HARRY BRIGGS, ET AL.,
Appellants,

—vs.— No. 101

R. W. ELLIOTT, Chairman, J. D. CARSON, ET AL., Members of Board of Trustees of School District No. 22, Clarendon County, S.C., et al.,
Appellees.

Washington, D.C.
Wednesday, December 10, 1952.

Oral argument in the above-entitled cause was resumed, pursuant to recess, at 12:10 p.m.,

BEFORE:

FRED M. VINSON, *Chief Justice of the United States*
HUGO L. BLACK, *Associate Justice*
STANLEY F. REED, *Associate Justice*
FELIX FRANKFURTER, *Associate Justice*
WILLIAM O. DOUGLAS, *Associate Justice*
ROBERT H. JACKSON, *Associate Justice*
HAROLD H. BURTON, *Associate Justice*
THOMAS C. CLARK, *Associate Justice*
SHERMAN MINTON, *Associate Justice*

APPEARANCES:

JOHN W. DAVIS, ESQ., *on behalf of Appellees—Resumed.*

THURGOOD MARSHALL, ESQ., *on behalf of Appellants.*

PROCEEDINGS

MR. CHIEF JUSTICE VINSON: Case No. 101, *Harry Briggs, Jr., et al.*, against *R. W. Elliott, Chairman, et al.*

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE VINSON: Proceed.

ARGUMENT OF JOHN W. DAVIS, ESQ., ON BEHALF OF APPELLEES—RESUMED

MR. DAVIS: If the Court please, when the Court arose on yesterday, I was reciting the progress that had been made in the public school system in South Carolina, and with particular reference to the improvement of the facilities, equipment, curricula, and opportunities accorded to the colored students. I might go further on that subject, but I am content to read two sentences from the opinion of the court below. This is the opinion of Judge Parker:

> The reports of December 21 and March 3 filed by defendants, which are admitted by plaintiffs to be true and correct and which are so found by the court, show beyond question that defendants have proceeded promptly and in good faith to comply with the court's decree.

They add:

> There can be no doubt that as a result of the program in which defendants are engaged the educational facilities and opportunities afforded Negroes within the district will, by the beginning of the next school year beginning in September, 1952, be made equal to those afforded white persons.

The only additional fact which I want to mention, aside from leaving the remainder to my brief of the opinion of the court below, is a fact of which I think Mr. Marshall should take cognizance when he proceeds to his redistricting program, and that is the fact that in District No. 1, the district here in controversy,

there are now, speaking of the report of last March, 2,799 registered Negro students and 295 registered white students. In other words, the proportion between the Negroes and the whites is about in the ratio of ten to one. And whether discrimination is to be abolished by introducing 2,800 Negro students in the schools now occupied by the whites, or conversely introducing 295 whites into the schools now occupied by 2,800 Negroes, the result in either event is one which one cannot contemplate with entire equanimity.

I come, then, to what is really the crux of the case. That is the meaning and interpretation of the Fourteenth Amendment to the Constitution of the United States. We devote to that important subject but five pages of our brief. We trust the Court will not treat that summary disposition of it as due to any lack of earnestness on our part.

We have endeavored to compress the outline of the argument for two reasons. The first is that the opinion of Judge Parker rendered below is so cogent and complete that it seems impossible to add anything to his reasoning. The second is, perhaps more compelling at the moment, that Your Honors have so often and so recently dealt with this subject that it would be a work of supererogation to remind you of the cases in which you have dealt with it or to argue with you, the authors, the meaning and scope of the opinions you have emitted.

But if, as lawyers or judges, we have ascertained the scope and bearing of the equal protection clause of the Fourteenth Amendment, our duty is done. The rest must be left to those who dictate public policy, and not to courts.

How should we approach it? I use the language of the Court: An Amendment to the Constitution should be read, you have said,

> . . . in a sense most obvious to the common understanding at the time of its adoption. For it was for public adoption that it was proposed.

Still earlier you have said it is the duty of the interpreters,

> . . . to place ourselves as nearly as possible in the condition of the men who framed the instrument.

