LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW

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***Brown* v. *Board of Education* (1954 & 1955)**

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HARRY BRIGGS, JR., 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.

DOROTHY E. DAVIS, BERTHA M. DAVIS AND INEZ E. DAVIS, etc., ET AL.,

Appellants,

—vs.— No. 191

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

Appellees.

Washington, D. C.
Monday, December 7, 1953.

The above-entitled causes came on for oral reargument at 1:05 p.m.,

BEFORE:

EARL WARREN, *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:

SPOTTSWOOD W. ROBINSON, III, ESQ., *on behalf of Appellants, Dorothy E. Davis, et al.*

THURGOOD MARSHALL, ESQ., *on behalf of Appellants, Harry Briggs, Jr., et al.*

JOHN W. DAVIS, ESQ., *on behalf of the Appellees, R. W. Elliott, Chairman, J.R. Carson, et al., Members of Board of Trustees of School District No. 22, Clarendon County, S.C., et al.*

T. JUSTIN MOORE, ESQ., *on behalf of the Appellees, R. W. Elliott, Chairman, J.R. Carson, et al., Members of Board of Trustees of School District No. 22, Clarendon County, S.C., et al.*

PROCEEDINGS

MR. CHIEF JUSTICE WARREN: No. 2, *Harry Briggs, Jr., et al.*, versus *R. W. Elliott, et al.*

THE CLERK: Counsel are present.

OPENING ARGUMENT OF SPOTTSWOOD W. ROBINSON, III, ESQ., ON BEHALF OF THE APPELLANTS

MR. ROBINSON: May it please the Court:

At the outset, I should like to point out that the argument in No. 2 and the argument in No. 4 are being combined. Mr. Marshall and I are offering two separate appeals, as I have already outlined, the appeal in No. 2 and the appeal in No. 4, and for this reason at the outset I would like the indulgence of the Court, before stating the facts, to outline the argument and the part that he will present and the part that I will undertake to present.

After stating the facts and the procedural matters, I propose to address myself to questions one and two of the Court, and to discuss the historical evidence which we submit demonstrates that the Congress that submitted it and the legislatures and conventions that ratified the Fourteenth Amendment, contemplated and understood that it would abolish segregation in public schools; that future congresses might in the exercise of their power under section 5 of the Amendment abolish segregation, and also, that it would be within the jurisdictional power in the light of future conditions to construe the Amendment as abolishing segregation of its own force.

Mr. Marshall will then address himself to questions three, four, and five, and will present our arguments demonstrating that it is within the jurisdictional power in construing the Amendment to abolish segregation in public schools and our position with respect to the disposition that this Court should make of these cases in the event that it is decided that segregation in public schools violates the Fourteenth Amendment.

Both of these cases are rearguments of appeals from final decrees of three-judge district courts, in the instance of No. 2 from the Eastern District of South Carolina; in the instance of No. 4, from the Eastern District of Virginia.

In each of these cases, Negro children and their respective parents and guardians sued competent county school authorities, alleging that by requiring these and other Negro children to attend separate Negro schools as commanded by the constitutions and the laws of South Carolina and Virginia respectively, they denied them rights secured by the Fourteenth Amendment. In each of these cases the appellants sought decrees declaring the invalidity of the state school segregation provisions and injunctions restraining the appellees from enforcing these provisions and from restricting Negro children on a racial basis in their requiring attendance in the public schools.

In case No. 2, the majority of the district court, with Judge Waring dissenting, following the original hearing of that case in that court filed an opinion and entered a final decree requiring the appellees to afford the appellants involved in that case equal facilities, but declaring that the contested constitutional and statutory provisions were valid, and refusing to grant the requested injunctive relief.

On appeal from this decree this Court, Mr. Justice Douglas and Mr. Justice Black dissenting, vacated the judgment, that is, the first decree of the district court, and remanded the case for the purpose of obtaining the view of the district court upon additional facts in the record presented by a report which was subsequently filed in the district court by the appellees, and to give the district court the opportunity to take such action as it might deem appropriate in the light of the facts disclosed by that report.

The district court then proceeded to have a second hearing. Judge Waring, in the meanwhile, had retired from the bench. Upon this occasion, after the hearing the district court filed another opinion and entered another final decree, this time unanimously, again declaring the school segregation provision valid, and refusing to grant injunctive relief.

In case No. 4, the District Court for the Eastern District of Virginia likewise found inequalities in physical facilities and curricula, and likewise, it ordered that these inequalities be eliminated. But as the district court in No. 2, it refused to invalidate or to enjoin the enforcement of the school segregation provisions.

These cases were argued before this Court at the last term. On last June 8 the Court entered an order directing reargument in the case and requesting counsel to address themselves to five questions set forth in the order so far as those questions would be relevant to the issues involved in the respective cases. It is pursuant, of course, to that order that we are here today.

I think that it is highly significant at the outset to note that each of these cases was brought pursuant to the authority conferred by the Act of April 20, 1871, section 1 of that Act, which is

now codified in large measure in Title 8 of the United States Code, section 43. That Act was entitled:

> An Act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States and for other purposes.

As the Court is well aware, the Act provided, as does the present section, although the present section does not exactly conform to the original Act, though essentially the same provisions are there, that:

> Any person who, under color of any law of any State, subjects or causes to be subjected any person within the jurisdiction of the United States to the deprivation of any rights secured by the Constitution of the United States shall be liable to the party injured in an action at law, a suit in equity or other proper proceeding for redress.

Involved in these cases is a statute which in the viewpoint of the appellants is in violation of the provisions of section 1 of the Fourteenth Amendment. In section 43 of Title 8 we have a statute which, in the enforcement of the provisions of the Fourteenth Amendment, creates a cause of action and confers both the power and the duty upon the federal courts to enforce that cause of action. We submit that the statute imposes a positive duty upon the courts to determine whether, under the Fourteenth Amendment, the action of a state in imposing racial segregation in public education is valid.

I would like now to proceed to an examination of the history of the formulation, the proposal and the ratification of the Fourteenth Amendment, as an aid to the Court's determination of whether the laws involved in these cases can stand consistently with the prohibitions of the Fourteenth Amendment.

Our position is this: Considering the overall evidence derived from the debates and proceedings on the Fourteenth Amendment, these conclusions are supported:

First, that the Amendment had as its purpose and effect the complete legal equality of all persons, irrespective of race, and the prohibition of all state-imposed caste and class systems based upon race.

And secondly, that segregation in public schools, constituting as it does legislation of this type, is necessarily embraced within the prohibitions of the Amendment.

Going first to the debates on the Fourteenth Amendment itself, there is considerable evidence of the intention of the framers

to broadly provide for the complete legal equality of all men, irrespective of race, and to broadly proscribe all caste and class legislation based upon race or color. There is also some reference specifically to the impact which the proposed Amendment would have upon state-imposed segregation in public schools. I propose to address myself to both categories of evidence.

When the 39th Congress, which formulated the Fourteenth Amendment, convened in December of 1865, it was cognizant of, and it was confronted with, the so-called Black Codes which had been enacted throughout the southern states. In brief summary, these laws imposed and were designed to maintain essentially the same inferior position which Negroes had occupied prior to the abolition of slavery. As a matter of fact, they followed pretty much the legal pattern of the antebellum slave codes.

For example, they compelled Negroes to work for limited pay, they restricted their mobility, they prohibited their testimony in court against a white person, and contained innumerable provisions for segregation on carriers and in public places. In some of these codes there were expressed prohibitions upon the attendance by Negroes of the public schools provided for white children.

I would like to emphasize, as this Court has in its previous decisions recognized, that the existence of these laws was largely responsible for the Fourteenth Amendment and the contemporaneous civil rights legislation.

We find in the debates and proceedings on the Fourteenth Amendment abundant evidence demonstrating that the radical Republicans in the 39th Congress desired and intended that the Fourteenth Amendment would effect both the invalidation of the existing Black Codes and any and all future attempts to impose governmental caste distinctions predicated upon race.

Among the items of evidence which demonstrate this broad overall purpose in effect of the Amendment, I would like to make reference to the following: When the resolution was introduced into the Senate which embraced the provision which is now section 1 of the Fourteenth Amendment, with simply the addition of the citizenship clause—in other words, House Resolution 127—Senate Howard opened the debate in the Senate—as a matter of fact, he was speaking for the Joint Committee on Reconstruction, which had formulated the provision, mindful, as I said before, that it did not yet contain the citizenship clause, but did contain the privileges or immunities, the equal protection and due process clauses—speaking for the Joint Committee, because Senator Fessenden, one of its co-chairmen, was ill, he made these significant statements.

He referred to the last two clauses of the first section. He said

that these two clauses disabled a state from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty or property without due process of law, and from denying him the equal protection of the laws. This, Senator Howard says, abolishes all class legislation in the states and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws around the white man.

Here we have an explicit declaration by one of the co-chairmen of the committee of Congress which formulated what is now essentially section 1 of the Fourteenth Amendment, and that is the scope that he ascribed to it. As a matter of fact, during the course of the same speech introducing the bill into Congress, Senator Howard had this to say:

> I look upon the first section, taken in connection with the fifth section, as very important. It will, if adopted by the states, forever disable every one of them from passing laws infringing upon those fundamental rights and privileges which pertain to citizens of the United States and to all persons who may happen to be within their jurisdiction.
>
> It establishes equality before the law, it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law that it gives to the most powerful, the most wealthy and the most haughty.

Consequently, certainly in the opinion of Senator Howard, the due process and equal protection clauses would sweep away, in his language, all class legislation.

Similarly, during the Senate debates, Senator Poland addressed himself to section 1, and he made a somewhat similar declaration. As a matter of fact, he pointed out the existence of the Black Codes. He made reference to them specifically:

> We know that state laws exist and some of them of very recent enactment, in direct violation of these principles.

Then he went on to give the Amendment the scope which he thought it was entitled to.

The statements in this regard were by no means confined to the proponents of the Amendment. As a matter of fact, after the citizenship clause had been added to the Amendment, Senator

Davis of Kentucky had this to say:

> The real and only object of the first provision of this section—

—speaking of the citizenship clause which the Senate has added to it—

> —is to make Negroes citizens, to prop the Civil Rights bill and to give them a more plausible if not a valid claim to its provisions, to press forward to a full community of civil and political rights with the white race, for which its authors are struggling and mean to continue to struggle.

Over in the House, when Representative Stevens introduced Resolution 127, he made a similar declaration with respect to scope:

> I can hardly believe that any person can be found who will not admit that every one of these provisions is just.

As a matter of fact, Congressman Stevens says they are all asserted in some form or another in our Declaration or organic law. He pointed out, however, that the Constitution limits the action of Congress; that in this area it was not a limitation upon the states and said that the Amendment supplied that defect and allowed Congress to correct the unjust legislation of the states—and here again referring to the Black Codes—insofar as that law which operates upon one man shall operate equally upon all.

He later on made further reference to the fact that the Amendment was made necessary by what he termed the oppressive codes which had become law in the southern states, pointing out that unless the Constitution should restrain these states, "those states will, I fear"—to use his language—"will all keep up this discrimination, and crush to death the hated freedmen."

And just as in the Senate, we had others who took the floor in the discussion. I might make reference to the statement which was made by Congressman Randall of Pennsylvania, the statement that was made by Congressman Rogers of New Jersey. Now, these were men who opposed the Amendment. Yet, their statements, which we have set forth in our brief, show that they also recognized as one of the clauses, as the great occasion for the Fourteenth Amendment, the existence of these racial laws in southern states, and recognized that if the Amendment were in fact adopted, it would have an impact upon such laws of the character which we describe.

I should also like to direct the Court's attention specifically to the statement of Mr. Bingham, who has very appropriately been described as the Madison of the first section of the Fourteenth Amendment. Mr. Bingham made a very notable speech in the House during the debates on the Amendment.

He said that the need for the first section was, to use his language,

> . . . one of the lessons that had been taught by the history of the past four years of terrific conflict.

He pointed out that the Amendment did not take away rights which were properly reserved to the states, for in his opinion, and in his language,

> No state ever had the right under the forms of law, or otherwise, to deny to any freedmen the equal protection of the law or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised that power and that without remedy.

