FRANCIS B. GEBHART, ET AL.,
Petitioners,

—vs.— No. 10

ETHEL LOUIS BELTON, ET AL.,
Respondents.

FRANCIS B. GEBHART, ET AL.,
Petitioners,

—vs.— No. 10

SHIRLEY BARBARA BULAH,
ET AL.,
Respondents.

Washington, D. C.
Wednesday, December 9, 1953.

The above-entitled cause came on for reargument at 1:20 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:

H. ALBERT YOUNG, ESQ., *on behalf of Petitioners.*

JACK GREENBERG, ESQ., and THURGOOD MARSHALL, ESQ., *on behalf of Respondents.*

PROCEEDINGS

MR. CHIEF JUSTICE WARREN: No. 10, *Francis B. Gebhart, et al.*, v. *Ethel Louise Belton, et al.*

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Young?

OPENING ARGUMENT OF H. ALBERT YOUNG, ESQ., ON BEHALF OF PETITIONERS

MR. YOUNG: The petitioners in this case, Your Honors, seek review of final judgments of the Supreme Court of the State of Delaware affirming orders of the Court of Chancery. The petitioners are members of the Board of Education of the State of Delaware, and the boards of the Claymont Special School District and the Hockessin School District. The provision from which the petitioners seek relief is the same in both cases:

> That the defendants, and each of them, are enjoined from denying to infant plaintiffs and others similarly situated, because of colored ancestry, admittance to the public schools.

In the court of chancery the respondents urged the proposition that segregation in and of itself is contrary to the Fourteenth Amendment and prayed for a declaratory judgment to that effect. The petitioners appealed from other rulings of the chancellor which enjoined the petitioners from refusing admittance to the plaintiffs to schools maintained for white children. The basis of these rulings was that the physical and educational facilities of the schools maintained for Negro children were inferior. Simultaneously, the respondents appealed from the denial of a declaratory judgment, and the Delaware Supreme Court affirmed the decrees of the chancellor.

The petitioners applied for certiorari to this Court on the narrow issue, namely, the type of relief which should have been granted, the form and shape of the decree, and asked for an opportunity to equalize the facilities. The respondents did not file a cross petition, nor did they seek any review of the decision that segregation in and of itself is not contrary to the Fourteenth Amendment.

The basic question, then, of segregation *per se* is, therefore, not before this Court in the Delaware case; but the respondents, however, take a different view, and because of this position taken by the respondents and the importance of the questions raised, and the wishes of this Court, and a sense of duty, we have attempted to answer the questions that are posed to counsel.

There is no evidence that Delaware refused to ratify the Fourteenth Amendment because of a belief that it would require the State to admit Negroes into its public schools on a mixed basis. The respondents draw from the historical facts in Delaware the remarkable conclusion that the General Assembly, in a series of discriminatory statutes, demonstrated that it fully understood that equality before the law demanded nonsegregation, and that school segregation in Delaware is based upon white superiority. A few important facts, taken out of the pages of history from the State of Delaware, will throw some light on its position with respect to the Fourteenth Amendment and segregated schools.

Delaware did not secede from the Union, nor did it join the Confederacy. Its geographical position alone was sufficient to assure Delaware's loyalty to the Union. Its situation on the Wilmington-Philadelphia-Baltimore Railroad and the Delaware Railroad, along which troops could be moved south, and on the Delaware River, controlled by the Union fleet which lay off Hampton Roads in Virginia, would have made resistance hopeless. In addition, the material prosperity of the State had become increasingly dependent upon Northern markets. Reinforcing the material ties was a long Delaware tradition of loyalty to the Constitution, and pride in having been the first State to ratify it.

Delaware's adherence, however, to the Union cause was a reluctant one. Attempts to obtain from the legislature a resolution of adherence to the Union failed. There were many manifestations of Southern sympathies throughout the State, throughout the war, and although slave-owning was clearly on the decline, particularly in Wilmington and other sections of New Castle County, one of the three counties of the State of Delaware, and although a vast majority of the Negroes were no longer slaves, it was pretty clear that slavery was a part of the social and economic life of the citizens of the remaining two counties, Kent and Sussex, as it was a part of the lives of the citizens of the Southern states.

