OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, ET AL.,

Appellants,

—vs.— No. 1

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

Appellees.

Washington, D. C.
Tuesday, December 8, 1953.

The above-entitled cause came on for reargument at 2:50 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:

ROBERT L. CARTER, ESQ., *on behalf of the Appellants.*

PAUL E. WILSON, ESQ., *on behalf of the Appellees.*

PROCEEDINGS

MR. CHIEF JUSTICE WARREN: No. 1, *Oliver Brown, Mrs. Richard Lawton, Mrs. Sadie Emmanuel* v. *Board of Education of Topeka, et al.*

THE CLERK: Counsel are present, sir.

MR. CHIEF JUSTICE WARREN: Mr. Carter?

OPENING ARGUMENT OF ROBERT L. CARTER, ESQ., ON BEHALF OF THE APPELLANTS

MR. CARTER: Mr. Chief Justice:

The facts in this case are similar to those involved in the cases preceding. The appellants are of elementary school age, of Negro origin, and they are required to obtain their elementary school education in segregated elementary schools maintained pursuant to the laws of the State of Kansas, and pursuant to the rules and regulations of the Topeka School Board.

The statute in question, whose constitutionality we are here attacking, is chapter 172 of the Kansas Statutes of 1949.

MR. JUSTICE FRANKFURTER: Is your case moot, Mr. Carter?

MR. CARTER: I hoped that I would get a little further into the argument before that question was asked.

[Laughter.]

MR. CARTER: We take the position, Your Honor, that the case is not moot. The government—the State, that is—takes the same position. We take that position because of the fact that, although the plan which I had hoped to get to when I discussed questions four and five—but if you want me to discuss it now, I will—the plan which is presently in operation, and the resolution of the School Board of Topeka under which they have decided that they will eliminate segregation in the elementary schools in Topeka—under this plan, two schools have been desegregated, and the Negro children have been admitted. However, with respect to the remaining schools, Negro children are still segregated.

The brief which the Topeka Board filed with this Court gives no indication as to how long they feel the plan which they now

have in operation will take before the other Negro children will be able to go to an integrated school system. We feel further that the case is not moot because the statute is still involved, and if the Court were without these problems being settled, we still have—while we have only one appellant here who has been admitted to the school, unsegregated school, pursuant to this plan—our position is that the case is not a moot case, and we have to address ourselves to the questions which the Court asked.

MR. JUSTICE FRANKFURTER: Is Topeka here apart from—I understand the State takes a different view. Is the immediate respondent-appellee here?

MR. CARTER: If Your Honor will remember, last year the Topeka School Board did not appear.

MR. JUSTICE FRANKFURTER: No.

MR. CARTER: This year they did not appear. So far as I know, they have no intention of appearing, if I am right in that—Mr. Wilson?

MR. JUSTICE FRANKFURTER: They have every intention of giving you what you want, is that it?

MR. CARTER: I beg your pardon?

MR. JUSTICE FRANKFURTER: They merely have the intention of giving you what you want, and not contesting your claim?

MR. CARTER: That is right.

MR. JUSTICE FRANKFURTER: That is what I call a moot case.

[Laughter.]

MR. JUSTICE JACKSON: Do I understand that the parties you represent here are now admitted to unsegregated schools?

MR. CARTER: No, sir. One of the appellants has been admitted to a school in the district in which he lives; that school has been opened to Negroes. Just one of the appellants has been admitted.

MR. JUSTICE JACKSON: What about the others?

MR. CARTER: The others are still attending the four segregated schools.

MR. JUSTICE JACKSON: You have clients, then, who are still subject to the rule of segregation?

MR. CARTER: Yes.

MR. JUSTICE JACKSON: But by the authorized pronouncemen

of the appellee, they will be admitted just as soon as it is physically or administratively or whatever the adverbs are—Topeka is able to admit them, and they do not contest your position.

MR. CARTER: That is true.

MR. JUSTICE FRANKFURTER: Kansas does contest?

MR. CARTER: That is right.

MR. JUSTICE FRANKFURTER: That is a different story. But Kansas is not a party.

MR. CARTER: Well, Kansas appeared in the court below as a party. It intervened in the court below as a party, specifically for the purpose of defending the constitutionality of the statute.