Going specifically to the evidence which was directed to the issue of public school segregation, I should like first to point out that on the Fourteenth Amendment debates proper, we find only one specific reference to school segregation, and that was the reference that was made in the House by Representative Rogers at the time that Resolution No. 63 was up for consideration. Resolution 63 was the predecessor of 127, and the relationship between the two of them I shall undertake to establish in just a moment. But during his speech, Representative Rogers made a direct attack upon the proposed Amendment, which at that time simply provided that Congress should have the power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens of the several states, and to all persons in the several states equal protection in the rights of life, liberty and property.

Perhaps I should undertake at this moment to demonstrate that connection which I mentioned. H. R. 63 was the bill which had been reported by the Joint Committee on Reconstruction, and it was a bill drafted by Mr. Bingham. H. R. 127, which eventually became, with two significant changes, the Fourteenth Amendment, was also drafted so far as the provisions of section 1 of the Amendment were concerned by Mr. Bingham.

Mr. Bingham introduced Resolution 63 in the House first and it is notable at this point to say two things which I think are

very significant. In the first place, H. R. 63 was proposed simply to grant to Congress the power to enact laws of a certain character. Pursuant to this authority, assuming as I do that this would have been the construction given to H. R. 63 had it become a constitutional amendment, pursuant to this authority Congress might undertake to pass laws which would outlaw this or that embraced within the scope of the prohibition. Later on—and the proceedings of the Joint Committee on Reconstruction indicate the various drafts, the various attempts, the various procedures which were gone through and finally deriving the present language of the trilogy of the first section—the form was changed, and it was changed and rewritten by Mr. Bingham to state as a direct prohibition upon the states the disabilities with respect to the things which were embraced within that section.

Now it was, as I said before, at the time that H. R. 63 came up for consideration in the House that Representative Rogers made reference to school segregation. As a matter of fact, he attacked this proposal. He termed it "more dangerous to the liberties of the people and the foundations of the Government than any proposal for amending the Constitution heretofore advanced." He said this Amendment would destroy all state legislation distinguishing Negroes on the basis of race. With respect to schools specifically, he had this to say:

> In the State of Pennsylvania there are laws which make a distinction with regard to the schooling of white children and the schooling of black children. It is provided that certain schools shall be designated and set apart for white children, and certain other schools designated and set apart for black children.
>
> Under this amendment Congress would have the power to compel the state to provide for white children and black children to attend the same school upon the principle that all the people shall have equal protection and all the rights of life, liberty and property and all the privileges and immunities of citizens of the several states.

I think that it is also highly significant that during these debates no one denied that H. R. 63 had the scope that Mr. Rogers said that it did.

Throughout the debates there is practically no dispute as to the scope of H. R. 127, which eventually became the trilogy of the Fourteenth Amendment. As a matter of fact, Representative Bingham, who was contemporaneously amending the 1866 Civil Rights

Act, to which I will make reference shortly, because of its broad anti-discrimination provisions, and claiming that it lacked constitutional foundation, naturally did not make any dispute of Representative Rogers' appraisal of the wide scope of H. R. 63. On the contrary, Mr. Bingham in a colloquy with Mr. Hale two days later indicated his appraisal in just about the same terms. He was asked at that time a question in that regard, and at that time Mr. Bingham pointed to the equal protection clause of his constitutional proposal as justifying the scope which he attributed to the Amendment.

In addition to the debates and proceedings on the Fourteenth Amendment proper, there is other evidence which in our opinion is helpful in promoting an understanding of the purposes and effects of the Fourteenth Amendment and of the correctness of our conclusions in this regard. One of the most important of these items of evidence in my opinion is the Civil Rights Act of 1866. The 39th Congress had an occasion to contemporaneously consider, in addition to the Fourteenth Amendment, this piece of civil rights legislation.

I think that it is very important that at the outset I should point out that these two measures are related—this measure, rather, is related to the Fourteenth Amendment by something more than a mere coincidence in terms of time or subject matter. The Fourteenth Amendment was actually proposed after members of the 39th Congress stated that the civil rights guaranteed by statute, particularly the Civil Rights Act of 1866, were vulnerable to future political attack or might be struck down as unconstitutional. Consequently, the legislative history of the Act of 1866 is a relevant and important part of the background of the Fourteenth Amendment. This is particularly true in our opinion since, as I will later undertake to show, the scope of the Fourteenth Amendment was broader than the scope of this Act.

Going through this as deeply as time will permit, the Civil Rights Act came about in the form of a bill introduced by Senator Trumbull which intended to prohibit, in the terms of the bill, "any discrimination in civil rights or immunities among the people of the United States on account of race, color or previous condition of servitude," and also containing other provisions to the effect that all persons should have full and equal benefit of all laws for the security of their persons and property, and enumerating certain rights, the right to sue, the right to make contracts, to own and inherit property and that type of thing, which the latter provision would provide.

Senator Trumbull introduced the bill and, upon its introduction, he gave it a very broad scope. He said that in his opinion any

statute which was based on race, which was not equal to all persons and which deprived any citizen of civil rights which are secured to other citizens, is in fact a badge of servitude which in his opinion was prohibited by the Constitution.

When the bill was introduced, there were two things that were considered by the houses of Congress with regard to this Act. First was its constitutionality, and I don't think I need to needlessly consume the time of the Court on that issue, but simply point out that opponents of the bill took the position there was nothing in the Constitution at that time to justify the enactment of such a law. There were others on the other side who asserted that the bill was constitutional.

And the second big issue that was involved in the proceedings in this regard was the scope of the bill. Time and again the Democrats and the more conservative Republicans in the Senate and in the other house of Congress had occasion to state that this bill, if Congress passed it, would have a very, very broad effect. It would have an effect which would deprive the states of all power to make or impose racial distinctions or classifications, and some of these people made specific reference to the impact of the provisions of the first section of this bill, the "no discrimination" of this bill upon public school segregation.

MR. JUSTICE FRANKFURTER: Mr. Robinson, what attitude do you think the Court is called upon to manage, what weight is to be given, or how is it to ever deal with individual utterances of this, that or other congressman or senator?

MR. ROBINSON: I do not, Mr. Justice Frankfurter, take the position, as this Court has on previous occasions stated that it would insist that the meaning of a constitutional provision or of a statute is to be determined by any isolated statement of any individual proponent or opponent of the legislation. At the outset, however, I tried to point out what was the great occasion, in other words, what there was in the history of the times which presented the occasion for the constitutional amendment. Perhaps I should have earlier pointed out that the same thing, the racial laws in the southern states, constituted the basis, the occasion for the enactment, for the promulgation and eventual enactment in limited form, of the Civil Rights Act of 1866.

MR. JUSTICE FRANKFURTER: Do you think we can get out of the debates anything more than Mr. Justice Miller got out of them at the time of the *Slaughter-House Cases*?

MR. ROBINSON: Yes, I think so, Mr. Justice Frankfurter. As I recall Mr. Justice Miller's opinion in the *Slaughter-House Cases,*

he recognized also that the great purpose of the Fourteenth Amendment, the occasion for the enactment of it, for the adoption of the Fourteenth Amendment—and I think that what additionally we got out of the debate is not simply a statement here or a statement there with respect to the broad overall purpose and effect, the fundamental thing that a constitutional amendment is supposed to accomplish, but what we get is a general understanding by people who are in the body promulgating that provision as to what scope it was intended to have.

MR. JUSTICE FRANKFURTER: And the understanding you get or you think we ought to get goes beyond the terms which Justice Miller put it in the *Slaughter-House Cases.*

MR. ROBINSON: Well, I do not in any wise, of course, intend in any way to cut down on anything that Mr. Justice Miller stated in that connection. We offer the evidence in the congressional debates on the Amendment and other debates—

MR. JUSTICE FRANKFURTER: I grant you we solicited and elicited that. But I just wondered, now that we have got it, what are we to get out of it? The fact that a man in your position says, "This is a terrible measure and if you pass it we will do this and that"; does that tell me that this measure does do this and that?

MR. ROBINSON: To this extent, sir. So far as the statement standing alone is concerned, I would attribute no value to it. But when a man makes that statement and he is joined in it by others, he is not disputed by anyone, we have a condition of general understanding that is demonstrated by the overall statements pro and con in that particular connection. I think we get assistance.

MR. JUSTICE FRANKFURTER: You think if an opponent gives an extreme interpretation of a proposed statute or constitutional amendment in order to frighten people on the other side, and the proponents do not get up and say, "Yes, this is the thing we want to accomplish," that means they believe, do you?

MR. ROBINSON: Well, I will have to put it in these terms. I would not, of course, sir, know the motive of the person making that statement.

MR. JUSTICE FRANKFURTER: I know, but what does silence mean?

MR. ROBINSON: I think when you have statement after statement with respect to broad overall purpose—

MR. JUSTICE FRANKFURTER: By individual members?

MR. ROBINSON: By individual members.

MR. JUSTICE FRANKFURTER: That the proposal has—

MR. ROBINSON: On other sides, if you please, on both sides, coupled with the fact of almost an entire absence of evidence to the contrary showing that anyone there had a different understanding or a different opinion as to what scope it would have.

MR. JUSTICE FRANKFURTER: Namely, they wanted this proposal to put an end to treating white and colored differently before the law in all its manifestations?

MR. ROBINSON: That is correct, sir.

MR. JUSTICE FRANKFURTER: That is all you get out of it?

MR. ROBINSON: In all of its manifestations.

MR. JUSTICE FRANKFURTER: Then the question is whether this is one of its manifestations.

MR. ROBINSON: I beg your pardon, sir.

MR. JUSTICE FRANKFURTER: Then the question is whether this is one of its manifestations.

MR. ROBINSON: Our position in this regard, Mr. Justice Frankfurter, is that when you consider overall what these people said, what from the facts of history it appears, what Mr. Justice Miller, if you please, said was the purpose and the intended scope of the Amendment, we cope up with a broad, general purpose that necessarily embraces a prohibition against the type of state activity which we have presented to the Court in these cases. I do not mean in any respect to divorce from the other factors which this Court normally utilizes to determine the scope of a constitutional amendment, the debates and proceedings, but simply to relate them in the fashion in which I have undertaken to do.

I will simply make reference to the remaining congressional legislation, out of the consideration of time. As I have pointed out, Senator Cowan of Pennsylvania in the Senate made a specific reference to the scope of the Civil Rights Act in its original form, stating that it would outlaw school segregation.

Senator Howard made a statement with respect to its outlawing all state laws discriminating on the basis of civil rights. As a matter of fact, as we have set forth in our brief, there was speech after speech in each house devoted not only to the broad general intention of the Act, but also with respect to segregation in public schools. Over in the House, the same Representative Rogers who said that the Fourteenth Amendment would abolish school segregation said that the original form of the Civil Rights Act would also have that effect.

Now the importance of all that comes to this. After all of this discussion, particularly the raising of objections as to the constitutionality of the Act, Representative Bingham took the floor, stated that he was thoroughly in favor of the provisions of the thing which the proponents of the Act were attempting to accomplish. He had an objection not to the scope of the bill, but he did have one to its constitutionality. He then stated that in his opinion, while the objectives were properly to be attained, they were to be attained by a constitutional amendment, and not by a statute which in his opinion was not justified by the provisions of the Constitution as it then existed. He made it very plain, however, that his objection in this particular regard was not the scope. His objection was to constitutionality.

Now, as a matter of history, Mr. Bingham had just introduced in the House a few days before H. R. 63 which was, as I have said, the forerunner of the Fourteenth Amendment; so consequently, he already had before the Congress a proposal which, if adopted, would in his opinion constitute or provide a constitutional basis for the type of legislation which was involved in the Civil Rights Act.

Now, at this point the discussions and the debates make it perfectly plain that the actions of the Congress in eliminating the broad no-discrimination clause in the first part of the Civil Rights Act of 1866 and enacting the rest, the balance of the Act in a more limited form, did so for the reasons that were suggested by Mr. Bingham. As a matter of fact, in this regard we haven't been able to find anything in history that discloses, as our opponents contend, that the rights which are embraced in, and the prohibitions imposed by, the Fourteenth Amendment are no larger than those which are embraced in or imposed by the Civil Rights Act of 1866.

