THE DOWNFALL OF SEPARATE BUT EQUAL:

BROWN V. BOARD OF EDUCATION

THE SWEATT DECISION WAS A MAJOR BREAKTHROUGH FOR GROUPS CONTESTING THE SEPARATE BUT EQUAL DOCTRINE IN PUBLIC EDUCATION. THE COURT WAS UNWILLING TO GO ALL THE WAY AND REVERSE PLESSY V. FERGUSON, BUT THE SWEEPING LANGUAGE IN SWEATT MADE IT APPARENT THAT THE COURT MIGHT GO ALL THE WAY IF PRESENTED AGAIN WITH THE ISSUE. ACCORDINGLY, OPPONENTS OF SEGREGATION WASTED LITTLE TIME IN LAUNCHING AN ALL-OUT ATTACK ON THE SEPARATE BUT EQUAL DOCTRINE AS PRACTICED AT THE SECONDARY AND ELEMENTARY SCHOOL LEVELS. THE BATTLEGROUNDS FOR THE ATTACK WERE IN SOUTH CAROLINA, KANSAS, VIRGINIA, DELAWARE, AND THE DISTRICT OF COLUMBIA. THE FOUR CASES INVOLVING STATE ACTION WERE BROUGHT UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT; THE DISTRICT CASE WAS ARGUED UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT. THE FOUR CASES ARISING IN THE STATES WERE CONSOLIDATED FOR PURPOSES OF DECISION AND REPORTED OFFICIALLY AS BROWN V. BOARD OF EDUCATION. THEY ARE EXAMINED IN DEPTH IN THIS APPENDIX.

SEEDS OF DISCONTENT

SOUTH CAROLINA

Our children are forced to attend schools that are old and dilapidated. There is no plumbing and conditions are unsanitary and unhealthy. There are old stoves in each room for heat and the children must try to supply their own fuel. There are no janitors to keep the building clean. We don’t have enough teachers and the classes are overcrowded. Our kids aren’t taught chemistry, physics, industrial arts and trades, or general science because there are no facilities for such. And, of course, the library facilities are woefully inadequate. What’s more, many of our children must walk long distances since no bus transportation is provided. Now the white children go to schools that are new, safe, sanitary, healthy, well lighted and equipped, modern in every respect and maintained in first-class condition. Their library facilities are excellent and the children who live good distances from school are provided free bus transportation.

The preceding paragraph is a paraphrase of the charges made by 119 Negro parents against school authorities of Clarendon County Board of Education and the Trustees of School District No. 22 of that county. They were contained in a complaint filed on November 11, 1949. After detailing their grievances, the parents called on school officials to “immediately cease discriminating against Negro children... and... make available to [them] educational advantages and facilities equal in all respects to that which is being provided for whites.” A public hearing was requested before the board for a more detailed presentation of their complaint. On February 9, 1950, the board held the requested hearing. The parents were represented at the hearing by lawyers from the National Association for the Advancement of Colored People, who had also assisted them in formulating the earlier complaint. Nothing much came out of this forum, and it could appropriately have
been characterized as a fruitless session rehashing complaints already cited.

The board formally replied to the complaints on February 20. It said that it had a duty to maintain separate schools for Negroes and whites in accordance with the South Carolina Constitution, which states that “separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race.” It denied, however, the existence of gross inequalities between white and Negro schools. Insurance statistics were cited to show that the buildings were substantially equal for both races. The differentials in teachers’ salaries resulted from the lower average daily attendance of Negro children. The board also rejected the allegations about plumbing, heating, janitorial services, and other physical conditions as being based upon “incorrect information.” Concerning the curricula, the Board noted that in fact facilities available at the Negro schools were not available for whites in the district. Accordingly, the Board found that “the facilities afforded . . . white and Negro children of District No. 22, though separate, [were] substantially equal.”

FROM THE BOARD TO THE COURTS: THE ATTACK

Having been rebuffed by the board, the Negro petitioners turned to the judiciary for relief. On December 22, 1950, in the name of Harry Briggs, Jr., they brought action in federal district court seeking a declaratory judgment as to their rights in the school controversy. Represented by top lawyers of the NAACP, Thurgood Marshall and Robert L. Carter, the plaintiffs asked the court to: (1) declare that the policy, practice, custom, and usage of the defendant school board in maintaining segregated schools violated the equal protection clause of the Fourteenth Amendment, (2) declare the South Carolina constitutional and statutory provisions requiring segregated schools unconstitutional as violative of equal protection, and (3) issue a permanent injunction restraining and enjoining the defendants from making racial distinctions in making educational opportunities available.

The case was heard on May 28, 1951. Counsel for the Negro plaintiffs made it clear from the outset that the suit was not limited to an attack on inequalities between white and Negro schools, but was a broadside attack on the constitutionality of the separate but equal doctrine itself. To buttress the inequality charge, several professional educators were retained by the plaintiffs to conduct surveys of the schools in question. These surveys indicated that though segregated education shortchanged both groups in obtaining adequate physical facilities and quality classroom instruction, the Negro child was always hardest hit.

The plaintiffs made their sharpest attack on the constitutionality of the separate but equal doctrine itself. They presented testimony from expert psychologists to show the harmful effects of segregation on the development of the Negro child’s personality. One psychologist, Dr. Kenneth Clark of the City College of New York, employed a doll test with several Negro children in District No. 22 as subjects to determine their sensitivity to racial discrimination. As a result of these tests, Dr. Clark testified:

. . . The conclusion I was forced to reach was that these children in Clarendon County, like other human beings who are subjected to an obviously inferior status in the society in which they live, have been definitely harmed in the development of their personalities; that the signs of instability in their personalities are clear, and I think that every psychologist would accept and interpret these signs as such.

Dr. David Krech, professor of psychology at the University of California in Berkeley, said:

Legal segregation, because it is legal, because it is obvious to everyone, gives what we call in our lingo environmental support for the belief that Negroes are in some way different from and inferior to white people, and that in turn, of course, supports and strengthens beliefs of racial differences, of racial inferiority. . . . Legal segregation of the educational system starts this process of differentiating the Negro from the white at a most crucial age. Children, when they are beginning to form their perceptions of people, at the very crucial age they are immediately put into the situation which demands of them, legally, practically, that they see Negroes as somehow of a different group, different being, than whites....

It is my opinion that except in rare cases, a child who has for ten or twelve years lived in a community where legal segregation is practiced, furthermore, in a community where other beliefs
and attitudes support racial discrimination, . . .
will probably never recover from whatever
harmful effect racial prejudice and discrimination
can wreak.

A professor of educational psychology at Columbia
University, Dr. Harold McNalley, maintained that
Negro children could not receive equal classroom in-
structional opportunities in a segregated school. Dr.
McNalley testified:

. . . One of the purposes of education, in a country
such as ours, is to develop in each individual a
real meaning from the phrase “Respect for
Personalities” or “Respect for Individualities” and
respect for others—the historic concept of equal-
ity. And if we accept children for instruction,
whether we accept them on the basis of race, on
the basis of creed or what have you, . . . both
groups are being discriminated against in terms of
good education for a good Democratic State. That
is, I think the white children as well as the colored
children are being shortchanged in that respect.
They are not having the opportunity to learn to
value each other and one another as individuals, a
person. And, secondly, that there is basically im-
ploied in the separation—the two groups in this
case of Negro and white—that is some difference
in the two groups which does not make it feasible
for them to be educated together, which I would
hold to be untrue. Furthermore, by separating the two
groups there is implied stigma on at least one of
them. And I think that that would probably be
pretty generally conceded. We thereby relegate
one group to the status of more or less second-
class citizens. Now, it seems to me that if that is
true—and I believe it is—that it would be impos-
sible to provide equal facilities as long as one
legally accepts them.

“Give Us Time”: The Defense Pleads
Counsel for the defendants, headed by South
Carolina’s attorney general, centered their defense
on the contention that separate but equal was still a
valid constitutional doctrine and that the state’s
constitutional and statutory provisions requiring
separate schools based upon race were not contrary
to the Fourteenth Amendment. The state admitted
that inequalities existed between white and Negro
schools, but pointed out that the state legislature
had recently appropriated funds for a massive
school construction program to eliminate them. To
strengthen this contention, the defendants pre-

sented the testimony of E. R. Crow, director of the
State Educational Finance Commission. Crow testi-
fied that his agency had been asked by the Board
of Trustees of District No. 22 to survey the schools
with a view toward improving them under the state
aid plan. This line of testimony was supported by
H. B. Bechman, superintendent of District No. 22.
Accordingly, counsel for the defendants asked the
court for a reasonable time in which to eliminate
the inequalities, allowing, of course, for the court to
retain jurisdiction of the case, so that relief could be
granted if the school board should fail to eliminate
inequalities.

The defense gave brief attention to the plain-
tiff’s contention that the separate but equal formula
was unconstitutional. No experts were presented to
counter expert testimony of the plaintiffs. The de-
fense did ask several of the state’s witnesses to
view the consequence of eliminating segregated
education. Director Crow said that to mix the
schools now could possibly eliminate public edu-
cation altogether:

The existence of the feeling of separateness be-
tween the races of this State would make it such that
it would be impossible to have peaceable associa-
tion with each other in the public schools. In my
opinion it would be impossible to have sufficient ac-
ceptance of the idea of mixed groups attending the
same schools to make it possible to have public ed-
cucation on that basis at all.