Throughout the Civil War, the Democrats maintained firm control of the State government. It proclaimed itself the White Man's Party, and was in power until the late eighties or early nine-

ties. It disapproved of suffrage or political or social equality for Negroes.

The dominant mood in Delaware, both during and after the Civil War, was opposed to abolitionism and equality for the Negroes, and in our own state legislature, in a joint resolution of the house and senate opposing the Freedmen's Bureau Bill, the Civil Rights Bill, the Negro suffrage, we witnessed the expression of the feeling that equality cannot be sanctioned under the laws of God or nature; and Senator Saulsbury at that time stated that he was proud that his State was the last to abolish slavery.

The Thirteenth Amendment was unqualifiedly rejected by the legislature in 1865. The legislature expressed its unqualified disapproval of the Fourteenth and Fifteenth Amendments, and refused to adopt them in 1867 and 1869, respectively. After the passage of the Fifteenth Amendment, poll tax laws in Delaware, designed particularly to disfranchise the Negroes, were adopted with great effect.

In the meantime, Negroes' education in Delaware had made small progress. In the Constitution of 1792, we provided for a public school system; in 1829 we provided for schools for white children by statute; and by the Constitution of 1831 we reaffirmed what we had said in our Constitution of 1792 and provided for a public school system. This was all before any consideration of the Fourteenth Amendment by the State of Delaware.

In 1875 there was a statute imposed upon Negro property holders, and the funds that were obtained were used to supply and furnish education to the Negroes through a Delaware Society for the Advancement of Negro Education.

It was in 1881, for the first time, that Delaware did make some appropriation from its treasury for the education of Negroes, but the provision was rather meager and rather inadequate; but it is significant that it was the first step and the first stride forward in helping the Negro in his education in the State of Delaware.

In 1897 the Constitution that was rewritten and now under attack by our friends, and now in force in the State of Delaware, provided for segregated schools on an equal basis in the State of Delaware. That section reads as follows:

> In addition to the income of investments of of the public school funds, the General Assembly shall make provision for the benefit of the free public schools which shall be equitably apportioned among the school districts of the State; provided, however, that in such apportionment no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained.

In the late eighties or early nineties, a political revolution took place in the State of Delaware. The Republicans began to be a serious threat to the control of the Democrats, who proclaimed themselves as the White Party. This was partly due to the activities and the financial contributions of a political adventurer, John Addicks by name, who was a wealthy stock manipulator from Pennsylvania, and, reading of the contest for the United States senatorship in 1889, came to Delaware and stated he was available, and because of his contributions to the party at that time, the Republicans got in control; and he also accomplished the enfranchisement of a great many of the Negroes by paying their poll tax.

MR. JUSTICE FRANKFURTER: To an outsider it does not appear as one of the great social reforms of this country, does it?

MR. YOUNG: That is correct, Your Honor.

And by 1898 the Republican Party, through his efforts, however, had upset the Democratic control, so that the white supremacists in the State of Delaware had been overthrown. It was against this background that the Constitution of 1897, now in force, was adopted. It is evident that the constitutional provision and its statutory counterpart in Delaware were, in the cause of education of the Negroes, a long stride forward.

The attitude of the people of Delaware had undergone a change, for the slogan "White Man's Party" had finally lost its political potency, and the ineffaceable stamps of superiority were no longer present, and the doctrine of Negro inequality was no longer a guiding force in the framing of the statute.

The change may be said to have been formalized on February 12, 1901, when the Delaware legislature, without a dissenting vote, accepted and ratified the Thirteenth, Fourteenth, and Fifteenth Amendments. In Delaware, we ratified those three Civil War Amendments thirty years after they had been submitted for ratification. Thus, the argument of the respondents to the effect that school segregation in Delaware is based on the doctrine of white superiority is refuted. The resolutions about white superiority cited by the respondents in support of their argument belong to an era in Delaware history that had passed when the present school law and the present school system were enacted.

The constitutional provision for a separation of the races in the public schools in Delaware was not based upon any declaration of natural or God-made inequality or inferiority of the Ne-

gro. It was adopted in the light of the history and tradition of the people of the State of Delaware as the wisest and most workable and most acceptable method of educating the youth in that State, both white and colored.

