Brown v. Board of Education: "The Case of the Century

KANSAS BAR ASSOCIATION

NARRATOR: The main issue in *Brown* and its companion cases was whether racial segregation through "separate but equal" schools violates the Equal Protection Clause. The theory of *Plessy v. Ferguson* was that if the facilities were equal, then there was no unequal treatment. In the following portions of the argument, the attorneys and justices discuss whether separate but equal education can ever really be equal. Consider how the plaintiffs formulate the argument against segregation, and how the states defend it.

THE CHIEF JUSTICE: Case No. 8, Oliver Brown and others versus the Board of Education of Topeka, Shawnee County, Kansas . . .

MR. CARTER: [Mr. Carter for the plaintiffs, your honors. May it please the Court –] We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no state has any authority under the equal protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.

In short, the sole basis for our appeal here on the constitutionality of the statute of Kansas is that it empowers the maintenance and operation of racially segregated schools, and under that basis we say, on the basis of the fact that the schools are segregated, that Negro children are denied equal protection of the laws, and they cannot secure equality in educational opportunity.

We say that for two reasons: First, we say that a division of citizens by the states for public school purposes on the basis of race and color effects an unlawful and an unconstitutional classification within the meaning of the equal protection clause; and, secondly, we say that where public school attendance is determined on the basis of race and color, that it is impossible for Negro children to secure equal educational opportunities within the meaning of the equal protection of the laws.

JUSTICE REED: Was there any evidence in the record to show the inability, the lesser ability, of the child in the segregated schools?

MR. CARTER: Yes, sir, there was a great deal of testimony on the impact of racial distinctions and segregation on the emotional and mental development of a child.

The evidence went to the fact that in the segregated school, because of these emotional impacts that segregation has, that it does impair the ability to learn, that you are not able to learn as well as you do if you were in a mixed school; and that, further than that, you are barred from contact with members of the dominant group and, therefore, your total educational content is somewhat lower than it would be ordinarily.

JUSTICE BURTON: It is your position that there is a great deal more to the educational process even in the elementary schools than what you read in the books?

MR. CARTER: Yes, sir, that is precisely the point.

JUSTICE BURTON: And it is on that basis which makes a real difference whether it is segregated or not?

MR. CARTER: Yes, sir. We say that the question of your physical facilities is not enough. The Constitution does not, in terms of . . . giving equal protection of the laws with regard to equal educational opportunities, does not stop with the fact that you have equal physical facilities, but it covers the whole educational process.

THE CHIEF JUSTICE: The findings in this case did not stop with equal physical facilities, did they?

MR. CARTER: No, sir, but . . . the court did not feel that it could go in the law beyond physical facilities.

THE CHIEF JUSTICE: Well, in regard to the findings, it was found that the physical facilities, curricula, courses of study, qualifications and quality of teachers, as well as other educational facilities in the two sets of schools are comparable?

MR. CARTER: …That is true. But the court went on to show how segregation made the educational opportunities inferior, and this, we think, is the heart of our case.

JUSTICE FRANKFURTER: …we now have to face the fact that what you are challenging is something that was written into the public law and adjudications of courts, including this Court, by a large body of decisions and, therefore, the question arises whether, and under what circumstances, this Court should now upset so long a course of decisions?

MR. CARTER: But as I said before, as the Court apparently approached *Sweatt* and *McLaurin*, it did not feel it had to meet that issue, and we do not feel it has to meet it here. But if the Court has reached a contrary conclusion in regard to it, then we, of course, take the position that the "separate but equal" doctrine should be squarely overruled.

JUSTICE DOUGLAS: I think you are saying that segregation may be all right in streetcars and railroad cars and restaurants, but that is all that we have decided.

MR. CARTER: That is the only place that you have decided that it is all right.

JUSTICE DOUGLAS: And that education is different, education is different from that.

MR. CARTER: Yes, sir.

MR. WILSON: [Assistant Attorney General Wilson, for the State of Kansas, your honors. May it please the Court –] The views of the State of Kansas can be stated very simply and very briefly: We believe that our statute is constitutional. We do not believe it violates the Fourteenth Amendment.

We believe so because our supreme court, the Supreme Court of Kansas, has specifically said so. We believe that the decisions of the Supreme Court of Kansas follow and are supported by the decisions of this Court, and the decisions of many, many appellate courts in other jurisdictions.

This statute has been squarely challenged in our Kansas Supreme Court and has been upheld, and I cite in my case the leading case of *Reynolds* v. *The School Board*, where in 1903 the court held flatly that the Kansas statute does not violate the Fourteenth Amendment to the Constitution of the United States.

That opinion is an exhaustive one wherein the court drew on the Roberts case in Massachusetts and numerous other cases cited in the appellate courts of the State, and the court followed specifically the rule laid down in the Plessy case.

It is our position that the principle announced in the *Plessy* case and the specific rule announced in the *Gong Lum* case are absolutely controlling here.

We think it is sheer sophistry to attempt to distinguish those cases from the case that is here presented, and we think the question before this Court is simply: Is the *Plessy* case and the *Gong Lum* case and the "separate but equal" doctrine still the law of this land?