The District Court Decides
On June 23, 1951, a three-judge court, composed of
Chief Judge John J. Parker of the Court of Appeals
for the Fourth Circuit and District Judges George
Bell Timmerman and J. Waites Waring, handed
down its decision. The majority, with Judge Waring
dissenting, upheld the South Carolina constitutional
and statutory provisions and denied the injunction
forbidding segregation in District No. 22. The court
did accept, however, the defendants’ admission of
inequality in the educational facilities and held that
the Negro plaintiffs were entitled to equal facilities.
Accordingly, the court ordered the defendants to pro-
ceed at once to equalize the facilities. The court fur-
ther ordered the board to make a progress report
within six months.
Chief Judge Parker delivered the opinion of the Court.

At the beginning of the hearings the defendants admitted upon the record that "the educational facilities, equipment, curricula, and opportunities afforded in District #22 for colored pupils are not substantially equal to those afforded for white pupils." The evidence offered in the case fully sustains this admission.

There can be no question but that where separate schools are maintained for Negroes and whites, the educational facilities and opportunities afforded by them must be equal. The state may not deny to any person within its jurisdiction the equal protection of the laws, says the Fourteenth Amendment; and this means that, when the state undertakes public education, it may not discriminate against any individual on account of race but must offer equal opportunity to all. . . . We think it clear, therefore, that plaintiffs are entitled to a declaration to the effect that the school facilities now afforded Negro children in District #22 are not equal to the facilities afforded white children in the district and to mandatory injunction requiring that equal facilities be afforded them. How this shall be done is a matter for the school authorities and not the court, so long as it is done in good faith and equality of facilities is afforded; but it must be done promptly and the court in addition to issuing an injunction to that effect will retain the cause upon its docket for further orders and will require that defendants file within six months a report showing the action that has been taken by them to carry out the order.

Plaintiffs rely upon expressions contained in opinions relating to professional education such as Sweatt v. Painter, 339 U.S. 629; McLaurin v. Oklahoma State Regents, 339 U.S. 637; and McKissick v. Carmichael, 4 Cir. 187 2d 949, where equality of opportunity was not afforded. Sweatt v. Painter, however, instead of helping them, emphasized that the separate but equal doctrine of Plessy v. Ferguson has not been overruled, since the Supreme Court, although urged to overrule it, expressly refused to do so and based its decision on the ground that the educational facilities offered Negro law students in that case were not equal to those offered white students. The decision in McKissick v. Carmichael was based on the same ground. The case of McLaurin v. Oklahoma State Regents involved humiliating and embarrassing treatment of a Negro graduate student to which no one should have been required to submit. Nothing of this sort is involved here.

The problem of segregation as applied to graduate and professional education is essentially different from that involved in segregation in education at the lower levels. In the graduate and professional schools, the problem is one of affording equal educational facilities to persons sui juris and of mature personality. Because of the great expense of such education and the importance of the professional contacts established while carrying on the educational process, it is difficult for the state to maintain segregated schools for Negroes in this field which will afford them opportunities for educational and professional advancement equal to those afforded
by the graduate and professional schools maintained
for white persons. What the courts have said, and all
they have said in the cases upon which plaintiffs rely,
is that notwithstanding these difficulties, the oppor-
tunity afforded the Negro student must be equal to
that afforded the white student and the schools estab-
lished for furnishing this instruction to white persons
must be opened to Negroes if this is necessary to
give them the equal opportunity which the
Constitution requires.

The problem of segregation at the common school
level is a very different one. At this level, as good edu-
cation can be afforded in Negro schools as in white
schools and the thought of establishing professional
contacts does not enter into the picture. Moreover, edu-
cation at this level is not a matter of voluntary choice
on the part of the student but of compulsion by the
state. The student is taken from the control of the fam-
ily during school hours by compulsion of law and
placed in control of the school, where he must associ-
ate with his fellow students. The law thus provides that
the school shall supplement the work of the parent in
the training of the child and in doing so it is entering a
delicate field and one fraught with tensions and diffi-
culties. In formulating educational policy at the com-
mon school level, therefore, the law must take account,
not merely of the matter of affording instruction to the
student, but also of the wishes of the parents as to the
upbringing of the child and his associates in the forma-
tive period of childhood and adolescence. If public ed-
cucation is to have the support of the people through
their legislature, it must not go contrary to what they
dem for the best interest of their education.

We conclude, therefore, that if equal facilities are of-
fered, segregation of the races in the public schools as
prescribed by the Constitution and laws of South
Carolina is not itself violative of the Fourteenth
Amendment. We think that this conclusion is sup-
ported by overwhelming authority which we are not at
liberty to disregard on the basis of theories advanced
by a few educators and sociologists. Even if we felt at
liberty to disregard other authorities, we may not ig-
nore the unreversed decisions of the Supreme Court of
the United States which are squarely in point and con-
clusive of the question before us. . . .

. . .

Decree will be entered finding that the constitutional
and statutory provisions requiring segregation in the
public schools are not of themselves violative of the
Fourteenth Amendment, but that defendants have
denied to plaintiffs rights guaranteed by the amend-
ment in failing to furnish for Negroes in School
District #22 educational facilities and opportunities
equal to those furnished white persons, and injunc-
tion will issue directing defendants promptly to fur-
nish Negroes within the district educational facilities
and opportunities equal to those furnished white per-
sons and to report to the court within six months as
to the action that has been taken by them to effectu-
ate the court decree.

JUDGE J. WAITES WARING, dissenting:

The case came on for a trial upon the issues as pre-
sented in the Complaint and Answer. But upon the
call of the case, Defendants’ counsel announced that
they wished to make a statement on behalf of the
Defendants making certain admissions and praying
that the Court make a finding as to inequalities in re-
spect to buildings, equipment facilities, curricula and
other aspects of the schools provided for children in
School District 22 in Clarendon County and giving
the public authorities time to formulate plans for end-
ing such inequalities. In this statement Defendants
claim that they never had intended to discriminate
against any of the pupils and although they had filed
an answer to the Complaint some five months ago,
denying inequalities, they now admit that they had
found some; but rely upon the fact that subsequent to
the institution of the suit, James F. Byrnes, the
Governor of South Carolina, had stated in his inau-
ugural address that the state must take steps to provide
money for improving educational facilities and that
thereafter, the Legislature had adopted certain legis-
lation. They stated that they hoped that in time they
would obtain money as a result of the foregoing and
improve the school situation. This statement was al-
lowed to be filed and considered as an amendment to
the Answer.

By this maneuver, the Defendants have endeav-
ored to induce this court to avoid the primary purpose
of the suit. And if the court should follow this sugges-
tion and fail to meet the issues raised by merely con-
sidering this case in the light of another “separate but
equal” case, the entire purpose and reason for the in-
titution of the case and the convening of a three-
judge court would be voided. The sixty-six (66)
plaintiffs in this cause have brought suit at what must
have cost much in effort and financial expenditures.

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They are here represented by six attorneys, all, save one, practicing lawyers from without the State of South Carolina and coming here from a considerable distance. The Plaintiffs have brought a large number of witnesses exclusive of themselves. As a matter of fact, they called and examined eleven witnesses. They said that they had a number more coming who did not arrive in time owing to the shortening of the proceedings and they also stated that they had on hand and had contemplated calling a large number of other witnesses but it became unnecessary by reason of the foregoing admissions by Defendants. It certainly appears that large expenses must have been caused by the institution of this case and great efforts expended in gathering data, making a study of the issue involved, interviewing and bringing numerous witnesses, some of whom are foremost scientists in America. And in addition to all of this, these sixty-six Plaintiffs have not merely expended their time and money in order to test this important Constitutional question, but they have shown unexampled courage in bringing and presenting this cause at their own expense in the face of the long-established and age-old pattern of the way of life which the State of South Carolina has adopted and practiced and lived in since and as a result of the institution of human slavery.

If a case of this magnitude can be turned aside and a court refuse to hear these basic issues by the mere device of an admission that some buildings, blackboards, lighting fixtures and toilet facilities are unequal but that they may be remedied by the spending of a few dollars, then indeed people in the plight in which these Plaintiffs are, have no adequate remedy or forum in which to air their wrongs. If this method of judicial evasion be adopted, these very infant Plaintiffs now pupils in Clarendon County will probably be bringing suits for their children and grandchildren decades or rather generations hence in effort to get for their descendants what are today denied them. If they are entitled to any rights as American citizens, they are entitled to have these rights now and not in the future. And no excuse can be made to deny them these rights which are theirs under the constitution and laws of America by the use of the false doctrine and pattern called “separate but equal” and it is the duty of the Court to meet these issues simply and factually and without fear, sophistry and evasion. If this be the measure of justice to be meted out to them, then indeed, hundreds, nay thousands of cases will have to be brought and in each case thousands of dollars will have to be spent for the employment of legal talent and scientific testimony and then the cases will be turned aside, postponed or eliminated by devices such as this.

