IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

Nos. 1, 2, 3, and 4 5

OLIVER BROWN, ET AL.,
Appellants,
v
BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.,
On Appeal from the United States District Court for the District of Kansas

HARRY BRIGGS, JR., ET AL.,
Appellants,
v
R. W ELLIOTT, ET AL.
On Appeal from the United States District Court for the Eastern District of South Carolina

DOROTHY E. DAVIS, ET AL.,
Appellants,
v
COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY VIRGINIA, ET AL.
On Appeal from the United States District Court for the Eastern District of Virginia

FRANCIS B. GEBHART, ET AL.,
Petitioners,
v
ETHEL LOUISE BELTON, ET AL.
On Writ of Certiorari to the Supreme Court of Delaware

BRIEF OF JOHN BEN SHEPPERD, ATTORNEY GENERAL OF TEXAS, AMICUS CURIAE

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES

PRELIMINARY STATEMENT

John Ben Shepperd, Attorney General of Texas, pursuant to request for leave to appear amicus curiae and file a brief, submits this amicus curiae brief to the Court upon the condition that such appearance will not have the effect of making the State of Texas or any of its officers or agencies parties to this litigation

In compiling data for this brief a sincere effort has been made to obtain a correct cross section of views of educators, legislators and others with knowledge of the subject matter under consideration Surveys have been made, public opinion has been sampled, and composite views of groups best acquainted with the segregation problem have been obtained The Texas Education Agency has been most helpful in furnishing pertinent materials which have been used in this brief We will attempt to present the true Texas picture as reflected from this research

The public school system in Texas from its inception has been operated and maintained on a segregated basis, and has existed for more than eighty years under the authority of Section 7 of Article VII of the Texas Constitution (1876)[1] and statutes enacted pursuant thereto This constitutional and statutory authority creating separate but equal facilities

[1] Section 7 of Article VII of the Texas Constitution provides: Separate schools shall be provided for the white and colored children and impartial provision shall be made for both

in the public school system of Texas was the direct and continuing result of the expressed will of the people of Texas This Honorable Court in many of its decisions has held that the states may provide education at their own expense for the white and Negro students in separate schools so long as equal facilities and advantages are offered both groups *Plessy v Ferguson*, 163 U S 537 (1896), and related cases Stability and harmony in the law, particularly in the constitutional law, is a primary requirement in an effective and efficient government When the courts have announced, for the guidance and government of individuals and the public, certain controlling principles of law, they should not be changed, because the law by which men are governed should be fixed, definite and known, particularly when millions of dollars have been spent in reliance thereon Attending a public free school is a privilege extended by the state It is not a right of a citizen of the United States *Cumming v Richmond County Board of Education*, 175 U S 528, 545 (1899) So long as the privileges extended to all groups are equal no one is deprived of the equal protection of the law The decisions of this Honorable Court have recognized that, where 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 the general welfare, the people of Texas in their Constitution, and the Legislature by statutes have declared that such a necessity exists in Texas There is no *discrimination* on the part of the State of Texas in administering its public school system, only *separation* of the

races It is the belief of the people of this State that discrimination against the individual can best be eliminated by segregation of the races in the educational system It is the evil of discrimination and not segregation per se that is condemned by the United States Constitution

Section 7 of Article VII of the Texas Constitution and related statutes provide that the State shall furnish equal education to its Negro and white students The State of Texas has been operating under the assumption that the power of states so to classify and the reasonableness of the classification had been settled as a matter of law since 1896 and was not violative of the equal protection clause of the Fourteenth Amendment

However, if the occasion arises whereby we are compelled to abolish segregation in Texas, it should be by a gradual adjustment in view of the complexities of the problem Such complexities include the unwillingness of the Texas people immediately to abide by the decision, the varying degrees in which different areas of the State of Texas would be affected, and the result such a decision would have on the State's public school system which has been maintained on a segregated basis for generations

Legal action which bears upon the folkways of nearly one-fourth of the nation's population cannot be effective unless the affected group is largely willing to abide by it No individual can be forced against his will to accept, associate, or cohabit with another not of his own choosing The Fourteenth Amendment to the United States Constitution prohibits only

"*State action*" which is discriminatory because of race, creed or color, not the prejudices or discrimination evidenced by individuals toward their fellow man *United States v Cruikshank*, 92 U S 542 (1876) And while it has been determined that equal but separate facilities maintained in the public free school systems of the states involved in this litigation is "State action" in violation of the Fourteenth Amendment, still this Court should consider that such a decision also affects the individual rights, mores and beliefs of the Southern people To insure that the people of the South accept the decision and make moral decisions of their own commensurate with the end of bettering the Negro race, some way must be found to protect the constitutional rights of the minority without ignoring the will of the majority The underlying thought implicit in the Court's decision in these cases is that a feeling of inferiority is generated in the Negro child, resulting not from *actual attendance* in a segregated school, but from the *legal requirement* under which the Negro child is forced to attend separate schools From the standpoint of principle, there is no real difference between compulsory segregation and compulsory integration Compulsion can only arouse resentment, individual discrimination, and, as experience has demonstrated in other states, violence The objectives reached by the War between the States left a scar of bitterness and resentment that is visible even now in some parts of the South Such, we hope, will not be the result of this Court's May 17th decision

Variance of Degree in Which Different Areas Would Be Affected

In order that this Honorable Court have the full assistance of all parties and amici curiae in formulating decrees, these cases were restored to the docket for the presentation of further argument upon the following questions

> "4 Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
>
> (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
>
> (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?
>
> 5 On the assumption on which questions 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (b),
>
> (a) should this Court formulate detailed decrees in these cases,
>
> (b) if so, what specific issues should the decrees reach,
>
> (c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees,
>
> (d) should this Court remand to the courts of first instance with directions to frame de-

crees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

The following factual information is submitted which we believe to be pertinent insofar as the State of Texas is concerned

The State of Texas has a total population of seven million, seven hundred eleven thousand, one hundred ninety-four (7,711,194), of whom nine hundred seventy-seven thousand, four hundred fifty-eight (977,458), or 12 7%, are colored [2] The concentration of the Negro population is shown by counties on the map designated "Appendix I" There are one million, seven hundred eighty-six thousand, nine hundred eighteen (1,786,918) persons of scholastic age enumerated in the scholastic census for the 1954-1955 school year, of whom two hundred thirty thousand, five hundred forty-six (230,546), or 13%, are colored The concentration of the Negro scholastic population is shown by counties on the map designated "Appendix II" Texas has two hundred fifty-four (254) counties There are located in the northeastern forty-five counties of this State 50% of the colored scholastics of Texas, and in four of these counties the Negro scholastics comprise a majority of the county's scholastics In the forty-three counties adjacent to and immediately west of the northeastern block of counties above referred to, another 40% of the colored scholastics reside Thus, in Texas today ap-

[2] This population is based on the 1950 Federal Census

proximately 90% of the total Negro scholastics are located in the eighty-eight counties comprising the northeastern quadrant of the State Forty-one Texas counties do not list a single Negro scholastic Therefore the remaining 10% of the colored scholastics of Texas are scattered throughout the remaining one hundred and twenty-five counties A map evidencing this factual information is attached and designated "Appendix III", to which particular reference is made A study of this map reveals that the segregation problem in Texas is not state wide, but is of serious import and of vital concern to our local school districts

Of the two hundred and thirteen Texas counties listing Negro scholastics, one hundred forty-six counties offer a complete Negro high school, twenty-one counties offer some Negro high school, but not twelve grades, and thirty six counties offer only Negro elementary school Ten counties operate no school for Negroes, however, these counties have ten or fewer Negro scholastics Negro scholastics in counties not having a complete twelve grades are transported at State expense to other schools Texas in 1953-54 had a total of one thousand, nine hundred fifty three (1,953) active school districts, two hundred ninety-two (292) of which offered a full twelve grade school for both white and Negro One hundred twenty-five (125) districts maintained a Negro school but did not have a white school A total of nine hundred fifty-six (956) districts provided Negro schools The districts that did not maintain a school for Negroes were primarily in areas that did not contain Negro scholastics

Texas Public School System

Pursuant to the constitutional authority, the Texas public school system is administered under what is commonly called "The Minimum Foundation School Program"[3] Under this very effective program, education of the Texas school child is provided on an equal but separate basis, with millions of dollars being spent each year Under the Minimum Foundation Program, as administered by Texas' twenty one-member elective State Board of Education, all possible control and responsibility are left to local school administrators and local school boards to provide school programs to meet the needs of the children in their communities As the name implies, the Minimum Foundation Program guarantees to every school-age child in Texas, regardless of race, creed, color, economic status or place of residence, at least a *minimum* of a full nine months of schooling each year, thereby spreading the State's financial resources available for public education as equally as possible among all the people The Program has been in effect for five years, and during that time the average daily attendance of school age children actually attending school has risen from 73 77% in 1948-49 to 80 85% during 1953-54 79 31% of the Negro school-age children were in average daily attendance in 1953-54