Now, in answer to Question 1, I do not want to burden the Court—I know much argument has been presented—but it seems to me that in connection with Delaware's position, in order for the Court to obtain some idea of what the thinking was in the Congress at the time, I would like to touch upon some of the action and debates, although briefly, if I may, of Congress.

MR. JUSTICE REED: May I ask a question whether there is any other case in the courts of Delaware? I should like to be informed.

MR. YOUNG: No, Your Honor.

MR. JUSTICE REED: Just for my information.

MR. YOUNG: This is the only case.

MR. JUSTICE REED: This is the only case?

MR. YOUNG: This is the only case, the first case of its kind.

MR. JUSTICE REED: We know nothing, then, as to the federal performance?

MR. YOUNG: No, this is the only case.

In attempting to evaluate the understanding of Congress, of course, we have got to consider the debate in Congress and the action of Congress, the action of Congress, for example, on the bill to enlarge the Freedmen's Bureau; the Civil Rights Act of 1866; the Fourteenth Amendment; and also the debates on the Civil Rights Act of 1875.

The debates in Congress on legislation of a similar character afford strong evidence that the Fourteenth Amendment was considered to have no effect on public school segregation. A majority of the Senate and House came from the states which had segregated school systems. I have no doubt that Senator Sumner and Representative Stevens wanted to include in the Fourteenth Amendment mixed schools for white children and colored children.

I have no doubt that those who opposed the Amendment attempted to stigmatize the bill, and made every effort they could to see to it that the Negroes received no rights, civil, political, or social; but I do believe that between the proponents of those measures and the opponents of those measures there was that responsible majority that saw the distinction between civil and political rights and social rights.

The members of Congress, I respectfully submit, would not

have remained silent if they thought it would invalidate segregation in the schools in the states which they represented and which held to segregation of public education. The suggestions that it would do so came from the white supremacists who sought to stigmatize the bill; they sought to present a parade of horror to the existing state of public opinion, and their expressions should be taken cautiously.

Much has been said about the legislation in the District of Columbia at the time when they provided for a segregated school system and, at the same time, also abolished certain acts of discrimination, and did so both prior to any consideration of the Fourteenth Amendment, and also took up the question of the Negroes' rights during a consideration of the Fourteenth Amendment, and after a consideration of the Fourteenth Amendment. But at no time did they change the system in the District of Columbia with respect to segregated schools.

Mr. Grimes or Senator Grimes of Iowa, in reporting the bill, had this to say in offering an amendment—and if Your Honors would permit me I would like to read from it because it illustrates that Congress did not sit by nor was Congress asleep, apparently, or that this act of providing segregated schools in the District of Columbia was not just a perfunctory or routine matter about which no one knew anything.

> Mr. Grimes. Before the bill is read, I wish to propose some amendments on which the question can be taken altogether. In line 7 of section 9, after the word 'the' and before the word 'taxable,' I move to insert the word 'white'; in line 19 of section 9 before the word 'inhabitants,' insert the word 'white'; in line 30-3 of section 9, after the word 'District,' insert the words 'owned by white persons.'

And so forth and so on; and then he concludes:

> The purpose is to make the bill conform to the view of the Committee—the bill was not printed in consonance with their views—and to confine the levy of taxes to white persons in the District, and to open the schools to the admission of white children.

It does not seem likely that with this language, and with this introduction with respect to the provision for segregated schools in the District of Columbia, the window of the Republic at that time, that such equalitarians as Ben Wade of Ohio, and Senator Sumner and Senator Sprague, and Representative Stevens and all the other equalitarians would have sat by and said nothing.

The amendment was adopted, and another amendment was offered by Senator Grimes to provide separate schools for Negroes in the county, without any dissent; and it is interesting to know that these amendments were adopted without any opposition, even though 23 members of the 39th Congress that considered the Fourteenth Amendment served in the Senate at that time, and not a single member of the House raised his voice against segregation in schools in the District of Columbia.

In the 40th Congress no suggestion was made to abolish segregation in schools in the District of Columbia when a bill to transfer the duties of the trustees of the colored schools for the cities of Washington and Georgetown came under consideration, and this bill was passed after the Fourteenth Amendment was declared and ratified; and again, the 41st and 42nd Congresses, in those Congresses attempts were made to abolish segregation in the public schools, and in 1874, Congress reaffirmed its segregation policy in the District of Columbia.

