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IN THE

Supreme Court of the United States

October Term, 1953

No. 1

OLIVER BROWN, ET AL., *Appellants,*

VS.

BOARD OF EDUCATION OF TOPEKA, ET AL., *Appellees.*

No. 2

HARRY BRIGGS, JR., ET AL., *Appellants.*

VS.

R. W. ELLIOTT, ET AL., *Appellees.*

No. ~~4~~ 3

DOROTHY E. DAVIS, ET AL., *Appellants,*

VS.

COUNTY SCHOOL BOARD OF PRINCE EDWARDS COUNTY, *Appellees.*

No. ~~10~~ 5

FRANCIS B. GEBHART, ET AL., *Petitioners,*

VS.

ETHEL LOUISE BELTON, ET AL., *Respondents.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, THE EASTERN DISTRICT OF SOUTH CAROLINA AND THE EASTERN DISTRICT OF VIRGINIA, AND ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE, RESPECTIVELY

BRIEF FOR APPELLANTS IN NOS. 1, 2 AND 4 AND FOR RESPONDENTS IN NO. 10 ON REARGUMENT

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BRIEF FOR APPELLANTS IN NOS. 1, 2 AND 4 AND FOR RESPONDENTS IN NO. 10 ON REARGUMENT

Explanatory Statement

One brief is being filed in these four cases. They fundamentally involve the same questions and issues. As an aid to the Court, we are restating below a full history of each case.

NO. 1

Opinion Below

The opinion of the statutory three-judge District Court for the District of Kansas (R. 238-244) is reported at 98 F. Supp. 797.

Jurisdiction

The judgment of the court below was entered on August 3, 1951 (R. 247). On October 1, 1951, appellants filed a petition for appeal (R. 248), and an order allowing the appeal was entered (R. 250). Probable jurisdiction was noted on June 9, 1952 (R. 254). Jurisdiction of this Court rests on Title 28, United States Code, §§ 1253 and 2101(b).

Statement of the Case

Appellants are Negro students eligible to attend and attending elementary schools in Topeka, Kansas, and their parents (R. 3-4). Appellees are state officers empowered to maintain and operate the public schools of Topeka, Kansas (R. 4-5). On March 22, 1951, appellants commenced this class action against appellees to restrain them from enforcing and executing that part of Chapter 72-1724, General Statutes of Kansas, 1949, which permitted racial segregation in public elementary schools, on the ground that it violated the Fourteenth Amendment by depriving the infant appellants of equal educational opportunities (R. 2-7), and for a judgment declaring that the

practice of appellees under said statute of maintaining and operating racially segregated elementary schools is in violation of the Fourteenth Amendment.

Appellees admitted in their answer that they acted pursuant to the statute and that, solely because of their color, the infant appellants were not eligible to attend any of the elementary schools maintained exclusively for white students (R. 12). The Attorney General of the State of Kansas filed a separate answer specifically to defend the constitutional validity of the statute (R. 14).

The court below was convened in accordance with Title 28, United States Code, § 2284, and, on June 25-26, a trial on the merits was held (R. 63 *et seq.*). On August 3, 1951, the court below filed its opinion (R. 238-244), findings of fact (R. 244-246) and conclusions of law (R. 246-247) and entered a final judgment denying the injunctive relief sought (R. 247).

Specification of Errors

The court below erred:

1. In refusing to grant appellants' application for a permanent injunction to restrain appellees from acting pursuant to the statute under which they are maintaining separate public elementary schools for Negro children, solely because of their race and color.

2. In refusing to hold that the State of Kansas is without authority to promulgate the statute because it enforces a classification based upon race and color which is violative of the Constitution of the United States.

3. In refusing to enter judgment in favor of appellants after finding that enforced attendance at racially segregated elementary schools was detrimental and deprived them of educational opportunities equal to those available to white children.

NO. 2

Opinions Below

The majority and dissenting opinions of the statutory three-judge District Court for the Eastern District of South Carolina on the first hearing (R. 176-209) are reported in 98 F. Supp. 529-548. The opinion on the second hearing (R. 301-306) is reported in 103 F. Supp. 920-923.

Jurisdiction

The judgment of the court below was entered on March 13, 1952 (R. 306). A petition for appeal was filed below and allowed on May 10, 1952 (R. 309). Probable jurisdiction was noted on June 9, 1952 (R. 316). Jurisdiction of this Court rests on Title 28, United States Code, §§ 1253 and 2101(b).

Statement of the Case

Appellants are Negro children who reside in and are eligible to attend the public schools of School District No. 22, Clarendon County, South Carolina, and their respective parents and guardians (R. 4-5). Appellees are the public school officials of said district who, as officers of the state, maintain and operate the public schools of that district (R. 5-6). On December 22, 1950, appellants commenced this class action against appellees to enjoin enforcement of Article XI, Section 7, of the Constitution of South Carolina and Section 5377 of the Code of Laws of South Carolina of 1942, which require the segregation of races in public schools, on the ground that they deny to appellants the equal protection of the laws secured by the Fourteenth Amendment, and for a judgment declaring that said laws violate the Fourteenth Amendment and are invalid (R. 2-11).

Appellees in their answer admitted adherence to the said constitutional and statutory provisions requiring racial segregation in public schools and asserted that such provisions were a reasonable exercise of the police powers of the state and, therefore, were valid (R. 13-17).

A three-judge District Court was convened, pursuant to Title 28, United States Code, §§ 2284, and on July 25, 1951, a trial on the merits was held (R. 30 *et seq.*). On June 23, 1951, the court below filed its opinion (R. 176) and entered a final decree (R. 209): (1) upholding the constitutional validity of the contested state constitutional and statutory provisions; (2) denying the injunctive relief which was sought; (3) requiring appellees to furnish to appellants educational facilities equal to those furnished to white students; and (4) requiring appellees within six months to file a report of action taken toward that end.

An appeal from this judgment was allowed by this Court on July 20, 1951. The report required by the decree of the court below was filed on December 21, 1951, and subsequently forwarded to this Court. On January 28, 1952, this Court vacated the judgment of the court below and remanded the case for the purpose of obtaining the views of the court below on the additional facts in the record and to give it the opportunity to take such action as it might deem appropriate in light of the report. 342 U. S. 350. Mr. Justice Black and Mr. Justice Douglas dissented on the ground that the additional facts in the report were "wholly irrelevant to the constitutional questions presented by the appeal to this Court". 342 U. S. 350.

Pursuant to the mandate of this Court, a second trial was held in the court below on March 3, 1953 (R. 271), at which time the appellees filed an additional report showing progress made since the filing of the original report (R. 273). On March 13, 1952, the court below filed its opinion (R. 301) and entered a final decree (R. 306) again upholding the validity of the contested constitutional and statutory provisions, denying the injunctive relief re-

quested and requiring appellees to afford to appellants educational facilities equal to those afforded to white students.

Specification of Errors

The court below erred:

1. In refusing to enjoin the enforcement of the laws of South Carolina requiring racial segregation in the public schools of Clarendon County on the ground that these laws violate rights secured under the equal protection clause of the Fourteenth Amendment.

2. In refusing to grant to appellants immediate and effective relief against the unconstitutional practice of excluding appellants from an opportunity to share the public school facilities of Clarendon County on an equal basis with other students without regard to race or color.

3. In predicating its decision on the doctrine of *Plessy* v. *Ferguson* and in disregarding the rationale of *Sweatt* v. *Painter* and *McLaurin* v. *Board of Regents.*

NO. 4

Opinion Below

The opinion of the statutory three-judge District Court for the Eastern District of Virginia (R. 617-623) is reported at 103 F. Supp. 337-341.

Jurisdiction

The judgment of the court below was entered on March 7, 1952 (R. 623). A petition for appeal was filed below and allowed on May 5, 1952 (R. 625, 630, 683). Probable jurisdiction was noted on October 8, 1952. —U. S. —, 97 L. ed. (Advance p. 27). Jurisdiction of this Court rests on Title 28, United States Code, §§ 1253 and 2101(b).

Statement of the Case

Appellants, high school students residing in Prince Edward County, Virginia, and their parents and guardians, brought a class action against appellees, the County School Board and the Division Superintendent of Schools on May 23, 1951. The complaint (R. 5-30) alleged that said appellees maintained separate public secondary schools for Negro and white children pursuant to Article IX, Section 140 of the Constitution of Virginia, and Title 22, Chapter 12, Article 1, section 22-221, of the Code of Virginia of 1950; that the Negro school was inferior and unequal to the white schools; and that it was impossible for the infant appellants to secure educational opportunities or facilities equal to those afforded white children similarly situated as long as said appellees enforce said laws or pursued a policy of racial segregation. It sought a judgment declaratory of the invalidity of said laws as a denial of rights secured by the due process and equal protection clauses of the Fourteenth Amendment, and an injunction restraining said appellees from enforcing said laws and from making any distinction based on race or color among children attending the secondary schools of the County.

Appellees admitted maintenance of said schools, enforcement of said laws, and inequalities as to physical plant and equipment, but denied that the segregation violated the Constitution (R. 32-36). Appellee, the Commonwealth of Virginia, intervened (R. 37) and made the same admissions and defense (R. 37-39).

On March 7, 1952, a three-judge District Court found the Negro school inferior in plant, facilities, curricula and means of transportation (R. 622-623) and ordered appellees forthwith to provide "substantially" equal curricula and transportation facilities and to "proceed with all reasonable diligence and dispatch to remove" the existing inequality "by building, furnishing and providing a high school building and facilities for Negro students" (R. 624). It refused to enjoin enforcement of the constitutional and

statutory segregation provisions on the grounds: (1) that appellants' evidence as to the effects of educational segregation did not overbalance appellees', and that it accepted as "apt and able precedent" *Briggs* v. *Elliott,* 98 F. Supp. 529 (E. D. S. C. 1951) and *Carr* v. *Corning,* 182 F. 2d 14 (C. A. D. C. 1950) which "refused to decree that segregation be abolished incontinently" (R. 619); (2) that nullification of the segregation provisions was unwarranted in view of evidence that racial segregation was not based on prejudice or caprice but, rather, was "one of the ways of life in Virginia" (R. 620); (3) that segregation has begotten greater opportunities for the Negro (R. 621); (4) that elimination of segregation would lessen interest in and financial support of public schools (R. 621); and (5) that, finding "no hurt or harm to either race," it was not for the court "to adjudge the policy as right or wrong" (R. 621-622).

Specification of Errors

The court below erred:

1. In refusing to enjoin the enforcement of Article IX, Section 140 of the Constitution of Virginia, and Title 22, Chapter 12, Article 1, Section 22-221, of the Code of Virginia of 1950, upon the grounds that these laws violate rights secured by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

2. In refusing to forthwith restrain appellees from using race as a factor in determining the assignment of public secondary educational facilities in Prince Edward County, Virginia, after it had found that appellants are denied equality of buildings, facilities, curricula and means of transportation in violation of the due process and equal protection clauses of the Fourteenth Amendment.

3. In refusing to hold that appellants are entitled to equality in all aspects of the public secondary educational

process, in addition to equality in physical facilities and curricula.

4. In issuing a decree ordering appellees to equalize secondary school facilities in the County where such decree cannot be effectively enforced without involving the court in the daily operation and supervision of schools.

NO. 10

Opinions Below

The opinion of the Chancellor of the State of Delaware (A. 338) is reported at 87 A. (2d) 862. The opinion of the Supreme Court of Delaware (R. 37) is reported at 91 A. (2d) 137.*

Jurisdiction

The judgment of the court below was entered on August 28, 1952 (R. 37). On November 13, 1952 petition for writ of certiorari was filed herein. On November 20, 1952, respondents waived the filing of a brief in opposition to the petition for writ of certiorari and moved that, if certiorari were granted, the argument be advanced and heard immediately following argument in Nos. 8, 101 and 191. On November 24, 1952, the petition for writ of certiorari and motion to advance were granted. — U. S. —; 97 L. ed. (Advance, p. 124). Jurisdiction of this Court rests upon Title 28, United States Code, § 1257(3).