The Minimum Foundation Program provides a system of financing which guarantees to local school districts that State funds will be available to pay the

[3] Art 2922 11 et seq , Tex Civ Stat (Vernon s 1948)

cost of a minimum school program when local funds are insufficient

A number of the Texas school districts do not need a supplemental appropriation from the Legislature A majority of the Texas schools have surplus money derived from local taxation with which to enrich the local school program beyond the minimum program prescribed by the State Expenditures from surplus funds provide adult and kindergarten classes for students not included in the scholastic census age brackets, classes for exceptional children, supplemental expenditures on salaries, maintenance and capital costs, and any other authorized school costs The State funds are provided in proportionate equality to all school districts, for the benefit of all scholastics, irrespective of race, creed or color If a school program superior to the minimum requirements is desired in any district, it may be paid for by the taxes voted, levied and collected from the taxpayers of the district

As a result of the Minimum Foundation Program, teachers' and school administrators' salaries have risen from twenty ninth in the nation to sixteenth 97 1% of the Texas teachers now have college degrees Only the State of Arizona exceeds this mark There are approximately eight thousand, five hundred (8,500) Negro teachers and school administrators in Texas This number is nearly equal to the total number of Negro educators in the thirty-one Northern and Western States which practice non-segregation According to the *U S News and World Report*, August 27, 1954, only one out of every seventy-three teachers in those thirty-one states

maintaining an integrated system is a Negro, while in Texas, one out of every five is a Negro These positions are believed to be the most secure and best paid employment the Negro has today The effect of this decision upon the teaching profession is speculative, and any decree which would disrupt the stability and security of teachers should be avoided [4]

Under the Minimum Foundation Program, the public school system of Texas has greatly raised its standards, teachers have been benefited by salary increases and retirement plans, and every school-age child in Texas, without regard to his race, creed or color, has been offered the opportunity of education The State has not discriminated in its appropriations, such being provided equally to all races and persons, with the privilege and authority in each local district to go further if it is so desired But the program does provide for separate schools, segregating the races and contemplating an equalization of facilities for all scholastics Integration would re quire alteration of the Minimum Foundation Program

The establishment of an integrated system is not a problem which would apply equally to West or South Texas, where there is only a small percentage of the Negro population, and to Northeast Texas, where the concentration of the Negro population is the heaviest No equitable general decree could ever be formulated for the entire State of Texas Specific decrees could be made only after a particular school

[4] Texas at the present time has no tenure statute for teachers in the public free schools Employment is through the local school boards

district was before this Court and the facts relevant to that district were presented It would be impossible to get enough facts before the Court in one isolated case upon which the Court could enter a general decree which would apply equally to all parts of this State or to all the states practicing segregation Since we do not know the various fact situations as they exist in these cases, we are in no position to advise the Court as to the type of decree that should be entered

QUESTION FOUR

4 Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

(a) Would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

(b) May this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

Argument

This Court has recognized the complexities involved in the formulation of a decree in these cases because problems of different characteristics are presented Evidently all states were invited to appear

because each should have an opportunity to demonstrate the obstacles to adjustment in compliance with any decision that might be rendered in the future affecting the individual states

It is respectfully submitted that this Court is authorized to permit an effective gradual adjustment toward integration and, unquestionably, if the occasion arises, the administration of this program in Texas must be left to the local school districts The education system in Texas is predicated upon a number of local, self-governing school districts, with full authority to administer the school system The basic and historic concept of public free schools is based upon the democratic and salutary principle of local self-government The schools in Texas are operated, maintained and controlled by local school boards elected by the people of the individual school district [5] Operational and maintenance costs are provided by local taxation voted by the taxpayers of the district[6] and supplemented by the Legislature under the Minimum Foundation Program [7] Capital expenditures are made through bond issues voted by the taxpayers of the district [8] All personnel of the school, with the exception of the elected officials, are employed by local

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[5] *Southwestern Broadcasting Company v Oil Center Broadcasting Company,* 210 S W 2d 230 (Tex Civ App 1947, error ref N R E) ; *University Interscholastic League v Midwestern University* Tex 255 S W 2d 177 (1953) ; Arts 2745 2749 2775 et seq and 2780 Tex Civ Stat (Vernon s, 1948)

[6] Art 2784e Tex Civ Stat (Vernon s 1948)

[7] See discussion of the Texas Public School System in this brief

[8] Art 2784e and Art 2786 Tex Civ Stat. (Vernon s 1948)

officials and work under such officials' supervision [9] It is thus seen that the schools in Texas constitute almost a complete local autonomy controlled by the taxpayers of the individual school districts and their locally elected school board In fact, the courts of Texas have repeatedly held that these school districts are local public corporations of the same general character as municipal corporations [10] Any decree of the Court that might affect Texas must leave this administration in the local school districts unhampered The problems with which we are confronted can best be resolved at the local level in this manner

As a basic premise for showing the need for a transition period, the following is typical of the feeling of Texas citizens and school administrators on the vital subject now before this Court

In an article appearing in *The Dallas Morning News* on June 9, 1954, Dr J W Edgar, Texas Commissioner of Education, stated

> "Texas has 2,000 problems as a result of the Supreme Court's decision We have 2,000 school districts, and they vary from totally white to totally Negro
>
> "The final decree by the Court ought to permit continued management of local districts by local boards Schools must be run on a community basis They can't be run successfully from Washington or even from Austin (Texas)
>
> "Experience in separating children on a language basis has proved to us that where the re-

[9] Art 2750a and Art 2781 Tex Civ Stat (Vernon s 1948)

[10] *Hatcher v State* 125 Tex 84, 81 S W 2d 499 (1935); *Love v City of Dallas* 120 Tex 351 40 S W 2d 20 (1931)

sponsibility is put upon the local community, they work honestly to resolve differences

"Anything which schools do effectively must be done with local support We don't care to tell others how to run their schools, but we certainly believe that our 2,000 problems can be resolved best if the Supreme Court leaves control in local districts"

In a statement made to the Texas Commission on Higher Education, Dr R O'Hara Lanier, Negro president of Texas Southern University, stated

"In spite of the U S Supreme Court's anti-segregation ruling, Negro schools will be needed more than ever in the future It would be a narrow position for the state to get rid of Negro schools for if the Negroes are given equal facilities there is nothing to worry about from segregation

"For many years to come there will be shown a great desire and preference on the part of the Negro student to attend an institution equal in every respect, where there will exist many opportunities for development for qualities of leadership and where full participation in every phase of college life will be assured

"Because of human behavior and social backgrounds and patterns long existent, the large majority of such students will come to us (the Negro schools) because they prefer to do so

"Such students very likely will prefer to continue to study with homogeneous groups and will feel strongly that more sympathetic attention will be given to them in our institutions than in some other schools"

Dr E B Evans, Negro president of Prairie View A & M College, expressed similar views to the Commission

The latest state-wide survey of the Texas Poll[11] on September 12, 1954, indicates

> "1 71% of the Texas people are definitely opposed to the Supreme Court's decision The breakdown on the decision is like this
>
> | | Approve | Disapprove | Undecided |
> |---|---|---|---|
> | Negroes | 60% | 33% | 7% |
> | Latins | 49% | 37% | 14% |
> | Other Whites | 15% | 80% | 5% |
> | Entire Public | 23% | 71% | 6% |
>
> "2 What should be done about the problem? 7% favor putting the Court's ruling into effect immediately, and another 23% believe plans should be made to bring the races together in the schools within the next few years A majority of 65% goes on record in favor of continued segregation notwithstanding the Court's decision The breakdown on this problem is
>
> | | Go Now | Few Years | Keep Apart | Undecided |
> |---|---|---|---|---|
> | Negroes | 27% | 40% | 26% | 7% |
> | Latins | 20% | 37% | 33% | 10% |
> | Other Whites | 3% | 19% | 74% | 4% |
> | Entire Public | 7% | 23% | 65% | 5% |
>
> In the entire public, Negroes account for about 12% of the population, Latins, about 11%, and other whites, about 77% "

In a recent questionnaire forwarded by the Attorney General of Texas to approximately one hun-

[11] A long established Texas organization operated by Joe Belden who periodically and systematically conducts a scientific sampling or polling and reporting thereon of public opinion in Texas on current events

dred fifty-two Texas school administrative officials, seventy-seven reported that 85% or more students would continue attending the same school if they had free choice Of this number, fourteen answers were from Negro administrators Only three answered that students in their districts would prefer attending integrated schools, and all three reports were from Negro administrators The questions propounded and the answers received by the Attorney General are compiled in a report which is attached as "Appendix IV"

