of Texas, which petitioner contends invalidates such statute. The Legislature of Texas may not carve out by legislation its own notion and conception of education for non-Negro students and carve out a different and inferior notion and conception of education by affording advantages and rights superior for non-Negroes than those furnished for Negro students. If an examination of the record in this case is made by the judicial mind, the unconstitutionality of the statute is inescapable.

CONCLUSION

The government through all of its branches and by its own method and technique has the duty of meeting a

challenge of this day that democracy is unreal, a promise yet to be fulfilled. To meet this challenge there must be more than ideas expressed in words. It requires that the government bring their practices in accordance with our expressions. This challenge must be met in part within the school room if we are to accord the full meaning to the basic moral principle -- that all men are created equal as well as free. This government must build through our public school system social institutions that will guarantee equality of opportunities to all men; for without this equality, freedom becomes a nullity. We must build through the school an aristocracy that is consistent with the free way of life. That aristocracy must be an aristocracy of talent and achievement. It cannot be done under a segregated formula in our public school system.

RESPECTFULLY SUBMITTED:

W. J. DURHAM