I think this contention ignores the evolution of the Fourteenth Amendment in so far as its relation to the Civil Rights Act of 1866 is concerned. It will be recalled, as I have previously said, that some members of Congress stated that the bill in its original form would outlaw school segregation. It is another fact that Mr. Wilson in the House claimed that the Act as originally proposed would not affect school segregation; and it was at that point that Mr. Bingham disputed his construction of the Act and asserted that the bill was as broad as the conservatives charged and that, while he favored such sweeping objections, he felt that they could not be legally justified except by a new constitutional amendment.

Consequently, when the 39th Congress eliminated the no-discrimination clause and restricted the scope of the Act, they did so both on the basis of Mr. Bingham's construction of the breadth of the Act and his assertion that there would be forthcoming a constitutional amendment of broad scope. It is very evident that House

Resolution 127, which finally became section 1 of the Fourteenth Amendment, with the addition of the citizenship clause, was even broader than H. R. 63, which was before Congress at that time.

Now, I should like to point out that during the debates on the proposed Amendment, it was charged that the Radical Republicans were simply undertaking to provide a constitutional basis for the Civil Rights Act which had already been enacted. At this point the proponents of the Amendment made their purpose clear. They pointed out that they intended not to adopt a constitutional amendment of restrictive scope, but first they wanted to place the rights to be secured by the constitutional amendment beyond the power of repeal by future congresses. A congressional act would not do this, but a constitutional amendment would.

They also made it plain that what they wanted to assure was the constitutionality in the future of any subsequent legislation which would have as broad a scope as did the '66 Act at the time it was originally introduced. And they also made it plain that they intended to enable the Judiciary to give full and complete protection to the rights secured.

We don't find in the debates, nor do we find elsewhere, any such limiting scope attributable to the Fourteenth Amendment as is claimed. As I have had occasion to say, Senator Howard in the Senate and Mr. Stevens in the House, introducing the bill for the Joint Committee on Reconstruction—I am speaking about 127 now, the Fourteenth Amendment—gave it a scope which far exceeded the Civil Rights Act of 1866.

I should also like to make this final point; that in adopting the Civil Rights Act of 1866, Congress enumerated in its final form as it was enacted, enumerated the rights protected. I have already explained the reasons why that was done. But unrestricted by this consideration in drafting a constitutional provision, Congress used broad, comprehensive language to describe the standards necessary to guarantee complete Federal protection.

In one of the very early cases construing the Fourteenth Amendment, *Strauder* v. *West Virginia,* this Court had occasion to point that out. It said:

> The Fourteenth Amendment makes no effort to enumerate the rights it designs to protect. It speaks in general terms, and those are as comprehensive as possible.

I will make brief reference to the legislation following the proposal of the Fourteenth Amendment by Congress and, indeed, following its ratification by the states. We have set forth in our brief in considerable detail the proceedings in Congress relating

specifically to school segregation. By reason of the division of time which we desire in undertaking to present the argument in these two cases, time simply will not permit me to get into it. I would like to point out, however, that from beginning to end, all the way through, considering the evidence overall, there was an overwhelming mass of opinion that under the Fourteenth Amendment Congress could constitutionally legislate with respect to the elimination of segregation in public education.

MR. JUSTICE REED: Do you think that legislation by Congress would add anything to the strength of your position?

MR. ROBINSON: Insofar as this—

MR. JUSTICE REED: Insofar as segregation is concerned in the schools.

MR. ROBINSON: Oh, yes, I think if we had a congressional act, sir, that we probably would not have to be here now. However, I do not think that legislation by Congress in anywise detracts from the power of the Judiciary to enforce the prohibitions of the Fourteenth Amendment.

MR. JUSTICE REED: The provision granting new legislative power to Congress is useless?

MR. ROBINSON: Well, I would put it this way. As I understand section 5, section 5 was designed to give Congress the authority to legislate in this area if it so desired, within the scope of its legislative sphere. I am speaking, of course, about the limitations of section 1. However, the separation of the provisions of section 1 and 5 we think is very, very significant.

MR. JUSTICE REED: Was 5 intended only for punishment of violations?

MR. ROBINSON: For remedies, for remedies insofar as congressional action could afford them with respect to the prohibitions of section 1. But actually, as a matter of history, Mr. Justice Reed, the change was made from the original form of the Fourteenth Amendment as it was set up in H. R. 63 and H. R. 127 to make this a direct prohibition on the states not necessitating any congressional action, and as a matter of fact, of course, thereby empowering the courts to determine as a judicial matter acts of a state which were claimed to be in contravention thereof.

I should like to make brief reference to the evidence with respect to state ratification. We have again in our briefs set this forth in considerable detail.

I think the states will pretty largely fall in these general classifications. First we have the states which had seceded from the

Union and which were seeking readmission. We had ten in this class who were not in the Union at the time the Fourteenth—well, the ten southern states which had seceded, except Tennesee. I think for all practical purposes Tennesee can be classified in about the same fashion.

Our position in that regard simply is that, in view of the fact that these states were specifically required to adopt new constitutions in all respects in conformity with the provisions of the Federal Constitution, in view of the highly significant fact that at the time these states came back into the Union they contained in their constitutions no reference to race, no reference to school legislation—I mean to racial segregation in schools—in view of the fact that these restrictions appear in the laws of those states only at a later time, that under these circumstances, that fact is of great significance insofar as a determination as to what their understanding of the Fourteenth Amendment was to serve.

Additionally, the point which I urge in that connection was the fact that they were required to ratify the Fourteenth Amendment as a condition of readmission. Also, the newly admitted state, Nebraska, which came in at this time—the history which we set forth in our brief, I think, is sufficient to demonstrate that Nebraska's understanding with respect to the meaning of the Fourteenth Amendment was that it was not of a character which would permit of public school segregation.

Now, the rest of the cases fall in different categories. We have cases in which there were segregation laws at the time the Amendment was adopted. When the Amendment was adopted, those laws were eliminated, more or less at longer or shorter intervals after the adoption of this Amendment. We think that the action of the states in this connection is of great significance. There were also states in which segregation in public schools was practiced administratively, some instances in which it was practiced without any statutory authority at all; and we have pointed out, in our effort to respond to the Court's question in this particular regard, the fact that in a good many instances those states changed their laws as well. Time will simply not permit me to go down the list with respect to the others, but I want to emphasize this point.

We do not claim that every state in the Union understood the Fourteenth Amendment as abolishing school segregation. But we do submit that, considering the evidence overall, there was substantial understanding which is to be derived principally not from what the states said, because you can't get that, but from what the states did, that the Fourteenth Amendment would have the scope that we attribute to it, and that consequently school segregation laws would be invalidated.

In conclusion, with respect to this historical evidence, I would like to say this: I think it is very clear that the framers intended to destroy the Black Codes. I think it is clear that they intended to deprive the states of all power to enact similar laws in the future. I think the evidence overall is clear that it was contemplated and understood that the state would not be permitted to use its power to maintain a class or caste system based upon race or color, and that the Fourteenth Amendment would operate as a prohibition against the imposition of any racial classification in respect of civil rights.

I think, secondly, it is very clear that the breadth of the Amendment is such that it necessarily encompasses school segregation; consequently, it is one of the activities which the Amendment was designed to protect. Necessarily, it would be invalidated by its provisions.

I further submit that the overall evidence establishes substantial understanding by the states ratifying the Fourteenth Amendment that it would prohibit such segregation. The historical evidence in our opinion also demonstrates—well, there isn't any question about this—that under section 5 Congress could abolish such segregation and that the Judiciary in the enforcement of the provisions of section 1, in the light of future conditions, could construe the Amendment as abolishing segregation of its own force.

[A short recess was taken.]

MR. CHIEF JUSTICE WARREN: Mr. Marshall?

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

MR. MARSHALL: May it please the Court:

Mr. Robinson has addressed himself particularly to the congressional history and specifically to the first two questions asked by the Court. I would like for a moment to review particularly questions two and three.

As I understand it, the second question raised the question about Congress in submitting the Amendment as to whether future congresses would have the power; and (b) was as to whether or not it was within the judicial power in the light of future conditions to construe the Amendment as abolishing such segregation of its own force; and then we get to question three, which is the one I would like to address myself to for the first part of this argument, namely, that, as I understand it, the Court is first requesting us to make the assumption that the answers to questions two (a) and two (b) do not dispose of the case, and on this assumption we are requested to direct our attention to the specific

question as to whether or not the Court—this Court—has judicial power in construing the Fourteenth Amendment to abolish segregation in the public schools. And our answer to that question is a flat "yes."

But in answering the question we want to develop from the legal precedents in this case the necessary answer, and to us these legal precedents divide themselves into three groups; and it would be normal and, perhaps, would be more logical to cover these groups of cases in chronological order. But, however, with the permission of the Court and for the purpose of this argument, we would like to divide them as follows: in the first group to discuss the cases this Court has handed down in the recent years construing the Fourteenth Amendment and the Fifth Amendment, in both instances in regard to the power of the Government, Federal or state, to use race, class or national origin for classification purposes. Then we would like to go to the second group, being the decisions of the Court construing the Fourteenth Amendment during the period immediately subsequent to the ratification of the Fourteenth Amendment. We believe that a review of these two groups of cases will show that during these two periods this Court uniformly gave to the Amendment the broad scope which the framers intended, as set forth by Mr. Robinson.

If there were no other cases on the point, the answer to question three would be simple. However, there is a third group of cases, including at least two decisions and some others inferentially in that group, which are heavily relied upon by the appellees as compelling a contrary decision of this Court. These cases, obviously, are the ones alleged to support the "separate but equal" doctrine.

With that preliminary statement, I would like to get to this first group of cases.

MR. JUSTICE JACKSON: May I suggest, I do not believe—

MR. MARSHALL: Yes, sir.

MR. JUSTICE JACKSON: I do not believe the Court was troubled about its own cases. It has done a good deal of reading of those cases.

MR. MARSHALL: And the first group are all from this very Court; I was just trying to relate them.

MR. JUSTICE JACKSON: Good.

Maybe the question was more nearly, instead of power—in the strong sense—I only speak for myself, not for others—it is the question of the propriety of exercising judicial power to reach this

result, if the result would be reached, in the absence of any legislation. I do not think it was a question of power in the sense that our cases have dealt with it. It is a question—

MR. MARSHALL: Well, so far—if I understand you correctly, Mr. Justice Jackson, you mean power that would come from the legislative history of the Fourteenth Amendment?

MR. JUSTICE JACKSON: Whether the Amendment, with what light you can throw on it, makes it appropriate for judicial power, after all that has intervened, to exercise this power instead of—

MR. MARSHALL: Leaving it to the Congress.

MR. JUSTICE JACKSON: That is right.

I do not like to see you waste your time on a misunderstanding, because I do not think we had any doubt about our cases. Things are so often read—

MR. JUSTICE FRANKFURTER: And the books.

MR. MARSHALL: Believe it or not, I have read about it.

I think, then, that I should change and leave out the first group, for the time being, and go to the other group beginning with *Slaughter-House*, because the reason I would like to discuss those—because, for example, Mr. Justice Frankfurter raised the question about Mr. Justice Miller in the *Slaughter-House Cases,* and I wanted to add to that the fact that we cannot ignore the opinion of Justice Strong in the *Strauder* v. *West Virginia* case; and at that stage of the argument I wanted to say that in these decisions at that period of time they recognized the exact same legislative historical argument that we have just completed; and the *Slaughter-House Cases,* as I read it, stand for the proposition—and at least it has been cited by this Court all the way up at least to the covenant cases of *Shelley*—that the Fourteenth Amendment and the intent that you get from the framers of it, is definitely on the broad purpose that we allege here.

As to whether or not Congress intended to leave this matter to Congress, I submit that one of the short answers is that Title 8, section 43, which is the statute that we base all of these cases on, says specifically in its enacting clause adopted in 1871, which we have in our brief, that "this bill is enacted for the purpose of enforcing the Fourteenth Amendment." Congress has already acted and in that Act I am sure it will be remembered that it says that anyone acting under color of state statute, who denies anyone rights guaranteed by the Constitution or laws of the United States shall have a right of action in law or in equity. The original statute said "in the District Court or Circuit Courts," and in codifying it they, of course, have left out the circuit court point.

