SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 191

DOROTHY E. DAVIS, BERTHA M. DAVIS AND INEZ D. DAVIS, ETC., ET AL,

Appellants,

vs.

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

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

STATEMENT AS TO JURISDICTION

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TABLE OF CONTENTS

Subject Index

Table of Cases

STATUTES CITED

OTHER AUTHORITIES

IN THE UNITED STATES DISTRICT COURT FOR THE
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION NO. 1333

DOROTHY E. DAVIS, BERTHA M. DAVIS AND INEZ D. DAVIS, INFANTS, BY JOHN DAVIS, THEIR FATHER AND NEXT FRIEND, ET AL.,

Plaintiffs,

vs.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, AND T. J. McILWAINE, DIVISION SUPERINTENDENT OF SCHOOLS OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL.,

Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, plaintiffs-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause.

Opinion Below

The opinion of the United States District Court for the Eastern District of Virginia, ——F. Supp.——, has not yet been reported and a copy of the opinion, along with the final decree, is attached hereto as Appendix "A."

Jurisdiction

The district court, convened pursuant to Title 28, United States Code, Sections 2281 and 2284, entered final judgment on 7 March 1952. A petition for appeal is presented to the district court herewith, to wit, on 5 May 1952. Jurisdiction of the Supreme Court to review this judgment by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b) and has been sustained by the following decisions: *McLaurin* v. *Board of Regents*, 339 U.S. 637; *Board of Supervisors* v. *Wilson*, 340 U.S. 909; *Briggs* v. *Elliott*, 342 U.S. 350.

Questions Presented

1. Whether Sections 140 of the Constitution of Virginia of 1902, as amended, and Sections 22-221 of the Code of Virginia of 1950, as amended, are invalid and unenforceable under the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States because they mandate segregated public secondary schools for colored children in Prince Edward County, Virginia, and because they compel infant-appellants to attend such segregated schools to their detriment.

2. Whether after finding that the buildings, facilities, curricula and means of transportation furnished appellants are inferior to those provided for white students, the court below was required by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States to issue a decree restraining appellees forthwith from denying appellants admission to the superior state facilities solely because of their race and color.

3. Whether in addition to parity in curricula and physical facilities the constitution guarantees appellants equality

in all other educationally significant factors affecting the development of skills, mind, and character.

Statutes Involved

Section 140 of the Constitution of Virginia of 1902, as amended, and Section 22-221, Code of Virginia of 1950, as amended, are set forth in Appendix "B" hereto.

Statement

Appellants are colored persons defined by law in the state of Virginia as a person with "any" "ascertainable" Negro blood and are citizens of the state of Virginia and of the United States and residents of Prince Edward County. They are: (1) children of public school age attending secondary public schools in Prince Edward County; and (2) the parents and guardians of these children. Appellees are state officers charged with the duty and responsibility of providing, operating and maintaining public elementary and secondary schools in Prince Edward County, Virginia.

Section 140 of the Constitution of Virginia of 1902, as amended, and Section 22-221 of the Code of Virginia of 1950, as amended, compel appellees to maintain separate schools for colored and white children. Appellants are seeking to enjoin enforcement of these provisions on the grounds that they are in direct conflict with the equal protection and due process clauses of the Fourteenth Amend-Amendment.

Three public high schools are now in operation in the county—the Moton High School for colored children and the Worsham and Farmville High Schools for white children. The Moton High School has a larger enrollment (Tr. 37), average daily attendance and average daily membership (Tr. 77) than the combined totals at the other two schools.

Appellees admitted in their answer and in their opening statement that the buildings and equipment of the Negro school were inferior to those of the white schools but alleged that equal educational opportunities were furnished in all other respects, (Tr. 9010). Blueprints of a proposed new Negro high school designed to correct the inequalities in physical facilities by September 1953 were placed in evidence (Tr. 521-541).

After hearing the evidence, the court below found the Moton High School inferior not only in buildings and equipment, but also in curricula and means of transportation as well. Appellees were ordered forthwith to provide appellants with curricula and means of transportation "substantially" equal to that available to white high school students. Appellees were also ordered to "proceed with all reasonable diligence and dispatch to remove the inequality existing as aforesaid in said buildings and facilities, by building, furnishing and providing a high school building and facilities for Negro students, in accordance with the program mentioned in said opinion and in the testimony on behalf of the defendants herein, or otherwise . . ." (See Appendix "A".) As indicated, according to appellees' testimony, this new high school will not be available until September 1953 (Tr. 541).

The court refused either to enjoin enforcement of the state constitutional and statutory provisions requiring the maintenance of radically segregated schools or to restrain appellees from assigning school space in the county on the basis of race and color.

Questions Involved Are Substantial

The issues raised in this case are similar to those raised in *Sweatt* v. *Painter,* 339 U.S. 629; *McLaurin* v. *Board of Regents,* 339 U.S. 637; and *Board of Supervisors* v. *Wilson,* 340 U.S. 909. Under the federal constitution, appellants

are entitled to equal state educational opportunities. Since the Negro high school was found to be inferior in bus transportation, curricula, buildings and facilities, appellants are entitled to effective and immediate relief. Such relief, we submit, requires the issuance of a decree which permits appellants to share now in the superior state facilities without regard to their race or color. A decree that does less makes meaningless appellants' constitutional rights to equal educational opportunities.

Moreover, without regard to the present inequality with respect to physical facilities, appellants contend that the racial barriers and restrictions mandated by the state separate school laws block the full and complete development of their educational potential and make it impossible for them to benefit from public education to the same extent as white children. Thus by enforcing its invidious racial classifications and distinctions among children of public school age in Prince Edward County, as well as by furnishing appellants inferior physical facilities because of race, the state violates the Fourteenth Amendment.

This is not only a local problem but is a question with both national and international implications. The full development of human resources of this country are certainly as important to the nation and the world as the full development of our natural resources, such as steel, aluminum, coal and oil. As Mr. Justice Jackson said in *American Communications Association* v. *Douds,* 339 U.S. 383, 442: "Thoughtful, bold and independent minds are essential to wise and considered self-government." Insofar as a majority of the public school population in Prince Edward County is retarded in the full development of its mental resources, the state of Virginia and the United States are weakened in their efforts to develop that strong, enlightened citizenry essential to the preservation of our democratic institutions.

