Supreme Court of the United States

OCTOBER TERM, 1952

No. 413

SPOTTSWOOD THOMAS BOLLING, et al., *Petitioners,*

v.

C. MELVIN SHARPE, et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMERICAN VETERANS COMMITTEE, INC. (AVC) Amicus Curiae

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INDEX

TABLE OF AUTHORITIES

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Preliminary Statement. This case raises for the first time in this Court the issue whether the Board of Education of the District of Columbia may constitutionally exclude Negro children, solely because of their race and color, from enrollment and instruction in a public junior high school of the District of Columbia which the Board sets apart for

the education exclusively of white children, and require Negro children to attend a public junior high school set apart for the education exclusively of colored children.[1]

In our *amicus* brief filed in one of the State cases now scheduled for argument with this case, we have indicated why we think a State cannot constitutionally do what the Board of Education is doing here. Brief of American Veterans Committee in *Brown* v. *Board of Education of Topeka, Shawnee County, Kansas,* No. 8. In this brief we shall, without repeating the argument there presented, indicate why such exclusion may not constitutionally be imposed by the Board of Education in the District of Columbia.

I. The right to be free from racial discrimination by governmental authority, guaranteed in the States under the Equal Protection Clause of the 14th Amendment, is guaranteed in the District of Columbia under the Due Process Clause of the 5th Amendment. The racial distinctions drawn by the District Board of Education are discriminatory and therefore unconstitutional.

This Court has characterized the Due Process clause of the Constitution[2] as "the compendious expression for all those rights which the courts must enforce because they are basic to our free society" [*Wolf* v. *Colorado,* 338 U. S. 25, 27 (1949)]; as "a summarized constitutional guarantee of respect for those personal immunities which . . . are 'so rooted in the traditions and conscience of our people

[1] The reference in *Plessy* v. *Ferguson,* 163 U. S. 537, 551 (1896) to "acts of Congress requiring separate schools for colored children in the District of Columbia" was pure *dictum,* intended simply to indicate that segregation on railroad cars was less "obnoxious" than segregated schools in the District "the constitutionality of which does not seem to have been questioned" (p. 551). The decisions by the Court of Appeals in *Wall* v. *Oyster,* 36 App. D. C. 50, 54 (1910), and *Carr* v. *Corning,* 86 App. D. C. 173, 182 F. (2d) 14 (1950), rested squarely on *Plessy,* and neither case reached this Court.

[2] The Due Process Clause of the 5th Amendment imposes upon the Federal Government the same restraints as are imposed on the States by the Due Process Clause of the 14th Amendment. *Farrington* v. *Tokushige,* 273 U. S. 284, 299 (1927); *Heiner* v. *Donnan,* 285 U. S. 312, 326 (1932); *Twining* v. *New Jersey,* 211 U. S. 78, 101 (1908).

as to be ranked as fundamental' . . . " [*Rochin* v. *California,* 342 U. S. 165, 169 (1952)].

One of these basic and fundamental rights is the right of every person to be free from discriminatory treatment by governmental power solely because of race.

This right was imbedded, by the adoption of the 14th Amendment, into our fundamental law and is part of the warp and woof of our country's basic beliefs. This Court has vindicated this right in many areas of our national life, including housing, land ownership and occupancy,[3] employment,[4] education,[5] political participation,[6] jury service,[7] transportation,[8] and many other areas. Such vindication has not been simply by implication—this Court has stated time and again that a governmental restriction based "wholly upon color" or aimed at particular racial groups "in the eye of the law is not justified" [*Yick Wo* v. *Hopkins,* 118 U. S. 356, 374 (1886)]; that "discriminations based on race alone are obviously . . . invidious" [*Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192, 203 (1944)]; that "racial discrimination . . . is at war with our basic concepts of a democratic society" [*Smith* v. *Texas,* 311 U. S. 128, 130 (1940)].

Still other decisions by this Court show clearly that the right to be free from governmentally imposed racism is so "basic to our free society" as to have become a right constitutionally accorded to free men under the Due Process

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[3] *Buchanan* v. *Warley,* 245 U. S. 60 (1917); *Shelley* v. *Kraemer,* 334 U. S. 1 (1948); *Hurd* v. *Hodge,* 334 U. S. 24 (1948); *Oyama* v. *California,* 332 U. S. 633 (1948).

[4] *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886); *Takahashi* v. *Fish & Game Commission,* 334 U. S. 410 (1948); see also *Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192 (1944); *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U. S. 768 (1952).