It is hardly conceivable that the Congress which proposed the Fourteenth Amendment was attempting to prohibit the states a type of school which it had endorsed and failed or refused to change in the District of Columbia.

It is clear that the Fourteenth Amendment was not intended, as contended by the respondents, to write into the Constitution the principle of absolute and complete equality so as to include the prohibition by the states against school segregation. Thaddeus Stevens realized that this notion of equality had not been achieved in the passage of the Amendment when, at the opening of the debate on the Fourteenth Amendment, he had this to say:

> This proposition is not all that the Commission desired. It falls far short of my wishes. But it fulfills the present state of public opinion. Not only Congress but the several states are to be consulted. Upon a careful survey of the whole ground, we do not believe that 19 of the loyal states could be induced to ratify any proposition more stringent than this.

Then at the close of the debate on July 13, 1866, he said this:

> We may perhaps congratulate the House and the country on the new approach to the completion of a proposition to be submitted to the people for the admission of an outlawed community into the privileges and advantages of a civilized and free government. When I say that we should rejoice at such a completion, I do not thereby intend so much to express joy at the superior excellence of the scheme as that there is to be a scheme, a scheme containing much of positive good as well, I am bound to admit, as the omission of many better things.

I am going to skip some of it, but he concluded:

> Do you inquire why, holding these views and possessing some will of my own, I accept so imperfect a proposition?

He is talking about the Fourteenth Amendment.

> I answer: Because I live among men, and not among angels; among men as intelligent, as determined and as interested as myself, who, not agreeing with me, do not choose to yield their opinions to mine. Mutual concession, therefore, is our only resort, or mutual hostilities.

There is no doubt that one of the things which Stevens at that time found lacking was a provision to compel the elimination of school segregation, and that he thought then, as we urge now, that it is a matter of policy for the states, within their police power.

The debates and the absence of reference to school segregation in the House led to the conclusion that the House understood that the Fourteenth Amendment did not affect the right of the state to educate the Negro in segregated schools. Of the 183 or so congressmen, 129 came from states which either had mandatory segregation or no education for the Negroes, and at least six others from states which had segregated school systems.

It is unlikely that they would have ignored the consequences of such measures on the school systems of their own states if they believed that they were abolishing school segregation.

The respondents state that the debates which followed the bill to enlarge the power of the Freedmen's Bureau amounted to a forthright assault on the idea that there could be racial segregation in the public schools, and then they rely upon Representative Hubbard of Connecticut, who made no mention of racial segregation in public schools; they rely on Representative Rousseau of Kentucky, who opposed the bill because he said the Bureau would take over all the schools used by white children; and they rely upon Representative Dawson, a white supremacist who, every

time the occasion arose, castigated the extreme radicals and suggested that the bill would permit white and Negro children to sit side by side.

In the debates on the Civil Rights bill, Representative Rogers of New Jersey and Kerr of Indiana stated that the bill would outlaw segregation in the common schools of the various states. However, Representative Wilson of Iowa, Chairman of the Judiciary Committee and floor leader of the bill in the House, stated that it did not mean that Negro children would attend the same schools as white children, these not being civil rights or immunities.

In the amendment to the Freedmen's Bureau bill proposed by Representative Donnelly of Minnesota to require the Commissioner to provide common school education to all refugees and freedmen who shall apply therefor, was defeated—not a single reference or quotation by any proponent of the bill to support the statement that this was an assault on the idea that there could be racial segregation in the public schools.

In the debates on the Civil Rights bill in the Senate, only Senator Cowan of Pennsylvania suggested that the bill would abolish segregation in the school systems in his State. No such suggestion appears to have been made in the Senate with respect to the Freedmen's Bureau or the Fourteenth Amendment.

The silence in the Senate on the school question leads only to the conclusion that it was the understanding of the Senate that the measures would not affect segregated education. The senators and representatives were not oblivious to the effect of these measures on the school systems in their own states, nor would they have failed to discuss the consequences if they believed that segregation would be outlawed.