1. *In offering educational facilities and opportunities, the state is without power under the equal protection and due process clauses of the Fourteenth Amendment to make distinctions among its citizenry based upon race and color.*

Sections 22-251 to 22-256 of the Code of Virginia of 1950, as amended, require that all children between the ages of 7 and 16 attend public school or receive instruction in private schools. The state provides free public elementary and secondary education. Negro children, whose parents object to their attending racially segregated schools, must seek their education in states where racial segregation is not practiced. To most there is, therefore, no practicable alternative to attending the segregated public schools.

While appellants have no abstract or natural right to a public school education, as Mr. Justice Frankfurter noted in his concurring opinion in *American Communications Association* v. *Douds,* supra at 417, the government is under no obligation to furnish any public facilities, but once it does it cannot make its facilities "available in an obviously arbitrary manner nor exact surrender of freedoms unrelated to the facilities." In this case, the state tells appellants that they must attend school, but if they choose to attend the schools which the state maintains, they must attend the segregated Moton High School solely because they are Negroes.

The Fourteenth Amendment was designed to secure full and equal citizenship rights for Negroes; it made freedom from state action based upon race or color fundamental to our way of life *Strauder* v. *West Virginia,* 100 U.S. 303. Protection of this freedom is secured by due process which is "the compendious expression for all those rights which courts must enforce because they are basic to our free society . . ." *Wolf* v. *Colorado,* 338 U.S. 25, 27. In requiring appellants to attend specially designated public schools solely because of their color, the state denies to them the

enjoyment of a freedom and liberty which they would otherwise have except for the fact that they are Negroes. In the infringement of this freedom, the state has further magnified the harm to which appellants are subjected by requiring them to attend inferior schools and to receive inferior educational advantages.

As to equal protection, it must be conceded that a state may classify its citizenry to accomplish some legitimate governmental objective *Dominion Hotel* v. *Arizona,* 249 U.S. 265; *Groessart* v. *Cleary,* 335 U.S. 464. The classification, however, must be based upon some real difference pertinent to a lawful legislative end. *Quaker City Cab Co.* v. *Pennsylvania,* 277 U.S. 389; *Skinner* v. *Oklahoma,* 316 U.S. 535. Admittedly the only difference between appellants and white public school children is a difference of race and color, and this cannot be considered a difference in the constitutional sense.

The state has not attempted to show, nor can it show, that this separation is based upon inherent differences between appellants and white children in the county because of their racial origin.[1] There is not even here the question of language differences upon which Arizona unsuccessfully sought to sustain the segregation of children of Mexican descent. *Gonzales* v. *Sheeley,* 96 F. Supp. 1004 (D. Arizona, 1951). As the court declared at 1008, 1009:

> "Segregation of school children in public school buildings because of racial or national origin . . . constitutes a denial of equal protection of the laws as guaranteed . . . by the provisions of the Fourteenth Amendment to the Constitution of the United States."

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[1] Montague, *Man's Most Dangerous Myth—The Fallacy of Race,* 188 (1945); American Teachers Association, *The Black & White of Rejections for Military Service* 5 at 29 (1944); Klineberg, *Negro Intelligence and Selective Migration* (1935); Peterson & Lanier, *Studies in the Comparative Abilities of Whites and Negroes,* Mental Measurement Monograph (1929); Clark, *Negro Children, Educational Research Bulletin* (1923); Klineberg, *Race Differences* 343 (1935).

The purposes of public education in Virginia, defined in its official pronouncements, is to develop fundamental skills, provide experience for emotional, moral and social development, develop good citizenship in a democracy, provide studies appropriate to the child's needs and aptitudes, prepare students for occupations and college and serve adults by providing facilities needed as they attempt to solve the problems of life (Tr. 46-47). There is no rational connection between these aims and racial segregation. Thus the separate school laws not only fail to satisfy the constitutional requirements of due process, but also equal protection of the laws. They are, therefore, invalid under both provisions.

Indeed, we take the unqualified position that the Fourteenth Amendment has totally stripped the state of power to make race and color the basis for governmental action. See *Skinner* v. *Oklahoma, supra,* at 541. While an exception may be made with respect to the federal government in a grave national emergency, *Hirabayashi* v. *United States,* 320 U. S. 81; *Korematsu* v. *United States,* 323 U. S. 214, no state can show any such overriding necessity which would warrant sustaining state action founded upon these constitutionally irrelevant and arbitrary considerations. See *Oyama* v. *California,* 332 U. S. 633; *Takahashi* v. *Fish and Game Commission,* 334 U.S. 410; *Shelley* v. *Kraemer,* 334 U. S. 1. For this reason alone, we submit, the state separate school laws in this case must fall.

In our view, the law also violates the privileges and immunities clause of the Fourteenth Amendment. Under that Amendment a privilege and immunity incident to national citizenship is freedom from governmental restrictions founded upon race.

Appellants contend further that the state separate school laws are motivated by racial prejudice and are based upon

a belief in the inherent inferiority of the Negro directly flowing from his racial origin and that they are invalid for this additional reason. Cf. *Korematsu* v. *United States, supra,* at 216; *Oyama* v. *California, supra,* at 646; and see concurring opinion of Mr. Justice Murphy in *Takahashi* v. *California, supra,* at 412, 427.

The court below concluded that the state school segregation laws are not the result of racial animosity or antipathy, but declare "one of the ways of life in Virginia" and are "a part of the mores of her people." (See Appendix "A".) The available historical evidence does not sustain these conclusions. Doubts concerning the status of the free Negro prior to the Civil War were resolved by the *Dred Scott* decision which expressly decided that a Negro had no citizenship rights equal to those enjoyed by a white person.[2] After the Civil War the Negro was affirmatively granted full and equal citizenship by the Thirteenth and Fourteenth Amendments, and the legal basis for racial distinctions inherent in the institution of slavery was destroyed. The white South, however, not content with this constitutional change, immediately undertook to reestablish the Negro status to accord with the ante-bellum philosophy expressed in the *Dred Scott* decision.

These attempts were first manifested in the Black Codes (1865-1866) which in many instances permitted the effective reestablishment of slavery through the apprenticeship system.[3] Subordination of the Negro was temporarily restrained by Congress but between 1870-1871 gained momentum in North Carolina, Virginia and Georgia[4] and throughout the South after the Presidential election of 1877.[5]

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[2] *Scott* v. *Sandford,* 19 How. 393.

[3] Henry S. Commager, 1 *Documents of American History* 5 (1935); Paul Lewinson, *Race, Class and Party,* 34 (1932).

[4] Bunche, *The Political Status of the Negro,* 1, 230 (Unpublished manuscript, Carnegie-Myrdal study.)

[5] Bunche, *op. cit.* supra note 5 at 230-233.