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* The record in this case consists of five separate parts: appendix to petitioners' brief in the court below, the supplement thereto, appendix to respondents' brief in the court below, the supplement thereto, and the record of proceedings in the Supreme Court of Delaware. These will be referred to in respondents' brief as follows:

Appendix to petitioners' brief below will be indicated by A; the supplement to the petitioners' appendix below will be referred to as SA; respondents' appendix below will be referred to as RA; the supplement to respondents' appendix below will be referred to as RSA; the record of proceedings in the Supreme Court of Delaware will be referred to as R.

Statement of the Case

No. 10 arises from two separate class actions filed in the Court of Chancery of the State of Delaware by Negro school children and their guardians seeking admittance of the children to two public schools maintained by petitioners exclusively for white children in New Castle County, Delaware. In the courts below, plaintiffs prevailed, and they and members of their class are now attending the schools to which they sought admission, an application for stay of final order having been denied. (Brief of Respondents, No. 448, October Term, 1952, pp. 25-27). Thus, in this case, unlike the other school segregation cases now under consideration, plaintiffs are respondents in this Court. Nevertheless, they file their brief at this time along with appellants in Numbers 1, 2 and 4, because, on the fundamental issues, they take the same position as do those appellants, and because they believe that by so filing they will facilitate the Court's consideration of the matters at bar.

The complaint (A 3-13) in one of the two cases from which No. 10 arises, alleged that respondents residing in the Claymont Special School District were refused admittance to the Claymont High School maintained by petitioner-members of the State Board of Education and members of the Board of Education of the Claymont Special School District solely because of respondents' color. Because of this, these respondents were compelled to attend Howard High School (RA 47), a public school for Negroes only, in Wilmington, Delaware. Howard High School is operated and controlled by the Corporate Board of Public Education in Wilmington, not a party to this case (A 314-15, 352; R 57, RA 203). The second complaint (A 14-30) out of which No. 448 arises alleged that respondent was excluded from Hockessin School No. 29, a public elementary school maintained for white children only, by petitioner-members of the State Board of Education and petitioner-

members of the Board of School Trustees of Hockessin School No. 29. Respondent and the class she represented at the time of the complaint, attended Hockessin School No. 107, maintained solely for Negroes by the State Board of Education. Respondents in both complaints asserted that the aforesaid state-imposed racial segregation required by Par. 2631, Revised Code of Delaware, 1935, and Article X, Section 1 of the Constitution of Delaware: (1) compelled them to attend schools substantially inferior to those for white children to which admittance was sought; and (2) injured their mental health, impeded their mental and personality development and made inferior their educational opportunity as compared with that offered by the state to white children similarly situated. Such treatment, respondents asserted, is prohibited by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Petitioners' answers (A 31-33, A 34-37) defended the exclusion: (1) upon mandatory constitutional and statutory provisions of the State of Delaware which require separate public schools for white and colored children; and (2) upon the fact that the educational opportunities offered respondents were equal to those offered white children similarly situated.

The two cases were consolidated and tried before the Chancellor. In an opinion (A 348-356; 87 A. (2d) 862) filed on April 1, 1952, the Chancellor found as a fact that in "our Delaware society" segregation in education practiced by petitioners "itself results in Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated." However, the Chancellor denied respondents' prayers for a judgment on this ground and refused to declare that the Delaware constitutional and statutory provisions violated respondents' right to equal protection. But the Chancellor did award respondents the relief which they requested because other in-

equalities were found to exist. These included, in the high school, teacher training, pupil-teacher ratio, extra-curricular activities, physical plant and esthetic considerations, and time and distance involved in travel. As to the elementary schools in question, the court found the Negro facilities inferior in building and site, esthetic considerations, teacher preparation and transportation facilities. A more detailed exposition of the facts upon which these findings were based is set forth in respondents' Brief in No. 448, October Term, 1952, pp. 27-44.

The Chancellor, as stated above, ordered that respondents be granted immediate relief in the only way that it was then available, that is, by admission to the superior facilities. On August 28, 1952, the Supreme Court of Delaware affirmed. 91 A. (2d) 137. Its findings on some of the facts were somewhat different than the Chancellor's but, on the whole, it agreed with him. Upholding the Chancellor's determination that the requested relief could not be granted because of the harmful psychological effect of racial segregation, it did not otherwise review his factual findings in this regard. Denying petitioners' plea for time to equalize the facilities in question, the Supreme Court held that in the high school case: (1) a decree ordering petitioners to equalize the facilities in question could have no effect on the legal entity having control of the Wilmington public schools which was not a party to the cause; and (2) that the court did not see how it could supervise and control the expenditure of state funds in a matter committed to the administrative discretion of school authorities. Finally, the court held that it could not issue a decree which would, in effect, deny to plaintiffs what it had held they rightfully deserved. As to the elementary school, the court also noted that defendants had not assumed the burden of showing to what extent remedial legislation had improved or could improve conditions in the future. Alluding to its antecedent discussion of the question of

relief for high school respondents, it affirmed the Chancellor's finding on this issue also.

Stay of the order was denied by the Chancellor and by the Supreme Court of Delaware (Brief of Respondents, No. 448, October Term, 1952, pp. 25-27) and respondents and members of their class are now enjoying their second year of equal educational opportunities under the decree.

This Court's Order

These four cases were argued and submitted to the Court on December 9-11, 1952. Thereafter, on June 8, 1953, this Court entered its order for reargument, as follows, — U. S. —; 97 L. ed. (Advance p. 956):

> *"Each of these cases is ordered restored to the docket and is assigned for reargument on Monday, October 12, next. In their briefs and on oral argument counsel are requested to discuss particularly the following questions insofar as they are relevant to the respective cases:*
>
> *"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 Sec. 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;

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

"(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

"The Attorney General of the United States is invited to take part in the oral argument and to file an additional brief if he so desires."

On August 4, 1953, upon motion of the Attorney General of the United States and without objection by the parties,

this Court entered its order postponing the date assigned for reargument of these cases until December 7, 1953.

Summary of Argument

These cases consolidated for argument before this Court present in different factual contexts essentially the same ultimate legal questions.

The substantive question common to all is whether a state can, consistently with the Constitution, exclude children, solely on the ground that they are Negroes, from public schools which otherwise they would be qualified to attend. It is the thesis of this brief, submitted on behalf of the excluded children, that the answer to the question is in the negative: the Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race. Both the legal precedents and the judicial theories, discussed in Part I hereof, and the evidence concerning the intent of the framers of the Fourteenth Amendment and the understanding of the Congress and the ratifying states, developed in Part II hereof, support this proposition.

Denying this thesis, the school authorities, relying in part on language originating in this Court's opinion in *Plessy* v. *Ferguson,* 163 U. S. 537, urge that exclusion of Negroes, *qua* Negroes, from designated public schools is permissible when the excluded children are afforded admittance to other schools especially reserved for Negroes, *qua* Negroes, if such schools are equal.

The procedural question common to all the cases is the role to be played, and the time-table to be followed, by this Court and the lower courts in directing an end to the challenged exclusion, in the event that this Court determines, with respect to the substantive question, that exclusion of Negroes, *qua* Negroes, from public schools contravenes the Constitution.

The importance to our American democracy of the substantive question can hardly be overstated. The question is whether a nation founded on the proposition that "all men are created equal" is honoring its commitments to grant "due process of law" and "the equal protection of the laws" to all within its borders when it, or one of its constituent states, confers or denies benefits on the basis of color or race.

1. Distinctions drawn by state authorities on the basis of color or race violate the Fourteenth Amendment. *Shelley* v. *Kraemer,* 334 U. S. 1; *Buchanan* v. *Warley,* 245 U. S. 60. This has been held to be true even as to the conduct of public educational institutions. *Sweatt* v. *Painter,* 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637. Whatever other purposes the Fourteenth Amendment may have had, it is indisputable that its primary purpose was to complete the emancipation provided by the Thirteenth Amendment by ensuring to the Negro equality before the law. The *Slaughter-House Cases,* 16 Wall. 36; *Strauder* v. *West Virginia,* 100 U. S. 303.

2. Even if the Fourteenth Amendment did not *per se* invalidate racial distinctions as a matter of law, the racial segregation challenged in the instant cases would run afoul of the conventional test established for application of the equal protection clause because the racial classifications here have no reasonable relation to any valid legislative purpose. See *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389; *Truax* v. *Raich,* 239 U. S. 33; *Smith* v. *Cahoon,* 283 U. S. 553; *Mayflower Farms* v. *Ten Eyck,* 297 U. S. 266; *Skinner* v. *Oklahoma,* 316 U. S. 535. See also *Tunstall* v. *Brotherhood of Locomotive Firemen,* 323 U. S. 192; *Steele* v. *Louisville & Nashville R. R. Co.,* 323 U. S. 192.

3. Appraisal of the facts requires rejection of the contention of the school authorities. The educational detriment involved in racially constricting a student's associations has already been recognized by this Court.

Sweatt v. *Painter,* 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637.

4. The argument that the requirements of the Fourteenth Amendment are met by providing alternative schools rests, finally, on reiteration of the separate but equal doctrine enunciated in *Plessy* v. *Ferguson.*

Were these ordinary cases, it might be enough to say that the *Plessy* case can be distinguished—that it involved only segregation in transportation. But these are not ordinary cases, and in deference to their importance it seems more fitting to meet the *Plessy* doctrine head-on and to declare that doctrine erroneous.

Candor requires recognition that the plain purpose and effect of segregated education is to perpetuate an inferior status for Negroes which is America's sorry heritage from slavery. But the primary purpose of the Fourteenth Amendment was to deprive the states of *all* power to perpetuate such a caste system.

5. The first and second of the five questions propounded by this Court requested enlightment as to whether the Congress which submitted, and the state legislatures and conventions which ratified, the Fourteenth Amendment contemplated or understood that it would prohibit segregation in public schools, either of its own force or through subsequent legislative or judicial action. The evidence, both in Congress and in the legislatures of the ratifying states, reflects the substantial intent of the Amendment's proponents and the substantial understanding of its opponents that the Fourteenth Amendment would, of its own force, proscribe all forms of state-imposed racial distinctions, thus necessarily including all racial segregation in public education.

The Fourteenth Amendment was actually the culmination of the determined efforts of the Radical Republican majority in Congress to incorporate into our fundamental law the well-defined equalitarian principle of complete

equality for all without regard to race or color. The debates in the 39th Congress and succeeding Congresses clearly reveal the intention that the Fourteenth Amendment would work a revolutionary change in our state-federal relationship by denying to the states the power to distinguish on the basis of race.

The Civil Rights Bill of 1866, as originally proposed, possessed scope sufficiently broad in the opinion of many Congressmen to entirely destroy all state legislation based on race. A great majority of the Republican Radicals—who later formulated the Fourteenth Amendment—understood and intended that the Bill would prohibit segregated schools. Opponents of the measure shared this understanding. The scope of this legislation was narrowed because it was known that the Fourteenth Amendment was in process of preparation and would itself have scope exceeding that of the original draft of the Civil Rights Bill.

6. The evidence makes clear that it was the intent of the proponents of the Fourteenth Amendment, and the substantial understanding of its opponents, that it would, of its own force, prohibit all state action predicated upon race or color. The intention of the framers with respect to any specific example of caste state action—in the instant cases, segregated education—cannot be determined solely on the basis of a tabulation of contemporaneous statements mentioning the specific practice. The framers were formulating a constitutional provision setting broad standards for determination of the relationship of the state to the individual. In the nature of things they could not list all the specific categories of existing and prospective state activity which were to come within the constitutional prohibitions. The broad general purpose of the Amendment—obliteration of race and color distinctions—is clearly established by the evidence. So far as there was consideration of the Amendment's impact upon the undeveloped educational systems then existing, both proponents and opponents of the Amend-

ment understood that it would proscribe all racial segregation in public education.

7. While the Amendment conferred upon Congress the power to enforce its prohibitions, members of the 39th Congress and those of subsequent Congresses made it clear that the framers understood and intended that the Fourteenth Amendment was self-executing and particularly pointed out that the federal judiciary had authority to enforce its prohibitions without Congressional implementation.