We should be unwilling to straddle or avoid this issue and if the suggestion made by these defendants is to be adopted as the type of justice to be meted out by this court, then I want no part of it.

And so we must and do face, without evasion or equivocation, the question as to whether segregation in education in our schools is legal or whether it cannot exist under our American system as particularly enunciated in the Fourteenth Amendment to the Constitution of the United States. . . .

. . .

It is openly and frankly admitted by all parties that the present facilities are hopelessly disproportional and no one knows how much money would be required to bring the colored school system up to parity with the white school system. The estimates as to the cost merely of equalization of physical facilities run anywhere from forty to eighty million dollars. Thus, the position of the Defendants is that the rights applied for by the Plaintiffs are to be denied now because the State of South Carolina intends (as evidenced by a general appropriations bill enacted by the legislature and a speech made by the Governor) to issue bonds, impose taxes, raise money and do something about the inadequate schools in the future. There is no guarantee or assurance as to when the money will be available. As yet, no bonds have been printed or sold. No money is in the treasury. No plans have been drawn for school buildings or order issued for materials. No allocations have been made to the Clarendon school district or any other school districts and not even application blanks have, as yet, been printed. But according to Mr. Crow, the Clarendon authorities have requested him to send them blanks for the purpose, if and when they come into being. Can we seriously consider this a bona fide attempt to provide equal facilities for our school children?

. . .

. . . The Plaintiffs brought many witnesses, some of them of national reputation in various educational fields. It is unnecessary for me to review or analyze their testimony. But they who have made studies of education and its effect upon children, starting with the lowest grades and studying them up through and into high school, unequivocally testified that aside from inequality in housing appliances and equipment,
the mere fact of segregation itself had a deleterious and warping effect upon the minds of children. These witnesses testified as to their study and researches and their actual tests with children of varying ages and they showed that the humiliation and disgrace of being set aside and segregated as unfit to associate with others of different color had an evil and ineradicable effect upon the mental processes of our young which would remain with them and deform their view of life until and throughout their maturity. This applies to white as well as Negro children. These witnesses testified from actual study and tests in various parts of the country, including tests in the actual Clarendon school district under consideration. They showed beyond a doubt that the evils of segregation and color prejudice come from early training. And from their testimony as well as from common experience and knowledge and from our own reasoning, we must unavoidably come to the conclusion that racial prejudice is something that is acquired and that that acquiring is in early childhood. . . . If segregation is wrong, then, the place to stop it is in the first grade and not in graduate colleges.

From their testimony, it was clearly apparent, as it should be to any thoughtful person, irrespective and having such expert testimony, that segregation in education can never produce equality and that it is an evil that must be eradicated. This case presents the matter clearly for adjudication and I am of the opinion that all of the legal guideposts, expert testimony, common sense and reason point unerringly to the conclusion that the system of segregation in education adopted and practiced in the State of South Carolina must go and must go now.

As heretofore shown, the courts of this land have stricken down discrimination in higher education and have declared unequivocally that segregation is not equality. But these decisions have pruned away only the noxious fruits. Here in this case, we are asked to strike its very root. Or rather, to change the metaphor, we are asked to strike at the cause of infection and not merely at the symptoms of disease. And if the courts of this land are to render justice under the laws without fear or favor, justice for all men and all kinds of men, the time to do it is now and the place is in the elementary schools where our future citizens learn their first lessons to respect the dignity of the individual in a democracy.

To me the situation is clear and important, particularly at this time when our national leaders are called upon to show to the world that our democracy means what it says and that it is a true democracy and there is no under-cover suppression of the rights of any of our citizens because of the pigmentation of their skins. And I had hoped that this court would take this view of the situation and make a clear-cut declaration that the State of South Carolina should follow the intent and meaning of the Constitution of the United States and that it shall not abridge the privileges accorded to or deny equal protection of its laws to any of its citizens. But since the majority of this court feel otherwise, and since I cannot concur with them or join in the proposed decree, this opinion is filed in Dissent.

APPEAL, REMAND, RECONSIDERATION

Following what they considered a defeat in the district court, the plaintiffs appealed directly to the U.S. Supreme Court. After the appeal was docketed, but before its consideration by the Court, the defendants complied with the district court’s order and filed a progress report of December 21, 1951. But action on the report was withheld because the cause was now pending in the Supreme Court.

However, the Supreme Court would not act under these circumstances. On January 28, 1952, the Court vacated the judgment of the district court and remanded the cause for further proceedings. In a per curiam opinion, the Court observed that it “should have the benefit of the views of the district court upon the additional facts brought to the attention of that court in the report which it [had] ordered,” and that the district court should also be “afforded the opportunity to take whatever action it [might] deem appropriate in the light of that report.” Justices Black and Douglas dissented. They viewed the “additional facts” (progress reports) as totally irrelevant to the crucial constitutional issues involved and thought the Court should hear the case without delay.

However, before the case was reconsidered by the district court, the lone dissenter in the original district court ruling, Judge J. Waites Waring, had retired. He found his judicial views most unpopular in South Carolina and was roundly criticized for his decision (see Brown v. Baskin, 78 F. Supp. 933, 1948; and Rice v. Elmore, 333 U.S. 649, 1944) declaring unconstitutional South Carolina’s attempt to circumvent the Supreme Court ruling in Smith v. Allwright, 321 U.S. 649 (1944). In Smith the Court found Texas’s “white primary” unconstitutional in that the state itself was inextricably involved with the Democratic party that kept Negroes from voting in primary elections.
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The defendants centered their case primarily on the substantial equality of physical facilities and educational opportunities afforded Negroes and whites. Even experts called by the plaintiffs who had surveyed the facilities afforded the two races in Topeka could find but a few minor inequalities. To support their “equality” arguments, the defendants relied heavily upon Dr. Kenneth McFarland, Topeka superintendent of schools, who proved a knowledgeable expert in psychology, and then ride twenty-one blocks to an all-Negro elementary school. Sometimes, of course, she had to wait in the cold, rain, or snow, which could have been avoided, thought her father, if she were permitted to attend the white school only seven blocks from her home.

On June 25–26, 1951, a three-judge federal district court was convened to hear the case. Brown and other plaintiffs were represented by Robert L. Carter and Jack Greenberg of the NAACP legal staff, and several local attorneys (They had been given support of the local chapter from the beginning.) The defendants were represented by attorneys George Brewster and Lester Goodell. Brown’s attorneys concentrated their attack on the grounds that segregation per se violated the Fourteenth Amendment. Generally their arguments were similar to those presented in the South Carolina case. Again, much of the testimony came from experts in psychology and other fields who discussed the harmful effects of segregated education.

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and adept witness. But in considering the problem of the constitutionality of segregation, the superintendent did not feel as knowledgeable. He felt that the formulation of social custom and usage in a community was beyond his concern as a school administrator. Said Dr. McFarland:

I think that point is extremely significant; in fact, it’s probably the major factor in why the Board of Education is defending this lawsuit, and that is that we have never considered it, and there is nothing in the record historically, that it’s the place of the public school system to dictate the social customs of the people who support the public school system. . . . There is no objective evidence that the majority sentiment of the public would desire a change in the fundamental structure.

In closing the case for the defendants, Kansas Attorney General Harold R. Fatzer strongly defended the separate but equal doctrine:

School segregation statutes have been before the United States Supreme Court in a number of cases and at no time have they held that these state statutes are unconstitutional. . . . We submit that under the facts which are stipulated . . . it is established that there is no inequality of educational facilities and, furthermore, that it is within the province of the state to determine what regulations [are] necessary under its police power . . . to promote the peace and welfare of the people of that state. . . . As far as the opinions of some sociologists or educators are concerned, we are in agreement with what the court decided in South Carolina, that it would not be within the province of a federal court or any federal agency to adopt those views regardless of what the state might consider to be the proper regulation under the police power.

THE COURT DECIDES

On August 3, 1951, a unanimous court handed down a decision denying the injunctive relief sought. Circuit Judge Huxman delivered the opinion of the court.

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**Brown v. Board of Education**

98 F. Supp. 797

1. We have found as a fact that the physical facilities, the curricula, courses of study, qualification of and quality of teachers, as well as other educational facilities in the two sets of schools are comparable. It is obvious that absolute equality of physical facilities is impossible of attainment in buildings that are erected at different times. So also absolute equality of subjects taught is impossible of maintenance when teachers are permitted to select books of their own choosing to use in teaching in addition to the prescribed courses of study. It is without dispute that the prescribed courses of study are identical in all of the Topeka schools and that there is no discrimination in this respect. It is also clear in the record that the educational qualifications of the teachers in the colored schools are equal to those in the white schools and that in all other respects the educational facilities are comparable. It is obvious from the fact that there are only four colored schools as against eighteen white schools in the Topeka School District, that colored children in many instances are required to travel much greater distances than white children are required to travel. The evidence, however, established that the school district transports colored children to and from school free of charge. No such service is furnished to white children. We conclude that in the maintenance and operation of the schools there is no willful, intentional or substantial discrimination in the matters referred to above between the colored and white schools. In fact, while plaintiffs attorneys have not abandoned this contention, they did not give it great emphasis in their presentation before the court. They relied primarily upon the contention that segregation in and of itself without more violates their rights guaranteed by the Fourteenth Amendment.