MR. JUSTICE FRANKFURTER: Yes. But abstractly to defend a statute does not give this Court jurisdiction to pass upon it.

MR. CARTER: Well, frankly, Your Honor, my only feeling on this is that, with respect to the plan which is in operation, the appellees have certainly indicated an intention—

MR. JUSTICE FRANKFURTER: And you do not question the good faith?

MR. CARTER: I certainly do not.

But the point that I think that we need to, that we have to have in mind, one, I think, insofar as the plan itself is concerned, I have serious questions about—with respect to the plan, as to whether this is the forum to raise that, I do not know. Also, I think, insofar as the other appellants are concerned, as I indicated, I do not know when they will be free from the imprint of the statutes, and it does not seem to me that at this point in the litigation I can say that the case is moot, when the State of Kansas—

MR. JUSTICE FRANKFURTER: Perhaps I ought to change my inquiry. I do not mean to shut off your argument. Having heard you before, it gives me pleasure to hear you again. But as I understand it, then, the position is that the respondent, the appellee, meets your claim, and you do not question the purpose is to meet it; and the question is whether, as a matter of formality, in fact the concession of your claim would be appropriately carried out.

So I suggest what you ought to say to us is that we ought to enter a decree sending the case back to the district court to enforce that which the respondent or the appellee concedes. Therefore, it is a question of the terms of the decree, is it not, in your case?

I am sure that you must feel it is a welcome thing if a board of education accedes to your wishes and of its own volition stops—it has a desire not to oppose desegregation, and I am sure that is

a welcome thing to you. I am not talking about the general question; I am talking about the specific thing, that the Board of Education has taken the position, and you just want to be sure that they will carry it out; is that right?

MR. CARTER: That is right. If that is the general view of the Court, I would certainly—

MR. JUSTICE REED: What about the State? As I recall it, the State was admitted as a party.

MR. CARTER: Yes, sir; the State was admitted as a party.

MR. JUSTICE REED: Or merely as a friend of the court.

MR. CARTER: No, they intervened as a party in the court below, defending the constitutionality of the statute under which the segregation was practiced and permitted and was in fact practiced in Topeka.

In the original—

MR. JUSTICE REED: And is there authority in the State of Kansas for the Attorney General as intervenor in the litigation in which part of the State is involved, or a city in the State, or the Board of Education?

MR. CARTER: No.

MR. JUSTICE REED: Has that been pointed out as to the Attorney General's right to intervene in the case and take charge of the case?

MR. CARTER: Well, that wasn't what occurred.

MR. JUSTICE REED: They did not approach it on that basis?

MR. CARTER: No, sir. I will explain briefly what happened. We went before a statutory court, and we attacked the constitutionality of the statute. The clerk of the court advised the Attorney General that a state statute was under attack. The Topeka Board appeared and defended their action and the statute, and the State appeared separately in order to defend the constitutionality of the statute. They are in that position here. They appeared in the original argument, and they reappeared—

MR. JUSTICE FRANKFURTER: They did not appear; we had to bring them in. We had to ask them whether they would let the thing go by default. They did not appear; they were not so anxious. They did not claim that they had a great right, that they had a right to defend here.

MR. CARTER: Well, I think—

MR. JUSTICE FRANKFURTER: Perhaps "cajoled" is a better word.

MR. CARTER: If you are expressing—if that is the view of the Court, Your Honor—

MR. JUSTICE FRANKFURTER: Mr. Carter, nobody knows better than you that I can speak only for one poor lone voice.

MR. CARTER: I certainly have no real desire to proceed with an argument.

MR. JUSTICE FRANKFURTER: But Mr. Carter, if all the appellants had been admitted—suppose all of them were in the position of this one child—

MR. CARTER: I would have no question about it.

MR. JUSTICE FRANKFURTER: Then the State would not say, "We want to be heard," could they?

MR. CARTER: No, sir. I would have no question about it if all the appellants had been admitted; I think that the question of mootness would have been clear. But my problem with respect to it is that some are admitted and some are not.

MR. JUSTICE FRANKFURTER: I understand it then, that it is a question of whether Topeka will carry this out as quickly with these other children as they have with Leah—

MR. CARTER: Leah Carter. And I also have no way of knowing whether this would be so, because the appellees do not appear before the Court, and the State cannot speak for the appellees with respect to this question. But if it is permissible, I would yield my time to the State, and see what the State has to say about this, and I would answer it, if that is permissible so far as the Court is concerned.

