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.
Tuesday, December 8, 1953.

Oral reargument in the above-entitled causes was resumed, pursuant to recess, at 12:10 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:

T. JUSTIN MOORE, ESQ.,—*Resumed.*

J. LINDSAY ALMOND, ESQ., *on behalf of the Appellees, County School Board of Prince Edward County, Virginia, et al.*

J. LEE RANKIN, ESQ., *Assistant Attorney General, on behalf of the United States.*

PROCEEDINGS

MR. CHIEF JUSTICE WARREN: This is in the matter of a hearing before the United States Supreme Court in the segregation cases held on Tuesday, December 8, 1953.

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

MR. MOORE: May it please the Court:

At the adjournment yesterday afternoon, I had referred briefly in presenting our side of the Virginia case to the fourth and fifth questions. Perhaps I was very brief, but we felt in comparison with these other great questions, that we dealt with those very fully in our brief, and I hope my statement was sufficient as to our position as to gradual adjustment and as to the kind of decree in the event of an adverse decision.

I started in the discussion of the first great question, one, as to congressional intent and understanding. In view of Mr. Davis's very extensive discussion on that matter and also on the question of the states' understanding, I shall try to be quite brief on those two next questions, and will simply try to pinpoint what we regard as the high point as to both those matters, and give the greater part of my time to what we believe now, in view of questions from the Court as well as from the former hearing, what is perhaps the larger question as to judicial power.

Your Honors will recall that I had pointed out that there are six classes of legislation which throw a great deal of light on the intent of Congress. I had touched on the first two, the Freedmen's Bill, which is significant here only in this respect: that that was the first bill in which Congress had undertaken to provide for the Negro, for public schools at public expense, and the significant thing is, they were separate schools.

I had then proceeded to discuss the 1866 Civil Rights Act and had undertaken to point out to you the great change that was made

in that Act. As the Act was originally introduced, it had broad language which provided that all discrimination in civil rights and immunities as to all inhabitants on account of race is prohibited. And because of constitutional questions that had been raised and arguments on policy, that language was changed around to the specific language that you now find in the bill as it was finally passed.

Now, I had pointed out that there were these five groups of rights that were listed, and the sponsors of the bill made clear that those were the rights intended, and only those. Now, there is no difficulty about *Strauder* when you look at it in that light. The fourth group of rights was their right to equal security, and all that *Strauder* held was the right to have a Negro possibly on the jury was a part of his right of equal security.

I also tried to point out that there were three classes of rights which, by debate, were clearly eliminated in that list of rights. The first was the right of suffrage, which, as we all know, in spite of this argument about equal rights, was never given the Negro until two years later in 1870 when the Fifteenth Amendment was passed although the Thirteenth had freedom from slavery. The second was the right of intermarriage, which was clearly not intended to be included, in spite of the broad language; and this right of mixed schools. Now, those were three that were clearly pointed out in all the debates and were not intended to be covered.

That brings us therefore to the third important piece of legislation, which was the Fourteenth Amendment itself. As Your Honors recall, that Amendment really sprung out of the debates on the Civil Rights Act, because it was argued that the Civil Rights Act, even in spite of the Thirteenth Amendment that freed the slaves, was still not constitutional. So the Amendment sprung from that.

It came from the Joint Committee on Reconstruction. That Committee was composed of nine representatives and six senators. The majority were radicals, although Senator Sumner was considered too radical for membership, we find, from a very interesting letter from Senator Fessenden's son. It is in our opinions. His friends wouldn't put him on there.

The Chairman was Senator Fessenden of Maine and he was ill much of the time, and Senator Howard of Michigan took the lead in his place. The House leader was the famous Co-Chairman; that is, Stevens.

Now, the Amendment here again is debated in two forms, very much like the Civil Rights Act. In its first form it purported to confer on Congress the affirmative power to make all laws that

were necessary to secure privileges and immunities and equal protection. That version, though, was considered too broad, just as was the broad language in the original Civil Rights Act.

And finally, in May of that year, the Amendment was reported in the form that is now found, and, as Your Honors probably are thoroughly familiar with it, there are two sentences, really, in the first section. The first was the sentence put in by Senator Howard, which defined citizenship, that everyone born and naturalized in this country, regardless of race, was a citizen; and the second sentence, which Mr. Bingham wrote, was the same section we are here concerned with, which switched around the approach to the matter from a grant of affirmative power to Congress to a denial of power to the states.

Now, in both the House and the Senate the debates made one thing clear. The purpose of the first section of the Amendment was simply to write the Civil Rights Act into the Constitution. Stevens, the sponsor in the House, said that; Howard of Michigan said that; and numerous others, which I will not take time to enumerate.

The reasons were very interesting. The Democrats persistently charged the Republicans with trying to constitutionalize the Civil Rights Act. They said, "That is all you are trying to do, is to legalize it." On the other hand, the Republicans replied, "Yes, that is what we want to do, but we want to nail it down so it can't be repealed."

That is what Stevens said in perfectly clear language as the leader, and, as I pointed out yesterday, we look primarily to Stevens and Howard, people like that, and Wilson in the House, to find out really what they are talking about, the proponents.

Now, the appellants here assert two things. They first quote these broad statements about equal privileges and immunities that certain members of Congress and the Senate wanted to assure, and next they assert that the Amendment went beyond those civil rights that we have in the Civil Rights Act. Neither statement, in our judgment, is a safeguard to this Court, because it is perfectly plain from the extracts in our brief and appendix and in the South Carolina brief, that these radical people never were able to go as far as they wanted. Stevens admitted that frankly. So did Howard at the end.

So the Amendment was proposed in the form with these two sentences, Howard's definition of citizenship and Bingham's statement of denial of rights to the states to deny equal protection of the laws. Now, the debates give convincing evidence that it was not intended to abolish segregated schools; but confirmation comes

from two other sources which were mentioned, one of them particularly yesterday. I will just touch it very briefly.

The next step is the District school legislation, which our opponents, our colored friends, saw fit in their brief to completely ignore, and which the Attorney General comes in and dusts off with just a gesture, saying it was dealt with casually.

The most signficant thing in that legislation, Your Honors, aside from the fact that just a month after slavery was abolished here in the District in 1862 and separate schools were set up for Negroes, is this fact: I am not going to review it all, but keep in mind this fact, that in 1866, in July, 1866, within one month after the Fourteenth Amendment was proposed in June, 1866, this Congress passed these two bills in which they dealt with these separate schools. In one case they provided for property to be transferred for the use solely of those schools. In the second bill they appropriated money in proportion to the number of Negroes to whites; and yet, these gentlemen are bold enough to come up and say, because that legislation passed without great debate, that it was not carefully considered.

Now, passing on from the District school legislation, let's take the next important piece of legislation. I will mention it; it was the amnesty bills. Those bills were debated with greatest heat in Congress with a view to granting amnesty to Southerners who participated in the war. And on two occasions Charles Sumner undertook to draft, to tack onto those bills his Civil Rights bill, which included a requirement that the Negroes should be given equal status as to schools, churches, cemeteries, theaters and whatnot. And in respect to each of those he lost out, and the bills were finally passed without them.

Now, one more reference and I am through with this part of the case. We should not lose sight of the 1875 Civil Rights Act. This matter was not finally ended until the 1875 Act was dealt with, the famous right—the famous Act which was held unconstitutional in the *Civil Rights Cases*. And therein, in respect of that Act, which was introduced by General Butler of Massachusetts, the effort was being made as the last effort on this matter to write into the civil rights bill the fact that the Negroes should be given equal status in schools, churches, cemeteries, theaters and whatnot.

Finally, in order to get something passed, because the Republicans lost out—there were a hundred people who lost their seats in Congress just about that time on the Republican side—and to try to get something through, they struck out all reference to schools and the cemeteries and things of that sort, and the Act was passed

without it, and that was the last effort made to write into this legislation all of this business about equal rights as to schools. So how our friends on the other side can get comfort out of that story, when they can point only to Rogers of New Jersey and occasionally to a remark made by Senator Cowan, is beyond us to understand.

Now, let me turn just very briefly to the state end of this. There is a very interesting chart in our brief. I have called Your Honors' attention to one yesterday, which was the chart of the 1950 Census. If you look at page 150, you will see the Census of 1870, where, for the first time after the Amendment was adopted, we get a Census including the Negro; and that chart is very illuminating as to what was done with these states. Mr. Davis discussed it yesterday, and I will not take much time on it. I will just comment on two or three points.

As you see from that chart, there are five states, including Maine, New Hampshire, and so forth, where the question of segregation never was even pertinent at all, never even came up, and in those states the Negro was not quite two-tenths of one percent of the population.

There is another group of states, such as Massachusetts, Michigan, and so forth, where slavery had been abolished before the Amendment, or where it was abolished about that time, and it is less than one percent of the Negroes in those states; so it was of no moment.

You then turn to the 23 states, the principal ones that are left. My friend, Judge Almond, who will follow me in a brief talk about the seceding states as to which there is an abominable conspiracy charged here by our opponents, is going to talk about the seceding states. But there what happened was that the same legislature that adopted the Fourteenth Amendment passed these laws that required segregation.

Well, how could that be clear evidence that they didn't understand that the Amendment prevented that? But I submit to you that the significant thing in this whole state story is the fact that there were seven of the great states—and I will name them: New York, New Jersey, California, Illinois, Missouri, Ohio and Pennsylvania—as to which our opponents are unable to lay any finger of scorn; and every one of those states had segregation before the Amendment was adopted, and they continued segregation for years thereafter; in California until 1880, in Illinois until 1874, in New Jersey until 1881, in Ohio until 1887, in Pennsylvania until 1881, and in New York until 1930.

And in addition to that, we have the supreme courts of those states—Ohio was the first in 1871—which passed directly on the

matter and held that the equal facilities, equal doctrine, was not in violation of the Constitution. California filed suit with the decision of its supreme court, then Pennsylvania and New York. I will not take further time on it. The record is perfectly clear. And how these gentlemen try to explain away that record with respect to those states is beyond our understanding.

