DOROTHY E. DAVIS, BERTHA M. DAVIS and INEZ D. DAVIS, etc., ET AL.,
Appellants,

—vs.— No. 191

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

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

The above-entitled cause came on for oral argument at 1:15 p.m.,

BEFORE:

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

APPEARANCES:

SPOTTSWOOD W. ROBINSON, III, ESQ., *on behalf of the Appellants.*

T. JUSTIN MOORE, ESQ., *on behalf of the Appellees.*

J. LINDSAY ALMOND, ESQ., *on behalf of the Appellees.*

PROCEEDINGS

MR. CHIEF JUSTICE VINSON: Case No. 191, *Davis, et al.*, against *County School Board of Prince Edward County, Virginia, et al.*

THE CLERK: Counsel are present.

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

MR. ROBINSON: May it please the Court:

This case comes before this Court upon appeal from the final decree of the United States District Court for the Eastern District of Virginia, denying an injunction against the enforcement of section 140 of the Constitution of Virginia, and section 22-221 of the Code of Virginia, each requiring that white and colored children be taught in separate schools.

The appellants, who were the plaintiffs below, are infant high school students residing in Prince Edward County, Virginia, and their respective parents and guardians. The appellees are the County School Board of Prince Edward County and the Division Superintendent of Schools of the County, who were the original defendants below, and who as officers of the State of Virginia enforce its segregation laws, and the Commonwealth of Virginia, which intervenes as a party defendant after the filing of the action.

The complaint in this case alleged that the original defendants maintain separate schools for white and Negro high school students residing in the county, but the public high school maintained for Negroes was unequal to the public high schools maintained for white students in plant, equipment, curricula, and other opportunities, advantages and facilities, and that it was impossible for the infant appellants to secure public high school opportunities, advantages, and facilities equal to those afforded white children so long as the segregation laws are in force.

The complaint therefore sought a judgment declaratory of the invalidity of the laws as a denial of appellant's rights secured by the due process and equal protection clauses of the Fourteenth

Amendment, and an injunction restraining the appellees from enforcing these laws or from making any distinction based upon race or color among the children attending the high schools of Prince Edward County.

In their answer, the original defendants admitted that they were enforcing the segregation laws of the State, admitted that the Negro high school was inferior in plant and equipment to the two white high schools, but denied that it was otherwise unequal and denied that segregation in the public schools contravened any provision of the Federal Constitution.

After intervention by the Commonwealth, in its answer it made the same admissions and asserted the same defenses as did the original defendants.

There are three high schools in Prince Edward County, which are the Farmville High School and the Worsham High School, which are maintained for white students, and the Moton High School, which is maintained for Negro students.

Attendance of white children at the Farmville High School or the Worsham High School is largely determined according to the area in which the child lives. But the segregation laws of the State, so it was testified to in this record by the Division Superintendent of Schools, determine whether the child attends the Moton School on the one side or one of the other two schools on the other.

A three-judge district court was convened pursuant to sections 2281 and 2284 of Title 28 of the United States Code, and at the trial both the appellants and the appellees introduced evidence, including expert testimony, first as to the extent of the existing inequalities in the Negro high school as compared with the two white high schools with respect to physical facilities and curricula, and secondly, on the issue as to whether equality of educational opportunities and benefits can ever be afforded Negro children in a racially segregated public school system. The evidence on the second score will be summarized at a later portion of this argument.

At the conclusion of the trial, the district court found that the Moton High School for Negroes was inferior to the white schools, not only in plant and equipment, but also in curricula and means of transportation. It ordered the appellees to forthwith provide the appellants with curricula and transportation facilities substantially equal to those afforded to white students, and to proceed with all reasonable diligence and dispatch to remove the existing inequalities by building, furnishing, and providing a high school building and facilities for Negro students in accordance with the program, which the evidence for the appellees indicated would result in the availability for Negro students of a new Negro high school in September, 1953.

At the same time, the district court refused to enjoin the enforcement of the segregation laws or to restrain the appellees from assigning school space in the county on the basis of race or color, and in its opinion asserted the following grounds:

First, it said that on the issue of the effects of segregation in education, it accepted the decision in *Briggs* v. *Elliott,* the district court's decision, and the decisions of the Court of Appeals for the District of Columbia in *Carr* v. *Corning,* cases which, as the court said, had upheld segregation and had refused to decree that it should be abolished.

Additionally, the court said that on the issue of the effects of segregation, of the effects upon the pupil resulting from the fact of segregation itself, the court could not see that the plaintiffs' evidence overbalances the defendants'.

It further felt that nullification of the segregation laws was unwarranted in view of the evidence of the appellees that the segregation laws declare what the court called one of the two ways of life in Virginia, having an existence of more than eighty years; evidence that segregation had begotten greater opportunities for the Negro, including employment in Virginia alone of more Negro public school teachers than in all 31 nonsegregating states; in view of evidence which was offered by the appellees that in 63 of Virginia's 127 cities and counties, the high school facilities are equal to those for whites; in view of the evidence, or testimony submitted by the appellees' witnesses that the involuntary elimination of segregation would lessen public interest in and support of the public schools, and would injure both races, which the court felt was, in the language of the court,

> . . . a weighted practical factor to be considered in determining whether a reasonable basis had been shown to exist for the continuation of the school segregation.

The court further felt that, having found no hurt or harm to either race, that ended its inquiry, stating that it was not for the court to adjudicate the policy as right or wrong, but that the Commonwealth of Virginia must determine for itself.

An appeal was duly taken to this Court from this decision under the provisions of sections 1253 and 2101(b) of Title 28 of the United States Code.

Probable jurisdiction was noted by this Court on October 8, 1952, and presented for decision in this case are the following questions:

First, whether the segregation laws of Virginia are invalid because violative of rights secured by the due process and equal protection clauses of the Fourteenth Amendment;

Secondly, whether after finding that the buildings, facilities, curricula, and means of transportation afforded appellants were equal to those afforded whites, the court should have issued a decree forthwith restraining the appellees from excluding the infant appellants from the superior secondary school facilities of the county on the basis of race or color, and whether or not under the due process and equal protection clauses, the appellants are entitled to equality in all aspects of the public secondary educational process, including all educationally significant factors affecting the development of skills, mind, and character, in addition to equality merely in physical facilities and curricula, and whether the district court should have so found on the evidence presented.

At the outset, I would like to place the Virginia case in what I consider to be its proper setting. Unlike *Gebhart* v. *Belton,* the Delaware case, this case does not present the situation of a finding of inequality of physical facilities and curricula coupled with an injunction against the continuance of segregation in these circumstances. In this case, the district court made a finding of inequality of physical facilities and curricula and still refused to enjoin the segregation practice in the school system in question.

Unlike *Brown* v. *Board of Education,* the Kansas case, this case does not present the situation of equal physical facilities and curricula coupled with a finding of injury resulting from the fact of segregation itself. In this case, the facilities and curricula were found to be unequal, and the district court, erroneously, in our view, made a finding that no harm resulted to the student from the fact of segregation.

Unlike *Bolling* v. *Sharpe,* the District of Columbia case, the appellants in this case did not concede an equality of physical facilities and curricula. But like in *Bolling* v. *Sharpe* and unlike the other state cases, we urge that state-imposed educational segregation is a denial of due process, as well as a denial of the equal protection of the laws.

I submit that it is important to distinguish between two dissimilar approaches to the basic problem in this case. It has been urged that the segregation laws derive validity as a consequence of a long duration supported and made possible by a long line of judicial decisions, including expressions in some of the decisions of this Court. At the same time, it is urged that these laws are valid as a matter of constitutionally permissible social experimentation by the states. On the matter of *stare decisis,* I submit that the duration of the challenged practice, while it is persuasive, is not controlling. This Court has not hesitated to change the course of its decision, although of long standing, when error has been demonstrated, and courts are even less reluctant to examine their decisions when it is plain that the conditions of the present are sub-

stantially different from those of the past.

No court has ever considered itself irrevocably bound into the future by its prior determinations. As a matter of social experimentation, the laws in question must satisfy the requirements of the Constitution. While this Court has permitted the states to legislate or otherwise officially act experimentally in the social and economic fields, it has always recognized and held that this power is subject to the limitations of the Constitution, and that the tests of the Constitution must be met. Upon examination in the past, it has found such experimentation to be constitutionally wanting when predicated solely on the facts of race.

MR. JUSTICE FRANKFURTER: Mr. Robinson, if I heard you right—and I was looking at your brief to clarify my impression—if you are right, this injunction is reversible because it violates the *Gaines* doctrine?

MR. ROBINSON: I would submit, Mr. Justice Frankfurter, for the additional reason—that is correct, sir.

MR. JUSTICE FRANKFURTER: Not for the additional reason. I should say it is for the prior reason. This Court ought not to pass on constitutional issues bigger than the record calls for.

MR. ROBINSON: Let me answer Your Honor's question this way. I believe, and I intend to argue, that by reason of the physical inequalities and the inequalities in curricula which the district court found and which were supported largely by uncontested testimony, that alone should have justified the issuance of an injunction which would have admitted these appellants to share the high school facilities of the county without regard to race; in other words, would have unsegregated the schools at that point.

MR. JUSTICE FRANKFURTER: We have specific appellants here, specific plaintiffs, and particular children, boys and girls, I take it—

MR. ROBINSON: That is correct, sir.

MR. JUSTICE FRANKFURTER: —who want to get to a high school.

MR. ROBINSON: That is correct, sir.

MR. JUSTICE FRANKFURTER: And you say that they ought to be allowed because they do not have adequate high schools with equal facilities?

MR. ROBINSON: I would answer the question this way. I do not know where they will go, sir. I do not mean to imply that all of them can get in a white high school, because I know that they cannot.

MR. JUSTICE FRANKFURTER: I am talking about your clients.

MR. ROBINSON: That is correct, sir.

MR. JUSTICE FRANKFURTER: And if you are right, then, any decree should have been issued according to *Gaines* v. *Canada*?

MR. ROBINSON: That is one of our decisions here. But we feel that the other question is also necessarily involved for additional reasons. If we got that decree, I take it that it would unsegregate the schools and keep them in that fashion only so long as there would be a showing, or we would be able to maintain a showing, of physical inequality.

Now, the appellants in this case say that they will have a new Negro high school available in September of 1953. But be that as it may, if their right to enjoy the superior facilities of public education depends upon the existence or the nonexistence of inequality, then it seems very fair to me that there is no permanency in the administration of the schools, and there is no permanency in the status of these appellants. Any way we look at the situation, it means that if the facilities are unequal, you cannot segregate. If the scope of the decision is limited to that, if the facilities are equal, you can segregate; consequently, as the facilities change in that regard, as equilibrium is disturbed by the variety of facts and circumstances present in any educational system, then under those circumstances we could have segregated or we could have nonsegregated education.