What was the condition of those who framed the instrument? The resolution proposing the Fourteenth Amendment was proffered by Congress in June, 1866. In the succeeding month of July, the same Congress proceeded to establish or to continue separate schools in the District of Columbia, and from that good day to

this Congress has not waivered in that policy. It has confronted the attack upon it repeatedly. During the life of Charles Sumner, over and over again, he undertook to amend the law of the District so as to provide for mixed and not for separate schools, and again and again he was defeated.

MR. JUSTICE BURTON: What is your answer, Mr. Davis, to the suggestion mentioned yesterday that at that time the conditions and relations between the two races were such that what might have been unconstitutional then would not be unconstitutional now?

MR. DAVIS: My answer to that is that changed conditions may affect policy, but changed conditions cannot broaden the terminology of the Constitution; the thought is an administrative or a political question, and not a judicial one.

MR. JUSTICE BURTON: But the Constitution is a living document that must be interpreted in relation to the facts of the time in which it is interpreted. Did we not go through with that in connection with child labor cases, and so forth?

MR. DAVIS: Oh, well, of course, changed conditions may bring things within the scope of the Constitution which were not originally contemplated, and of that perhaps the aptest illustration is the interstate commerce clause. Many things have been found to be interstate commerce which at the time of the writing of the Constitution were not contemplated at all. Many of them did not even exist. But when they come within the field of interstate commerce, then they become subject to congressional power, which is defined in terms of the Constitution itself. So circumstances may bring new facts within the purview of the constitutional provision, but they do not alter, expand or change the language that the framers of the Constitution have employed.

MR. JUSTICE FRANKFURTER: Mr. Davis, do you think that "equal" is a less fluid term than "commerce between the states"?

MR. DAVIS: Less fluid?

MR. JUSTICE FRANKFURTER: Yes.

MR. DAVIS: I have not compared the two on the point of fluidity.

MR. JUSTICE FRANKFURTER: Suppose you do it now.

MR. DAVIS: I am not sure that I can approach it in just that sense.

MR. JUSTICE FRANKFURTER: The problem behind my question is whatever the phrasing of it would be.

MR. DAVIS: That what is unequal today may be equal tomorrow or vice versa?

MR. JUSTICE FRANKFURTER: That is it.

MR. DAVIS: That might be. I should not philosophize about it. But the effort in which I am now engaged is to show how those who submitted this Amendment and those who adopted it conceded it to be, and what their conduct by way of interpretation has been since its ratification in 1868.

MR. JUSTICE FRANKFURTER: What you are saying is, that as a matter of history, history puts a gloss upon "equal" which does not permit elimination or admixture of white and colored in this aspect to be introduced?

MR. DAVIS: Yes, I am saying that.

MR. JUSTICE FRANKFURTER: That is what you are saying?

MR. DAVIS: Yes, I am saying that. I am saying that equal protection in the minds of the Congress of the United States did not contemplate mixed schools as a necessity. I am saying that, and I rest on it, though I shall not go further into the congressional history on this subject, because my brother Korman, speaking for the District of Columbia, will enter that phase of it.

It is true that in the Constitution of the United States there is no equal protection clause. It is true that the Fourteenth Amendment was addressed primarily to the states. But it is inconceivable that the Congress which submitted it would have forbidden the states to employ an educational scheme which Congress itself was persistent in employing in the District of Columbia. I therefore urge that the action of Congress is a legislative interpretation of the meaning and scope of this Amendment, and a legislative interpretation of a legislative act no court, I respectfully submit, is justified in ignoring.

What did the states think about this at the time of the ratification? At the time the Amendment was submitted, there were 37 states in the Union. Thirty of them had ratified the Amendment at the time it was proclaimed in 1868. Of those thirty ratifying states, 23 either then had, or immediately installed, separate schools for white and colored children under their public school systems. Were they violating the Amendment which they had solemnly accepted? Were they conceiving of it in any other sense than that it did not touch their power over their public schools?

How do they stand today? Seventeen states in the Union today provide for separate schools for white and colored children, and four others make it permissive with their school boards. Those

four are Wyoming, Kansas, of which we heard yesterday, New Mexico, and Arizona; so that you have 21 states today which conceive it their power and right to maintain separate schools if it suits their policy.