But if there is a need for congressional action, it is there, and in *Strauder* against *West Virginia* Mr. Justice Strong in his opinion—and we quote it in our brief on page 22 and 23, the language which we believe—either I have the wrong brief or—it is there; 33.

MR. CHIEF JUSTICE WARREN: I would like to have you discuss the question of power because I believe that is the question the Court asked you to discuss.

MR. MARSHALL: The power.

MR. CHIEF JUSTICE WARREN: Yes, the power.

MR. MARSHALL: Yes, sir. On the power, Mr. Chief Justice Warren, we take the position, and we have covered it in the brief—

MR. CHIEF JUSTICE WARREN: Yes.

MR. MARSHALL: —and that was the part that Mr. Robinson was to deal with this morning, and it is our understanding that the Fourteenth Amendment, following the Civil Rights Law, but not limited to the Civil Rights Act of 1866—in the debates it is obvious, especially in the later debates, that left with the courts of the land was this problem of deciding as to the interpretation, so that as to the power, it is our position that the Court gets specific power in addition to the regular judiciary act, in this Act of 1871, Title 8, which is not Title 8, section 43, which, I submit, not only gives the federal courts power, but imposes upon the federal courts a specific duty which is different; and this is where we get our power point, and we thought that was sufficient.

MR. CHIEF JUSTICE WARREN: Yes.

MR. JUSTICE FRANKFURTER: Mr. Marshall—

MR. MARSHALL: Yes, Mr. Justice Frankfurter.

MR. JUSTICE FRANKFURTER: —you trouble me about saying there has been legislation. You are not resting your claim here on the Act of 1871 and are then discussing whether that Act is constitutional?

MR. MARSHALL: No, sir.

MR. JUSTICE FRANKFURTER: You have to—you are resting, as I understand it, on the compulsions, the implications, derived from the Fourteenth Amendment, as such, in your cases?

MR. MARSHALL: Yes, sir.

MR. JUSTICE FRANKFURTER: So I do not know why you constantly revert to the fact that Congress has already exercised the power. I do not understand what you mean by that.

MR. MARSHALL: Well, as I understand, running through the questions, especially those in number two, the second question—and, fortunately, insofar as this case is concerned, the appellees here claim that Congress has no power to legislate in this field at all and, as I understand their position, the courts and Congress and nobody else can touch it; it is a matter solely for the states.

MR. JUSTICE FRANKFURTER: That we have not got here.

MR. MARSHALL: No, sir; but it is our position that the Fourteenth Amendment was intended to leave to the courts the normal construction of the statute—I mean of the Constitution—and this Act of 1871 is merely recognizing that.

MR. JUSTICE FRANKFURTER: I do not know what that Act has to do with this, our problem. If your claim prevails, it must prevail by virtue of what flows out of the Fourteenth Amendment as such.

MR. MARSHALL: And would be—

MR. JUSTICE FRANKFURTER: And so far as I am concerned, 1871 need not be on the statute books.

MR. MARSHALL: And we would still have a valid—

MR. JUSTICE FRANKFURTER: And does not help me any.

MR. MARSHALL: Yes, sir.

MR. JUSTICE FRANKFURTER: All right, I understand.

MR. MARSHALL: As I understand it, Mr. Justice Frankfurter, if I may for a minute leave the congressional debates, because I think on the matter of time—and go to the *Strauder* and the *Slaughter-House Cases* which, I think, are the key to this situation, because they were decided at the time nearest to the Fourteenth Amendment—and the *Slaughter-House Cases,* Justice Miller's opinion has been, as I said, cited over and over again; and there is no question that that opinion makes it clear that the Fourteenth Amendment was adopted for the express purpose, and the purpose was, to correct the situation theretofore existing in regard to the treatment of Negroes, slave or free, in a different category from the way you treated the others.

Then in that particular instance on page 81, which is cited on page 33 of our brief, it is stated that:

> 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.

That is the expression that is nearest to the time of the Amendment.

MR. JUSTICE FRANKFURTER: Wouldn't you say, sir, we do not have to elaborate that because the whole point—not the whole point, but one of the difficulties or one of the assumptions that has to be remedied by later cases—was the intimation of Justice Miller that it was related exclusively to equalizing things?

MR. MARSHALL: Yes, sir.

MR. JUSTICE FRANKFURTER: So one does not have to argue that the Fourteenth Amendment, the target of the Fourteenth Amendment, was to give Negroes certain rights.

MR. MARSHALL: I think so, sir.

MR. JUSTICE FRANKFURTER: I do not see that that needs any argument.

MR. MARSHALL: The only thing that was preliminary to this, Mr. Justice Frankfurter, was that in the *Strauder* case—and I think that is the one that is really on the point for this particular issue—in *Strauder* v. *West Virginia*, it was made clear, one thing which I would have considered obvious all along, and that is, the constitutional amendments are setting down rules—I mean broad principles and not rules—of conduct, as such, and they are put in broad language. Well, *Strauder* mentions that.

But the important point is that in the *Strauder* case the decision in that Court makes it clear that they did not intend to enumerate these rights; and that, to my mind, is the crux of whether or not the Court has power to deal with segregation.

Certainly it did not mention it in the Amendment itself, and a lot of items it did not mention. But when you read the debates, as Mr. Robinson explained, you cannot escape this point: that the Amendment was adopted for the express purpose of depriving the states of authority to exercise and enforce the existing Black Codes; that by putting it in the Constitution it was obviously intended that the states would not have power in the future to set up additional Black Codes; and to use the language of this Court in one case, *Lane* v. *Wilson*, whether it is sophisticated or simple-minded; and the part that is to my mind crucial in this case is that until this time the appellees have shown nothing that can in any form or fashion say that the statutes involved in these cases are not the same type of statutes discussed in the debates and in the decisions of the Court nearest to that, namely, the Black Codes;

and I do not see how the inevitable result can be challenged, because they are of the exact same cloth, when you go to these Black Codes. They do, however, on the question of power, argue that the State of South Carolina and the State of Virginia have themselves worked out this problem, and for that reason they have found they have to have segregation.

The only way they can keep schools would be to keep segregation and for that reason, as I understand their argument, that reason takes them out of the general flow of invidious legislation under the Fourteenth Amendment; and then they say that there is no definite material in the debates that shows the intent of Congress to include segregation in public education.

We submit that that is not the way to approach this problem. Once we admit, either by reading the legislative debates or reading cases such as *Strauder,* the *Slaughter-House Cases* and the other cases, once we arrive at the conclusion that the Fourteenth Amendment was intended to strike down all types of class and caste legislation that on its face involves class, then it seems to me that the only way the appellees can destroy that very clear and logical approach is to show that it was intended not to include schools, not include segregation; and then we have the very interesting position —they immediately recognize that in their briefs, especially in the South Carolina brief, because they say that the *McLaurin* case involves "separate but equal" doctrine, and certainly, if ever there was a case that did not involve "separate but equal," it was *McLaurin*, because as soon as the *McLaurin* case recognizes the broad intent of the Fourteenth Amendment to cover in progresive stages education, graduate education—I mean, excuse me, legal education—then graduate education; and, as I understand the task the appellees have perforce addressed themselves to, it is that, even admitting that education is within the purview of the Fourteenth Amendment, when you get to elementary and high schools this Court loses its power to decide as to whether or not segregation in elementary and high schools is illegal.

Now, as to the power argument, it seems to me that that is it in the simplest fashion; and despite the fact that we thought we were obliged to develop it, I think that is a shorthand statement of our position on it; and I think it has not been met, at least up to this point, in any of the briefs and cases.

MR. JUSTICE FRANKFURTER: I should suggest that the question is not whether this Court loses its power, but whether the states lose their powers. I understand the answer you make to it—

MR. MARSHALL: It is my understanding, yes, sir, I think definitely, Mr. Justice Frankfurter, that a reading of the two briefs in

this case demonstrates clearly that as of this time we have a test to see whether or not the public policy, customs and mores of the states of South Carolina and Virginia or the avowed intent of our Constitution—as to which one will prevail.

For example, in their briefs they rely on the fact that, they mention the fact that there is such a thing as racial prejudice, and this is this and that is that; and I would like to, if I could, quote to you one case in our reply brief which, at least is, I know, not news to the Court; but it was news to us. I am sure the Court is familiar with the case of *Tanner* v. *Little*. I am not advocating the actual final decision in that case as of this time, but in the language in that case, which involved, as you may remember, the green stamps by trading stores—the language is cited on pages eight and nine of our brief, and I submit that it is in the middle of a paragraph—is that:

> Red things may be associated by reason of their redness, with disregard of all other resemblances or of distinctions. Such classification would be logically appropriate. Apply it further: make a rule of conduct depend upon it, and distinguish in legislation between red-haired men and black-haired men, and the classification would immediately be seen to be wrong; it would have only arbitrary relation to the purpose and province of legislation.

In these cases the only way—and if I will stay with the power point a short while longer, there would have to be a showing in order to sustain this legislation under the broad power of this Court to construe statutes under the reasonable classification doctrine. They would have to show, and we have shown to the contrary—they would have to show, one, that there are differences in race; and, two, that differences in race have a recognizable relationship to the subject matter being legislated, namely, public education. That is a rule that has been uniformly applied by this Court in all other challenges that a classification is unreasonable. Those cases, of course, are also set out in our brief.

The other side in the South Carolina case says that the rule is a general rule, and the State has these powers; and they cite, of all cases, to support that, *Yick Wo* v. *Hopkins*, which this Court is thoroughly familiar with, the principle established in that case, which is directly to the contrary.

So, on the power point, it seems to me that there are only two relative groups of arguments: one, the congressional side, and the other, in addition to the recognized cases, the regular reasonable classification cases.

Now, with that, it seems to me that if I am correct in interpreting Mr. Justice Jackson's position, that that is what that point involves, it seems to me that is a sufficient answer to it, and if it is, I would conclude it by going back to the difference between the cases and the cases on the other side, because I feel obliged to touch the cases that the other side, of course, relies on and the lower court relied on, beginning with the *Plessy* v. *Ferguson* case, and its doctrine.

In our brief we have pointed out the obvious ways that those cases could be distinguished. For the purpose of this argument and for the purpose of answering the specific question of this Court, we believe that it is proper for us to say here and now that the distinction, for example, in the *Plessy* v. *Ferguson* case, that it involved railroads instead of education, transportation against education, is a point of distinction; but for this point there is none, in fact, because it has been recognized as the originator of the "separate but equal" doctrine.

The next case that is near to the point is the *Gong Lum* v. *Rice* case, which was different; they did not raise the issue of the validity of the classification. All they were objecting to—and possibly it is understandable that the Chinese child was objecting to being classified as a Negro and put in an inferior school. Maybe that is, but so far as the law in the country today is concerned, that decision stands for the proposition that a state has a right to classify on the basis of class, race or ancestry; and our position on that is merely that the *Gong Lum* case and the "separate but equal" doctrine of *Plessy* v. *Ferguson* is just out of step with the earlier decisions in *Slaughter-House* and *Strauder* v. *West Virginia* and the recent cases in this Court.

The other point which is made—

MR. JUSTICE REED: But to reach that you have to take the *Sweatt* case based on the "separate but equal" doctrine.

MR. MARSHALL: No, sir; I only say the *McLaurin* case does not embrace the "separate but equal" doctrine. I think in *Sweatt* v. *Painter*, the truth of the matter is that the decision was able to find that these intangibles produced inequality, and to that extent—

MR. JUSTICE REED: But didn't the *McLaurin* case—

MR. MARSHALL: There was none of that.

MR. JUSTICE REED: Granting the facts in the statement showed that they were equal—

MR. MARSHALL: Yes.

MR. JUSTICE REED: But didn't the fact that they did not have the opportunity for association or discussion have any effect on it?

MR. MARSHALL: Yes, sir.

MR. JUSTICE REED: And that, therefore, since they were graduate students, they did not have equal opportunities.