Now turning finally to the third question as to judicial power, as we understood that question, we understood that the Court had in mind in asking us whether the Court had judicial power of itself to abolish segregation, we understood that the Court had in mind perhaps three approaches to it, which I will deal with very briefly.

The first is whether or not this is a case where there should be a restraint of judicial power and the matter left to the legislative bodies. The second is whether or not, in the light of precedents, this is a case lasting over these hundred years where it would be an abuse of power in the light of that history. It is what Mr. Davis called yesterday the time where there should be some time, a period of repose when a matter is really settled. That is the second question. And the third branch is whether or not there is some idea here of a living Constitution and changing conditions that should make a difference. I am going to talk just very briefly about those three.

As we pointed out, segregation in education does exist in these seventeen states and the District where 55 milion people live. In many of these states it is written into the constitution. And we submit that the first point to bear in mind on this phase of the case is the principle that was mentioned in Justice Jackson's opinion here yesterday, and so well put by Justice Brandeis many years ago: that in a situation like this the statute of a particular constitution comes before Your Honors with a presumption of constitutionality.

In the second place, we point out that this is not a case of some novel or modern experiment such as has been involved in so many cases before Your Honors, where these old doctrines have been attempted to be applied to some modern situation. Here the statute is as old as the Constitution itself, and the novel principles are those that are brought in issue here by our opponents.

Finally, we must refer to the field of legislative action. Mr. Justice Holmes has very well expressed the thought when he said:

> Legislatures are ultimate guardians of the liberties and the welfare of the people in quite as great a degree as the courts.

We submit that the Court must coordinate the field for its operations with that of the legislative branch in a case particularly

of this kind. What we urge is that the size, the history of this problem before the Court here, makes it clear that the solution should be left with the legislatures. This case presents a matter, we submit, for judicial restraint if there ever was a case presented. We don't mean judicial restraint here in the sense of these political cases such as have been referred to by the other side. What we do urge is that this question should be left to the duly elected representatives of the people.

Now, in touching just the second question as to what is the true situation here in the light of history of the decisions of this Court and the many state courts, in view of questions between Mr. Justice Frankfurter and Mr. Marshall yesterday, I can touch that very briefly. I need only point out that this "separate but equal" doctrine is not a new doctrine; it is more than one hundred years old.

It was first presented to the nation in *Roberts* against *Boston* in 1849, and there was upheld under the Massachusetts Constitution in fundamentals like we have here. From that time on it got written in the various state statutes, as I have just pointed out. It was continued, it was debated back and forth in the halls of Congress here between 1862 and 1875. In states like Virginia and Georgia it was written into fundamental law in 1870.

These state court cases came along in 1871, 1873 and 1874. In *Hall* v. *DeCuir* in 1877, Mr. Justice Clifford there in the Steamboat case, where the State of Louisiana, in a legislature dominated by Negroes and carpetbaggers, had passed a law requiring the mixing of people on these boats, that was held unconstitutional under the commerce clause; and he had recognized the doctrine in his concurring opinion there.

So the Court came in 1896 to *Plessy* v. *Ferguson*. There was nothing new to present, and I am glad to find that our gentlemen on the other side here differ from their position here a year ago. They do not come here trying to distinguish *Plessy* v. *Ferguson* and *Gong Lum* from this case. They were here a year ago saying *Plessy* v. *Ferguson* was a railroad case, and the *Gong Lum* case was a Chinese case, and they could be distinguished; but I am very glad Mr. Marshall marched right up to the point. He said, "Now, we are asking that this Court go further than it has ever gone before and overrule *Plessy* v. *Ferguson* and *Gong Lum,*" because that is what has got to be done for the decree that he asks to be entered.

I am not going to review these more recent cases. As was pointed out, it was admitted here yesterday these gentlemen are not happy with these recent cases of *Sweatt* v. *Painter* nor *McLaurin*, for that matter. McLaurin there in the Department of Education in Oklahoma was set apart, true enough; but he was set apart in a way so it was just as if he had the sign, "Here is a leper, here is a leper, don't touch him." In very proper words, said, "Well, you can't do that. That is not any proper application of the doctrine." So we find the Court under the Chief Justice saying in *Sweatt* v. *Painter*, which they don't like on the other side, "Nor do we need to reach the petitioners' contention that *Plessy* v. *Ferguson* should be reexamined."

Now, coming finally to the last phase of this matter that I just spoke of, and that is whether or not there are changed conditions that may warrant some different application of the doctrine. The appellants urge that these precedents should be overruled. They don't urge merely changed conditions. Practically every argument these gentlemen present, Your Honors will find that Charles Sumner presented just as effectively and just as oratorically in 1870 and in that period as they presented it.

The real crux of their argument is the fact they contend that the mere act of separation is a badge of inferiority, and that was his theme, that is what he dedicated his life to long before the Amendment and until his death in 1874.

Now, if we are going to look at this matter from the standpoint of precedent, the rule is pretty simple. The rule is that the state may classify and the test of its classification is merely within the bounds of reason. Mr. Justice Hughes well said, quoting him:

> The inquiry must be whether considering the end in view, the statute passes the bounds of reason and assumes the character of a mere arbitrary fiat.

Now, how is "reasonable" to be decided here? It can't be decided in a vacuum. It has got to be decided in the light of all the surrounding facts. Now, what are the local conditions in Virginia where we are concerned? In our case the superintendent, State Superintendent of Public Construction, testified that the people, Negroes and whites alike, believed that the best interests of both the whites and the Negroes are that the separate schools are best. A former Superintendent of Public Education testified that segregation caused no warped personalities, and that the general welfare would be definitely harmed by mixed schools in Virginia.

A distinguished child psychiatrist testified in this case that the amalgamation would result in increased anxieties which would be detrimental to both races. The Chairman of Psychology in the Department of Columbia testified—and he is a Virginia boy, educated in Virginia, went up to the big city where he has been a great teacher for these many years—he testified with full knowledge of Virginia conditions that the result of segregation in Virginia pro-

duced better education for both races.

Now, what are we going to do with that testimony? Are we just going to disregard it? Can this Court now say that on the basis of this record, segregation is beyond the bounds of reason, that it is an arbitrary fiat? We don't believe so.

I would like to say this in conclusion, may it please Your Honors: We are trying to be fair as we know how about this matter. It is a matter on which there is great feeling in these seventeen states. We recognize that there are a great many people of the highest character and position who disapprove of segregation as a matter of principle or as ethics. We think that most of them really do not know the conditions, particularly in the South, that brought about that situation. That was true of all these witnesses, these experts that appeared in our Virginia case. They did not know a thing about Virginia, they all admitted, and they are not familiar with the way in which it is gradually being worked out. But those feelings that I refer to are not relevant here.

Mr. Justice Holmes had very well put the thought when he said:

> There is nothing that I deprecate more than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though those experiments may seem futile or even noxious to me and to those whose judgment I most respect.

Is that sound? We believe it is. And just look at the picture that faces the seventeen states as I leave this matter with you. These states start at Maryland. They go all the way down to Texas, to the Gulf of Mexico. They go out as far west as Missouri and Oklahoma, with a third of the nation included in those states with ten and a half million Negroes in those states, seventy percent of the Negroes in the whole nation in those states.

During this hundred-year period since *Roberts* and *Boston* has been the law, millions and millions of dollars have been spent in building up these systems. There are thousands of school houses, fine school houses, all over these seventeen states. As a matter of fact, these gentlemen here have one of the finest school buildings in the nation just completed, which they moved into on September the first.

What are we to do with that situation? Are we to go and put in this country—there are about five and a half Negroes to every

five white persons—shall we put one Negro along with every white child in high school when that is the best high school? I say to you that there is looking down on you from every one of these high school sections, every elementary school in these seventeen states, with anxiety as to what you shall do with this.

In our humble judgment there is not anything that could be more serious than an adverse decision. And I want to leave that matter just with this thought which our friend Judge Parker in the South Carolina case has expressed better than anywhere I know. Here is the way he summed it up, after referring to *Plessy* v. *Ferguson* and *Gong Lum* and the great judges that sat in those cases. He said:

> To this we may add that, when seventeen states and the Congress of the United States have for more than three-quarters of a century required segregation of the races in the public schools, and when this has received the approval of the leading appellate courts of the country including the unanimous approval of the Supreme Court of the United States at a time when that Court included Chief Justice Taft, Justices Stone, Holmes and Brandeis, it is a late day to say that such legislation is violative of fundamental constitutional rights.
>
> It is hardly reasonable to suppose that the legislative bodies of so wide a territory, including the Congress of the United States and the great judges of high courts, have knowingly defied the Constitution for so long a period or that they have acted in ignorance of the meaning of its provisions. The constitutional principle is the same now that it has been throughout this period; and if conditions have changed so that segregation is no longer wise, this is a matter for the legislatures and not for the courts. The members of the judiciary have no more right to read their ideas of sociology into the Constitution than their ideas of economics.

Thank you.

MR. CHIEF JUSTICE WARREN: General Almond?

ARGUMENT OF J. LINDSAY ALMOND, ESQ., ON BEHALF OF APPELLEES, COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, *ET AL.*

MR. ALMOND: May it please the Court:

Mr. Moore assigned to me a rather Herculean task, and I have no time in which to address myself to that phase of the case which I would like to discuss.

As the only official of one of the seceding states privileged to actively participate in this case, I just want to, if Your Honors please, take a few moments, the few moments which remain, to bring to your attention this phrase: What are they here asking for? They are asking this Court, contrary to the intention of the Congress which proposed the Fourteenth Amendment, as evidenced irrevocably by the records of that historic session and during those years, they are asking you to make a decision contrary to the spirit, the intent and purpose of the Fourteenth Amendment. They are asking you to amend the Constitution of the United States and to go further than the Congress ever intended that this Court should go.