When we turn to the judicial branch, it has spoken on this question, perhaps with more repetition and in more cases than any other single separate constitutional question that now occurs to me. We have not larded our brief with quotations from the courts of last resort of the several states. It would be easy to do so. But we have assembled in our appendix a list of the cases which the highest courts in the states have decided on this question. I am not sure that that list is exhaustive. In fact, I am inclined to think that it is not exhaustive. But certainly it is impressive; and they speak with a single voice that their separate school system is not a violation of the Constitution of the United States.

What does this Court say? I repeat, I shall not undertake to interpret for Your Honors the scope and weight of your own opinions. In *Plessy* v. *Ferguson, Cumming* v. *Richmond County Board of Regents, Gaines* v. *Canada, Sweatt* v. *Painter,* and *McLaurin* v. *Oklahoma,* and there may be others for all I know, certainly this Court has spoken in the most clear and unmistakable terms to the effect that this segregation is not unlawful. I am speaking for those with whom I am associated.

We find nothing in the latest cases that modified that doctrine of "separate but equal" in the least. *Sweatt* v. *Painter* and similar cases were decided solely on the basis of inequality, as we think, and as we believe the Court intended.

It is a little late, said the court below, after this question has been presumed to be settled for ninety years—it is a little late to argue that the question is still at large.

I want to read just one of Judge Parker's sentences on that. Said he:

> It is hardly reasonable to suppose that legislative bodies over so wide a territory, including the Congress of the United States, and great judges of high courts have knowingly defied the Constitution for so long a period or that they have acted in ignorance of the meaning of its provisions. The constitutional principle is the same now that it has been throughout this period, and if conditions have changed so that segregation is no longer wise, this is a matter for the legislatures and not for the courts. The members of the judiciary . . . have no more right to read their ideas of sociology into the Constitution than their ideas of economics.

It would be an interesting, though perhaps entirely useless, undertaking to enumerate the numbers of men charged with official duty in the legislative and the judicial branches of the Government who have declared that segregation is not per se unlawful. The members of Congress, year after year, and session after session, the members of state constitutional conventions, the members of state legislatures, year after year and session after session, the members of the higher courts of the states, the members of the inferior federal judiciary, and the members of this tribunal—what their number may be, I do not know, but I think it reasonably certain that it must mount well into the thousands, and to this I stress for Your Honors that every one of that vast group was bound by oath to support the Constitution of the United States and any of its Amendments. Is it conceivable that all that body of concurrent opinion was recreant to its duty or misunderstood the constitutional mandate, or was ignorant of the history which gave to the mandate its scope and meaning? I submit not.

Now, what are we told here that has made all that body of activity and learning of no consequence? Says counsel for the plaintiffs, or appellants, we have the uncontradicted testimony of expert witnesses that segregation is hurtful, and in their opinion hurtful to the children of both races, both colored and white. These witnesses severally described themselves as professors, associate professors, assistant professors, and one describes herself as a lecturer and adviser on curricula. I am not sure exactly what that means.

I did not impugn the sincerity of these learned gentlemen and lady. I am quite sure that they believe that they are expressing valid opinions on their subject. But there are two things notable about them. Not a one of them is under any official duty in the premises whatever; not a one of them has had to consider the welfare of the people for whom they are legislating or whose rights they were called on to adjudicate. And only one of them professes to have the slightest knowledge of conditions in the states where separate schools are now being maintained. Only one of them professes any knowledge of the condition within the 17 segregating states.

I want to refer just a moment to that particular witness, Dr. Clark. Dr. Clark professed to speak as an expert and an informed investigator on this subject. His investigation consisted of visits to the Scott's Branch primary and secondary school at Scott's Branch, which he undertook at the request of counsel for the plaintiffs. He called for the presentation to himself of some 16 pupils between the ages of six and nine years, and he applied to them what he devised and what he was pleased to call an objective test. That consisted of offering to them sixteen white and colored dolls, and inviting them to select the doll they would prefer, the doll they

thought was nice, the doll that looked bad, or the doll that looked most like themselves. He ascertained that ten out of his battery of sixteen preferred the white doll. Nine thought the white doll was nice, and seven thought it looked most like themselves. Eleven said that the colored doll was bad, and one that the white doll was bad. And out of that intensive investigation and that application of that thoroughly scientific test, he deduced the sound conclusion that segregation there had produced confusion in the individuals —and I use his language—"and their concepts about themselves conflicting in their personalities, that they have been definitely harmed in the development of their personalities."