[5] *Sweatt* v. *Painter,* 339 U. S. 629 (1950); *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637 (1950); *Sipuel* v. *Board of Regents,* 332 U. S. 631 (1948); *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1938).

[6] *Smith* v. *Allwright,* 321 U. S. 649 (1944); *Schnell* v. *Davis,* 336 U. S. 933 (1949); *Lane* v. *Wilson,* 307 U. S. 268 (1939).

[7] *Ex parte Virginia,* 100 U. S. 339 (1880); *Virginia* v. *Rives,* 100 U. S. 313 (1880); *Cassell* v. *Texas,* 339 U. S. 282 (1950).

[8] *Mitchell* v. *United States,* 313 U. S. 80 (1941); *Henderson* v. *United States,* 339 U. S. 816 (1950).

clause of the 5th Amendment against arbitrary action by the Federal government or agencies acting under its authority. In *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500, 525-527 (1926), this Court held that an arbitrary restriction directed solely against Chinese residents violated both the Due Process clause of the 5th Amendment and the Equal Protection clause of the Philippine Bill of Rights which has the same content as the Equal Protection clause of the 14th Amendment. In more recent cases, this Court, in considering the constitutionality of acts of Congress, said that "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality" and are therefore "immediately suspect" and "subject . . . to the most rigid scrutiny". *Hirabayashi* v. *United States,* 320 U. S. 81, 100 (1943); *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944). And in *Hurd* v. *Hodge,* 334 U. S. 24, 35-36 (1948), this Court ruled that a branch of the Federal Government may not do what the Equal Protection Clause of the 14th Amendment would clearly deny to a State Government. *Cf. United States* v. *Yount,* 267 Fed. 861, 863 (D., W. D. Penn. 1920).

True, the *Hirabayashi* and *Korematsu* cases did permit the Federal Government to restrict the rights of Americans of a single racial group (those of Japanese ancestry) during the period following the attack on Pearl Harbor. But those restrictions were allowed only because of the "pressing public necessity" occasioned by the sudden onslaught of the holocaust of war. More specifically, the restrictions on American residents of Japanese ancestry were there allowed solely because it was thought that loyalty to the race of the group dominant in the aggressor country might, during the period of war, be incompatible with loyalty to the United States. It was therefore said that because of "the danger of espionage and sabotage, in time of war and threatened invasion" the racial distinction there drawn was "relevant to the measures for our national defense

and for the successful prosecution of the war" . . . to prevent "an invasion of our West Coast." *Hirabayashi* at p. 100; *Korematsu* at p. 223. Its "single aim was the protection of the war effort against espionage and sabotage . . . it was an espionage and sabotage measure." *Ex Parte Endo,* 323 U. S. 283, 300, 302 (1944). And this Court subsequently emphasized that what *Hirabayashi* and *Korematsu* sustained was "a war measure" whose racial distinctions were excused by "only the most exceptional circumstances." *Oyama* v. *California,* 332 U. S. 633, 646 (1948).

It is unnecessary here to debate the merits of the *Hirabayashi-Korematsu* "loyalty" test, in the light of our Constitution which abhors racism in all its manifestations. In this case no "pressing public necessity" to safeguard our country against foreign aggression, espionage or sabotage is asserted to justify separation of white and colored children in the public schools of the District of Columbia. Nor does the District rely even on the overworked assumption of "race conflict". No such danger brews when white and colored children sit next to each other in street cars, swim in the same pools, eat in the same restaurants, picnic informally in the same parks, shop in the same stores, or worship in the same churches. It is entirely clear that permitting these children, who are subject to the laws of the community and the disciplines of parental and school authority, to attend the same public school will not produce either an over-riding public danger within the meaning of the *Hirabayashi-Korematsu* exception to the general doctrine that the Federal government may not validly impose restrictions based solely on race, or any other kind of real public danger. See Part III of this Brief.

Indeed, the District neither asserts that public school segregation has a reasonable relationship to the legitimate objectives of public education, nor does it furnish any justification whatsoever for that segregation. It relies simply on the "separate but equal" doctrine of *Plessy* v. *Ferguson,*

163 U. S. 537 (1896), implicitly recognizing that racial discrimination forbidden by the 14th Amendment is also forbidden by the 5th Amendment. But as we show in our Brief in *Brown* v. *Board of Education of Topeka* (No. 8, this Term), the "separate but equal" doctrine is not a valid constitutional basis upon which a State may compel white and colored children to go to separate public elementary schools, solely because of their race, and thereby impose on them a racial discrimination forbidden by the 14th Amendment.[9] The *Plessy* doctrine is an equally invalid justification for the same action by the District of Columbia Board of Education which violates the Constitutional guarantee against racial discrimination implicit in the present content of the Due Process Clause of the 5th Amendment.