MR. JUSTICE FRANKFURTER: But this Court, constituted as it is at this moment, has faced that problem in several cases, and has decided that with inequality, the order will be issued on that basis, and we shall not borrow trouble in 1953 or 1954 or whenever it is.

MR. ROBINSON: I agree with Your Honor entirely. My understanding of the past cases has been that the basis of the decision under those circumstances has been one upon which it was pretty nearly impossible to resume segregation at some future time.

Looking at the *Gaines* case, for example, the factors which this Court enumerated in its opinion, in order to make out the showing of inequality, not merely inequality of physical facilities and curricula—they were there—but this Court considered, and it based its opinion upon what it termed the more important considerations which were involved in a situation of that sort. And I certainly take it that after the decision in the *Sweatt* case, it is no longer possible for any state to have hope of establishing a segregated law school for Negro students.

MR. JUSTICE FRANKFURTER: But if Mr. Marshall is right, and your clients are going to go to present white schools, things might turn out to be so happy and congenial and so desirable that you do not know what the result may be.

MR. ROBINSON: I am fully aware of that, if Your Honor please. But it seems to me that there should be more in the way of stability in the disposition of a situation of this sort.

We have the matter of the administration of the schools, and also, I submit, we have the matter of the right of the pupils who are involved. And I just do not see how, if we simply rest the decision upon a narrow ground which will not afford any reasonable expectation—or let me put it this way—any sound assurance that whatever changes will occur in the system at the present time, as a consequence of those inequalities, will continue, but we might revert back to the situation where we are once the facilities are made physically equal and the same courses of instruction are put in, under those circumstances it seems to me that the normal disinclination to base a decision upon a broader ground—

MR. JUSTICE FRANKFURTER: It is not disinclination. It is not a restriction of that order. It is not just a personal preference.

MR. ROBINSON: I understand that in the historical context, of course, considering the whole history of this nation, it is a fact that the legislation of a state should not be disturbed unless it is fatally in collision with the Constitution.

I should like to urge upon Your Honors in this connection that what we sought in this case was a permanent injunction. It seems to me that we do not get it. If we are simply limited to that particular phase of the matter, it means, as I have tried to emphasize here, that we are in a situation where we cannot depend on anything.

The schools may be unequal, if Your Honor please, tomorrow, and consequently we are shunted right on out.

MR. JUSTICE REED: Assuming that you would be admitted by decree to the high schools that you seek to enter, would it not be necessary to admit them on a segregated basis as the law stands now?

MR. ROBINSON: Yes, I suppose so.

MR. JUSTICE REED: As the law stands now, you will be admitted on a segregated basis?

MR. ROBINSON: That is correct, sir.

MR. JUSTICE REED: Because you have not had a decision that below the grade of colleges you are required to have an association of students.

MR. ROBINSON: Then, of course, if Your Honor please, we might have the other situation where they will take the white students and put them into bad schools. So consequently, I think any way we look at it, I agree with Your Honor's suggestion in that regard.

I submit that at least we get to the point, it seems to me, where the basis of decision must be something more than a basis which will permit of a shuttling of pupils back and forth into segregated schools and into an unsegregated system, something which would have no assurance, and something which I cannot conduce will be helpful, either to the school authorities or to the pupils involved.

MR. JUSTICE REED: This is not a class suit, is it?

MR. ROBINSON: Yes, it is; yes, Your Honor. We brought it as a class suit on behalf of all Negroes similarly involved.

I might say for the benefit of the Court that I do not intend to unduly consume the Court's time on behalf of the question of constitutionality *per se*. But in view of the fact that I do feel that the question is in the Virginia case, I would like to be indulged for just a moment to make reference to a few things that I think are particularly important.

I have just said that on examination this Court had in the past found that legislation or other types of state activity, official activity, which were predicated solely on the fact of race were unconstitutional. I was going to make reference to the decisions of this Court in the area of the ownership and occupancy of real property, the *Buchanan* and *Shelley* cases, specially.

The *Takahashi* case opened the field of employment or occupation. Restrictions on the right to vote were *Nixon* v. *Herndon*, based solely on the question of race, and in the Court's opinion, having no relationship whatsoever to the end which the legislation sought to attain; and in the area of professional and graduate education, *McLaurin* v. *the Oklahoma State Regents,* which, incidentally, was a case in which there was no inequality present at all, but quite on the grounds of other factors which the Court found to exist in the situation in which it was concluded that there was a violation of the Fourteenth Amendment.

MR. JUSTICE REED: What do you conceive to be the purpose of the Virginia enactment of the statute?

MR. ROBINSON: If Your Honor please, I am in very much the same situation that counsel in the South Carolina case are. The only thing which appears in the record which might be helpful to the Court in that regard is the testimony of Doctor Colgate W Darden, the present president of the University of Virginia, and former Governor of the State. That testimony commences in the record at page 451.

Doctor Darden went into an examination—he gave rather an outline of the historical development of public education in Virginia, and he said, according to his testimony—and it is a fact, as a check of the statutes will show—that segregation came into Virginia in pretty much the same way as it did in South Carolina, at the time when the public school system of Virginia was just getting under way.

Virginia embarked upon a broad program of public education about 1870, and the first provision with respect to the segregation of white and colored people appeared on the statute books of Virginia in that particular year. It did not appear in the Constitution of Virginia until about 1900.

On page 462 of the record, Doctor Darden characterized the problem before the court as a by-product, and a fearful by-product, of human slavery, and he went on to say that we are the inheritors of that system.

I think from the historical viewpoint there is much to sustain the position that the original notion behind the school segregation laws was to impose upon Negroes disabilities which prior to the time of the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments they labored under. That is the only thing that I can offer to this Court in the way of a justification.

MR. JUSTICE REED: You say, to impose disabilities?

MR. ROBINSON: I beg your pardon. I meant, the Thirteenth, Fourteenth, and Fifteenth Amendments were passed to eliminate disabilities which were upon the Negroes prior to the time of the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments, which had as their purpose the elimination of those disabilities.

Insofar as the statute is concerned, Doctor Darden speaks of it here, in his very words, as a by-product, and a fearful by-product, of human slavery.

Before moving on to the next point, I would like to urge upon the Court that the reasonableness or the unreasonableness of educational segregation *per se* at the elementary and high school levels has never been tested. Its validity in the previous decisions of this Court has been assumed to follow from its duration and acceptance over a long period of time.

As Mr. Marshall made reference, the duration of the particular practice has not been considered by this Court in the past to prevent reexamination of the problem. We had the same thing, for example, to come before the Court in the cases dealing with this problem at the graduate and professional levels, where it came here with a history of long duration; yet, the mere fact that

the practice had existed for many years, the mere fact that it had become a part of the community life, did not, in the judgment of the Court, establish its validity.

The same thing is true with respect to the restrictive covenant area, the area of exclusion of Negroes from jury service, segregation of passengers in interstate commerce, all instances where there were practices of long duration, yet they were found to be constitutionally fatal, and this Court so held.

So it is our position in Virginia, on this particular score, that it should now be determined by the application of the normal constitutional standards, whether the legislation here involved meets the challenge of the Fourteenth Amendment, and we respectfully submit that upon such examination, they will be found to be lacking.

On the second point, as I have already said, the district court found that there was physical inequality and inequality of curricula. In these circumstances, we submit that the action which the district court should have taken at that particular time was to have enjoined the enforcement of segregation under those circumstances.

I should also like to point out that in addition to the finding of the district court, which is found on page 622 of the record, in which the court goes into some small amount of discussion of the extent of the inequality, our record is pretty well loaded with evidence, most of which was uncontradicted, showing physical inequalities in the various areas. As a matter of fact, the appellees did not even bother to cross-examine the chief witness that we put on the stand, whose testimony established these inequalities.

I should like to request the attention of the Court to the fact that the Farmville High School, one of the two white high schools, is a school which is accredited by the Southern Association of Colleges and Secondary Schools, while the Moton School for Negroes is not. As a consequence of this accreditation, the white graduate of Farmville will generally be admitted to institutions of higher learning outside the State on his record alone, while Negro graduates of Moton will generally be required to take examinations to get in, or, if admitted without examination, will be accorded only a probationary status.

Farmville also offers to its students the opportunity of membership in the National Honor Society, which creates educational motivation and affords preferences in college acceptance and employment.

Our evidence in this case shows not only these inequalities, but clearly demonstrated that these inequalities in themselves handicap Negro students in their educational endeavors and make it

impossible for Negro students to obtain educational opportunities and advantages equal to those afforded white students.

While the district court did forthwith enjoin the continuation of discrimination in curricula offerings, I think it is important to note—and this is uncontradicted on this record—that lack of, inferiority of proper facilities for teaching many of the courses prevents advantageous instruction in some of these courses, and in some instances prevents those courses from being taught at all.

Going back for just a moment, the Court will recall that the district court here did enter an injunction requiring forthwith the elimination of discrimination with respect to transportation means and curricula. But while that is true, we are faced with the situation where, absent the particular facilities essential for teaching the course, or, if not that, the inferiority of the facilities for teaching the course, it simply is not possible, even though we have a decree which purports to forthwith equalize curricular offerings—

MR. CHIEF JUSTICE VINSON: What is your solution to that problem?

MR. ROBINSON: The solution, we submit, was not the solution taken by the district court—

MR. CHIEF JUSTICE VINSON: I say, what is your solution?

MR. ROBINSON: That, under the circumstances, the court should have immediately entered an injunction which would have prevented the school authorities from assigning school space in the county on the basis of race, would have removed—

MR. CHIEF JUSTICE VINSON: If you did not have the facilities and if you did not have the teachers, how would you take care of them, regardless of what kind of curricula you had?

MR. ROBINSON: There are a sufficient number of teachers in the county, Mr. Chief Justice, to take care of all of the students. There is a sufficient amount of school space in the county to take care of all the students.

The differences here are—

MR. CHIEF JUSTICE VINSON: You mean, to take them out of this particular locality and transport them over to some other part of the county?

MR. ROBINSON: No. At the present time, if Your Honor please, we have the situation where the white children are getting these courses; Negro children are getting, not all of them, but they are getting some of these courses, anyway. But the trouble is that over in the Negro school you have these inferiorities.

Now, we submit that you cannot continue to discriminate

against Negroes, or these Negro students; under the circumstances what you do is, you simply make all the facilities in the county available to all the pupils, without restriction or assignment to particular schools on the basis of race.