That is a sad result, and we are invited to accept it as a scientific conclusion. But I am reminded of the scriptural saying, "Oh, that mine adversary had written a book." And Professor Clark, with the assistance of his wife, has written on this subject and has described a similar test which he submitted to colored pupils in the northern and nonsegregated schools. He found that 62 percent of the colored children in the South chose a white doll; 72 percent in the North chose the white doll; 52 percent of the children in the South thought the white doll was nice; 68 percent of the children in the North thought the white doll was nice; 49 percent of the children in the South thought the colored doll was bad; 71 percent of the children in the North thought the colored doll was bad.

Now, these latter scientific tests were conducted in nonsegregating states, and with those results compared, what becomes of the blasting influence of segregation to which Dr. Clark so eloquently testifies?

The witness Trager, who is the lecturer and consultant on curricula, had never been in the South except when she visited her husband who was stationed at an Army post in Charleston during the war. And I gather that the visit was of somewhat brief character. She also was in search of scientific wisdom, and she submitted that same scientific test to a collection of children in the schools of Philadelphia, where segregation has been absent for many years. She made as a result of that what seems to have been surprising to her, the fact that in children from five to eight years of age, they were already aware, both white and colored, of racial differences between them. Now, that may be a scientific conclusion. It would be rather surprising, if the children were possessed of their normal senses, if they were ignorant of some racial differences between them, even at that early age.

I am tempted to digress, because I am discussing the weight and pith of this testimony, which is the reliance of the plaintiffs here to turn back this enormous weight of legislative and judicial precedent on this subject. I may have been unfortunate, or I may

have been careless, but it seems to me that much of that which is handed around under the name of social science is an effort on the part of the scientist to rationalize his own preconceptions. They find usually, in my limited observation, what they go out to find.

One of these witnesses, Dr. Krech, speaks of a colored school, gives, as he says,

> . . . what we call in our lingo environmental support for the belief that Negroes are in some way different from and inferior to white people, and that in turn, of course, supports and strengthens beliefs of racial differences, of racial inferiority.

I ran across a sentence the other day which somebody said who was equally as expert as Dr. Krech in the "lingo" of the craft. He described much of the social science as "fragmentary expertise based on an examined presupposition," which is about as scientific language as you can use, I suppose, but seems to be entirely descriptive.

Now, South Carolina is unique among the states in one particular. You have often heard it said that an ounce of experience is worth a pound of theory. South Carolina does not come to this policy as a stranger. She had mixed schools for twelve years, from 1865 to 1877. She had them as a result of the Constitutional Convention of 1865, which was led by a preacher of the Negro race, against whom I know nothing, who bore the somewhat distinguished name of Cardozo, and he forced through that convention the provision for mixed schools.

The then Governor of South Carolina, whose term was expiring, was the war governor, Governor Orr, who denounced the provision. He was succeeded by—I hope the term has lost its invidiousness—a carpetbagger from Maine, named Scott, and Scott denounced the provision. And Dr. Knight, the Professor of Education at the University of North Carolina, who has written on the subject, declares that it was the most unwise action of the period, and that that is a certainty.

When South Carolina moved from mixed to segregated schools, it did so in the light of experience, and in the light of the further fact, these authorities state, that it had been destructive to the public school system of South Carolina for fifty years after it was abolished.

Now, these learned witnesses do not have the whole field to themselves. They do not speak without contradiction from other sources. We quote in our brief—I suppose it is not testimony, but it is quotable material, and we are content to adopt it—Dr. Odum

of North Carolina, who is perhaps the foremost investigator of educational questions in the entire South; Dr. Frank Graham, former president of the University of North Carolina; ex-Governor Darden, president of the University of Virginia; Hodding Carter, whose recent works on southern conditions have become classic; Gunnar Myrdal, Swedish scientist employed to investigate the race question for the Rockefeller Foundation; W. E. B. DuBois; Ambrose Caliver; and the witness Crow, who testified in this case, all of them opposing the item that there should be an immediate abolition of segregated schools.