MR. MARSHALL: As I read it, sir—the best I could do is read it—as I understand it, the conclusion in there in two particular places, he says that in a situation of this type the state is deprived of the power to make distinctions; and the other point, it says, to make any difference in treatment—but it was my idea that the thrust of the *McLaurin* opinion is that segregation in and of itself, at least as far as graduate training is concerned, is invalid, and that it was that conclusion was reached by first finding out—

MR. JUSTICE REED: But they gave the reasons why, for undergraduate students, because they did not give equal opportunity.

MR. MARSHALL: But the only reason, I submit, Mr. Justice Reed, on the *McLaurin* case and these cases is age, age of students, and the fact that obviously graduate training is different from elementary training and high school training. But it has a difference, to use the language about another point in the *McLaurin* case, there is constitutional difference, or rather it is insignificant as to the minor points, because if I understand, if we follow that to the logical conclusion, I do not have the slightest idea of where the line would be; whether the line would be at the college level, the junior college level, or the high school level, as to where this discussion with other pupils is of benefit.

MR. JUSTICE FRANKFURTER: Am I wrong in thinking that you must reject the basis of the decision in *McLaurin* for purposes of this case?

MR. MARSHALL: You mean reject the basis of the fact that they were not allowed to associate?

MR. JUSTICE FRANKFURTER: No. The basis was the criterion of those cases, was whether each got the same thing. Your position in these cases is that that is not arguable, that you cannot differentiate, you cannot enter the domain of whether a black child or a white child gets the same educational advantages or facilities or opportunity. You must reject that, do you not?

MR. MARSHALL: We reach—

MR. JUSTICE FRANKFURTER: Therefore, that is what I mean by saying you must reject the basis on which those cases went.

MR. MARSHALL: We reject it to this extent: I think I am—

MR. JUSTICE FRANKFURTER: You reject the Delaware groun of decision, don't you?

MR. MARSHALL: Absolutely.

MR. JUSTICE FRANKFURTER: Well, therefore, you reject th basis of the *McLaurin* case.

MR. MARSHALL: I think so far as our argument on the consti tutional debates is concerned, and these two cases, that the state i deprived of any power to make any racial classification in an governmental field.

MR. JUSTICE FRANKFURTER: So I understand.

MR. MARSHALL: But I do have to qualify it to this extent: I ca conceive of some governmental action—to be perfectly frank, sir we have discussed the point of census-taking—so they could tak the census and name in the census, but so long as it affects no either group—but in any area where it touches the individuals con cerned in any form or fashion, it is clear to me, to my mind, un der the Fourteenth Amendment, that you cannot separate peopl or denote that one shall go here and one shall go there if the facili ties are absolutely equal; that is the issue in this case, because i the South Carolina case especially it is admitted on record tha every other thing about the schools is equal, schools, curricula everything else. It is only the question as to the power of the Stat to—

MR. JUSTICE FRANKFURTER: Well, the Delaware case test that. You are opposed to—you are in favor of the requested equal ity there, because I do not know whether you are—

MR. MARSHALL: Yes, sir.

MR. JUSTICE FRANKFURTER: That is generally under you wing?

MR. MARSHALL: It is not only under our wing, sir; we are ver proud of the fact that the children are going to school there, an they are demonstrating that it can be done.

MR. JUSTICE FRANKFURTER: All I am saying is that, witl reference to the basis on which the Delaware decision went, yo reject—

MR. MARSHALL: Yes, sir.

MR. JUSTICE FRANKFURTER: I follow that.

MR. MARSHALL: Well, it seems to me, sir, that there is considerable—there is an opening for argument that, after all, the Court is interpreting the phrase "equal protection" underlining the word "equal," and for that reason, that is the reason in our record in the case we felt obliged to show that these, what we consider as intangibles in the *Sweatt* case, were there in this case, and, if necessary, the doctrine of *Sweatt* and *McLaurin* could automatically on all fours come there except for the question of difference of schools.

MR. JUSTICE FRANKFURTER: But the point is important whether we are to decide that the facilities are equal or whether one says that is an irrelevant question, because you cannot apply that test between white and black.

MR. MARSHALL: In this case it is irrelevant—

MR. JUSTICE FRANKFURTER: All right.

MR. MARSHALL: —for two reasons: one, it is not in the case because we have agreed that equality is outside the case, and our argument is deliberately broad enough to encompass a situation regardless of facilities, and we make no issue about it.

MR. JUSTICE FRANKFURTER: I understand that; but that will be a ground on which the series of cases in the *McLaurin* case—the point of my question is that I think we are dealing with two different legal propositions; *McLaurin* is one and what you are tendering to the Court is another.

MR. MARSHALL: The questions raised by this Court in June, as we understand it, requested us to find out as to whether or not class legislation and, specifically segregation, whether or not it, in and of itself, with nothing else, violated the Fourteenth Amendment. We have addressed ourselves to that in this brief, and we are convinced that the answer is that any segregation which is for the purpose of setting up either class or caste legislation is in and of itself a violation of the Fourteenth Amendment, with the only proviso that normally, in normal judicial proceedings, there must be a showing of injury or what have you. That is our position and that is up—

MR. JUSTICE REED: That is solely on the equal protection clause?

MR. MARSHALL: Solely on the equal protection clause, except, sir, that is true in South Carolina, but we are arguing two cases together. In Virginia we rely on equal protection and due process both, but the argument in our brief is limited to equal protection; not that we have discarded due process, but we did not have to get

to it because of the wording of the questions of the Court. But we think it is a denial of both.

I urge particularly the equal protection clause because it seems to me, at least from the restrictive covenant case, the *Shelley* case on that—these rights are beginning to fall into the equal protection clause rather than the due process clause, but we do not abandon the due process clause at all.

MR. JUSTICE FRANKFURTER: In the District of Columbia case—

MR. MARSHALL: Automatically—

MR. JUSTICE FRANKFURTER: —the opposite would happen.

MR. MARSHALL: In the District of Columbia case—we are not the lawyers in that case—we are all working together on it—they, of course, are relying on the due process clause and they have the cases that support that; so I would say that insofar as there is a due process argument to be in the District of Columbia and Virginia, they would be related, except for the difference that in the District of Columbia this Court has broad power—

MR. JUSTICE FRANKFURTER: Your argument comes down to this: If in one of the states in which there is a large percentage of Negro voters, a preponderance, where we get a situation where x state has a preponderance of Negro voters who are actually going to the polls, and actually assert their preponderance and install a Negro governor, to the extent that more money is spent for Negro education, better housing, better schools, more highly paid teachers, where teachers are more attracted, better maps, better schoolbooks, better everything than the white children enjoy—and I know I am making a fantastic, if you will, assumption—

MR. MARSHALL: Yes.

MR. JUSTICE FRANKFURTER: —and yet there is segregation, you would come here and say that they cannot do that?

MR. MARSHALL: If it is done by the state, the state has been deprived of—

MR. JUSTICE FRANKFURTER: That is your position; that is the legal—

MR. MARSHALL: I think, sir, that is our flat legal position, that if it involves class or caste legislation—

MR. JUSTICE FRANFURTER: That is the antithesis of the *McLaurin* and the *Gaines* doctrine.

MR. MARSHALL: Well, of the *Gaines* case, certainly so, sir, because I, for one, do not believe that the language used by Chief Justice Hughes was—I mean, I just do not consider it as dictum when he said that they operated under a doctrine the validity of which had been supported.

I think that *Gaines* was interpreted within the "separate but equal" doctrine. I think *Sipuel* was, with the addition of "you have to do it now." I think that *Sweatt* and *McLaurin*, if I could disagree for a moment, are moving between the two; that is the way I look at it.

MR. JUSTICE FRANKFURTER: My only purpose is to try to see these things clearly without a simplifying darkness, and to try to see it clearly.

MR. MARSHALL: Yes, sir. But I do not believe—the point I wanted to make clear is that we do not have to, the Court does not have to take my position to decide this case. Because of what I told you a minute ago, they could take up that material in those other records and find that the children were not getting an equal education, but it would not help in the situation.

MR. JUSTICE FRANKFURTER: No, but if that line is taken, then the whole problem that you bring your weight to bear on is opened, and in each case we have to decide that.

MR. MARSHALL: I think so, sir.

MR. JUSTICE FRANKFURTER: I did not suppose that you would say that we had to open this case, that they were not equal, whether psychologically, whether buildings, whether they spent x million dollars for white, or x minus y for the black; that does not open any doctrine?

MR. MARSHALL: No, sir; and the Delaware case, if I can go to that without going outside of the record, demonstrates a situation more so than it does in South Carolina, because in Delaware so long as the schools are unequal, okay. And then the schools are made equal, and if I understand the procedure, you move the Negroes back to the colored school; and then the next year you put ten more books in the white school, and the colored school is unequal; and I do not see how that point would ever be adequately decided, and in truth and in fact, there are no two equal schools, because there are no two equal faculties in the world in any schools. They are good as individuals, and one is better than the other; but to just—that is the trouble with the doctrine of "separate but equal"; the doctrine of "separate but equal" assumes that two things can be equal.

MR. JUSTICE REED: There is not absolute equality, but substantially equal, in accordance with the terms of our cases.

MR. MARSHALL: Yes, sir; starting with *Plessy* the word "substantial," and we say in our brief—I mean we are absolutely serious about it—that the use of the word "substantial" emphasizes that those cases in truth and in fact amend the Fourteenth Amendment by saying that equal protection can be obtained in a substantially equal fashion, and there is nothing in the debates that will hint in the slightest that they did not mean complete equality—they said so—to raise the Negro up into the status of complete equality with the other people. That is the language they used. "Substantial" is a word that was put into the Fourteenth Amendment by *Plessy* v. *Ferguson*, and I cannot find it, and it cannot be found in any place in the debates.

If it please the Court, we would like to, if possible, conserve the balance of the time for rebuttal. Mr. Robinson was a little over his time, and I cut mine down. Unless there are any questions on this particular point, because we still have some time left, I would like to leave that for rebuttal.

MR. CHIEF JUSTICE WARREN: Thank you.

Mr. Davis?

ARGUMENT OF JOHN W. DAVIS, ESQ., ON BEHALF OF APPELLEES R. W. ELLIOTT ET AL.

MR. DAVIS: May it please the Court:

I suppose there are few invitations less welcome in an advocate's life than to be asked to reargue a case on which he has once spent himself, and that is particularly unwelcome when an order for reargument gives him no indication whatever of the subjects in which the Court may be interested, and, therefore, I want to at the outset tender the Court my thanks and, I think, the thanks of my colleagues on both sides of the desk, for the guidance they have given us by the series of questions which they asked us to devote our attention to, and in what I shall have to say, I hope to indicate the answers which, for our part, we give to each one of them.

At the previous hearing of this case, I think all counsel on both sides of the controversy, and in every case, realizing that it was an act of mercy and, perhaps, even of piety, not to increase the reading matter that comes to this Court, briefed the case in rather concise fashion. An effort was apparent, and I am sure I shared it, to condense the controversy to the smallest compass it would bear. Now, for a rough guess I should think the motion for reargument has contributed somewhere between 1500 and 2000

pages to the possible entertainment, if not the illumination, of the Court. But I trust the Court will not hold counsel responsible for that proliferation.

Most of us have supported our answers to the Court's questions by appendices addressed to the action of Congress, to the action of the ratifying states, and in our particular case, to the history of the controversy within the State of South Carolina.

In view of the fact that His Honor, the Chief Justice, was not on the bench at the time of the other argument, perhaps I should outline the present posture of the South Carolina case of *Briggs* and *Elliott*. It was brought, as Mr. Robinson correctly stated, upon two grounds: A suit by infant Negro children in Clarendon County School District No. 22 which, by a subsequent reorganization, became a part of District No. 1, by their parents and next friends, asserting that they were denied the equal protection of the laws on two grounds: first, that section 7 of Article 11 of the Constitution of South Carolina forbade integrated schools, commanded that the white and colored races should be taught in separate schools; and that the statute, in pursuance of that Constitution, section 5277 of their Code, made a similar provision; and that both were in violation of the Fourteenth Amendment to the Constitution of the United States *per se*. Second, that be that as it may, inequalities existed between the educational facilities furnished to the white and black children, to the detriment of the black.