8. The evidence as to the understanding of the states is equally convincing. Each of the eleven states that had seceded from the Union ratified the Amendment, and concurrently eliminated racial distinctions from its laws, and adopted a constitution free of requirement or specific authorization of segregated schools. Many rejected proposals for segregated schools, and none enacted a school segregation law until after readmission. The significance of these facts is manifest from the consideration that ten of these states, which were required, as a condition of readmission, to ratify the Amendment and to modify their constitutions and laws in conformity therewith, considered that the Amendment required them to remove all racial distinctions from their existing and prospective laws, including those pertaining to public education.

Twenty-two of the twenty-six Union states also ratified the Amendment. Although unfettered by congressional surveillance, the overwhelming majority of the Union states acted with an understanding that it prohibited racially segregated schools and necessitated conformity of their school laws to secure consistency with that understanding.

9. In short, the historical evidence fully sustains this Court's conclusion in the *Slaughter Houses Cases,* 16 Wall. 61, 81, that the Fourteenth Amendment was designed to take from the states all power to enforce caste or class distinctions.

10. The Court in its fourth and fifth questions assumes that segregation is declared unconstitutional and inquires as to whether relief should be granted immediately or gradually. Appellants, recognizing the possibility of delay of a purely administrative character, do not ask for the impossible. No cogent reasons justifying further exercise of equitable discretion, however, have as yet been produced.

It has been indirectly suggested in the briefs and oral argument of appellees that some such reasons exist. Two plans were suggested by the United States in its Brief as *Amicus Curiae*. We have analyzed each of these plans as well as appellees' briefs and oral argument and find nothing there of sufficient merit on which this Court, in the exercise of its equity power, could predicate a decree permitting an effective gradual adjustment from segregated to non-segregated school systems. Nor have we been able to find any other reasons or plans sufficient to warrant the exercise of such equitable discretion in these cases. Therefore, in the present posture of these cases, appellants are unable to suggest any compelling reasons for this Court to postpone relief.

ARGUMENT

PART ONE

The question of judicial power to abolish segregated schools is basic to the issues involved in these cases and for that reason we have undertaken to analyze it at the outset before dealing with the other matters raised by the Court, although formally this means that the first section of this brief comprehends Question No. 3:

> *On the assumption that the answers to question 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?*

I.

Normal exercise of the judicial function calls for a declaration that the state is without power to enforce distinctions based upon race or color in affording educational opportunities in the public schools.

This Court in a long line of decisions has made it plain that the Fourteenth Amendment prohibits a state from making racial distinctions in the exercise of governmental power. Time and again this Court has held that if a state's power has been exercised in such a way as to deprive a Negro of a right which he would have freely enjoyed if he had been white, then that state's action violated the Fourteenth Amendment.

In *Shelley* v. *Kraemer,* 334 U. S. 1, for example, an unanimous Court held that States of Missouri and Michigan had violated the 14th Amendment when their courts ruled that a Negro could not own real property whose ownership it was admitted the state law would have protected him in, had he been white. This, despite the fact

that the state court was doing no more than enforcing a private agreement running with the land. The sole basis for the decision, then, was that the Fourteenth Amendment compels the states to be color blind in exercising their power and authority.

Buchanan v. *Warley,* 245 U. S. 60, was an earlier decision to the same effect. There, this Court invalidated a Louisville, Kentucky ordinance which required racial residential segregation. Though it applied to Negro and white alike, the Court rightly recognized that the ordinance was an exercise of the state's power based on race and race alone. This, the Court ruled, was a violation of the Fourteenth Amendment. To the same effect is *Barrows* v. *Jackson,* — U. S. —, 97 L. ed. Advance p. 261). And see *Oyama* v. *California,* 332 U. S. 633.

This Court has applied the same rigorous requirement to the exercise of the state's power in providing public education. Beginning with *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, this Court has uniformly ruled that the Fourteenth Amendment prohibits a state from using race or color as the determinant of the quantum, quality or type of education and the place at which education is to be afforded. Most recently, this Court in *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637, held that rules which made distinctions among students in the same school solely on the basis of color were forbidden by the Fourteenth Amendment. Thus, this Court has made it plain that no state may use color or race as the axis upon which the state's power turns, and the conduct of the public education system has not been excepted from this ban.

This judicial recognition that race is an irrational basis for governmental action under our Constitution has been manifested in many decisions and opinions of this Court. In *Yick Wo* v. *Hopkins,* 118 U. S. 356, this Court struck down local administrative action which differentiated between whites and Chinese. In *Hirabayashi* v. *United States,* 320 U. S. 81, 100, Chief Justice Stone, in a majority

opinion, characterized racial distinctions as "odious to a free people". In *Korematsu* v. *United States,* 323 U. S. 214, 216, the Court viewed racial restrictions as "immediately suspect". Mr. Justice Jackson, concurring in *Edwards* v. *California,* 314 U. S. 180, 185, referred to race and color as "constitutionally an irrelevance". Mr. Justice Douglas, dissenting in *South* v. *Peters,* 339 U. S. 276, 278, considered discriminations based upon race, creed, or color "beyond the pale". In an unanimous opinion in *Henderson* v. *United States,* 339 U. S. 816, 825, the Court, while not reaching the constitutional question raised, described signs, partitions and curtains segregating Negroes in railroad dining cars as emphasizing "the artificiality of a difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility". Every member of the present Court has from time to time subscribed to this view of race as an irrational premise for government action.

The restrictions placed upon persons of Japanese origin on the West Coast during World War II were sustained in *Hirabayashi* v. *United States, supra,* and in *Korematsu* v. *United States, supra,* as emergency war measures taken by the national government in a dire national peril of the gravest nature. The military decision was upheld as within an implied war power, and the Court was unwilling to interfere with measures considered necessary to the safety of the nation by those primarily responsible for its security. Yet, in upholding these orders, the Court made some of the most sweeping condemnations of governmentally imposed racial and color distinctions ever announced by our judiciary. And while departure from accepted standards of governmental conduct was sustained in order to remove persons of Japanese origin from areas where sabotage and espionage might have worked havoc with the national war effort, once this removal was accomplished and individual loyalty determined, further restrictions based upon race or

color could no longer be countenanced. *Ex Parte Endo,* 323 U. S. 283.

Tunstall v. *Brotherhood of Locomotive Firemen & Enginemen,* 323 U. S. 210, and *Steele* v. *Louisville & Nashville R. R. Co.,* 323 U. S. 192, while not deciding the constitutional question, left no doubt that the Fifth Amendment had stripped the national government of power to enforce the racial discrimination assailed.

These decisions serve to underscore the constitutional prohibition against Congressional action grounded upon color except in so far as it may have temporary justification to meet an overwhelming national emergency such as that which led to decisions in the *Hirabayashi* and *Korematsu* cases.

The power of states is even more rigidly circumscribed. For there is grave doubt that their acts can be sustained under the exception made in the *Hirabayashi* and *Korematsu* cases with respect to the national government. See *Oyama* v. *California,* 332 U. S. 633. The Fourteenth Amendment has been defined as a broad prohibition against state enforcement of differentiations and discrimination based upon race or color. State action restricting the right of Negroes to vote has been struck down as a violation of the Fourteenth Amendment. *Nixon* v. *Condon,* 286 U. S. 73. Similarly, the Court has refused to sanction the systematic exclusion of Negroes from the petit or grand jury, *Hill* v. *Texas,* 316 U. S. 400; *Pierre* v. *Louisiana,* 306 U. S. 354; their representation on juries on a token or proportional basis, *Cassell* v. *Texas,* 339 U. S. 282; *Shepherd* v. *Florida,* 341 U. S. 50; or any method in the selection of juries susceptible of racial discrimination in practice. *Avery* v. *Georgia,* 345 U. S. 559.

Legislation depriving persons of particular races of an opportunity to pursue a gainful occupation has been held a denial of equal protection. *Truax* v. *Raich,* 239 U. S. 33; *Takahashi* v. *Fish and Games Commission,* 334 U. S. 410. It is now well settled that a state may not make racial dif-

ferences among its employees the basis for salary differentiations. *Alston* v. *School Board,* 112 F. 2d 992 (CA 4th 1940), *cert. denied,* 311 U. S. 693.

Indeed, abhorence of race as a premise for governmental action pervades a wide realm of judicial opinion dealing with other constitutional provisions. Sweeping decisions have enforced the right of Negroes to make effective use of the electoral process consistent with the requirements of the Fifteenth Amendment. *Guinn* v. *United States,* 238 U. S. 347; *Lane* v. *Wilson,* 307 U. S. 268; *Smith* v. *Allwright,* 321 U. S. 649; *Terry* v. *Adams,* 345 U. S. 461.

It should be added parenthetically that these decisions are not mere *pro forma* applications of the self-evident requirements of the Fifteenth Amendment. On the contrary, the concept of state action has been utilized in a dynamic and expanding fashion as the Court has sought to reach any method or subterfuge with which the state has attempted to avoid its obligation under that constitutional amendment. *Smith* v. *Allwright, supra; Terry* v. *Adams, supra.* See *Rice* v. *Elmore,* 165 F. 2d 387 (CA 4th 1947), *cert. denied,* 333 U. S. 875 and *Baskin* v. *Brown,* 174 F. 2d 391 (CA 4th 1949), cases holding state non-action violative of the Fifteenth Amendment the principle of which was expressly approved in *Terry* v. *Adams.*

State laws requiring racial segregation in interstate commerce have been declared an invalid invasion of commerce power reserved to the Congress. *Morgan* v. *Virginia,* 328 U. S. 373. But where a state sought to enforce against a carrier engaged in foreign commerce its local non-segregation policy, the state law was upheld. The Court considered it inconceivable that the Congress in the exercise of its plenary power over commerce would take any action in conflict with the local nondiscriminatory regulations imposed. *Bob-Lo Excursion Co.* v. *Michigan,* 333 U. S. 28. These two cases considered together strikingly exemplify this Court's position that fundamental national policy is

offended by a requirement of segregation, but implemented by its prohibition.

The contention by a labor union that a state civil rights law which prohibited racial discrimination in union membership offended the Fourteenth Amendment was dismissed because such a position "would be a distortion of the policy manifested in that amendment which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race and color". *Railway Mail Association* v. *Corsi,* 326 U. S. 88, 94.

Thus, the Court has all but universally made short shrift of attempts to use governmental power to enforce racial distinctions. Yet, where such power has prohibited racial discrimination, it has been sustained even where it has been urged that the state is acting in derogation of other constitutional rights or protected interests.

At the graduate and professional school level, closest to the cases here, racial distinctions as applied have been struck down. *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637; *Sweatt* v. *Painter,* 339 U. S. 629. In those cases the educational process was viewed as a totality. The faculty of the school, the prestige of the institution, the fact that segregation deprived the Negro applicant of the benefits which he might secure in attending school with representatives of the state's dominant racial majority, the value judgment of the community with respect to the segregated school, and the impact of segregation on the individual were among the factors considered by the Court in determining that equal educational opportunities were not available. Those cases, we submit, control disposition of the cases here.

Since segregation was found to impair and inhibit an adult's ability to study in the *McLaurin* case, it seems clear that such segregation has even more far reaching adverse consequences on the mental development of the children involved here.

Sweatt's isolation from the dominant racial majority in a segregated law school was held to deprive him of an effec-

tive opportunity to learn the law. The basic function of the public school is to instruct each succeeding generation in the fundamental traditions of our democracy. The child can best come to believe in and respect these traditions by learning them in a setting in which they are in practical operation. But to be taught that our society is founded upon a concept of equality in a public school from which those racial groups are excluded which hold pre-eminence in every field in his community makes it all but impossible for such teachings to take root. Segregation here is detrimental to the Negro child in his effort to develop into a useful and productive citizen in a democracy.