This contention poses a question not free from difficulty. As a subordinate court in the federal judicial system, we seek the answer to this constitu-
tional question in the decisions of the Supreme Court when it has spoken on the subject and do not substitute our own views for the declared law by the Supreme Court. The difficult question as always is to analyze the decisions and seek to ascertain the trend as revealed by the later decisions. . . . [Here follows an analysis of *Plessy v. Ferguson* and *Gong Lum v. Rice.*]

It is vigorously argued and not without some basis therefore that the later decisions of the Supreme Court in *McLaurin v. Oklahoma*, 339 U.S. 637, 70 S. Ct. 851, 94 L. Ed. 1149, and *Sweatt v. Painter*, 339 U.S. 629, 70 S. Ct. 848, 94 L. Ed. 1114, show a trend away from the *Plessy* and *Lum* cases. . . .

. . . If segregation within a school as in *McLaurin* is a denial of due process, it is difficult to see why segregation in separate schools would not result in the same denial. Or if the denial of the right to comingle with the majority group in higher institutions of learning as in the *Sweatt* case and gain the educational advantages resulting therefrom, is lack of due process, it is difficult to see why such denial would not result in the same lack of due process if practiced in the lower grades.

It must however be remembered that in both of these cases the Supreme Court made it clear that it was confining itself to answering the one specific question, namely: “To what extent does the Equal Protection Clause . . . limit the races in professional and graduate education in a state university?” and that the Supreme Court refused to review the *Plessy* case because that question was not essential to a decision of the controversy in the case.

2. We are accordingly of the view that the *Plessy* and *Lum* cases have not been overruled and that they still presently are authority for the maintenance of a segregated school system in the lower grades.

The prayer for relief will be denied and the judgment will be entered for defendants for costs.

**THE THIRD FRONT: PRINCE EDWARD COUNTY, VIRGINIA**

Since May 25, 1951, Prince Edward County, Virginia, has never been the same. On that date, Negro parents asked a federal district court in Richmond to declare unconstitutional Virginia provisions and statutes requiring racial segregation. In 1952, when the case was heard, the county had a population of 15,000, more than half of whom were Negroes. They comprised 59 per cent of the school population, yet claimed that educational opportuni-

ties and facilities for them were far inferior to those for whites. They asked the court to issue a declaratory judgement declaring the Virginia legal provisions requiring segregated schools unconstitutional, and in the alternative, an order to correct the existent inequalities between white and Negro high schools in the county.

As in the *Briggs* and *Brown* cases, counsel for the Negro plaintiffs concentrated on the contention that segregated education in and of itself is a violation of the equal protection clause of the Fourteenth Amendment. The plaintiffs again relied heavily upon the testimony of social science experts, who described the detrimental effects of segregation. For example, Dr. Kenneth Clark, whose doll tests were used in testimony in the South Carolina case, presented substantially the same testimony in this case. He stressed the problems of the Negro child under a system of racial segregation and noted that segregation also had a detrimental effect upon the white child.

Counsel for the defendants gave far more attention to the segregation issue than in either of the previous cases. Not only was an attempt made to challenge the testimony of the experts presented by the plaintiffs, but this time the defense presented other experts, who testified in support of the segregated school system. The star witness for the defense was Dr. Henry E. Garrett, professor and chairman of the department of psychology of Columbia University. Garrett had been a former teacher of Dr. Clark. Said Garrett:

I do not think one can possibly defend separation of one group from another if the separated group is stigmatized or put into an inferior position. Separation can be of separate sorts which does not involve, necessarily, any feeling of inferiority or stigma. The principle of segregation in education, for example, is long and well established in American life. Boys and girls are taught in separate schools, Catholic children in parochial schools, Jewish children in Hebrew schools; we have opportunity classes for those children who are slow; we have classes for those children who are bright. It has been regarded by many people as being nondemocratic, but it does not seem to have made a great deal of difference in those children. So long as the facilities which are allowed are equal, the mere fact of separation does not seem to me to be, in itself, discriminatory.

Also, Dr. William H. Kelly, a specialist in neurology and psychiatry, challenged Dr. Clark’s doll test, since he felt the test could be manipulated to get the
desired results. In cross-examination, however, Dr. Kelly admitted that he was not familiar with the literature involved in Dr. Clark’s findings.

THE COURT DECIDES: EQUALITY, YES! DESEGREGATION, NO!

On March 7, 1952, the court handed down its decision. While all three judges rejected the plaintiffs’ plea to end segregated schools, they held that facilities for Negroes were not equal to those provided for whites, and ordered the defendant school board to remove the inequalities. But on the issue of segregation itself, the court held firm:

It indisputably appears from the evidence that the separation provision rests neither upon prejudice, nor caprice, nor upon any other measureless foundation. Rather the proof is that it declares one of the ways of life in Virginia. Separation of white and colored “children” in the public schools of Virginia has for generations been a part of the mores of her people.

Maintenance of the separated systems in Virginia has not been social despotism, the testimony points out, and suggests that whatever its demerits in theory, in practice it has begotten greater opportunities for the Negro. Virginia alone employs as many Negro teachers in her public schools, according to undenied testimony, as are employed in all the 31 non-segregated States. Likewise, it was shown that in 29 of the even hundred counties in Virginia, the schools and facilities for the colored are equal to the white schools, in 17 more they are now superior, and upon completion of work authorized or now in progress, another 5 will be superior. Of the twenty-seven cities, 5 have Negro schools and facilities equal to the white and 9 more have better Negro schools than white.

In this milieu we cannot say that Virginia’s separation of white and colored children in the public schools is without substance in fact or reason. We have found no hurt or harm to either race. This ends our inquiry. It is not for us adjudge the policy as right or wrong—that the Commonwealth of Virginia “shall determine for itself.”

THE DELAWARE SITUATION

To attend Howard High School, Negro residents of New Castle County, Delaware, had to travel nine miles each way. Like South Carolina and Virginia, Delaware’s constitution and statutes required its school districts to maintain separate schools for Negroes and whites. Pursuant to this policy, the Claymont Special School District in New Castle County maintained a high school for whites only; Negro residents of the district had to send their children to Howard, which was maintained and operated by the Wilmington Special School District. No bus transportation was provided for the Negro children, although provision was made for reimbursing them for transportation expenses. Negro attempts to be admitted to Claymont failed. Time and again school officials denied their request, citing relevant provisions from the state constitution and laws requiring racial segregation.

Negroes also directed attention to conditions at the elementary school level. The distance factor was not as crucial as in the high school case, but Negroes contended that significant inequalities existed between white and Negro elementary schools. Consequently, they sought admission to the white elementary schools of New Castle County, but met with no more success than they had at the high school level.

Rebuffed at the administrative level, New Castle Negroes took the battle to the courts. Two separate actions (at high school and elementary school levels) were brought by Negro plaintiffs in the Court of Chancery of Delaware in New Castle County. In both actions plaintiffs alleged that the State of Delaware, through its agencies and agents, was violating their rights under the equal protection clause of the Fourteenth Amendment in that: (1) state-imposed segregation in education is of itself a violation of the Fourteenth Amendment and (2) the facilities and educational opportunities afforded them and those similarly situated were inferior to those afforded white students. On these grounds they asked the state court to invalidate constitutional and statutory provisions requiring segregation in public education and to issue an injunction restraining the defendants from denying them admission to the schools maintained for whites.

For trial purposes, the two actions were consolidated and Chancellor Seitz began taking testimony on October 22, 1951. Counsel for the plaintiffs, attorneys Jack Greenberg of the NAACP legal staff and Louis L. Redding of Wilmington, used expert testimony to compare facilities and opportunities of the schools involved. The high schools were studied by Dr. Stephen J. Wright, dean of the faculty of Hampton Institute, Virginia. Dr. Wright testified:

I have studied these schools from the standpoint first of sites. . . . And in my opinion the site on which Claymont School is located is superior to that
The elementary school survey was made by Dr. Paul F. Lawrence, associate professor of education at Howard University, Washington, D.C. Just as at the high school level, Lawrence found substantial inequalities between white and Negro elementary schools. He professed:

As a professional educator whose primary purpose in making surveys is to be as objective as possible, I can say that there is no evidence of equality in the educational facilities afforded in [white and Negro] schools. . . .

On the issue of segregation itself, a parade of witnesses testified for the plaintiffs. Generally they detailed the injurious effects of segregation on the individual, documenting conclusions with scientific studies. For example, Dr. Frederic Wertham, director of psychiatric services at Queens General Hospital, New York, said:

I have come to the conclusion that physical differences in schools are not at all really material. . . . In other words, if I may express it geographically, if the State of Delaware would employ Professor Einstein to teach physics in marble halls to these children, I would still say everything I have said goes: It is the fact of segregation in general and the problems that come out of it that to my mind is anti-educational, by which I mean that education in the larger sense is interfered with. And since for a child education is one part of mental health and not merely a question of learning something, their health is interfered with. . . .