MR. CHIEF JUSTICE VINSON: What was the order of the district court?

MR. ROBINSON: The district court did not order—

MR. CHIEF JUSTICE VINSON: I did not ask you what they did not do; what did they do?

MR. ROBINSON: The district court on the matter of courses forthwith enjoined discrimination in the curricular offerings. That was the order of the district court. I was trying to make the distinction, if the Chief Justice please, between the so-called equalization decree and what I would call an antisegregation decree.

In this regard—and I think that I have already pretty well indicated our position—we feel that, in view of the fact that in this particular area we are dealing with an exercise of state power which has been shown to affect rights which are secured by the Fourteenth Amendment, an area in which the authority of the State is subordinate to the mandate of the Amendment, that whatever the fate of educational segregation may be under other circumstances, it is perfectly plain that it cannot obtain in the face of these inequalities.

As this Court has on several occasions said, the rights which are involved are personal and present, and the Constitution does not countenance any moratorium upon the satisfaction of these particular rights. So under the line of decisions of this Court, commencing with *Gaines* and going right straight through with *Sweatt,* we feel that the relief which I have suggested in arguing here today should have been granted by the district court.

I should also like to point out that we feel that there are additional reasons why this equalization decree should not have been entered, and I think I can be brief in this regard, because Mr. Marshall in his argument touched upon this yesterday.

We feel that any undertaking by a court to establish or maintain constitutional equality by judicial decree simply means that the court is in the business of supervising the school system and is in there indefinitely. We are not dealing with a physical thing. We are not dealing with a static thing. We are dealing with an educational system that has a number of variables and a number of dissimilarities. We have schools that are different in size, location, and environment, and we have teachers who differ in ability, personality, and effectiveness, and consequently their teachings vary in value.

So consequently, all up and down the educational system we are going to find points of difference. Additionally, education is an ever-growing and progressing field, and facilities and methods are constantly changing. They get better as experience and need demonstrate the way. As a matter of fact, several of the witnesses for the appellees testified that, notwithstanding an effort to provide equal buildings and facilities and equally well prepared teachers, identity of educational opportunity could not be afforded under any circumstances, and at the very best the facilities could only be made comparable or approximately equal.

Consequently, we submit that this is a task for which the Court's machinery is not entirely suited, and consequently the regulation or maintenance of constitutional equality by an equalization decree embracing, as it does, the necessity that pupils and school authorities almost constantly stay in court should be avoided, if possible.

We have also set forth in our brief something of the history of the equalization decree in Virginia. There have been four cases in which permanent injunctions against discrimination, upon a finding that there was inequality of curricula or inequality of physical facilities, have been forthcoming. Nevertheless, in each instance it was necessary, after the decree, to have further proceedings in the court with respect to efforts to obtain that sort of educational equality.

On the final point, I should like to say this: As I indicated earlier in the argument, the evidence in Virginia was conflicting—I should put it this way: There was evidence on both sides, evidence offered by both sides on the question of harm or the effect resulting from segregation itself. The witness for the appellees—

MR. CHIEF JUSTICE VINSON: What did the court say about that?

MR. ROBINSON: The court concluded that, first, it found no hurt or harm resulting from segregation to the pupils of either race. Secondly, the court said that, on the fact issue as to whether Negroes could obtain in a separate school an equal education, the court could not say that the evidence for the plaintiffs overbalanced the evidence for the defendants.

Our testimony went quite fully into the matter, and I will not bother at the present time—we set it forth in pretty good summary, I think, in our brief—to summarize it here. But I should like to make these comments addressed to the disposition which was made of this evidence by the district court.

Notwithstanding the fact that the district court concluded that there was no harm or hurt to any student, upon the examination of the evidence submitted by the appellees, the situation actually is that all of their experts who testified except one admitted that there was either harm, or that there was a possibility of harm.

Additionally, on the question as to whether separate education can ever afford equal educational opportunity, the witnesses who expressed the opinion for the appellees that it was possible that there might be equality in a separate school based their conclusion upon the conditions existent in Virginia at the present time. They were influenced by what the situation would be in the event race should be removed as a factor in the educational system, and consequently predicated the opinions under those circumstances. We submit that, under these conditions, a reexamination of this evidence will demonstrate that the conclusion of the district court in this particular regard is without foundation and consequently it should not be held binding upon this Court.

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

MR. JUSTICE REED: You spoke of the fact that you depended, not only on equal protection, but due process.

MR. ROBINSON: Yes, sir.

MR. JUSTICE REED: Did I hear you make a distinction between the two?

MR. ROBINSON: I would be glad to do so at the present time.

MR. JUSTICE REED: Is there a distinction, in your mind?

MR. ROBINSON: I think that I can say this: Anything that due process will catch, I think equal protection will catch, in this area. But certainly a legislative enactment which makes a distinction based solely on race in the enjoyment of the educational program offered by the State, I think, would be that type of arbitrary and unreasonable legislation which would be in violation of the due process clause.

MR. JUSTICE REED: You could have a valid classification under equal protection; you could have a classification under due process?

MR. ROBINSON: That is correct, sir.

MR. JUSTICE REED: You do not make any point on that?

MR. ROBINSON: It is also conceivable to me that you might have the other situation, though, by reason of the fact that I feel in this particular instance certainly the legislation is caught by the one or by the other.

MR. CHIEF JUSTICE VINSON: Mr. Moore?

ARGUMENT OF T. JUSTIN MOORE, ESQ., ON BEHALF OF THE APPELLEES

MR. MOORE: May it please the Court:

We believe it to be particularly fortunate that the Court concluded to assume for argument all five of these cases together, because while in history each case stands on its own record, there is, of course, one main stream which runs through all of the cases, and it is obvious from the arguments already made by counsel for the appellants that that is the real question with which they are concerned, namely, to test finally, if possible, the issue as to whether the mere fact of segregation by law is a denial of equal protection.

Now, the Virginia case is one which is equally helpful, I believe not only in respect of its own setting, but in its bearing on these other cases.

I am going to undertake in the discussion of this case to deal with it in that sort of way, not merely from the standpoint of our case, but also in its bearing on the other.

There are several distinctive features of this Virginia case that I want to call to Your Honors' attention at the outset. The first is the nature of the record that you find here. You were impressed, I am sure, with the fact that you have a much larger record. We believe that was not unnecessarily made large. When we were requested to represent this little county of Prince Edward and also to be associated with the Attorney in the representation of the Commonwealth, we found that there had been these four or five cases in the federal court where the question of inequality of facilities had been the issue, and that was the only issue. Where the courts had found that to exist, they promptly made decrees requiring equalization.

We also found that the State had undertaken an amazing program of expenditures of money and expansion of the public school system, particularly over the last twenty years, with the view to making the facilities equal for Negroes and whites, so that perhaps with the exception of the State of South Carolina, Virginia stands probably at the top among all these southern states in that program, which I am going to refer to more fully a little later.

But we also found, in comparing and getting the benefit of the Kansas and the South Carolina case, which has just been heard, that these appellants had laid all this great stress on what they call the psychological issue. But we also found that there was quite a conflict of opinion among the experts on that matter.

So we undertook to prepare a full record, and Your Honors would find, when you browse through this record, that you have, instead of, as in the Kansas case, where all of these teachers and

educators and psychologists testified on one side, and in the South Carolina case on the appellant's side—you find a great array of very distinguished persons who testified in the Virginia case in direct conflict on this crucial question of fact. So the first distinctive feature is the fuller record.

The second distinctive feature is the difference in the findings of the court. The court, in contrast to the Kansas case, based upon the historical background in Virginia and upon all this evidence, found on the crucial questions which these gentlemen had stressed so much that they failed to prove their case, even on that point. That is one of the main distinctive features in this case.

There also will be presented the difference as compared to—with the Kansas case, as to the great impact that would result in Virginia from a sudden elimination of segregation.

Now, those are among the issues. There is this other distinctive feature, which I should mention at the outset. This case on this point is similar to the South Carolina case in large degree, because when the case of South Carolina was tried, the facilities were not yet completed on the first trial, and were not completed on the second hearing. But when the case reaches this Court, they had been completed.

Now, Virginia is just a little bit behind South Carolina in that respect. But there is no doubt about it, no question from this record, that the funds are in hand, the buildings are going up, and the facilities will be equal by next September.

Those are the four principal distinctive features.

Now, may it please the Court, in undertaking to make a very brief statement of the case, as to how the issues come here, there are several facts that I believe should be brought to your attention at the outset. This case arises in a comparatively small county of the hundred counties of Virginia, Prince Edward County. It has only about 15,000 population. It has one town of any size in it, the town of Farmville, where the old Hampden-Sydney College is located. The population is divided about 52 percent Negro and 48 percent white in the county. The school population is higher among the Negroes than that figure. There is about sixty percent of the school population that is Negro and forty percent white. So, roughly, you may regard the situation as being one where the ratio is about three to one, whites three to one.

Now, these appellants are high school students. This case relates entirely to high school students. The South Carolina case was elementary and high school. These cases vary. But this is strictly a high school.

MR. JUSTICE BLACK: What did you say about the three to one?

MR. MOORE: I said that the ratio is about three whites to one Negro.

MR. JUSTICE BLACK: Where?

MR. MOORE: Throughout the State. I am sorry, I did not clear that up.

MR. JUSTICE BLACK: I thought you were referring to the county. That is quite different.

MR. MOORE: That is right. I am sorry.

Now, in the county, I should mention that this is a rather poor county financially, in the State. It has an assessed value of only about 9.5 million dollars. The total assessed property, on the ratio of assessment of about fifty percent—the total real and personal property value is about 18.5 million dollars.

Now, there are three high schools in the county, two for white and one for Negro. As might be expected, they are not identical. In the three high schools in 1951, there were 400 white children and 460 Negro children.

In standing, the Farmville High School was shown to be the best high school. That is, the white high school in Farmville. The next is the Moton School, the Negro school at Farmville; and the worst is the Worsham, which is a white school, a small combination high school and elementary school.

Now, one of the principal reasons why the Moton School, which, as Your Honors will realize, is named for the distinguished colored educator, who, by the way, was educated largely in Virginia, where there was segregation—one of the main reasons why Farmville is ranked first is because of the unequal growth in school population in the last ten years, particularly among the Negroes. The record shows that the Negro pupils increased in the last ten years 225 percent, but unfortunately whites have declined about 25 percent.

The school authorities, in view of that increase in Negro attendance, particularly in view of that, made a survey in 1947 as to school requirements, approval, and so on. And they finally have approved a program which the record shows will cost about 2.5 million dollars in all to carry out, with about two million of that being allocated for Negro schools, and about 500,000 dollars for white schools.