The *Sweatt* and *McLaurin* cases teach that the Court will consider the educational process in its entirety, including, apart from the measurable physical facilities, whatever factors have been shown to have educational significance. This rule cannot be peculiar to any level of public education. Public elementary and high school education is no less a governmental function than graduate and professional education in state institutions. Moreover, just as Sweatt and McLaurin were denied certain benefits characteristic of graduate and professional education, it is apparent from the records of these cases that Negroes are denied educational benefits which the state itself asserts are the fundamental objectives of public elementary and high school education.

South Carolina, like the other states in this country, has accepted the obligation of furnishing the extensive benefits of public education. Article XI, section 5, of the Constitution of South Carolina, declares: "The General Assembly shall provide for a liberal system of free public schools for all children between the ages of six and twenty-one years". Some 410 pages of the Code of Laws of South Carolina deal with "education". Title 31, Chapters 122-23, S. C. Code, pp. 387-795 (1935). Provision is made for the entire state-supported system of public schools, its administration and

organization, from the kindergarten through the university. Pupils and teachers, school buildings, minimum standards of school construction, and specifications requiring certain general courses of instruction are dealt with in detail. In addition to requiring that the three "R's" must be taught, the law compels instruction in "morals and good behaviour" and in the "principles" and "essentials of the United States Constitution, including the study of and devotion to American institutions". Title 31, Chapter 122, sections 5321, 5323, 5325, S. C. Code (1935). The other states involved here are attempting to promote the same objectives.

These states thus recognize the accepted broad purposes of general public education in a democratic society. There is no question that furnishing public education is now an accepted governmental function. There are compelling reasons for a democratic government's assuming the burden of educating its children, of increasing its citizens' usefulness, efficiency and ability to govern.

In a democracy citizens from every group, no matter what their social or economic status or their religious or ethnic origins, are expected to participate widely in the making of important public decisions. The public school, even more than the family, the church, business institutions, political and social groups and other institutions, has become an effective agency for giving to all people that broad background of attitudes and skills required to enable them to function effectively as participants in a democracy. Thus, "education" comprehends the entire process of developing and training the mental, physical and moral powers and capabilities of human beings. See *Weyl* v. *Comm. of Int. Rev.*, 48 F. 2d 811, 812 (CA 2d 1931); *Jones* v. *Better Business Bureau*, 123 F. 2d 767, 769 (CA 10th 1941).

The records in instant cases emphasize the extent to which the state has deprived Negroes of these fundamental educational benefits by separating them from the rest of the school population. In the case of *Briggs* v. *Elliott* (No. 101), expert witnesses testified that compulsory racial

segregation in elementary and high schools inflicts considerable personal injury on the Negro pupils which endures as long as these students remain in the segregated school. These witnesses testified that compulsory racial segregation in the public schools of South Carolina injures the Negro students by: (1) impairing their ability to learn (R. 140, 161); (2) deterring the development of their personalities (R. 86, 89); (3) depriving them of equal status in the school community (R. 89, 141, 145); (4) destroying their self-respect (R. 140, 148); (5) denying them full opportunity for democratic social development (R. 98, 99, 103); (6) subjecting them to the prejudices of others (R. 133) and stamping them with a badge of inferiority (R. 148).

Similar testimony was introduced in each of the other three cases here involved, and that testimony was undisputed in the case of *Briggs* v. *Elliott* (No. 101); *Brown* v. *Board of Education of Topeka, et al.* (No. 8); *Gebhart* v. *Belton* (No. 448). In *Davis* v. *County School Board* (No. 191), while witnesses for the appellees disputed portions of the testimony of appellants' expert witnesses, four of appellees' witnesses admitted that racial segregation has harmful effects and another recognized that such segregation could be injurious.

In the *Gebhart* case (No. 448) the Chancellor filed an opinion in which he set forth a finding of fact, based on the undisputed oral testimony of experts in education, sociology, psychology, psychiatry and anthropology (A. 340-341) that in "our Delaware society", segregation in education practiced by petitioners as agents of the state "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".

And the court below in the *Brown* case (No. 8) made the following Finding of Fact (R. 245-246):

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored chil-

> dren. 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 retard the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system."

The testimony of the expert witnesses in the cases now under consideration, the Opinion of the Chancellor in the Delaware case and the Finding of Fact by the lower court in the Kansas case are amply supported by scientific studies of recognized experts. A compilation of these materials was assembled and filed as an Appendix to the briefs in these cases on the first hearing. The observation of Mr. Justice Jackson in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 636 that public school children, being educated for citizenship, must be scrupulously protected in their constitutional rights, "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes", while made in somewhat different context, appropriately describes the high public interest which these cases involve.

In sum, the statutes and constitutional provisions assailed in these cases must fall because they are contrary to this Court's basic premise that, as a matter of law, race is not an allowable basis of differentiation in governmental action; they are inconsistent with the broad prohibition of the Fifth and Fourteenth Amendments as defined by this Court; they are clearly within that category of racism in state action specifically prohibited by the *McLaurin* and *Sweatt* decisions.

II.

The statutory and constitutional provisions involved in these cases cannot be validated under any separate but equal concept.

The basic principles referred to in Point I above, we submit, control these cases, and except for the mistaken belief that the doctrine of *Plessy* v. *Ferguson,* 163 U. S. 537, is a correct expression of the meaning of the Fourteenth Amendment, these cases would present no difficult problem.

This Court announced the separate but equal doctrine in a transportation case, and proponents of segregation have relied upon it repeatedly as a justification for racial segregation as if "separate but equal" had become *in haec verba* an amendment to the Fourteenth Amendment, itself. Under that anomalous doctrine, it is said that racial differentiations in the enjoyment of rights protected by the Fourteenth Amendment are permitted as long as the segregated facilities provided for Negroes are substantially equal to those provided for other racial groups. In each case in this Court where a state scheme of racism has been deemed susceptible of rationalization under the separate but equal formula, it has been urged as a defense.

A careful reading of the cases, however, reveals that this doctrine has received only very limited and restricted application in the actual decisions of this Court, and even that support has been eroded by more recent decisions. See particularly *McLaurin* v. *Oklahoma State Regents; Sweatt* v. *Painter.* Whatever appeal the separate but equal doctrine might have had, it stands mirrored today as the faulty conception of an era dominated by provincialism, by intense emotionalism in race relations caused by local and temporary conditions and by the preaching of a doctrine of racial superiority that contradicted the basic concept upon which our society was founded. Twentieth century America, fighting racism at home and abroad, has rejected the race

views of *Plessy* v. *Ferguson* because we have come to the realization that such views obviously tend to preserve not the strength but the weaknesses of our heritage.

A. Racial Segregation Cannot Be Squared With the Rationale of the Early Cases Interpreting the Reach of the Fourteenth Amendment.

In the *Slaughter House Cases,* 16 Wall. 36—the first case decided under the Fourteenth Amendment—the Court, drawing on its knowledge of an almost contemporaneous event, recognized that the Fourteenth Amendment secured to Negroes full citizenship rights and prohibited any state action discriminating against them as a class on account of their race. Thus, addressing itself to the intent of the Thirteenth, Fourteenth and Fifteenth Amendments, the Court said at pages 71 and 72:

> "We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the 15th Amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth."

The real purpose of the equal protection clause was discussed in these terms at page 81:

> "In the light of the history of these amendments, and the pervading purpose of them, which we have

> already discussed, it is not difficult to give a meaning to this clause. *The existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.''* (Emphasis supplied).

So convinced was the Court that the overriding purpose of the Fourteenth Amendment was to protect the Negro against discrimination that it declared further at page 81:

> ''We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.''

In *Strauder* v. *West Virginia,* 100 U. S. 303, the Court, on page 306, viewed the Fourteenth Amendment in the same light and stated that its enactment was aimed to secure for the Negro all the civil rights enjoyed by white persons:

> ''It was in view of these considerations the 14th 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. It not only gave citizenship and the privileges of citizenship to persons of color, but *it denied to any State the power to withhold from them the equal protection of the laws,* and authorized Congress to enforce its provisions by appropriate legislation.'' (Emphasis supplied).

Clearly recognizing the need to construe the Amendment liberally in order to protect the Negro, the Court noted at page 307:

> "If this is the spirit and meaning of the Amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside)."

It was explicitly stated at pages 307, 308 that the Amendment prevented laws from distinguishing between colored and white persons:

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

Any distinction based upon race was understood as constituting a badge of inferiority, at page 308:

> "The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens and may be in other respects fully qualified, is practically a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race preju-

> dice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."

There was no doubt that this new constitutional provision had changed the relationship between the federal government and the states so that the federal courts could and should now protect these new rights. At page 309 the Court said:

> "The framers of the constitutional Amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was, doubtless, a motive that led to the Amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that, through prejudice, they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the National Government the power to enforce the provision that no State shall deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the Amendment would have been unnecessary, and it might have been left to the States to extend equality of protection."

That law must not distinguish between colored and white persons was the thesis of all the early cases. *United States* v. *Cruikshank,* 92 U. S. 542, 554, 555; *Virginia* v. *Rives,* 100 U. S. 313; *Ex Parte Virginia,* 100 U. S. 339; *Neal* v. *Delaware,* 103 U. S. 370, 386; *Bush* v. *Kentucky,* 107 U. S. 110; *Civil Rights Cases,* 109 U. S. 3, 36, 43. As early as *Yick Wo* v. *Hopkins,* 118 U. S. 356, it became settled doctrine that the Fourteenth Amendment was a broad prohibition against state enforcement of racial differentiations or discrimination—a prohibition totally at war with any separate but equal notion. There can be no doubt, we submit, that, had the state regulation approved in *Plessy* v. *Fergu-*

son been before the Court that rendered the initial interpretations of the Fourteenth Amendment, the regulation would have been held a violation of the Federal Constitution.

B. The First Time the Question Came Before the Court, Racial Segregation In Transportation Was Specifically Disapproved.

In *Railroad Co.* v. *Brown,* 17 Wall. 445, the first case involving the validity of segregation to reach this Court after the adoption of the Fourteenth Amendment, segregation was struck down as an unlawful discrimination. While the Fourteenth Amendment was not before the Court, the decision in the *Brown* case was in line with the spirit of the new status that the Negro had gained under the Thirteenth, Fourteenth and Fifteenth Amendments.

The problem before the Court concerned the validity of the carrier's rules and regulations that sought to segregate its passengers because of race. The pertinent facts are described by the Court as follows at page 451:

> "In the enforcement of this regulation, the defendant in error, a person of color, having entered a car appropriated to white ladies, was requested to leave it and take a seat in another car used for colored persons. This she refused to do, and this refusal resulted in her ejectment by force and with insult from the car she had first entered."

The Court characterized the railroad's defense that its practice of providing separate accommodations for Negroes was valid, as an ingenious attempt at evasion, at page 452:

> "The plaintiff in error contends that it has literally obeyed the direction, because it has never excluded this class of persons from the cars, but on the contrary, has always provided accommodations for them.
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> "This is an ingenious attempt to evade a compliance with the obvious meaning of the requirement. It is true the words taken literally might bear the

> interpretation put upon them by the plaintiff in error, but evidently Congress did not use them in any such limited sense. There was no occasion, in legislating for a railroad corporation, to annex a condition to a grant of power, that the company should allow colored persons to ride in its cars. This right had never been refused, nor could there have been in the mind of anyone an apprehension that such a state of things would ever occur, for self-interest would clearly induce the carrier—South as well as North—to transport, if paid for it, all persons whether white or black, who should desire transportation."

The Court stressed with particularity the fact that the discrimination prohibited was discrimination in the use of the cars, at pages 452-453:

> "It was the discrimination in the use of the cars on account of color, where slavery obtained, which was the subject of discussion at the time, and not the fact that the colored race could not ride in the cars at all. Congress, in the belief that this discrimination was unjust, acted. It told this company, in substance, that it could extend its road in the District as desired, but that this discrimination must cease, and the colored and white race, in the use of the cars, be placed on an equality. This condition it had the right to impose, and in the temper of Congress at the time, it is manifest the grant could not have been made without it."

The regulation that was struck down in the *Brown* case sought to accomplish exactly what was achieved under a state statute upheld subsequently in *Plessy* v. *Ferguson*—the segregation of Negro and white passengers. It is clear, therefore, that in this earlier decision the Court considered segregation *per se* discrimination and a denial of equality.