They are asking you to disturb and tear down the principle of *stare decisis* enunciated so clearly in 1896 in *Plessy* v. *Ferguson,* reimplemented again in 1899 in *Cumming* v. *Board,* clearly enunciated again in 1927 in *Gong Lum* v. *Rice,* and even though driven to the wall yesterday, the ingenious counsel of the opposition in a fruitless effort to confess and avoid, finally admitted that the very basis of the latest decisions of this Court on that subject, beginning with *Gaines* v. *Canada* in 1938, followed by *Sipuel* in 1948, by *Sweatt* v. *Painter* and *McLaurin* in 1950, that the very basis of those latter cases was predicated upon the doctrine enunciated in *Plessy* v. *Ferguson*: separate but equal facilities do not offend any provision of the Constitution of the United States.

They are asking you to overturn the principle of *stare decisis* laid down by this Court and the courts of last resort of every state in this Union that a solemn constitutional provision or legislative enactment carries with it the highest presumption known to law, that it is a valid exercise of the powers of the body which enacted it.

They are asking you to disturb the unfolding evolutionary process of education where from the dark days of the depraved institution of slavery, with the help and the sympathy and the love and the respect of the white people of the South, the colored man has risen under that educational process to a place of eminence and respect throughout this nation. It has served him well.

In those days as now, the states were dealing with the question of policy. Questions have been asked here or submitted by this Court as to what directions there should be in any adverse decree handed down, adverse to the appellees in this case. I like the language of Mr. Justice Holmes when he said—I believe it was Mr. Justice Holmes—no, probably not, but in the case of *International Salt* in 332 U.S.:

> It is not the province of the appellate court to write decrees. That is within the province and the equipment of the District Court.

I would say to this Court on that question, in the event of an adverse decision to our side, that the case be remanded with direction to the lower court to conduct a hearing taking into consideration the vast administrative difficulties which would be occasioned as a result of such a decision.

We must determine from Virginia what we are going to do with our compulsory attendance law in the event of an adverse decision. We must determine whether we will have one system or three systems, if the dual system is destroyed.

It is a matter, sir, of great import to these states affected. What crime has Virginia committed? She has within the last fifteen years gone further in the promotion of education on an equal facilities basis than almost, I can say, any state in the South. Within the last four years she has appropriated 75 millions of dollars, which has been more than matched by the political subdivisions, to increase the facilities of our public school system, and most of that has been spent to equalize facilities which needed to be equalized.

MR. JUSTICE FRANKFURTER: General Almond, let me ask you a question to see whether I understand your suggestion.

MR. ALMOND: Yes.

MR. JUSTICE FRANKFURTER: Of these systems, the choice is of going to what is called an integrated school, but in default of that, deciding of the choice then, it will be shepherded into one or the other; is that what you mean by the decree?

MR. ALMOND: I didn't mean, Mr. Justice Frankfurter, shepherding in that sense.

MR. JUSTICE FRANKFURTER: That is a bad word. If they do not choose to go to unmixed schools, then they would have to go to a separate school, is that right? If they do not choose to go to a mixed school which is open to them, then they would have to go to one or the other; is that what you mean, General Almond?

MR. ALMOND: I said, sir, that that is the matter of policy which the states—

MR. JUSTICE FRANKFURTER: Yes, I understand; but is that what you meant?

MR. ALMOND: Yes.

MR. JUSTICE FRANKFURTER: Those are the three which you have in mind?

MR. ALMOND: That is right, sir, which the state would have to determine.

MR. JUSTICE FRANKFURTER: Yes, I understand that. It is a very hypothetical answer on that, but I just wanted to understand you.

MR. ALMOND: That is a matter of legislative policy.

Now, if Your Honors please, I guess my time has just about expired. I would like to say one thing in behalf of the seceding states, if there was ever such a thing, why they have been indicted by the opposition of treachery, of fraud, of conniving to subvert the Fourteenth Amendment. I ask our friends of the opposition to consider this: that when the constitutional conventions were created in the South, think of their composition. There were 101 delegates to the constitutional convention which framed the new constitution of the great State of Alabama. Of these there were 18 Negroes, 38 carpetbaggers and 45 scalawags.

Now, I do not use those two latter terms in any sense of opprobrium. Mr. Webster defines a carpetbagger as a roving venturer meddling in the politics of a locality in which he has no interest. History defines a scalawag as a white southerner who associated with the machinations of the carpetbaggers.

Now, Georgia's constitutional convention of 1867 and '68 consisted of 131 scalawags, 37 Negroes, nine carpetbaggers and twelve conservative whites. The convention that prepared the new constitution for Virginia was composed of 24 Negroes, 26 carpetbaggers, 14 scalawags and 35 conservative whites.

I ask them, when they indict these states for perpetrating a fraud by not placing certain provisions in their constitutions until after readmissions had been accomplished, and then turning around as they said and enacting mixed school law, if a fraud was perpetrated, who was the perpetrator?

We should remember also in this indictment against the southern states that governors were sent in as importations from as far away as Maine, Kansas and Pennsylvania, and those governors recommended to the very legislatures which ratified the Fourteenth Amendment that a school system should be established on a segregated basis. They did that because they understood the facts of life and knew that in no other way could that question then, as we maintain now, be solved to the benefit of both races.

REBUTTAL ARGUMENT OF THURGOOD MARSHALL, ESQ., ON BEHALF OF APPELLANTS, HARRY BRIGGS, JR., *ET AL.*

MR. MARSHALL: May it please the Court:

There are several points I would like to clear up preliminarily, and then I would like to make sure that our position is correctly stated, and as it relates to statements made by counsel on the other side.

MR. JUSTICE FRANKFURTER: Mr. Marshall, I do not want to interrupt your closing argument, but I hope before you sit down you will state to the Court whether you have anything more to say on the question of remedies.

MR. MARSHALL: Yes, sir.

MR. JUSTICE FRANKFURTER: In case you should prevail, more than is contained in your brief.

MR. MARSHALL: Yes, sir, I would be glad to get to that first, Mr. Justice Frankfurter.

In our brief we found ourselves, after having given as much research as we could, in a position where we intelligently could not put forth a plan. We find that in the briefs of the other side they recognized there would be certain administrative problems involved, and anything else that they mentioned we, of course, —well, not of course—we do not recognize as being valid for this Court to consider.

On the other hand, we spent as much time as we could during the time of filing and the present time on the United States Government's suggestion as to the decree, and so far as we are concerned, it appears to us that there are administrative problems, there would be administrative problems, and that the decree of this Court could very well instruct the lower court to take into consideration that factor, and, if necessary, give to the state involved a sufficient time to meet the administrative problems, with the understanding so far as we are concerned that I do not agree with the last part of the Government brief, that if it isn't done within a school year, that they could get more time for this reason, sir.

I can conceive of nothing administrative-wise that would take longer than a year. If they don't have staff enough to do these administrative things, the sovereign states can hire more people to

do it. So for that reason I don't think it should take more than a year for them to adequately handle the administrative techniques, and I submit that a longer period of time would get the lower court into the legislative field as to whether or not to do it this way or that way.

Specifically, I am a firm believer that, especially insofar as the federal courts are concerned, their duty and responsibility ends with telling the state, in this field at least, what you can't do. And I don't think anybody is recommending to this Court that this Court take over the administrative job. Obviously, that is not recommended by anyone. So, with that, I think that is our position.

We said in the opening brief that if any plans were put forth, we would be obliged to do it, we wanted to do it, and that is our position on the limited point. It gets me, if it please the Court, to one of the points that runs throughout the argument in the brief on the other side, and that is that they deny that there is any race prejudice involved in these cases. They deny that there is any intention to discriminate. But throughout the brief and throughout the argument they not only recognize that there is a race problem involved, but they emphasize that that is the whole problem. And for the life of me, you can't read the debates, even the sections they rely on, without an understanding that the Fourteenth Amendment took away from the states the power to use race.

As I understand their position, their only justification for this being a reasonable classification is, one, that they got together and decided that it is best for the races to be separated, and, two, that it has existed for over a century. Neither argument, to my mind, is any good.

The answer to the first argument is in two places, if I may for a moment address myself to it. This one that Mr. Davis and Mr. Moore both relied on, these horrible Census figures, the horrible number of Negroes in the South—and I thought at some stage it would be recognized by them that it shows that in truth and in fact in this country that high percentage of Negroes they talk about can be used to demonstrate to the world that, insofar as this country is concerned, two-thirds of the Negroes are compelled to submit to segregation.

They say that is the reason for it. The best answer is in the record in the Clarendon County case, where the only witness the other side put on on this point—and a reading of it will show he was put on for the express purpose—he is a school administrator—of explaining how the school system would be operated under the new bill that was going to tax people; but they dragged this other point in and made him an expert in race relations and everything else. He emphasized—well, the best way to do it is this way, on page 119 of the record in the *Briggs* case:

> What I was saying is that the problem of the mixed groups and racial tensions is less in communities where the minority population is small. That has been true of the testimony I have heard.
>
> Then the question: 'Well, Mr. Crow,' incidentally, that was his name, Mr. Crow, 'assuming that in Clarendon County, especially in School District No. 22, the population was 95 percent white and 5 percent Negro, would that change your opinion?'
>
> Answer. No.
>
> Question. Then that is not really the basis of your opinion, is it?
>
> Answer. The question that you have asked me is in my opinion, will the elimination of segregation be fraught with undesirable results, and I have said that I thought it would. That may not be stating your question exactly, but that is still my answer.
>
> Question. As a matter of fact, Mr. Crow, isn't your opinion based on the fact that you have all of your life believed in segregation of the races? Isn't that the reason, the real reason, the basis of your opinion?
>
> Answer. That wouldn't be all.
>
> Question. But it is a part of it?
>
> Answer. I suppose it is.

And that answers all of those arguments about this large number of people involved. They are all American citizens who, by accident of birth, are a different color, and it makes no difference one way or another insofar as this Court is concerned.