MR. JUSTICE JACKSON: You have the privilege of rebuttal under our rules, if he says anything that you wish to answer.

MR. CHIEF JUSTICE WARREN: Mr. Wilson, will you please address yourself to the question of whether it is moot or not?

ARGUMENT OF PAUL E. WILSON, ESQ.,
ON BEHALF OF THE STATE OF KANSAS

MR. WILSON: If it please the Court, it is our position that the case is not moot from our standpoint for several reasons. In the first place, the appellant has pointed out that only one of the group of appellants that counsel represents has been admitted to the integrated public schools of Topeka.

MR. JUSTICE REED: Why is that?

MR. WILSON: The Board of Education—may I preface this remark by pointing out that our statute is a permissive one. The local boards of education are authorized to make the determination on the local level as to whether separate or integrated school systems shall be maintained in cities of the first class. Now, as a matter of policy, and as a matter of policy only, and without reference to this case, the Topeka Board of Education has determined that segregation will be abandoned in the elementary schools of Topeka as soon as practicable. That is the language of their resolution.

Now, we think, if they are simply exercising their prerogative under the statute, another city in the State of Kansas, the City of Atchison, has adopted a similar resolution that does not reflect at all on this case.

It was our view that the constitutionality of this statute is still under attack. We were permitted to defend the constitutionality of the statute in the district court. We were asked to defend it in the Supreme Court a year ago. But we feel that we must, in order to maintain a position consistent with the expressed intent of this Court, answer the brief and the arguments that the appellants have supplied us.

MR. JUSTICE FRANKFURTER: May I trouble you to tell me what are the cities of the first class in Kansas?

MR. WILSON: Yes, sir. May I refer you to Appendix D in our brief, the very last page. There are set out in tabular form the nine cities of the first class where segregation is maintained on a complete or partial basis in the elementary schools. Now, in addition to that, there are three cities, namely Wichita, Hutchinson and Pittsburgh, that do not maintain segregated elementary schools. Two of those cities, as we point out in our brief, have completed a process of integration during the past two years.

We feel that—

MR. JUSTICE FRANKFURTER: Is there any litigation pending as to any of the other cities?

MR. WILSON: No, sir.

MR. JUSTICE REED: Why did one of the parties, appellants, disappear from the case?

MR. WILSON: The plan adopted by the Topeka Board of Education was this: You will recall from the record last year and the arguments that the city then maintained within the entire district eighteen geographic areas. In each geographic area there was a

school attended by the white students living within the limits of that area. In addition to the eighteen white schools, there were four Negro schools spaced at wider intervals throughout the city.

The first affirmative step taken by the Board of Education in carrying out its policy to abandon segregation as soon as practicable eliminated segregation in two of the geographic areas, namely, Randolph and Southwest. There were nine Negro students living within the limits of those geographic areas. Consequently, they are admitted to the integrated schools, and one of these appellants is one of those children.

MR. JUSTICE FRANKFURTER: As I understand it, the present situation is that the only litigation that is rife is the one now before the Court?

MR. WILSON: That is correct, if the Court please.

MR. JUSTICE FRANKFURTER: As to which the educational authorities, with an authority not challenged by the State to stop segregated schools, in fact formally and officially announced that they are going to integrate their schools, and have begun the process of integration; is that correct?

MR. WILSON: I should point out that not only is the authority not challenged by the State, the authority is specifically granted by the statute that is here being attacked.

MR. JUSTICE FRANKFURTER: So they are doing what they can do, no matter—

MR. WILSON: They are doing, as a matter of policy, as a matter of legislative policy, may I say, what they can do without reference to this case.

MR. JUSTICE FRANKFURTER: But if they did what it wanted, the State cannot say, "You are exceeding your authority," and no case could come here on that ground, could it?

MR. WILSON: Certainly not.

MR. JUSTICE REED: If they were to reverse their position tomorrow, these children who seek admission would have no right to go unless it was unconstitutional?

MR. WILSON: That is right.