We think if you decide in favor of these appellants, the Court will necessarily overrule the doctrines expressed in those cases and, at the same time, will say that the legislatures of the seventeen or twenty–one states, that the Congress of the United States, that dozens of appellate courts have been wrong for a period of more than seventy–five years, when they have believed and have manifested a belief that facilities equal though separate were within the meaning of the Fourteenth Amendment.

JUSTICE BURTON: Don't you recognize it as possible that within seventy–five years the social and economic conditions and the personal relations of the nation may have changed, so that what may have been a valid interpretation of them seventy–five years ago would not be a valid interpretation of them constitutionally today?

MR. WILSON: We recognize that as a possibility. We do not believe that this record discloses any such change.

JUSTICE BURTON: But that [would be different than] saying that these courts of appeals and state supreme courts have been wrong for seventy–five years.

MR. WILSON: Yes, sir.

We concede that this Court can overrule the *Gong Lum* doctrine, the *Plessy* doctrine, but nevertheless, until those cases are overruled they are the best guide we have.

THE CHIEF JUSTICE: Case No. 101, Harry Biggs Junior v. Elliot, Chairman of the Board of Trustees of School District No. 22, Clarendon, South Carolina.

MR. MARSHALL . . . [Mr. Thurgood Marshall, for the plaintiffs, your honors. May it please the Court –] [T]his Court has laid down the rule in many cases set out in our brief, that in the case of the object or persons being classified, it must be shown: (1) that there is a difference in the two; [and] (2) that . . . the difference has a significance with the subject matter being legislated; and the state has made no effort up to this date to show any basis for that classification other than that it would be unwise to do otherwise.

Witnesses testified that segregation deterred the development of the personalities of these children. Two witnesses testified that it deprives them of equal status in the school community, that it destroys their self-respect. Two other witnesses testified that it denies them full opportunity for democratic social development. Another witness said that it stamps him with a badge of inferiority.

The summation of that testimony is that the Negro children have roadblocks put up in their minds as a result of this segregation, so that the amount of education that they take in is much less than other students take in.

The other significant point is that one witness, Dr. Kenneth Clark, examined the appellants in this very case and found that they were injured as a result of this segregation. The court completely disregarded that.

I do not know what clearer testimony we could produce in an attack on a specific statute as applied to a specific group of appellants.

MR. DAVIS: [Mr. John W. Davis, for the State of South Carolina, your honors. May it please the Court –] I shall not undertake to interpret for Your Honors the scope and weight of your own opinions. In *Plessy* v. *Ferguson*, *Cumming* v. *Richmond County Board of Regents*, *Gong Lum* v. *Rice*, *Berea College* and *McLaurin* v. *Oklahoma*, and there may be others for all I know, certainly this Court has spoken in the most clear and unmistakable terms to the effect that this segregation is not unlawful.

Now, what are we told here that has made all that body of activity and learning of no consequence? Says counsel for the plaintiffs, or appellants, we have the uncontradicted testimony of expert witnesses that segregation is hurtful, and in their opinion hurtful to the children of both races, both colored and white. These witnesses severally described themselves as professors, associate professors, assistant professors, and one describes herself as a lecturer and adviser on curricula. I am not sure exactly what that means.

I did not impugn the sincerity of these learned gentlemen and lady. I am quite sure that they believe that they are expressing valid opinions on their subject. But there are two things notable about them. Not a one of them is under any official duty in the premises whatever; not a one of them has had to consider the welfare of the people for whom they are legislating or whose rights they were called on to adjudicate. And only one of them professes to have the slightest knowledge of conditions in the states where separate schools are now being maintained. Only one of them professes any knowledge of the condition within the 17 segregating states.

I want to refer just a moment to that particular witness, Dr. Clark. Dr. Clark professed to speak as an expert and an informed investigator on this subject. His investigation consisted of visits to the Scott's Branch primary and secondary school at Scott's Branch, which he undertook at the request of counsel for the plaintiffs. He called for the presentation to himself of some 16 pupils between the ages of six and nine years, and he applied to them what he devised and what he was pleased to call an objective test. That consisted of offering to them sixteen white and colored dolls, and inviting them to select the doll they would prefer, the doll they thought was nice, the doll that looked bad, or the doll that looked most like themselves. He ascertained that ten out of his battery of sixteen preferred the white doll. Nine thought the white doll was nice, and seven thought it looked most like themselves. Eleven said that the colored doll was bad, and one that the white doll was bad. And out of that intensive investigation and that application of that thoroughly scientific test, he deduced the sound conclusion that segregation there had produced confusion in the individuals--and I use his language--"and their concepts about themselves conflicting in their personalities, that they have been definitely harmed in the development of their personalities."

That is a sad result, and we are invited to accept it as a scientific conclusion. But I am reminded of the scriptural saying, "Oh, that mine adversary had written a book." And Professor Clark, with the assistance of his wife, has written on this subject and has

described a similar test which he submitted to colored pupils in the northern and nonsegregated schools. He found that 62 percent of the colored children in the South chose a white doll; 72 percent in the North chose the white doll; 52 percent of the children in the South thought the white doll was nice; 68 percent of the children in the North thought the white doll was nice; 49 percent of the children in the South thought the colored doll was bad; 71 percent of the children in the North thought the colored doll was bad.

Now, these latter scientific tests were conducted in nonsegregating states, and with those results compared, what becomes of the blasting influence of segregation to which Dr. Clark so eloquently testifies?