Then, in that same vein, Attorney General Almond gets to the name-calling stage about these state conventions. Well, let's go up to the later convention in his State of Virginia. I don't believe that the man I am now going to quote can be characterized as anything but a respected former Senator of the United States, and in debating the section in the latter Constitution of Virginia, not the one in this period but the later one, Senator Carter Glass, who was a delegate to the convention, spoke thusly in the debates:

> Discrimination, that is precisely what we propose. That exactly is what this Convention was elected for, to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution.

That is quoted in the statement of jurisdiction in the Virginia case on page eleven. And another answer, I submit, is quoted in our reply brief involving the University of North Carolina Law School case, which was decided adversely to the Negro applicants in the district court, and on appeal to the Fourth Circuit Court of Appeals, the very Circuit that is involved here, in an opinion by Judge Soper of Maryland met this question of what we are doing is for the benefit of the white and Negro people alike, saying:

> The defense seeks in part to avoid the charge of inequality by the paternal suggestion that it would be beneficial to the colored race in North Carolina as a whole, and to the individual plaintiffs in particular, if they would cooperate in promoting the policy adopted by the State rather than seek the best legal education which the State provides. The duty of the federal courts, however, is clear. We must give first place to the rights of the individual citizen, and when and where he seeks only equality of treatment before the law, his suit must prevail. It is for him to decide in which direction his advantage lies.

As to this time of how long segregation has been in existence in the South, the same argument has been made in every case that has come up to this Court, the argument of *stare decisis*; that you should leave this because it has been longstanding, the "separate but equal" doctrine, and that there are so many states involved, was made in even more detailed fashion in the *Sweatt* brief filed by Attorney General Price Daniel; and, as an aside, it is significant that in the Virginia brief on the last page they go out of their way to pay acknowledgment to that brief filed by the Attorney General, which was obviously discarded by this Court.

There is not one new item that has been produced in all of these cases. And we come to the question as to whether or not the wishes of these states shall prevail, as to whether or not our Constitution shall prevail. And over against the public policy of the State of Virginia and the State of South Carolina is an Amendment that was put in the Constitution after one of the worst wars that was ever fought, and around that constitutional provision we

say that the public policy of the United States does not look to the state policy, but looks to our Government.

And in the brief we have filed in our reply brief, we quote from a document which just came out—at least we just got ahold of it a couple of weeks ago, monograph—which we cite in our brief from the Selective Service of our Government, and we have some quotes in our brief. I don't emphasize or urge the quotes as such, but a reading of that monograph will convince anyone that the discriminatory segregation policies, education and otherwise, in the South almost caused us to lose one war, and I gather from the recommendations made in there that unless it is corrected we will lose another.

Now, that is the policy that I understand them to say that it is just a little feeling on the part of Negroes: They don't like segregation. As Mr. Davis said yesterday, the only thing the Negroes are trying to get is prestige. Exactly correct. Ever since the Emancipation Proclamation, the Negro has been trying to get what was recognized in *Strauder* v. *West Virginia*, which is the same status as anybody else regardless of race.

I can't for the life of me—it seems to me they recommend to us what we should do. It seems to me they should show some effort on their part to conform their states to the clear intent of past decisions. For example, the argument was made in *McLaurin* and *Sweatt* of what would happen if these decisions were granted, and indeed the brief, joint brief filed by the Attorneys General of all the states—and I remember correctly, it was signed by General Almond—said that if this Court broke down exclusion and segregation in the graduate and professional schools, or maybe it was the law schools—I know exactly what they said—the schools would have to close up and go out of business. And the truth of the matter—and we cite in our record the figures that show that since that decision there are now 1500 Negroes in graduate and professional schools in heretofore all white universities, 1500 at least in twelve states, one of the states significantly out of the group being South Carolina. It is also pointed out in our brief a very long list of private schools in the South which as a result, with no legal binding upon them at all, do so.

It is also significant that in states like Arkansas—I could name four or five—without any lawsuit, segregation was broken down. The truth of the matter is that I for one have more confidence in the people of the South, white and colored, than the lawyers on the other side. I am convinced they are just as lawful as anybody else, and once the law is laid down, that is all there is to it.

In their argument on the congressional debate, they do a job too well. They say no education was intended to be covered by the Fourteenth Amendment. Obviously, that is not correct, because even their pet case, *Plessy* v. *Ferguson*, recognized that education was under the Fourteenth Amendment.

Then Mr. Moore goes to great detail to point out that the Fourteenth Amendment could go no further than the Civil Rights Act, and he emphasized yesterday and he emphasized today that, in addition to that, there were some rights that were deliberately excluded. His language is "clearly eliminated," and then he says, "Suffrage was clearly not intended to be included."

And how anyone can stand in this Court, having read the opinion of Mr. Justice Holmes in the first Texas Primary case, and take that position is beyond me, because that decision, in the language of Mr. Justice Holmes, said specifically that they urged the Fourteenth and Fifteenth Amendments, but we don't have to get to the Fifteenth Amendment because the Fourteenth Amendment said that the states can do a lot of classifying which we, speaking as a Court, can't seem to understand, but it is clear that race cannot be used in suffrage. So I don't see the purport of any of that argument.

MR. JUSTICE FRANKFURTER: Do you think the Fifteenth Amendment was redundant, superfluous?

MR. MARSHALL: No, sir, definitely not.

MR. JUSTICE FRANKFURTER: So if it had not been there, it would have been included in the Fourteenth?

MR. MARSHALL: I think definitely, under the reasoning of Mr. Justice Holmes, it would have been.

MR. JUSTICE FRANKFURTER: That is superfluous; then it is an extra.

MR. MARSHALL: It is an extra.

MR. JUSTICE FRANKFURTER: An extra.

MR. MARSHALL: I just—maybe it is timidity, but I just can't say a constitutional amendment is superfluous; but if you are asking me if I think Mr. Justice Holmes was absolutely correct, definitely, yes, sir.

That brings me to the other point which I want to make clear. It involves the questions yesterday about our position as to the *McLaurin* case, and I am a little worried in thinking of what I said yesterday as to whether the position was absolutely clear. And it is suggested today that the position we take in this case is a negation of the *McLaurin* case, and as to whether or not the *McLaurin* case

is a negation of the "separate but equal" doctrine, and it is argued that McLaurin had a constitutional grievance, because he was denied equality; but in the *McLaurin* case the answer is that the only inequality which he suffered is that which is inherent—emphasis on "inherent," if you please—in segregation itself.

He had the same schools, same everything else, but he had this segregation; so that is inherent. And if McLaurin won because he was denied equality, it is also true and much more important that he suffered constitutional inequality in the enjoyment of these identical offerings.

And it follows that with education, this Court has made segregation and inequality equivalent concepts. They have equal rating, equal footing, and if segregation thus necessarily imports inequality, it makes no great difference whether we say that the Negro is wronged because he is segregated, or that he is wronged because he received unequal treatment.

We believe that what we really ask this Court is to make explicit what they think was inevitably implicit in the *McLaurin* case, that the two are together. But most certainly I do not agree, and I want to make it clear, that the *McLaurin* case is under the one-way, and I think that with this understanding the Court has no difficulty in our position at least.

And finally, I would like to say that each lawyer on the other side has made it clear as to what the position of the state was on this, and it would be all right possibly, but for the fact that this is so crucial. There is no way you can repay lost school years. These children in these cases are guaranteed by the states some twelve years of education in varying degrees, and this idea, if I understand it, to leave it to the states until they work it out—and I think that is a most ingenious argument—you leave it to the states, they say; and then they say that the states haven't done anything about it in a hundred years, so for that reason this Court doesn't touch it.

The argument of judicial restraint has no application in this case. There is a relationship between Federal and State, but there is no corollary or relationship as to the Fourteenth Amendment. The duty of enforcing, the duty of following the Fourteenth Amendment is placed upon the states. The duty of enforcing the Fourteenth Amendment is placed upon this Court, and the argument that they make over and over again to my mind is the same type of argument they charge us with making, the same argument Charles Sumner made. Possibly so.

And we hereby charge them with making the same argument that was made before the Civil War, the same argument that was made during the period before the Civil War, the same argument

that was made during the period between the ratification of the Fourteenth Amendment and the *Plessy* v. *Ferguson* case.

And I think it makes no progress for us to find out who made what argument. It is our position that, whether or not you base this case solely on the intent of Congress, or whether you base it on the logical extension of the doctrine as set forth in the *McLaurin* case, on either basis the same conclusion is required, which is that this Court makes it clear to all of these states that in administering their governmental functions, at least those that are vital not to the life of the state alone, not to the country alone, but vital to the world in general, that little pet feelings of race, little pet feelings of custom—I got the feeling yesterday that when you put a white child in a school with a whole lot of colored children, the child would fall apart or something. Everybody knows that is not true. Those same kids in Virginia and South Carolina—and I have seen them do it—they play in the streets together, they play on their farms together, they go down the road together, they separate to go to school, they come out of school and play ball together. They have to be separated in school.

There is some magic to it. You can have them voting together, you can have them not restricted because of law in the houses they live in. You can have them going to the same state university and the same college; but if they go to elementary and high school the world will fall apart. And it is the exact same argument that has been made to this Court over and over again, and we submit that when they charge us with making a legislative argument, it is in truth they who are making the legislative argument.

They can't take race out of this case. From the day this case was filed until this moment, nobody has in any form or fashion, despite the fact I made it clear in the opening argument that I was relying on it, done anything to distinguish this statute from the Black Codes, which they must admit, because nobody can dispute, say anything anybody wants to say one way or the other, the Fourteenth Amendment was intended to deprive the states of the power to enforce Black Codes or anything else like it. We charge that they are Black Codes. They obviously are Black Codes if you read them. They haven't denied that they are Black Codes, so if the Court wants to very narrowly decide this case, they can decide it on that point.