Now, among other things, one of the main things in the financing program was a new Negro high school in place of the existing Moton School. They were trying to arrange a bond issue for that, but unfortunately, in April and May, there was a two week strike called in the Negro school, which the Negro principal claimed that he could not control. The record indicates—and the matter

was argued in the district court—that the strike was really inspired by outsiders. However that may be, the strike came at a very unfortunate time. It lasted two weeks. But that absolutely put an end to any bond issue.

The school authorities then undertook to raise the money for the new school from the State, and the State, which does have ample funds in Virginia, I am glad to say, through two sources, provided all the funds required. We have what is called a Battle Fund in Virginia, which is named after our present Governor, Governor Battle, and I am going to refer to that a little later after lunch. But it is a great source of money for these purposes, and about 250,000 dollars out of the 900,000 dollars required for the new Negro school was granted from that fund, and the remaining 600,000 dollars was made in the way of a loan from the Literary Fund at two percent.

Now, this suit was filed in May of last year, shortly after the strike, and as I said, it broke up the bond issue. But the State provided the funds, so that we are in the fortunate position of having the cash, the building is right under way, there is no question about the fact from the record and from the decree of the court that it is going to be completed.

MR. CHIEF JUSTICE VINSON: Has that money been obtained, and firm commitments made?

MR. MOORE: Yes, sir, all that has gone in the record.

MR. CHIEF JUSTICE VINSON: When?

MR. MOORE: The money was obtained finally in June of 1951. You see, they were on the program of the bond issue when the strike created such a public sentiment that it was felt that they could not carry that through.

MR. CHIEF JUSTICE VINSON: What is the present situation in regard to the building program?

MR. MOORE: The building is under way.

MR. CHIEF JUSTICE VINSON: What do you mean by "under way," Mr. Moore?

MR. MOORE: It is about twenty-five to thirty percent complete. A firm contract is made. The funds are available to be drawn on from the State, just as the funds are needed, and the record shows that there is no reason why the school should not be in operation, a better school than any school in the county or that whole area, by next September.

Now, the challenge which was presented in this trial, which

required five days—the case was very fully heard—was on two grounds:

First, it was said that, on the basis of the federal precedent, the segregation in the schools at the high school level violated constitutional standards. On that issue, the court held:

> We cannot say that Virginia's separation of white and colored children in the public schools is without substance in fact or reason. We have found no hurt or harm to either race.

I was astonished at the statement that my friend—I will defer that until we come back.

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

AFTERNOON SESSION

MR. MOORE: May it please the Court:

When the Court rose for its luncheon recess, I had just mentioned the first of two very important findings that we feel the trial court made here. The first was that, on the basis of the record made, they found that the separation scheme that had been in effect in Virginia through these eighty years—we cannot say that it was without foundation in fact or reason, and there was no hurt or harm to either race.

Now, there is another finding. These are set out at great length there in the record at pages 19 through 21, and the facts proved in our case presently demonstrate or potently demonstrate why nullification of the cited sections is not warranted.

In those pages of the opinion, Judge Bryan, sitting with Judge Dobie and Judge Hutcheson, had given a very much more adequate answer, may it please Your Honor, Justice Reed, than our friends on the other side did to your question as to what was the real basis and, therefore, I was about to comment when we adjourned for lunch that I was very astonished at the comment that had just been made that there was such a scanty record.

Judge Bryan, in the opinion, went back and traced the history of this scheme to the Acts of 1869 and 1870 in Virginia, with the various changes in those laws that were passed right during the Reconstruction period when, as everyone knows, there was this zeal involved in protecting the Negroes' rights, but stemming right from the first Act of 1869-1870, the law has been substantially the way it is today.

Instead of President Darden of the University—leaving the matter, as our friend on the other side suggested, if Your Honors would look at page 456 of the record, you will see a very much more illuminating comment, where he goes on to show quite a bit about this history.

Of course, this system did spring out of the system which was in effect in the South before the war, but because it sprang out of that system it does not follow that there was any intent to continue a form of slavery or form of servitude, such as here argued.

He goes ahead and points out there that actually in the consideration of the Underwood constitution there were 22 Negroes in the convention, and they were split eleven to eleven—eleven voting against the proposal to include a prohibition against segregation. That was obviously because of the friction that was involved arising out of that period.

Now, there is another set of facts here that I believe to be very pertinent. We observe that during the argument of our opponents, there was distributed among the Justices of the Court two very interesting sheets, which we were not able to obtain until a few days ago, from the Census, and you will see from those sheets that the problem as exists in these 17 states that have segregation and the District of Columbia is a very different problem from many of the other states.

You will observe on that first sheet entitled, "Relationship of White and Negro Population," that there is a factor of ten percent of the total population of the country today that is Negro, about 15 million; it is very interesting to see how that is distributed. In the 17 states and in the District of Columbia, the total population in those states that is Negro is 20.5 percent; in all these other states it is 4.6 percent. But there is a concentration of the Negro population in those 17 states and the District to the extent of approximately seventy percent. In the second sheet you will observe that there is a variation all the way from about one-tenth of one percent in Vermont to 45 percent in Mississippi, with about 22 percent in Virginia, Justice Black—that is where I was confused just a moment ago, as you will see right there. It is perfectly clear that that situation is a very pertinent thing in the consideration of this matter.

MR. JUSTICE REED: Have you carried it out into the counties?

MR. MOORE: We do not have it in the counties. As a matter of fact, we had much difficulty getting it from the Census people to this extent. We have got it for the county that is in question here. I gave that just before we adjourned for lunch. Sixty percent of the school population is Negro in this county to forty percent white and the total population is 52 percent Negro and 48 percent white.

May I just undertake in my remaining time to address myself very briefly to four questions which we believe are the controlling questions in this case: First, while we know that Your Honors are so familiar with the precedents that are here talked about so much, we do not feel we could do justice to this case without referring to them, at least briefly; and I then want to refer briefly to what we call the Virginia situation as shown on these facts; and third, I want to mention briefly the expert evidence that became so important in this case; and fourthly, I wish to talk briefly about the

point that Justice Frankfurter mentioned a moment ago as to what is the kind of decree or remedy that should be granted in a situation like this where, as distinguished from South Carolina, we have not quite got our facilities in shape, although they have been able to do that in South Carolina. I am going to take up those four matters in that order just as briefly as I can.

Mr. Davis stressed in his argument so far as background for the issue, the main issue in all these cases, the question as to whether separation by law is *per se* a violation of equal protection. He stressed the legislative history primarily.

There is an equally important area, we believe, involving the legal precedents. Of course, all these cases come down finally to the question as to whether this type of case falls over into the category of *Gong Lum*—really, that is the closest case; *Plessy* v. *Ferguson* is, of course, its forerunner—but do they fall under the doctrine of *Gong Lum* or do they fall under the *Sweatt* v. *Painter* and *McLaurin*; that is the real crucial question.

I am not going to labor the point. Judge Parker has worked it out better than any of these other courts have. He has done that better, more fully, but you have got not only these statutes that have been passed, but this large body of decisions which certainly over a period of eighty years has recognized that the thing that is existing here in the South, particularly, as you saw from those sheets, is a thing that has become a part of a way of life, as our court said in our case, in the South. It is plainly based on real reason, and if that is so, then there is no reason why the equal facilities, equal but separate facilities, doctrine should not apply.

What the court held in *Sweatt* v. *Painter* and in *McLaurin* was that on the facts, that at that level equality could not be provided.

Now, we took the trouble here to obtain—there are three very distinguished experts that testified in our case, right on that point, that there are great differences at the high school level on this question as to whether equality of not only facilities and curricula and all can be afforded as compared with the graduate and professional schools.

We did not have to rely simply upon what the Court might take notice of, but Your Honors will find the testimony of Doctor Lindley Stiles, who is the head of the Department of Education of the University of Virginia, a man with wide experience all over the country, teaching and supervising segregated schools and nonsegregated schools, who stressed that there was a difference in that level at adolescent age; you find Doctor Henry E. Garrett, head of the Department of Psychology of Columbia University, who testified at great length on this subject; and then Doctor Dabney L.

Lancaster, the president of Longwood College in Virginia, stresses that situation.

Now, there the gist of their testimony was that equality of opportunity really could be provided and possibly better provided at the high school level with separate schools, provided you had equal facilities, just as good teachers, just as good curricula, and all the facilities that go along with it. On that basis there is no occasion to approach this matter from the standpoint of *Sweatt* v. *Painter* and *McLaurin*.

It is shown right here definitely—and that is what Judge Bryan's opinion rests on—it is shown by evidence that at this level you have not got the problem that exists at the graduate and professional school level.

These gentlemen on the other side at great length cite a long line of cases in this Court which they say are pertinent, and which we contend are not pertinent, and I just list them and state our position. They mention cases like these: The Jury Duty case, the Right to Vote case, the Right to the Fishing License, the Florida *Shepherd* case, the Right to Participate in Primary Elections, the Right to Own Property, *Shelley* v. *Kraemer*; and then they rely upon these commerce cases, *Morgan* v. *Virginia,* and the recent *Chance* case.

Those cases are not comparable here. There you had a complete denial of a right. The question of separation but with equal facilities and equal opportunities really did not exist in those cases; there was a denial, a complete denial.

What really happened, as we see it, in the appellants' theory is that we believe they are quite confused. They come here and they first make their attack in this way: They say that the doctrine, the separate but equal doctrine, just *per se* amounts to an offense to the Constitution, the Fourteenth Amendment. Now, that, of course, as was pointed out in the first case, the Kansas case yesterday, is just a direct attack on *Plessy* v. *Ferguson* and the *Gong Lum* doctrine.

But then they come along and make a second contention. They say that as long as there is separation, then, as a matter of fact, there cannot be equality, and the only basis they have for urging that is to draw on this so-called expert testimony of the psychologists, and they say that because of that line of testimony you can never attain equality as a fact.

Now, in the Virginia case we meet head-on on that issue. It may be, as some of the questions from Your Honors have indicated, that, perhaps, all of that testimony may be irrelevant. If we are right in our first proposition that *Gong Lum* is still the law, then, perhaps, all that testimony may be irrelevant. But we did

not want to take any chances in the Virginia case. We knew that there was this great body of expert opinion which was in conflict with that which had been presented without conflict in Kansas and in South Carolina, and we presented it. So that if, as a fact, that issue becomes important, we had met it head-on, and we have a finding of the court in our favor.