I may say: What is the attitude of these children about segregation? Most of the children we have examined interpret segregation in one way and only one way, and that is they interpret it as punishment. There is no doubt about that. Now, whether that is true, whether the State of Delaware wants to punish these children, has nothing to do with it. I am only testifying about what is in the minds of children. They think they are being punished, and for something which is not explained to them, and certainly not for something that they have done. . . .

Dr. Wertham also thought that segregation had a detrimental effect upon white children, since “it creates [in them] an illusion of superiority.” Wertham continued:

And the difficulty about the [illusion of superiority] is, where does the reality end and where does the illusion begin?

How is this child, when he becomes an adolescent . . . how is he to find his way ethically in the world if he has been indoctrinated with the illusion of superiority? He inevitably comes into situations where somehow or other his equilibrium will be disturbed and certainly a normal and healthy and correct development will be disturbed.

Counsel for the defendants were not concerned with the effects of segregation per se. They contended that there was substantial equality of educational facilities and opportunities in white and Negro schools. State and local school officials were called as witnesses to support this contention. For example, Dr. Ward I. Miller, superintendent of the City Schools of
Wilmington Delaware, in which the Howard High School for Negroes was located, said:

. . . It has been the policy of the Board of Education and the administration to make every one of the schools as fine a school as possible, and I would say that the record of the graduates of the Howard High School justifies the belief that the money is well spent and is soundly invested. . . .

THE COURT DECIDES: “RIGHTS CANNOT BE POSTPONED”

On April 1, 1952, Chancellor Seitz handed down his decision. While the court’s findings were similar to those in the Briggs and Davis cases, the action required of the boards of education was different. The judge remained within the framework of the separate but equal doctrine and refused to invalidate the Delaware laws requiring separate schools for the two races, but since the court found facilities and educational opportunities afforded Negro children inferior to those for whites, it ordered immediate admission of Negro children to white schools. The court said that the right to equal educational opportunities should not be postponed until school authorities had time to make them equal. Chancellor Seitz agreed that compulsory school segregation had a detrimental effect on the Negro child, but felt that his was not the proper court to overthrow the separate but equal doctrine. Rather, he thought that such a decision should come from the U.S. Supreme Court itself. Chancellor Seitz’s far-reaching state court opinion is given below:

BELTON v. GEBHART/BULAH v. GEBHART
32 Del. Ch. 343, J 87 A.2d 862 (1951)

I conclude from the testimony that, in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated.

But my factual conclusion does not dispose of the first question presented. I say this because it is necessary to consider the decisions of the United States Supreme Court construing the Fourteenth Amendment as they apply to this general problem. Specifically, I must decide whether such a finding of fact as I have here made is a proper basis for holding that such separate facilities cannot be equal. In other words, can the “separate but equal” doctrine be legally applied in the fields of elementary and secondary education?"

Plaintiffs say that the situation here presented has never been passed upon by the United States Supreme Court, or the Supreme Court of Delaware, and so is an open question. I agree with the plaintiffs that the Supreme Court has not, so far as I can find, passed upon a case containing the specific finding as to the effect on the Negro, educationally, of State-imposed segregation in education. The question, however, which judicial integrity requires one to answer is this: Has the United States Supreme Court by fair or necessary implication decided that State-imposed segregated education on the grammar and high school levels, in and of itself, does not violate the Fourteenth Amendment? . . .

[Here follows an analysis of several Supreme Court decisions which treat this question, beginning with Plessy v. Ferguson.]

Plaintiffs point to a decisional trend from which they would have this Court conclude that the “separate but equal” doctrine as applied to education should be rejected. Certainly such a trend is “in the wind” but, as stated, it is yet for the Supreme Court to say so in view of its older, and as yet unrepudiated decisions. . . .

I, therefore, conclude that while State-imposed segregation in lower education provides Negroes with inferior educational opportunities, such inferiority has not yet been recognized by the United States Supreme Court as violating the Fourteenth Amendment. On the contrary it has been by implication excluded as a Constitutional factor. It is for that
court to re-examine its doctrine in the light of my finding of fact. It follows that relief cannot be granted plaintiffs under their first contention.

We turn now to a consideration of the second question, to wit, are the separate facilities and educational opportunities offered these plaintiffs, and those similarly situated, equal to those furnished white children similarly situated?

I conclude that with respect to teacher training, pupil-teaching ratio, extracurricular activities, physical plants and aesthetic considerations, the Howard-Carver School is inferior to Claymont under the “separate but equal” test. These factors are a part of the educational process as the experts stated.

I have enumerated the several respects in which I have found the facilities and educational opportunities at Howard-Carver to be inferior to those offered at Claymont. Viewing such factors both independently and cumulatively I conclude that the separate facilities and opportunities offered these plaintiffs, and those similarly situated, are not equal to those offered white children in the Claymont District, and that, in consequence, the State, by refusing these plaintiffs admission to Claymont solely because of their color, is violating the plaintiffs’ rights protected by the Equal Protection Clause of the Fourteenth Amendment.

Under these circumstances, defendants urge that even though the Court should find inequalities, it should do no more than direct the defendants to equalize facilities and opportunities, and give them time to comply with such an order. Passing over the fact that the Wilmington Board is not before this Court, there are three reasons why I cannot agree with this approach. (1) I do not see how the plans mentioned will remove all the objections to the present arrangement. (2) Moreover, and of great importance, I do not see how the court could implement such an injunction against the State. (3) Just what is the effect of such a finding of a violation of the Constitution, as has here been made? It is true that in such a situation some courts have merely directed the appropriate State official to equalize facilities. I do not believe that such is the relief warranted by a finding that the United States Constitution has been violated. It seems to me that when a plaintiff shows to the satisfaction of a court that there is an existing and continuing violation of the “separate but equal” doctrine, he is entitled to have made available to him the State facilities which have been shown superior. To do otherwise is to say to such a plaintiff: “Yes, your Constitutional rights are being invaded, but be patient, we will see whether in time they are still being violated.” If, as the Supreme Court has said, this right is personal, Sweatt v. Painter, 339 U.S. 629, 70 S. Ct 848, 94 L. Ed. 1114, such a plaintiff is entitled to relief immediately, in the only way it is available, namely by admission to the school with the superior facilities. To postpone such relief is to deny relief, in whole or in part, and to say that the protective provisions of the Constitution offer no immediate protection.

I conclude that the State’s future plans do not operate to prevent the granting of relief to those plaintiffs by way of an injunction, preventing the authorities from excluding these plaintiffs, and others similarly situated, from admission to the Claymont High School on account of their color. If it be a matter of discretion, I reach the same conclusion. If at some future time, defendants feel that they can demonstrate that all the constitutional inequalities have been removed, then it would be for them to take the initiative.

CHANCELLOR SEITZ’S DECISION APPEALED

Neither plaintiffs nor defendants were satisfied with the court’s decision. While the plaintiffs obtained partial relief, they did not get a clear-cut decision on the larger issue of segregation itself. At the same time, the decision had gone against the defendant school boards since the court ordered the immediate admission of Negroes to white schools, denying the defendant’s request for time to establish equal facilities. As a result, the defendant school boards appealed the decision to the State Supreme Court, and the Negro plaintiffs filed a cross-appeal, contending that the separate but equal doctrine itself should be declared unconstitutional.

On August 28, 1952, the Delaware Supreme Court unanimously affirmed the lower court decision, upholding Chancellor Seitz’s disposition of the segregation issue:

It is our duty to uphold the Constitution of our State, and not to abrogate its provisions except in so far—and only in so far—as required to do so by a ruling of the Supreme Court of the United States that they infringe upon rights protected by the federal Constitution.

But it is said that the uncontradicted evidence adduced by the plaintiffs shows that state-imposed
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segregation in the public schools and equality of educational opportunity are inherently incompatible, and that the Chancellor so held. The Chancellor indeed found on the evidence that segregation itself results in the Negro’s receiving inferior educational opportunities, and expressed the opinion that the “separate-but-equal” doctrine should be rejected. He nevertheless recognized that his finding was immaterial to the legal conclusion drawn from the authorities above cited. We agree that it is immaterial, and hence see no occasion to review it. The Supreme Court of the United States has said that the states may establish separate schools if the facilities furnished are substantially equal for all. To say the facilities can never be equal is simply to render the Court’s holdings meaningless...in effect, to say that the Court’s construction of the Constitution is wrong. If so, it is for that court to say so and not for us. . . .

THE PARTIES REACT: DISAPPOINTMENT, FRUSTRATION, AND MORE APPEALS

While the court’s decision disappointed the defendant school board, it also gave them some hope. The court indicated that the order admitting Negroes to white schools might be modified if and when inequalities between white and Negro schools were removed. Said the court:

In affirming the Chancellor’s order we have not overlooked the fact that the defendants may at some future date apply for a modification of the order if, in their judgment, the inequalities as between the Howard and Claymont schools or as between School No. 29 and School No. 107 have then been removed. As to Howard, the defendants, as above stated, assert that when the Howard-Carver changes are completed, equality will exist. The Chancellor apparently thought the contrary. We do not concur in this conclusion, since we think that question, if it arises, is one which will have to be decided in the light of the facts then existing and applicable principles of law. The Chancellor properly reserved jurisdiction of the cause to grant such further and additional relief as might appear appropriate in the future, and we construe this reservation to be a general reservation to any party to the cause to make an application to modify the order in any respect if and when changed conditions are believed to warrant such action.