So whichever way it is done, the only way that this Court can decide this case in opposition to our position is that there must be some reason which gives the state the right to make a classification that they can make in regard to nothing else in regard to Negroes; and we submit the only way to arrive at this decision is to find that for some reason Negroes are inferior to all other human

beings. Nobody will stand in the Court and urge that, and in order to arrive at the decision that they want us to arrive at, there would have to be some recognition of a reason why, of all of the multitudinous groups of people in this country, you have to single out Negroes and give them this separate treatment.

It can't be because of slavery in the past, because there are very few groups in this country that haven't had slavery some place back in the history of their groups. It can't be color because there are Negroes as white as the drifted snow, with blue eyes, and they are just as segregated as the colored man. The only thing can be is an inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that stage as is possible; and now is the time, we submit, that this Court should make it clear that that is not what our Constitution stands for.

Thank you, sir.

MR. CHIEF JUSTICE WARREN: Mr. Rankin?

ARGUMENT OF J. LEE RANKIN, ESQ., ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

MR. RANKIN: May it please the Court:

As this Court well knows, the United States appears in this action as a friend of the Court, and the only excuse for us to be here is because of the assistance that we may be able to give the Court in regard to this problem before it.

When these questions were asked by the Court as a part of the request for reargument in this matter, we approached them with the idea of how much we might be able to help the Court in answering the questions, and we felt it incumbent upon us in the Department of Justice to try to arrive at the truth in the background and the history as the Court inquired for it. And we saw it as our duty to approach that history much as historians would, and try to draw from it the facts just as objectively as any party could on either side, for someone who had no personal interest in the case. That was the approach that we made to this case in trying to help the Court in the answer of these questions.

We have been chided because we did not come forth in our brief in answer to the questions with certain history. We did not conceive it as our duty to develop any history. We thought it our duty to present what the history showed, whether it hurt or helped either side.

We have no apology to Your Honors or to the country for the manner in which we have developed the history involved in this case and the Fourteenth Amendment; and, on behalf of the Attorney General and myself personally, I want to express publicly my

appreciation for the work that was done, as some of you well know, by others and myself on this, in order to present a factual history of the entire matter that the Court could rely on and not have to do independent work in regard to it.

But these questions were not in vain. There are great lessons that can be drawn from them, and they are important to this Court in helping them to decide this, one of the greatest cases that this Court has had before it. Why do these questions seem important? Because they clean out some of the unimportant elements, some of the claims that cannot be sustained by history, and leave the Court with the naked problems of what this Amendment means to every American citizen who loves this country and this Constitution.

Many claims have been made in these cases about the acts of Congress, and the only way to determine the validity of those claims is to look at what Congress did, what was said about them, and we have rejected masses of material and tried to boil it down. I apologize for the size of the work we left for the Court, but it is the best we could do, and we tried to eliminate all we could. However, in looking at what happened, we have tried to follow the standards this Court has laid down in many decisions—*Maxwell* v. *Dow* is one of them—in which the Court would not pick out an isolated remark, part of debates, something of the opponents or the proponents, in connection with a certain piece of legislation, and even that rule did not apply in constitutional matters. And we have rejected purposely those various statements, but pointed them out to the Court so the Court could consider them for what they are worth.

But we say, when Congress considered the question of segregation in the schools in the debates that extended over a period of months in this matter, that you cannot rely on those statements as showing that Congress decided this particular question before the Court. They are too sketchy under the rules laid down by this Court to rely on. There we get to the middle of the road. We are not satisfactory to either side. We turn up with conclusions that the evidence does not sustain the plaintiff's position nor the position of the states. But regardless of who it hurts, it is there and it cannot be overlooked.

Now to deal directly with a few of these problems, let us look at what happened in the District of Columbia, and on its face the fact that two enactments were passed by the same 39th Congress dealing with this question of schools and separate schools in the District might seem of grave importance as to the interpretation by Congress. But we show you what happened. We show the consideration or lack of it that Congress gave to that particular problem.

The separate schools question was considered by Congress back in 1862. The 39th Congress considered only two things. One was whether to give three lots for the use of the colored schools in the District, and the other was to allocate certain funds. There were no committee reports, no participation by the members of the Reconstruction Committee. There was no debate, and we show you on page 71 in the supplement to our brief the detail of the material that Congress considered on the same day.

Now gentlemen, with your experience I am sure that Your Honors know that in this particular instance the history is of great help to this Court, because it does not show that Congress determined at that time that segregation should be continued as the policy under the Fourteenth Amendment to the Constitution. Congress just did not consider that matter, and they did not have time for it, and it wasn't the way that those matters are determined by Congress as we well know, and the things that this Court considers in regard to it.

In addition to that, we must keep in mind, as the Court well knows in connection with the *Thompson* case, that at that time Congress did not have the same responsibility in the administration and conduct of the District of Columbia that it has today; that it had its own government; and it wasn't until 1871 that the change was made where Congress undertook the detailed supervision of the District.

So we are saying that that event in itself doesn't show the Congress understood that the Fourteenth Amendment was to permit segregation in the schools of this nation. Then we turn to the action of the states.

MR. JUSTICE FRANKFURTER: Before you do that, Mr. Attorney General, I suppose you would say that the action since 1871 is too *ex post facto* to be relevant.

MR. RANKIN: Very largely, Your Honor. It all is removed from the scene. Changes have occurred in Congress over the years. The framers were not participants in most of that action, and the Fourteenth Amendment was not involved in those questions.

MR. JUSTICE FRANKFURTER: But it could in any event be involved; but I think, so far as any inference is to be drawn from what Congress did or did not do, the early legislation, you put to one side for the reason that you have given. That would be significant because Congress was then contemporaneous; it was the same Congress about the same time as those that submitted the Fourteenth Amendment. But since 1871 Congress has continued to pass legislation year after year acknowledging or authorizing—

which is it—acknowledging or authorizing segregation in the District, both. Whatever it is, there have been appropriations recognizing the fact of segregation, and such has been the policy of the District; is that correct?

MR. RANKIN: That is right.

MR. JUSTICE FRANKFURTER: To this day.

MR. RANKIN: That is right.

MR. JUSTICE FRANKFURTER: From 1871, when Congress had sole charge, you would say we can't attribute constitutional verification to Congress passing the appropriations act.

MR. RANKIN: That is correct. That is our position.

MR. JUSTICE REED: I understood you to attribute it to after 1896. What about the period from 1866 until '96, where the question hadn't been raised, where they went ahead and appropriated for the District schools which had segregation? Does that give any indication to you of the attitude of the Congress or the meaning of the Fourteenth Amendment?

MR. RANKIN: We don't consider that there is anything to show that that was an interpretation with knowledge as required by the opinions of this Court in the past concerning the meaning of the Fourteenth Amendment with regard to segregation in the schools in the District or anyplace else.

When you go back into the—

MR. JUSTICE REED: What about the 1875 Act?

MR. RANKIN: When you go into the history of the 1875 Act, as we have set out in detail, the consideration before Congress was whether or not the law would be passed with a provision for mixed schools or with an amendment that was offered for separate and equal. Both of them lost. How you can possibly draw any inference from such action that one side won that contest rather than the other is what we cannot follow. We think that Congress, by not enacting separate and equal, and failing to enact for mixed schools, left the question in abeyance as far as that particular action is concerned.

MR. JUSTICE REED: Or left it to the states.

MR. RANKIN: No, I think it left it to the Fourteenth Amendment, which had already been passed by the Congress and ratified by the states, and it was appreciated at that time that this Court would have the problem to protect those rights as they were declared in section 1.

MR. JUSTICE REED: The Fourteenth Amendment, in the light of the history that had gone on from 1866 to 1875—

MR. RANKIN: Well, that history as we saw it—

MR. JUSTICE REED: I mean the history of the states.

MR. RANKIN: Well, the history of the states, if the Court will look—

MR. JUSTICE REED: You are coming to that next?

MR. RANKIN: Yes, we will look into that picture.

MR. JUSTICE JACKSON: Before you go into that, isn't the one thing that is perfectly clear under the Fourteenth Amendment that Congress is given the power and the duty to enforce the Fourteenth Amendment by legislation? You don't disagree with that, do you? You believe that, don't you?

MR. RANKIN: No, there is no question but—

MR. JUSTICE JACKSON: And the other thing that is clear is that they have never done, have never enacted an act that deals with this subject.

MR. RANKIN: There is no question but what Congress has the power under section 5 to enforce the Fourteenth Amendment.

MR. JUSTICE JACKSON: And if the Amendment reaches segregation, they have the power to enforce it and set up machinery to make it effective. There is no doubt about that, is there, and it hasn't been done. Now, if our representative institutions have failed—is that the point?

MR. RANKIN: No, because this Court has, in our understanding, concurrent jurisdiction.

MR. JUSTICE JACKSON: Have you taken it over?

MR. RANKIN: No. You both have a responsibility, and neither one can give that responsibility up to the other, in our conception. There is a concurrent responsibility, and the Court has recognized it in numerous cases where it has interpreted and applied the Fourteenth Amendment. It has not waited for Congress to act under section 5, but it has looked at section 1 and the other sections of the Amendment to see what they meant, and the force of that language that was used at that time in adopting the intention and purpose of the framers as expressed, and tried to give a liberal interpretation to carry out the purposes that were pervading in the passing of the Amendment.

MR. JUSTICE JACKSON: I suppose that realistically the reason

this case is here was that action couldn't be obtained from Congress. Certainly it would be here much stronger, from your point of view, if Congress did act, wouldn't it?

MR. RANKIN: That is true, but there are many cases that the Court well recognized, I know, upon any reflection, and has in its opinions, that if the Court would delegate back to Congress from time to time the question of deciding what should be done about the rights, the constitutional rights of a party appearing before this Court for relief, the parties would be deprived by that procedure from getting their constitutional rights because of the present membership or approach of Congress to that particular question. And the whole concept of constitutional law is that those rights that are defined and set out in the Constitution are not to be subject to the political form which changes from time to time, but are to be preserved under the holdings of this Court over many, many years by the orders of this Court granting the relief prayed for.