MR. MARSHALL: [Mr. Marshall in rebuttal, your honors. May it please the Court.] I would like to emphasize to the Court, if I may, that this question, the ultimate question of segregation at the elementary and high school levels, has come to this Court through the logical procedure of case after case, going all the way back to the Gaines case, and coming up to the present time.

We had hoped that we had put in the evidence into the record, the type of evidence which we considered this Court to have considered in the Sweatt and McLaurin cases, to demonstrate that at the elementary and high school levels, the same resulting evil which was struck down in the Sweatt and McLaurin cases exists, for the same reason, at the elementary and high school levels, and I say at this moment that none of that has been disputed.

JUSTICE FRANKFURTER: Do you think it would make any difference to our problem if this record also contained the testimony of six professors from other institutions who gave contrary or qualifying testimony? Do you think we would be in a different situation?

MR. MARSHALL: You would, sir, but I do not believe that there are any experts in the country who would so testify. And the body of law is that--even the witnesses, for example, who testified in the next case coming up, the Virginia case, all of them, admitted that segregation in and of itself was harmful. They said that the relief would not be to break down segregation. But I know of no scientist that has made any study, whether he be anthropologist or sociologist, who does not admit that segregation harms the child.

JUSTICE FRANKFURTER: Of course, if it is written into the Constitution, then I do not care about the evidence. If it is in the Constitution, then all the testimony that you introduce is beside the point, in general.

MR. MARSHALL: I think, sir, that so far as the decisions of this Court, this Court has repeatedly said that you cannot use race as a basis of classification.

JUSTICE FRANKFURTER: Certainly. Any single individual, just one, if his constitutional rights are interfered with, can come to the bar of this Court and claim it.

MR. MARSHALL: Yes, sir. We therefore respectfully urge that the judgment of the United States district court be reversed.

NARRATOR: The requirement of equal protection cannot and does not mean that all people must be treated equally all the time. Differences in treatment do not violate the equal protection clause if there is a legitimate reason to classify people under the law. For that reason, the states might defend segregation if they could find a legitimate reason for it. Although racial discrimination is not a legitimate reason for segregation, the practice was at times defended as necessary to avoid racial friction and violence or as a reflection of the preferences of both races. In the portions of the argument that follow, the attorneys and the justices consider the justification for school segregation.

[MR. CHIEF JUSTICE: Mr. Carter, what is the historical reason for this law? Why does it permit cities like Topeka to have segregated schools?]

MR. CARTER: As I understand the state's position, the State of Kansas said that the reason for this legislation to be applicable in urban centers, is that although Negroes compose four percent of the population in Kansas, ninety percent of them are concentrated in the urban areas, in the cities of the first class, and that Kansas has people from the North and the South with conflicting views about the question of the treatment of Negroes and about the separation and segregation, and that, therefore, what they did was that they authorized, with the power that they had, they authorized these large cities where Negroes appeared in large numbers to have segregated public elementary schools.

JUSTICE FRANKFURTER: We are dealing here with a body of enactments by numerous states, whatever they are—eighteen or twenty—not only the South but border states and northern states, and legislation which has a long history.

Now, unless you say that this legislation merely represents man's inhumanity to man, what is the root of this legislation? What is it based on? Why was there such legislation, and was there any consideration that the states were warranted in dealing with—maybe not this way—but was there anything in life to which this legislation responds?

MR. CARTER: Well, Your Honor, I think that this legislation is clear—the sole basis for it is race.

JUSTICE FRANKFURTER: Is race?

MR. CARTER: Is race.

MR. WILSON: My theory of the justification of the statute is this: The State of Kansas was born out of the struggle between the North and the South prior to the War Between the States, and our State was populated by squatters from the North and from the South.

Those squatters settled in communities. The pro–slavery elements settled in Leavenworth, in Atchison, and Lecompton. The Free Soil elements settled in Topeka, in Lawrence, and in Wyandotte. The Negroes who came to the State during and immediately subsequent to the war also settled in communities.

Consequently, our early legislatures were faced with this situation: In some communities the attitudes of the people were such that it was deemed best that the Negro race live apart. In other communities a different attitude was reflected. Also in some communities there was a substantial Negro population. In other communities there were few Negroes.

Therefore, the legislature sought by this type of legislation to provide a means whereby the community could adjust its plan to suit local conditions, and we believe they succeeded.

JUSTICE JACKSON: You mentioned Topeka as one of the Free State settlements, and that seems to be the subject that is involved here with the segregation ordinances. Is there any explanation for that?

MR. WILSON: We have in Kansas history a period of migration of the Negro race to Kansas which we call the exodus, the black exodus, as spoken of in the history books.

At that time, which was in the [eighteen] ‘eighties, large numbers of Negro people came from the South and settled in Kansas communities. A large number of those people settled in Topeka and, for the first time, I presume—and again I am speculating—there was created there the problem of the racial adjustment within the community.

The record in this case infers that segregation was established in Topeka about fifty years ago.

I am assuming that, in my speculation for the Court, that segregation began to be practiced in Topeka after the exodus had given Topeka a substantial colored population.