C. The Separate But Equal Doctrine Marked An Unwarranted Departure From the Main Stream of Constitutional Development and Permits the Frustration of the Very Purposes of The Fourteenth Amendment As Defined by This Court.

In *Plessy* v. *Ferguson,* this Court for the first time gave approval to state imposed racial distinctions as consistent with the purposes and meaning of the Fourteenth Amendment. The Court described the aims and purposes of the Fourteenth Amendment in the same manner as had the earlier cases, at page 543:

> ". . . its main purpose was to establish the citizenship of the negro; to give definitions of citizenship of the United States and of the states, and to protect from the hostile legislation of the states the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the states."

But these defined aims and purposes were now considered consistent with the imposition of legal distinctions based upon race. The Court said at 544, 551-552:

> "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.
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> * * *
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> 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. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."

And reasonableness of the regulation was found in established social usage, custom and tradition, at page 550:

> "So far, then, as a conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."

In *Plessy*, through distortion of the concept of "social" rights as distinguished from "civil" rights, the right to civil equality as one of the purposes of the Fourteenth Amendment was given a restricted meaning wholly at variance with that of the earlier cases and the intent of the framers as defined by this Court. Indeed, civil rights, as defined by that Court, seem merely to encompass those rights attendant upon use of the legal process and protection against complete exclusion pursuant to state mandate. Race for the first time since the adoption of the Fourteenth Amendment was sanctioned as a constitutionally valid basis for state action, and reasonableness for the racial distinctions approved was found in the social customs, usages and traditions of a people only thirty-one years removed from a slave society.

Under this rationale the Court sought to square its approval of racial segregation with the *Slaughter House Cases, Strauder* v. *West Virginia* and the other precedents. It is clear, however, that the early cases interpreted the Fourteenth Amendment as encompassing that same category of rights which were involved in *Plessy* v. *Ferguson*—the right to be free of a racial differentiation imposed by the state in the exercise of any civil right. And the Court's attempt to distinguish *Railroad Co.* v. *Brown,* as a case of

exclusion, was the very argument that has been specifically rejected in the *Brown* case as a sophisticated effort to avoid the obvious implications of the Congressional requirement. Thus, the separate but equal doctrine is a rejection of the precedents and constitutes a break in the development of constitutional law under which the Fourteenth Amendment has been interpreted as a fundamental interdiction against state imposed differentiations and discriminations based upon color.

D. The Separate But Equal Doctrine Was Conceived in Error.

The separate but equal doctrine of *Plessy* v. *Ferguson,* we submit, has aided and supported efforts to nullify the Fourteenth Amendment's undoubted purpose—equal status for Negroes—as defined again and again by this Court. The fallacious and pernicious implications of the doctrine were evident to Justice Harlan and are set out in his dissenting opinion. It is clear today that the fact that racial segregation accords with custom and usage or is considered needful for the preservation of public peace and good order does not suffice to give constitutional validity to the state's action. What the doctrine has in fact accomplished is to deprive Negroes of the protection of the approved test of reasonable classifications which is available to everyone else who challenges legislative categories or distinctions of whatever kind.

1. The Dissenting Opinion of Justice Harlan in Plessy v. Ferguson.

Justice Harlan recognized and set down for history the purpose of segregation and the implications of the separate but equal doctrine and evidenced prophetic insight concerning the inevitable consequences of the Court's approval of racial segregation. He said at page 557: "The thing to accomplish was, under the guise of giving equal accommoda-

tions for whites and blacks to compel the latter to keep to themselves while traveling in railroad passenger coaches."

He realized at page 560, moreover, that the approved regulations supported the inferior caste thesis of *Scott* v. *Sandford,* 19 How. 393, supposedly eradicated by the Civil War Amendments: "But it seems that we have yet, in some of the states, a dominant race, a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, on the basis of race." And at page 562: "We boast of the freedom enjoyed by our people above all other people. 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."

While the majority opinion sought to rationalize its holding on the basis of the state's judgment that separation of races was conducive to public peace and order, Justice Harlan knew all too well that the seeds for continuing racial animosities had been planted. He said at pages 560-561:

> "The sure guaranty of peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of equality before the law of all citizens of the United States without regard to race. State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible and to keep alive a conflict of races, the continuance of which must do harm to all concerned."

"Our Constitution", said Justice Harlan at 559, "is color-blind, and neither knows nor tolerates classes among citizens." It is the dissenting opinion of Justice Harlan, rather than the majority opinion in *Plessy* v. *Ferguson,* that is in keeping with the scope and meaning of the Fourteenth Amendment as consistently defined by this Court both before and after *Plessy* v. *Ferguson.*

2. Custom, Usage and Tradition Rooted in the Slave Tradition Cannot Be the Constitutional Yardstick for Measuring State Action Under the Fourteenth Amendment.

The analysis by Justice Harlan of the bases for the majority opinion in *Plessy* v. *Ferguson* was adopted by this Court in *Chiles* v. *Chesapeake & Ohio Railroad Company,* 218 U. S. 71, 77, 78. There this Court cited *Plessy* v. *Ferguson* as authority for sustaining the validity of legislative distinctions based upon race and color alone.

The importance of this case is its clear recognition and understanding that in *Plessy* v. *Ferguson* this Court approved the enforcement of racial distinctions as reasonable because they are in accordance with established social usage, custom and tradition. The Court said at pages 77, 78:

> "It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, 'the established usages, customs and traditions of the people,' and the 'promotion of their comfort and the preservation of the public peace and good order,' this must also be the test of reasonableness of the regulations of a carrier, made for like purposes and to secure like results."

But the very purpose of the Thirteenth, Fourteenth and Fifteenth Amendments was to effectuate a complete break with governmental action based on the established usages, customs and traditions of the slave era, to revolutionize the legal relationship between Negroes and whites, to destroy the inferior status of the Negro and to place him upon a plane of complete equality with the white man. As we will demonstrate, post Civil War reestablishment of ante-bellum custom and usage, climaxed by the decision in *Plessy* v. *Ferguson,* reflected a constant effort to return the Negro to his pre-Thirteenth, Fourteenth Amendment inferior status.

When the Court employed the old usages, customs and traditions as the basis for determining the reasonableness of segregation statutes designed to resubjugate the Negro to an inferior status, it nullified the acknowledged intention of the framers of the Amendment, and made a travesty of the equal protection clause of the Fourteenth Amendment.

Here, again, the *Plessy* v. *Ferguson* decision is out of line with the modern holdings of this Court, for in a variety of cases involving the rights of Negroes it has constantly refused to regard custom and usage, however widespread, as determinative of reasonableness. This was true in *Smith* v. *Allwright,* of a deeply entrenched custom and usage of excluding Negroes from voting in the primaries. It was true in *Shelley* v. *Kraemer,* of a long standing custom excluding Negroes from the use and ownership of real property on the basis of race. In *Henderson* v. *United States,* a discriminatory practice of many years was held to violate the Interstate Commerce Act. In the *Sweatt* and *McLaurin* decisions, the Court broke a southern tradition of state-enforced racial distinctions in graduate and professional education—a custom almost as old as graduate and professional education, itself.

In each instance the custom and usage had persisted for generations and its durability was cited as grounds for its validity. If this were the only test, ours indeed would become a stagnant society. Even if there be some situations in which custom, usage and tradition may be considered in testing the reasonableness of governmental action, customs, traditions and usages rooted in slavery cannot be worthy of the constitutional sanction of this Court.

3. Preservation of Public Peace Cannot Justify Deprivation of Constitutional Rights.

The fallacy underlying *Plessy* v. *Ferguson* of justifying racially-discriminatory statutes as essential to the public peace and good order has been completely exposed by

Frederick W. Lehmann, a former Solicitor General of the United States, and Wells H. Blodgett in their Brief as *amici curiae* in *Buchanan* v. *Warley,* 245 U. S. 60. Their statements warrant repetition here:

> "The implication of the title of the ordinance is, that unless the white and colored people live in separate blocks, ill feeling will be engendered between them and conflicts will result and so it is assumed that a segregation of the races is necessary for the preservation of the public peace and the promotion of the general welfare. There is evidence in the record that prior to the enactment of the ordinance there were instances of colored people moving into white blocks and efforts by the white people to drive them out by violence. So to preserve the peace, the ordinance was enacted not to repress the lawless violence, but to give the sanction of the law to the motives which inspired it and to make the purpose of it lawful.
>
> "The population of Louisville numbers two hundred and fifty thousand, of whom about one-fifth are colored. The ordinance, almost upon its face, and clearly by the evidence submitted and the arguments offered in support of it is a discriminating enactment by the dominant majority against a minority who are held to be an inferior people. It cannot be justified by the recitals of the title, even if they are true. Many things may rouse a man's prejudice or stir him to anger, but he is not always to be humored in his wrath. The question may arise, 'Dost thou well to be angry?' " (*Brief Amici Curiae,* pp. 2 and 3).

Accepting this view, the Court in *Buchanan* v. *Warley* rejected the argument that a state could deny constitutional rights with impunity in its efforts to maintain the public peace:

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be

> accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution'' (245 U. S. 60, 81).

Accord, *Morgan* v. *Virginia, supra; Monk* v. *City of Birmingham,* 185 F. 2d 859 (CA 5th 1950), *cert. denied,* 341 U. S. 940.

Thus, the bases upon which the separate but equal doctrine was approved in the *Plessy* v. *Ferguson* case have all been uprooted by subsequent decisions of this Court. All that remains is the naked doctrine itself, unsupported by reason, contrary to the intent of the framers, and out of tune with present notions of constitutional rights. Repudiation of the doctrine itself, we submit, is long overdue.

4. THE SEPARATE BUT EQUAL DOCTRINE DEPRIVES NEGROES OF THAT PROTECTION WHICH THE FOURTEENTH AMENDMENT ACCORDS UNDER THE GENERAL CLASSIFICATION TEST.

One of the ironies of the separate but equal doctrine of *Plessy* v. *Ferguson* is that under it, the Fourteenth Amendment, the primary purpose of which was the protection of Negroes, is construed as encompassing a narrower area of protection for Negroes than for other persons under the general classification test.

Early in its history, the Fourteenth Amendment was construed as reaching not only state action based upon race and color, but also as prohibiting all unreasonable classifications and distinctions even though not racial in character. *Barbier* v. *Connolly,* 113 U. S. 27, seems to be the earliest case to adopt this concept of the Amendment. There the Court said on page 31:

> ''The Fourteenth Amendment . . . undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights.''

Accord: *Minneapolis & St. Louis Ry. Co.* v. *Beckwith,* 129 U. S. 26, 28, 29; *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *McPherson* v. *Blacker,* 146 U. S. 1, 39; *Yesler* v. *Board of Harbor Line Commissioners,* 146 U. S. 646, 655; *Giozza* v. *Tiernan,* 148 U. S. 657, 662; *Marchant* v. *Pennsylvania R. Co.,* 153 U. S. 380, 390; *Moore* v. *Missouri,* 159 U. S. 673, 678.

In effectuating the protection afforded by this secondary purpose, the Court has required the classification or distinction used be based upon some real or substantial difference pertinent to a valid legislative objective. *E.g., Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389; *Truax* v. *Raich,* 239 U. S. 33; *Smith* v. *Cahoon,* 283 U. S. 553; *Mayflower Farms* v. *Ten Eyck,* 297 U. S. 266; *Skinner* v. *Oklahoma,* 316 U. S. 535. See also *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.,* 340 U. S. 179, 186.

Justice Holmes in *Nixon* v. *Herndon,* 273 U. S. 536, 541, recognized and restated a long established and well settled judicial proposition when he described the Fourteenth Amendment's prohibition against unreasonable legislative classification as less rigidly proscriptive of state action than the Amendment's prohibition of color differentiation. There he concluded:

> "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case."