Implicit in the plan to relegate the Negro to a subordinate political, economic and social status was the separate school system. There was determined resistance to any public education whatsoever for the Negro, and where public education was provided, there was resistance to affording such education in mixed schools. Mixed education was in fact undertaken in Louisiana and South Carolina, but proponents of mixed schools were persuaded that abandonment of mixed schools would help the cause of public education throughout the South.[6]

The records of the southern state constitutional convention, 1890-1910, reveal that segregation was looked upon as a means of giving the Negro as little education as possible and of assuring the progress of white education unhampered by the economic burden of Negro education.[7] Equality under segregation in education was never intended, and certainly has never been achieved.[8]

At the Constitutional Convention for the state of Virginia, 1901-1902, devices were specifically sought which would give the Negro as little education as possible,[9] and to

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[6] Horace M. Bond, *The Education of the Negro in the American Social Order*, 37-57 (1934).

[7] E. Franklin Frazier, *The Negro in the United States*, 421-427 (1949).

[8] Charles S. Mangum, *Legal Status of the Negro*, 132-133 (1940); W. E. B. DuBois, *Black Reconstruction*, 642-677 (1935); Allison Davis, et al., *Deep South*, 240, 417-419 (1941); H. M. Bond, *Negro Education in Alabama*, 190 (1939).

[9] Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia, Richmond, June 12, 1901-June 26, 1902, Hermitage Press, Inc., 1906. In the debate over a resolution that state funds for schools must be used to maintain primary schools for four months before these funds could be used for establishment of schools of higher grades, the following exchange took place. See Vol. 1, p. 1677:
Mr. Turnbull:
"Might not the effect of this provision be to tend to prevent the establishment of schools in sections of the country where it ought to be prevented?"
Mr. Glass:
"I do not think so. Those matters were discussed. The committee discussed this provision perhaps more earnestly and longer than any other

make certain that he remained in an inferior position. The late Senator Carter Glass, who was a delegate at the Convention, took a relatively moderate position. During the course of the debates he stated:[10]

> "Discrimination! . . . that is precisely what we propose; that, exactly, is what this convention was elected for—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."

As late as 1928, in commenting upon the Fourteenth and Fifteenth Amendments and the South, Walter F. George of Georgia—now Senator—declared:[11]

> "No statutory law, no organic law, no military law, supersedes the law of racial necessity and social identity.
>
> "Why apologize or evade? We have been very careful to obey the letter of the Federal Constitution—but we have been very diligent and astute in violating the spirit of such amendments and such statutes as would lead the Negro to believe himself the equal of a white man."

Thus, it is clear that the purpose and intent of Virginia's separate school laws was to avoid according to Negroes the full citizenship rights which the Fourteenth Amendment

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provision contained in this report; and as I have said, it was a discussion to this very demand—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 had been passed, which would safeguard the poorer classes of those communities, divert that fund to the exclusive use of the white children, and I do not think we ought to go beyond that point."

[10] Lewinson, *op. cit.* supra, at 86.

[11] Sidney Sutherland, "The 14th, 15th and 18th Amendments," *Liberty Magazine*, V, No. 16,10 (April 21, 1928).

was designed to secure. On this basis alone, we submit, these laws should be struck down.

In summation, appellants contend that these state laws violate due process, deny the equal protection of the laws, abridge a privilege and immunity of national citizenship, exceed the permissible limits of state power and are motivated by racial prejudice. For each and all of these reasons, we submit, the laws must fall.

2. *Application of the separate school laws has resulted in continued and unbroken discrimination against Negro children in Prince Edward County in violation of the Fourteenth Amendment.*

Even assuming that Virginia had a proper motive in the enactment of its separate school laws, an examination of the natural and actual effect of these laws—which is clearly relevant to a determination of constitutionality, *Bailey* v. *Alabama,* 219 U. S. 219; *Guinn* v. *United States,* 283 U. S. 347; *Yick Wo* v. *Hopkins,* 118 U. S. 356—discloses that in Prince Edward County public educational facilities for Negroes are inferior to those available for white children and that this condition has existed for a continuous period of at least thirty-four years. The present Superintendent of Schools of Prince Edward County took office in 1918 and has held the position ever since (Tr. 638-639). Although a high school for white children was available when he took office, no high school facility of any sort was open to Negroes until 1927-1928 when a combination elementary-high school was erected; no accredited high school was available until 1931; in 1924-25, public school bus transportation was made available for whites, but it was not until 1938 that such transportation was offered to Negroes (Tr. 639-642). Discrimination in salary between teachers in the white schools and teachers in the Negro schools was in effect in 1918, and no steps were made to end this

practice until 1940 (Tr. 645-646). At no time during the thirty-four year period in the regime of the present Superintendent have physical school facilities for Negroes been equal to those available for white children. These are the undisputed facts.

The inequality which existed when the present Superintendent took office necessarily predated 1918. It is, therefore, fair to conclude that educational opportunities for Negroes have never been equal to those for white children in Prince Edward County under the separate school laws.

The present Superintendent knew that school facilities for Negro children were inferior when he took office in 1918. The present school board knew of the dissatisfaction among Negro citizens with conditions at the Moton High School at least as long ago as December of 1947 (Tr. 463). The school board even ordered a school survey which was completed in 1948 (Tr. 464-465), yet no affirmative steps were taken to remedy this discrimination until after the present law suit was filed in 1951.

Section 22-221 of the State Code, which has been in force since 1869-70, provides that the separate schools be under the "same general regulations as to management, usefulness and efficiency." If this provision is interpreted as requiring equality, it has been ignored as scrupulously as the requirement for separation has been observed.

While it may be true, as the district court pointed out, that separate schools have been "one of the ways of life of Virginia," systematic and deliberate discrimination against Negroes has been its inevitable result in Prince Edward County.[12] Appellants are seeking to modify that

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[12] Nor does the situation in Prince Edward County differ materially in this regard from that in the rest of the state. The opinion of the district court indicates that in a large number of counties and cities in Virginia the schools and facilities for Negroes are equal and superior to those

was designed to secure. On this basis alone, we submit, these laws should be struck down.

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way of life so that it will conform with the requirements of the Fourteenth Amendment.