MR. JUSTICE FRANKFURTER: Do you think it is an alarming assumption that in 1953, where a state has stopped segregation, and in the next year is going to begin segregation in Topeka, Kansas? Do you think we ought to do business on that assumption?

MR. WILSON: If the Court please, may I distinguish between the

State of Kansas and the Board of Education of Topeka, Kansas, which is a separate municipal corporation. The Board of Education of Topeka, Kansas, has announced its intention to abandon the policy of segregation. I think the Board is acting in complete good faith, and I have no notion that they will reverse that trend. On the other hand, the State of Kansas is here to defend its statute, and I emphasize, and the Court emphasized, we came a year ago, at the express invitation of the Court, and there are other cities that are concerned; and, therefore, the State had hoped to be heard with respect to the questions that the Court submitted to it on June 8.

If the case is moot, obviously, after five or six hours, argument does reach a point of diminishing returns, and certainly we do not want to discuss a matter that is moot, if the Court deems that to be the case.

MR. JUSTICE JACKSON: Is there anything that would distinguish your case and that would save your statute if the statute in the other states went down?

MR. WILSON: I think not, Your Honor.

MR. JUSTICE JACKSON: So that your case is governed by what— is there anything that you have to add that Mr. Davis or Judge Moore have not covered, in defense of your statute?

MR. WILSON: In preparing my argument, I examined the same authorities that both the other appellees and the appellants have examined. As a matter of fact, I cite both the same authorities that both the parties, as well as the Attorney General, have examined. My conclusions, my interpretations, are substantially those that Mr. Davis and Judge Moore have presented to this Court.

MR. MOORE: That is Mr. Moore; I would just like to correct that.

MR. WILSON: I am not sure whether it is proper to apologize under the circumstances or not.

[Laughter.]

MR. CHIEF JUSTICE WARREN: You may proceed, Mr. Wilson.

MR. WILSON: In view of the comments by the Court, I shall proceed somewhat summarily. I shall not make an effort to review in detail the evidence that I base the conclusions that I shall present to the Court. I think the facts—Mr. Carter started to state the facts in this case. Perhaps, in order to give proper perspective to my argument, some further statement would be proper.

We pointed out that the Board of Education in Topeka is a separate municipal corporation, is the party defendant in the court below; that the State of Kansas, with the consent of the court below, intervened for the sole and only purpose of defending the statute that is under attack.

We further pointed out the permissive nature of our statute. It applies to cities of only—only cities of the first class; that is, cities of more than 15,000 population, of which there are twelve in the State of Kansas. It applies only on the elementary school level. The school systems in the cities that are included in this group are divided generally into elementary, junior high, and senior high school levels. The elementary category includes only the kindergarten and the first six grades of instruction, and it is there only that the statute under attack applies, except in the single case of Kansas City where, under an exception in the law, the practice of segregation is authorized in the high school, in addition to the elementary grades.

Now, I emphasize that it is our position that the action of the Topeka Board of Education, which had been discussed here at some length, does not in any way alter the position or the status of the State of Kansas. We are here as appellees; we are defending the constitutionality of the statute that is under attack. The Board of Education of the City of Topeka, as a matter of policy and not —there is nothing in the record to indicate that it is a concession to the appellants in this case, but as a matter of policy—and exercising their power under the statute, the Board of Education has determined to abandon segregation as early as practicable.

MR. JUSTICE BLACK: Do you think this is a case of a controversy between these people and the City of Topeka?

MR. WILSON: Sir?

MR. JUSTICE BLACK: Do you think this is a case of a controversy between these people and the City of Topeka in the present situation? If so, what is it?

MR. WILSON: The appellants have denied the right of the Board of Education of the City of Topeka to maintain separate schools, pursuant to our statute. The City of Topeka has never agreed that it does not have such a right.

MR. JUSTICE BLACK: It has been agreed to desegregate schools.

MR. WILSON: It has agreed as a matter of policy to put them in the schools. Now, there may be a controversy as to the means of accomplishing this stated intention. The Board of Education has filed a separate brief here in which they point out numerous administrative difficulties that will be encountered, and in brief, they

are asking for time, but they do not believe—

MR. JUSTICE BLACK: You could not rest on that, could you?

MR. WILSON: I think we could not.

MR. JUSTICE FRANKFURTER: To follow up Justice Black's question, is there any controversy between these appellants and the State of Kansas, any justiciable controversy?