MR. JUSTICE FRANKFURTER: The thing to be said—or is it to be said fairly?—that not only did Congress not exercise the power under section 5 with reference to the states, but in a realm which is its exclusive authority, it enacted legislation to the contrary.

Now, I understand the argument that from 1871 to date you do not get that which has contemporaneous significance; but it does indicate—or does it indicate; I ask you that—any understanding on the part of successive congresses that segregation was not ruled out by the Constitution, not the Fourteenth Amendment.

I take it that whatever you have to say about the District you will be saying during this hour?

MR. RANKIN: Yes.

MR. JUSTICE FRANKFURTER: The Fourteenth Amendment apart, which does not bind the Federal Government, of course, but whatever is to be drawn out of the Fifth Amendment through the action of Congress for what is now eighty years has contradicted the assumption that the Fourteenth Amendment, as reflected by the due process of the Fifth, bars such action.

MR. RANKIN: Well, we think that the action regarding the District back in 1862, when the Amendment was before the 39th Congress, does not give any bearing upon the action in adopting the Fourteenth Amendment.

MR. JUSTICE FRANKFURTER: I understand that. Because after all, what precedes, as Justice Bradley said in the *Legal Tender Cases*, when we got that Amendment and the antecedent—but

it does seem to be underlying some implicit belief on all the congresses from 1871, that such legislation does not contravene the deepest presuppositions of our Constitution, or am I overstating what that means, or are you saying that legislation does not mean anything but what it does; it just segregates, that is all?

MR. RANKIN: Well, not exactly. It seems that you have to find a conscious determination by Congress that segregation was permitted under the Fourteenth Amendment.

MR. JUSTICE FRANKFURTER: You think legislation by Congress is like the British Empire, something that is acquired in a fit of absentmindedness?

[Laughter.]

MR. RANKIN: I couldn't make that charge before this Court, and I wouldn't want to be quoted in that manner. There might be times that that occurred, but I think Congress is well aware that when that does happen, the subject matter does not deserve greater consideration than it has at the moment, and that it is ordinarily pretty well taken care of under the processes. With regard to the entire question, it seems that there should be another factor that the Court should consider in this matter.

MR. JUSTICE REED: Are you going to discuss later the action of the states?

MR. RANKIN: Yes. I will proceed now to the question of the legislation of the states in regard to this matter.

MR. JUSTICE REED: The issue of the states, the seceding states?

MR. RANKIN: Yes.

In the ratification of the Amendment and the readmission of the seceding states, much is assumed in connection with that by the parties. We find that the evidence, the record of history, does not sustain that. There were no references to the Fourteenth Amendment and its effect, and the history of the times shows why there were not.

We must look back to that period and recognize the condition of the entire country, and particularly the South, that had just been occupied, was in the process of occupation; the condition of the Negroes who were entirely illiterate, but were freedmen, and the problem of what to do about their education; and the many things dealing with them in the situation where they had just been slaves. We must remember the condition of education throughout the North. It was far different than the progress that has been made up to this day. And that in the South there were very few public schools. The public schools were largely for the

poor, and other people went to the private schools, and there was a prohibition against the Negro going to any school because it might make him rebellious.

Now, when you take all of that into account and consider what happened at that time, it seems to us that it is very revealing, but you can't draw any conclusions from that legislation that there was any conscious understanding that the Fourteenth Amendment provided or permitted segregation in the public schools.

A perfect example is shown in the appendix to our brief on page 352, where we set out the history about South Carolina. There was a State where reconstructionists, scalawags, the Radical Republicans, carpetbaggers, and all of the others that have been remarked about here, had control of the convention that ratified this Amendment. And you recall the circumstances. They had to do certain things, three things in order to get back into the Union.

Now, arguments were made at great length about the terms of the Constitution for the State of South Carolina, and during those arguments much was said about the schools, and the facts were that the Negroes had taken over the public schools, such as they were, in the important cities at that time in South Carolina, and had them in their possession, to try to teach the Negroes something, because they had to start from scratch. And during those debates, when the question was presented about whether they should have mixed schools or separate schools, nothing was said about the effect of the Fourteenth Amendment, although it was provided in the Constitution that there could be no distinction in the schools based upon race or color.

Now, that is in a convention that was under complete control of the Reconstruction forces, and we say from that you just cannot properly say that the history shows that anyone had any conscious understanding at the time those various acts were passed that the Fourteenth Amendment would permit segregation in public schools. It just wasn't there, because in those debates, as shown in the appendix again, all they would have had to say was, "Look at the Fourteenth Amendment; it prohibits this very thing."

Instead of that, one of the parties who was in control of the schools actively trying to get education for the Negroes said, "Maybe the Negroes will attend the same schools as the whites, or the whites will come into the schools of the Negroes now in our possession." Nobody saw fit to say anything about the effect of the Fourteenth Amendment.

Now, if you will look back at the history of the schools in the North and also throughout the South, you will see that everybody was involved in the problem of, "What are we going to do to educate the Negro? He is a free man, he is a part of our citizenry like

any white man. He has no background for education. Many of them are of mature years, as well as the children." And they were so involved in that problem that the effect of the Fourteenth Amendment and whether it permitted or would allow segregation in the public schools was just not discussed by anyone. And I don't think you can draw from that any assumption that by those legislative acts, when there was not any discussion of the problem, that it was intended or understood by anyone that the Fourteenth Amendment would permit, in spite of its language, segregation of the Negro in the public schools.

MR. JUSTICE JACKSON: Mr. Rankin, I would like to ask you this: You have studied this much more than I have had a chance to, and I almost hesitate to ask a question in a case of this kind because people jump to the assumption that if you want information it is stating a judgment that I have.

How do you account for the decisions of the State of New York, for example, holding the Amendment did not reach this question, when there was a State where there was no problem of numbers—there were few Negroes—the court that last decided this was predominantly a Republican court, predominantly from upstate New York, where the underground railway had plenty of stations, all kinds of things to fight the war, a popular war? How do you account for judges like that not understanding what this Amendment meant? The very section that promulgated it—it was a northern product, there was no getting away from that. You studied the history of this a great deal. How do you account for those interpretations?

MR. JUSTICE REED: May I ask this question before you answer that, also the question of the legislatures of the northern states on the Amendment, the same legislatures in some instances passed legislation which recognized segregation, allowed segregation amendments?

MR. RANKIN: Well, first if I might answer in regard to the courts, apparently there was no detailed study of the history and background of the Fourteenth Amendment in connection with some of the decisions of the cases.

MR. JUSTICE JACKSON: You can't say that of the New York case. It is one of the—

MR. RANKIN: And the Court will find that in later periods there was reliance placed upon *Plessy* against *Ferguson* and some of the earlier cases where the history was not reviewed in such detail; that will explain fully the decisions that the court made without examining the question in detail.

MR. JUSTICE JACKSON: These men had lived with the thing. They didn't have to go to books. They had been through it. They didn't have to go to books any more than we have to read books on what is going on today—

MR. RANKIN: Well, if the Court is looking—

MR. JUSTICE JACKSON: And the Grand Army of the Republic was the strongest force in that community, don't make any mistake about that.

MR. RANKIN: If the Court is looking for someone who knew, who lived through the period, to give it aid in regard to this problem, I think it has to look no further than its own decisions; and going back to the *Slaughter-House Cases* and the *Strauder* case, Justice Miller comments upon the fact in the *Slaughter-House Cases* that it was within five years of the time when all of this occurred and that they had the matter fresh in their minds; and then he reviews the background, the history and the detail and the reasons for the Amendment and what they were trying to reach in the greatest of detail; and we recommended to the Court something superior to anything else that can be found with regard to a fresh appraisal of the basis for the Fourteenth Amendment and the history back of it.

In the *Strauder* cases we have a later period, but we do have a period not too far removed, and a thorough consideration of what the Fourteenth Amendment means in all of its various reaches.

MR. JUSTICE JACKSON: Then the assumption is that they didn't understand what it was about?

MR. RANKIN: Well, in those days—

MR. JUSTICE JACKSON: That is what it comes to, isn't it?

MR. RANKIN: It was considered that education as such was a state matter, and we had the question of whether schools would be provided as public schools. We also had a good portion of the problem handled by private schools. We had areas where there were mixed separate schools and also where there was no restriction on attendance, and the two races did mix, but there was no provision legally for such mixture.

MR. JUSTICE REED: So the very men that sat on the *Plessy-Ferguson* case on this Court were thoroughly familiar with all the history in that case.

MR. RANKIN: Well, the Court in that case was not giving any consideration to this particular situation. It was considering the question of segregation in public utilities and railroads.

MR. JUSTICE REED: That is the difference, isn't it?

MR. RANKIN: There is a very material difference in the question of whether or not segregation is to be permitted in public schools furnished by the state itself and the monies of the state, although this Court has recognized that that may be and is a privilege, but that the state has no power to restrict that privilege based upon race in regard to the schools. If it is going to provide education at all, it must provide it equally to the citizens. It does not have to provide education, and to that extent it is a privilege; but if it provides it at all, it must do it equally to all citizens.

Apparently that was not fully understood, the difference between it being privileged and the later decisions of this Court in regard to the requirement that even such a privilege had to be granted to citizens alike; but we think that question is now decided by this Court, that it cannot be contravened at this time.

Regarding the question of the power of the Court, we do not think this is a matter that involves the right to abolish segregation in the public schools. It is a question whether or not the Fourteenth Amendment permits the state to determine that it shall have segregation as an order of the state in the conduct of its public education, and that, we think, is within the peculiar competency of this Court to determine.

It is a civil right to have education on the same basis as every other citizen. When Congress deals with these matters, it must deal with them generally, and the courts deal with them specifically. The courts deal with whether or not a certain litigant before it is entitled to relief, has not been permitted to have the rights he was entitled to by the wording of the Constitution, and this Court has never seen fit to determine that a man has been denied his constitutional rights and then referred him to Congress to see what type of relief he should be granted from it.