MR. MARSHALL: So far as the appellants are concerned in this case, at this point it seems to me that the significant factor running through all these arguments up to this point is that for some reason, which is still unexplained, Negroes are taken out of the main stream of American life in these states.

There is nothing involved in this case other than race and color, and I do not need to go to the background of the statutes or anything else. I just read the statutes, and they say, "white and colored."

There are always respectable people who can be quoted as in support of a statute. But in each case, this Court has made its own independent determination as to whether that statute is valid. Yet in this case, the Court is urged to give blanket approval that this field of segregation and, if I may say, this field of racial segregation, is purely to be left to the states, the direct opposite of what the Fourteenth Amendment was passed for, the direct opposite of the intent of the Fourteenth Amendment and the framers of it.

JUSTICE FRANKFURTER: Do you really think it helps us not to recognize that behind this are certain facts of life, and the question is whether a legislature can address itself to those facts of life in spite of or within the Fourteenth Amendment, or whether, whatever the facts of life might be, where there is a vast congregation of Negro population as against the states where there is not, whether that is an irrelevant consideration? Can you escape facing those sociological facts, Mr. Marshall?

MR. MARSHALL: No, I cannot escape it. But if I did fail to escape it, I would have to throw completely aside the personal and present rights of those individuals.

JUSTICE FRANKFURTER: It would be more important information in my mind to have you spell out in concrete what would happen if this Court reverses and the case goes back to the district court for the entry of a decree.

MR. MARSHALL: I think, sir, that the decree would be entered which would enjoin the school officials from, one, enforcing the statute; two, from segregating on the basis of race or color. Then I think whatever district lines they draw, if it can be shown that those lines are drawn on the basis of race or color, then I think they would violate the injunction. If the lines are drawn on a natural basis, without regard to race or color, then I think that nobody would have any complaint.

MR. DAVIS: [We believe that the Fourteenth Amendment permits the states to follow the policy of maintaining segregated schools.] How should we approach that Amendment? I use the language of the Court: An Amendment to the Constitution should be read, you have said,

> "in a sense most obvious to the common understanding at the time of its adoption. For it was for public adoption that it was proposed."

Still earlier you have said it is the duty of the interpreters, to place ourselves as nearly as possible in the condition of the men who framed the instrument.

What was the condition of those who framed the instrument? The resolution proposing the Fourteenth Amendment was proffered by Congress in June, 1866. In the succeeding month of July, the same Congress proceeded to establish or to continue separate schools in the District of Columbia, and from that good day to this Congress has not wavered in that policy. It has confronted the attack upon it repeatedly. During the life of Charles Sumner, over and over again, he undertook to amend the law of the District so as to provide for mixed and not for separate schools, and again and again he was defeated.

JUSTICE BURTON: What is your answer, Mr. Davis, to the suggestion mentioned yesterday that at that time the conditions and relations between the two races were such that what might have been unconstitutional then would not be unconstitutional now?

MR. DAVIS: My answer to that is that changed conditions may affect policy, but changed conditions cannot broaden the terminology of the Constitution; the thought is an administrative or a political question, and not a judicial one.

JUSTICE BURTON: But the Constitution is a living document that must be interpreted in relation to the facts of the time in which it is interpreted. Did we not go through with that in connection with child labor cases, and so forth?

MR. DAVIS: Oh, well, of course, changed conditions may bring things within the scope of the Constitution which were not originally contemplated, and of that perhaps the aptest illustration is the interstate commerce clause. Many things have been found to be interstate commerce which at the time of the writing of the Constitution were not contemplated at all. Many of them did not even exist. But when they come within the field of interstate commerce, then they become subject to congressional power, which is defined in terms of the Constitution itself. So circumstances may bring new facts within the purview of the constitutional provision, but they do not alter, expand or change the language that the framers of the Constitution have employed.

What did the states think about this at the time of the ratification? At the time the Amendment was submitted, there were 37 states in the Union. Thirty of them had ratified the Amendment at the time it was proclaimed in 1868. Of those thirty ratifying states, 23

either then had, or immediately installed, separate schools for white and colored children under their public school systems. Were they violating the Amendment which they had solemnly accepted? Were they conceiving of it in any other sense than that it did not touch their power over their public schools?

How do they stand today? Seventeen states in the Union today provide for separate schools for white and colored children, and four others make it permissive with their school boards. Those four are Wyoming, Kansas, of which we heard yesterday, New Mexico, and Arizona; so that you have 21 states today which conceive it their power and right to maintain separate schools if it suits their policy.

When we turn to the judicial branch, it has spoken on this question, perhaps with more repetition and in more cases than any other single separate constitutional question that now occurs to me.

MR. MARSHALL: I think we should point out in this regard that when we talk about reasonableness, what I think the appellees mean is reasonable insofar as the legislature of South Carolina decided it to be reasonable, and reasonable to the people of South Carolina. But what we are arguing in this case is as to whether or not it is reasonable, within the decided cases of this Court on the Fourteenth Amendment. As to this particular law involved in South Carolina, the constitutional provision and the statute--the Constitution, I think, was in 1895--I do not know what this Court would have done if that statute had been brought before it at that time, but I am sure that this Court, regardless of its ultimate decision, would have tested the reasonableness of that classification, not by what the State of South Carolina wanted, but as to what the Fourteenth Amendment meant.