May I just refer very briefly to what, for short, I may call the Virginia scene in which this whole problem arises? Of course, it is obvious that it is not just Prince Edward County that is involved or Clarendon County, South Carolina. It is a statewide question, and this record abounds with information that shows that over the last twenty years there has been a tremendous movement, springing largely with the position that Doctor Lancaster, now the head of Longwood College at Farmville, Virginia, right where this controversy arose, while he was head of the Department of Education, he saw ahead that this problem was going to arise in the way in which it has, and the State, under his sponsorship, and his successors, put on this tremendous program which, perhaps except for North Carolina, is the greatest program in the South, of expending these huge sums for building up these facilities.

You have a situation today where the State of Virginia has every reason to be proud of what has been accomplished, although complete perfection has not yet been attained in every one of the counties and cities of the State.

Let me give you just a few figures. As Dr. Darden pointed out, public education somewhat dragged in Virginia until about 1920. At that time there were only 31,000 high school students in the State. Today there are 155,000.

During these last ten years the State, according to this record, has reached the point where the Negro salaries have been equalized with the whites throughout; there are actually more four-year college graduates among the Negro teachers in Virginia than there are white teachers.

The Negro expenditures in this State have increased 161 percent as compared with 123 percent.

According to a survey that was put in evidence in our case, it appeared that approximately one-half of the counties and cities in the State are now or within a very short time will be carrying out programs now in effect—will be on the basis of as good as or better than the whites. As a matter of fact, in the City of Richmond, the finest high school in the city is a Negro high school, and at Charlottesville there has just been completed the finest high school for Negroes that there is in all that area.

Now, as an indication of what has been accomplished—I sound as if we are trying to brag in comparison with South Carolina, and we do not mean it that way, but we believe these figures

are very pertinent, Your Honors. We are telling that to you because we have no other way of getting these facts to you except by telling them to you.

In Virginia we have put on this program that I referred to as the Battle Fund. It is sixty million dollars as compared with the seventy-five million dollars in South Carolina. Of that amount, ten million dollars have already been allocated for the Negroes, and 18 million dollars for the whites. They are getting much more than their share.

We have this tremendous Literary Fund, as it is called in Virginia. We are more fortunate in Virginia financially than many of the states, and through that fund loans are being made to these schools, with the Negroes greatly benefiting in proportion. Of the 48 million dollars that have been loaned out of—comparing the 48 million dollars loaned for whites, are 16.5 million dollars loaned for the Negroes at two percent interest, at a two percent interest rate.

MR. CHIEF JUSTICE VINSON: Are those loans made to the boards of education?

MR. MOORE: That is right, sir, at two percent, and that was the 600,000 dollars in this 900,000 dollar program for this very high school. So you see the funds are really right there in hand. There is no trouble about going out with a sales tax like our friends have to do in South Carolina. We have got the money, and we have got a contract, and we have got a court decree which tells us that we have got to go ahead as quickly as possible.

Now, there is just one more fact in this connection, and I am through with this point. It is very striking that in the four-year plan that the board of education has adopted there are 168 projects for whites, with 73 projects for Negroes, involving for whites 189 million dollars, may it please Your Honors.

Just think of what that means in taxation and in burdens to the people of Virginia in carrying out this program, with 74.5 million dollars for Negroes. In other words, they are sharing in all this huge program in a ratio of about two to one, although their ratio in the State is only about 22 percent.

In view of all that, the court could not find that this program, so important to the welfare of the people of Virginia, rested on prejudice, but it presented a way of life, and it represented a firm determination on the part of the people of Virginia, because they were able to bear the burden better than many of the southern states—but they were fully committed in good faith to provide for the Negro child just as good education as a white child could get, and they were doing it and, therefore, the court found that they could not find that that program rested on prejudice.

Now, isn't that of some importance in this matter when this matter reaches the stage of this Court? The trial court said that they found that the program rested neither upon prejudice nor caprice, nor upon any nebulous foundation, but rather the proof is that it declares one of the ways of life in Virginia.

May I just very briefly refer to this expert testimony because, perhaps that, together with the difference in findings of the court, is the most distinctive thing about this case.

We are glad to get the benefit among our brethren involved in the other cases, if that be appropriate, with their testimony. We were able to profit by the trials in these other cases. They could have gotten the experts if they had deemed it essential or relevant to do it. They, proceeding in their own way, considered, in the light of the decisions of this Court and the numerous decisions of the state courts, that all that line of expert testimony presumably was irrelevant.

Now, the statement is made here that time after time there is consensus of opinion among social scientists that segregation is bad. I was interested in the appendix which is signed by some 32 alleged social scientists who say that appendix is out on the frontiers of scientific knowledge; that is the way they describe it. When you examine that appendix you find that five of the persons who signed that appendix were cross-examined in our case, and the appendix is really just an effort—I say this without any lack of respect—but it is just an effort to try to rehabilitate those gentlemen and add to it with some other persons.

Now, it is our view that, when you consider the expert evidence on the two sides in this case, it is perfectly clear that the trial court was justified in finding as they did.

Let me just briefly give you a description as to the kind of expert testimony that was presented in the Virginia case. Some of these witnesses apparently travel around over the country quite a bit testifying in these cases.

There were four principal experts for the plaintiffs in our case: A man named Doctor John J. Brooks, who runs an experimental school in New York where about 300 students attend, and he tries to get a cross-section of the population, a certain number of whites, a certain number of Negroes, and a certain number of others. He has had practically—he had no experience in Virginia. He had a little experience in Georgia. He testified, in effect, that he felt that segregation was bad.

The next was Doctor Brewster Smith, who was a professor of psychology at Vassar. His chief contribution was that he considered that as a matter of principle segregation in the abstract was an official insult. That is about what his testimony finally boiled down to.

One of the most interesting witnesses was Doctor Isidor Chein. He has written a great deal on this subject, and he testified as to a questionnaire that he had sent out to some 850 social scientists, he said, asking them two main questions: First, as to whether or not in their view segregation was harmful to those segregated; secondly, was it harmful to those who did not segregate; and he said that the replies he got were some 500, and that some ninety percent of the people who answered said that it was bad on both groups.

We showed on cross-examination and otherwise that there were some six or eight thousand persons who were eligible to have that questionnaire sent to them; we showed that only 32 came from south of the Mason and Dixon Line; and he was unable to show a single one from Virginia; and what you wind up with is that you get a statement in the air as sort of a moral principle—it is kind of a religious statement that you get—that, in principle or in theory, in the abstract, that segregation is a bad thing to have.

MR. JUSTICE FRANKFURTER: Mr. Moore, of what would the six or eight thousand people be specialists in or of?

MR. MOORE: Well, there is a great line—

MR. JUSTICE FRANKFURTER: Who are these specialists in that field?

MR. MOORE: Well, they described them as sociologists, anthropologists, psychologists, and variations of those groups, principally, Your Honor.

MR. JUSTICE FRANKFURTER: Everybody in the sociological field is an expert in his domain?

MR. MOORE: That is right, Your Honor.

We say it does not mean a thing except as a matter of stating something in the abstract. You might as well be talking about the Sermon on the Mount or something like that, that it would be better—

MR. JUSTICE FRANKFURTER: It is supposed to be a good document.

MR. MOORE: Well, I say you might as well be asking people whether it is desirable for everybody to try to live according to the Sermon on the Mount as to ask them the kind of questions that they had put to them.

Now, let us look for a moment at the experts we called. We had eight people who testified, who were especially familiar with conditions in Virginia and in the South.

We started at the lower level with the superintendent of education, Mr. J. I. McIlwaine, who had been the superintendent for over thirty years in that very area.

We then moved up to the next level. We took the present superintendent of education of the State, Doctor Dowell J. Howard; we took the ex-superintendent, Doctor Lancaster.

Then we moved up to the university level. We took Doctor Stiles, who has had this broad knowledge and experience all over the country, as the head of the Department of Education; and then took Doctor Darden, and took them; and then we followed through with three other kinds of experts. We called a leading child psychiatrist, Doctor William H. Kelly, a leading man in all our area, who testified and who had wide experience all over the country; as a matter of fact, in the war among the soldiers and what-not, he had such experience.

We then called a clinical psychologist, Mr. John N. Buck, who had had wide experience, and then—our friends like to chide us with the fact that our star witness was Doctor Garrett—they would have given their right eye to have gotten Doctor Garrett. He happened to be the teacher in Columbia of two of their experts, this very Doctor Clark who made these doll tests, and who studied under Doctor Garrett.

Dr. Garrett, it so happened, was born and raised very near this very place where this controversy arose in Virginia. He was educated in the Richmond public schools and at the University of Richmond, and then he went on to Columbia and finished his graduate work; and for years has been a leading professor of psychology, years the head of the department of psychology, with some 25 professors and assistant professors under him, with wide experience as an adviser to the War Department in connection with the psychological tests among soldiers during the war.

I have not time—my time is going by so fast, I see it is almost gone—and I must read you one or two things about what Doctor Garrett said about this thing. He said this. He said:

> What I have said was that in the State of Virginia, in the year 1952, given equal facilities, that I thought, at the high school level, the Negro child and the white child—who seem to be forgotten most of the time—could get better education at the high school level in separate schools, given those two qualifications; equal facilities and the state of mind in Virginia at the present time.
>
> If a Negro child goes to a school as well equipped as that of his white neighbor, if he had teachers of his own race and friends of his own race, it seems to me he is much less likely to develop tensions, animosities, and hostilities, than if you put him into a mixed

school where, in Virginia, inevitably he will be a minority group.

Then he says again:

> It seems to me that in the State of Virginia today, taking into account the temper of its people, its mores, and its customs and background, that the Negro student at the high school level will get a better education in a separate school than he will in mixed schools.

It is a better education he is talking about because of this friction that would arise and these eighty years of history in Virginia. Is all that to be ignored? Is that not, Your Honor, Justice Frankfurter, a basis for classification with eighty years in this background, just as in the pilot case you mentioned yesterday—I was not familiar with it yesterday until you mentioned it, but I read it this morning; but it is very important, the historical background in the light of this testimony.

MR. JUSTICE REED: What am I to draw from this argument that you are making now?

MR. MOORE: I think you are to draw—evidently I have not been successful, as successful as I had hoped.

MR. JUSTICE REED: Perhaps I should express my question a little more fully.

MR. MOORE: Yes.

MR. JUSTICE REED: What if they had decided to the contrary?

MR. MOORE: You mean the trial court?

MR. JUSTICE REED: The trial court; and your experts had not been so persuasive as they were, and there were other experts, and the trial court had accepted their conclusion that this was detrimental and was injurious to the ability of the Negro child to learn or of the white child to learn, and created great difficulties; what difference does it make which way they decided this particular question?