MR. WILSON: These appellants alleged and contend that a statute enacted by the legislature of Kansas is unconstitutional.

MR. JUSTICE FRANKFURTER: Suppose I allege that a statute, an Act of Congress, is unconstitutional; and I have no secular damage of mine that is effected. I think such a profound Act of Congress, passed in this heedless way we have been told about, is unconstitutional. Can I go to court?

MR. WILSON: No, obviously not.

MR. JUSTICE FRANKFURTER: Obviously not.

MR. WILSON: However, when you consider the peculiar circumstances under which the State of Kansas got into this case—

MR. JUSTICE FRANKFURTER: Litigants sometimes get in, and then find themselves out.

[Laughter]

MR. WILSON: Unless the Court desires, I do not wish to proceed with argument; that is, I have no intention to burden the already overburdened Court.

MR. JUSTICE FRANKFURTER: That is not my question. There is no suggestion about your not arguing the appropriateness; it is just the question of whether it is one of those cases where you have to say there is no controversy in a judicial sense before the Court.

MR. WILSON: Well, to repeat my earlier statement, I think there still is a controversy, because under the authority that the Board of Education presumes to exercise, it does maintain segregation in sixteen of its eighteen geographic areas, and it requires the children living in those areas to go to segregated schools.

MR. CHIEF JUSTICE WARREN: I consider that a problem; I would like to hear some light on it, anyway. I think when both parties to the action feel that there is a controversy, and invited the Attorney General to be here and answer these questions, I, for one, would like to hear the argument.

MR. WILSON: Thank you, sir.

At the outset I should point out—I have pointed out—that we are not here defending a policy, and the determination that has been made is one of policy. We are here solely for the purpose of defending the right, the constitutional right, we contend, of the State of Kansas and of its own communities to make these determinations as to state and local policy on state and local levels.

We think that, regardless of all that has been said, and regardless of the extreme difficulty of these cases, of the fact that they do involve great moral and ethical and humanitarian principles, there are still some very basic considerations, so basic, in fact, that I am a little bit embarrassed to mention them to this Court after there has been so much argument.

But nevertheless, they are so very important that I think I must suggest, in the first place, that this is a union of states that are sovereign, except for only those purposes where they have delegated their sovereignty to the national authority; and I think, further, to determine the scope of the national authority, we must look at the intent and the purpose of the instrument by which the authority was delegated.

I think in these arguments we frequently lose sight of the historic doctrine of separation of powers. We fail to distinguish between the legitimate sphere of judicial activity and the legislative or policy-making function; and if I may presume, it may have been that the Court had these things in mind when it suggested to us last summer that we answer certain questions by way of reargument, for certainly my studies, and apparently the studies of other counsel, have reinforced these basic considerations that this is a federal union; the national Government only possesses power delegated to it, and that the legislative must always be distinguished from the judicial function.

Now, as to the specific intent of the framers of the Fourteenth Amendment, the evidence has been examined in detail and I should not wish to repeat that which has been said. I can state generally, and I have stated generally, that we agree with the other appellees. We find the evidence to be persuasive that the Congress which submitted the Fourteenth Amendment did not contemplate that it would affect segregation in the public schools.

It may not be significant that all of the appellees in these cases—that is, all of the states, including the State of Delaware—have reached that conclusion working independently, but we do think it is significant that the Attorney General, in his brief, finds that the legislative history does not conclusively establish that Congress which proposed the Fourteenth Amendment specifically understood that it would abolish racial segregation in the public schools.

Now, we thought the question was rather specific. We thought

the Court asked, was it specifically understood. We contend it was not. The Attorney General agrees it was not. That should dispose of that question.

I think perhaps in the discussion here there has been too much emphasis on contemporary intent. I want to suggest very briefly that the concept of equality and equal protection was not something that originated with the 39th Congress. For a long time prior to that the term "equal protection" had had a place in the understanding of the people and in the philosophy of government. Equal protection, as we study the record, the aims and objectives of the abolitionist societies, equal protection was meant to include those very basic rights, rights for which governments are established—the right to life, to liberty and property—and we think that it is in that sense that the term "equal protection" is used in the Fourteenth Amendment.