While we are talking about the feeling of the people in South Carolina, I think we must once again emphasize that under our form of government, these individual rights of minority people are not to be left to even the most mature judgment of the majority of the people, and that the only testing ground as to whether or not individual rights are concerned is in this Court.

I respectfully remind the Court that the exact same argument was made in the Sweatt case, and the brief in the Sweatt case contained, not only the same form, but the exact same type of appendix showing all the ramifications of the several decisions which had repeatedly upheld segregated education. I do not believe that that body of law has any more place in this case than it had in the Sweatt case. In the year 1952, when a statute is tested, it is not tested as to what is reasonable insofar as South Carolina is concerned; it must be tested as to what is reasonable as to this Court.

JUSTICE FRANKFURTER: But what we are considering and what you are considering is a question that is here for the very first time.

MR. MARSHALL: I agree, sir. And I think that the only issue is to consider as to whether or not that individual or small group, as we have here, of appellants, that their constitutionally protected rights have to be weighed over against what is considered to be the public policy of the State of South Carolina; and if what is considered to be the public policy of the State of South Carolina runs contrary to the rights of that individual, then the public policy of South Carolina--this Court, reluctantly or otherwise, is obliged to say that this policy has run up against the Fourteenth Amendment, and for that reason his rights have to be affirmed.

But I for one think--and the record shows, and there is some material cited in some of the amicus briefs in the Kansas case--that all of these predictions of things that were going to happen, they have never happened. And I for one do not believe that the people in South Carolina or those southern states are lawless people.

Every single time that this Court has ruled, they have obeyed it, and I for one believe that rank and file people in the South will support whatever decision in this case is handed down.

JUSTICE REED: In the legislatures, I suppose there is a group of people, at least in the South, who would say that segregation in the schools was to avoid racial friction.

MR. MARSHALL: Yes, sir. Until today, there is a good-sized body of public opinion that would say that, and I would say respectable public opinion.

JUSTICE REED: Even in that situation, assuming, then, that there is a disadvantage to the segregated group, the Negro group, does the legislature have to weigh as between the disadvantage of the segregated group and the advantage of the maintenance of law and order?

MR. MARSHALL: I think that the legislature should, sir. But I think, considering the legislatures, that we have to bear in mind that I know of no Negro legislator in any of these states, and I do not know whether they consider the Negro's side or not. It is just a fact. But I assume that there are people who will say that it was and is necessary, and my answer to that is, even if the concession is made that it was necessary in 1895, it is not necessary now because people have grown up and understand each other.

They are fighting together and living together. For example, today they are working together in other places. As a result of the ruling of this Court, they are going [to school] together on the higher level. Just how far it goes--I think when we predict what might happen, I know in the South where I spent most of my time, you will see white and

colored kids going down the road together to school. They separate and go to different schools, and they come out and they play together. I do not see why there would necessarily be any trouble if they went to school together.

JUSTICE REED: I am not thinking of trouble. I am thinking of whether it is a problem of legislation or of the judiciary.

MR. MARSHALL: I think, sir, that the ultimate authority for the asserted right by an individual in a minority group is in a body set aside to interpret our Constitution, which is our Court.

NARRATOR: Following the 1952 oral argument, the Supreme Court justices remained deeply divided over the question of whether to uphold racial segregation in education. At the conclusion of the Court's session, the justices delayed their decision by asking the parties to present additional arguments. Five questions were issued to the parties focusing upon the original understanding of the Fourteenth Amendment. and on the judicial power to abolish segregation in public schools even if abolition had not been contemplated by those who framed and ratified the Amendment. The Court set a time for reargument on October 12, 1953.

Those plans changed on September 8, 1953, when Chief Justice Fred Vinson died of a heart attack at the age of 63. Less than one month after Vinson's death, Earl Warren took the oath of office to become the new Chief Justice of the United States. New arguments in Brown were rescheduled to begin on December 7, 1953.

The new chief justice called the first case.

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

NARRATOR: Mr. Spotswood Robinson made the first argument on behalf of the plaintiffs.

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

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

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

When the 39th Congress, which formulated the Fourteenth Amendment, convened in December of 1865, it was cognizant of, and it was confronted with, the so-called Black Codes which had been enacted throughout the southern states.

In brief summary, these laws imposed and were designed to maintain essentially the same inferior position which Negroes had occupied prior to the abolition of slavery. As a matter of fact, they followed pretty much the legal pattern of the antebellum slave codes.

For example, they compelled Negroes to work for limited pay, they restricted their mobility, they prohibited their testimony in court against a white person, and contained innumerable provisions for segregation on carriers and in public places. . . . I would like to emphasize, as this Court has in its previous decisions recognized, that the existence of these laws was largely responsible for the Fourteenth Amendment and the contemporaneous civil rights legislation.

NARRATOR: In the argument which followed, Mr. Robinson described the limited references to education made by members of Congress while debating the 14th Amendment. He was interrupted by a question from Justice Frankfurter.

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

MR. ROBINSON: I do not, Mr. Justice Frankfurter, take the position as this Court has on previous occasions stated that it would insist that the meaning of a constitutional provision or of a statute is to be determined by any isolated statement of any individual proponent or opponent of the legislation.

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

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

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

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

JUSTICE FRANKFURTER: By individual members?

