Nos. 8, 101, 191, 413, 448

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 8

OLIVER BROWN, ET AL., APPELLANTS

v.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

No. 101

HARRY BRIGGS, JR., ET AL., APPELLANTS

v.

R. W. ELLIOTT, ET AL.

No. 191

DOROTHY E. DAVIS, ET AL., APPELLANTS

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL.

No. 413

SPOTTSWOOD THOMAS BOLLING, ET AL., PETITIONERS

v.

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No. 448

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v.

ETHEL LOUISE BELTON, ET AL.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Because of the national importance of the constitutional questions presented in these cases, the United States considers it appropriate to submit this brief as *amicus curiae*. We shall not undertake, however, to deal with every aspect of the issues involved. Comprehensive briefs have been submitted by the parties and other *amici curiae;* and, so far as possible, this brief will avoid repetition of arguments and materials contained in those briefs. We shall try to confine ourselves to those aspects of the cases which are of particular concern to the Government or within its special competence to discuss.

*Together with No. 101, *Briggs, et al.* v. *Elliott;* No. 191, *Davis, et al.* v. *County School Board, et al.;* No. 413, *Bolling, et al.* v. *Sharpe, et al.;* and No. 448, *Gebhart, et al.* v. *Belton, et al.*

I

The interest of the United States

In recent years the Federal Government has increasingly recognized its special responsibility for assuring vindication of the fundamental civil rights guaranteed by the Constitution. The President has stated: "We shall not * * * finally achieve the ideals for which this Nation was founded so long as any American suffers discrimination as a result of his race, or religion, or color, or the land of origin of his forefathers. * * * The Federal Government has a clear duty to see that constitutional guaranties of individual liberties and of equal protection under the laws are not denied or abridged anywhere in our Union."[1]

Recognition of the responsibility of the Federal Government with regard to civil rights is not a matter of partisan controversy, even though differences of opinion may exist as to the need for particular legislative or executive action. Few Americans believe that government should pursue a *laissez-faire* policy in the field of civil rights, or that it adequately discharges its duty to the people so long as it does not itself intrude on their civil liberties. Instead, there is general acceptance of an affirmative government obligation to insure respect for fundamental human rights.

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[1] Message to the Congress, February 2, 1948, H. Doc. No. 516, 80th Cong., 2d sess., p. 2.

The constitutional right invoked in these cases is the basic right, secured to all Americans, to equal treatment before the law. The cases at bar do not involve isolated acts of racial discrimination by private individuals or groups. On the contrary, it is contended in these cases that public school systems established in the states of Kansas, South Carolina, Virginia, and Delaware, and in the District of Columbia, unconstitutionally discriminate against Negroes solely because of their color.

This contention raises questions of the first importance in our society. For racial discriminations imposed by law, or having the sanction or support of government, inevitably tend to undermine the foundations of a society dedicated to freedom, justice, and equality. The proposition that all men are created equal is not mere rhetoric. It implies a rule of law—an indispensable condition to a civilized society—under which all men stand equal and alike in the rights and opportunities secured to them by their government. Under the Constitution every agency of government, national and local, legislative, executive, and judicial, must treat each of our people as an *American,* and not as a member of a particular group classified on the basis of race or some other constitutional irrelevancy. The color of a man's skin—like his religious beliefs, or his political attachments, or the country from which he or his ancestors came to the United States—does not

diminish or alter his legal status or constitutional rights. "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[2]

The problem of racial discrimination is particularly acute in the District of Columbia, the nation's capital. This city is the window through which the world looks into our house. The embassies, legations, and representatives of all nations are here, at the seat of the Federal Government. Foreign officials and visitors naturally judge this country and our people by their experiences and observations in the nation's capital; and the treatment of colored persons here is taken as the measure of our attitude toward minorities generally. The President has stated that "The District of Columbia should be a true symbol of American freedom and democracy for our own people, and for the people of the world."[3] Instead, as the President's Committee on Civil Rights found, the District of Columbia "is a graphic illustration of a failure of democracy."[4] The Committee summarized its findings as follows:

> For Negro Americans, Washington is not just the nation's capital. It is the

[2] Mr. Justice Harlan in *Plessy* v. *Ferguson*, 163 U. S. 537, 559. Regrettably, he was speaking only for himself, in dissent.