Many plans have been advanced to alter the public school system of Texas as a result of the May 17th decision Some go so far as to suggest the complete abolition of the free public school system, while others advocate turning the State schools into private schools The decision of the United States Supreme Court is to the effect that segregation in public schools maintained by compulsion of law is unconstitutional as being in violation of the Fourteenth Amendment Many suggest that it does not necessarily follow that integration of the white race with the colored race in the field of education is compelled by the Constitution If, under the Fourteenth Amendment, all citizens are entitled to equal protection of the law, which was the premise for the Supreme Court's decision, then integration can no more be compelled than can segregation Provision for domestic tranquility in the exercise of the police powers of the State premised the original laws requiring segregation To maintain public peace, good order and the domestic tranquility, these same police pow-

ers of the State could be exercised, calling for another and different provision relating to public education

Realizing this, and that the need for compulsion no longer exists, another plan suggests that the section of the law which provides for compulsory education should be repealed and the laws providing that the State furnish free education to all should be left undisturbed Then the present laws should be amended to allow the parent or guardian of the child desiring to take advantage of free education to express his own desires and preferences as to the type of school the child should attend The parent or guardian could select a school in which the majority of the other pupils are of the same race as the child, or he could select a school in which the other pupils are of both races, thereby providing equality of opportunity and freedom of individual choice

This change would remove the unconstitutional "compulsion" of segregation, and at the same time the State would be in a position of honoring the individual preferences of its people

Another plan advanced is that of allowing voluntary transfers between school districts, and it is based upon the same principle as the foregoing

In complying with the mandatory duties placed upon the Legislature of the State of Texas by the Constitution of the State of Texas, the Legislature has by general law established, supported and maintained a segregated public free school system These laws of the State of Texas are not before the Court in these causes, and the State Board of Education has ruled that the schools of Texas should continue to be operated in the same manner until otherwise di-

rected [12] Since the end of World War II, Texas, together with many of our states, has been confronted with the enormous task of providing adequate school housing for a shifting and rapidly increasing population In areas predominantly populated by white students schools have been built to house these students In areas predominantly populated by colored students schools have also been built to house them Utilization of all present school housing to the fullest extent in this State will be an absolute necessity Texas is also confronted with the difficult problem of providing adequate facilities for the anticipated increase in its scholastics in the interim between now and 1960 Statistics reveal that at the close of the 1958-1959 school year, eight hundred forty-nine million, three hundred forty-four thousand, nine hundred twenty-two dollars ($849,344,922) will be needed over and above the present needs to care for the increase in population and replacement costs on existing facilities Of this amount, only three hundred ninety-four million, eight hundred fifty-eight thousand, fifty two dollars ($394,858,052) can be anticipated from local funds, leaving a balance of four hundred fifty million, four hundred eighty six

[12] On July 5 1954 the State Board of Education passed the following resolution: Since the recent United States Supreme Court s decisions on segregation in public schools are not final the State Board of Education of Texas is of the unanimous opinion that it is obligated to adhere to and comply with all of our present state laws and policies providing for segregation in our public school system and to continue to follow these present laws and policies until such time as they may be changed by a duly constituted authority of this State If in the future the Texas laws should be changed then each local district should have sufficient time to work the problem out

thousand, eight hundred seventy dollars ($450,486,-870) which must be derived from another source to care for the needs of the school children for the school year of 1960 The school system is presently overcrowded with certain school-age groups being separated into morning and afternoon classes to offset this condition It can readily be seen that if Texas attempted an immediate integration, the perplexities confronted in accomplishing the same would be overwhelmingly multiplied Additional facilities are needed and will have to be supplied by local bond issues It is highly speculative as to whether such bond issues would be voted to house an integrated school system which an overwhelming majority of the people oppose The election calls for freedom of choice and no mandamus action could be maintained to force an affirmative vote At this time it would be highly impracticable to eliminate any of the present school housing, and great consideration must be given to the natural and presently existing boundary lines which, of course, is the prime consideration for the Legislature or the local school board

A gradual transition to an integrated public school system is not a denial of relief or of the constitutional rights enunciated by the Court The Court has previously permitted a transition period in analogous situations, particularly in the antitrust and nuisance cases In *United States v American Tobacco Co* , 221 U S 106 (1911), the Supreme Court determined that the defendant had violated the Sherman Anti-Trust Act Recognizing the need for adjustment to its decree, the Court, in order to avoid and mitigate any possible injury to the interest of the general public,

remanded the case to the lower court to hear the parties and to ascertain and determine a plan for dissolution of the combination To accomplish this end, the Court allowed sufficient time (eight months) to carry out its decree In *Georgia v Tennessee Copper Co*, 240 U S 650 (1916), the Court entered a final decree in a case in which the State of Georgia had sued the Tennessee Copper Company to restrain the discharge of irritating gases into Georgia The case had involved three lawsuits and covered a span of nine years in which the Court allowed considerable time and discretion to devise ways and means of subduing and preventing the escape of the noxious fumes In *Railroad Commission of Texas v Pullman Company*, 312 U S 496 (1941), the Pullman Company brought suit in the Federal Court against the Railroad Commission of Texas attacking a regulation of the Commission as being in violation of the Federal Constitution and unauthorized by the Texas statutes The Court remanded the case to the lower court, with directions to retain the bill pending a determination of proceedings, to be brought within a reasonable time in the state court to determine a definite construction of the state statute [13]

The use of administrative discretion and its limits has been spelled out often by the Court in the areas of administrative agencies The Court has emphasized consistently that supervision and discretion should lie with the administrative agencies in conducting their functions as economic and political gov-

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[13] See also: *New Jersey v City of New York* 283 U S 473 (1931); *Standard Oil Co v United States* 221 U S 1 (1911); *Northern Securities Company v United States* 193 U S 197 (1904)

erning boards [14] Such emphasis is closely related also to the administrative discretion which exists in school boards In *United States v Paramount Pictures,* 334 U S 131 (1948), Mr Justice Douglas reviewed a decree in an injunction suit by the United States under the Sherman Act to eliminate or qualify certain business practices in the motion picture industry A provision in the decree that films be licensed on a competitive bidding basis was eliminated by the Supreme Court *as not likely to bring about the desired end and as involving too much judicial supervision to make it effective* This elimination was held to require reconsideration by the district court of its prohibition of the expansion of theatre holdings by distributors and provisions for divesting existing holdings

The Court at page 163 stated

> "It would involve the judiciary in the administration of intricate and detailed rules governing priority, period of clearance, length of run, competitive areas, reasonable return and the like The system would be apt to require as close a supervision as a continuous receivership, unless the defendants were to be entrusted with vast discretion The judiciary is unsuited to affairs of business management, and control through the power of contempt is crude and

[14] See *Alabama Public Service Commission v Southern Railway Company,* 341 U S 341 (1951); *Burford v Sun Oil Co*, 319 U S 315 (1943); and *Far Eastern Conference United States Lines Co States Marine Corporation, et al v United States and Federal Maritime Board* 342 U S 570 (1952)

> clumsy and lacking in the flexibility necessary to make continuous and detailed supervision effective "

The implications in the Court's opposition to judicial administration of intricate and detailed rules in the economic field apply with greater force to the social relationship and problems created by these cases in the field of public education Furthermore, the amount of capital involved in the *Paramount* case is minute when compared with the wealth invested in the public school systems of the South

The Court, in *Barbier v Connolly*, 113 U S 27 (1885), speaking of the Fourteenth Amendment, stated at page 31

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

A tremendous portion of the wealth of these states has been invested in capital expenditures for their public schools The only practical method of establishing an integrated system calls for a period of implementation in our present dual system This Court in the exercise of its equity powers has ample authority to permit the parties to adjust gradually from their existing segregated systems to an integrated one The instant cases affect millions of individuals and the entire public in some seventeen states By reason of the great number of people affected by

the decree and by reason of the vast amount of money invested in capital expenditures, and because of the necessity to make use of all present buildings in the operation of an efficient system of public education, this Court should permit the states to adjust their dual systems gradually into an integrated system It is, therefore, respectfully submitted that this Honorable Court has sufficient authority to permit a gradual adjustment to an integrated school system with sufficient time given for local school officials to accomplish this purpose by the exercise of their administrative authority

QUESTION FIVE

5 On the assumption on which Questions 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in Question 4 (b),

(a) Should this Court formulate detailed decrees in these cases;

(b) If so, what specific issues should the decrees reach;

(c) Should this Court appoint a special Master to hear evidence with a view to recommending specific terms for such decrees;