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[9] The Appellees in the South Carolina case (No. 101, Brief, p. 15) and in the Virginia case (No. 191, Brief, p. 12-13), which are being argued with this case, have suggested, largely on the basis of an intimation in *Carr* v. *Corning*, 86 App. D. C. 173, 177, 182 F. (2d) 14, 18 (1950), that the 39th Congress, which proposed the 14th Amendment, implicitly interpreted it to permit compulsory segregation of white and colored children in public schools. They say this because the 39th Congress enacted two acts for the benefit of the then existing schools for colored children. One of these, the act of July 23, 1866 (14 Stat. 216), was intended to clarify that the apportionment of tax funds between the then existing schools for white children and schools for colored children, an apportionment required under a previous statute (act of June 25, 1864, 13 Stat. 187), was to be made by the cities of Georgetown and Washington as well as by the County of Washington. The other, the act of July 28, 1866 (14 Stat. 343), authorized the donation of certain lots to trustees for the sole use of schools for colored children in the District of Columbia. But these acts simply provided certain limited benefits to colored children in an existing situation. Neither act established the segregation, nor can either act be construed as a constitutional judgment by Congress as to the scope and content of the 14th Amendment. None of the debates indicates such an intent. Indeed, the sponsor of these acts, Senator Morrill of Maine (36 Cong. Globe, 39th Cong., 1st sess., p. 1753), vigorously opposed racial distinctions. See *ibid.*, pp. 570-571. Congress by these acts simply "supported the effort to take care of" the colored children "without ratifying every phase of the program." *Ex parte Endo*, 323 U. S. 283, 303 (1944). Nor did either Congressional failure to integrate the schools or any subsequent Congressional legislation or appropriations in support of the existing dual system freeze that segregation pattern into the fabric of our fundamental Charter of Liberty.

II. The impossibility of providing equality of educational opportunity to every child in the District of Columbia public schools within the framework of the segregated system is so plain that no remedy, short of abolition of compulsory separation by race, can prevent the inequality forbidden by the Constitution.

The physical and educational disparity between the separate public schools for white and colored children in the District of Columbia has been extensively analyzed. See, e. g., Strayer, *Report of a Survey of the Public Schools of the District of Columbia* (Govt. Printing Off., 1949); opinion of Judge Edgerton in *Carr* v. *Corning,* 86 U. S. App. D. C. 173, 181-194, 182 F. (2d) 14, 22-35 (1950); Rept. of President's Committee on Civil Rights, *To Secure These Rights,* 90 (Govt. Printing Off., 1947); Rept. of National Committee on Segregation in the Nation's Capital, *Segregation in Washington,* 75-81 (1948); Federation of Civic Associations, D. C., Committee on Education, *A Brief Comprehensive Report on the Public Educational Facilities for Colored Children in the District of Columbia* (1952). These studies document the conclusion of the President's Committee on Higher Education that "the separate and equal principle has nowhere been fully honored. Educational facilities for Negroes in segregated areas are inferior to those provided for whites. Whether one considers enrollment, over-all costs per student, teachers' salaries, transportation facilities, availability of secondary schools, or opportunities for undergraduate and gradute study, the consequences of segregation are always the same, and always adverse to the Negro citizen . . . This Commission concludes that there will be no fundamental correction of the total condition until segregation legislation is repealed." *Higher Education for American Democracy,* vol. II, pp. 31, 35 (Govt. Printing Off., 1947).

It is common knowledge, reflected almost daily in the Washington newspapers, that the Board of Education is striving to mitigate the many racial inequities in the school

system. But no matter how the Board shifts the racial use of school buildings or what other measures it invokes in its desperate efforts to keep abreast of population changes, it is unable to do more than mildly alleviate the almost scandalous inequalities inevitable under, and resulting solely from, the dual school system.