Neither were the plaintiffs satisfied with the decision. True, the decision ordered the immediate admission of Negroes to white schools, but the deed, in their opinion, was done on the wrong doctrine—separate but equal. Accordingly, the plaintiffs, in concert with plaintiffs in the South Carolina, Kansas, and Virginia cases, took the issue to the U.S. Supreme Court.

ON THE SUPREME COURT

In late 1952, the attack on segregated schools moved from the lower courts to the Supreme Court. The Court agreed to consolidate the four cases for argument and decision, since they all embraced the same basic issues. In addition, the Court included a desegregation case coming out of Washington, D.C., Bolling v. Sharpe. Involved in these five cases were issues that struck at the heart of a way of life for millions of Americans. Hence wide and varied interests were involved as the stage was set for the most far-reaching arguments to be heard in the “marble palace” in this century.

THE LITIGANTS STATE THEIR CASES

Comprehensive briefs were submitted by both sides in each of the four cases. In general, the briefs rehashed familiar themes, with Negro plaintiffs detailing the harmful effects of segregation and contending that the Fourteenth Amendment forbade such segregation, while the defendant states extolled the wisdom of the separate but equal doctrine, insisting that the Fourteenth Amendment was not intended to interfere with the basic right of states to operate public schools. Excerpts from the various briefs underscore the emphasis on these familiar themes. In the Kansas case, for example, the plaintiffs argued:

The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone. The State of Kansas has no power thereunder to use race as a factor in affording educational opportunities to its citizen.

Racial segregation in public schools reduces the benefits of public education to one group solely on the basis of race and color and is a constitutionally proscribed distinction. Even assuming that the segregated schools attended by appellants are not inferior to other elementary schools in Topeka with respect to physical facilities, instruction and courses of study, unconstitutional inequality adheres in the retardation of intellectual development and distortion of personality which Negro children suffer as a result of enforced isolation in school from the general public school population.
However, the defendants interpreted the Fourteenth Amendment quite differently, arguing in the South Carolina case, for example:

The history of the Fourteenth Amendment compels the conclusion that it has no such scope as is claimed by appellants. Under that amendment, the right of a state which maintains a public school system to classify its students on the basis of race or for that matter of sex or age or mental capacity, has been so often and so pointedly declared by the highest authorities that it should no longer be regarded as open to debate. These authorities are from legislative sources, both federal and state, and from the judicial branch, both state and federal. There is no conflict of opinion among them which needs to be resolved. Only an excess of zeal can explain the present challenge.

It is, however, equally well settled that the right of a state to classify for purposes of education is qualified by the requirement that equal facilities and opportunities must be provided for each stated class. The equal protection of the law demands no less. This also is beyond all debate.

Local self-government in local affairs is essential to the peace and happiness of each locality and to the strength and stability of our whole federal system. Nowhere is this more profoundly true than in the field of education. It is the duty and function of each state primarily to provide for the education of its citizens. To devolve this sensitive activity as far as may be on those to whose minds and hearts it is an intimate concern is surely the highest statesmanship. As the district court so well said, “if conditions have changed so that segregation is no longer wise, this is a matter for the legislature and not for the courts.”

THE BIGGEST FRIEND OF ALL: THE NATIONAL GOVERNMENT

Though many amici curiae briefs were filed in the school segregation cases, the plaintiffs undoubtedly had on their side the biggest friend of all, the national government. While its brief concentrated on constitutional objections to the separate but equal doctrine, the government’s concern in the case was more far-reaching. Its legal arguments were flavored throughout with moral and political considerations and justifications. The government said:

The subordinate position occupied by Negroes in this country as a result of governmental discriminations (“second-class citizenship” it is sometimes called) presents an unresolved problem for American democracy, an inescapable challenge to the sincerity of our espousal of the democratic faith.

In these days when the free world must conserve and fortify the moral as well as the material sources of strength, it is especially important to affirm that the Constitution of the United States places no limitation, express or implied, on the principle of the equality of all men before the law. Mr. Justice Harlan said in his dissent in the Plessy case:

We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law.

The Government and people of the United States must prove by their actions that the ideals expressed in the Bill of Rights are living realities, not literary abstractions. As the President has stated:

If we wish to inspire the people of the world whose freedom is in jeopardy, if we wish to restore hope to those who have already lost their civil liberties, if we wish to fulfill the promise that is ours, we must correct the remaining imperfections in our practice of democracy.

We know the way. We need only the will.

TWO “GIANTS” MEET: THE BATTLE OF WORDS

When the school segregation cases were called for oral argument on December 9, 1952, a wave of expectancy swept through the crowd of 300 who jammed the Supreme Court chambers. Outside, some 450 persons waited, hoping somehow to witness what had been billed as the constitutional drama of the century. Inside, the nine justices—Chief Justice Fred M. Vinson, Associate Justices Hugo Black, Felix Frankfurter, William Douglas, Robert Jackson, Stanley Reed, Harold Burton, Tom Clark, and Sherman Minton—took their places and readied themselves for the monumental task they faced.

(In the main, the oral presentations to the Court are extensions and clarifications of points raised in the briefs submitted earlier. In addition, counsel are afforded an opportunity to challenge the validity and logic of the opponent’s argument. One of the most useful aspects of the appearance before the justices is the examination of the counsel directed from the bench itself. Through this device, justices are able to raise questions counsel have not considered or have not clarified sufficiently in their written briefs.)

The South Carolina case commanded the spotlight. Opposing counsel in this case were as widely known for their legal skill and competence as they
were for their strong convictions on the respective causes for which they were arguing: for the plaintiffs, Thurgood Marshall; for the defendants, John W. Davis. As chief counsel on the NAACP legal staff, Marshall had argued numerous cases before the Court with great success. Some of his victories, especially those in the McLaurin and Sweatt cases, he could now use as key weapons in the attack on segregation. But just as the plaintiffs had their “giant,” so did the defense. To present its case, South Carolina retained the Honorable John W. Davis, Democratic presidential candidate in 1924. A West Virginian, Davis’s legal reputation was at an all-time high. Less than six months earlier (in June, 1952), Davis had bested the president of the United States before the Supreme Court, convincing the Court that President Harry S. Truman’s seizure of the steel companies was unconstitutional. Now Davis was ready to take on the biggest job of all—defending the “southern way of life.”

To get the feel and scope of their arguments, let us rearrange and paraphrase the verbal battle between Marshall and Davis.

Marshall opened the attack by stating that mandatory segregation denies Negroes the equal protection guaranteed under the Fourteenth Amendment; “slavery is perpetuated in these statutes.”

Not so, replied Davis. Segregation in education does not “offend the Fourteenth Amendment” any more than does classification on the basis of sex, age, or mental capacity.

Moreover, continued Marshall, segregation takes its toll on the child. “The humiliation the children go through will affect their minds as long as they live; evidence shows that segregation puts roadblocks in the way of learning.”

But there’s no proof, countered Davis. There is no real evidence that segregation is harmful; “much [of the evidence] bandied around in the name of the social scientist is an effort to rationalize his own preconceptions.”

Marshall concluded by contemplating reactions to ending segregation. The people of the South are not “lawless,” he said. “The Court’s decision, whatever it is, will be abided by generally.”

But Davis did not see so rosy a future: Ending segregation will create a condition “one cannot contemplate with equanimity.”

Thus went the oral argument, and though the counsel were different, arguments in each of the five cases were basically the same. After three days of oral argument, the justices took the cases under advisement.

**THE COURT DECIDES(?)**

On June 8, 1953, the Court decided that it needed more information before final disposition of the issues presented. Accordingly, the Court ordered the cases restored to the docket and called for additional argument on five specific questions:

1. What evidence is there that the Congress which submitted and the state legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?

2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment:
   a. that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or
   b. that it would be within the judicial power, in light of future conditions to construe the Amendment as abolishing such segregation of its own force?

3. On the assumption that the answers to questions 2 (a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

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;
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The Court scheduled reargument of the cases (specifically upon the five questions) for its 1953 term beginning in October. In addition, the Court invited the U.S. Attorney General to take part in the argument and to file a supplemental brief if he so desired.

WHY THE FIVE QUESTIONS? REACTION TO THE COURT’S DELAY

The order for additional argument stirred speculation that the Court was delaying action for some reason other than information. Some construed the Court’s action as a sign of deadlock among the justices. This view was expressed editorially by the Richmond News-Leader, which inferred that “the High Court’s hot potato” was too hot to handle, at least just now. On the other hand, Ralph McGill, well-known editor of the Atlanta Constitution, interpreted the delay as a reprieve in which the South could begin to give serious study to the problem of moving from the segregated system. In doing this kind of study, concluded McGill, each community would do itself, the state, and the South a great service.

Though some southern officials were confused by the Court’s action, others welcomed the delay in making a decision. Governor Hugh White of Mississippi, for example, admitted that postponement had him in a “quandary.” On the other hand, officials of Arkansas and South Carolina welcomed the delay, since it gave them more time to equalize facilities between white and Negro schools.