The respondents state on page 91 of their brief that none of the bill's supporters in the House, except Wilson, deny that the bill had any effect of ending all caste legislation, including segregated schools, and that this was the view of the Senate. Well, the significant thing is not that no one contradicted the white supremacists, such as Rogers and Kerr and Cowan, but that no one contradicted Wilson, the man responsible for the bill, on the floor of the House, who specifically stated that the bill did not mean that Negro children would attend the same school as white children, holding that these were not civil rights or immunities.

Wilson's statement constituted an official interpretation, and neither Stevens nor Conkling nor Bingham nor Donnelly nor any other Radical Republican contradicted him; and the respondents have introduced nothing to explain the silence of the proponents of the bill with respect to segregation in schools.

The actions of a majority of the state legislatures which ratified the Fourteenth Amendment, in re-enacting school segregation laws or allowing such laws to stand, demonstrate the understanding of those legislatures, that the Fourteenth Amendment did not abolish such segregation; and we agree with the appellants' statement on page 140 of their brief that if there was any authorization or requirement of segregation in state school laws, and after ratification the legislature took no action to end this disparity, undoubtedly it would appear that this state did not understand the Amendment to have the effect which appellants urge; and all the more reason, we state, that if the state legislature actually took action to continue or to compel school segregation, the legislature must have understood the Fourteenth Amendment not to abolish such segregation.

In some of the cases, the legislatures which ratified the Fourteenth Amendment provided for segregation; others permitted segregation; others had no segregation. In some instances, the segregation in schools was declared invalid under state laws, but not under the Fourteenth Amendment. In some cases, as in the case of New York, of ringing declarations that Negroes shall have full equality and the enjoyment of all civil and political rights, segregation was not regarded as a violation of such rights. Wherever segregation was abolished, whether by statute or by court decisions, there is no evidence that the Fourteenth Amendment entered into the question.

As to the action by future Congresses under section 5, we state that the enforcement clause, section 5, was inserted in order to give Congress the power to supplement any civil remedies or other protection which might be available or through the courts by providing penalties for violation of the Amendment. The provisions of the Fourteenth Amendment do not permit Congress to broaden the Amendment, but merely provide for more effective remedies than those which might be obtained through the normal judicial process.

It cannot logically be argued that, although the Amendment was properly understood to be broad enough to eliminate segregation in public schools at the time it was enacted, that it was, nevertheless, understood that Congress might in the future make segregation illegal.

In answer to Question 3, we take the position that the problem obviously is a legislative one and not a judicial one. To construe the Amendment as requiring the abolition of segregation in the public schools would be to give the Amendment a meaning and an effect directly contrary to the understanding of the framers. It was clearly understood by both Congress which submitted, and the states which ratified, the Amendment that it was to have no

effect on the public school system of the state.

The Court, if it should abolish segregation, would not be interpreting the document to meet new conditions, but would be meeting a problem which existed at the time of the Fourteenth Amendment—the time the Fourteenth Amendment was adopted—in a manner directly contrary to the intent of those who proposed and adopted the Amendment.

The wisdom of abolishing segregation in public schools of the states was considered by Congress at and about the time the Fourteenth Amendment was adopted. Congress consistently, whenever the matter arose, decided to leave this problem to the states.

This Court is not in a position to judge to what extent the prejudices and tensions which gave rise to the segregation laws and the congressional decision to leave these matters to the states, have abated in any particular state or district, or to judge the wisdom of abolishing segregation in public schools of that state. The matter should be left where Congress originally left it, in the state legislatures.

The problem before the Court is whether the people of those states, providing for a segregated school system, in the exercise of their judgment, based on firsthand knowledge of local conditions, decide that the state objective of free public education is best served by a system of separate but equal schools; and if I may borrow from—

MR. CHIEF JUSTICE WARREN: General, may I ask you what is the situation in Delaware today, as of this moment?

MR. YOUNG: In Delaware, in the high school district which is the Claymont School District—and I might say it is the northern part of the State, almost on the borderline of Pennsylvania—there are 19 school children in that school out of 22 eligible Negro children. The total enrollment, you might be interested in knowing, is five hundred in the high school, but about eight hundred in the entire school; it is a combination elementary and high school.