MR. MOORE: I think you can argue the matter two ways, Your Honor. I think, in the first place, you can argue that the difference, for instance, in the Kansas finding and the Virginia finding point up how important is the legislative policy that is involved, that Mr. Davis talked about so much this morning. It just illustrates how it really is a policy question.

MR. JUSTICE REED: I can understand that. But is it your argument that there are two sides to it?

MR. MOORE: It illustrates there are two sides to it, and it points up that the real crux of the whole matter is that there is involved fundamentally a policy question for legislative bodies to pass on, and not for the courts. Now, in the second place, it emphasizes, I hope, that the historical background that exists, certainly in this Virginia situation, with all the strife and the history that we have shown in this record, shows a basis, a real basis, for the classification that has been made.

MR. JUSTICE REED: There has been a legislative determination in Virginia?

MR. MOORE: That is right, sir.

MR. JUSTICE REED: That the greatest good for the greatest number is found in segregation?

MR. MOORE: That is right; with these lawmakers continuously since 1870 doing their job to do their best in the general welfare. It is significant that the Virginia statutes since 1870 have contained straight through a requirement that there should not only be a separation, but there should be treatment with equality and with efficiency all the way through; that is the policy.

My time is almost up.

MR. JUSTICE JACKSON: Suppose Congress should enact a statute, pursuant to the enabling clause of the Fourteenth Amendment, which nobody seems to attach any importance to here, as far as I have heard, that segregation was contrary to national policy, to the national welfare, and so on; what would happen?

MR. MOORE: Your Honor, we thought of that in here, and that is a big question, as you realize.

MR. JUSTICE JACKSON: That is why I asked it.

MR. MOORE: Our view of the matter is that it should not be held valid in this Court; that the only effective way to accomplish that is to be done through an Act of Congress, which would be by amending the Constitution.

MR. JUSTICE JACKSON: You think that the Fourteenth Amendment would not be adequate to do that?

MR. MOORE: We do not believe so, and I have not the time and I have no desire to engage in this very interesting discussion that Justice Burton and Justice Frankfurter engaged in, as to whether there is any difference through the passage of time and through progress which has been made between the commerce clause and the Fourteenth Amendment.

But I would suggest in that connection that it certainly is much

more easy to find facts that demonstrate that as progress has gone on, such as in *Morgan* v. *Virginia*, where the separation of races on the interstate buses is involved, it is much easier to find facts which will show, as time has gone on, that there should be a different application than there is where a question of equal protection is involved. We believe, as Mr. Davis pointed out this morning, I think touching this same point, although very slightly, that the Fourteenth Amendment here should be viewed in the light of what was really intended, and what was understood by Congress and by the legislatures at that time.

MR. JUSTICE FRANKFURTER: But Justice Jackson's question brings into play different questions and different considerations, Mr. Moore, because the enabling act of the Fourteenth Amendment is itself a provision of the Fourteenth Amendment; patently Congress looked forward to implementing legislation; implementing legislation patently looked forward to the future; and if Congress passed a statute doing that which is asked of us to be done through judicial decree, the case would come here with a pronouncement by Congress in its legislative capacity that in its view of its powers this was within the Fourteenth Amendment and, therefore, it would come with all the heavy authority, with the momentum and validity that a congressional enactment has.

MR. MOORE: That may be so, Your Honor, but that is another case.

MR. JUSTICE FRANKFURTER: That is a good answer.

MR. MOORE: Yes, it is another case.

MR. JUSTICE JACKSON: I wonder if it is. I should suppose that your argument that this was a legislative question might have been addressed to the proposition that the enforcement of the Fourteenth Amendment, if this were deemed conflicting, might be for the Congress rather than for this Court. I would rather expect and I had rather expected to hear that question discussed. But you apparently are in the position that no federal agency can supersede the state's authority in this matter, which, I say, you have good precedents for arguing.

MR. MOORE: Your Honor will appreciate that you have asked a question that to try to answer adequately requires a lot more time than I have got.

MR. JUSTICE FRANKFURTER: I understood you to say that that is a different case—

MR. MOORE: That is right.

MR. JUSTICE FRANKFURTER: —meaning that you do not have an Act of Congress.

MR. MARSHALL: That is right, sir. Now, of course, in the District—

MR. JUSTICE JACKSON: What I am trying to get at is, do you attach any importance to the fact that there is not any Act of Congress? Apparently you do not, because there could not be one.

MR. MOORE: I am very glad there is not; yes, sir, I am very pleased with that anyway.

May I just take one more minute or two? I wanted to take a couple of minutes on that last question that Justice Frankfurter asked, because it is a very important point in our case, and I would like to take a moment.

The question is posed as to whether or not we are in a different position in Virginia rather than that in the South Carolina case because our building is not yet finished. I do not think so. In line with the doctrine that Your Honor, Justice Frankfurter, saw this Court declare in *Eccles* v. *Peoples Bank*, there certainly must be some leeway here in a court of equity and in a declaratory judgment proceeding. Our friend on the other side, Mr. Marshall, said yesterday he realized there must be a transition period. We are operating under a court decree which says, "Do that thing right now."

MR. CHIEF JUSTICE VINSON: He was talking then, was he not, about segregation, and if it should be held that segregation *per se* was invalid, then he would be willing to let some time pass. But as I have understood him here, he says it is of the present, and it should be here admitted presently.

MR. MOORE: Well, the short answer here really is that as a practical matter in the situation we are in with the building under construction, under the court decree, with our knowing it is going to be ready in September, all we could really do practically would be to close the schools down until June, and then come along with equality. Now, we do not believe that is in the interest of anybody.

I am sorry, I have encroached a little bit on Judge Almond's time. Judge Almond, the Attorney General, desires the remainder of the time.

ARGUMENT OF J. LINDSAY ALMOND, ESQ., ON BEHALF OF THE APPELLEES

MR. ALMOND: May it please the Court:

Just a few minutes are available to our side in which I would

like to discuss with the Court what we conceive to be the historical background of this question in Virginia.

The question posed yesterday, or the remark made by Mr. Justice Frankfurter, is whether or not in the minds of some it may represent man's inhumanity to man or whether or not Virginia and the other southern states made these provisions in its law, its statute, and its constitution, for the separation of the races in the field of education because she had the power to do it or, as answered by our worthy opponent, Mr. Robinson, this morning, that it was placed there to place disabilities upon the Negro.

Prior to 1865 there were no public free schools in Virginia supported by any government, state or local. In 1865 kind missionaries from New England came into Virginia and established schools on a separate basis for the Negro children of former slaves.

The people were impoverished, and the poor white people—and nearly all of them were poor because the land was ravaged as a result of that unfortunate conflict, and they had no place to send their children to school except to do the very best they could through private tutorship. So that arrangement lasted until 1870, when the public free school system of Virginia came into being by virtue of the enactment of the legislature of Virginia, found here in substantially the same language that it was put into the Constitution of Virginia in 1902.

MR. CHIEF JUSTICE VINSON: In 1865, General, you say there were missionaries who came down from the North?

MR. ALMOND: Yes, sir.

MR. CHIEF JUSTICE VINSON: What funds did they have?

MR. ALMOND: They were private funds.

MR. CHIEF JUSTICE VINSON: Private funds; and private schools, I take it?

MR. ALMOND: They were private schools.

MR. CHIEF JUSTICE VINSON: For the Negro?

MR. ALMOND: For the Negro children.

But when the State took over or decided after a terrific conflict as to whether or not it should go into the field of public education, because it was the custom and tradition of our people prior to that time that every family should educate its own children—they were opposed to the expending of public funds for the education of the children of our people.

But a distinguished Virginian, a Doctor William H. Ruffing, became the first superintendent of schools in Virginia, and he wrote that statute which we have before us today, providing that

white and colored children shall not be taught in the same schools, but under the same general regulations as to usefulness and efficiency.

As has been pointed out here, in the Underwood Convention of 1870, when the Underwood Constitution was adopted that Convention was presided over by an individual distinctly hostile to the great majority of the white people in Virginia, and the question came before that Convention as to whether or not a provision would be written into the Constitution requiring that the schools be mixed and operated by the State and the localities jointly on a mixed basis.

An amendment was offered by an eminent Negro doctor from the city of Norfolk to bring that about and, to use an expression that is frequently used in my State today, I may say to the Court that the fur flew; but, as Mr. Moore has pointed out, there were 22 Negro members of the Convention, and on the vote eleven of them voted not to have mixed schools in Virginia.

The debates in that Convention reflect what has been said here today relative to the mixed schools which prevailed in the State of South Carolina for a period of twelve years, and that was discussed.

That was adopted in the light of the fact that they knew then that in 1862 the Congress of the United States provided for separate schools in the District of Columbia. That was adopted because they knew then, and discussed that when the Fourteenth Amendment was submitted to the people or proposed on June 16, 1867, and in the great debate raging in Congress relative to the adoption of the enabling Civil Rights Act, that Congress itself had established the policy of separation of schools, because of the feeling that had grown as an aftermath of that great struggle between the states, and because of the bitterness that ensued, unfortunately—it was determined in Virginia, not as a badge of inferiority, not to place the Negro man or the Negro child in the position where he could never rise to take his place in a free society, but the only way that we could have a free public school system was on a separate basis.

And then during the Reconstruction period, when impoverished as our public treasury and our peoples were, it became necessary to use tax funds for other purposes, and the public treasury and provisions for school purposes were raided to this extent, or diverted; and Dr. Ruffing made a big fight on that. But throughout the Reconstruction period, and not until 1920 did the people of Virginia awaken to the necessity of improvement of their public schools.

Sad to relate, I am ashamed to say, that during many of

those years of the past we have been grossly neglectful of our responsibility in bringing about equal facilities for the Negro race in Virginia.

In 1920 there were only 31,000 children of high school age in Virginia going to school, and today there are something like 155,000 of them.

With that undertaking, our people have come to believe and to know and to feel as a moral proposition, if Your Honors please, that the only position we can take, the one that is morally defensible, is that they are entitled to equal facilities, and there has been launched this great program in Virginia, appropriating millions of dollars and, Mr. Moore has pointed out, at this time we are spending more for facilities for Negro children than we are for whites, and we should do it because we were laggards in the years past in doing what we should have done.

MR. CHIEF JUSTICE VINSON: General, I understood Mr. Moore to say that it was a legal responsibility for Virginia to have the equal facilities in the statute itself.

MR. ALMOND: In the statute itself there is a legal responsibility, and in the years past it has not been discharged as it should have been discharged.

What I said about it is, independently of his right, that we should do it; it is our policy and it is our determination; we are irrevocably dedicated and our people are enthusiastically in support of equal facilities for Negroes at the secondary level in Virginia. That is our program today, and that is the program that we want to go forward with, and that we are going forward with.