MR. ROBINSON: By individual members.

JUSTICE FRANKFURTER: That the proposal has—

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

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

MR. ROBINSON: That is correct, sir.

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

MR. ROBINSON: In all of its manifestations.

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

MR. ROBINSON: Our position in this regard, Mr. Justice Frankfurter, is that when you consider overall what these people said, was the purpose and the intended scope of the Amendment, we come up with a broad, general purpose that necessarily embraces a prohibition against the type of a state activity which we have presented to the Court in these cases.

THE CHIEF JUSTICE: Thank you. Mr. Davis?

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

The naked question is whether a separation of the races in the primary and secondary schools, which are the subject of this particular case, is of itself per se a violation of the Fourteenth Amendment.

Now, turning to our answers, let me state what we say to each one of them. The first question was what evidence is there that the Congress which submitted to the state legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand that would abolish segregation in public schools?

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

Our friends, the appellants, take an entirely contrary view, and they take it, in part, on the same historical testimony; certain fallacies underlie, I think, their course in reaching that conclusion. . . . Now, if I gather my friends' position both in brief and argument, they hope from the debates of such Congress to distill clear, specific evidence of congressional intent. I do not think it possible, but there is a course from which congressional intent can be gathered, far more reliable, far less hope for challenge by anyone.

What did Congress do? [W]hen we study the legislation enacted by Congress immediately before, immediately after, and during the period of the discussion of the Fourteenth Amendment, there can be no question left that Congress did not intend by the Fourteenth Amendment to deal with the question of mixed or segregated schools. In the 39th Congress the first supplemental Freedmen's Bureau bill passed, giving the Freemen's Bureau power to buy sites and buildings and schools for freedmen, refugees, and their children; and, of course, the freedmen and the refugees were of the colored race. [The 39th Congress also] passed a second Act . . . dealing with the distribution of funds between the Negro and the white schools.

Bills to require mixed schools in the District of Columbia were defeated in the 41st and the 42nd Congress. Then came the Civil Rights Act of 1875, which was passed only after the Kellogg Amendment striking out the reference to schools, churches, cemeteries and juries, and passed in that form.

We say the intent of Congress was clear not to enter this field. We say the intent of the ratifying states was equally clear, the majority of them, not to enter this field.

NARRATOR: The Supreme Court had invited a representative of the United States government to also address this issue. J. Lee Rankin was an Assistant Attorney General who represented the position of the federal government.

THE CHIEF JUSTICE: Mr. Rankin.

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

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

I apologize for the size of the work we left for the Court, but it is the best we could do, and we tried to eliminate all we could.

We say when Congress considered the question of segregation in the schools in the debates that extended over a period of months in this matter, that you cannot rely on those statements as showing that Congress decided this particular question before the Court.

They are too sketchy under the rules laid down by this Court to rely on. There we get to the middle of the road. We are not satisfactory to either side. We turn up with conclusions that the evidence does not sustain the plaintiff's position nor the position of the states. But regardless of who it hurts, it is there and it cannot be overlooked.

With regard to the entire question, it seems that there should be another factor that the Court should consider in this matter.

We must look back to that period and recognize the condition of the entire country.

We must remember the condition of education throughout the North. It was far different than the progress that had been made up to this day. And that in the South there were very few public schools.

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

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

Now if you will look back at the history of the schools in the North and also throughout the South, you will see that everybody was involved in the problem of "What are we going to do to educate the Negro? He is a free man, he is a part of our citizenry like any white man. He has no background for education. Many of them are of mature years, as well as the children."

And they were so involved in that problem that the effect of the Fourteenth Amendment and whether it permitted or would allow segregation in the public schools was just not discussed by anyone.

And I don't think you can draw from that any assumption that by those legislative acts when there was not discussion of the problem, that it was intended or understood by anyone that the Fourteenth Amendment would permit, in spite of its language, segregation of the Negro in the public schools.

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

MR. RANKIN: No, your Honor, no. Our position is that the history helps the Court in showing that some of the conclusions that have been asserted from history are not borne out.

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

NARRATOR: The second question that the parties were asked to respond to was whether, even if Congress and the states had not understood that the Fourteenth Amendment would require abolition of segregated schools, did future Congresses or the courts have power to interpret the Amendment so as to abolish that segregation. Thurgood Marshall presented initial arguments for the plaintiffs regarding this issue, followed by Mr. Davis and Mr. Rankin.

MR. MARSHALL: May it please the Court, we are requested to direct our attention [to] the specific question as to whether or not the Court—this Court—has judicial power in construing the Fourteenth Amendment to abolish segregation in the pubic schools. And our answer to that question is a flat "yes."

As to whether or not Congress intended to leave this matter to Congress, [so that Courts would not have power to abolish segregation,] I submit that one of the short answers is that . . . the statute that we base all of these cases on, says specifically in its enacting clause adopted in 1871, which we have in our brief, that "this bill is enacted for the purpose of enforcing the Fourteenth Amendment."

Congress has already acted and, in that act I am sure it will be remembered that it says that anyone acting under color of state statute, who denies anyone rights guaranteed by the Constitution or laws of the United States shall have a right of action in law or in equity.

JUSTICE FRANKFURTER: Mr. Marshall—

MR. MARSHALL: Yes, Mr. Justice Frankfurter.