Now, in the other district, which is the elementary school district, and which is referred to as the Hockessin School District, there are six out of 46 that are attending that school, and that is also in New Castle County and on—near the Pennsylvania border, but more towards the west, the southwest; and I might add here that I heard the statement from—one of counsel, our adversaries, said that he was very happy to report that they were in those schools. Well, I do not know to what extent he is happy, but I might say, if I am permitted to say it outside the record, that in a recent survey there was an indication that there was not too much happiness in the district, in the school, particularly where the six

out of the 46 are attending, and that situation is not solved in that particular district in New Castle County.

MR. JUSTICE JACKSON: At any rate, Mr. Attorney General, we have no question in your case of shaping the remedy? I suppose the questions accidentally went to you as well as to the other counsel?

MR. YOUNG: That is right, yes.

MR. JUSTICE JACKSON: But in your case we have no problem of a decree?

MR. YOUNG: If segregation *per se* is declared invalid, that is the end of it.

MR. JUSTICE JACKSON: It goes to the state courts?

MR. YOUNG: That is right.

MR. JUSTICE JACKSON: So we have nothing to do with that?

MR. YOUNG: That is right.

MR. JUSTICE JACKSON: So that those questions should not really have been addressed to you, I think.

MR. YOUNG: It would have been very much appreciated if they had not been.

[Laughter.]

MR. JUSTICE FRANKFURTER: We have had the benefit of your observations.

MR. YOUNG: Thank you, Justice Frankfurter.

MR. JUSTICE REED: In that county are there still existing segregated schools?

MR. YOUNG: Yes.

MR. JUSTICE REED: All except in two districts?

MR. YOUNG: Just the two districts are affected.

MR. JUSTICE REED: And they are maintaining segregated schools?

MR. YOUNG: They are maintaining segregated—

MR. JUSTICE REED: There are Negro residents and it is—

MR. YOUNG: That is right.

If I may borrow from a statement made by the venerable Mr. John W. Davis, and quote from his brief this statement, he said:

> An emotional approach to this question is a poor substitute for a rational discussion of the problem at hand, which is to be judged by the application of well-settled principles governing the effect of the Fourteenth Amendment on the police power of the state.

The arguments, I respectfully submit, such as I have heard in this courtroom for three days by our adversaries, have great emotional appeal; but they belong in an entirely different forum and in a different setting. Any change in state policy is for the legislature. The Fourteenth Amendment is a pact between the Federal Government and the individual states.

The intention of the parties was clear at the time it was adopted and ratified. In order to make that provision in the Constitution cover the question of public school segregation, it must be done within the framework of the Constitution, for as between providing for integrated or mixed schools in those states, where it is deemed best to maintain separate but equal schools, and preserving the meaning and intent of the provision of the Fourteenth Amendment, and the sanctity of the pact between the Federal Government and the states, it is more important that this problem, however worthy, be dealt with within the meaning of our Constitution.

As author Stanley Morrison, in conjunction with Charles Fairman, in a very scholarly article which appeared in the Stanford Law Review on "The Judicial Interpretation of the Fourteenth Amendment" aptly put it:

> No matter how desirable the results might be, it is of the essence of our system that the judges must stay within the bounds of their constitutional power. Nothing is more fundamental, even the Bill of Rights. To depart from this fundamental is, in Mr. Justice Black's own words, 'to frustrate the great design of a written Constitution.'

I would like to reserve the balance of my time for rebuttal.

MR. CHIEF JUSTICE WARREN: Mr. Redding?

ARGUMENT OF JACK GREENBERG, ESQ., ON BEHALF OF THE RESPONDENTS

MR. GREENBERG: Mr. Greenberg.

If it please the Court, Mr. Redding and I shall argue only briefly in support of our position.

In this case, as the Attorney General of Delaware has indicated, plaintiffs prevailed in the courts below. The plaintiffs and members of their class are now in schools to which they sought admission, but the Attorney General is trying to get them out, and we appear here in an effort to keep them in the schools permanently.

As respondents here, we urge that the decision of the court below did not give respondents all that the Constitution guaranteed. Therefore, in this Court we urge that the decision below should be affirmed on grounds other than those given by the court below, and that segregation in elementary and high schools in the State of Delaware should be declared unconstitutional.

At the argument last term we submitted it was clear that the decision below could be affirmed on independent state grounds, and that this Court need not reach the constitutional question. But since this Court has seen fit to address to respondents in this case the same questions which it addressed to petitioners in numbers one, two, and four, we inferred that this Court believed that the constitutional question may be reached in this case.