The State of South Carolina came in and admitted that those inequalities existed and declared its intention to remove them as promptly as possible.

Evidence was taken; the district court decreed that the Constitution and statute of South Carolina did not violate the Amendment; found the existence of the admitted inequality, and enjoined its immediate removal, gave to the State of South Carolina the period of six months to report what steps had been taken to implement that decree.

At the end of that time a report came in which came to this Court, and was returned to the district court, and upon a second hearing, a further report came in. It was made to appear that the promise of the State of South Carolina to remove this inequality was no empty promise; that it had authorized, its legislature had authorized, a bond issue of 75 million dollars to equalize the physical facilities of the schools, supported by a three percent sales tax; that the curricula had been equalized, the pay of teachers had been equalized, transportation had been provided for children, white and black; and the accuracy of those reports being admitted —and I am merely summarizing it—the court below held that it

was clear that by the first of September, 1952, that the inequalities had disappeared. It then entered an order enjoining the further removal of such inequalities as might have existed, and declared the Constitution and the statute to be valid and nonviolative of the Fourteenth Amendment.

We have, then, in South Carolina a case, as Mr. Marshall has so positively admitted, with no remaining question of inequality at all, and the naked question is whether a separation of the races in the primary and secondary schools, which are the subject of this particular case, is of itself *per se* a violation of the Fourteenth Amendment.

Now, turning to our answers, let me state what we say to each one of them. The first question was: What evidence is there that the Congress which submitted to 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?

We answer: The overwhelming preponderance of the evidence demonstrates that the Congress which submitted, and the state legislatures which ratified, the Fourteenth Amendment did not contemplate and did not understand that it would abolish segregation in public schools; and in the time that is afforded I hope to vindicate that categorical reply.

Our friends the appellants take an entirely contrary view, and they take it, in part, on the same historical testimony; certain fallacies underlie, I think, their course in reaching that conclusion. Some of them are apparent in their brief, and I have not found that they touch upon them in oral argument.

The first fallacy which appears in their brief, in their recounting of history, is the assumption, wholly unwarranted, as I think, that the antislavery pre-Civil War crusade, the abolitionist crusade, was directed not only against slavery but against segregation in schools. I do not think that thesis can be sustained, for the thrust and movement of the abolitionist crusade was directed toward one thing and one thing only: the abolition of the institution of slavery, and from that nothing can be deduced which is helpful to the Court in its study of this section of history.

I think the next unjustified assumption which—again, I am referring to my adversaries' brief and not to their oral presentation—was that the Radical Republicans controlled the action of the 39th Congress. That again is an unwarranted assumption. The 39th Congress never went as far as some of the Radical Republicans wished it to go, and perhaps there has never been a Congress in which the debates furnished less real pablum on which history might feed. It was what Claude Bowers calls in his book *The Trag-*

ic Era, well-named—flames of partisan passion were still burning over the ashes of the Civil War.

In the Senate there were such men as Sumner, who made a lifelong crusade in favor of mixed racial schools from the time that he was counsel for the plaintiff in *Roberts* v. *Boston* in '49—he never missed an opportunity to bring the question forward, and never succeeded in having it enacted into law, except by the legislature of Massachusetts in 1855. There were men who stood with Sumner, his colleague Henry Wilson of Massachusetts, and on the other side, equally critical, men like Cowan of Pennsylvania and Garrett Davis of Kentucky, and others, resented all of the Civil War Reconstruction legislation, and whenever they had an opportunity to attack it, painted it in the blackest colors that they could devise.

In the House, Thaddeus Stevens, called by historians perhaps the most unlovely character in American history, more concerned to humiliate the aristocrats of the South, as he called them, even than to preserve the rights of the Negro. His policy was confiscation of all estates over 10,000 dollars and 200 acres, of which forty dollars should be given to every adult Negro, and the remainder should be sold to pay the expenses of the war. He wanted the South to come to Washington as suppliants in sackcloth and ashes. He had his echoes.

On the other side there were resisters like Rogers of New Jersey, a Democrat from New Jersey, who never missed an opportunity to criticize every one of the bills that were presented on the ground that they would forbid segregated schools. That echo came from Rogers almost as regularly as the contrary view came from Sumner.

Now, if I gather my friends' position both in brief and argument, they hope from the debates of such a Congress to distill clear, specific evidence of congressional intent. I do not think that is possible; but there is a source from which congressional intent can be gathered, far more reliable, far less hope for challenge by anyone: What did the Congress do? And when we study the legislation enacted by Congress immediately before, immediately after, and during the period of the discussion of the Fourteenth Amendment, there can be no question left that Congress did not intend by the Fourteenth Amendment to deal with the question of mixed or segregated schools.

There is another fallacy in the presentation of the case by the appellants. They take for granted they can quote any senator, congressman, or other character in favor of racial equality, they can count him down in the column of those who were opposed to segregated schools, which is a clear *non sequitur* and a begging of the

question.

We are not concerned here with the mandate of the Constitution that the Negro, as well as the white, shall enjoy the equal protection of the laws. The question with which Your Honors are confronted is: Is segregation in schools a denial of equality where the segregation runs against one race as well as against the other, and where, in the eye of the law, no difference between the educational facilities of the two classes can be discerned?

Now, I think those remarks sum up most of what I care to say by way of direct reply to the argument of the appellants.

There is a third point of view presented to Your Honors. We say the intent of Congress was clear not to enter this field. We say the intent of the ratifying states was equally clear, the majority of them, not to enter this field. The Attorney General is present, acceding to the invitation of the Court, with a brief and a very large appendix reciting the history of the legislation. He reaches the conclusion, or those who speak for him—I am not speaking in the personal sense, but only of the office—he reaches the conclusion, as stated in his brief, historical facts, after some 400 pages of recital, are too equivocal and inconclusive—I am having some trouble with my own chirography here—the historical facts are too equivocal and inconclusive to formulate a solid basis on which this Court can determine the application of the Amendment to the question of school segregation as it exists today.

After so prolonged a study as has evidently been made, it does seem rather a lame and impotent conclusion, not calculated to be a great deal of help to the Court; and I think the cause of that despair on the part of the learned Attorney General and his aides is that they have fallen into the same fallacy into which the appellants have fallen. They endeavor by collating all that was said on either side whenever the question raged, and it was not a single instance—they hope out of that to distill some attar that will exhibit what can fairly be called the congressional intent. It is no wonder that, having plunged into that Serbonian bog, they are in a state of more or less despair when they are able to emerge.

Now, Your Honors then are presented with this: We say there is no warrant for the assertion that the Fourteenth Amendment dealt with the school question. The appellants say that from the debates in Congress it is perfectly evident that the Congress wanted to deal with the school question; and the Attorney General, as a friend of the Court, says he does not know which is correct. So Your Honors are afforded the reasonable field for selection.

[Laughter.]

Now, we say that, whatever may have been said in debate—

and there is not an angle of this case that would not find, if that were the decisive question, support in what some person might have said at some time—but Congress by its action demonstrated beyond a peradventure what scope it intended to employ.

I hoped at one time that it would be possible to take up each action of Congress upon which we rely and vindicate our interpretation of it. I see now that I underestimated the time that would be at my disposal, or overestimated my power of delivery. I shall have to speak now more or less in word of catalogue and leave to our brief and to our appendices confirmation of the relevancy of these incidents.

In the 39th Congress the first supplemental Freedmen's Bureau bill passed, giving the Freedmen's Bureau power to buy sites and buildings and schools for freedmen, refugees and their children; and, of course, the freedmen and the refugees were of the colored race. There was provision that if certain catalogued rights were denied, military protection should be given. What was that catalogue? To make and enforce contracts, sue, be sued, be a party and give evidence, inherit, purchase or dispose of real or personal property, have full and equal benefit of all laws and proceedings for the security of person and estate, and be subject to like punishments, pains and penalties as with others, and none beside.

What did the Freedmen's Bureau do? It was the pet and child of Congress and, acting under its constant supervision, they installed separate schools throughout the South, so separate indeed that history records one complaint by the City of Charleston that they had seized, occupied, and taken over all the school buildings in the city, filled them with their Negro wards, and the white children no longer had any buildings to which to resort.

The Civil Rights Act of 1866, where the rights to be protected by it were catalogued almost in the identical language of the Freedmen's Bureau Bill, the difference being that the Freedmen's Bureau Bill ran only in those states in which the process of the courts had been interrupted, which was a euphemism, being those states that had been occupied by the Confederate and Federal Army, and the Civil Rights Act of 1866 was designed to be nationwide—it is not surprising that its language conformed to the language of the Freedmen's Bureau. They were both introduced at the same time by Senator Trumbull, the Chairman of the Judiciary Committee of the Senate, and they made their way through Congress in much the same fashion.

After the Civil Rights Act of 1866 had passed the Senate, it went to the House for consideration. There it was introduced,

sponsored, discussed by Congressman James Wilson of Iowa, who was Chairman of the Judiciary Committee; and when brother Rogers, with his usual complaint that it would do away with the separate schools—and others joined him in taking that point of view—at that time Wilson said on the floor that the Act did not mean that their children should attend the same school, and, in effect, that it was absurd so to interpret it.

Now, the pertinency of that is due to the connection which counsel has stated between the Civil Rights Act and the Fourteenth Amendment. It was the constant claim of those who favored the Fourteenth Amendment, Stevens and Sumner, both speaking to it, that it was intended to make the Civil Rights Act not only constitutional and quiet Bingham's doubt and conscience, but to make it irrepealable so that, as Stevens said, whenever the Democrats and their Copperhead allies came back to Congress, they would not be able to repeal it.

I will pass over for the moment some other legislation, which I will come back to, that occurred in the 39th Congress.

We came to the reinstatement of the seceded states. Congress passed an Act by virtue of which they might, in compliance, send their senators and congressmen back. Now, in the 39th Congress, Sumner had put forward his prescription for their readmission. He had five headings for it, of which the fourth was this: that the seceding states, if they wished to return, should adopt constitutions which, among other things, would provide for the organization of an educational system for the equal benefit of all, without distinction of color or race.

The Reconstruction Act was adopted in the succeeding Congress and it called for a catalogue of performances to be carried out by the states desiring readmission. Did they say anything about Sumner's educational plank? Not a word. Was any requirement made of the state as to educational provision? None whatever.

When they came to admit the State of Arkansas, Senator Drake of Missouri offered an amendment in which he provided that the constitution of the petitioning state should provide no denial of the elective franchise or any other right. He offered that as an amendment to the bill admitting the State of Arkansas. Controversy arose as to the meaning of "any other right." Then it was asserted that there would enter the question of schools. It was stricken out, and the Drake Amendment adopted without—and Senator Frelinghuysen, who had been Chairman of the Joint Committee on Reconstruction, said that neither the Drake Amendment or the Fourteenth Amendment touched the question of separate schools. That is once I think it is proper to quote from a debate.

There came then the amnesty bill amendments. Congress

passed an amnesty bill. When it was before the Senate, Sumner offered his supplemental Civil Rights Act, which provided expressly for mixed schools. The Judiciary Committee twice reported it adversely, and Sumner flanked them by offering it then as an amendment to the amnesty bill. In that form it was debated and, finally, a vote was taken which was 28 to 28, and the Vice President broke the tie in Sumner's favor. It was the high-water mark of his achievement.

The amnesty bill, so amended, went to the House. It failed of passage in the Senate, where it needed a two-thirds vote under the terms of the Fourteenth Amendment. It failed of passage in the Senate and the Senate did nothing more with it. Then it went to the House, and the House failed to pass it. The weight of the Sumner Amendment was too much for the bill to carry.

Bills to require mixed schools in the District of Columbia were defeated in the 41st and the 42nd Congress.

Then came the Civil Rights Act of 1875, which was passed only after the Kellogg Amendment striking out the reference to schools, churches, cemeteries, and juries, and passed in that form.

Then in 1862 Congress set up its first school for Negroes in the District on a segregated basis. In 1864 it dealt with that question again on a segregated basis.