We would point out that—we have pointed out in our brief—there is probably no occasion for pointing it out further—that there were specific denials in the Congress that civil rights and equal protection did comprehend the public schools and racial segregation therein. Mr. Davis quite eloquently, in his statement yesterday, expressed to the Court the conviction that the thrust of the Fourteenth Amendment was toward the institution of slavery. We think that is the case, and nothing more.

The Fourteenth Amendment was intended to embody the rights that are catalogued in the Civil Rights Act, and they are catalogued rather specifically. They are set out in this language:

> That citizens will have the right in every State and Territory to make and enforce contracts, to sue, to be parties, to give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to the full and equal benefits of all laws and proceedings for the security of person and property as is enjoyed by white citizens.

Now, we think this is the fruition of the whole abolitionist movement and the most complete expression of the consensus of abolitionist aims.

We think that the only purpose of the Fourteenth Amendment was to give constitutional status and dignity to these aims and objectives expressed in the Civil Rights Act of 1866, and in them we find no place for the contention that racial segregation or the absence of racial segregation would be comprehended within their terms.

Turning to the states, we again find the same result; but our

colleagues, or at least the other appellees in these cases, have discovered—we were unable to find a single instance where it appeared to us that a state, by reason of deference to the Fourteenth Amendment, had eliminated segregation from its public school system. On the other hand, we found that some 24 of the states, either at the time of the adoption of the Amendment or within a few years thereafter, did legally sanction separate public schools. We found that ten states, including my own State of Kansas, that by the same legislature in the same year and, I think, perhaps in the same session, legislated with respect to segregated schools and ratified the Fourteenth Amendment. Now, we think that is positive evidence that the states, or at least a majority of the states, did not contemplate, did not understand, did not comprehend that the Fourteenth Amendment would preclude segregation in the public schools.

Kansas is, perhaps, unique in this case, because Kansas is a State with a pronounced abolitionist tradition. The other states, Virginia and South Carolina, were members of the Confederacy; Delaware, we are told by the Attorney General's brief, was sympathetic toward the Confederacy, although it remained in the Union. On the other hand, Kansas was an abolitionist State. The settlement of Kansas was inspired and financed by the Immigrant Aid Society of Boston. The first positive political influence in Kansas was the Free Soil Party, an offshoot of the abolitionists of the East. Certainly, Kansas is not subject to the accusation that can be hurled, perhaps, at the other states, that its tradition is rooted in the slave tradition.

But I mentioned a while ago the same legislature, and I might point out that this legislature was composed largely of Union veterans. Our historians tell us that Kansas contributed more troops to the Union armies in proportion to its population than any other state. Almost to a man, the legislature of 1867 was composed of those Union veterans, of men who had offered their lives for the cause of Negro freedom, and that legislature ratified routinely, as a matter of course, the Fourteenth Amendment.

We infer from the Governor's message that ratification was deemed desirable because it was a part of the national Republican program, and the Republicans were in the ascendancy in Kansas. That same legislature, within about six weeks, enacted a statute providing for separate education for children of white and Negro races in cities of the second class.

Prior thereto, the statutes had provided for separate education, for optional separate education, in common school districts, that is, in the rural areas. A little later, a statute had been enacted authorizing separate education in cities of the first class, which

then was cities of more than 7,000. Then you have the gap between the rural areas and the cities of more than 7,000, where segregation was not authorized. By the action of the legislature of 1867, which ratified the Fourteenth Amendment, the picture was completed in Kansas. Segregation was then authorized on all levels.

Now, I point this out because it seems to me if we can infer any intention from our own legislative act, we must infer that the legislature recognized that within the State of Kansas there were areas where, by reason of lack of mutual understanding between the races, it would be impossible to provide equality of opportunity, assured by the Fourteenth Amendment, in integrated schools. Therefore, as a special benevolence, as a special device whereby equality to be assured in the Fourteenth Amendment could be complied with, the legislature of Kansas made it possible to establish separate schools in those areas. Now, again, that is only my inference. However, my adversaries infer also.

Now, to pass quickly to the other questions that are submitted, I think I have emphasized our position. We find that the Congress nor the state legislatures intended or comprehended or understood that segregation would be precluded by the Fourteenth Amendment.