The records of this Court disclose beyond cavil that the "separate but equal" doctrine has not provided equal educational opportunities consistent with the demands of the federal Constitution. In 1938, this Court held that a state had to provide equal legal facilities for Negro applicants within the state or admit them to the state university despite segregation laws. *Missouri ex rel Gaines* v. *Canada,* 305 U. S. 337. This decision gave notice to all that states could not provide legal training without making provisions for training of Negro applicants on the same basis. Yet, ten years later Oklahoma was still attempting to do just that. *Sipuel* v. *Board of Regents,* 332 U. S. 631. Until the case of *Sweatt* v. *Painter, supra,* had been in the state court for about a year, no law school other than the University of Texas was available. In *Hawkins* v. *Board of Control,* 47 So. 2d 608 and 53 So. 2d 116 (Fla.); cert. den. U. S. , November 13, 1951, for want of final judgment, and in *Gray* v. *University of Tennessee,* U. S. , decided March 3, 1952, the only law schools available were at the state universities to which Negroes had been denied admission. In Virginia, a court decree in *Swanson* v. *Uni-*

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available for white children. There is nothing in the record to justify this broad conclusion.

Uncontroverted testimony was introduced to establish those facts only with respect to high school buildings (Tr. 545-547), but that evidence is not a sufficient basis for the court's unqualified statement.

As a matter of fact, the Annual Report of the State Superintendent of Public Instruction for 1950-1951, pages 322-324, discloses that in every city and county in Virginia the white schools are superior to Negro schools in terms of value of sites and buildings, value of furniture and equipment, and value of school buses. Appellants took the appellees' own figures and demonstrated at the trial without challenge that for every dollar the state had spent on instruction in white schools, eighty-five cents had been spent in the Negro schools in 1933-1934; and that in 1950 the figure in the Negro schools had increased to eighty-nine cents (Tr. 955-g-h); that taking into account the state's ambitious construction program even after these proposed projects are completed, for every dollar invested in sites and buildings in the white schools, seventy-four cents would have been invested in Negro schools (Tr. 956).

versity of Virginia, unreported, Civil Action No. 30, (W.D. Va. 1950) was necessary to secure admission of a Negro to the only state facility where legal training was being offered.

In all the cases which heretofore have reached this Court involving the equality of educational opportunities as between the segregated and nonsegregated groups, either the separate facilities have been inferior to those available to other racial groups or nonexistent. *Cumming* v. *Board of Education,* 175 U. S. 528; *Missouri ex rel Gaines* v. *Canada, supra; Sipuel* v. *Board of Regents, supra; Sweatt* v. *Painter, supra; McLaurin* v. *Board of Regents, supra; Gray* v. *University of Tennessee, supra.* The present case falls into the same pattern. The "separate but equal" theory as a rule of law has been a total failure in providing that protection against racial discrimination which was concededly one of the primary purposes of the Fourteenth Amendment. *Shelley* v. *Kraemer, supra.* Acutal experience has demonstrated the fallacy of the theory and it should now be discarded.

With respect to the operation of the separate school laws in this case, this Court is in exactly the same position as it was in *Yick Wo* v. *Hopkins, supra.* There, after finding that the ordinance in question made possible unconstitutional discrimination against Chinese solely because of race, the Court struck it down. It declared at 373:

> ". . . we are not obliged to reason from the probable to the actual . . . For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured . . . the Fourteenth Amendment to the Consti-

> tution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The separate school laws make possible discrimination against Negroes because of their color, deliberate and invidious discrimination has been its actual result for more than thirty-four continuous years in Prince Edward County. No law should be allowed to stand where discrimination forbidden by the federal Constitution is made possible and indeed actually and inevitably results. *Yick Wo* v. *Hopkins, supra.*

Looking at the application of these laws in Prince Edward County, the conclusion is inescapable, we submit, that appellants' rights as guaranteed under the Fourteenth Amendment can only be secured if the state's separate school laws are held unconstitutional, and appellees are required to admit appellants to the superior schools in the county without regard to race or color.

3. *The findings of the court below entitle appellants to admission at once to the superior schools in Prince Edward County.*

In *Missouri ex rel Gaines* v. *Canada, supra,* at 352, this Court, even without a record showing the injury incident to racial segregation, held that a Negro applicant must be admitted to the state university "in the absence of other and proper provisions for his legal training." "The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the quality of the privileges which the laws give the separated

groups within the State." Id at 349. Subsequently, in *Sipuel* v. *Board of Regents, supra,* the state was held under obligation to furnish educational opportunities for Negro applicants as soon as these were furnished any other group. Finally, in *Sweatt* v. *Painter, supra,* after finding the state had failed to provide equal educational opportunities to a Negro applicant, this Court said at pages 635, 636: ". . . petitioners may claim his full constitutional right: legal education equivalent to that offered by the State to students of other races . . . the Equal Protection Clause of the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School."

Rights secured under the Fourteenth Amendment are personal and present, *Sweatt* v. *Painter, supra,* at 605; *McLaurin* v. *Board of Regents, supra; Shelley* v. *Kraemer, supra; Sipuel* v. *Board of Regents, supra; Missouri ex rel Gaines* v. *Canada, supra,* and having established a clear and unmistakable violation of these constitutional guarantees, appellants are entitled to full and effective relief at once which in this instance is their immediate admission to the white schools. It should be remembered that appellants are high school students. For many this represents their last opportunity to obtain equal educational opportunities. A decree effective at some future time when the state gets around to completing a new Negro high school after they graduated will mean in fact that they will secure no relief.

In *Belton et al.* v. *Gebhart et al.,* Del. Ch., A 2d , decided April 1, 1952, the Delaware Court dealt with the same problem raised here. The state presented evidence to show that it was engaged in a building program designed to better the Negro schools and argued that under such circumstances, the court should merely direct the equaliza-

tion of facilities and allow the state time to comply with such an order. While recognizing that some courts in similar cases had taken this course, Chancellor Seitz rejected this proposal on the grounds that where a showing has been made of an existing and continuing "violation of the 'separate but equal' doctrine, [a Negro applicant] is entitled to have made available to him the State facilities which have been shown to be superior." Otherwise, he said, a complainant would be told that although his constitutional rights had been violated, he would have to patiently wait for the court to find out whether they were still being violated at some future date. "To postpone such relief is to deny relief, in whole or in part, and to say that the protective provisions of the Constitution offer no immediate protection." The court concluded that despite the state's future plans, immediate injunctive relief was necessary and issued a decree restraining the state from denying admission to the white school based upon race and color.

The only basis upon which the court below could have sustained the constitutionality of Virginia's separate school laws is under the "separate but equal" doctrine. While appellants contend that their rights should not be measured by that formula, and that no state has power to make racial distinctions among its citizenry with respect to educational facilities, certainly they are entitled to no less than the *Plessy* v. *Ferguson* doctrine requires, i.e., equal educational opportunities.