(d) Should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this

Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

Argument

The information contained in the introductory statements and in Appendix III clearly demonstrates that the problem of establishing a public school system not based on race is a localized problem in Texas, not a state-wide problem This is further evidenced in Appendix V, which is a compilation of scholastic population by counties It is not a problem in which the remedy voluntarily adopted in West Texas or South Texas would be equally applicable and effective in Northeast Texas For that reason no equitable general decree could be formulated which would be appropriate for every part of the State of Texas Specific decrees would have to be provided for each case, based on the facts and conditions then presented to the Court which are shown to exist in the locality involved in a proper case

Section 1 of Article VII of the Constitution of Texas imposes the duty on the Legislature to establish, support and maintain our system of public free schools [15] This Court announced on May 17, 1954, that segregation in public education is a denial of the

[15] Section 1 of Article VII of the Constitution of Texas provides: A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people it shall be the duty of the Legislature of the State to estab lish and make suitable provision for the support and main tenance of an efficient system of public free schools

equal protection of the laws Since that time the Texas Legislature has not met in session, and it is not known at this time what action the Legislature will take, if any

In *Minersville School District v Gobitis*, 310 U S 586 (1940), this Court stated that it did not want to become the school board for the entire country At page 598 the Court stated

> "But the courtroom is not the arena for debating issues of educational policy It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncrasies among a people so diversified in social origins and religious alliances *So to hold would in effect make us the school board for the country That authority has not been given to this Court, nor should we assume it* " (Emphasis supplied)

Keeping the control of public education close to the local people is perhaps the strongest tradition in American education One of the predominant characteristics of American education is the variation in local policies and procedures in terms of unique local conditions The Texas Legislature has the right and duty to maintain public safety and good order This Court, in the *Gobitis* case,[16] supra, recognized its

[16] That portion of the *Gobitis* case dealing with the validity of a statute requiring a compulsory flag salute was overruled in *Board of Education v Barnette* 319 U S 624 (1942)

limitations and the authority of the state legislatures when it said at page 597

> "The precise issue, then, for us to decide is whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious To stigmatize legislative judgment in providing for this universal gesture of respect for the symbol of our national life in the setting of the common school as a lawless inroad on that freedom of conscience which the Constitution protects, would amount to no less than the pronouncement of pedagogical and psychological dogma *in a field where courts possess no marked and certainly no controlling competence*" (Emphasis supplied)

Other decrees have been held in abeyance until an appropriate action could be taken by the proper agency See *Addison v Holly Hill Co*, 322 U S 607 (1944), and *Railroad Commission of Texas v Pullman Company*, 312 U S 496 (1940)

This Court has the authority to remand these cases to the courts of first instance, instructing them to enter decrees implementing the principles enunciated in the Court's opinion of May 17, 1954 See *International Salt Company v United States*, 332 U S 392 (1947) If this decision stands, then on remand the courts of first instance would be familiar with local conditions and could provide a continuing supervision over the program of non-discrimination

They could recognize and adjust the equities between the parties, bringing individual rights into equality without unduly hindering the public school program

CONCLUSION

Since our position before the Court is that of amicus curiae only and not that of a party, ordinarily we would not assume to state specifically the scope of the decrees to be entered by the Court in these cases If the Court attempted to formulate a general decree applicable to all school districts and States, it would be prejudging a multitude of cases not before the Court However, in entering appropriate decrees the Court should consider the following suggestions which are respectfully submitted at the request of the Court

(1) In formulating a decree or decrees, the Court should recognize the long established traditions and usages which have prevailed in those States maintaining a segregated school system, such as Texas, under the separate but equal doctrine as predicated upon the principles announced in *Plessy v Ferguson*, supra These traditions and usages should not be suddenly and abruptly destroyed A period of orderly transition will insure that a decree will meet with no more than passive resistance by the public

(2) In formulating a decree or decrees, this Court must preserve the democratic and salutary principle of local self government inherent in our public school systems Any decree or decrees entered by the Court should protect this principle In this manner the decrees could appropriately be implemented by the local

school authorities as a legislative and administrative matter

(3) The Court, in formulating a decree or decrees, should preserve the right of free selection and choice by the patrons of public schools in selecting the school which will be patronized

Respectfully submitted,

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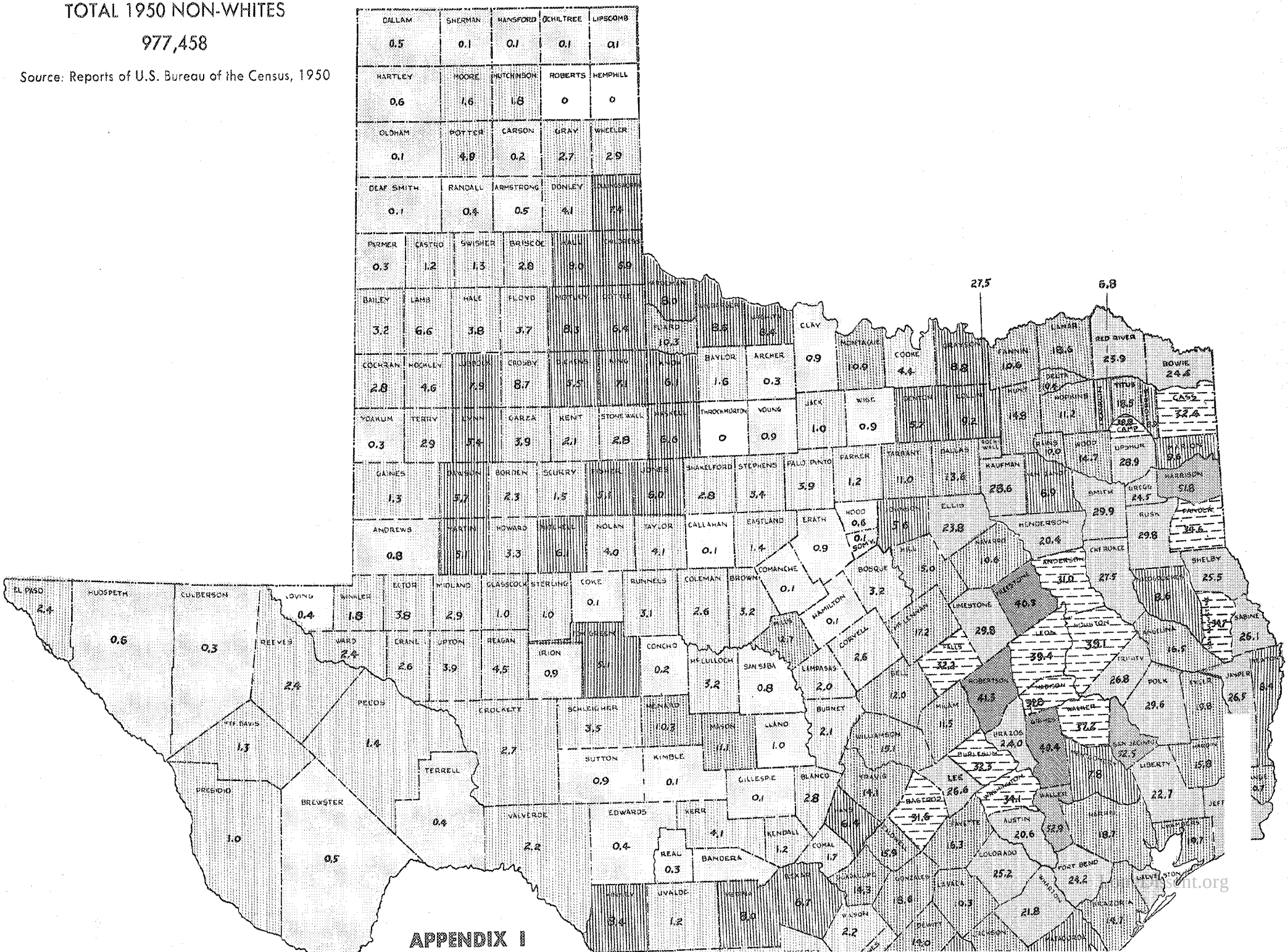
APPENDICES