The next question, of course, concerns the contemporary understanding of future intent, and again, we answer both questions in the negative. We cannot understand, we cannot conceive, of how a Congress or how state legislatures, in ratifying an amendment, could contemplate that in the future the limitations that they imposed upon that amendment might be enlarged by any agency or any branch of the Federal Government. The limitations were fixed by the intent that preceded and existed at the time of the adoption of the Amendment. We think those limitations were present in the minds of the Congress that submitted, and the states that ratified, the Amendment.

We do not believe that any member of Congress intended that the basic relationship between the states and the Federal Government should be altered by the Amendment. We do not think that they contemplated that they were providing a means for amending the Constitution and giving it a meaning that it did not presently have.

We must admit that, if we are impelled in this instance, and looking only at the intent, to choose between the judicial and the congressional power, the choice would necessarily be the congressional. My understanding is not, perhaps, mature on this phase of the question, but, as I read these debates, there was throughout an emphasis on congressional power.

Undoubtedly the abolitionists had contemplated that Reconstruction might be affected by congressional action. The fact was that the Congress trusted neither the Executive nor the Judiciary to any extent, and so, looking at the intent of the Congress and the intent of the legislatures, we must concede that should the issue before this Court be one within the Amendment, within the federal competence, that it was then the intent of the framers that the Congress and not the courts should supply the re-definition or the impetus by which the particular subject is comprehended within the terms of the Amendment.

With respect to the judicial power, our argument is limited pretty much by our conclusions with respect to the intended future effect of the Amendment. Certainly, in commenting upon the subject of judicial power, we are confronted with a considerable amount of difficulty.

Obviously, the Judiciary has the power to determine the limitations of its power. Furthermore, any decision that this Court makes in this case will become the law of the case. In that sense, certainly the entire matter is within the judicial power. However, when we consider the historic exercise of the judicial power, we are constrained to recognize a great deal of limitation and restraint upon that exercise.

There is a case in which Justice Holmes has commented on the judicial power and particularly on the judicial power to legislate, in these words. He says that:

> I recognize, without hesitation, that judges do and must legislate, but they do so only interstitially. They are confined from molar to molecular motion.

We think that at least that is the key or that is the essence of our understanding of the judicial power, to move from molar, from mass, to molecular motions, to refine the broad and general concepts that are included in the statute and in the constitutional provisions that are presented to the Court.

Certainly, it is not moving from the molar to the molecular to move outside the original intention, and with a sweeping gesture to bring into the Constitution a meaning, a view that was not entertained by the framers and those that gave the Amendment its effect.

That disposes of our general arguments with respect to the first three questions. The latter two questions of the Court deal with the remedy to be applied, which in this case may be moot.

The State of Kansas, of course, is not concerned with the immediate problems that will confront the Board of Education in complying with whatever decree or order this Court may enter.

We have taken the position that this Court need not concern itself in the Kansas case with a decree in detail, but should simply, in the event of reversal, remand the case to the district court with directions to form an appropriate decree. There are a number of considerations which must be taken into the purview of that court, but they are not for consideration here.

We appreciate very much the opportunity to be heard somewhat summarily in the circumstances of a moot case, and we hope that in considering this matter, this matter of constitutional right, the Court will not be unmindful of the constitutional right of the State of Kansas to set up and maintain its own school system and to initiate and maintain there the policies that are most beneficial to all of its people.

Thank you.

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

Mr. Carter?

REBUTTAL ARGUMENT OF ROBERT L. CARTER, ESQ., ON BEHALF OF APPELLANTS

MR. CARTER: I would like to say this, Your Honors: I do stil have doubts with regard to the question of mootness in this case However, as Mr. Justice Frankfurter pointed out, I would think i would not be likely that, having made this step, that Topeka woulc reverse itself, not in 1953. I am also confident that the State o Kansas, if this Court declares the statute unconstitutional witl respect to South Carolina and Virginia, that the State of Kansa would abide by that decision.

I might add that, insofar as I am concerned with respect t the arguments that have been urged by the Attorney General, sinc I do not feel he has opened any new avenues, it seems to me tha in order to conserve the Court's time I will not speak.

MR. CHIEF JUSTICE WARREN: Thank you.

[Whereupon, at 3:40 o'clock p.m., the argument was con cluded.]