While upholding the constitutionality of the segregation of appellants in the public high schools of Prince Edward County, the court below found that equal educational opportunities with respect to buildings, facilities, curricula and means of transportation were not being offered at the Moton High School and would not be offered

until 1953.[13] Since a *sine qua non* to a finding of constitutionality even under the minimum constitutional standard—the "separate but equal" doctrine—is the equality of the facilities provided for the segregated group, the state in this case has failed to build the constitutional flooring essential to its argument that its separate school laws are valid. Under these circumstances the court below was at least obligated to order appellants' admission to the superior schools without regard to the state's policy of racial segregation. In failing to issue such a decree, the court below committed a fatal error, and its judgment should be reversed.

4. *Equal educational opportunities in fact cannot be provided under Virginia's separate school laws.*

Controversy has raged for many years over the question as to whether the framers of the Fourteenth Amendment specifically intended to deprive the state of power to promulgate and enforce racial segregation in public schools. Modern-day scholars have demonstrated that racial segregation was one of the evils which the framers of the Fourteenth Amendment sought to eradicate.[14] It has always been clear and undisputed, however, that the Fourteenth Amendment sought to secure forever against state abridgment full and equal civil and political rights for Negroes. *Shelley* v. *Kraemer, supra,* at 23. It is against this undisputed objective that Virginia's separate school laws must be measured.

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[13] Appellants introduced evidence to show that even when the new Moton High School is completed, for every dollar spent on white high school buildings and facilities in Prince Edward County, eighty-two cents would be spent for Negro schools (Tr. 958).

[14] E.g., see Graham, "The Early Anti-Slavery Backgrounds of the 14th Amendment," *Wis. L.Rev.*, 478, 610 (1950); Frank and Munro, "The Original Understanding of 'Equal Protection of the Laws,'" 50 Col. L.Rev. 131 (1950).

Racial segregation has been sustained in the past under the "separate but equal" philosophy. Upon the evidence introduced at the trial of this case, there is little doubt that appellants have been subjected to invidious discrimination under the shield of the segregation laws. Whatever interpretation may have been placed upon the Constitution by past courts, constitutional guarantees can only be given meaning and vitality in the light of present knowledge and experience. See *Smith* v. *Allwright*, 321 U. S. 649, 665; see also Douglas, *Stare Decisis*, 49 Col. L. Rev. 735 (1939). It is difficult to conclude today that separate schools can ever be equal schools.

Appellants contend that they have been denied equal educational opportunities in Prince Edward County because they are required to attend racially segregated schools and that these schools are in fact inferior to schools which the state provides for white children. The court has found that the segregated schools are inferior with respect to buildings, facilities, curricula and means of transportation. Appellants contend that in deciding the constitutional question involved here—whether appellants are receiving equal educational opportunities—the inquiry cannot be limited to a comparison of curricula and physical facilities alone but must embrace every significant factor which relates to educational and mental development.

Appellants introduced experts in the fields of education and psychology who testified that racial segregation stigmatizes the Negro child with a sense of inferiority; that it impedes the natural development of his mental resources; that it is conductive to the development of an unhealthy personality; and that it bars contact with the dominant groups in the community thereby making it impossible for the Negro child to receive educational opportunities equal to those which would be available to him in an unsegregated

school system (Tr. 241, 276, 318-321, 391-393, 404-406). Cf. *Sweatt* v. *Painter, supra.* Appellees introduced experts in the fields of education, psychology and psychiatry to show that given equal facilities in a separate school, the Negro would receive equal educational opportunities.

As to this phase of the case, the court said that appellants had introduced expert witnesses who unanimously agreed that segregation in schools "immeasurably abridged [the Negro child's] educational opportunities"; and that on the other hand appellees had introduced equally distinguished expert witnesses who agreed that given equal physical facilities, offerings and instruction, "the Negro would receive in a separate school the same educational opportunity as he would obtain in the classroom "and on the campus of a mixed school . . . On this fact issue the Court cannot say that the plaintiffs' evidence overbalances the defendants." (Appendix "A".)

Four experts in education testified for appellees—Dr. Colgate Darden, President of the University of Virginia and former Governor of the State (Tr. 741-761); Dr. Dabney Lancaster, President of Longwood College (Tr. 762-793); Dr. Dowell J. Howard, State Superintendent of Public Instruction (Tr. 717-740); and Dr. Lindley Stiles, Dean of the Department of Education of the University of Virginia (Tr. 803-855). All testified that segregated schools with equal facilities would be better for Negroes than mixed schools and expressed fear of withdrawal of public support if segregation were abolished.

Appellees' witness, Dr. Darden, however, stated that segregation in many instances had been used as a shield for oppression, discrimination and mistreatment although he was of the opinion that this should not necessarily follow from segregation (Tr. 752).

Appellees' witness, Dr. Stiles, stated that he could not accept segregation as a social practice (Tr. 825), and that

to the degree that Negroes are given equal educational opportunities to learn and to the extent that all Virginians get better schools, segregation was in the process of being abolished (Tr. 826). He said that the debate was not over whether society could or should be cured of the ailment of segregation, but rather on how to treat the disease (Tr. 825-827). With better education for both groups, he felt the time would come when segregation would be considered unnecessary (Tr. 835).

Also testifying for appellees were Dr. William Kelly, a psychiatrist and Director of the Memorial Foundation and Memorial Guidance Clinic, Richmond, Virginia (Tr. 856-883); John Buck, a retired clinical psychologist (Tr. 884-910); and Dr. Henry E. Garrett, Chairman of the Department of Psychology, Columbia University (Tr. 911-955C). Again, all voiced the opinion that Negroes could get equal training in separate schools.

Appellees' witness, Dr. Kelly, while of the opinion that segregation was going to end, feared its abrupt termination (Tr. 871 and 875). He conceded, however, that racial segregation was adverse to the personality development of the individual, although he expressed doubt that its elimination would per se change the personality defect or remove the adverse influence (Tr. 882).

Appellees' witness, Mr. Buck, stated that racial segregation in the abstract was bad (Tr. 903), and that it was the consensus of members of his profession that segregation was harmful, although he felt the harm done depended upon many other circumstances (Tr. 908).

Appellees' witness, Dr. Garrett, felt that segregation could not be defended if the segregated group is stigmatized or put into an inferior position, but that the mere fact of segregation did not necessarily mean discrimination (Tr. 920-921). In view of the present state of mind of

Virginia and given equal facilities, it was his feeling that Negro children could get a better education in segregated schools (Tr. 953). However, in answer to a question as to whether segregation as practiced in the United States today was harmful, Dr. Garrett stated: "In general, whenever a person is cut off from the main body of society or a group, if he is put in a position that stigmatizes him and makes him feel inferior, I say, yes, it is detrimental and deleterious to him." (Tr. 954.)