Let me read a sentence or two from Dr. DuBois. I may be wrong about this, but I should think that he has been perhaps the most constant and vocal opponent of Negro oppression of any of his race in the country. Says he:

> It is difficult to think of anything more important for the development of a people than proper training for their children; and yet I have repeatedly seen wise and loving colored parents take infinite pains to force their little children into schools where the white children, white teachers, and white parents despised and resented the dark child, make mock of it, neglected or bullied it, and literally rendered its life a living hell. Such parents want their children to "fight" this thing out—but, dear God, at what a cost.

He goes on:

> We shall get a finer, better balance of spirit; an infinitely more capable and rounded personality by putting children in schools where they are wanted, and where they are happy and inspired, than in thrusting them into hells where they are ridiculed and hated.

If this question is a judicial question, if it is to be decided on the varying opinions of scholars, students, writers, authorities, and what you will, certainly it cannot be said that the testimony will be all one way. Certainly it cannot be said that a legislature conducting its public schools in accordance with the wishes of its people—it cannot be said that they are acting merely by caprice or by racial prejudice.

Says Judge Parker again:

> The questions thus presented are not questions of constitutional right but of legislative policy, which must be formulated, not *in vacuo* or with doctrinaire disregard of existing conditions, but in realistic approach to the situations to which it is to be applied.

Once more, Your Honors, I might say: What underlies this whole question? What is the great national and federal policy on this matter? Is it not a fact that the very strength and fiber of our federal system is local self-government in those matters for which local action is competent? Is it not, of all the activities of government, the one which most nearly approaches the hearts and minds of people, the question of the education of their young?

Is it not the height of wisdom that the manner in which that shall be conducted should be left to those most immediately affected by it, and that the wishes of the parents, both white and colored, should be ascertained before their children are forced into what may be an unwelcome contact?

I respectfully submit to the Court, there is no reason assigned here why this Court or any other should reverse the findings of ninety years.

MR. CHIEF JUSTICE VINSON: Mr. Marshall.

REBUTTAL ARGUMENT OF THURGOOD MARSHALL, ESQ., ON BEHALF OF APPELLANTS

MR. MARSHALL: May it please the Court:

So far as the appellants are concerned in this case, at this point it seems to me that the significant factor running through all these arguments up to this point is that for some reason, which is still unexplained, Negroes are taken out of the main stream of American life in these states. There is nothing involved in this case other than race and color, and I do not need to go to the background of the statutes or anything else. I just read the statutes, and they say, "white and colored."

While we are talking about the feeling of the people in South Carolina, I think we must once again emphasize that under our form of government, these individual rights of minority people are not to be left to even the most mature judgment of the majority of the people, and that the only testing ground as to whether or not individual rights are concerned is in this Court.

If I might digress just for a moment, on this question of the will of the people of South Carolina, if Ralph Bunche were assigned to South Carolina, his children would have to go to a Jim Crow school. No matter how great anyone becomes, if he happens to have been born a Negro, regardless of his color, he is relegated to that school.

Now, when we talk of the reasonableness of this legislation,

the reasonableness, the reasonableness of the Constitution of South Carolina, and when we talk about the large body of judicial opinion in this case, I respectfully remind the Court that the exact same argument was made in the *Sweatt* case, and the brief in the *Sweatt* case contained, not only the same form, but the exact same type of appendix showing all the ramifications of the several decisions which had repeatedly upheld segregated education.

I also respectfully remind the Court that in the *Sweatt* case, as the public policy of the State of Texas, they also filed a public opinion poll of Texas showing that by far the majority of the people of Texas at this late date wanted segregation.

I do not believe that that body of law has any more place in this case than it had in the *Sweatt* case.