But the separate but equal doctrine substitutes race for reasonableness as the constitutional test of classification. We submit, it would be a distortion of the purposes and intendment of the Fourteenth Amendment to deny to those persons for whose benefit that provision was primarily intended the same measure of protection afforded by a rule of construction evolved to reach the Amendment's subsidiary and secondary objectives. We urge this Court to

examine the segregation statutes in these cases to determine whether the statutes seek to serve a permissible legislative objective; and, if any permissible objective is found, whether color differentiation has pertinence to it. So examined, the constitutional provisions and statutes involved here disclose unmistakably their constitutional infirmity.

E. The Separate But Equal Doctrine Has Not Received Unqualified Approval in This Court.

Even while the separate but equal doctrine was evolving, this Court imposed limitations upon its applications. In *Buchanan* v. *Warley,* the Court, after reviewing the limited acceptance which the doctrine had received, concluded that its extension to approve state enforced segregation in housing was not permissible.

Ten years later in *Gong Lum* v. *Rice,* 275 U. S. 78, 85, 86, without any intervening development in the doctrine in this Court, sweeping language was used which gave the erroneous impression that this Court already had extended the application of the doctrine to the field of education. And in *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, the doctrine is mentioned in passing as if its application to public education were well established. But, what Justice Day was careful to point out in *Buchanan* v. *Warley,* was true then and is true now—the separate but equal doctrine has never been extended by this Court beyond the field of transportation in any case where such extension was contested.

While the doctrine itself has not been specifically repudiated as a valid constitutional yardstick in the field of public education, in cases in which this Court has had to determine whether the state had performed its constitutional obligation to provide equal education opportunities—the question presented here—the separate but equal doctrine has never been used by this Court to sustain the validity of the state's separate school laws. *Missouri ex rel. Gaines* v. *Canada; Sipuel* v. *Board of Regents,* 332 U. S. 631; *Sweatt* v. *Painter; McLaurin* v. *Oklahoma State Regents.*

Earlier educational cases, not concerned with equality, did not apply the doctrine. In *Cumming* v. *County Board of Education,* 175 U. S. 528, the question was explicitly beyond the scope of the decision rendered. In *Berea College* v. *Kentucky,* 211 U. S. 45, the question was reserved. In *Gong Lum* v. *Rice,* the separate but equal doctrine was not put in issue. Instead of challenging the validity of the Mississippi school segregation laws, the Chinese child merely objected to being classified as a Negro for public school purposes.

Even in the field of transportation, subsequent decisions have sapped the doctrine of vitality. *Henderson* v. *United States* in effect overruled *Chiles* v. *Chesapeake & Ohio Railway Co.,* 218 U. S. 71. See *Chance* v. *Lambeth,* 186 F. 2d 879 (CA 4th 1951), *cert. denied,* 341 U. S. 91. *Morgan* v. *Virginia* places persons traveling in interstate commerce beyond the thrust of state segregation statutes. Thus, the reach of the separate but equal doctrine approved in the *Plessy* case has now been so severely restricted and narrowed in scope that, it may be appropriately said of *Plessy* v. *Ferguson* as it was said of *Crowell* v. *Benson,* 285 U. S. 22, "one had supposed that the doctrine had earned a deserved repose." *Estep* v. *United States,* 327 U. S. 114, 142 (concurring opinion).

F. The Necessary Consequence of the Sweatt and McLaurin Decisions is Repudiation of the Separate But Equal Doctrine.

While *Sweatt* v. *Painter* and *McLaurin* v. *Oklahoma State Regents* were not in terms rejections of the separate but equal doctrine, their application in effect destroyed the practice of segregation with respect to state graduate and professional schools. *Wilson* v. *Board of Supervisors,* 92 F. Supp. 986 (E. D. La. 1950), *aff'd,* 340 U. S. 909; *Gray* v. *Board of Trustees of University of Tennessee,* 342 U. S. 517; *McKissick* v. *Carmichael,* 187 F. 2d 949 (CA 4th 1951), *cert. denied,* 341 U. S. 951; *Swanson* v. *University of Virginia,* Civil Action #30 (W. D. Va. 1950) unreported;

Payne v. *Board of Supervisors,* Civil Action #894 (E. D. La. 1952) unreported; *Foister* v. *Board of Supervisors,* Civil Action #937 (E. D. La. 1952) unreported; *Mitchell* v. *Board of Regents of University of Maryland,* Docket #16, Folio 126 (Baltimore City Court 1950) unreported.[1]

In the *Sweatt* case, the Court stated that, with members of the state's dominant racial groups excluded from the segregated law school which the state sought to require Sweatt to attend, "we cannot conclude that the education offered petitioner is substantially equal to that he would receive if admitted to the University of Texas." If this consideration is one of the controlling factors in determining substantial equality at the law school level, it is impossible for any segregated law school to be an equal law school. And pursuant to that decision one of the oldest and best state-supported segregated law schools in the country was found unequal and Negro applicants were ordered admitted to the University of North Carolina. *McKissick* v. *Carmichael.* Thus, substantial equality in professional education is "substantially equal" only if there is no racial segregation.

In the *McLaurin* case, the racial distinctions imposed in an effort to comply with the state's segregation laws were held to impair and inhibit ability to study, to exchange views with other students and, in general, to learn one's

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[1] Negroes are now attending state graduate and professional schools in West Virginia, Maryland, Arkansas, Delaware, Oklahoma, Kentucky, Texas, Missouri, North Carolina, Virginia, and Louisiana. See (Editorial Comment), THE COURTS AND RACIAL INTEGRATION IN EDUCATION, 21 J. NEG. EDUC. 3 (1952).

Negroes are also now attending private universities and colleges in Missouri, Georgia, Kentucky, Louisiana, Texas, Maryland, West Virginia, North Carolina, District of Columbia, and Virginia. See THE COURTS AND RACIAL INTEGRATION IN EDUCATION, 21 J. NEG. EDUC. 3 (1952): SOME PROGRESS IN ELIMINATION OF DISCRIMINATION IN HIGHER EDUCATION IN THE UNITED STATES, 19 J. NEG. EDUC. 4-5 (1950); LEE AND KRAMER, RACIAL INCLUSION IN CHURCH-RELATED COLLEGES IN THE SOUTH, 22 J. NEG. EDUC. 22 (1953); A NEW TREND IN PRIVATE COLLEGES, 6 NEW SOUTH 1 (1951).

profession. The state, therefore, was required to remove all restrictions and to treat McLaurin the same way as other students are treated. Consequently these decisions are a repudiation of the separate but equal doctrine.

III.

Viewed in the light of history the separate but equal doctrine has been an instrumentality of defiant nullification of the Fourteenth Amendment.

The history of segregation laws reveals that their main purpose was to organize the community upon the basis of a superior white and an inferior Negro caste. These laws were conceived in a belief in the inherent inferiority of Negroes, a concept taken from slavery. Inevitably, segregation in its operation and effect has meant inequality consistent only with the belief that the people segregated are inferior and not worthy, or capable, of enjoying the facilities set apart for the dominant group.

Segregation originated as a part of an effort to build a social order in which the Negro would be placed in a status as close as possible to that he had held before the Civil War. The separate but equal doctrine furnished a base from which those who sought to nullify the Thirteenth, Fourteenth and Fifteenth Amendments were permitted to operate in relative security. While this must have been apparent at the end of the last century, the doctrine has become beclouded with so much fiction that it becomes important to consider the matter in historical context to restore a proper view of its meaning and import.

A. The Status of the Negro, Slave and Free, Prior to the Civil War.

One of the basic assumptions of the slave system was the Negro's inherent inferiority.[2] As the invention of the

[2] For an illuminating discussion of these assumptions, see JOHNSON, THE IDEOLOGY OF WHITE SUPREMACY, 1876-1910, IN ESSAYS IN SOUTHERN HISTORY PRESENTED TO JOSEPH GREGOIRE DEROULHAC HAMILTON, GREEN ED., 124-156 (1949).

cotton gin rendered slavery essential to the maintenance of the plantation economy in the South, a body of pseudo-scientific thought developed in passionate defense of slavery, premised on the Negro's unfitness for freedom and equality.[3] Thus, the Negro's inferiority with respect to brain capacity, lung activity and countless other physiological attributes was purportedly established by some of the South's most respected scientists.[4] In all relationships between the two races the Negro's place was that of an inferior, for it was claimed that any other relationship status would automatically degrade the white man.[5]

This concept of the Negro as an inferior fit only for slavery was complicated by the presence of several hundred thousand Negroes, who although not slaves, could not be described as free men.[6] In order that they would not

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[3] JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH 243 (1935); JOHNSON, THE NEGRO IN AMERICAN CIVILIZATION 5-15 (1930).

[4] See VAN EVRIE, NEGROES AND NEGRO SLAVERY 120 ff, 122 ff, 214 ff (1861); CARTWRIGHT, DISEASES AND PECULIARITIES OF THE NEGRO RACE, 2 DEBOW, THE INDUSTRIAL RESOURCES, ETC., OF THE SOUTHERN AND WESTERN STATES 315-329 (1852); NOTT, TWO LECTURES ON THE NATURAL HISTORY OF THE CAUCASIAN AND NEGRO RACES (1866); VAN EVRIE, NEGROES AND NEGRO "SLAVERY"; THE FIRST AN INFERIOR RACE—THE LATTER ITS NORMAL CONDITION (1853); VAN EVRIE, SUBGENATION: THE THEORY OF THE NORMAL RELATION OF THE RACES (1864); CARTWRIGHT, DISEASES AND PECULIARITIES OF THE NEGRO RACES, 9 DEBOW'S REVIEW 64-69 (1851); CARTWRIGHT, ESSAYS, BEING INDUCTIONS DRAWN FROM THE BACONIAN PHILOSOPHY PROVING THE TRUTH OF THE BIBLE AND THE JUSTICE AND BENEVOLENCE OF THE DECREE DOOMING CANAAN TO BE A SERVANT OF SERVANTS (1843).

[5] JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH 242 ff (1935); THE PRO-SLAVERY ARGUMENT, especially HARPER'S MEMOIR ON SLAVERY, pp. 26-98; and SIMMS, THE MORALS OF SLAVERY, pp. 175-275 (1835); JOHNSON, THE IDEOLOGY OF WHITE SUPREMACY, *op. cit. supra*, n. 2 at 135.

[6] See FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF AMERICAN NEGROES 213-238 (1947).

constitute a threat to the slave regime, free Negroes were denied the full rights and privileges of citizens. They enjoyed no equality in the courts, their right to assemble was denied, their movements were proscribed, and education was withheld.[7] Their plight, in consequence of these proscriptions, invited the unfavorable comparison of them with slaves and confirmed the views of many that Negroes could not profit by freedom. They were regarded by the white society as the "very drones and pests of society," pariahs of the land, and an incubus on the body politic.[8] Even this Court, in *Scott* v. *Sanford,* recognized this substantial body of opinion to the effect that free Negroes had no rights that a white man was bound to respect.

The few privileges that free Negroes enjoyed were being constantly whittled away in the early nineteenth century. By 1836, free Negroes were denied the ballot in every southern state and in many states outside the South.[9] In some states, they were denied residence on penalty of enslavement; and in some, they were banned from the mechanical trades because of the economic pressure upon the white artisans.[10] Before the outbreak of the Civil War, the movement to reenslave free Negroes was under way in several states in the South.[11]

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[7] FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA, 1790-1860 59-120 (1943).

[8] DEW, REVIEW OF THE DEBATES IN THE VIRGINIA LEGISLATURE OF 1831-1832, THE PRO-SLAVERY ARGUMENT, 422 ff (1853); JENKINS, *op. cit. supra,* n. 5, 246.

[9] WEEKS, HISTORY OF NEGRO SUFFRAGE IN THE SOUTH, 9 POL. SCI. Q. 671-703 (1894); PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 87 ff (1918); SHUGG, NEGRO VOTING IN THE ANTE-BELLUM SOUTH, 21 J. NEG. HIST. 357-364 (1936).

[10] VA. HOUSE J. 84 (1831-1832); VA. LAWS 1831, p. 107; CHANNING, HISTORY OF THE UNITED STATES 136-137 (1921); GREENE and WOODSON, THE NEGRO WAGE EARNER 15 ff (1930).