Thus, four of appellees' seven expert witnesses admit that segregated schools have harmful effects on Negro children, and while favoring the eventual elimination of separate schools, they presently support the immediate preservation of separate schools primarily because of the climate of public opinion in the state. A fifth witness for appellees recognized that segregation made possible racial discrimination. Only two of appellees' witnesses gave unqualified support to the state practice, and even they placed emphasis upon public opinion.

Whether segregation in the public schools of the state is a wise or sound policy is not involved in this litigation; nor can the state practice be defended on the grounds that even if removed appellants will be no better off since the teachers and white students might not accept them. This Court dealt firmly with that argument in *McLaurin* v. *Board of Regents, supra,* at 641, 642, where it said:

> "It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. The removal of the state restrictions will not necessarily abate in-

to the degree that Negroes are given equal educational opportunities to learn and to the extent that all Virginians get better schools, segregation was in the process of being abolished (Tr. 826). He said that the debate was not over whether society could or should be cured of the ailment of segregation, but rather on how to treat the disease (Tr. 825-827). With better education for both groups, he felt the time would come when segregation would be considered unnecessary (Tr. 835).

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> dividual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits."

And as Judge Soper noted in *McKissick* v. *Carmichael,* 187 F. 2d 949, 953, 954 (CA 4th 1951) the state cannot successfully defend against the assertion of constitutional rights on the grounds that it is in the individual's interest that he be deprived of them. We quote his apt language:

> ". . . the defense seeks in part to avoid the charge of inequality by the paternal suggestion that it would be beneficial to the colored race in North Carolina as a whole, and to the individual plaintiffs in particular, if they would cooperate in promoting the policy adopted by the State rather than seek the best legal education which the State provides. The duty of the federal courts, however, is clear. We must give first place to the rights of the individual citizen, and when and where he seeks only equality of treatment before the law, his suit must prevail. It is for him to decide in which direction his advantage lies."

It must be remembered that the Fourteenth Amendment requires that the state not deny to appellants, because of race, educational opportunities equal to those it furnishes other groups. Only if it were possible to resolve that question in terms of physical facilities would it be appropriate to limit the reach of the constitutional mandate to that phase of the educational picture alone. That the constitutional guarantee of equal educational opportunities involves more than mere equal physical offerings was settled beyond doubt in the *McLaurin* decision. Whatever may be the present force of the *Plessy* v. *Ferguson* "separate but equal" doctrine, it is now too late for a court to determine constitutional equality on the basis of physical facilities alone as that case seems to imply.

Appellants have demonstrated that racial separation in public schools as practiced in Prince Edward County injures appellants and is adverse to their educational development. With this basic thesis at least four of appellees' expert witnesses agree. These were the considerations which were the basis of the *McLaurin* decision. If the state practice produces harm forbidden by the Constitution, the fact that a majority of the state's population does not want the practice changed or that it has become a feature of the state's way of life cannot insulate the practice against the reach of the Constitution. Since it has been demonstrated that segregation in the public schools in Prince Edward County is injurious and adverse to appellants, we submit that the separate school laws are forbidden by the Fourteenth Amendment and should be struck down.

5. *The decree of the court below fails to grant appellants effective relief from an admitted deprivation of their constitutional rights.*

The court below found that Moton school is unequal with respect to curricula and issued a decree designed to immediately remove discrimination in this category. Serious questions arise, however, concerning the meaning of this decree and the problem of enforcement presents, in our view, insurmountable difficulties.

In its opinion the trial court stated that:

> ". . . we find physics, world history, Latin, advanced typing and stenography, metal and machine shop work and drawing, not offered at Moton, but given in the white schools."

We assume that under this decree appellees must provide at Moton at once courses in physics, world history, Latin, advanced typing and stenography, metal and machine shop work and drawing. Yet as to physics, metal and machine shop work and drawing, there are deficiencies at Moton

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in the equipment and facilities essential to the proper teaching of these courses.

The court was not unaware of these deficiencies in facilities and equipment. For it is specifically stated in the court's opinion that the Moton school lacks a gymnasium, showers, or:

> "dressing rooms to accompany physical education or athletics, no cafeteria, no teachers' restroom and no infirmary *to give some of the items lacking in Moton but present in the white school.* Moton's science equipment and facilities are lacking and inadequate. No industrial art shop is provided . . ." (emphasis supplied)

Inequalities in buildings and facilities under the court's decree need not be removed until the new Moton High School, promised for occupancy in September, 1953, is completed.

Either appellees must provide equality in curricula at once by offering courses in physics, metal and machine shop work and drawing without the necessary equipment—in which case they cannot provide substantial equality now; or appellees are permitted to wait until the promised new school is finished at some subsequent date before being required to equalize the curricula—in which case the decree ordering equalization at once is meaningless.

The record further shows that Moton is overcrowded. If courses in physics, metal and machine shop work and drawing, advanced typing and stenography must be added at once, this may require special rooms which Moton cannot spare without dropping some of the program presently in force. Thus, in order to comply with this decree, appellees may have to create new curricula inequalities without curing the old ones.

Confusion is also created by the court's phraseology. The court states:

> "While the school authorities tender their willingness to give any course in the Negro school now obtainable in the white school, all courses in the latter should be made more readily available to the students at Moton."

It is difficult to conclude exactly what appellees are required to do in this regard.

Concerning bus transportation, the court had this to say in its opinion:

> "In supplying school buses the Negro students have not been accorded their share of the newer vehicles. This practice must cease. In the allocation of new conveyances, as replacements or additional equipment, there must be no preference in favor of the white students."

It issued a decree ordering immediate equality in means of transportation. Yet, the court did not indicate what appellees must now do to satisfy this order. One could assume that appellees could satisfy the court's decree in operating school transportation facilities under present conditions as long as Negro children got their proportionate share of any new equipment which might be added in the future. On the other hand, the decree may require appellees to buy new equipment for Negro children at once.

With reference to buildings and facilities, after pointing out some of the inequalities in the Negro school, the court uses the all-inclusive and vague terminology "in many other ways the structures and facilities do not meet the level of the white school." The expert witness for appellants who surveyed the schools testified that Moton was at a great disadvantage in respect to attractiveness, arrangement of physical plant, location, construction and compactness (Tr. 114-115). Unless there is equality of buildings in these features, even conceding the possibility

of a separate equality, the new structure cannot be the equal of the white school. It is not clear whether under this decree appellees must take these features into account.