I think we should also point out in this regard that when we talk about reasonableness, what I think the appellees mean is reasonable insofar as the legislature of South Carolina decided it to be reasonable, and reasonable to the people of South Carolina. But what we are arguing in this case is as to whether or not it is reasonableness within the decided cases of this Court on the Fourteenth Amendment. As to this particular law involved in South Carolina, the constitutional provision and the statute—the Constitution, I think, was in 1895—I do not know what this Court would have done if that statute had been brought before it at that time, but I am sure that this Court, regardless of its ultimate decision, would have tested the reasonableness of that classification, not by what the State of South Carolina wanted, but as to what the Fourteenth Amendment meant.

In the year 1952, when a statute is tested, it is not tested as to what is reasonable insofar as South Carolina is concerned; it must be tested as to what is reasonable as to this Court. That is why we consider the case that Mr. Justice Johnson decided, cited in our reply brief, that even if this case had been tested back in those days, this Court would have felt a responsibility to weigh it against the applicable decisions of the Fourteenth Amendment, not on the question as to what is good for South Carolina.

Insofar as the argument about the states having a right to classify students on the basis of sex, learning ability, etcetera, I do not know whether they do or not, but I do believe that if it could be shown that they were unreasonable, they would feel, too, that any of the actions of the state administrative officials that affect any classification must be tested by the regular rules set up by this Court.

So we in truth and in fact have what I consider to be the main issue in this case. They claim that our expert witnesses and all that

we have produced are a legislative argument at best; that the witnesses were not too accurate, and were the run-of-the-mill scientific witnesses. But I think if it is true that there is a large body of scientific evidence on the other side, the place to have produced that was in the district court, and I do not believe that the State of South Carolina is unable to produce witnesses for financial or other reasons.

MR. JUSTICE FRANKFURTER: Can we not take judicial notice of writings by people who competently deal with these problems? Can I not take judicial notice of Myrdal's book without having him called as a witness?

MR. MARSHALL: Yes, sir. But I think when you take judicial notice of Gunnar Myrdal's book, we have to read the matter, and not take portions out of context. Gunnar Myrdal's whole book is against the argument.

MR. JUSTICE FRANKFURTER: That is a different point. I am merely going to the point that in these matters this Court takes judicial notice of accredited writings, and it does not have to call the writers as witnesses. How to inform the judicial mind, as you know, is one of the most complicated problems. It is better to have witnesses, but I did not know that we could not read the works of competent writers.

MR. MARSHALL: Mr. Justice Frankfurter, I did not say that it was bad. I said that it would have been better if they had produced the witnesses so that we would have had an opportunity to cross-examine and test their conclusions. For example, the authority of Hodding Carter, the particular article quoted, was a magazine article of a newspaperman answering another newspaperman, and I know of nothing further removed from scientific work than one newspaperman answering another.

I am not trying—

MR. JUSTICE FRANKFURTER: I am not going to take issue with you on that.

MR. MARSHALL: No, sir. But it seems to me that in a case like this that the only way that South Carolina, under the test set forth in this case, can sustain that statute is to show that Negroes as Negroes—all Negroes—are different from everybody else.

MR. JUSTICE FRANKFURTER: Do you think it would make any difference to our problem if this record also contained the testimony of six professors from other institutions who gave contrary or qualifying testimony? Do you think we would be in a different situation?

MR. MARSHALL: You would, sir, but I do not believe that there are any experts in the country who would so testify. And the body of law is that—even the witnesses, for example, who testified in the next case coming up, the Virginia case, all of them, admitted that segregation in and of itself was harmful. They said that the relief would not be to break down segregation. But I know of no scientist that has made any study, whether he be anthropologist or sociologist, who does not admit that segregation harms the child.

MR. JUSTICE FRANKFURTER: Yes. But what the consequences of the proposed remedy are is relevant to the problem.

MR. MARSHALL: I think, sir, that the consequences of the removal of the remedy are a legislative and not a judicial argument, sir. I rely on *Buchanan* v. *Warley*, where this Court said that insofar as this is a tough problem, it was tough, but the solution was not to deprive people of their constitutional rights.

MR. JUSTICE FRANKFURTER: Then the testimony is irrelevant to the question.

MR. MARSHALL: I think the testimony is relevant as to whether or not it is a valid classification. That is on the classification point.