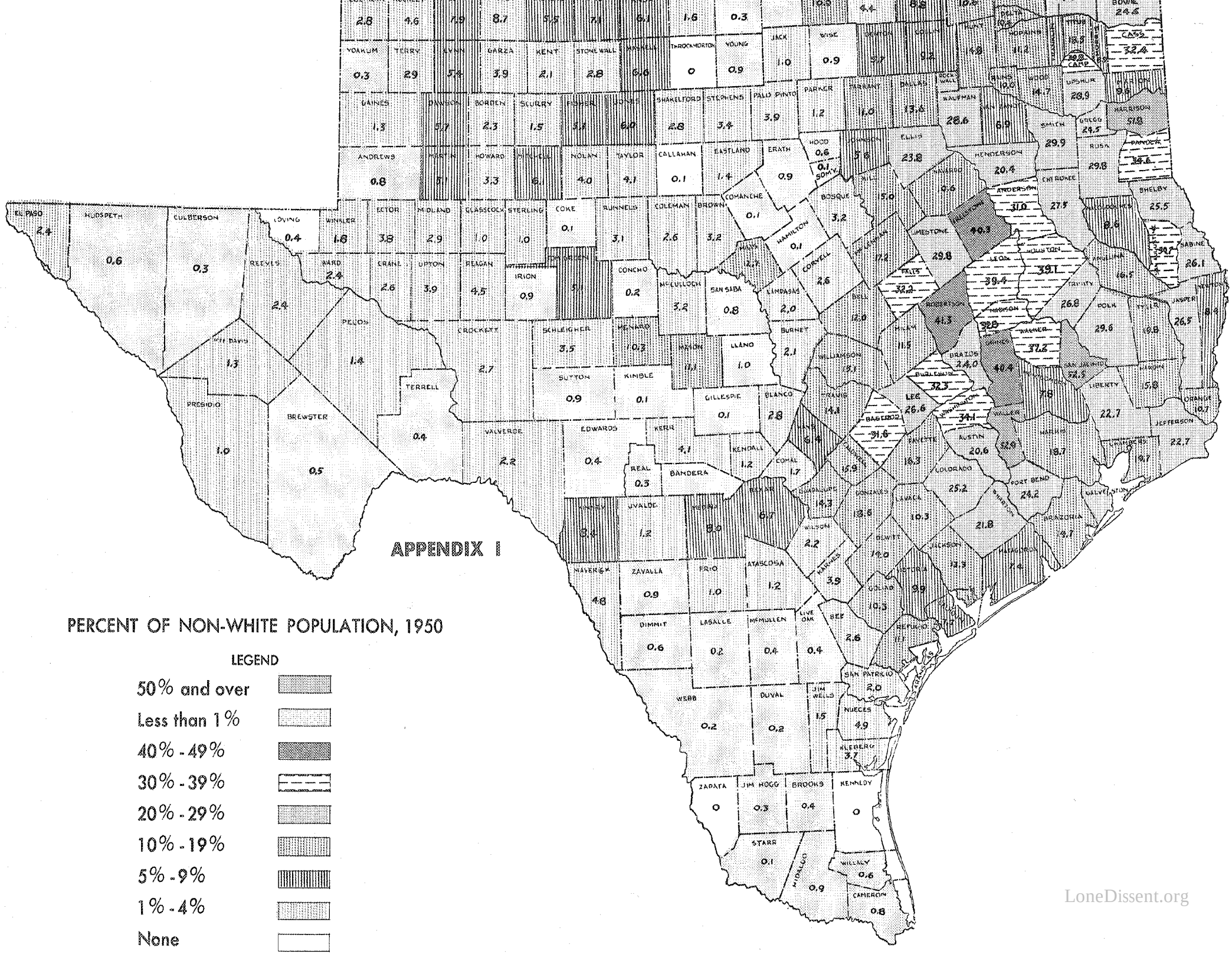
TOTAL POPULATION

TOTAL 1950 NON-WHITES

977,458

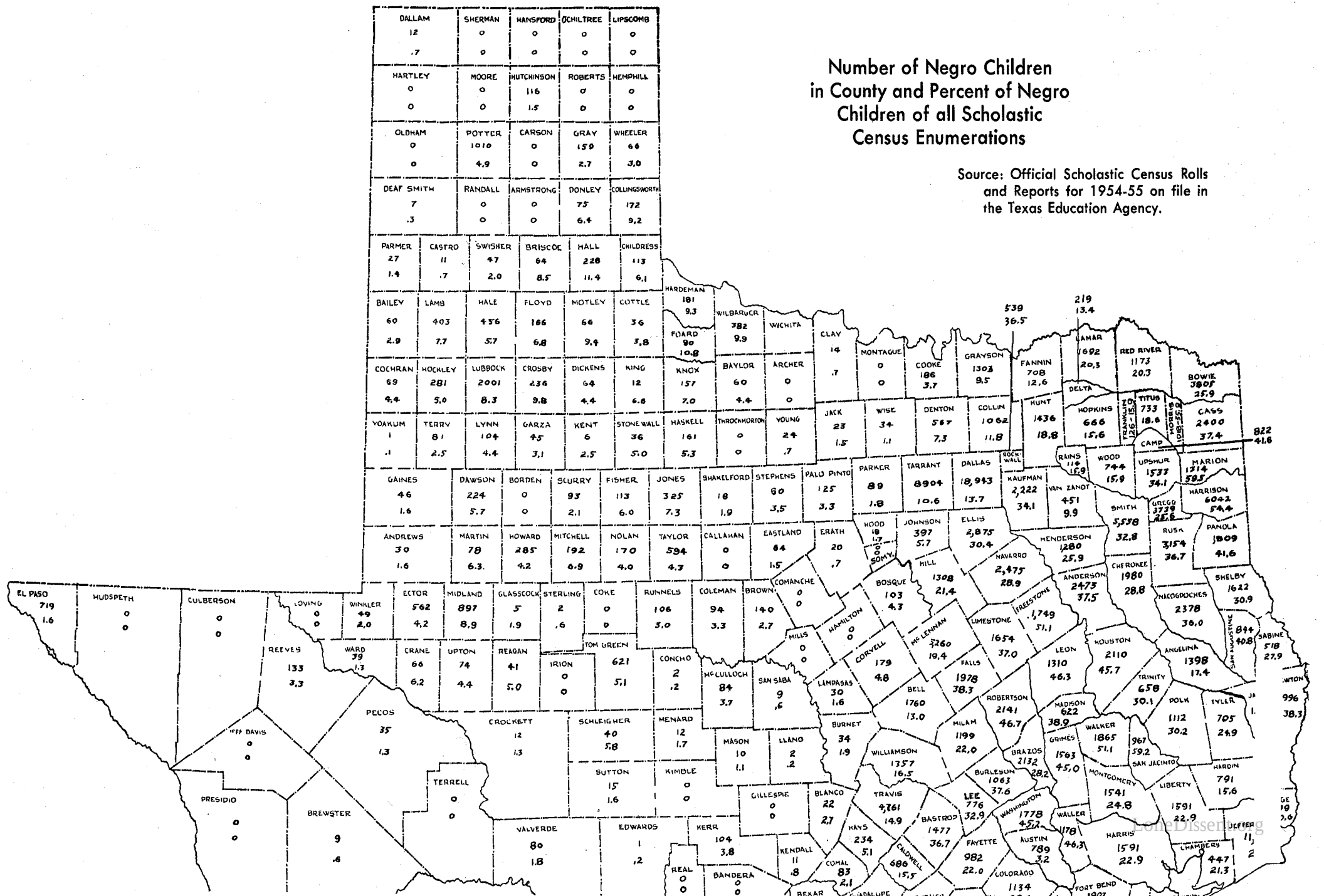
Source: Reports of U.S. Bureau of the Census, 1950