MR. JUSTICE DOUGLAS: The Department of Justice goes no further than to say that, first, we can decide this case, these cases, and second, we can decide them under what, on the basis of history?

MR. RANKIN: No, Your Honor, no. Our position is that the history helps the Court in showing that some of the conclusions that have been asserted from history are not borne out. The history as related by the *Slaughter-House Cases* and the *Strauder* case is the history that the Department of Justice found to be correct in its review of the entire matter. That by reason of that history it is shown that the pervading purpose of the Fourteenth Amendment was to establish that all men are equal, that they are equal before the law, that they are entitled to equal protection of the law, that

no distinction can ever be made on the basis of race or color; and that therefore this Court, in applying the rules it has laid down in many cases looking to that pervading purpose, can find only one answer to this case, and that is, when they stand before the bar of this Court and say that "The reason that we want to segregate black children from white children is because of racism, just because of their color," that the Fourteenth Amendment does not permit that to happen, because if there was anything the Fourteenth Amendment tried to do for this country, it was to make it clear that no discrimination could ever be made based upon race or color; and that is the position of the Department of Justice in this matter.

MR. JUSTICE FRANKFURTER: That is your third conclusion, on page 186 of your brief, isn't it?

MR. RANKIN: Yes.

We think that the history is of great help to the Court in regard to the basic question of the rights of the parties, and this Court has the problem of deciding two things: first, whether or not the constitutional rights have been abridged, and we think that is clear. The history shows the pervading purpose.

MR. JUSTICE DOUGLAS: The provision that Justice Frankfurter referred to doesn't say that, in my opinion. I am just inquiring to find out what it says. You start on page 185; the Government brief reads as follows:

> . . . the Government respectfully suggests to the Court that, if it holds school segregation to be unconstitutional, the public interest would be served by entering decrees in the instant cases providing in substance as follows: (1) That racial segregation in public schools be decreed by this Court to be a violation of rights secured by the Constitution.

I would think that would be obvious, that if the Court holds segregation would be unconstitutional, that we would—and it was within the judicial competence, it would be within our duty to enter an appropriate decree to that effect. But my question went further than that. It was: What are the merits, whether the Department of Justice had taken a position?

MR. RANKIN: Yes. I think Your Honor is correct in that regard, and the way I answered the question was due to the formulation of the question. But in order to answer your question specifically, it is the position of the Department of Justice that segregation in

public schools cannot be maintained under the Fourteenth Amendment, and we adhere to the views expressed in the original brief of the Department in that regard. We did limit our brief in our—

MR. JUSTICE DOUGLAS: I just wanted to clear up that confusion in my mind.

MR. RANKIN: Yes.

MR. JUSTICE FRANKFURTER: You say this is the kind of a question where you are responding to the inquiry of the Court as to what the form of the decree should be. The Department has already, in its prior brief and in this brief, if I can interpret the entire brief, made its position perfectly clear that it thinks segregation is outlawed by the Fourteenth Amendment, and on pages 186 and 187 you indicate the kind of a decree that should follow such a declaration, is that correct?

MR. RANKIN: That is correct. The problem about the questions that the Court presented that gave us the greatest trouble was the question of relief. Because of the statements of the Court, there are a number of decisions that, when a person has had his constitutional rights abridged, that he had a present and personal right to immediate relief.

MR. JUSTICE REED: Are you leaving the third question?

MR. RANKIN: I thought I had dealt with it, but I will be glad to try to answer any further questions.

MR. JUSTICE REED: I did not quite understand what you were saying in regard to that. The third question is: On the assumption the answers to question 2(a) and (b) do not dispose of the issue, is it within the judicial power of the Fourteenth Amendment to abolish segregation? Now, that is saying that the argument over history is inconclusive, as I understand it.

MR. RANKIN: That's right.

MR. JUSTICE REED: Assuming that that is inconclusive, then does this Court through its own power have the right—is that the belief of the Government—have the power to declare segregation unconstitutional?

MR. RANKIN: The position of the Government is that the Court does have the power and that it has the duty.

MR. JUSTICE REED: Where do we get that power, and how?

MR. RANKIN: By reason of the power given to it under the Constitution and by act of Congress, and the—

MR. JUSTICE REED: So far as the Fourteenth Amendment is concerned by the very words of the Fourteenth Amendment?

MR. RANKIN: Yes, by reason of section 1, which says that "These rights shall not be denied by any state," and in the interpretation of that language the Court, in applying it, has the right to find, and according to its decisions will find, that the parties are entitled to this.

MR. JUSTICE REED: Regardless of the view of Congress, regardless of the history of it, which you say is inconclusive, that the wording covers segregation?

MR. RANKIN: I think the best answer to that would be the history in regard to—

MR. JUSTICE REED: Is that what we are trying to determine now?

MR. RANKIN: Yes.

MR. JUSTICE REED: It could very well be. That is what is striking to me: If you lay aside the history, lay aside what has happened, and the intention as expressed in Congress, then we have nothing left except the bare words.

MR. RANKIN: That is correct.

MR. JUSTICE REED: And those you say require the invalidation of all the laws of segregation?

MR. RANKIN: Yes. And the Court has in other cases seen fit to examine the question and, not finding any specific language about, for instance, jury trials, has found that the Fourteenth Amendment would not permit any abridgment of those rights by reason of race or color. And this Court has said many times that it does not have to find that a particular matter or subject was examined by Congress.

MR. JUSTICE JACKSON: We have a statute on juries. Congress passed a statute on juries.

MR. RANKIN: Yes.

MR. JUSTICE JACKSON: So it is clear that Congress acted on that subject.

MR. RANKIN: We don't have any statute, as I recall, about petitions or freedom of speech; but this Court has not hesitated to protect the provisions of the Constitution and the litigants before this Court in regard to them; and the history also does show that the framers of this constitutional amendment desired to avoid having it submitted to Congress, and they recognized that they

might lose control of the Congress in the future, and they wanted to frame their change deliberately, section 1, in order to make certain that it wouldn't be a question for Congress, because you will recall the history that we relate.

Originally, it was to empower Congress, in section 1, to take certain action; and they feared and they expressed the fear that Congress by that might change it and they would lose control, and they said maybe they can get a majority, but two-thirds they will never get; and so they provided the specific right in such a form that it was like the provisions of the Bill of Rights. It was a declaration of a right that every citizen can look to and say, "That is mine, equality before the law."

MR. JUSTICE REED: Which clause of the Fourteenth Amendment of the first section is that applicable to, to any person within its jurisdiction, providing equal protection of the law?

MR. RANKIN: We think that there are two clauses that are controlling. One is the equal protection of the laws and the other is the depriving of any person of life, liberty or property without due process; both of them. Congress deliberately put the words so that no state could deny them.

MR. JUSTICE REED: And is this a denial of liberty or property, segregation?

MR. RANKIN: Well, I would think it would be a denial of part of liberty rather than property.

MR. JUSTICE REED: It has to be one or the other or both, doesn't it?

MR. RANKIN: Yes, it could be a combination.

[Whereupon, at two o'clock p.m., the Court recessed, to reconvene at two-thirty o'clock p.m. the same day.]

AFTERNOON SESSION

ARGUMENT OF J. LEE RANKIN, ESQ.,
ON BEHALF OF THE UNITED STATES,
AS AMICUS CURIAE—RESUMED

MR. RANKIN: May it please the Court:

I would like to deal briefly with the question of relief and try to give to the Court our points on that problem.

MR. CHIEF JUSTICE WARREN: Which problem is that, you say?

MR. RANKIN: The question of relief.

After the Court determines whether or not rights have been violated in these cases, then there is the question of the relief that should be granted. We do not regard lightly the question of presenting to this Court a policy of delaying at all the relief that should be granted to citizens of this country when constitutional rights are found to have been violated, as we feel that they have been in this case. However, upon careful study of the entire problem, we do think there are considerations that we can recommend to this Court that should be taken into account in the decision of these cases.

These cases do not deal only with the particular plaintiffs. The Court knows that they deal with certain classes, in addition to these plaintiffs. But beyond that, we think it is fair to take into account the fact that the precedents established by the Court in the decision of these cases will necessarily bear upon the educational systems of some seventeen states and the District of Columbia. There have to be adjustments to take care of the children attending these schools, and to provide them a program of mixed schools that will be adequate; and there will also have to be the problems of the administration and the various financial problems involved. It seems unrealistic not to take into account those factors, and that some time may be involved in providing for them.

We therefore suggest that it should be—the burden should be —upon the defendants to present and satisfy the lower court as to the extent of time that is necessary to make such an adjustment in the school system, and that plan should be presented to the Court, not for the purpose of determining at all the wisdom of the plan, but only to determine and satisfy that court that, according to criteria presented and set out by this Court, that the plan satisfies the constitutional requirements of our Constitution and its amendments.

We therefore recommend to the Court, although we do not think it is squarely in point, the history of the Court in regard to the *American Tobacco* case, and the possibility that this decree may lay out, at least in a measure, a plan for handling these cases in returning them to the lower courts for final disposition. We suggest a year for the presentation and consideration of a plan, not because that is an exact standard, but with the idea that it might involve the principle of handling the matter with deliberate speed.

MR. JUSTICE JACKSON: Mr. Rankin, may I ask you a question or two about this remedy you suggest: We have no state before us, have we? We have several school districts.

MR. RANKIN: Yes, that is correct.

MR. JUSTICE JACKSON: I suppose that, even if we said that the state statutes or state constitutional provisions authorizing segregation were unconstitutional, local custom would still perpetuate it in most districts of the states that really want it; I assume that would be the case, would it not?

MR. RANKIN: We do not assume that once this Court pronounces what the Constitution means in this area that our people are not going to try to abide by it and be in accord with it as rapidly as they can.

MR. JUSTICE JACKSON: I do not think a court can enter a decree on that assumption, particularly in view of the fact that for 75 years the "separate but equal" doctrine has prevailed in the cases that came before us within the recent past, indicating it still had not been complied with in many cases. The only people we can reach with the judicial decree are the people who are before us in the case.