JUSTICE FRANKFURTER: —you trouble me about saying there has been legislation.

You are not resting your claim here on the Act of 1871 and are then discussing whether that Act is constitutional?

MR. MARSHALL: It is our position that the Fourteenth Amendment was intended to leave to the courts the normal construction of the statute—I mean of the Constitution—and this Act of 1871 is merely recognizing that.

JUSTICE FRANKFURTER: All right, I understand.

MR. MARSHALL: As I understand it, Mr. Justice Frankfurter, there is no question that the Fourteenth Amendment was adopted for the express purpose, and the purpose was, to correct the situation theretofore existing in regard to the treatment of Negroes, slave or free, in a different category from the way you treated the others.

As I understand the task the appellees have by force addressed themselves to, it is that even admitting that education is within the purview of the Fourteen Amendment, when you get to elementary and high schools this Court loses its power to decide as to whether or not segregation in elementary and high schools is illegal.

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

MR. MARSHALL: It is my understanding, yes, sir, I think definitely. Mr. Justice Frankfurter, that a reading of the two briefs in this case demonstrates clearly that as of this time we have a test to see whether or not the public policy, customs and mores of the states of South Carolina and Virginia or the avowed intent of our Constitution—as to which one—will prevail.

The questions raised by this Court in June, as we understand it, requested us to find out as to whether or not class legislation and, specifically segregation, whether or not it, in and of itself, with nothing else, violated the Fourteenth Amendment.

We have addressed ourselves to that in this brief, and we are convinced that the answer is that any segregation, which is for the purpose of setting up either class or caste legislation, is in and of itself a violation of the Fourteenth Amendment, with the only proviso that normally, in normal judicial proceedings, there must be a showing of injury.

NARRATOR: John W. Davis also addressed the question of whether Congress or the Court had power to give different meaning to the Fourteenth Amendment than that which had been intended.

MR. DAVIS: Neither the Congress, in submitting or the states, in ratifying, the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools.

If we are right in the initial proposition that neither Congress nor the states thought the Amendment was dealing with the question of segregated schools, obviously section 5 of the Amendment could not give Congress more power than the Amendment itself had originally embraced.

Section 5 is not a Trojan horse which opened to Congress a wide field in which Congress might expand the boundaries of the article itself.

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

MR. DAVIS: Well, if you can imagine a necessary and proper clause which would enforce the provisions of this article by dealing with matter which is not within the scope

of the article itself, which I think is a contradiction in terms, that is a paradox. Congress could do what the Amendment did not warrant under the guise of enforcing the Amendment.

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

MR. DAVIS: Quite so. We say that you interpret the Amendment as including something that it does not include is not to interpret the Amendment but is to amend the Amendment, which is beyond the power of the Court.

Sometime to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance.

That is the opinion which we held when we filed our former brief in this case. We relied on the fact that this Court had not once but seven times, I think it is, pronounced in favor of the "separate but equal" doctrine.

We relied on the fact that Congress has continuously since 1862 segregated its schools in the District of Columbia.

We relied on the fact that twenty-three of the ratifying states—I think my figures are right, I am not sure—had by legislative action evinced their conviction that the Fourteenth Amendment was not offended by segregation.

In Clarendon School District No. 1 in South Carolina, in which this case alone is concerned, there were in the last report that got into this record something over a year or year and a half ago, 2,799 Negroes, registered Negro children of school age. There were 295 whites, and the state has now provided those 2,800 Negro children with schools as good in every particular.

Who is going to disturb that situation? If they were to be reassorted or comingled, who knows how that could best be done?

If it is done on the mathematical basis, with 30 children as a maximum, which I believe is the accepted standard in pedagogy, you would have 27 Negro children and 3 whites in one schoolroom. Would that make the children any happier? Would they learn any more quickly. Would their lives be more serene?

Children of that age are not the most considerate animals in the world, as we all know. Would the terrible psychological disaster being wrought, according to some of these witnesses, to the colored child be removed if he had three white children sitting somewhere in the same schoolroom?

You say that is racism. Well, it is not racism. Recognize that for sixty centuries and more humanity has been discussing questions of race and race tension, not racism.

Your Honors do not sit, and cannot sit as a glorified Board of Education for the State of South Carolina or any other state. Neither can the District Court.

Let me say this for the State of South Carolina. It does not come here as Thad Stevens would have wished in sackcloth and ashes. It believes that its legislation is not offensive to the Constitution of the United States.

It is confident of its good faith and intention to produce equality for all of its children of whatever race or color. It is convinced that the happiness, the progress and the welfare of these children is best promoted in segregated schools, and it thinks it a thousand pities that by this controversy there should be urged the return to an experiment which gives no more promise of success today than when it was written into their Constitution during what I call the tragic era.

I am reminded—and I hope it won't be treated as a reflection on anybody—of Aesop's fable of the dog and the meat: The dog, with a fine piece of meat in his mouth, crossed a bridge and saw the shadow in the stream and plunged for it and lost both substance and shadow.

Here is equal education, not promised, not prophesied, but present. Shall it be thrown away on some fancied question of racial prestige?

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

[THE CHIEF JUSTICE: Mr. Marshall, do you wish to present rebuttal argument?]