[3] Message to the Congress, note 1, *supra*, p. 5.

[4] *To Secure These Rights*, Report of the President's Committee on Civil Rights (1947), p. 89.

point at which all public transportation into the South becomes "Jim Crow." If he stops in Washington, a Negro may dine like other men in the Union Station, but as soon as he steps out into the capital, he leaves such democratic practices behind. With very few exceptions, he is refused service at downtown restaurants, he may not attend a downtown movie or play, and he has to go into the poorer section of the city to find a night's lodging. The Negro who decides to settle in the District must often find a home in an overcrowded, substandard area. He must often take a job below the level of his ability. He must send his children to the inferior public schools set aside for Negroes and entrust his family's health to medical agencies which give inferior service. In addition, he must endure the countless daily humiliations that the system of segregation imposes upon the one-third of Washington that is Negro.

* * * * *

The shamefulness and absurdity of Washington's treatment of Negro Americans is highlighted by the presence of many dark-skinned foreign visitors. Capital custom not only humiliates colored citizens, but is a source of considerable embarrassment to these visitors. * * * Foreign officials are often mistaken for American Negroes and refused food, lodging and entertainment. However, once it

> is established that they are not Americans, they are accommodated.[5]

It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed. The United States is trying to prove to the people of the world, of every nationality, race, and color, that a free democracy is the most civilized and most secure form of government yet devised by man. We must set an example for others by showing firm determination to remove existing flaws in our democracy.

The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith. In response to the request of the Attorney General for an authoritative statement of the effects of racial discrimination in the United States upon the conduct of foreign relations, the Secretary of State has written as follows:

> * * * I wrote the Chairman of the Fair Employment Practices Committee on May 8, 1946, that the existence of discrimination against minority groups was having an adverse effect upon our relations with other countries. At that time I pointed out that

[5] *Id.*, pp. 89, 95.

discrimination against such groups in the United States created suspicion and resentment in other countries, and that we would have better international relations were these reasons for suspicion and resentment to be removed.

During the past six years, the damage to our foreign relations attributable to this source has become progressively greater. The United States is under constant attack in the foreign press, over the foreign radio, and in such international bodies as the United Nations because of various practices of discrimination against minority groups in this country. As might be expected, Soviet spokesmen regularly exploit this situation in propaganda against the United States, both within the United Nations and through radio broadcasts and the press, which reaches all corners of the world. Some of these attacks against us are based on falsehood or distortion; but the undeniable existence of racial discrimination gives unfriendly governments the most effective kind of ammunition for their propaganda warfare. The hostile reaction among normally friendly peoples, many of whom are particularly sensitive in regard to the status of non-European races, is growing in alarming proportions. In such countries the view is expressed more and more vocally that the United States is hypocritical in claiming to be the champion of democracy while permitting practices of racial discrimination here in this country.

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The segregation of school children on a racial basis is one of the practices in the United States that has been singled out for hostile foreign comment in the United Nations and elsewhere. Other peoples cannot understand how such a practice can exist in a country which professes to be a staunch supporter of freedom, justice, and democracy. The sincerity of the United States in this respect will be judged by its deeds as well as by its words.