MR. JUSTICE FRANKFURTER: But the consequences of how you remedy a conceded wrong bear on the question of whether it is a fair classification.

MR. MARSHALL: I do not know. But it seems to me that the only way that we as lawyers could argue before this Court, and the only way that this Court could take judicial notice of what would happen, would be that the Attorney General or some responsible individual officer of the State of South Carolina would come to this Court and say that they could not control their own State.

MR. JUSTICE FRANKFURTER: No, that is not what I have in mind. I want to know from you whether I am entitled to take into account, in finally striking this judgment, whether I am entitled to take into account the reservation that Dr. Graham and two others, I believe, made in their report to the President. May I take that into account?

MR. MARSHALL: Yes, sir.

MR. JUSTICE FRANKFURTER: May I weigh that?

MR. MARSHALL: Yes, sir.

MR. JUSTICE FRANKFURTER: Then you have competent consideration without any testimony.

MR. MARSHALL: Yes, sir. But it is a policy matter. And that type of information, I do not believe, is more than persuasive when we consider constitutionally protected rights.

MR. JUSTICE FRANKFURTER: Of course, if it is written into the Constitution, then I do not care about the evidence. If it is in the Constitution, then all the testimony that you introduce is beside the point, in general.

MR. MARSHALL: I think, sir, that so far as the decisions of this Court, this Court has repeatedly said that you cannot use race as a basis of classification.

MR. JUSTICE FRANKFURTER: Very well. If that is a settled constitutional doctrine, then I do not care what any associate or full professor in sociology tells me. If it is in the Constitution, I do not care about what they say. But the question is: Is it in the Constitution?

MR. MARSHALL: This Court has said just that on other occasions. They said it in the Fifth Amendment cases, and they also said it in some of the Fourteenth Amendment cases, going back to Mr. Justice Holmes in the first primary case in *Nixon* v. *Herndon*. And I also think—I have no doubt in my mind—that this Court has said that these rights are present, and if all of the people in the State of South Carolina and most of the Negroes still wanted segregated schools, I understand the decision of this Court to be that any individual Negro has a right, if it is a constitutional right, to assert it, and he has a right to relief at the time he asserts that right.

MR. JUSTICE FRANKFURTER: Certainly. Any single individual, just one, if his constitutional rights are interfered with, can come to the bar of this Court and claim it.

MR. MARSHALL: Yes, sir.

MR. JUSTICE FRANKFURTER: But what we are considering and what you are considering is a question that is here for the very first time.

MR. MARSHALL: I agree, sir. And I think that the only issue is to consider as to whether or not that individual or small group, as we have here, of appellants, that their constitutionally protected rights have to be weighed over against what is considered to be the public policy of the State of South Carolina; and if what is considered to be the public policy of the State of South Carolina runs contrary to the rights of that individual, then the public policy of South Carolina—this Court, reluctantly or otherwise, is obliged to

say that this policy has run up against the Fourteenth Amendment, and for that reason his rights have to be affirmed.

But I for one think—and the record shows, and there is some material cited in some of the *amicus* briefs in the Kansas case—that all of these predictions of things that were going to happen, they have never happened. And I for one do not believe that the people in South Carolina or those southern states are lawless people. Every single time that this Court has ruled, they have obeyed it, and I for one believe that rank and file people in the South will support whatever decision in this case is handed down.

MR. JUSTICE FRANKFURTER: I have not heard that the bar of this case has suggested that South Carolina or Kansas will not obey whatever decree this Court hands down.

MR. MARSHALL: There was only one witness, and he was corrected by Judge Parker. That was in this particular case. So it seems to me, and I in closing would like to emphasize to the Court, if I may, that this question, the ultimate question of segregation at the elementary and high school levels, has come to this Court through the logical procedure of case after case, going all the way back to the *Gaines* case, and coming up to the present time.

We had hoped that we had put in the evidence into the record, the type of evidence which we considered this Court to have considered in the *Sweatt* and *McLaurin* cases, to demonstrate that at the elementary and high school levels, the same resulting evil which was struck down in the *Sweatt* and *McLaurin* cases exists, for the same reason, at the elementary and high school levels, and I say at this moment that none of that has been disputed.