In 1866, the 39th Congress, it passed a donation of certain lots to be given to schools for Negroes only. It passed a second Act in the same Congress dealing with the distribution of funds between the Negro and the white schools. In 1868 it dealt with the question again on the segregated basis, and has so continued to this day.

I know that Your Honors are shortly going to hear a case which challenges the validity of those statutes; and be they valid or invalid, for the purposes of my present argument it is immaterial. They are enough to show what the sentiment of Congress was, what its determination was on this specific question; and it is no answer to say that Congress is not controlled by the Fourteenth Amendment. Of course it is not; but is it conceivable to any man that Congress should submit to the states an amendment destroying their right to segregated schools and should contemporaneously and continuously institute a regime of segregated schools in the District of Columbia? I should think that if a congressman who was responsible for submitting to the state an amendment shearing them of power—he would have quite an explanation to make if he got home, if he said he had not done exactly the reverse in the District of Columbia.

Then it is suggested in the brief for the learned Attorney General—and I think similar comment, perhaps, by the appellants—

that these two instances in the 39th Congress, these two legislative recognitions of separate schools in the District, which was taking place when the Fourteenth Amendment was taking form and substance—they say that those were mere routine performances, that they came very late in the congressional session, that they were not even honored by having any debate. Apparently, to have a law which is really to be recognized as a congressional deliverance it must come early in the session, it must be debated, and the mere fact that it is passed by unanimous consent and without objection more or less disparages its importance as an historical incident. I have never, that I can recall, heard a similar yardstick applied to congressional action.

There isn't time to go over the states. They are covered by our appendix and these other appendices. We classified them, too. We say that there are nine states that never had segregated schools. There were those states in the northern territory, and there weren't enough Negroes to make it worthwhile. There were five states—I am speaking now of the ratifying states, not of the ratifying—of the 37 states that were then in existence, there were about five states where there had been segregation, and they contemporaneously discontinued. Those were Connecticut, Louisiana, Michigan, Florida and South Carolina. Three of those states returned to segregation as soon as the Reconstruction period was over.

There were four states that had segregation—I am speaking of the period now from '66 when the Amendment was submitted to '68 when it was proclaimed—there were four states with segregation who refused to ratify and continued segregation. They were California, Kentucky, Maryland and Delaware. Delaware didn't ratify until 1901.

There were two border states that had segregation both before and after ratification, and have continued it to this day. They are Missouri and West Virginia.

There were nine northern states that either continued segregation they already had or established it immediately after the ratification of the Fourteenth Amendment: Illinois, Indiana, Kansas, Nevada, New Jersey, New York, Ohio, Oregon and Pennsylvania.

And then—and I can find no evidence that my friends appreciate the significance of this fact—of the reconstructed states who ratified in order to get their delegate, their congressmen and senators back to Washington, eight Reconstruction states in the same Reconstruction legislature, Republican controlled, the same legislature which ratified the Fourteenth Amendment passed statutes continuing or immediately establishing segregated schools. I regard that as a fact of great significance. If there was any place where the Fourteenth Amendment and its sponsors would have blown

the bugle for mixed schools and asserted that the Fourteenth Amendment had settled the question, surely it would have been those eight states under Reconstruction legislation, sympathetic to the party which was responsible for the submission of the Fourteenth Amendment.

Now the appellants say in their brief that three-fourths of the ratifying states gave evidence that they thought the Fourteenth Amendment had abolished segregated schools. I can find in the history as detailed by all of these appendices no warrant whatever for any such assertion, for any such proportion of nonconcurring states. That is before Your Honors in the appendices, and you must, between the three points of view that I have indicated, make your selection.

The second question: 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.

It was nevertheless the understanding of the framers of the Amendment that future congresses might, in the exercise of their power under section 5 of the Amendment, abolish 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; and to that we answer: It was not the understanding of the framers of the Amendment that future congresses might, in the exercise of their power under section 5 of the Amendment, abolish segregation in public schools. And, (c), it was not the understanding of the framers of the Amendment that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing segregation in public schools of its own force.

It was not the understanding of the framers that Congress might, in the exercise of the power under section 5 of the Amendment, abolish segregation; and if we are right in the initial proposition that neither Congress nor the states thought the Amendment was dealing with the question of segregated schools, obviously section 5 of the Amendment could not give Congress more power than the Amendment itself had originally embraced. But the power given to Congress, we had noted, in section 5 is the power that—I thought I had the exact language—to enforce the provision of this article. And section 5 is not a Trojan horse which opened to Congress a wide field in which Congress might expand the boundaries of the article itself.

MR. JUSTICE JACKSON: Mr. Davis, would not the necessary and proper clause apply to the Amendment as well as to the enumerated powers of the instrument itself? In other words, if Congress should say that in order to accomplish the purposes of equality in the other fields, the abolition of segregation was necessary, as a necessary and proper measure, would that not come under it, or might it not come under the necessary and proper clause? In other words, I mean, is it limited to just what is given in the Amendment or does the necessary and proper clause follow into the amendments?

MR. DAVIS: Well, if you can imagine a necessary and proper clause which would enforce the provisions of this article by dealing with matter which is not within the scope of the article itself, which I think is a contradiction in terms, that is a paradox. Congress could do what the Amendment did not warrant under the guise of enforcing the Amendment.

MR. JUSTICE FRANKFURTER: But you can look for the necessary and proper clause to determine whether it is something appropriate within the Amendment.

MR. DAVIS: Quite so. That is if you use, choose, a monetary clause, related to congressional wisdom and policy; and to the judicial power, in answer to that question, we say that to interpret the Amendment as including something that it does not include is not to interpret the Amendment, but is to amend the Amendment, which is beyond the power of the Court.

The third question: On the assumption 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 the public schools. And we answer: It is not within the judicial power to construe the Fourteenth Amendment adversely to the understanding of its framers as abolishing segregation in the public schools.

Before we answer, we preface that with an expression of the extreme difficulty we have in making the initial assumption on which that question is based, where in our humble judgment the answers to question 1 and 2(a) and (b) do dispose of the issue in this case and dispose of it in the clearest and most emphatic manner.

We go on in our answer: Moreover, if in construing the Amendment the principle of *stare decisis* is applied, controlling precedents preclude a construction which would abolish segregation in the public schools. Now, we are cognizant of what this Court has said not once but several times, and what some of us have heard outside the Court as to the scope of *stare decisis* in constitutional matters, and it has been accepted that where there is a pronounced dissent from previous opinions in constitutional matters, mere difficulty in amendment leads the Court to bow to

that change of opinion more than it would in matters of purely private rights.

But be that doctrine what it may, somewhere, sometime to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance. That is the opinion which we held when we filed our former brief in this case. We relied on the fact that this Court had, not once but seven times, I think it is, pronounced in favor of the "separate but equal" doctrine. We relied on the fact that the courts of last appeal of some sixteen or eighteen states have passed upon the validity of the "separate but equal" doctrine vis-a-vis the Fourteenth Amendment. We relied on the fact that Congress has continuously since 1862 segregated its schools in the District of Columbia.

We relied on the fact that 23 of the ratifying states—I think my figures are right; I am not sure—had by legislative action evinced their conviction that the Fourteenth Amendment was not offended by segregation; and we said, in effect, that that argument—and I am bold enough to repeat it here now—that, in the language of Judge Parker in his opinion below, after that had been the consistent history for over three-quarters of a century, it was late indeed in the day to disturb it on any theoretical or sociological basis. We stand on that proposition.

Then we go on that, even if the principle of *stare decisis* in controlling precedents be denied, the effect of the Amendment upon public school segregation examined *de novo*, that the doctrine of reasonable classification would protect this from the charge of any policy that is brought against us.

In Clarendon School District No. 1 in South Carolina, in which this case alone is concerned, there were in the last report that got into this record, something over a year or year and a half ago, 2,799 Negroes, registered Negro children of school age. There were 295 whites, and the state has now provided those 2,800 Negro children with schools as good in every particular. In fact, because of their being newer, they may even be better. There are good teachers, the same curriculum as in the schools for the 295 whites.

Who is going to disturb that situation: If they were to be reassorted or commingled, who knows how that could best be done? If it is done on the mathematical basis, with thirty children as a maximum, which I believe, is the accepted standard in pedagogy, you would have 27 Negro children and three whites in one school room. Would that make the children any happier? Would they learn any more quickly? Would their lives be more serene?

Children of that age are not the most considerate animals in the world, as we all know. Would the terrible psychological disaster being wrought, according to some of these witnesses, to the colored child be removed if he had three white children sitting somewhere in the same school room? Would white children be prevented from getting a distorted idea of racial relations if they sat with 27 Negro children? I have posed that question because it is the very one that cannot be denied.

You say that is racism. Well, it is not racism. Recognize that for sixty centuries and more humanity has been discussing questions of race and race tension, not racism. Say that we make special provisions for the aboriginal Indian population of this country; it is not racism. Say that 29 states have miscegenation statutes now in force which they believe are of beneficial protection to both races. Disraeli said, "No man," said he, "will treat with indifference the principle of race. It is the key of history." And it is not necessary to enter into any comparison of faculties or possibilities. You recognize differences which racism plants in the human animal.

Now, I want to spend some time on the fourth and fifth questions. They give us a little disturbance, and I don't feel they will greatly disturb the Court.

As to the question of the right of the Court to postpone the remedy, we think that adheres in every court of equity, and there has been no question about it as to power.

The fifth question, whether the Court should formulate a decree, we find nothing here on which this Court could formulate a decree, nor do we think the court below has any power to formulate a decree, reciting in what manner these schools are to be alternative at all, and what course the State of South Carolina shall take concerning it. Your Honors do not sit, and cannot sit, as a glorified Board of Education for the State of South Carolina or any other state. Neither can the district court.

Assuming, in the language of the old treaties about war, it is not to be expected and that, God forbid, that the Court should find that the statutes of the State of South Carolina violated the Constitution, it can so declare. If it should find that inequality is being practiced in the schools, it can enjoin its continuance.

Neither this Court nor any other court, I respectfully submit, can sit in the chairs of the legislature of South Carolina and mold its educational system; and if it is found to be in its present form unacceptable, the State of South Carolina must devise the alternative. It establishes the schools, it pays the funds, and it has the sole power to educate its citizens. What they would do under these circumstances, I don't know. I do know, if the testimony is to be

believed, that the result would not be pleasing.

Let me say this for the State of South Carolina. It does not come here, as Thad Stevens would have wished, in sackcloth and ashes. It believes that its legislation is not offensive to the Constitution of the United States. It is confident of its good faith and intention to produce equality for all of its children of whatever race or color. It is convinced that the happiness, the progress and the welfare of these children is best promoted in segregated schools, and it thinks it a thousand pities that by this controversy there should be urged the return to an experiment which gives no more promise of success today than when it was written into their Constitution during what I call the tragic era.

I am reminded—and I hope it won't be treated as a reflection on anybody—of Aesop's fable of the dog and the meat: The dog, with a fine piece of meat in his mouth, crossed a bridge and saw the shadow in the stream and plunged for it and lost both substance and shadow. Here is equal education, not promised, not prophesied, but present. Shall it be thrown away on some fancied question of racial prestige?

It is not my part to offer advice to the appellants and their supporters or sympathizers, and certainly not to the learned counsel. No doubt they think what they propose is best, and I do not challenge their sincerity in any particular period, but I entreat them to remember the age-old motto that the best is often the enemy of the good.

ARGUMENT OF T. JUSTIN MOORE, ESQ., ON BEHALF OF APPELLEES, COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, *ET AL.*

MR. MOORE: May it please the Court:

In undertaking to present the Virginia case, and in view of the fact that the facts are now so similar to those in the South Carolina case, I am aware that there will necessarily be covering of much of the same ground that my distinguished friend and associate, Mr. Davis, has covered. But we feel that we should present our own point of view.

Starting with a very interesting table, if Your Honors will look at page 211 and 212 of our brief, you will get a very quick and vivid conception of the impact that a decree such as is asked for against South Carolina and Virginia in these cases would produce. As you will see from page 212, we have there shown you the population by race in every state in this Union, and according to the 1850 census, and as you will see from that table, the proportions vary from practically zero up to 45.3 percent in Mississippi, with, near the bottom there, 22.1 percent in Virginia.