Although progress is being made, the continuance of racial discrimination in the United States remains a source of constant embarrassment to this Government in the day-to-day conduct of its foreign relations; and it jeopardizes the effective maintenance of our moral leadership of the free and democratic nations of the world.[6]

II

The Court may not find it necessary to reach the question whether the "separate but equal" doctrine should be reaffirmed or overruled

The briefs in these cases are largely concerned with the question, specifically reserved in *Sweatt* v. *Painter,* 339 U. S. 629, 635–636, whether the "separate but equal" doctrine of *Plessy* v. *Ferguson,* 163 U. S. 537, "should be reexamined in the light of contemporary knowledge respecting

[6] Letter to the Attorney General, dated December 2, 1952. The earlier letter of May 8, 1946, referred to by the Secretary, is quoted in *To Secure These Rights*, note 4, *supra*, pp. 146–147.

the purposes of the Fourteenth Amendment and the effects of racial segregation."

In the *Sweatt* case (p. 631) the opinion stated: "We have frequently reiterated that this Court will decide constitutional questions only when necessary to the disposition of the case at hand, and that such decisions will be drawn as narrowly as possible." The essential requisites for constitutional adjudication "may be lacking though there be entire disinterestedness on both sides in their desire to secure at the earliest possible moment an adjudication on constitutional power."[7] The Court has emphasized that "it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully." *Liverpool Steamship Company* v. *Emigration Commissioners,* 113 U. S. 33, 39. Additional authorities are collected in the concurring opinion of Brandeis, J., in *Ashwander* v. *T. V. A.,* 297 U. S. 288, 346–348.

Because of its "traditional reluctance to extend constitutional interpretations to situations or facts" not actually presented to it, the Court

[7] *United States* v. *CIO*, 335 U. S. 106, 126 (concurring opinion).

has declined to pass on the abstract constitutionality of racial segregation *per se* in cases where such an issue was raised but where other or additional grounds for finding inequality were present. *Sweatt* v. *Painter, supra; Sipuel* v. *Board of Regents,* 332 U. S. 631, 633; *Fisher* v. *Hurst,* 333 U. S. 147, 150; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; cf. *Henderson* v. *United States,* 339 U. S. 816, 826. The Court may find, upon examination of the records in the cases at bar, that none of them presents inescapably the question whether separate but otherwise equal public schools for white and colored children are, solely because they are separate, constitutionally unequal.

That question would not arise unless and until it were found as a fact, upon the basis of supporting evidence, that the separate schools are equal in the educational benefits and opportunities afforded children of both races. Such a finding, if made by a district court and sustained by the evidence, would make it necessary to decide whether the establishment of such "separate but equal" schools satisfies the requirements of the Constitution. In none of the cases before the Court, however, is there such a finding.

In the Virginia, South Carolina, and Delaware cases, physical inequality, apart from segregation, was expressly found, and these findings of fact are not here challenged. (No. 101, R. 210, 307; No. 191, R. 622, 624; No. 448, R. 48–66.) The spe-

cific findings of inequality in those cases make it unnecessary to go further in order to establish that plaintiffs' constitutional rights have been violated. Failure of a state to provide "equal" educational facilities to some of its citizens, solely because of their race or color, is without more a violation of the Fourteenth Amendment. "The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State." *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 349. The constitutional right to equality of educational opportunity is "personal and present" (*Sweatt* v. *Painter,* 339 U. S. 629, 635), and it is no answer to the particular plaintiffs' claim to say that, at some time in the future, colored persons as a group will be treated "equally." A state can discharge its obligation to persons discriminated against only by furnishing them equal educational benefits "as soon as it does for applicants of any other group." *Sipuel* v. *Board of Regents,* 332 U. S. 631, 633. We agree with the Supreme Court of Delaware in No. 448 that, in cases where separate schools are found physically unequal, the particular plaintiffs should not be required to attend inferior schools until such time as the state may complete an "equalization" program. Accordingly, the district courts, upon making such findings in the Virginia and South Carolina cases, erred in withholding from the plaintiffs the relief to which they were then imme-

diately entitled. If and when it should be found as a fact, and not merely prophesied, that "equalization" has been accomplished, there would arise the question which on the present records in the Virginia and South Carolina cases may be deemed hypothetical, namely, whether "equalization" is the same as equality. Cf. *Wilshire Oil Co.* v. *United States,* 295 U. S. 100, 102.