MR. RANKIN: That is correct.

MR. JUSTICE JACKSON: So that if it is not acquiesced in and embraced, we have to proceed school district by school district; is that right?

MR. RANKIN: Well, this Court traditionally handles each case as it comes before it.

MR. JUSTICE JACKSON: Yes. It means that private litigation will result in every school district in order to get effective enforcement; and that is why, I suppose, this "separate but equal" doctrine has never really been enforced, because many disadvantaged people cannot afford these lawsuits. But the judicial remedy means just that, does it not, lawsuit after lawsuit?

MR. RANKIN: Well, it is probably true in every Fourteenth Amendment case that comes before the Court, each litigant has to come and say, "My rights have been infringed, and I have to be provided a remedy."

MR. JUSTICE JACKSON: That is right; that is the nature of judicial process; that is why in some cases it has been necessary to set up something like the SEC to enforce individual rights in security transactions, and the Interstate Commerce Commission.

But what I do not get in your statement here are any criteria that we are to lay down to the lower court, in your view, to determine what shall be taken into consideration. Now, you mention the antitrust cases, but we have been fifty years in interpreting the antitrust cases in this Court, laying down the criteria, the standards. Some districts may have to have bond issues; some may

have to submit to a vote; commissioners may resign; no commissioners would take the job—I wouldn't want it, to be caught between these forces.

What criteria are we going to lay down? I am all for having the district courts frame decrees and do all the rest of the work that we can put on them; but what are we going to tell them: "This is something different from antitrust. This is something that hasn't been before"? What are we going to do to avoid the situation where in some districts everybody is perhaps held in contempt almost immediately because that judge has that disposition, and in some other districts it is twelve years before they get to a hearing? What criteria do you propose?

MR. RANKIN: If I may try to answer some of the questions that Your Honor—

MR. JUSTICE JACKSON: It is all one question: What are the standards?

MR. RANKIN: In the first place, I do not think the country would ever be satisfied with anybody but the Supreme Court saying what the Fourteenth Amendment means; and, secondly—

MR. JUSTICE JACKSON: We would not be, anyway.

MR. RANKIN: No.

[Laughter.]

MR. RANKIN: Secondly, I think that this Court does not have the duty or the function to try to determine what is a wise educational policy for each one of the various school districts in the country.

MR. JUSTICE JACKSON: I am with you there.

MR. RANKIN: It has the duty and the obligation to say that when the Constitution says that men shall be equal before the law, and the states shall regard them as equal in all of the various things that it does for them, that it cannot take one group of people and say, "You shall be separated, just because of your color, from another group," and that is not equality.

MR. JUSTICE JACKSON: That leads you squarely to Mr. Marshall's position that they have the right; children are getting older, they get out of school before they get this right and therefore it should be done; and then you say there are some conditions that should postpone that. Now, what is to be taken, financial conditions, unwillingness of the community to vote funds? What are the conditions that the lower court should consider?

MR. RANKIN: I think that that problem will have to be tried, as these matters are constantly before the lower courts and the federal courts, in the determination as to whether or not the equities of the particular situation are such that the defendant has established the burden that it is unreasonable under those standards to require them to act more rapidly than they propose, and those standards are well-established as a part of our judicial process and experience, and in the statements of this Court.

MR. JUSTICE JACKSON: I foresee a generation of litigation if we send it back with no standards, and each case has to come here to determine it standard by standard.

MR. RANKIN: Well, experience has demonstrated that the common law procedure of trying to decide each case as it comes before the court has been very wise in the experience of mankind, and many of the decisions, problems, are handled by the lower courts in the federal system, and never reach this Court for final decision.

MR. JUSTICE FRANKFURTER: Isn't there a difference between the applicable standard—it is one thing to talk about a standard—and another thing, the means by which this standard can be satisfied? This Court might decree that as between state and state, one state is maintaining a nuisance; but how a nuisance should be abated is a very different question.

It does not bring into play what standards you apply, but what, in fairness to the public interest which determines their decree, should dictate as to the time or the circumstances under which that standard of equality has been caused, assuming that the standard of equality here requires what the Government says it requires?

Certainly the fact that local people do not like the result is not any condition that should influence or in any wise influence the court; but whether you actually have a building in which children can go to school, and what distances there are, and things like that, like questions of abating a nuisance which the local fellow has to determine is or is not an evasion of the requirements, are one of those facts of life that not even a court can overcome.

MR. RANKIN: That is right.

MR. JUSTICE FRANKFURTER: If there is no appropriation by a legislature to build a school, the court cannot raise the taxes, the court cannot raise taxes by a court decree; or if a state makes a redistribution, the court cannot say, "You are indulging in educational gerrymandering."

MR. RANKIN: That is right.

MR. JUSTICE FRANKFURTER: I am not suggesting that I have exhausted the difficulties, because we still have them; but I do suggest that the standard is inherent in the very contention made by the Government, namely, that the standard of equality is not satisfied, indeed is violated, by a separation based merely on color. Assuming that is so, then I do not see how you can escape some of the things which worry my Brother Jackson, and I know raise some questions.

MR. JUSTICE JACKSON: They do not worry me; they will be worrying our children.

MR. RANKIN: May it please the Court, it is the position of the Government in this case, these cases are peculiarly those that deserve the most wise judgment of the members of this bench in the interests of this country. We are dealing with a problem of equality before the law for little children. We are busy in the educational process throughout the country in saying to these children that our Constitution means that all men, regardless of race, color or creed, are equal. None are better, none are worse, and to do—

MR. JUSTICE REED: I do not want to disagree with you on that, Mr. Rankin. But the problem we have here is: How is that to be implemented if the case should be decided that segregation was unconstitutional? These parties in these several cases have asked us for a decree of court that they be admitted to certain schools. Are they entitled to that in case of segregation?

MR. RANKIN: It is our position that, unless it can be shown by the defendants that that cannot be accomplished at once, in accordance with the precedents of this Court of granting them their present and personal rights when their constitutional rights are invaded, that they should have them.

MR. JUSTICE REED: Isn't it necessary in every school district at the present time that they have certain facilities, necessary facilities?

MR. RANKIN: That is right.

MR. JUSTICE REED: They will be admitted, I suppose, tomorrow, if they wanted to take them.

MR. RANKIN: We also take the position that it is reasonable for this Court to remand the matter to the lower court and to take into consideration, as equity courts have for generations, the problems that have to be dealt with in any inequities that can be presented; and that the lower court can properly then determine how rapidly a plan can be achieved to come within the criteria established by this Court and the requirements of the Fourteenth

Amendment; and that upon consideration of that, with all diligent speed, the lower court can enter a decree accordingly; and we visualize problems, but our courts have many problems, and they deal with those problems, and they weigh the various problems against the rights involved to accomplish the result in the best manner and as rapidly as possible.

MR. JUSTICE REED: Mention one problem, mention just one.

MR. RANKIN: Well, the question is whether or not children should attend tomorrow or the next school term; and I do not see any great problem in that for the federal district court.

MR. JUSTICE JACKSON: What is the criteria, though? What considerations would you say would justify postponing it until next term, if he has a present right to enter?

MR. RANKIN: Whether or not it was a deliberate attempt to evade the judgment of this Court of equity, or whether or not there are sound reasons that the action should be delayed because of transportation problems, whether or not the building is adequate, all of those matters—

MR. JUSTICE JACKSON: Suppose you have two schools; you have a school that has been used by white pupils, a pretty good school; you have a pretty poor one that has been used by colored children. What are you going to do? How are you going to decide—you either have got to build a new school or you have got to move some white people into the poor school, which would cause a rumpus, or you have got to center them all in the good school. What would the court take into consideration?

MR. RANKIN: Well, time after time the courts have said that they were not going to be bothered by the worries and difficulties of the litigants about meeting the requirements of the Constitution or other principles laid down by this Court; and I think those are the problems that have to be dealt with by the local school districts, and they would have the obligation to bring in a plan to accomplish this in accordance with the order of this Court as rapidly as could be obtained, and the details of it would not be a problem of the Court unless it found that the plan was unreasonable, that it was a deliberate attempt to evade the order of the Court, or that it was not equitably proper. Those standards—

MR. JUSTICE JACKSON: This is the most definite one, what appears on page 186, being the most definite thing that you have been able to devise?

MR. RANKIN: We explored the possibility of more definite decrees, but experience seems to dictate that the more definite courts

are, appellate courts, in trying to describe the activities of lower courts, the more often they are apt to not give them the opportunity to solve the problem in the best manner possible.

We conceived that the position and the duty of this Court is to establish the broad general principles of what could be obtained, what the Fourteenth Amendment meant with regard to equality in the attendance of schools: that there could not be a distinction because of race.

MR. JUSTICE FRANKFURTER: Am I right in assuming, if not in inferring—I do not think I have the right to infer—but in assuming that the Government in its suggestions as to the kind of a decree is not dealing with these cases on the assumption that what is involved are just these individual children; but you have indicated a while ago that underlying your suggestions lies the assumption that these cases will settle a widespread problem, as indicated by both Mr. Davis and Mr. Moore, involving, whatever it is, the relationship of ten million Negroes in seventeen states, and that it is not a question of putting one child in a school, but how to make a readjustment of an existing system throughout the states where this present practice prevails; is that right?

MR. RANKIN: Yes. We thought—

MR. JUSTICE FRANKFURTER: Rather than looking forward to having endless lawsuits of every individual child in the seventeen states for the indefinite future.

MR. RANKIN: We felt that your question, Your Honor, reached that far and, further, for the Department of Justice of the United States to close its eyes to the effect of the precedent established by this Court, if it should so decide, was not the help that this Court was entitled to receive; and that we should view the extent of the reach that the decision might properly obtain and try to give the help that we could in regard to it.

MR. CHIEF JUSTICE WARREN: Thank you, Mr. Rankin.

[Oral argument was concluded at 2:50 o'clock p.m.]