A school building program is constantly in progress. Teaching methods change as educators gain added insight into the problems of mass education. Public school education is materially different from what public school education was ten or twenty years ago or will be several years hence. With public school education always in flux, no two schools can retain a constant and fixed relation to each other.

Certainly this relationship cannot be fixed by court decree. As Judge Edgerton dissenting in *Carr* v. *Corning,* 182 F. 2d 14, 22, 31 (CADC 1950), said:

> ". . . two schools are seldom if ever fully equal to each other in location, environment, space, age, equipment, size of classes, and faculty."

While the meaning and effect of the decree is far from clear, its enforcement would necessarily involve the court in the daily operation of the public school system in Prince Edward County. It is clear that this is a task for which the judiciary is unsuited, and "control through the power of contempt is crude and clumsy and lacking in the flexibility necessary to make detailed and continuous supervision effective." *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131, 163.[15]

As a matter of fact this decree seems to require no more than the statute itself—which has been in force since 1869-70—under which appellees are required to maintain the

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[15] See *Belton et al.* v. *Bebhart et al.,* supra, where in refusing to merely issue an injunctive decree ordering the state to equalize the Negro school facilities within the framework of segregation, the court stated that one of the bases for its refusal was that it could not see how the court could implement such an injunction against the state.

colored schools under the "same general regulations as to management, usefulness and efficiency" as the white schools. Unquestionably, this statutory requirement has not prevented discrimination against Negro children. For more than thirty-four years, officials of Prince Edward County have been either woefully derelict and disinterested, actively prejudiced against Negroes or are unable to provide equal educational facilities under the state's separate school laws. Except to insure the involvement of appellants and the class they represent in constant and considerable litigation to obtain enforcement and clarification of the court's decree, the judgment accomplishes little. It is indeed difficult to believe that this decree will succeed where specific statutory requirements have failed.

On the other hand, by declaring the separate school laws unconstitutional and by restraining appellees from denying admission to the superior schools on the basis of race and color, the court settles and resolves the basic problem once and for all. Its only future concern would be upon a showing that appellees were attempting to avoid the decree.

Conclusion

For the foregoing reasons, it is respectfully submitted, the judgment of the court below should be reviewed by the United States Supreme Court and reversed.

Robert L. Carter,
Oliver W. Hill,
Thurgood Marshall,
Spottswood W. Robinson, III,
Counsel for Plaintiffs-Appellants.

Jack Greenberg,
James M. Nabrit,
Jack B. Weinstein,
Of Counsel.

Dated: May 5, 1952.

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.

Civil Action No. 1333.

DOROTHY E. DAVIS, ET AL.,

v.

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

(Heard February 25-29, 1952. Decided March 7, 1952)

Before DOBIE, Circuit Judge, and HUTCHESON and BRYAN, District Judges.

Oliver W. Hill, Esquire, Spottswood W. Robinson, 3rd, Esquire (Hill, Martin & Robinson) of Richmond, Virginia, and Robert L. Carter, Esquire, of New York City, for the plaintiffs;

T. Justin Moore, Esquire, Archibald G. Robertson, Esquire and T. Justin Moore, Jr., Esquire (Hunton, Williams, Anderson, Gay & Moore) of Richmond, Virginia, for the defendant school board and superintendent.

Honorable J. Lindsay Almond, Attorney General of Virginia, and Henry T. Wickham, Esquire, Assistant Attorney General of Virginia, for the Commonwealth of Virginia.

BRYAN, District Judge:

Prince Edward is a county of 15,000 people in the southern part of Virginia. Slightly more than one-half of its inhabitants are Negroes. They compose 59 percent of the county school population. At the high school plane the average pupil attendance is 386 colored, 346 white. For themselves and their classmates, a large number of these Negro students, their parents, or guardians now demand

that their county school board and school superintendent refrain from further observance of the mandate of section 140 of the Constitution of Virginia and its statutory counterpart,[16] the former reading: "White and colored children shall not be taught in the same school." Defendants' adherence to this command, it is averred, creates a positive discrimination against the colored child solely because of his race or color, constituting both a deprivation of his privileges and immunities as a citizen of the United States and a denial to him of the equal protection of the laws. The prohibition is denounced as a breach of the Civil Rights Act[17] and as inimical to section 1 of the 14th Amendment of the Federal Constitution.

Defendants pray a declaration of the invalidity, and an injunction against the enforcement of the separation provisions. In the alternative, they ask a decree noting and correcting certain specified inequalities between the white and colored schools. That the schools are maintained with public tax moneys, that the defendants are public officials, and that they separate the children according to race in obedience to the State law are conceded. The Commonwealth of Virginia intervenes to defend.

Plaintiffs urge upon us that Virginia's separation of the Negro youth from his white contemporary stigmatizes the former as an unwanted, that the impress is alike on the minds of the colored and the white, the parents as well as the children, and indeed of the public generally, and that the stamp is deeper and the more indelible because imposed by law. Its necessary and natural effect, they say, is to prejudice the colored child in the sight of his community, to implant unjustly in him a sense of inferiority as a human being to other human beings, and to seed his mind with hopeless frustration. They argue that in spirit and in truth the colored youth is, by the segregation law, barred from association with the white child, not the white from the colored, that actually it is ostracism for the Negro child, and that the exclusion deprives him of the equal opportunity with

[16] Constitution of 1902; Sec. 22-221, Code of Virginia 1950, q.v. post p. 6.

[17] 8 USCA 41.

the Caucasian of receiving an education unmarked, an immunity and privilege protected by the statutes and constitution of the United States.

Eminent educators, anthropologists, psychologists and psychiatrists appeared for the plaintiffs, unanimously expressed dispraise of segregation in schools, and unequivocally testified the opinion that such separation distorted the child's natural attitude, throttled his mental development, especially the adolescent, and immeasurably abridged his educational opportunities. For the defendants, equally distinguished and qualified educationists and leaders in the other fields emphatically vouched the view that, given equivalent facilities, offerings and instruction, the Negro would receive in a separate school the same educational opportunity as he would obtain in the classroom and on the campus of a mixed school. Each witness offered cogent and appealing grounds for his conclusion.