In the Kansas case, the district court found equality of physical facilities, curricula, qualifications of teachers, transportation service, etc., and held that the plaintiffs were "denied no constitutional rights or privileges by reason of any of these matters." (R. 245–246.) But it also made the following finding of fact (*ibid.*):

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retain [retard?] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial integrated school system.[8]

[8] A substantially identical finding of fact was made by the Chancellor in the Delaware case. The state Supreme Court, although it held that this finding was "immaterial" to the constitutional issue, did not reject it as unsupported by the evidence.

This is not a finding of "separate but equal." On the contrary, it is a finding of "separate but unequal," or more precisely, "separate and hence unequal." Despite this finding, the district court held that the plaintiffs' constitutional right to equality of treatment had not been violated. This holding was based solely on the court's understanding of the "separate but equal" doctrine of *Plessy* v. *Ferguson*. The district court thought that that case required it to hold as a matter of law that separate schools are legally equal even though it finds that, because of segregation, they are in fact unequal. This, we submit, was plain error even if it be assumed that *Plessy* is still controlling.

Plessy v. *Ferguson* did not purport to lay down an inexorable rule of law, which could not be challenged at any time in the future no matter how different the circumstances, that segregation could *never* create inequality. In the *Plessy* case the Court said only that, as a general matter, laws requiring the separation of white and colored persons "do not *necessarily* imply the inferiority of either race to the other." (P. 544; italics added.) This was asserted as if it were axiomatic and too obvious to admit of dissent. We do not pause here to demonstrate the errors of fact and law contained in the Court's generalization.[9] It suffices to note that the *Plessy* case plainly does not

[9] See Brief for the United States, pp. 27–35, 49–60, in *Henderson* v. *United States*, No. 25, Oct. Term 1949, 339 U. S. 816.

preclude a district court from finding, as the district court found in the Kansas case, that segregation can, and in the particular instance does, produce unequal and inferior treatment. In *Plessy* the Court indulged in an abstract speculation as to the effects of racial segregation in general; in No. 8 there is a contrary finding of fact, based on evidence and not on unproved assumptions, as to the particular effects of racial segregation in public schools on the education of colored children. Hence, we believe, the Kansas district court erred in construing *Plessy* v. *Ferguson* as compelling a holding of constitutional equality where there is a specific finding of fact that the particular type of enforced racial segregation creates inequality.

The District of Columbia case arises on the pleadings, the precise issue being whether the district court erred in granting the motion to dismiss the complaint. No evidence was taken, and no findings of fact were made. To the extent that determination of the constitutional questions raised may depend on facts, the case may not be in an appropriate posture for deciding such questions. *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 568–575, and cases cited.

In any event, it is contended that the action of respondents in establishing segregated schools in the District of Columbia infringes petitioners' rights under the Fifth Amendment. Respondents assert that such segregation is compelled by cer-

tain Acts of Congress, and their interpretation of these Acts was upheld by the district court in dismissing the complaint, apparently on the authority of *Carr* v. *Corning,* 182 F. 2d 14 (C. A. D. C.). There is, therefore, an initial question of statutory construction.

The Court may find this an appropriate case for application of the well-settled rule of construction that doubts as to the meaning of a statute should be resolved so as to avoid serious constitutional questions. The Court has in countless cases affirmed its duty "in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality." *United States* v. *CIO,* 335 U. S 106, 120–121, and cases cited. There is room for reasonable argument that in the pertinent statutes Congress *assumed* the existence of a system of segregated schools in the District of Columbia, but did not make it mandatory upon the responsible District authorities to maintain and continue such segregation.

The language of these Acts of Congress may be regarded as significantly different from the constitutional and statutory provisions involved in the state cases. Typical of the latter in their explicitness are those of Virginia.[10] Its Constitution (1902, Article IX, section 140) provides:

[10] The texts of the constitutional and statutory provisions in states having school segregation are quoted in appellees' brief in No. 101, pp. 38–46.