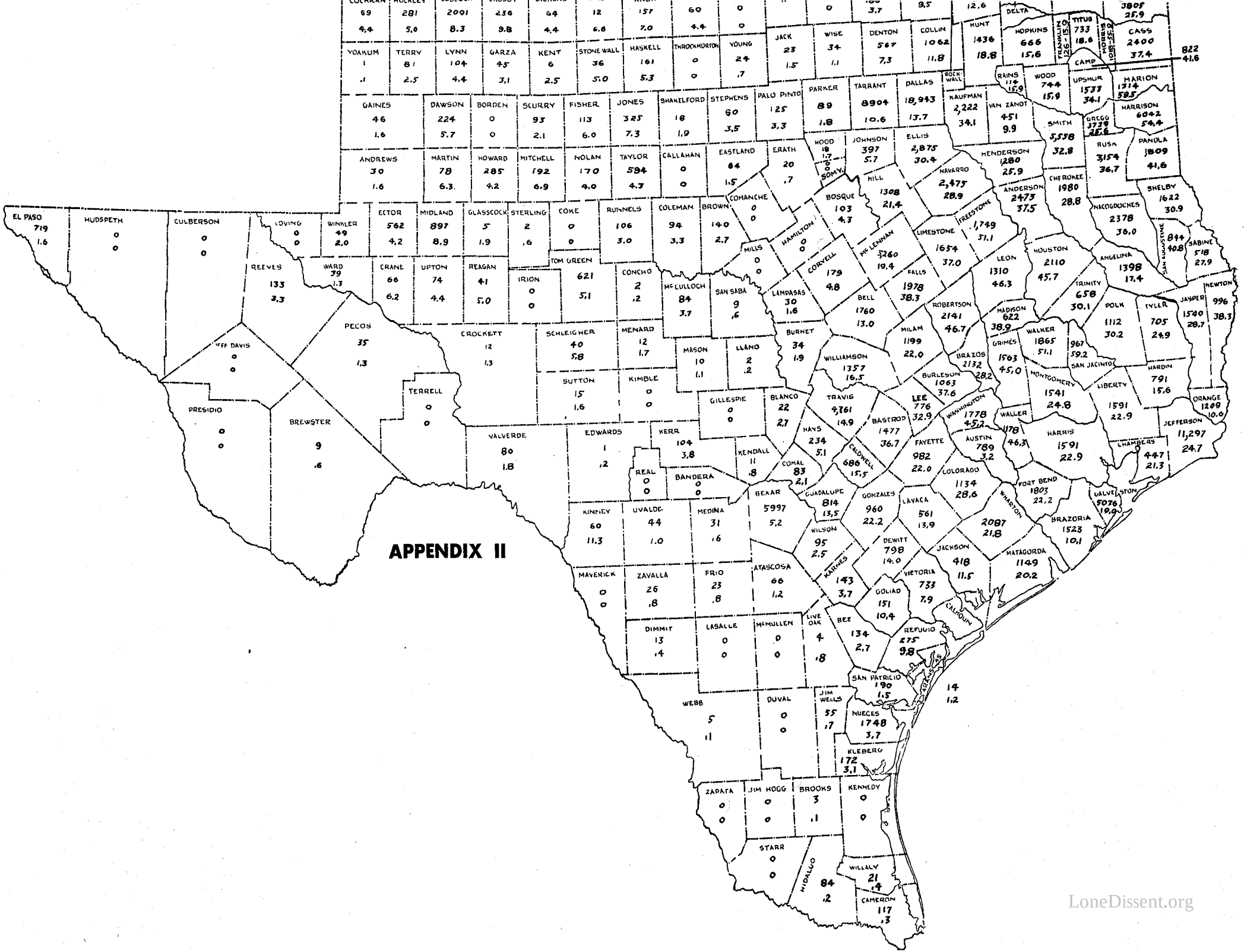
1954-55 SCHOLASTIC

(Children between 6-17 inclusive as of September 1, 1954, Residence as of February 1, 1954)



Number of Negro Children in County and Percent of Negro Children of all Scholastic Census Enumerations

Source: Official Scholastic Census Rolls and Reports for 1954-55 on file in the Texas Education Agency.



254 COUNTIES

13% of Population Ages 6-17 inclusive is Negro

230,546 Negroes, 1,556,372 Whites — 1,786,918 Total Population

166 COUNTIES

10% of Total Negro Population

21,470 Negroes
654,199 Whites

3% of Population is Negro

Counties, no Negroes (41)

[There are more Negroes, 32,559, in Harris County than in this entire area]

88 COUNTIES

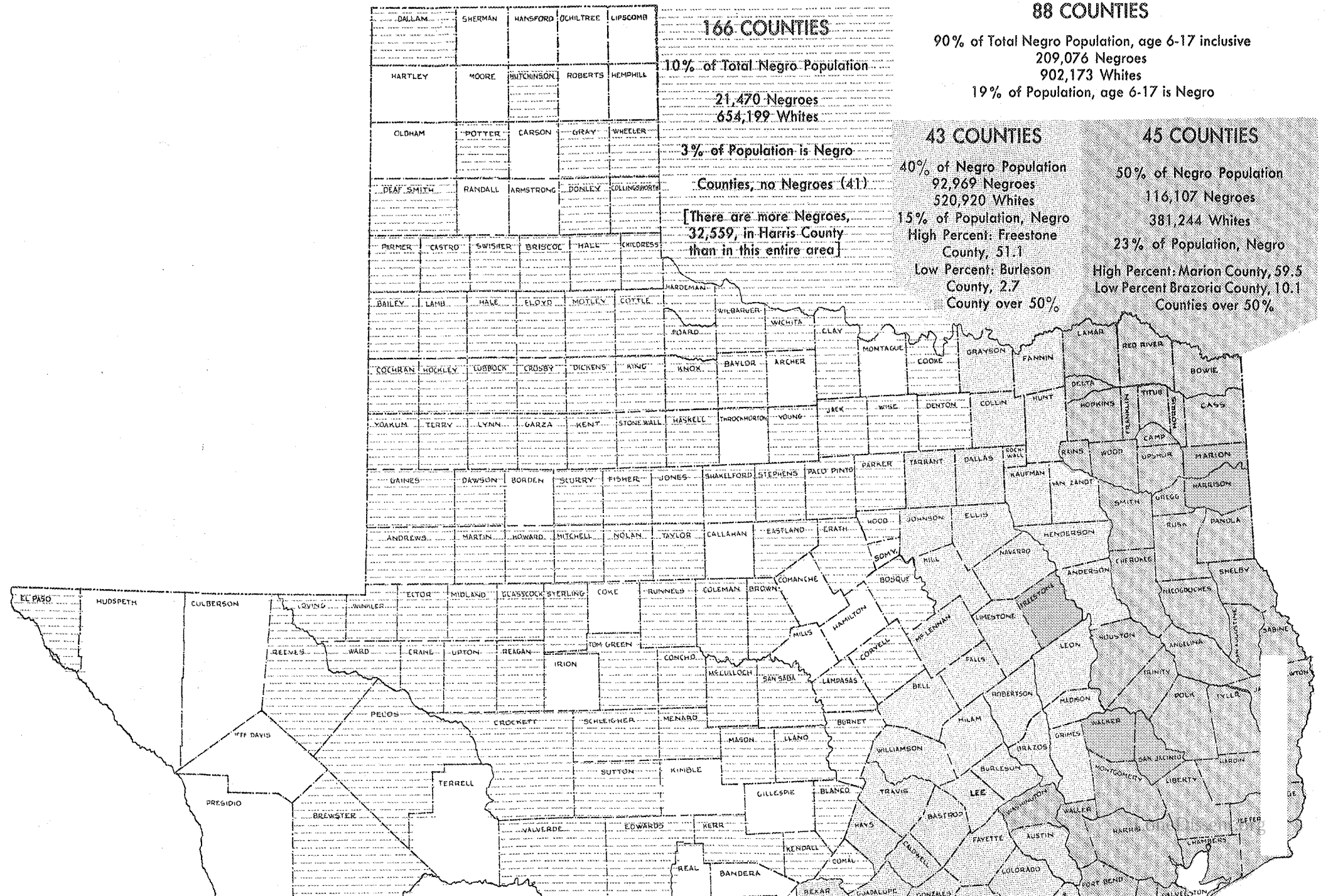
90% of Total Negro Population, age 6-17 inclusive
209,076 Negroes
902,173 Whites
19% of Population, age 6-17 is Negro