Now, if you look at page 211, you will see another very striking set of figures which shows that in these seventeen states in which segregation is now required, plus the District of Columbia, there is, according to this census, ten and a half million Negroes, 40.4 million whites, and that approximately seventy percent of the entire Negro population of the nation is in these seventeen states and in the District of Columbia.

It is very striking that the total percentage of the Negroes to total population is approximately ten percent, as you will notice there, ten percent of the total. In other words, there are fifteen million Negroes, according to the last census, in the nation as a whole, with ten and a half million of those Negroes, or approximately seventy percent, in these seventeen states plus the District; so that when our opponents talk about the effect of segregation in some of these northern and western states, they are not talking about the practical condition with which we are here faced. In other words, there is actually today one-third of the nation in these seventeen states which, by law, have required segregation, approximately one-third of the population which lives in that situation. Now, that focuses attention, we believe, at the outset upon the facts of each situation, so that you cannot talk about this problem just in a vaccum in the manner of a law school discussion.

Now, this particular case, I believe, should be very briefly referred to as to the facts just as was done in the South Carolina case, particularly in view of the fact that the present Chief Justice was not sitting at that a year ago. This case comes from one of the smaller and poorer counties in Virginia, Prince Edward County. It is about 130 miles from this very spot.

There were three high schools in Prince Edward County at the time this litigation arose. The best of those was the Farmville High School for whites; the poorest was the Worsham High School for whites; and in the middle was the Moton School for Negroes.

Now, the record shows that the school authorities during the ten-year period just before this suit was filed had had a very unexpected and difficult problem. In 1941 there were 540 white high school students in the county and only 208 Negro students. In ten years, by 1951, those relationships had changed tremendously. The white school students numbered 405, while the Negroes had increased to 463. In other words, there had been a decline of 25 percent in the white, but an increase of 120 odd percent in the colored.

Now, of course, during that period, during much of the time, it was not practical to obtain the necessary materials for construction of facilities that would be absolutely equal. But we are glad to say that in quality that does not any longer exist. The new Mo-

ton High School has now been completed, which was in process of construction when we were here a year ago. It has been completed at a cost of something more than 800,000 dollars.

The details of that are shown in the appendix at the end of our brief where there are certificates furnished there by the architects and Superintendent of Schools, showing that money being furnished either through loans or grants from the State of Virginia.

And it is a striking fact that this is just not an isolated case. This brand new high school which has now been completed and was occupied beginning the first of September is only one of a large number of similar projects. The State has in effect a program over the next four years of more than 250 millions of dollars, with a view to equalizing the facilities. They are able to do it, they intend to do it, and according to the records in this case, about half of the job has been done.

Now, just as in the South Carolina case, this suit was brought with two purposes. The first was the charge that segregation *per se* was a violation of the Fourteenth Amendment, and to support that charge the appellants here introduced expert testimony. I, of course, cannot go into that in detail here. We reviewed that a year ago. But it is sufficient to say that if expert testimony ever was discredited, the testimony in this case was.

Now, on the other hand, on our side of the case—and this is the most distinctive feature of this case—we called seven distinguished experts ourselves and attacked the theories, the factual theories that were relied on by the other side, four distinguished educators, a psychiatrist, a psychologist and a distinguished professor of Columbia University, the head of the department of psychology. And through our testimony we show perfectly clearly that the factual contentions that were made by the other side as to detriment to the Negro child were not borne out, as a matter of fact. And the court found on the crucial point in its opinion to this effect. The court said:

> In this milieu we cannot say that vast separation of white and colored children in the public schools is without substance in fact or reason. We have found no hurt or harm to either race.

Now, it is striking that in three of these five cases there was no evidence presented countervailing the Negroes' evidence. In the Kansas case, the District case and the Delaware case, expert evidence was presented which was not contradicted by opposing evidence. In the South Carolina case there was some opposing evidence, not to any great degree such as was in the Virginia case, so

that the Virginia case really stands out in opposition, for example, to the Kansas finding, where the Virginia court has found on the evidence, after five days of hearings, that the Negroes have failed to prove their case as a matter of fact.

Now, there was an inequality of facilities, which we admitted. We were required by the lower court to equalize. We have now done that, and so far as we know, we are precisely in the same situation as the South Carolina case. I don't think there is any dispute about that now from our friends on the other side.

Now, may I just, for a moment, touch questions four and five. Question four in substance is an inquiry as to our position on the question of gradual adjustment if the Court finds against us. We think it is perfectly clear, as Mr. Davis has pointed out, that in the event we are faced with the distressing situation of an adverse decree, that the Court as a court of equity plainly has the power and the duty, in situations like this, to permit a gradual adjustment, as a court of equity considering the balancing of equities. That is all briefed and I don't want to take up time in that discussion.

On the fifth question, the question is whether or not, if there is an adverse decree, whether the case should be remanded to the lower court or should a master be appointed, or some other way that the matter should be handled. We think it is perfectly clear that if there should be this unhappy, unfortunate decree, that the case should be remanded to the lower court where local conditions could be considered, where new evidence would be received. Considering what might be appropriate in Kansas, wouldn't necessarily be appropriate in South Carolina or Virginia.

MR. JUSTICE FRANKFURTER: What kind of guidance, if any, should be given to the district court on this unhappy hypothesis of your argument?

MR. MOORE: It really distresses me to face that question. About all I can say, Your Honor, is we feel the courts should be given the broadest possible discretion to act along reasonable lines. It is a matter of a reasonable exercise of discretion. That is the best answer, I believe, I can give.

MR. JUSTICE FRANKFURTER: I suppose, and Mr. Davis touched on it before when it was asked, it is one thing to ask a district court to lay out districts, school districts.

MR. MOORE: Yes.

MR. JUSTICE FRANKFURTER: I suppose that is one thing. But to have the parties or the state which would be involved, whatever

the political unit, say, "This is what we are going to do," and have the district court pass on whether that conforms to this hypothetical decree, is another thing, isn't it?

MR. MOORE: Well, Your Honor, we think, to further answer the question—I did not intend to just drop it summarily.

MR. JUSTICE FRANKFURTER: I beg your pardon, I am sorry. Please go your own way, Mr. Moore.

MR. MOORE: No, no, I want to answer Your Honor. We think that following the theory of, say, the antitrust cases, that the party certainly should be allowed to present a plan, rather than for the Court just to hand down a plan. Perhaps that is a more accurate and a better answer. I did not give quite as fluent an answer as I should have originally.

MR. JUSTICE FRANKFURTER: In the *Paramount* case in New York, as you know—

MR. MOORE: Yes.

MR. JUSTICE FRANKFURTER: —there was I don't know how long a proceeding before Judge Hand and his associates in which there was conformity by the parties going on as proposed by what this Court decided, which was made a matter of independent extensive litigation and consideration.

MR. MOORE: That's right.

MR. JUSTICE FRANKFURTER: Is your suggestion that kind of solution?

MR. MOORE: That's right.

I think undoubtedly that the decree should be a decree that would give broad discretion and permit the parties involved to present an appropriate plan that would be in conformity with the decision of this Court, but leaving a great deal of latitude for the parties to present their own kind of plan.

Now, in view of the discussion of Mr. Davis, I am going to pass rather rapidly on the first question. The remaining questions which Your Honors posed for us to investigate and discuss might be summarized very briefly in this way: The Court said to us to investigate what was the congressional understanding and intent of the framers of the Fourteenth Amendment with respect to this matter of its impact on schools, both from the standpoint of that time and from the standpoint of what they contemplated future congresses might do or what this Court might do. Secondly, what was the understanding and intent of the 33 out of the 37 states

that ratified? And the third question was: What is the judicial power of this Court? To what extent is it properly within the judicial power of this Court to outlaw segregation just by force of the Amendment and the decision of this Court?

Now there are six major pieces of legislation that were involved in that first question. I will just enumerate them for convenience, and then only touch the more important ones.

The first one was the Freedmen's, the supplemental Freedmen's Bureau Bill in this 39th Congress of 1866, which, as Mr. Davis pointed out, provided for certain relief, authorized certain relief for these freedmen; but nowhere is the effect on mixed schools really involved in that at all.

The second is the Civil Rights Act of 1866. The third is the Fourteenth Amendment Resolution. The fourth is the legislation with regard to District schools. The fifth are the amnesty bills, and sixth is the Civil Rights of 1875.

Now, it is a striking thing that that first supplemental Freedmen's Bill undertook to cover almost precisely the same rights, the same subject matter as the Civil Rights Act of 1866. The supplemental Freedmen's Bill covered only the seceding states. The Civil Rights Act of 1866 covered all the states.

The Rights bill fell into five groups, and everywhere through the debates you will see these five groups of rights being dealt with. The first was the right to contract. The second was the right to hold property, to inherit it, to transfer it, to lease it and whatnot. The third was the right to sue and be sued and give evidence in court. The fourth was the right to equal security, no improper seizures, no searches and so forth. Equal rights in respect of security. And the fifth was a group of rights that assured equal punishment for the same offenses.

Now, it is very striking that when this Civil Rights Act of 1866 was submitted, it was submitted by Senator Trumbull, who, as we show repeatedly in our brief, very clearly and finally came out very definitely on the specific point—and he was the proponent—that the right to go to public school was not regarded as a civil right. That is what he said repeatedly in those days.

Now, that was the five groups of rights that were covered. Notice what he said. I want to just leave in these few moments in your minds two quotations.

I agree entirely with the thought expressed this morning that you can't judge the intent of Congress by what one senator might have said here or what another congressman said there, but, as this Court has repeatedly said, what the sponsors of the legislation say is entitled to particular weight. That is the *Duplex* doctrine, that is the doctrine in the *Calvert* case which Mr. Justice Douglas

repeatedly delivered the opinion on, and I want to leave in your minds what these two sponsors said. Trumbull, as the sponsor of the Civil Rights Act, Wilson in the House, who was Chairman of the Judiciary Committee—and here is what Trumbull said:

> The first section of this bill defines what I understand to be civil rights, the right to make and enforce contracts, to sue, to be sued, to give evidence, to inherit, purchase, sell, lease, hold, convey real and personal property. It is confined exclusively to their civil rights.

And you couple that with his own statement that the right to go to school is not a civil right.

Here is what Wilson said over on the House side:

> Nor do they mean that children shall attend the same schools. These are not civil rights.

Later on he said:

> When he talks about setting aside the school laws of the states by the bill now under consideration, he steps beyond what he must know to be the rule of construction which must apply here.

And when you read these debates, as I hope to show you tomorrow, there were three types of rights which they all finally admitted were not civil rights. The first one was the right to vote, which was never given until the Fifteenth Amendment. The second was the right to marry a white woman or the other way. The third was the right to go to mixed schools.

Now, as I hope to show Your Honors tomorrow morning, those were certainly three vital rights, in spite of all this talk about equality of men, which were never intended to be given under that bill.

Now, the Attorney General, as Mr. Davis points out, says that, in view of this conflict, he sets one off against the other. He says he doesn't believe any interpretation is practical here. He asserts that the proponents and opponents both express the view that the act would outlaw or would not outlaw separate but equal schools. Two of the people he refers to are Kerr and Delano, I will have you bear in mind. They were speaking of cases where there were schools for whites and no schools for Negroes.

Senator Cowan, the only senator who insisted on the point of view that it might open up the schools, as we point out in our brief, later changed his mind in the light of further debate, and he said he became convinced that the rights are here, that the rights

are those which I here enumerated. And only Rogers of New Jersey, the most bitter opponent, stands out in the House in the final showdown, who was insistent that the right to go to school, the mixed schools, might be produced.

As we said in the *Calvert* case, may I just close this part of the discussion with this question. The Court said here:

> The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that should be looked to when the meaning of the statutory words is in doubt.

Now that brings me to the Fourteenth Amendment itself.

[Whereupon, at 4:30 o'clock p.m., oral argument in the above-entitled matter was recessed, to reconvene at 12:10 o'clock p.m., December 8, 1953.]