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"White and colored children shall not be taught in the same school." Its statutes (Code 1950, section 22–221) provide: "White and colored persons shall not be taught in the same school, but shall be taught in separate schools, under the same general regulations as to management, usefulness and efficiency."

No similarly explicit and mandatory language, manifesting an unmistakable intention to make racial segregation compulsory in the public schools of the District of Columbia, is to be found in the pertinent Acts of Congress.[11] If Congress had expressly required such segregation, a grave and difficult question under the Fifth Amendment would arise. This question could be avoided if these Acts were construed as meaning only that in them Congress assumed, but neither approved nor disapproved, the fact of a segregated school system in the District. Such a construction, we suggest, is not precluded by the terms of the legislation. Cf. *Ex parte Endo,* 323 U. S. 283, 303, note 24, and cases cited. If the Court should adopt this construction, it would be appropriate to remand the case to the district court with instructions to enter a declaratory judgment to that effect. The respondent Board of Education would then be free to abandon the present segregated school system in the District of Columbia. If it should thereafter continue to maintain such a segregated school system, its action

[11] These provisions are set out in petitioners' brief in No. 413, pp. 23–26.

could not be based upon any asserted mandate from Congress but would arise solely from its own independent ~~action~~ choice. In such event the legal questions which might arise would not be the same as those now sought to be raised.

III

If the Court should reach the question, the "separate but equal" doctrine should be reexamined and overruled

In the briefs submitted by the United States in *Henderson* v. *United States,* 339 U. S. 816, and in *Sweatt* v. *Painter,* 339 U. S. 629, and *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637, the Government argued that racial segregation imposed or supported by law is *per se* unconstitutional. We renew that argument here. Without repeating in detail the grounds, stated at length in those briefs, for the conclusion that the doctrine of "separate but equal" is wrong as a matter of constitutional law, history, and policy, the United States again urges the Court, if it should reach the question, to reexamine and overrule that doctrine.

The Government submits that compulsory racial segregation is itself, without more, an unconstitutional discrimination. "Separate but equal" is a contradiction in terms. Schools or other public facilities where persons are segregated by law, solely on the basis of race or color, cannot in any circumstances be regarded as equal. The con-

stitutional requirement is that of equality, not merely in one sense of the word but in every sense. Nothing in the language or history of the Fourteenth Amendment supports the notion that facilities need be equal only in a physical sense.

People who are compelled by law to live in a ghetto do not enjoy equality, even though their houses are as good as, or better than, those on the outside. Cf. *Buchanan* v. *Warley,* 245 U. S. 60. The same is true of children who know that because of their color the law sets them apart from others, and requires them to attend separate schools specially established for members of their race. The facts of every-day life confirm the finding of the district court in the Kansas case that segregation has a "detrimental effect" on colored children; that it affects their motivation to learn; and that it has a tendency to retard their educational and mental development and to deprive them of benefits they would receive in an integrated school system. (*Supra,* p. 12.) Similar considerations are reflected in the opinions of this Court in the *Sweatt* and *McLaurin* cases, 339 U. S. at 633–635 and 641–642.

The broad principle underlying the decisions of this Court from *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, to the *Sweatt* and *McLaurin* cases is that the Fourteenth Amendment forbids the classification of students on the basis of race or color so as to deny one group educational advantages and opportunities afforded to another. To

be sure, those cases involved university graduate and professional schools, but nothing in the language or history of the Fourteenth Amendment could support a constitutional distinction between universities on the one hand, and public elementary or high schools on the other. Strict insistence upon the constitutional requirement of equality is no less necessary as applied to public schools which, as has been said, are "designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people * * *. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny." [12]

Similarly, nothing in the language or history of the Fourteenth Amendment could support an interpretation which permits segregation of Negroes but not of other groups in the community. Indeed, as the Court has pointed out in many cases, that Amendment was primarily designed to assure to colored persons the right to be treated under the law exactly like white persons, and to protect them against being singled out for special or discriminatory treatment.