[11] FRANKLIN, THE ENSLAVEMENT OF FREE-NEGROES IN NORTH CAROLINA, 29 J. NEG. HIST. 401-428 (1944).

This ante-bellum view of the inferiority of the Negro persisted after the Civil War among those who already regarded the newly freed slaves as simply augmenting the group of free Negroes who had been regarded as "the most ignorant . . . vicious, improverished, and degraded population of this country." [12]

B. The Post War Struggle.

The slave system had supported and sustained a plantation economy under which 1,000 families received approximately $50,000,000 a year with the remaining 600,000 families receiving about $60,000,000 per annum. The perfection of that economy meant the ruthless destruction of the small independent white farmer who was either bought out or driven back to the poorer lands—the slaveholders controlled the destiny of both the slave and the poor whites.[13] Slaves were not only farmers and unskilled laborers but were trained by their masters as skilled artisans. Thus, slave labor was in formidable competition with white labor at every level, and the latter was the more expendable for it did not represent property and investment. Only a few white supervisory persons were needed to insure the successful operation of the plantation system.

After the Civil War, the independent white farmer entered into cotton cultivation and took over the lands of the now impracticable large plantations. Within a few years the independent farmer was engaged in 40% of the cotton cultivation, and by 1910 this percentage had risen to 67%.[14] To the poor white Southerner the new Negro,

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[12] See JENKINS, *op. cit. supra,* n. 5, 246.

[13] WESTON, THE PROGRESS OF SLAVERY (1859); HELPER, THE IMPENDING CRISIS OF THE SOUTH (1863); JOHNSON, THE NEGRO IN AMERICAN CIVILIZATION, *op. cit. supra,* n. 2; PHILLIPS, AMERICAN NEGRO SLAVERY, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY-PLANTATION AND FRONTIER DOCUMENTS (1910-11).

[14] VANCE, HUMAN FACTORS IN COTTON CULTIVATION (1926); SIMKINS, THE TILLMAN MOVEMENT IN SOUTH CAROLINA (1926).

as a skilled farmer and artisan in a free competitive economy, loomed as an even greater economic menace than he had been under the slave system. They became firm advocates of the Negro's subjugation to insure their own economic well being.[15]

The plantation aristocracy sought to regain their economic and political pre-eminence by rebuilding the pre-war social structure on the philosophy of the Negro's inferiority. This group found that they could build a new economic structure based upon a depressed labor market of poor whites and Negroes. Thus, to the aristocracy, too, the Negro's subjugation was an economic advantage.

The mutual concern of these two groups of white Southerners for the subjugation of the Negro gave them a common basis for unity in irreconcilable resistance to the revolutionary change in the Negro's status which the Civil War Amendments were designed to effect. Their attitude towards the Fourteenth Amendment is best described by a Mississippi editor who said that the southern states were not prepared "to become parties to their own degradation."[16] There were white southerners, however, as there always had been, who sought to build a society which would respect and dignify the rights of the Freedmen. But this group was in the minority and southern sentiment in bitter opposition to Negro equality prevailed. Accordingly, as a temporary expedient, even as an army of occupation has been necessary recently in Germany and Japan to prevent lawlessness by irreconcilables and the recrudescense of totalitarianism, so Union forces were needed during Reconstruction to maintain order and to make possible the development of a more democratic way of life in the states recently in rebellion.

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[15] For discussion of this whole development see JOHNSON, THE NEGRO IN AMERICAN CIVILIZATION (1930).

[16] COULTER, THE SOUTH DURING RECONSTRUCTION 434 (1947).

The Thirteenth, Fourteenth and Fifteenth Amendments and the Reconstruction effort, implemented by those in the South who were coming to accept the new concept of the Negro as a free man on full terms of equality, could have led to a society free of racism. The possibility of the extensive establishment and expansion of mixed schools was real at this stage. It was discussed in every southern state, and in most states serious consideration was given to the proposal to establish them.[17]

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[17] KNIGHT, PUBLIC EDUCATION IN THE SOUTH 320 (1922). See also Part II *infra*, at pages 142-157.

There were interracial colleges, academies, and tributary grammar schools in the South established and maintained largely by philanthropic societies and individuals from the North. Although they were predominantly Negro institutions, in the Reconstruction period and later, institutions such as Fisk University in Nashville, Tennessee, and Talladega College in Alabama usually had some white students. In the last quarter of the nineteenth century most of the teachers in these institutions were white. For accounts of co-racial education at Joppa Institute and Nat School in Alabama, Piedmont College in Georgia, Saluda Institute in North Carolina and in other southern schools, see BROWNLEE, NEW DAY ASCENDING 98-110 (1946).

The effect of these institutions in keeping alive the possibility of Negroes and whites living and learning together on the basis of complete equality was pointed out by one of the South's most distinguished men of letters, George W. Cable. "In these institutions," he said:

> ". . . there is a complete ignoring of those race distinctions in the enjoyment of common public rights so religiously enforced on every side beyond their borders; and yet none of those unnamable disasters have come to or from them which the advocates of these onerous public distinctions and separations predict and dread. On scores of Southern hilltops these schools stand out almost totally without companions or competitors in their peculiar field, so many refutations, visible and complete, of the idea that any interest requires the colored American citizen to be limited in any of the civil rights that would be his without question if the same man were white."
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> CABLE, THE NEGRO QUESTION 19 (1890).

C. The Compromise of 1877 and the Abandonment of Reconstruction.

The return to power of the southern irreconcilables was finally made possible by rapproachement between northern and southern economic interests culminating in the compromise of 1877. In the North, control of the Republican Party passed to those who believed that the protection and expansion of their economic power could best be served by political conciliation of the southern irreconcilables, rather than by unswerving insistence upon human equality and the rights guaranteed by the post war Amendments. In the 1870's those forces that held fast to the notion of the Negro's preordained inferiority returned to power in state after state, and it is significant that one of the first measures adopted was to require segregated schools on a permanent basis in disregard of the Fourteenth Amendment.[18]

In 1877, out of the exigencies of a close and contested election, came a bargain between the Republican Party and the southern leaders of the Democratic Party which assured President Hayes' election, led to the withdrawal of federal troops from the non-redeemed states and left the South free to solve the Negro problem without apparent

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[18] Georgia, where the reconstruction government was especially short-lived, passed a law in 1870 making it mandatory for district school officials to "make all necessary arrangements for the instruction of the white and colored youth . . . in separate schools. They shall provide the same facilities for each . . . but the children of the white and colored races shall not be taught together in any sub-district of the state." Ga. Laws 1870, p. 56. As soon as they were redeemed, the other southern states enacted similar legislation providing for segregated schools and gradually the states incorporated the provision into their constitutions. See, for example, Ark. Laws 1873, p. 423; THE JOURNAL OF THE TEXAS CONSTITUTIONAL CONVENTION 1875, pp. 608-616; Miss. Laws 1878, p. 103; STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 170-176 (1908). When South Carolina and Lousiana conservatives secured control of their governments in 1877, they immediately repealed the laws providing for mixed schools and established separate institutions for white and colored youth.

fear of federal intervention. This agreement preserved the pragmatic and material ends of Reconstruction at the expense of the enforcement of not only the Fourteenth Amendment but the Fifteenth Amendment as well.[19] For it brought in its wake peonage and disfranchisement as well as segregation and other denials of equal protection. Although there is grave danger in oversimplification of the complexities of history, on reflection it seems clear that more profoundly than constitutional amendments and wordy statutes, the Compromise of 1877 shaped the future of four million freedmen and their progeny for generations to come. For the road to freedom and equality, which had seemed sure and open in 1868, was now to be securely blocked and barred by a maze of restrictions and limitations proclaimed as essential to a way of life.

D. Consequences of the 1877 Compromise.

Once the South was left to its own devices, the militant irreconcilables quickly seized or consolidated power. Laws and practices designed to achieve rigid segregation and the disfranchisement of the Negro came on in increasing numbers and harshness.

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[19] The explanation for this reversal of national policy in 1877 and the abandonment of an experiment that had enlisted national support and deeply aroused the emotions and hopes has been sought in many quarters. The most commonly accepted and often repeated story is that authorized spokesmen of Hayes met representatives of the Southern Democrats at the Wormley House in Washington in late February, 1877, and promised the withdrawal of troops and abandonment of the Negro in return for the support of southern Congressmen for Hayes against the Democratic candidate Samuel J. Tilden in the contested Presidential election. Recent investigation has demonstrated that the so-called "Wormley House Bargain", though offered by southern participants as the explanation, is not the full relevation of the complex and elaborate maneuvering which finally led to the agreement. See WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (1951) for an elaborate and detailed explanation of the compromise agreement.

The policy of the southern states was to destroy the political power of the Negro so that he could never seriously challenge the order that was being established. By the poll tax, the Grandfather Clause, the white primary, gerrymandering, the complicated election procedures, and by unabated intimidation and threats of violence, the Negro was stripped of effective political participation.[20]

The final blow to the political respectability of the Negro came with disfranchisement in the final decade of the Nineteenth Century and the early years of the present century when the discriminatory provisions were written into the state constitutions.[21] That problem the Court dealt with during the next forty years from *Guinn* v. *United States,* 238 U. S. 347 to *Terry* v. *Adams,* 345 U. S. 461.

A movement to repeal the Fourteenth and Fifteenth Amendments shows the extremity to which the irreconcilables were willing to go to make certain that the Negro remained in an inferior position. At the Mississippi Constitutional Convention of 1890, a special committee studied the matter and concluded that "the white people only are capable of conducting and maintaining the government" and that the Negro race, "even if its people were educated, being wholly unequal to such responsibility," should be excluded from the franchise. It, therefore, resolved that the "true and only efficient remedy for the great and important difficulties" that would ensue from Negro participation lay

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[20] In 1890, Judge J. Chrisman of Mississippi could say that there had not been a full vote and a fair count in his state since 1875, that they had preserved the ascendancy of the whites by revolutionary methods. In plain words, he continued, "We have been stuffing the ballot boxes, committing perjury and here and there in the State carrying the elections by fraud and violence until the whole machinery for election was about to rot down." Quoted in WOODWARD, ORIGINS OF THE NEW SOUTH 58 (1951).

[21] KEY, SOUTHERN POLITICS IN STATE AND NATION 539-550 (1949); WOODWARD, ORIGINS OF THE NEW SOUTH 205, 263 (1951).

in the "repeal of the Fifteenth Amendment . . . whereby such restrictions and limitations may be put upon Negro suffrage as may be necessary and proper for the maintenance of good and stable government . . ." [22]

A delegate to the Virginia Constitutional Convention of 1901-1902 submitted a resolution calling for a repeal of the Fifteenth Amendment because it is wrong, "in that it proceeds on the theory that the two races are equally competent of free government." [23] Senator Edward Carmack of Tennessee gave notice in 1903 that he would bring in a bill to repeal the Amendments.[24] The movement, though unsuccessful, clearly illustrates the temper of the white South.

Having consigned the Negro to a permanently inferior caste status, racist spokesmen, with unabashed boldness, set forth views regarding the Negro's unassimilability and uneducability even more pernicious than those held by the old South. Ben Tillman, the leader of South Carolina, declared that a Negro should not have the same treatment as a white man, "for the simple reason that God Almighty made him colored and did not make him white." He lamented the end of slavery which reversed the process of improving the Negro and "inoculated him with the virus of

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[22] JOURNAL OF THE MISSISSIPPI CONSTITUTIONAL CONVENTION, 1890, 303-304. Tillman, Vardaman, and other Southern leaders frequently called for the repeal of the Amendments. Tillman believed "that such a formal declaration of surrender in the struggle to give the Negro political and civil equality would confirm the black man in his inferior position and pave the way for greater harmony between the races." SIMKINS, PITCHFORK BEN TILLMAN 395 (1944). Vardaman called for repeal as a recognition that the Negro "was physically, mentally, morally, racially, and eternally inferior to the white man." See KIRWAN, REVOLT OF THE REDNECKS (1951).