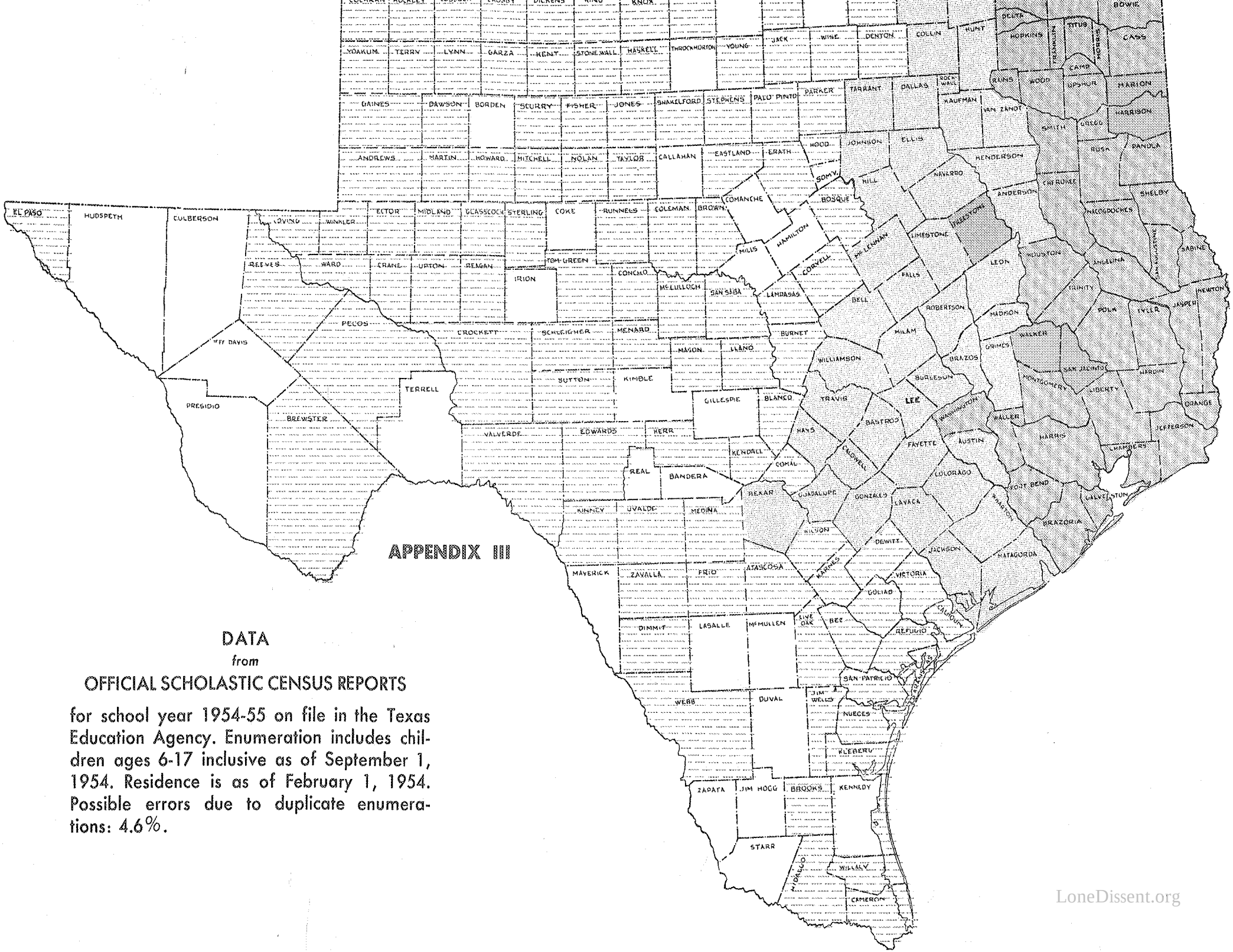
43 COUNTIES

40% of Negro Population
92,969 Negroes
520,920 Whites
15% of Population, Negro
High Percent: Freestone County, 51.1
Low Percent: Burleson County, 2.7
County over 50%

45 COUNTIES

50% of Negro Population
116,107 Negroes
381,244 Whites
23% of Population, Negro
High Percent: Marion County, 59.5
Low Percent Brazoria County, 10.1
Counties over 50%





APPENDIX III

DATA

from

OFFICIAL SCHOLASTIC CENSUS REPORTS

for school year 1954-55 on file in the Texas Education Agency. Enumeration includes children ages 6-17 inclusive as of September 1, 1954. Residence is as of February 1, 1954. Possible errors due to duplicate enumerations: 4.6%.

APPENDIX IV

Educators' Views on Integration

On July 30, 1954, the Attorney General of Texas directed a questionnaire to one hundred and fifty-two Texas school administrative officials One hundred two questionnaires were mailed to white administrators and fifty questionnaires were mailed to Negro administrators Twelve of the questionnaires were directed to county superintendents, fifty were directed to school principals and ninety were directed to district superintendents Responses were received in eighty two instances, eighteen of which were from Negro educators

The questionnaire and evaluated responses are

"We are in the process of compiling data to determine the feasibility of filing an amicus curiae brief in the United States Supreme Court relative to the recent segregation decisions which affects our public school system Our school system operates under legislative authorization, and the Legislature will not convene in Regular Session until January to consider the problem arising by reason of the Supreme Court decision Consequently, if any brief is filed, it should contain a cross-section of the views of educators and the public generally in Texas in an effort to see what impact the decision has made on our public school system and customs

"By reason of your long familiarity with the field of education throughout the State we would like to have an expression of your views on the following questions

"1 In the event of legislative or Supreme Court direction, what, in your opinion, would be a reasonable minimum period of time for working out an integrated system in your district?"

In evaluating responses, a period of five years was arbitrarily set as a division Thirty-six replied that a period of five years or less would be sufficient Forty-two replied that a longer time than five years was necessary Nineteen answers volunteered replies favoring a twelve year plan of integration (beginning with the first grade and adding a new grade each year) Ten of the Negro replies favored a five year or less program, while five thought a longer program was necessary Two Negroes volunteered that they favored the twelve year plan

"2 Do you consider the local problem more acute than the problem on a state wide basis?"

Thirty-nine answered that the local problem was not more acute, as compared to forty-one replies that the local problem was more acute The Negro replies were eleven affirmative, seven negative

"3 Do you think that the established precedent of separate schools would seriously handicap the operation of integrated schools in your area?"

Sixteen responses did not believe the operation of integrated schools would be handicapped by the precedent of separate schools, but sixty-four did believe a handicap would exist Eleven Negroes replied there would be no handicap, and seven replied there would be difficulty with an integrated system

"4 (a) In the event of an integrated system, could all school buildings be utilized?"

Forty-eight responses believed all present school buildings could be used in an integrated program Thirty-three thought that there would be a loss of use in an integrated system Ten Negroes replied that all buildings could be used and seven thought that all buildings could not be used in an integrated system

"4 (b) To what extent are present school buildings situated so that natural zones could be established that would continue to serve substantially the same student body in attendance at the same schools as under present operations?"

Forty replies stated that natural boundaries separated the two races and the schools for each race Thirty-eight responded that no natural boundaries existed in their locality Of the Negro educators, eleven replied that natural boundaries existed, while five answered that natural boundaries did not exist in their locality

"4 (c) If any existing buildings would be unusable in an integrated program, estimate the present value of such buildings "

Forty answered that there would be no loss of buildings in operating an integrated school system Thirty-eight answered that there would be some loss within their district Of the Negro educators nine replied there would be no loss, while six answered that there would be some loss

"5 How will an integrated public school system affect the school teachers in your area?"

Fifteen responded that there would be no affect on school teachers in their districts Fifty-six answers believed the Negro teachers would be adversely affected by an integrated school program Some replies thought white teachers in their districts would refuse to teach in an integrated school The Negro replies seeing no affect within their districts numbered seven, while three feared an adverse affect

"6 If the patrons of your district, both negro and white, were given free choice, what per cent would send their children to the same school now attended?"

Seventy seven replied that 85% or more would continue attending the same school if they had free choice Of this number fourteen answers were from Negro administrators Only three answered that students in their districts would prefer attending integrated schools, and all three replies were by Negro administrators

APPENDIX V

	County	Whites on 1954 1955 Scholastic Census	Negroes on 1954 1955 Scholastic Census	% of Negroes
1	Anderson	4,127	2,473	34 5
2	Andrews	1,885	30	1 6
3	Angelina	6,645	1,398	17 4
4	Aransas	1,154	14	1 2
5	Archer	1,541	0	
6	Armstrong	381	0	
7	Atascosa	5,266	66	1 2
8	Austin	1,977	789	28 5
9	Bailey	1,994	60	2 9
10	Bandera	725	0	
11	Bastrop	2551	1,477	36 7
12	Baylor	1,297	60	4 4
13	Bee	4,831	134	2 7
14	Bell	11,788	1,760	13 0
15	Bexar	109,453	5,997	5 2
16	Blanco	806	22	2 7
17	Borden	176	0	
18	Bosque	2,263	103	4 3
19	Bowie	10,895	3,805	25 9
20	Brazoria	13,514	1,523	10 1
21	Brazos	5,437	2,132	28 17
22	Brewster	1,460	9	6
23	Briscoe	688	64	8 5
24	Brooks	2,336	3	1
25	Brown	4,994	140	2 7
26	Burleson	1,791	1,063	37 6
27	Burnet	1,794	34	1 9
28	Caldwell	3,743	686	15 5
29	Calhoun	2,933	151	4 9

	County	Whites on 1954 1955 Scholastic Census	Negroes on 1954 1955 Scholastic Census	% of Negroes
30	Callahan	1,690	0	
31	Cameron	34,957	117	3
32	Camp	1,153	822	41 6
33	Carson	1,613	0	
34	Cass	4,018	2,400	37 4
35	Castro	1,458	11	7
36	Chambers	1,649	447	21 3
37	Cherokee	4,905	1,980	28 8
38	Childress	1,649	113	6 1
39	Clay	1,861	14	7
40	Cochran	1,503	69	4 4
41	Coke	826	0	
42	Coleman	2,761	94	3 3
43	Collin	7,950	1,062	11 8
44	Collingsworth	1,692	172	9 2
45	Colorado	2,827	1,134	28 6
46	Comal	3,916	83	2 1
47	Comanche	2,408	0	
48	Concho	940	2	2
49	Cooke	4,783	186	3 7
50	Coryell	3,518	179	4 8
51	Cottle	919	36	3 8
52	Crane	994	66	6 2
53	Crockett	893	12	1 3
54	Crosby	2,168	236	9 8
55	Culberson	606	0	
56	Dallam	1,638	12	7
57	Dallas	119,280	18,943	13 7
58	Dawson	3,695	224	5 7
59	Deaf Smith	2,456	7	3
60	Delta	1,416	219	13 4