Strauder v. *West Virginia,* 100 U. S. 303, decided in 1880, was the first case in which the Court was called upon to deal with the application of the Fourteenth Amendment to a state law making

[12] *McCollum* v. *Board of Education,* 333 U. S. 203, at 216, 231 (concurring opinion).

a classification based on race or color. The interpretation placed on the Amendment in that case (pp. 306–308) is especially significant, not merely because of its comprehensive nature, but because it was made by a Court whose members had lived during the period when the Amendment was adopted:

> This [the Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the *Slaughter-House Cases* (16 Wall. 36), cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate * * * that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It is well known that in some States laws making such discriminations then existed, and others might well be expected. * * * It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the

> enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. * * *
>
> * * * What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?
>
> * * * The very fact that colored people are singled out * * * is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Referring to the civil rights statutes (now 8 U. S. C. 41 and 42) enacted by Congress pursuant to the Fourteenth Amendment, the Court in *Virginia* v. *Rives,* 100 U. S. 313, 318, stated: "The plain object of these statutes, as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same." See also the *Slaughter-*

House Cases, 16 Wall. 36, 70–72, 81, and *Buchanan* v. *Warley,* 245 U. S. 60, 76.

In *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410, 420, the Court said: "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." Cf. *Hurd* v. *Hodge,* 334 U. S. 24, 30–34. And in *Shelley* v. *Kraemer,* 334 U. S. 1, 23, the Chief Justice stated for the Court:

> The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color.

"Separate but equal" is sometimes described as an "ancient" doctrine of constitutional law. But its antiquity dates not from the adoption of the Fourteenth Amendment in 1868 but from a judicial expression which did not make its appearance in the reports of this Court until 1896. Almost three decades after ratification of the post-bellum Amendments, when "the history of the times when they were adopted, and the gen-

eral objects they plainly sought to accomplish" may have become blurred by the passage of time, the opinion in *Plessy* v. *Ferguson,* 163 U. S. 537, read into the Fourteenth Amendment a qualification that enforced separation of white and colored persons in the use of public facilities does not violate the Amendment so long as the separate accommodations are "equal." This judicial contraction of the constitutional rights secured by the Amendment is irreconcilable with the body of decisions which preceded and followed *Plessy* v. *Ferguson,* and is not justified by the considerations adduced to support it.

In the *Plessy* case the view was expressed (p. 551) that the alternative to racial segregation compelled by law is "an enforced commingling" of white and colored persons. This observation, apart from its irrelevance to the constitutional issue, is a plain *non sequitur*. Segregation imposed by law is an interference with the right of an individual to exercise a voluntary choice as to those with whom he will associate. To remove such an interference is to enlarge individual freedom, not to limit it. "Commingling" between white and colored persons can then result as the product of voluntary choice, not of legal coercion. Cf. *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637, 641–642.

In the *Plessy* case the Court also said (p. 551) that "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon

physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation." This observation also was irrelevant to the constitutional issue before the Court. It might properly have been made before a legislative body considering a bill to penalize acts manifesting racial prejudice. But the Court was not called upon to make a judgment of policy as to the wisdom of legislation designed to eradicate racial prejudice; the only question before it was whether a particular statute violated a constitutionally-protected right.

In any event, this observation in the *Plessy* opinion is, at best, a half-truth. Although legislation may not be able to "eradicate" racial prejudice, experience has shown that it can create conditions favorable to the gradual elimination of racial prejudice; or it can, on the other hand, strengthen and enhance it. As the Supreme Court of California has said, the way to eradicate racial tension is not "through the perpetuation by law of the prejudices that give rise to the tension."[13] Even if statutes cannot in themselves remove racial antagonisms, they cannot constitutionally exacerbate such antagonisms by giving the sanction of law to what would otherwise be private acts of discrimination.