This inability results from the very nature of the dilemma facing the Board. The Constitution forbids racial inequality. Yet the complexity of administering an educational system for a large city with a dynamic and mobile population makes impossible the achievement of equality while keeping within the arbitrary lines of race. The Board's efforts to correct the inequalities simply create almost as many other inequalities, for both white and colored children. *E. g.*, as this Brief is being written, the Board's current budgetary makeshifts to relieve the teacher shortage in the schools for colored children are causing, in the schools for white children: firing of teachers, reassigning senior high school teachers to junior high schools and junior high teachers to elementary schools even though the Superintendent admits that such reassignment is both inefficient and "harmful to teacher morale," closing classes, turning senior high school counselors into instructors, teaching two grades in one room, disrupting educational schedules, cutting out special instruction for atypical children, etc. In the meantime, another tug-of-war is shaping up, between white and colored parents concerned about the welfare of their children, over the proposal to transfer either Bryan or Buchanan elementary school from white to colored use to relieve gross overcrowding of Negro pupils in that area. *Washington Post*, p. 1 (Nov. 20, 1952); *ibid.*, pp. 1, 12 (Nov. 21, 1952). Correction of these and other inequities is frustrated by the dual system itself. So long as compulsory separation of white and colored children exists in the public schools, there will always be some colored children whose educational opportunities will be less than if they had been white, and some white children whose educational opportunities will be less than if they had been colored.

It is no answer to say that the educational opportunities for colored children averaged as a group are substantially equivalent to the educational opportunities for white children averaged as a group. Even if this were true (which it is not), it does not mitigate the discrimination imposed on the child who, but for his race, would have received better educational opportunities. "The essence" of the constitutional right to be free from governmentally imposed racial discrimination is that "it is a personal one . . . It is the individual . . . who is entitled" to it, "not merely a group of individuals". *Buchanan* v. *Warley,* 245 U. S. 60, 80 (1917); *Mitchell* v. *United States,* 313 U. S. 80, 97 (1941); *Henderson* v. *United States,* 339 U. S. 816, 825 (1950). Nor is it relevant that some white children may sometimes get less than some colored children. The constitutional guarantee against racial discrimination "is not achieved through indiscriminate imposition of inequalities". *Shelley* v. *Kraemer,* 334 U. S. 1, 22 (1948); *Henderson* v. *United States,* 339 U. S. 816, 825-826 (1950).

The root of the discrimination is the rigid line of the racial bar to which all other considerations are subordinated. Every effort to cure the evil of racial discrimination by "equalization" of physical facilities within a segregated system is like trying to cure cancer with a mustard plaster. Only when the dual system is uprooted can the normal processes of eliminating inequities in the District's educational system become effective.

III. The People of Washington are ready for and will accept integration of their public schools.

Actual experience, both in Washington and throughout the country, including the South, proves how fallacious is the assumption that integration of the public schools will cause "racial trouble."

Not all the schools in Washington are racist. Negroes are now being admitted, in steadily increasing numbers, into the formerly all-white parochial schools and into more

and more of the formerly all-white private schools.[10] This integrated schooling brings, not trouble, but tolerance and better mutual understanding to all the students, and to the parents too. Throughout the country, public schools hitherto segregated are being peacefully integrated by cities, counties and States,[11] and by the Federal Government which operates elementary schools for the children of military and civilian personnel on federal areas, in the South as well as elsewhere.[12] "The success of the 1944 integration experiment in the service schools . . . was perhaps the major factor in increasing the demand for integration" in the military services.[13] Furthermore, over 1500 colored students have enrolled in formerly white graduate and professional schools throughout the South, following this Court's decisions of June 1950 in *Sweatt* and *McLaurin*.[14] At the under-graduate level, more and more of the previously all-white colleges and junior colleges in the South, including Berea College, the University of Kentucky, the University of Louisville, and others in Kentucky, Del Mar Junior College and others in Texas, and elsewhere, are opening their doors to colored students.[15]

The whole milieu of the District of Columbia is one of increasing change from Jim Crow to integration.[16] Segregation is gone or on the way out in many areas of public life in Washington; and the sequelae are uniformly peaceful.

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10 For the most recent announcement see *Washington Post*, p. 1 (Oct. 31, 1952) (Washington Cathedral's Beauvoir School).

11 E.g., see Joseph L. Bustard, "The New Jersey Story: The Development of Racially Integrated Public Schools," 21 J. of Negro Ed. 275-285 (Summer, 1952); *Time* Magazine, p. 84 (Oct. 8, 1951) (Tucson, Arizona); see also 21 J. of Negro Ed. 404 (1952) (St. Louis, Mo. parochial schools).

12 *Washington Post*, p. 3-B (Oct. 14, 1951); President Truman's Message to Congress of Nov. 2, 1951 on H. R. 5411, 82nd Congress (97 Cong. Rec. 13787-88).

13 Dennis Nelson, *The Integration of the Negro into the U. S. Navy*, 46, 45-48 (1951); Report of President's Committee on Equality of Treatment and Opportunity in the Armed Services, *Freedom to Serve*, (Govt. Printing Off., May 22, 1950).