	County	Whites on 1954 1955 Scholastic Census	Negroes on 1954 1955 Scholastic Census	% of Negroes
61	Denton	7,220	567	7 3
62	De Witt	4,901	798	14 0
63	Dickens	1,380	64	4 4
64	Dimmit	3,505	13	4
65	Donley	1,087	75	6 4
66	Duval	4,533	0	
67	Eastland	4,110	64	1 5
68	Ector	12,923	562	4 2
69	Edwards	541	1	2
70	Ellis	6,570	2,875	30 4
71	El Paso	45,775	719	1 6
72	Erath	2,927	20	7
73	Falls	3,191	1,978	38 3
74	Fannin	4,900	708	12 6
75	Fayette	3,492	982	21 9
76	Fisher	1,777	113	6 0
77	Floyd	2,291	166	6 8
78	Foard	742	90	10 8
79	Fort Bend	6,304	1,803	22 2
80	Franklin	783	126	13 9
81	Freestone	1,675	1,749	51 1
82	Frio	2,785	23	8
83	Gaines	2,796	46	1 6
84	Galveston	21,504	5,036	19 0
85	Garza	1,397	45	3 1
86	Gillespie	2,137	0	
87	Glasscock	255	5	1 9
88	Goliad	1,302	151	10 4
89	Gonzales	3,357	960	22 2
90	Gray	5,727	159	2 7
91	Grayson	12,366	1,303	9 5

	County	Whites on 1954 1955 Scholastic Census	Negroes on 1954 1955 Scholastic Census	% of Negroes
92	Gregg	10,895	3,739	25 5
83	Grimes	1,911	1,563	45 0
94	Guadalupe	5,228	814	13 5
95	Hale	7,618	456	5 7
96	Hall	1,770	228	11 4
97	Hamilton	1,790	0	
98	Hansford	989	0	
99	Hardeman	1,769	181	9 3
100	Hardin	4,268	791	15 6
101	Harris	156,638	32,559	17 2
102	Harrison	5,059	6,042	54 4
103	Hartley	233	0	
104	Haskell	2,892	161	5 3
105	Hays	4,332	234	5 12
106	Hemphill	803	0	
107	Henderson	3,657	1,280	25 9
108	Hidalgo	4,511	84	2
109	Hill	4,792	1,308	21 4
110	Hockley	5,391	281	5 0
111	Hood	1,054	18	1 2
112	Hopkins	3,595	666	15 6
113	Houston	2,511	2,110	45 7
114	Howard	6,423	285	4 2
115	Hudspeth	868	0	
116	Hunt	6,188	1,436	18 8
117	Hutchinson	7,511	116	1 5
118	Irion	355	0	
119	Jack	1,534	23	1 5
120	Jackson	3,221	418	11 5
121	Jasper	3,834	1,540	28 7
122	Jeff Davis	415	0	

	County	Whites on 1954 1955 Scholastic Census	Negroes on 1954 1955 Scholastic Census	% of Negroes
123	Jefferson	34,353	11,297	24 7
124	Jim Hogg	1,340	0	
125	Jim Wells	7,757	55	7
126	Johnson	6,595	397	5 7
127	Jones	4,137	325	7 3
128	Karnes	3,724	143	3 7
129	Kaufman	4,288	2,222	34 1
130	Kendall	1,311	11	8
131	Kenedy	142	0	
132	Kent	236	6	2 5
133	Kerr	2,602	104	3 8
134	Kimble	868	0	
135	King	169	12	6 6
136	Kinney	471	60	11 3
137	Kleberg	5,443	172	3 1
138	Knox	2,069	157	7 0
139	Lamar	6,644	1,692	20 3
140	Lamb	4,855	403	7 7
141	Lampasas	1,852	30	1 6
142	La Salle	2,800	0	
143	Lavaca	3,484	561	13 9
144	Lee	1,582	776	32 9
145	Leon	1,517	1,310	46 3
146	Liberty	5,368	1,591	22 9
147	Limestone	2,822	1,654	36 9
148	Lipscomb	725	0	
149	Liveoak	2,334	4	8
150	Llano	904	2	2
151	Loving	20	0	
152	Lubbock	22,164	2,001	8 3
153	Lynn	2,240	104	4 4

	County	Whites on 1954 1955 Scholastic Census	Negroes on 1954 1955 Scholastic Census	% of Negroes
154	Madison	978	622	38 9
155	Marion	896	1,314	59 5
156	Martin	1,160	78	6 3
157	Mason	893	10	1 1
158	Matagorda	4,537	1,149	20 2
159	Maverick	3,430	0	
160	McCulloch	2,184	84	3 7
161	McLennan	21,888	5,260	19 4
162	McMullen	200	0	
163	Medina	4,730	31	6
164	Menard	685	12	1 7
165	Midland	9,143	897	8 9
166	Milam	4,249	1,199	22 0
167	Mills	1,024	0	
168	Mitchell	2,570	192	6 9
169	Montague	3,515	0	
170	Montgomery	4,680	1,541	24 8
171	Moore	3,562	0	
172	Morris	1,816	1,018	35 9
173	Motley	633	66	9 4
174	Nacogdoches	4,218	3,278	36 0
175	Navarro	6,076	2,475	28 9
176	Newton	1,604	996	38 3
177	Nolan	4,083	170	4 0
178	Nueces	45,914	1,748	3 7
179	Ochiltree	1,114	0	
180	Oldham	653	0	
181	Orange	10,179	1,209	10 6
182	Palo Pinto	3,694	125	3 3
183	Panola	2,542	1,809	41 6
184	Parker	4,768	89	1 8

	County	Whites on 1954 1955 Scholastic Census	Negroes on 1954 1955 Scholastic Census	% of Negroes
185	Parmer	1,867	27	1 4
186	Pecos	2,699	35	1 3
187	Polk	2,568	1,112	30 2
188	Potter	19,370	1,010	4 9
189	Presidio	1,536	0	
190	Rains	729	114	13 5
191	Randall	1,316	0	
192	Reagan	780	41	5 0
193	Real	480	0	
194	Red River	3,155	1,173	27 1
195	Reeves	3,842	133	3 3
196	Refugio	2,522	275	9 8
197	Roberts	197	0	
198	Robertson	2,439	2,141	46 7
199	Rockwall	938	539	36 5
200	Runnels	3,437	106	3 0
201	Rusk	5,439	3,154	36 7
202	Sabine	1,336	518	27 9
203	San Augustine	1,222	844	40 8
204	San Jacinto	666	967	59 2
205	San Patricio	12,143	190	1 5
206	San Saba	1,599	9	6
207	Schleicher	654	40	5 8
208	Scurry	4,236	93	2 1
209	Shackelford	840	16	1 9
210	Shelby	3,623	1,622	30 9
211	Sherman	574	0	
212	Smith	11,385	5,558	32 8
213	Somervell	493	0	
214	Starr	5,053	0	
215	Stephens	1,646	60	3 5

	County	Whites on 1954 1955 Scholastic Census	Negroes on 1954 1955 Scholastic Census	% of Negroes
216	Sterling	308	2	6
217	Stonewall	681	36	5 0
218	Sutton	895	15	1 6
219	Swisher	2,318	47	2 0
220	Tarrant	74,977	8,904	10 6
221	Taylor	13,248	594	4 3
222	Terrell	656	0	
223	Terry	3,122	81	2 5
224	Throckmorton	634	0	
225	Titus	3,207	733	18 6
226	Tom Green	11,538	621	5 1
227	Travis	27,111	4,761	14 9
228	Trinity	1,524	658	30 1
229	Tyler	2,121	705	24 9
230	Upshur	2,965	1,533	34 1
231	Upton	1,598	74	4 4
232	Uvalde	4,307	44	1 0
233	Val Verde	4,440	80	1 8
234	Van Zandt	4,086	451	9 9
235	Victoria	8,502	733	7 9
236	Walker	1,786	1,865	51 1
237	Waller	1,367	1,178	46 29
238	Ward	2,870	39	1 3
239	Washington	2,333	1,778	45 2
240	Webb	16,089	5	1
241	Wharton	7,504	2,087	21 8
242	Wheeler	2,104	66	3 0
243	Wichita	17,203	1,219	6 6
244	Wilbarger	3,490	382	9 9
245	Willacy	5,490	21	4
246	Williamson	6,851	1,357	16 5

	County	Whites on 1954 1955 Scholastic Census	Negroes on 1954 1955 Scholastic Census	% of Negroes
247	Wilson	3,634	95	2 5
248	Winkler	2,415	49	2 0
249	Wise	3,096	34	1 1
250	Wood	3,932	744	15 9
251	Yoakum	1,465	1	1
252	Young	3,405	24	7
253	Zapata	1,035	0	
254	Zavala	3,293	26	8
	TOTALS	1,556,372	230,546	12 9