The above-quoted statements in the *Plessy* opinion illustrate the extent to which the "sepa-

[13] *Perez* v. *Sharp*, 32 Calif. 2d 711, 725.

rate but equal" doctrine represented the views of the members of the Court as the best solution for "the difficulties of the present situation" then existing. But the Justices were being called upon to make, not a judgment as to desirable legislative policy, but a judicial judgment as to the interpretation of the Fourteenth Amendment which would be most faithful to its terms, history, and purposes.

Whatever the merits in 1896 of a judgment as to the wisdom or reasonableness of the rule of "separate but equal", it should now be discarded as a negation of rights secured by the Constitution. The Court has said that "It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or essentials of fundamental rights." *Wolf* v. *Colorado,* 338 U. S. 25, 27. "* * * the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." *Gompers* v. *United States,* 233 U. S. 604, 610.

In sum, the doctrine of "separate but equal" is an unwarranted departure, based upon dubious

assumptions of fact combined with a disregard of the basic purposes of the Fourteenth Amendment, from the fundamental principle that all Americans, whatever their race or color, stand equal and alike before the law. The rule of *stare decisis* does not give it immunity from reexamination and rejection. In *Smith* v. *Allwright,* 321 U. S. 649, 665–666, the Court said:

> * * * we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself.[14]

[14] "* * * the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *Graves* v. *N. Y. ex rel. O'Keefe,* 306 U. S. 466, 491–492 (concurring opinion). In *Passenger Cases,* 7 How. 283, 470, Mr. Chief Justice Taney agreed that "it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."

IV

If in any of these cases the Court should hold that a system of "separate but equal" public schools is unconstitutional, it should remand the case to the district court with directions to devise and execute such program for relief as appears most likely to achieve orderly and expeditious transition to a non-segregated system

It is fundamental that a court of equity has full power to fashion a remedy to meet the needs of the particular situation before it. *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 622; *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 132; *Eccles* v. *Peoples Bank*, 333 U. S. 426, 431; *Alexander* v. *Hillman*, 296 U. S. 222, 239; *Union Pacific Railway Co.* v. *Chicago, M. & St. P. Railway Co.*, 163 U. S. 564, 600–601. The fact that a system or practice is determined to be unlawful does not of itself require the court to order that it be abandoned forthwith. Thus, where a violation of the antitrust laws has persisted over a long period of time, resulting in a tangled complex of economic arrangements tainted with illegality, it is recognized that a decree calling for complete elimination of the illegal arrangements overnight would be impracticable. For example, dissolution of the illegal combinations involved in the *Standard Oil* and *Motion Picture* [15] cases was deliberately

[15] *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *Paramount Pictures*, 70 F. Supp. 53 (S. D. N. Y.), 334 U. S. 131, 85 F. Supp. 881, 339 U. S. 974. See also *United States* v. *National Lead Co.*, 332 U. S. 319, 329–335; *United States* v. *Aluminum Co.*, 322 U. S. 716, 148 F. 2d 416 (S. D. N. Y.), 171 F. 2d 285, 91 F. Supp. 333, 419.

required to take place over a period of years.[16]

If, in any of the present cases, the Court should hold that to compel colored children to attend "separate but equal" public schools is unconstitutional, the Government would suggest that in shaping the relief the Court should take into account the need, not only for prompt vindication of the constitutional rights violated, but also for orderly and reasonable solution of the vexing problems which may arise in eliminating such segregation. The public interest plainly would be served by avoidance of needless dislocation and confusion in the administration of the school systems affected. It must be recognized that racial segregation in public schools has been in effect in many states for a long time. Its roots go deep in the history and traditions of these states. The practical difficulties which may be met in making progressive adjustment to a non-segregated system cannot be ignored or minimized.[17]

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[16] As another example, when Congress determined that certain holding company arrangements were illegal, it delayed elimination of such arrangements in particular cases until a satisfactory plan for their dissolution should be proposed by the parties and approved by the Securities and Exchange Commission. Public Utility Holding Company Act of 1935, 49 Stat. 820, 15 U. S. C. § 79k.