The Legislature of 1950, on the recommendation of the Governor, almost without a dissenting voice, appropriated fifty million dollars for school construction. The Legislature of 1952 appropriated another fifteen million dollars, making a total of sixty million dollars that have been appropriated in those two sessions of the Legislature of Virginia to be dedicated almost solely toward the improvement of facilities at the secondary level in Virginia.

MR. CHIEF JUSTICE VINSON: Are those sixty million dollars what you call the Battle Fund?

MR. ALMOND: That is right, Mr. Chief Justice.

MR. CHIEF JUSTICE VINSON: What is the Literary Fund, for what purpose and in what amount? Is it temporary or permanent?

MR. ALMOND: No, sir. Written into the Constitution of Virginia are provisions for what we call a Literary Fund, and there goes into that Fund the collections of all fines that are paid in Virginia; they go permanently into that Fund, and that is a revolving

fund from which the school boards of the various localities may make application for moneys for school purposes, principally for school construction, and meet certain minimum requirements laid down by the State Board of Education; and then they issue their bonds which are held at two percent interest by the State Board of Education; and as the interest comes in and the funds are paid in, it revolves, and it self-perpetuates itself. Then it has been augmented from time to time by direct appropriations from the Legislature into that Literary Fund.

Today, as I cite from memory—and I think the record bears it out—there are loans either in actual operations or applications approved for in excess of 48 million dollars from the Literary Fund, which have been applied to the construction of white schools and something over twelve million dollars which have been applied to the construction of the Negro schools.

If I may have just another moment—

MR. CHIEF JUSTICE VINSON: All right, General, you may have five additional minutes, and you may have five minutes for rebuttal.

MR. ALMOND: Thank you, sir.

I just want to say a word—

MR. CHIEF JUSTICE VINSON: I do not want to penalize you by my questions.

MR. ALMOND: I just want to say a word, if Your Honors please, relative to the impact of a decision that would strike down, contrary to the customs, the traditions and the mores of what we might claim to be a great people, established through generations, who themselves are fiercely and irrevocably dedicated to the preservation of the white and colored races.

We have had a struggle in Virginia, particularly from 192(on, to educate our people, white and colored, to the necessity of promoting the cause of secondary education. We think we have had great leaders to develop in that field. One, Doctor Dabney Lancaster, now president of Longwood College, I think, made himself very unpopular because he advocated and fought tooth and nail for the equalization of salaries between white and Negro teachers.

That has been accomplished. The curricula have been accomplished; facilities are rapidly being accomplished; and our people deeply ingrained within them, feel that it is their custom, their use and their wont; and their traditions, if destroyed, as this record shows, will make it impossible to raise public funds through the process of taxation, either at the state or the local level, to suppor

the public school system of Virginia, and it would destroy the public school system of Virginia as we know it today. That is not an idle threat.

Then, too, a thing that concerns us—

MR. CHIEF JUSTICE VINSON: General, in what way will it destroy it?

MR. ALMOND: It would destroy it, Mr. Chief Justice, because we must have—it is a costly proposition—money with which to operate the public school system at both the state level and the local level, and the only source of income, of course, is the source of taxation at the state and local level, and bond issues at the local level; and the people would not vote bond issues through their resentment to it. I say that not as a threat.

Then, another thing, we have 5,243 Negro teachers in the public school system of Virginia on an average of splendid qualification. That 5,243 exceed the Negro teachers in all of the 31 states of the Union where there is not segregation by law. They would not, as a hard fact of realism—and not in a spirit of recrimination do I say this, but simply as hard stark reality—those Negro teachers would not be employed to teach white children in a tax-supported system in Virginia.

Now, I know they tell us, "Why didn't you raise that voice when the Negro was admitted to the University of Virginia?" I did not raise it. I advised the University of Virginia that they had no defense, and I sat down with distinguished counsel in this case and agreed to the stipulations and helped prepare the decree that was entered by the court, and there was no evidence taken on it.

But here there is distinction, if Your Honor please, with 22.7 percent of our population, the Negro population, with 59 percent of the school population of Prince Edward County Negro population; to make such a transition would undo what we have been doing, and which we propose to continue to do for the uplift and advancement of the education of both races. It would stop this march of progress, this onward sweep.

I thank you.

MR. CHIEF JUSTICE VINSON: Mr. Robinson, you understand that you have five additional minutes.

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

MR. ROBINSON: In addition to the time that was reserved to me, yes.

May it please the Court:

In addition to the evidence in the record to which I have referred the Court to answer a question put to me by Mr. Justice Reed upon the opening argument, I should also like to request the attention of the Court directly to our statement as to jurisdiction, pages nine to eleven, where we did undertake to incorporate some historical evidence which we thought would be of value on the question of the basis, the original basis, of the segregation legislation, data which are not contained in the record in the case.

Examination of this material will indicate that prior to the time of the Civil War, as a consequence of the *Dred Scott* decision, the Negro did not enjoy citizenship rights equal to those enjoyed by a white person. As a matter of fact, in that case the Court had decided that he possessed no rights which a white person was bound to respect at all.

And so it goes that after the Civil War, and even after the Negro was affirmatively granted full and equal citizenship by the Thirteenth and Fourteenth Amendments, and even though his right to suffrage was given protection by the provisions of the Fifteenth Amendment, the white South was not content with this constitutional change. Consequently, we had the so-called period of the "Black Codes," which were a body of laws which were expressly intended and indeed did accomplish the disability of the Negro.

Examination of the records of the constitutional conventions of the southern states during the period that legislative segregation of education had its beginning gives, as I stated this morning, a reliable indication that the real basis of this legislation was not what it has been stated to this Court it is, but rather that the segregation laws themselves were intended to, and have in fact in Virginia accomplished—a matter which I shall get to in just a few minutes—were intended to limit the educational opportunities of the Negro, and place him in a position where he could not obtain in the State's educational system opportunities and benefits from the public educational program equal to those which flowed to white students.

We have incorporated in our statement as to jurisdiction as one piece of evidence specifically referable to Virginia the report of the proceedings during the debates at the 1902 Constitutional Convention over one of the provisions which was then up for discussion, a resolution that state funds for schools must be used to maintain the primary schools for a certain period of time before these funds could be used for the establishment of high schools or indeed grades beyond the higher grades.

The question was then asked as to whether or not the effect

of this provision would be to tend to prevent the establishment of schools in sections of the country where such schools ought to be prevented, and the eminent Mr. Carter Glass answered the question by pointing out that this provision had been considered, that there was a discussion of this demand, stating as he did—and these are his words:

> Certainly, in my judgment, a very reasonable demand, that the white people of the black sections of Virginia should be permitted to tax themselves, and after a certain point has been passed which would safeguard the poorer classes in these communities, divert that fund to the exclusive use of the white children.

It was at the same Constitutional Convention that Senator Glass made the statement that discrimination was one of the purposes for which the convention was called—I am speaking about discrimination over in the area of suffrage—and it was at this very same convention that he said that one of the purposes of the convention was to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every Negro voter who can be gotten rid of legally without materially impairing the numerical strength of the white electorate. The so-called Virginia picture bears out this purpose.

I would like to ask the Court's attention—invite the Court's attention—to the data which we have incorporated in our reply brief commencing on page eleven, the data pertaining to the present and the future educational system in Virginia. Although Negroes constitute, or they did constitute in 1950-51, 26 percent of the total number of pupils enrolled in the schools of the Commonwealth, they did not receive, when measured on a dollars and cents basis, anything like their fair share of the educational funds, anything like their fair share of the school property employed by the Commonwealth in its educational program. We have set forth there data to demonstrate that for each dollar invested in each category per Negro student, the investment for the 1950-51 school session per Negro student was 61 cents in sites and buildings, 50 cents in furniture and equipment, 67 cents in buses, and 61 cents in total school property. That is the situation in Virginia. It was the situation in Virginia as we were able to present it up to the latest possible point at the time of the trial in this case.

MR. JUSTICE JACKSON: I hope you will take time enough before you finish to tell me what your position is about the provision of the Fourteenth Amendment, that Congress pass appropriate legislation to enforce it, and what effect, if any, it has on these cases.

MR. ROBINSON: That are now before the Court, sir?

MR. JUSTICE JACKSON: Yes, cases of this character.

MR. ROBINSON: I will be glad to do that, Mr. Justice Jackson, right now. I disagree with counsel for the appellees that Congress does not have full power under section 5 of the Fourteenth Amendment to enact legislation that would outlaw segregation in state public schools. But I do feel that insofar as the present cases are concerned that has relatively little merit.

We come before this Court presenting what we consider to be justiciable questions, questions that are not essentially different in character from those which have been presented in cases which in the past have been brought here. In other words, I do not feel that the mere fact that under the authority of section 5 of the Fourteenth Amendment Congress could enact legislation which would settle this problem would in any way encroach upon the jurisdiction of this Court if, as a matter of fact, a violation of the Constitution has been shown.

MR. JUSTICE JACKSON: Of course, in the jury cases you have legislation by Congress; in the interstate commerce cases you have legislation by Congress.

MR. ROBINSON: That is correct, sir.

MR. JUSTICE JACKSON: In a good many of our cases, but not all, you are quite right, that some do have them. But in a number of cases they rest on specific statutory implementation of this Amendment.

MR. ROBINSON: Yes. I would like to make—

MR. JUSTICE DOUGLAS: What statute of Congress regulates juries?

MR. ROBINSON: I think it is section 47 of Title 8 of the United States Code. I think it is; I have forgotten.

MR. JUSTICE JACKSON: I pointed it out in a dissenting opinion some time ago, but Justice Douglas apparently did not read my dissent.

MR. ROBINSON: I do not remember the exact number, Mr. Justice Douglas, but it is up in Title 8, and, as I recall, it is somewhere in the forties; it is in the forties section.

I would like to make reference to this—

MR. JUSTICE DOUGLAS: Has the Court ever held that the Fourteenth Amendment is not executed unless Congress acts?

MR. ROBINSON: No, I do not think so.

There is a large area of law which has been developed by this Court in which the decision has rested upon the provisions of the due process and equal protection clauses, and, in a few instances, of the privileges and immunities clause where there was not any implementing legislation by Congress.