HISTORICAL RESEARCH AND BACK TO THE COURT

To answer the questions propounded by the Court, both parties retained some of the nation’s most prominent constitutional historians to research the legislative history of the Fourteenth Amendment. After exhaustive study, the parties reported their findings in elaborate briefs complete with lengthy appendices.

In the main, and as expected, both sides found evidence to support their respective causes. However, the most revealing side of this historical research was not known until some seven years after the Court’s 1954 decision, when in December, 1961, in a speech before the American Historical Association, Dr. Alfred H. Kelly told of his experiences in preparing the NAACP brief. Kelly, a history professor at Wayne State University in Detroit, indicated that though the historical odds were against them, he and the other NAACP researchers found sufficient evidence to support the position that there was disagreement among the framers (and now historians) as to what the Fourteenth Amendment was intended to accomplish. These differing interpretations of history, according to Professor Kelly, were exactly what NAACP counsel Marshall wanted, since Marshall thought the differences would shatter or at least becloud key opposition arguments. However, it remained to be seen which interpretations, if any, the Court would follow.

ACT II BEFORE THE COURT: ADDITIONAL ORAL ARGUMENTS

On December 7, 1953, the Court heard arguments on the five questions. As in the original arguments, the spotlight was again on Thurgood Marshall and John W. Davis. Also participating in the arguments in support of the plaintiffs were attorney Spottswood Robinson, assisting Marshall, and Solicitor General J. Lee Rankin, who presented the government’s arguments. These spokesmen made the following basic contentions:

Robinson on the intention of the framers of the Fourteenth Amendment: The amendment was meant to prevent the states from maintaining “caste systems predicated by race.” [We are] unable to find anything in the debates that would show that Congress had not intended the amendment to affect school segregation.

Marshall on the purpose of the Fourteenth Amendment: The same type of statute is involved in the pending cases as was involved in the “black codes” that some states enacted after the Civil War to restrict Negroes. The Fourteenth Amendment was adopted to deprive the states of authority to enforce such codes. “The question is whether the public policies, the prejudices, the mores of South Carolina and Virginia, or the provisions of the Constitution shall prevail.”

Marshall on the question of the judicial power to prohibit segregation: “The answer is a flat yes.” The Court not only has the power but the duty to ban segregation in all the schools of the land.
Davis on the intention of the framers of the Fourteenth Amendment: It was not the intent of Congress in adopting the Fourteenth Amendment or the understanding of the states in ratifying it that it would at that time or in the future be used to outlaw segregation in schools.

Davis on the question of the judicial power to prohibit segregation: It is “not within the judicial power” to set aside “on a sociological basis” a system that “has stood legally for three-quarters of a century.”

Davis on equality of facilities and reasonableness of segregation: South Carolina has equalized school facilities for the races. The happiness, progress and welfare of Negro children is “best promoted in segregated schools.”

J. Lee Rankin on the position of the Justice Department: It is the position of the Department of Justice that the Fourteenth Amendment does not permit any discrimination based on race or color.

J. Lee Rankin on whether the Court could decide the cases either way: No, the Court can find only one answer. When they [the defendants] stand before this court and say that the only reason for segregation is color, the Court must say that the Fourteenth Amendment does not permit this to happen.

The oral arguments were concluded on December 9, and the Court once again took the cases under advisement.

DELIBERATION, ANTICIPATION, FRUSTRATION

While the Court deliberated, pro- and antisegregation forces ventured predictions as to the probable consequences of the Court decision. Officials from southern states, where the decision would be most crucial, predicted that grave consequences would follow should the Court declare segregation unconstitutional. Governor James F. Byrnes of South Carolina, himself a former associate justice of the Supreme Court, warned that an adverse decision would confront the South Carolina legislature with a problem “more serious than any since ... reconstruction.” Whatever the decision, Byrnes predicted that there would be “years of litigation.” Governor Herman Talmadge of Georgia declared that he would use every resource at his disposal, including the state police and militia, to maintain segregated schools. He even threatened to close the public schools and resort to private schools should the Court render segregation unconstitutional. Like Byrnes, Talmadge said that to end segregation in public schools “would create chaos not seen since Reconstruction days.”

But perhaps the most vehement statement from a southerner came from a Texas state legislator who said that if there were no other way to keep the state’s public schools segregated, he would urge and fight for secession from the Union.

Antisegregation forces expressed “cautious optimism” about the outcome of the decision. Thurgood Marshall said that he certainly expected something more than a separate but equal ruling. In another vein, Walter White, executive secretary of the NAACP, cautioned southern officials about emotional outbursts in anticipation of the Court decision. He particularly criticized those, such as Governor Talmadge, who advocated abandoning public for private schools. White said that “if governors and legislators . . . do not realize what they are proposing, they will soon find out. They would do better to join those enlightened Southerners who already realize that segregation as a way of life is doomed. . . .” White pledged that the NAACP would fight any subtle forms of segregation and attempts to evade any possible decision outlawing segregated schools.

THE COURT SPEAKS: A DECISION AT LAST

Monday after Monday, for more than a month, the Court chambers had been filled with anxious spectators hoping to hear the long-awaited decision. But on May 17, when newsmen and others saw Mrs. Earl Warren, wife of the chief justice, former Secretary of State Dean Acheson, Attorney General Herbert Brownell, and Solicitor General Simon E. Sobeloff in the chambers, they surmised that this was the “right day,” and they were correct. When Chief Justice Warren began reading the opinion in Brown v. Board of Education, it did not take long for the jammed courtroom to sense that he was paying the Court’s last respects to the “separate but equal doctrine.” When after a half-hour he had completed the eulogy, any doubts as to the Court’s position had been removed. The Court had said with a single voice that segregated educational facilities are inherently unequal and are thus violative of the Fourteenth Amendment. (See Brown I, pp. 472–473.)

JUBILATION, CONDEMNATION, RESIGNATION: REACTION TO THE COURT DECISION

Reaction to the decision was immediate and widespread. For some it was the “end of the world”—at least the world as they wished it—and they denounced the Court bitterly, predicting and even urging open
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defiance. Governor Talmadge, for example, asserted
that there would never be mixed schools in Georgia as
long as he was its chief executive. In a vituperative
condemnation of the Court on the day following the
decision, Talmadge said:

It has blatantly ignored all law and precedent and
usurped from the Congress and the people the
power to amend the Constitution and from the
Congress the power to make the laws of the land. . .
. Its action confirms the worst fears of the motives
of the men who sit on its bench and raises a grave
question as to the future of the nation. . . .

In a somewhat similar vein, Senator John Stennis
(D-Miss.) commented:

I believe that in many of the counties of Mississippi
the leaders of the two races can work out satisfac-
tory separate arrangements for many years to come
within the pattern of the public school system. To
abolish our public school system should be the last
resort after all other efforts have failed, and not the
first step in a plan. I urge that all proceed with delib-
eration and caution. There is plenty of time and I
believe that there are even years to seek a solution.

Although condemning the Court’s action, a few
southern officials were resigned to the fact that the
decision had to be accepted as the law of the land.
This view was expressed by Senator Russell Long
(D-La.) when he said:

My oath of office requires me to accept it as the law.
Every citizen is likewise bound by his oath of alle-
giance to his country. I urge all Southern officials to
avoid any sort of rash and hasty action.

In addition, Russell called the Court a “pliant tool,”
saying it was becoming a “political arm of the exec-
utive branch of the government.”

Governor Byrnes said that he was “shocked to
learn that the Court had reversed itself.” But in an
apparently wistful mood, he observed that no final
decree had been issued, and consequently he urged both
races in South Carolina “to exercise restraint and pre-
serve order.” U.S. Senator Harry F. Byrd (D-Va.)
thought the situation called for careful analysis, not
hasty action. Though he felt that the Court had misled
many states into spending millions to conform to the
“separate but equal doctrine,” Byrd cautioned:

Those in authority, and the parents directly affected
in the education of their children, should exercise
the greatest wisdom in shaping our future course.
Whatever is done should be based on our mature
judgment after sober and exhaustive consideration.

On the other side of the ledger, leaders of some of
the states affected expressed willingness to proceed
under the directives of the Court. Governor Theodore
McKeldin of Maryland, for example, said that
“Maryland prides itself on being a law-abiding state,”
and that he was sure the Court’s interpretation of our
fundamental law would be accepted by its officials
and citizens. He also thought the transition would be
brought about “without confusion and undue delay.”
Likewise, Governor Edmund F. Arn of Kansas said
that the “long litigated question has now been de-
cided and it is the law for all the states of the nation
and the Kansas education procedure will have to ulti-
mately be adjusted to comply with it.”

There was also praise for the Court’s decision. Of
course Thurgood Marshall, chief counsel for the
Negro plaintiffs, was understandably jubilant.
Predicted Marshall, “By the time the 100th anniver-
sary of the Emancipation Proclamation is celebrated
in 1963, [segregation in all of its forms will have
been eliminated].” Marshall was especially pleased
that the Court’s position was “very clear,” and
warned that if it were violated in Georgia or else-
where “on one morning, we’ll have the responsible
authorities in court by the next morning, if not the
same afternoon.” Civil rights organizations also
hailed the decision. The National Urban League said
the decision would “reverberate throughout the en-
tire world” and would represent “a giant step toward
true democracy.” The American Jewish Congress

In Alabama, the leading spokesman of the “defiant
ones,” State Representative Sam Englehardt, de-
clared that “we are going to keep every brick in our
segregated wall intact.”