[17] These anticipated difficulties relate, of course, only to the question of relief; they cannot affect the merits of the constitutionality of compulsory racial segregation. Moreover, the discussion in this section of the brief assumes that the separate schools for colored children are in other respects "equal." It would be manifestly unfair and unjust,

A decision that the Constitution forbids the maintenance of "separate but equal" public schools will necessarily result in invalidation of provisions of constitutions, statutes, and administrative regulations in many states—provisions which were adopted in good faith upon the assumption, supported by previous declarations of this Court, that they were consistent with the requirements of the Fourteenth Amendment. A reasonable period of time will obviously be required to permit formulation of new provisions of law governing the administration of schools in areas affected by the Court's decision. School authorities may wish to give pupils a choice of attending one of several schools, a choice now prohibited. Teachers may have to be transferred, and teaching schedules rearranged. It is possible, of course, that abolition of segregation would in many areas produce no serious dislocations, and no wholesale transfers of teachers or pupils would be required. This could result from purely geographical factors, for it would still be likely that the pupils of a school would be representative of the area in which it is situated.

These are indicative of the kinds of problems which may arise in giving effect to a holding that "separate but equal" school systems are unconstitutional. We suggest that any relief which

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and contrary to the Court's decisions, to withhold immediate relief where the separate schools are also physically unequal and inferior. See pp. 10–12, *supra*.

this Court may direct should contemplate the possibility of such problems and afford opportunity for their expeditious settlement within a specified period. Moreover, to the extent that there may exist popular opposition in some sections to abolition of racially-segregated school systems, we believe that a program for orderly and progressive transition would tend to lessen such antagonism. An appropriate tribunal to devise and supervise execution of such a program is a district court, which could fashion particular orders to meet particular needs. On remand, that court could direct the parties to submit proposals for such a program. And if the district court so desires, it could appoint an advisory committee of lawyers and other citizens to assist it in this task. After the district court adopts a program, either side could seek review, by appeal or otherwise, if it believes the program does not conform to this Court's decision. At reasonable intervals after the program is put into effect, the parties should submit progress reports to the district court, which should have the power, if circumstances so require, to enter any further orders found to be necessary.

Such a procedure should afford opportunity to responsible school authorities to develop a program most suited to their own conditions and needs. Thus, subject to the court's approval, a school board might propose integration on a grade basis, *i. e.*, to integrate the first grades immediately, and to con-

tinue such integration until completed as to all grades in the elementary schools. Cf. *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U. S. 358. Another board might deem it more feasible to integrate on a school-by-school basis. In some states where there is segregation only in some grades of the elementary schools, as a result of the discretionary action of the authorities, it may be feasible to put a non-segregated system into effect immediately.[18]

CONCLUSION

The subordinate position occupied by Negroes in this country as a result of governmental discriminations ("second-class citizenship," as it is sometimes called) presents an unsolved 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 its strength, it is especially important to affirm that the Constitution of the United States places no limitation, express or implied,

[18] It is assumed that the district courts are, because of their familiarity with local conditions, the appropriate tribunals to deal with issues of relief. It may be, however, that the Court will wish to formulate more precise standards and provisions for the guidance of the district courts. In that event we suggest that several procedures are available. One would be for the Court to issue no decree at this time, but to set the matter down for argument at a later date on the question of relief. Another would be to appoint a special master to hold hearings and make recommendations to the Court on that question.

on the principle of the equality of all men before the law. Mr. Justice Harlan said in his dissent in the *Plessy* case (163 U. S. at 562):

> 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.[19]

Respectfully submitted.

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[19] Message to the Congress, note 1, *supra*, p. 7.

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