As I understand the theory, particularly as it came as a consequence of the *Civil Rights Cases*, that authority was there that Congress could exercise, if it desired to do so; but the position which we urge upon the Court is, the mere fact that if Congress has not done it, it will not preclude this Court from deciding constitutional questions. I can make reference, for example, to the situation which was recently presented to this Court in the so-called restrictive covenant cases, and in those cases we had a piece of legislation involved that was section 42 of Title 8 of the United States Code. This Court nevertheless held that a state court enforcement of those restrictions resulted in the denial of the equal protection of the laws, notwithstanding the fact in that situation we did have a case in which Congress, under its authority conferred by section 5 of the Fourteenth Amendment, might have outlawed the thing to start off with, so that the question might never have gotten to this Court.

MR. JUSTICE REED: But if segregation is not a denial of equal protection or due process, legislation by Congress could do nothing more except to express congressional views, and wouldn't that be decisive?

MR. ROBINSON: Yes, I am inclined to—

MR. JUSTICE REED: So you would be forced to decide whether or not segregation *per se* comes under that question.

MR. ROBINSON: Of course, that is our position here, sir.

MR. JUSTICE FRANKFURTER: The Fourteenth Amendment is not unlike, in some aspect, the commerce clause. There are many things that the states cannot do merely because the commerce clause exists. There are many things that a state can do until Congress steps in.

MR. ROBINSON: That is right, sir. Under those circumstances—

MR. JUSTICE REED: The state cannot violate the Fourteenth Amendment.

MR. ROBINSON: I beg pardon?

MR. JUSTICE REED: The state cannot violate the Fourteenth Amendment.

MR. ROBINSON: That is right, and I was just about to observe that it cannot violate the commerce clause either.

MR. JUSTICE FRANKFURTER: We would not be arguing for ten hours if it is clear that this is a violation of it. We do not argue for ten hours a question that is self-evident.

MR. ROBINSON: I understand, sir.

Now, going back to the so-called Virginia picture, reference was made and questions were asked concerning the Literary Fund allocations, the approximately sixty million dollars allocated by the state Literary Fund for school construction in the State. We have pointed out in our reply brief, and we have demonstrated statistically, that even with this large expenditure, when you add it to the present value of buildings and sites, the ratio of investment in school property will be increased from the present 61 cents to only 74 cents per Negro student.

I should like to also emphasize the fact that no time has been set for the completion of these projects and, consequently, we do not even know when the ratio is going to be realized; but even if all of the Negro projects which are proposed are completed, and even though no additional money whatsoever is invested in white schools, the amount of money invested in buildings and sites per Negro student over the entire State would be only 343.30 dollars as compared with 366.73 dollars that are already invested in school property per white student.

So, consequently, the Literary Fund program, the construction which is expected to develop out of the Literary Fund allocations would not seem to bring about this equality even of physical facilities within any point in the near future.

Reference was made in this case also to the so-called four-year program. That is a program that has been developed, and that contemplates the expenditure of some 263 million dollars for new construction and improvements. And it has been emphasized that 77.7 percent of this money will be spent on white projects, and 22.3 percent on Negro projects, and the emphasis is placed there by reason of the fact that the percentages of expenditures are slightly in excess of the percentages of school population.

The money for this program, as the record clearly shows, is not now available; and even if the money were available and the entire program were completed by 1956, the amount invested in sites and buildings would only be 79 cents per Negro student for each dollar per white student, and thus, I urge the Court, this is a very vast program. Virginia does not have the money for it now. Even though Virginia could spend 263 million dollars—an enormous sum by Virginia standards—all that we succeed in doing is moving from a present 61 cents to 79 cents per Negro student for each dollar that is invested in buildings and sites for white students.

MR. CHIEF JUSTICE VINSON: Have you got any breakdown as to the number of school buildings that have been constructed in the last, say, five years? I heard about the high school of Richmond and Charlottesville. I am fearful that this percentage business does not make it very clear to me because it is a question of the number of schools; it is a question of how the students are grouped, as to whether they are getting the fair "divvy," I might say.

MR. ROBINSON: Yes, Mr. Chief Justice.

Now, maybe I can help. On the Literary Fund allocations that I was talking about just a few minutes ago, the evidence at the time of the trial showed that there had been projects—no, it does not give the number of schools. It simply shows the scope of the program, that is, the number of cities and counties over which the construction would extend.

If Your Honor will indulge me just a moment, I will look at the exhibit. If we have it in the record at all, might I make this suggestion: There are a large number of exhibits in this case, and all of this statistical information is contained in those exhibits. Those exhibits are before the Court. If the information is available at all it will be found there.

We have in our reply brief a specific, pointed and detailed reference in each case where we get to one of these particular things. I do not recall that the precise information concerning which Your Honor has asked me does appear in the record.

MR. CHIEF JUSTICE VINSON: It would seem to me that if it did appear it would either show a stepped-up program or maybe retrogression in respect of the—if you had the breakdown it would show something.

MR. ROBINSON: Well, the appellees do insist that this is, in other words, a stepped-up program.

MR. CHIEF JUSTICE VINSON: Do I understand that you take the same position that Mr. Marshall would take if we were to hold that segregation *per se* was unconstitutional in regard to the time element?

MR. ROBINSON: On the matter of necessity of the administrative problem in these segregated—oh, yes.

MR. CHIEF JUSTICE VINSON: Then why, if you take that position there—and I assume you take it as a matter of necessity—why do you not take that position here under the equal facilities doctrine?

MR. ROBINSON: If Your Honor please, I think that there is a

difference between a postponement of a right and a delay which is incidental to affording the remedies that we asked for. I do not think that it would be possible, without enroaching upon the previous decisions of this Court, to take the position that, notwithstanding a present denial of the constitutional rights of the appellants, that notwithstanding that, they must wait until the State gets around to fixing the schools.

MR. CHIEF JUSTICE VINSON: Of course, I take it that you recognize the distinction in the cases in regard to the number of students affected, and all that sort of thing. But if you agree that a reasonable period of time should be granted if we held segregation was unconstitutional, I just wonder why you take the position you do in regard to the equal facilities, unless you say that the stepped-up program is just not sufficient to meet the situation.

MR. ROBINSON: We do take the latter position, if Your Honor please, and we have set forth—and since my time is just about up, I can only now refer the Court to the data which we have set forth in our reply brief in that connection, in which we point out that this stepped-up program of this State is not going to produce even physical equality on a statewide basis at any time in the near future, and we tried to calculate that time as best we could from the available information.

Now, with respect to the other portion of Your Honor's question, our position on it is simply this: I appreciate the fact that even though there has been a violation of legal rights, in affording a remedy it may be necessary and it may be entirely necessary for there to be some delay incidental to the affording of that remedy. A case that I can think of is if a court should decree specific performance of a contract to tear down a house; the man has got to have a reasonable opportunity to get the house down. But I do not think in that particular case if the man is entitled to that decree—

MR. CHIEF JUSTICE VINSON: A man might have to have a reasonable opportunity to get out of the house before it is torn down.

MR. ROBINSON: I agree with that, too.

In other words, we have the administrative practical problem arising from the affording of the remedy, and to that particular situation and to that particular extent, of course, we readily recognize some lapse of time. I am not in a position to suggest what it should be.

I think it is an administrative problem initially, at least, for the school authorities to work out. We appreciate that, but I do

not see how we can, without encroaching upon the body of decisions of this Court which have established the rights involved in these cases as present and personal, as to how we can say that notwithstanding that, we may delay the right; in other words, that a person must be compelled before he can get satisfaction of his rights—he may be postponed at some time into the future before he can get what the Constitution entitled him to, and what his white counterparts are getting already.

MR. CHIEF JUSTICE VINSON: Now, take the South Carolina case. Would you say that, assuming the equal facilities rule will still continue, would you say that the lapse of time in their construction program was not fully justified by the lower court?

MR. ROBINSON: Well, I would have to answer that question, if Your Honor please, this way: I do not personally feel, and I could not urge upon the Court, that suspension of the satisfaction of a constitutional right is ever justified. In other words, I would—

MR. CHIEF JUSTICE VINSON: But you realize you are in equity; you realize that you have got the rights of other people involved in regard to dislocation?

MR. ROBINSON: I appreciate that.

MR. CHIEF JUSTICE VINSON: And in the South Carolina case there was some delay, but we are told here that when the new buildings were constructed and occupied in September—I recall there was some effort, special effort, made to get the material to build the gymnasium—at one time they thought they would not get it, but they worked around and got it for the gymnasium.

MR. ROBINSON: Yes. As I understand the "separate but equal" rule, even under that, at that particular time, at the time of the first hearing when the facilities were—

MR. CHIEF JUSTICE VINSON: All right, go ahead.

MR. ROBINSON: —unequal, the court should, instead of entering an equalization decree, should have removed the segregation. That is what this Court said in the *Gaines* case is the consequence of trying to maintain segregation where you do not have equal physical facilities.

MR. CHIEF JUSTICE VINSON: Well, the Court did not—

MR. ROBINSON: The Court did not under those circumstances, and I say that at that particular point what the Court there was doing, the Court was not simply delaying the thing for purposes which would be incidental to giving to the plaintiffs the relief which

under that doctrine they were then entitled to. The Court was delaying it until conditions could be remedied in such a way that under the "separate but equal" doctrine, if limited to that particular point, they would not be entitled to any relief at all.

MR. CHIEF JUSTICE VINSON: Well now, what is your view in regard to the way it was handled by the lower court?

MR. ROBINSON: In the Virginia case?

MR. CHIEF JUSTICE VINSON: No, in the South Carolina case, considering that they ruled segregation *per se* not unconstitutional? Do you have objection to that method of handling it?

MR. ROBINSON: Well, if the Court should rule—I want to make certain—

MR. CHIEF JUSTICE VINSON: Well, they did rule. I say, so far as they are concerned, they did so rule.

MR. ROBINSON: Yes. I am just trying to understand Your Honor's question.

MR. CHIEF JUSTICE VINSON: Would you say that under the circumstances in the South Carolina case, having ruled on the segregation question as they did, that immediately, *eo instanti*, they should have said, "entry into white schools," or, seeing the imminent construction, that they should continue as they did?

MR. ROBINSON: Not the latter if you please; the former, taking into consideration that "immediately" would not mean five minutes from now.

MR. CHIEF JUSTICE VINSON: Well now, how many minutes, how many days? That is the point.

MR. ROBINSON: I would not be able—I have tried to make plain that I consider that that is an administrative problem, and that gets into things that, frankly, I do not think that I am able to answer.

MR. CHIEF JUSTICE VINSON: What about the courts?

MR. ROBINSON: I do not think that courts are, either. In other words, my position in that particular regard is that they are entitled to the relief immediately which should be afforded them just as soon as expeditious administrative arrangements can be made to unsegregate the schools, as I understand the *Gaines* and the subsequent cases, the doctrine of those cases, requires.

For these reasons, we respectfully submit that the decree of the district court should be reversed.

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