MR. JUSTICE FRANKFURTER: I do not quite understand the general invitation to counsel to submit arguments on a certain point changes the relevant issue within the controversy; I do not quite understand that.

MR. GREENBERG: I do not believe it changes the relevant issues, but we thought, perhaps, the Court was interested in the question of the constitutionality of segregation in the Delaware case.

MR. JUSTICE FRANKFURTER: As with the Attorney General of Delaware, I am glad to get his observations; and I am glad to get yours; but I do not see that something which is not in issue before we asked specific questions in a group of cases becomes the issue because we had asked them.

MR. GREENBERG: We submit that, although the decision below may be supported on an independent state ground, that in reality, equal protection of the laws will not be given to the respondents

unless the constitutional question is reached, because, in truth and in fact, they are attending the schools in which they now are, so to speak, under a cloud. They are not like the rest of the students in the school; they are under—

MR. JUSTICE FRANKFURTER: I think you should have cross-appealed.

MR. JUSTICE JACKSON: You have not cross-appealed.

MR. JUSTICE FRANKFURTER: I understand you can sustain a decision below on any ground, but I do not understand that you can object to a decision below on a ground that you have not appealed from.

MR. GREENBERG: Well, we did not cross-appeal, Mr. Justice Frankfurter, because we believed that we could urge other grounds for the affirmance of the judgment below.

MR. JUSTICE FRANKFURTER: You can urge any ground you please that will justify the decree below; but you cannot go outside of the decree below.

MR. GREENBERG: Well, it is our understanding—

MR. JUSTICE FRANKFURTER: I am glad to get your observations, but I might suggest I do not think the nature of the issues has been changed.

MR. JUSTICE JACKSON: I think the question was addressed in this case along with all the others, so if there were any variations they could be called to your attention. I do not think that we—speaking for myself—took into account the fact or expected in this case to deal with the problem of the decree and the relief or questions addressed to those things, because we cannot direct the state court as to what decree it shall enter. All we can say is, "You shall not go beyond a certain point," which we say is the constitutional limit. Here affirmance is as far as we can go. We could not order them to shape their decree.

MR. GREENBERG: It is our position, Mr. Justice Jackson, that the decree below does not give equal protection of the laws.

MR. JUSTICE JACKSON: You did not appeal.

MR. GREENBERG: No, we did not.

MR. JUSTICE JACKSON: So far as this case is concerned, the most that we can do would be to affirm the decree; but you probably will have the benefit of anything said in any other case that is

helpful.

[Whereupon, at two o'clock p.m., a recess was held.]

AFTERNOON SESSION

ARGUMENT OF THURGOOD MARSHALL, ESQ., ON BEHALF OF RESPONDENTS—RESUMED

MR. MARSHALL: May it please the Court:

During the luncheon recess, counsel in this case conferred, and it was agreed among—at least so far as we are concerned—that instead of going into the main part of the argument, that we would merely make a brief statement on it. And in the first point we wanted to make it clear the reason that we did not file cross-petitions in the court—and we have set out in our brief on the argument, the small one, on page two, three cases, *Helvering* v. *Lerner,* and *Langnes* v. *Green;* and we gathered from those cases that in the situation such as this, where we were not opposed to the decision of the lower court and merely wanted to urge other grounds for the decision in the case, that we should proceed with the case and merely urge in argument the point, specifically the point as to the validity of the segregated school statutes.

We are afraid that, in that particular posture of the case, if the Court should rule that we should have cross-appealed, it could be interpreted that we have waived the other part of the case, and I merely wanted to briefly state our position on the main part, and that is that our primary responsibility here is to urge the Court not to reverse the judgment of the Supreme Court of Delaware, and not to take the position urged by the Attorney General to reverse and send the matter back. In other words, so far as we are concerned, we are asking that the Court affirm the decision of the Supreme Court of Delaware.