14 21 Journ. of Negro Ed. 321 (Summer, 1952).

15 21 Journ. of Negro Ed. 354-358 (1952).

16 Phineas Indritz, "Racism in the Nation's Capital," 175 *The Nation* 355-357 (Oct. 18, 1952); *Washington Star*, "Segregation in the District," p. C-3 (Oct. 19, 1952).

The park facilities operated by the Department of the Interior, including such "sensitive" facilities as swimming pools, tourist camp lodgings, golf courses, picnic grounds, and others, are wholly non-segregated. Negroes, both as individuals and in integrated groups, are now admitted into every public building (including the public school buildings in the evening), into every major private auditorium, in at least 100 privately-owned restaurants, in all government cafeterias, and in several theaters, both stage and movie.

All the major universities and colleges in Washington, with the notorious exception of George Washington University, now admit qualified students without regard to race. Negroes are now admitted in many formerly all-white professional groups and voluntary organizations, *e. g.,* District Medical Society, American Association of University Women, American Institute of Architects, etc. Many of the major Washington hotels now admit colored people. A considerable number of churches have mixed congregations, and practically none would refuse admission to a Negro worshipper. Segregation in streetcars and buses has been forbidden by law in the District since 1865.[17] And an 1873 statute, already held valid by the Municipal Court of Appeals, may soon end racial exclusion and segregation in all the public eating places of Washington.[18]

The largest employer in Washington, the Federal Government, has no segregation. And the District Government, which still sponsors segregation in some of its playgrounds, and in some of its departments (e.g., fire department, jail, etc.), is looking to eliminate it. The National Capital Housing Authority recently announced that its new housing projects would be nonsegregated. Significant, and peaceful, shifts in racial residential patterns have occurred

[17] See act of March 3, 1865 (13 Stat. 536, 537); *Railroad Company* v. *Brown*, 84 U. S. (17 Wall.) 445 (1873).

[18] See *District of Columbia* v. *John R. Thompson Co., Inc.*, 81 Atl. (2d) 249, 79 Wash. L. Rep. 726 (1951), appeals argued and pending before U. S. Court of Appeals for the District of Columbia Circuit (Nos. 11039, 11044).

since this Court in 1948 prohibited the enforcement of restrictive housing covenants. *Hurd* v. *Hodge,* 334 U. S. 24 (1948). Segregation in Washington is no longer even a political issue. Both the Republicans and Democrats promised during the 1952 campaign to end racial segregation in the District.[19]

Only the public schools remain as the unyielding stronghold of segregation in Washington, imposing racist patterns on the growing generation, to the discomfiture not only of the Negroes but also of the ever increasing number of white people who do not want their children warped by the prejudice of racial discrimination and subjected to the inferior education inevitable under a dual school system.

It is only the alleged compulsion of law, not any peculiar aspect of public education, that keeps the public school system segregated. The attitude of educators with respect to the two sets of schools is evidenced by the recommendation by both Presidents of the Teachers' Colleges (Wilson, which trains white teachers, and Miner, which trains colored teachers) that they be merged.[20]

The time is ripe, and the people of Washington are ready, for the desegregation of the public schools and for equality of educational opportunity for all.

In any event, even if there were a real possibility of "racial trouble" in the public schools of the District (which there is not), such a problem should be solved by education and by enforcing, without racial discrimination, the law against violence and disorderly conduct, not by depriving well-behaved and respectable citizens of their legal rights. *Buchanan* v. *Warley,* 245 U. S. 60, 80-81 (1917); *Shelley* v. *Kraemer,* 334 U. S. 1, 21 (1948); *Mitchell* v. *United States,* 313 U. S. 80, 97 (1941). The imposition of compulsory segregation simply to placate those who threaten disorder and violence is to subordinate law to lawlessness, tolerance to

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[19] *Washington Post,* p. 2 (Oct. 18, 1952); *ibid.,* p. 11M (Oct. 26, 1952).

[20] *Washington Post,* p. 9M (Sept. 3, 1950); *Washington Star,* p. 1 (Sept. 3, 1950).

bigotry, Americanism to racism. The people of Metropolitan Washington are not really afraid of democracy. They have the capacity to meet and solve whatever intercultural problems may arise from the abolition of compulsory segregation in the public schools. They will show the Nation and the World that our Nation's Capital can be the living symbol of American faith in democracy.

Respectfully submitted,

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Amicus Curiae,

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December 1, 1952
Washington, D. C.