MR. MARSHALL: May it please the Court. . .

I got the feeling on hearing the discussion yesterday that when you put a white child in a school with a whole lot of colored children, the child would fall apart or something. Everybody knows that is not true.

Those same kids in Virginia and South Carolina—and I have seen them do it—they play in the streets together, they play on their farms together, they go down the road together, they separate to go to school, they come out of school and play ball together. They have to be separated in school.

They can't take race out of this case. From the day this case was filed until this moment, nobody has in any form or fashion, despite the fact I made it clear in the opening argument that I was relying on it, done anything to distinguish this statute from the Black Codes. Nobody can dispute the Fourteenth Amendment was intended to deprive the states of power to enforce Black Codes.

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

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

It can't because of slavery in the past, because there are very few groups in this country that haven't had slavery some place back in the history of their groups. It can't be color because there are Negroes as white as the drifted snow, with blue eyes, and they are just as segregated as the colored man.

The only thing can be is an inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that state as is possible, and now is the time, we submit, that this Court should make it clear that that is not what our Constitution stands for.

Thank you, sir.

NARRATOR: Finally, consider the arguments made by Mr. Rankin on behalf of the United States government regarding these issues of power as related to the meaning of the Fourteenth Amendment. We will begin with a question asked by Justice Jackson:

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

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

JUSTICE JACKSON: And if the Amendment reaches segregation, they have the power to enforce it and set up machinery to make it effective. There is no doubt about that, is there, and it hasn't been done.

Now if our representative institutions have failed—is that the point?

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

JUSTICE JACKSON: Have you taken it over?

MR. RANKIN: No. You both have a responsibility, and neither one can give that responsibility up to the other in our conception.

JUSTICE JACKSON: I suppose that realistically the reason this case is here was that action couldn't be obtained from Congress. Certainly it would be here much stronger from your point of view if Congress did act, wouldn't it?

MR. RANKIN: That is true, but there are many cases that the Court well recognized I know, upon any reflection, and has in its opinions, that if the Court would delegate back to Congress from time to time the question of deciding what should be done about the rights, the constitutional rights of a party appearing before this Court for relief, the parties would be deprived by that procedure from getting their constitutional rights because of the present membership or approach of Congress to that particular question.

And the whole concept of constitutional law is that those rights that are defined and set out in the Constitution are not to be subject to the political form which changes from time to time, but are to be preserved under the holdings of this Court over many, many years by the orders of this Court granting the relief prayed for.

JUSTICE FRANKFURTER: The thing to be said, or is it to be said fairly, that not only did Congress not exercise the power under section 5 with reference to the States, but in a realm which is its exclusive authority, it enacted legislation to the contrary. Are you saying that legislation does not mean anything but what it does? It just segregates, that is all.

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

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

MR. RANKIN: I couldn't make that charge before this Court, and I wouldn't want to be quoted in that manner.

JUSTICE REED: Does this Court through its own power have the right—is that the belief of the Government—have the power to declare segregation unconstitutional?

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

JUSTICE REED: What is striking to me, if you lay aside the history, and the intention as expressed in Congress, then we have nothing left except the bare words.

MR. RANKIN: That is correct.

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

MR. RANKIN: Yes.

NARRATOR: When the case of Brown v. Topeka Board of Education was called, Robert Carter spoke initially on behalf of the plaintiffs. Much of his time was spent answering questions about whether the Brown case should even remain before the Court given the steps taken in Topeka to dismantle its segregated school system. Paul Wilson, who appeared on behalf of the State of Kansas, followed Mr. Carter to the podium.

THE CHIEF JUSTICE: Mr. Wilson.

MR. WILSON: Thank you, sir.

At the outset I should point out—I have pointed out—that we are not here defending a policy, and the determination has been made is one of policy.

We are here solely for the purpose of defending the right, the constitutional right, we contend, of the State of Kansas and of its own communities to make these determinations as to state and local policy on state and local levels.

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

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

Mr. Davis quite eloquently in his statement yesterday expressed to the Court the conviction that the thrust of the fourteenth Amendment was toward the institution of slavery. We think that is the case, and nothing more.

Kansas is, perhaps, unique in this case because Kansas is a state with a pronounced abolitionist tradition. The settlement of Kansas was inspired and financed by the Immigrant Aid Society of Boston. The first positive political influence in Kansas was the Free Soil Party, an offshoot of the abolitionists of the East.

Certainly, Kansas is not subject to the accusation that can be hurled, perhaps, at the other states that its tradition is rooted in the slave tradition. Our historians tell us that Kansas contributed more troops to the Union armies in proportion to its population than any other state. Almost to a man, the legislature of 1867 was composed of those Union veterans, of men who had offered their lives for the cause of Negro freedom, and that legislature ratified routinely, as a matter of course, the Fourteenth Amendment. That same legislature, within about six weeks, enacted a statute providing for separate education for children of white and Negro races in cities of the second class.

Now, I point this out because it seems to me if we can infer any intention from our own legislative act, we must infer that the legislature recognized that within the State of Kansas there were areas where, by reason of lack of mutual understanding between the races, it would be impossible to provide equality of opportunity assured by the Fourteenth Amendment in integrated schools.

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

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

Thank you.

THE CHIEF JUSTICE: Thank you, Mr. Wilson.