[23] JOURNAL OF THE VIRGINIA CONSTITUTIONAL CONVENTION, 1901-1902, pp. 47-48.

[24] JOHNSON, THE IDEOLOGY OF WHITE SUPREMACY, *op. cit. supra*, n. 2, 136 ff.

equality.''[25] These views were expressed many times in the disfranchising conventions toward the end of the century.[26] Nor were the politicians alone in uttering such views about the Negro. Drawing on the theory of evolution as expressed by Darwin and the theory of progress developed by Spencer, persons of scholarly pretension speeded the work of justifying an inferior status for the Negro.[27] Alfred H. Stone, having the reputation of a widely respected scholar in Mississippi, declared that the "Negro was an inferior type of man with predominantly African customs and character traits whom no amount of education or improvement of environmental conditions could ever elevate to as high a scale in the human species as the white man.'' As late as 1910, E. H. Randle in his

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[25] SIMKINS, PITCHFORK BEN TILLMAN 395, 399 (1944). Tillman's Mississippi counterpart, J. K. Vardaman, was equally vigorous in denouncing the Negro. He described the Negro as an "industrial stumbling block, a political ulcer, a social scab, 'a lazy, lying, lustful animal which no conceivable amount of training can transform into a tolerable citizen.'" Quoted in KIRWAN, *op. cit. supra,* n. 22, at 146.

[26] See, for example, Alabama Constitutional Convention, 1901, Official Proceedings, Vol. I, p. 12, Vol. II, pp. 2710-2711, 2713, 2719, 2782, 2785-2786, 2793; Journal of the South Carolina Convention, 1895, pp. 443-472; Journal of the Mississippi Constitutional Convention, 1890, pp. 10, 303, 701-702; Journal of the Louisiana Constitutional Convention, 1898, pp. 9-10.

[27] See ROWLAND, A MISSISSIPPI VIEW OF RELATIONS IN THE SOUTH, A Paper (1903); HERBERT, et al., WHY THE SOLID SOUTH? OR RECONSTRUCTION AND ITS RESULTS (1890); BRUCE, THE PLANTATION NEGRO AS A FREEMAN: OBSERVATIONS ON HIS CHARACTER, CONDITION AND PROSPECTS IN VIRGINIA (1889); STONE, STUDIES IN THE AMERICAN RACE PROBLEM (1908); CARROLL, THE NEGRO A BEAST (1908); CARROLL, THE TEMPTER OF EVE, OR THE CRIMINALITY OF MAN'S SOCIAL, POLITICAL, AND RELIGIOUS EQUALITY WITH THE NEGRO, AND THE AMALGAMATION TO WHICH THESE CRIMES INEVITABLY LEAD 286 ff (1902); PAGE, THE NEGRO: THE SOUTHERNER'S PROBLEM 126 ff (1904); RANDLE, CHARACTERISTICS OF THE SOUTHERN NEGRO 51 ff (1910).

Characteristics of the Southern Negro declared that "the first important thing to remember in judging the Negro was that his mental capacity was inferior to that of the white man." [28]

Such was the real philosophy behind the late 19th Century segregation laws—an essential part of the whole racist complex. Controlling economic and political interests in the South were convinced that the Negro's subjugation was essential to their survival, and the Court in *Plessy* v. *Ferguson* had ruled that such subjugation through public authority was sanctioned by the Constitution. This is the overriding vice of *Plessy* v. *Ferguson.* For without the sanction of *Plessy* v. *Ferguson,* archaic and provincial notions of racial superiority could not have injured and disfigured an entire region for so long a time. The full force and effect of the protection afforded by the Fourteenth Amendment was effectively blunted by the vigorous efforts of the proponents of the concept that the Negro was inferior. This nullification was effectuated in all aspects of Negro life in the South, particularly in the field of education, by the exercise of state power.

As the invention of the cotton gin stilled the voices of Southern Abolitionists, *Plessy* v. *Ferguson* chilled the development in the South of opinion conducive to the acceptance of Negroes on the basis of equality because those of the white South desiring to afford Negroes the equalitarian status which the Civil War Amendments had hoped to achieve were barred by state law from acting in accordance with their beliefs. In this connection, it is significant that the Populist movement flourished for a

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[28] Quoted in JOHNSON, IDEOLOGY OF WHITE SUPREMACY, op. cit., *supra,* n. 2, p. 151. That the South was not alone in these views is clearly shown by Logan's study of the Northern press between 1877 and 1901. See LOGAN, THE NEGRO IN AMERICAN LIFE AND THOUGHT: THE NADIR 1877-1901, cc. 9-10 (unpub. ms., to be pub. early in 1954 by the Dial Press).

short period during the 1890's and threatened to take over political control of the South through a coalition of the poor Negro and poor white farmers.[29] This movement was completely smashed and since *Plessy* v. *Ferguson* no similar phenomenon has taken hold.

Without the "constitutional" sanction which *Plessy* v. *Ferguson* affords, racial segregation could not have become entrenched in the South, and individuals and local communities would have been free to maintain public school systems in conformity with the underlying purposes of the Fourteenth Amendment by providing education without racial distinctions. The doctrine of *Plessy* v. *Ferguson* was essential to the successful maintenance of a racial caste system in the United States. Efforts toward the elimination of race discrimination are jeopardized as long as the separate but equal doctrine endures. But for this doctrine we could more confidently assert that ours is a democratic society based upon a belief in individual equality.

E. Nullification of the Rights Guaranteed by the Fourteenth Amendment and the Reestablishment of the Negro's Pre-Civil War Inferior Status Fully Realized.

Before the end of the century, even without repeal of the Fourteenth and Fifteenth Amendments, those forces committed to a perpetuation of the slave concept of the Negro had realized their goal. They had defied the federal government, threatened the white defenders of equal rights, had used intimidation and violence against the Negro and had effectively smashed a political movement designed to unite the Negro and the poor whites. Provisions requir-

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[29] See CARLETON, THE CONSERVATIVE SOUTH—A POLITICAL MYTH, 22 Va. Q. Rev. 179-192 (1946); LEWINSON, RACE, CLASS AND PARTY (1932); MOON, THE BALANCE OF POWER—THE NEGRO VOTE, c. 4 (1948).

ing segregated schools were written into state constitutions and statutes. Negroes had been driven from participation in political affairs, and a veritable maze of Jim Crow laws had been erected to "keep the Negro in his place" (of inferiority), all with impunity. There was no longer any need to pretend either that Negroes were getting an education equal to the whites or were entitled to it.

In the Constitutional Convention of Virginia, 1901-1902, Senator Carter Glass, in explaining a resolution requiring that state funds be used to maintain primary schools for four months before being used for establishment of higher grades, explained that "white people of the black sections of Virginia should be permitted to tax themselves, and after a certain point had been passed which would safeguard the poorer classes of those communities, divert that fund to the exclusive use of white children. . . ." [30]

Senator Vardaman thought it was folly to make such pretenses. In Mississippi there were too many people to educate and not enough money to go around, he felt. The state, he insisted, should not spend as much on the education of Negroes as it was doing. "There is no use multiplying words about it," he said in 1899, "the negro will not be permitted to rise above the station he now fills." Money spent on his education was, therefore, a "positive unkindness" to him. "It simply renders him unfit for the work which the white man has prescribed and which he will be forced to perform." [31] Vardaman's scholarly compatriot, Dunbar Rowland, seconded these views in 1902, when he said that "thoughtful men in the South were beginning to lose faith in the power of education which had been heretofore given to uplift the negro," and to complain of the

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[30] REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, State of Virginia, Richmond, June 12, 1901-June 26, 1902, p. 1677 (1906).

[31] KIRWAN, *op. cit. supra,* n. 22, at 145-146.

burden thus placed upon the people of the South in their poverty.[32]

The views of Tillman, Vardaman, Stone, Rowland, Glass and others were largely a justification for what had been done by the time they uttered them. The South had succeeded in setting up the machinery by which it was hoped to retain the Negro in an inferior status. Through separate, inferior schools, through an elaborate system of humiliating Jim Crow, and through effective disfranchisement of the Negro, the exclusive enjoyment of first-class citizenship had now become the sole possession of white persons.

And, finally, the Negro was effectively restored to an inferior position through laws and through practices, now dignified as "custom and tradition." Moreover, this relationship—of an inferior Negro and superior white status—established through laws, practice, custom and tradition, was even more rigidly enforced than in the ante-bellum era. As one historian has aptly stated:

> "Whether by state law or local law, or by the more pervasive coercion of sovereign white opinion, 'the Negro's place' was gradually defined—in the courts, schools, and libraries, in parks, theaters, hotels, and residential districts, in hospitals, insane

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[32] JOHNSON, IDEOLOGY OF WHITE SUPREMACY, *op. cit. supra*, n. 2, at 153. That this pattern is not an antiquated doctrine but a modern view may be seen in the current expenditure per pupil in average daily attendance 1949-1950: In Alabama, $130.09 was spent for whites against $92.69 for Negroes; in Arkansas $123.60 for whites and $73.03 for Negroes; in Florida $196.42 for whites, $136.71 for Negroes; in Georgia, $145.15 for whites and $79.73 for Negroes; in Maryland, $217.41 for whites and $198.76 for Negroes; in Mississippi, $122.93 for whites and $32.55 for Negroes; in North Carolina, $148.21 for whites and $122.90 for Negroes; in South Carolina, $154.62 for whites and $79.82 for Negroes; in the District of Columbia, $289.68 for whites and $220.74 for Negroes. BLOSE AND JARACZ, BIENNIAL SURVEY OF EDUCATION IN THE UNITED STATES, 1948-50, TABLE 43, "STATISTICS OF STATE SCHOOL SYSTEMS, 1949-50" (1952).

> asylums—everywhere including on sidewalks and in cemeteries. When complete, the new codes of White Supremacy were vastly more complex than the ante-bellum slave codes or the Black Codes of 1865-1866, and, if anything, they were stronger and more rigidly enforced.'' [33]

This is the historic background against which the validity of the separate but equal doctrine must be tested. History reveals it as a part of an overriding purpose to defeat the aims of the Thirteenth, Fourteenth and Fifteenth Amendments. Segregation was designed to insure inequality—to discriminate on account of race and color—and the separate but equal doctrine accommodated the Constitution to that purpose. Separate but equal is a legal fiction. There never was and never will be any separate equality. Our Constitution cannot be used to sustain ideologies and practices which we as a people abhor.

That the Constitution is color blind is our dedicated belief. We submit that this Court cannot sustain these school segregation laws under any separate but equal concept unless it is willing to accept as truths the racist notions of the perpetuators of segregation and to repeat the tragic error of the Plessy court supporting those who would nullify the Fourteenth Amendment and the basic tenet of our way of life which it incorporates. We respectfully suggest that it is the obligation of this Court to correct that error by holding that these laws and constitutional provisions which seek to condition educational opportunities on the basis of race and color are historic aberrations and are inconsistent with the federal Constitution and cannot stand. The separate but equal doctrine of *Plessy* v. *Ferguson* should now be overruled.

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[33] WOODWARD, ORIGINS OF THE NEW SOUTH 212 (1951).

CONCLUSION TO PART ONE

In short, our answer to Question No. 3 proposed by the Court is that it is within the judicial power, whatever the evidence concerning Questions 2(a) and (b) may disclose, to hold that segregated schools violate the Fourteenth Amendment, and for the reasons hereinabove stated that such power should now be exercised.

WHEREFORE, it is respectfully submitted that constitutional provisions and statutes involved in these cases are invalid and should be struck down.

PART TWO

This portion of the brief is directed to questions one and two propounded by the Court:

> *"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 Sec. 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?"*

I.

The Fourteenth Amendment was intended to destroy all caste and color legislation in the United States, including racial segregation.

Research by political scientists and historians, specialists on the period between 1820 and 1900, and other experts in the field, as well as independent research by attorneys in these cases, convinces us that: (1) there is ample evidence that the Congress which submitted and the states which ratified the Fourteenth Amendment contemplated and understood that the Amendment would deprive the states of the power to impose any racial distinctions in determining when,