The other point we wanted to urge upon the Court was, even if the Court is of the opinion that they should not pass upon the validity one way or the other of the Delaware statutes, because we did not cross-appeal or for some other reason, it appears to us that these cases are all consolidated, the state cases in particular, and that if the Court, in the Virginia and the South Carolina cases in particular, should make it clear that the state was without power to enforce such statutes in the State of Virginia and the State of South Carolina, then merely affirm the decision of the Delaware case, I have no doubt at all that the Supreme Court of Delaware would follow the rationale of the decisions in the Virginia and South Carolina cases; so that if, as has been urged over and over

again—and as I understand the position of the Attorney General of Delaware—that when these physical facilities become equal they will then either put the colored children out or take some proceedings to have them removed, that if the Court goes the way I have just suggested, I have no doubt that at that time the same Supreme Court of Delaware, having considered the decision in the Virginia and South Carolina cases, would hold that the Attorney General could not have the children removed because as of that time it would clearly be the decision of this Court that in such instances the State of Delaware as well as the State of Virginia and South Carolina are without power to enforce such statutes.

So it seems to me to narrow down to the position that in this case, if the Court merely affirms the decision of the Supreme Court of Delaware, the first task that we have before this Court is to urge this Court to affirm that decision; at least go that far, because to us the decision in the Supreme Court of Delaware is the minimum that we could expect on our theory of what the Fourteenth Amendment requires. And with that, I don't need the *McLaurin* or any of the other cases to urge that upon the Court.

I go all the way back to the *Gaines* case, where Chief Justice Hughes said that the laws segregating the races depend for their validity upon the equality that is offered under it. So I think in that case, and despite all Mr. Young said earlier about what was peculiar to Delaware and what have you, I do not find anything that says that this Court should reverse the decision which said merely that in the absence of equal physical facilities the colored children have to be admitted to the existing facilities. So on that very narrow basis, it seems to me that the judgment of the Delaware court should be affirmed, at least on that narrow basis.

Our other ground that we urged, which was that in the decision and opinion of this Court, the expression be—or rather not, instruction—but that it should be made clear to the Delaware court that they are not required, as they thought, by the prior decisions of this Court to uphold the validity of the statutes, so that at future times it can be applied to the same plaintiffs in this case.

Furthermore, I do not think that we should reply in detail to the Attorney General of Delaware's argument about the meaning of the Fourteenth Amendment, because our argument in the other cases has been full; and I do not know anything to add to our other argument; and I do not see anything that has been added by Mr. Young's argument which would require us to meet it, except the peculiar situation in Delaware.

He thinks it is peculiar; we think it is peculiar. We have both dealt with it in great detail in our briefs, and I think that is as far

as I would like to go on that.

I agree that the remedy point is most certainly not involved in this case. I think, as in the South Carolina and Virginia cases, the only points involved are the points as to the congressional intent and the reliance that I understand from Mr. Young's argument runs the same as the others. We have the segregation in the schools of the District of Columbia, that they did not intend to exclude—rather, they did intend to exclude—school segregation.

All of the lawyers have repeatedly argued that, since the states had segregation statutes when they ratified the Fourteenth Amendment, we would gather something from that, when in truth and in fact, this Court in the case of *Neal* v. *Delaware* and specifically—of course, they were speaking of the jury situation—in that case the Court said specifically, this Court:

> The Fourteenth Amendment was intended to strike the word 'white' out of all those statutes.

So it seems to me when you pick up one point or another point it will do the Court no good.

The other point urged by the Attorney General is on the power argument and what this Court can do in the situation; and as I understand the power argument, it is, so far as we are concerned, that the authority of this Court is clear, and no one disputes that.

The real question involved is as to whether or not the states involved as of now, today, do or do not have power to use race and race alone for the basis of segregation, and that applies, our theory, that the states have been effectively deprived of that power hold as true—Mr. Young emphasized this—in Delaware, which is just beside Pennsylvania. It applies as well there as it applies in South Carolina and Virginia; and therefore, unless there are questions, we submit this case and urge the Court to affirm the judgment of the Supreme Court of Delaware.

Thank you, sirs.

MR. JUSTICE FRANKFURTER: Might I ask General Young whether the specific judgment we have before us is the final order that was entered by the Chancellor, which was adopted by the court? Is that your understanding?

MR. YOUNG: That is right.

There is nothing in rebuttal.

[Whereupon, at 2:40 o'clock p.m., oral argument in the above-entitled matter was concluded.]