Some of the defiant group viewed the decision as
politically inspired. U.S. Senator James O. Eastland
(D-Miss.) maintained that “the South will not abide
by nor obey this legislative decision by a political
court.” Echoing a similar view, Senator Richard
Russell (D-Ga.) suggested that the Court’s power
should be curbed. Said Russell:

Ways must be found to check the tendency of the
Court to disregard the Constitution and the prece-
dents of able and unbiased judges to decide cases
solely on the basis of the personal predilections of
some of its members as to political, economic and
social questions.

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the greatest wisdom in shaping our future course.
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judgment after sober and exhaustive consideration.
thought the decision could “open a new era in American democracy and reinvigorate the democratic concept everywhere.” A similar view was expressed by the American Civil Liberties Union, which characterized the decision as a “magnificent expression of faith.”

The intellectual community also spoke out. Some of the nation’s leading historians, including Professors Merle Curti, Arthur M. Schlesinger, Sr., and Avery O. Craven called the decision “momentous” and said it should be a boon to the democratic principles upon which this country was founded.

Dr. Arthur S. Adams, president of the American Council on Education, noted that the decision was not unexpected, that responsible persons in the South had long recognized that segregation could not continue indefinitely. Accordingly, Adams urged patience in devising the best possible solutions to the many problems resulting from it. Dr. John E. Ivey, director of the Southern Regional Educational Board, felt that there would not be undue trouble in adjusting to the nonsegregated system. It was his view that the delay in effectuating the decree would “prove immeasurably helpful” in permitting “the statesmen who have no sympathy with either extreme to develop a workable plan.”

PUBLIC OPINION SHAPERS: NEWSPAPER REACTION

Many big city newspapers, in northern as well as some border states, endorsed the Court decision. The San Francisco Chronicle editorialized that “the majesty of the democratic idea that men are created equal and entitled to equal protection of the laws shines through yesterday’s unanimous decision of the United States Supreme Court. . . .” The Chronicle characterized the decision as the “spirit as well as the letter of democracy speaking.” The New York Herald Tribune said the decision “squared the country’s basic law with its conscience and its deepest convictions.” [The decision] goes to the heart of America . . . .” concluded the Tribune, “[and] touches the things by which the nation lives.” The St. Louis Post-Dispatch interpreted the decision as a “great victory against the Reds.” The “nine men in Washington, “the paper said, have “given us a victory that no number of divisions, and arms and bombs could ever have won.”

The New York Times hailed the Court as “the guardian of our national conscience,” and said the Court had reaffirmed “its faith, and the underlying American faith, in the equality of all men and all children before the law.” The Minneapolis Tribune predicted the decision would be “welcomed and embraced by all who believe that the constitutional guarantee of equal rights means just that and nothing more.”

On the other side of the ledger, many southern papers expressed disgust and dissatisfaction with the decision and were apprehensive of its probable effects. The New Orleans Times Picayune saw “turmoil . . . in prospect” and stated that the decision would “do no service either to education or racial accommodation.” In fact, the Picayune starkly predicted that “the revolutionary overturn of practice and usage” would retard progress in race relations. Perhaps the most bitter reaction came from the Jackson (Miss.) Daily News, which predicted that enforcement of the decision would lead to bloodshed and that “dark red stains” would be on the “marble steps of the Supreme Court building.” The paper expressed fear that mixing races would lead to miscegenation and concluded that “Mississippi cannot and will not try to abide by such a decision.” But the other Jackson newspaper, the Clarion-Ledger, was less vituperative. Although it called the decision tragic and labeled May 17 as the “Black Day of Tragedy,” the Clarion-Ledger nevertheless counseled against “panic, violent emotional reactions or disturbance of normal race relations.”

In Alabama, the Birmingham News regretted that the Court had overturned the “separate but equal doctrine,” but thought that it would still be used “to better serve progress in race relations and education.” The Birmingham Post-Herald said that “acceptance of the decision does not mean that we are stopped from taking . . . honorable and legal steps to avoid difficulties resulting for both races.”

There were some southern papers, however, that urged caution and restraint in facing problems raised by the decision. The Atlanta Constitution, for example, said that now was “no time for hasty or ill-considered action.” The Constitution warned against demagogic attempts to incite violence and hatred and counseled Georgia to put its best minds to work “to arrive at constructive conclusions.” In like manner, the Nashville (Tenn.) Banner called for a “seasoned

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1Based on the sampling of editorial response by the New York Times and used with permission of the New York Times Company and other papers included in the survey.
and cautious treatment of the case” in order “to reconcile both national interests and states rights [under] the Constitution.” The Chattanooga Times warned against calling state legislatures into emergency or special sessions, reasoning that such sessions would generate more heat than light. Moreover, the Times predicted stiff opposition to any attempts to abolish the public school system. Accordingly, fully aware that there would be time to make necessary adjustments, the paper saw most southern states as meeting the situation calmly. Similarly, the Dallas (Tex.) Morning News, despite some apprehension, thought the decision was a fact that must be faced.

THE PROBLEM OF IMPLEMENTATION: WHAT KIND OF DECREES?

Undoubtedly, the sting of the Court’s decision was lessened with the postponement of a decree for implementation. Many interpreted this action as an attempt to provide a cooling-off period. In any case, the Court restored the cases to the docket for further argument on the question of appropriate decrees during its fall term.

Written briefs having been submitted, on April 11, 1955, counsel for the litigants, the solicitor general of the United States, and the attorneys general from the ten states commenced oral arguments on the nature of the decree that should be issued in implementing the decision. This was the third and final act in this High Court drama. There were many more actors than in the two preceding acts, but for the most part they were a supporting cast, and one of the leading characters—John W. Davis—was no longer around. He helped to prepare the brief, but was now too ill to participate in oral argument. Nevertheless, the lines that he might have spoken were delivered by those who made a general plea for more time and for local action in implementing the Court’s decision. Note, for example, the following:*

Attorney General Joseph Cravens of Delaware: “We are a divided and troubled people in the face of the mandate of the Court.” Unless an orderly plan that conforms to local policies and attitudes can be worked out, there will be “a plethora of suits” over enforcement.

Attorney S. E. Rogers, for Clarendon County, South Carolina, school officials: Clarendon County has had a biracial society for two centuries and in such a society “you can’t push the clock ahead too rapidly.” Attitudes would have to be changed and this could not be done too quickly.

Assistant Attorney General Ralph E. Odom of Florida: A time limit for ending segregation would be fixed by local courts with each district setting its own time.

Throughout the oral argument, counsel from several of the affected states referred to the violence that could result if the decree should order immediate compliance.

Thurgood Marshall once again played the leading role among the counsel representing the Negro appellants. In general, Marshall called for immediate desegregation of the schools. He made the following points:

1. A gradual, indeterminate adjustment to integrated school systems would “not do anything” to right the wrongs Negroes have suffered since 1870 because of segregated school systems.

2. There cannot be a “moratorium on the Fourteenth Amendment or local option” to enforce a constitutional decision of the Court.

3. If the matter were referred to federal district courts to “decide how much time is necessary, the Negro in this country would be in horrible shape.”

4. In response to an analogy drawn by the states in reference to enforcement problems encountered during Prohibition, Marshall said he was “shocked that anyone would put the right of Negroes to equal participation in our systems of education on a par with the right to take a drink of whisky.”

5. The administrative problems of integrating the schools would have to be worked out by local authorities, but they would not need years to do it. It is no problem to “put dumb colored children with dumb white children and smart colored children with smart white children.”

6. A time limit is the core of the effective enforcement of the decision. Throughout the South people were told that the ruling meant nothing until a time limit was set. “This Court cannot take a middle ground between two positions on the enforcement of a constitutional right.” The argument never before had been advanced that the Court should postpone constitutional rights. “It is never made until Negroes are involved.” The enforcement of constitutional rights should be uniform throughout the country and should not “mean one thing in one state and another thing in another state.” The Court’s “statement on time should be just as forthright as it was on constitutionality.”

*Based on the New York Times summary of the argument.
In addition, Marshall proposed several specific decrees. One called for an end to all segregated public schools by the following September. The other was what Marshall described as the least Negroes should be asked to accept; it called for a specific decree terminating segregated public schools by September, 1956.

Solicitor General Simon E. Sobeloff generally supported the position of the Negro plaintiffs. While he recognized that some time was needed to make the transition, he nevertheless asked the Court to reaffirm that time was not to be used to avoid desegregation. Moreover, Sobeloff reasoned that since problems of implementation would vary from locality to locality, the Court should clothe district courts with the responsibility for supervising plans for compliance as presented by local school authorities.

After four days of argument, the Court began fashioning its decree, and on the last decision day of the term—May 31, 1955—the Court issued a decree calling for “all deliberate speed” in the transition from segregated to nonsegregated school systems. In large measure, the decree more nearly reflected the position of the government as expressed in its brief and by Solicitor General Sobeloff in oral argument. (See Brown II, pp. 473–474.)