The only thing put up against it is a legislative argument which would ultimately relegate the Negro appellants in this case to pleas with the legislature of South Carolina to do what they have never done in the past, to recognize their pleas.

We therefore respectfully urge that the judgment of the United States district court be reversed.

MR. JUSTICE REED: Is there anything in the record which shows the purpose of the passage of the legislation in South Carolina?

MR. MARSHALL: No, sir. We did considerable research, and we had help on it. There is so much confusion and there are so many blank spots in between that we did not believe that it was in shape to give to anyone. As a matter of fact, at that time there was a terrific objection to public education, one; and, two, an objection to the compulsory attendance laws. So the three things got wound up together, the segregation and those two points.

MR. JUSTICE REED: Is it fair to assume that the legislation involving South Carolina, as these cases do, was passed for the purpose of avoiding racial friction?

MR. MARSHALL: I think that the people who wrote on it would say that. You bear in mind in South Carolina—I hate to mention it—but that was right in the middle of the Klan period and I cannot ignore that point. Considerable research in other states has shown that there were varying statements made in the debates, some of which could be interpreted as just plain race prejudice. But I think that the arguments back and forth in South Carolina, at least, you could draw no conclusion from them.

But we do know, and the authorities cited in the Government's brief in the *Henderson* case, and, if you will remember, in the law professor's brief in the *Sweatt* case—the authorities were collected to show that the effect of this has been to place upon the Negroes this badge of inferiority.

MR. JUSTICE REED: In the legislatures, I suppose there is a group of people, at least in the South, who would say that segregation in the schools was to avoid racial friction.

MR. MARSHALL: Yes, sir. Until today, there is a good-sized body of public opinion that would say that, and I would say respectable public opinion.

MR. JUSTICE REED: Even in that situation, assuming, then, that there is a disadvantage to the segregated group, the Negro group, does the legislature have to weigh as between the disadvantage of the segregated group and the advantage of the maintenance of law and order?

MR. MARSHALL: I think that the legislature should, sir. But I think, considering the legislatures, that we have to bear in mind that I know of no Negro legislator in any of these states, and I do not know whether they consider the Negro's side or not. It is just a fact. But I assume that there are people who will say that it was and is necessary, and my answer to that is, even if the concession is made that it was necessary in 1895, it is not necessary now because people have grown up and understand each other.

They are fighting together and living together. For example today they are working together in other places. As a result of the ruling of this Court, they are going together on the higher level Just how far it goes—I think when we predict what might happen I know in the South where I spent most of my time, you will see white and colored kids going down the road together to school They separate and go to different schools, and they come out and they play together. I do not see why there would necessarily be

any trouble if they went to school together.

MR. JUSTICE REED: I am not thinking of trouble. I am thinking of whether it is a problem of legislation or of the Judiciary.

MR. MARSHALL: I think, sir, that the ultimate authority for the asserted right by an individual in a minority group is in a body set aside to interpret our Constitution, which is our Court.

MR. JUSTICE REED: Undoubtedly that passes on the litigation.

MR. MARSHALL: Yes, sir.

MR. JUSTICE REED: But where there are disadvantages and advantages to be weighed, I take it that it is a legislative problem.

MR. MARSHALL: Insofar as the State is concerned, insofar as the majority of the people are concerned. But insofar as the minority—

MR. JUSTICE REED: The states have the right to weigh the advantages and the disadvantages of segregation, and to require equality of employment, for instance?

MR. MARSHALL: Yes, sir.

MR. JUSTICE REED: I think that each state has been given that authority by decisions of this Court.

MR. MARSHALL: And some states have, and others have not. I think that is the main point in this case, as to what is best for the majority of the people in the states. I have no doubt—I think I am correct—that that is a legislative policy for the state legislature. But the rights of the minorities, as has been our whole form of government, have been protected by our Constitution, and the ultimate authority for determining that is this Court. I think that is the real difference. As to whether or not I, as an individual, am being deprived of my right is not legislative, but judicial.

MR. CHIEF JUSTICE VINSON: Thank you.

MR. MARSHALL: Thank you, sir.

[Whereupon, argument in the above-entitled case was concluded.]