On this fact issue the Court cannot say that the plaintiffs' evidence overbalances the defendants'. But on the same presentation by the plaintiffs as just recited, Federal courts[18] have rejected the proposition, in respect to elementary and junior high schools, that the required separation of the races is in law offensive to the National statutes and constitution. They have refused to decree that segregation be abolished incontinently. We accept these decisions as apt and able precedent. Indeed we might ground our conclusion on their opinions alone. But the facts proved in our case, almost without division and perhaps peculiar here, so potently demonstrate why nullification of the cited sections of the statutes and constitution of Virginia is not warranted, that they should speak our conclusion.

Regulations by the State of the education of persons within its marches is the exercise of its police power—"the power to legislate with respect to the safety, morals, health and general welfare."[19] The only discipline of this power by

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[18] *Briggs et al.* v. *Elliott et al.*, 98 F.Supp. 529, and *Carr* v. *Corning*, 182 F2d 14, citing *Plessy* v. *Ferguson*, 163 U.S. 537, 41 L.Ed., 256; *Gong Lum* v. *Rice*, 275 U.S. 78, 72 L.Ed. 172, and *Cumming* v. *County Board of Education*, 175 U.S. 528, 44 L.Ed. 262.

[19] *Briggs* v. *Elliott*, supra, 98 F. Supp. 529, 532.

the 14th Amendment and the Civil Rights Act of Congress is the requirement that the regulation be reasonable and uniform. We will measure the instant facts by that yardwand.

It indisputably appears from the evidence that the separation provision rests neither upon prejudice, nor caprice, nor upon any other measureless foundation. Rather the proof is that it declares one of the ways of life in Virginia. Separation of white and colored "children" in the public schools of Virginia has for generations been a part of the mores of her people. To have separate schools has been their use and wont.

The school laws chronicle separation as an unbroken usage in Virginia for more than eighty years. The General Assembly of Virginia for its session of 1869-70, in providing for public free schools, stipulated "that white and colored persons shall not be taught in the same school, but in separate schools, under the same general regulations as to management, usefulness and efficiency."[20] It was repeated at the session 1871-2,[21] and carried into the Code of 1873.[22] As is well known, all this legislation occurred in the period of readjustment following the Civil War when the interests of the Negro in Virginia were scrupulously guarded. The same statute was re-enacted by the Legislature of 1877[23] Virginia. In almost the same words separation in the schools was carried into the Acts of Assembly of 1881-2,[25] and similarly embodied in the Code of 1887,[26] in the Code of 1919,[27] in the same words: "White and colored persons shall not be taught in the same school, but shall be taught in separate schools under the same general regulations as to management, usefulness and efficiency." The importance of the school separation clause to the people of the State is

[20] Acts of 1869-70, cp. 259, p. 402.

[21] Acts of 1871-2, c. 370, p. 461.

[22] Title 23, c. 78, sec. 58.

[23] Acts of General Assembly 1876-7, c. 38, p. 28.

and again in 1878,[24] still within the Reconstruction years of

[24] Acts of General Assembly 1877-8, c. 14, p. 10.

[25] C. 40, pp. 36, 37.

[26] Sec. 1492.

[27] Sec. 719.

the Caucasian of receiving an education unmarked, an immunity and privilege protected by the statutes and constitution of the United States.

Eminent educators, anthropologists, psychologists and psychiatrists appeared for the plaintiffs, unanimously expressed dispraise of segregation in schools, and unequivocally testified the opinion that such separation distorted the child's natural attitude, throttled his mental development, especially the adolescent, and immeasurably abridged his educational opportunities. For the defendants, equally distinguished and qualified educationists and leaders in the other fields emphatically vouched the view that, given equivalent facilities, offerings and instruction, the Negro would receive in a separate school the same educational opportunity as he would obtain in the classroom and on the campus of a mixed school. Each witness offered cogent and appealing grounds for his conclusion.

On this fact issue the Court cannot say that the plaintiffs' evidence overbalances the defendants'. But on the same presentation by the plaintiffs as just recited, Federal courts[18] have rejected the proposition, in respect to elementary and junior high schools, that the required separation of the races is in law offensive to the National statutes and constitution. They have refused to decree that segregation be abolished incontinently. We accept these decisions as apt and able precedent. Indeed we might ground our conclusion on their opinions alone. But the facts proved in our case, almost without division and perhaps peculiar here, so potently demonstrate why nullification of the cited sections of the statutes and constitution of Virginia is not warranted, that they should speak our conclusion.

Regulations by the State of the education of persons within its marches is the exercise of its police power—"the power to legislate with respect to the safety, morals, health and general welfare."[19] The only discipline of this power by

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[18] *Briggs et al.* v. *Elliott et al.*, 98 F.Supp. 529, and *Carr* v. *Corning*, 182 F2d 14, citing *Plessy* v. *Ferguson*, 163 U.S. 537, 41 L.Ed., 256; *Gong Lum* v. *Rice*, 275 U.S. 78, 72 L.Ed. 172, and *Cumming* v. *County Board of Education*, 175 U.S. 528, 44 L.Ed. 262.

[19] *Briggs* v. *Elliott*, supra, 98 F. Supp. 529, 532.

the 14th Amendment and the Civil Rights Act of Congress is the requirement that the regulation be reasonable and uniform. We will measure the instant facts by that yardwand.

It indisputably appears from the evidence that the separation provision rests neither upon prejudice, nor caprice, nor upon any other measureless foundation. Rather the proof is that it declares one of the ways of life in Virginia. Separation of white and colored "children" in the public schools of Virginia has for generations been a part of the mores of her people. To have separate schools has been their use and wont.

The school laws chronicle separation as an unbroken usage in Virginia for more than eighty years. The General Assembly of Virginia for its session of 1869-70, in providing for public free schools, stipulated "that white and colored persons shall not be taught in the same school, but in separate schools, under the same general regulations as to management, usefulness and efficiency."[20] It was repeated at the session 1871-2,[21] and carried into the Code of 1873.[22] As is well known, all this legislation occurred in the period of readjustment following the Civil War when the interests of the Negro in Virginia were scrupulously guarded. The same statute was re-enacted by the Legislature of 1877[23] Virginia. In almost the same words separation in the schools was carried into the Acts of Assembly of 1881-2,[25] and similarly embodied in the Code of 1887,[26] in the Code of 1919,[27] in the same words: "White and colored persons shall not be taught in the same school, but shall be taught in separate schools under the same general regulations as to management, usefulness and efficiency." The importance of the school separation clause to the people of the State is

[20] Acts of 1869-70, cp. 259, p. 402.

[21] Acts of 1871-2, c. 370, p. 461.

[22] Title 23, c. 78, sec. 58.

[23] Acts of General Assembly 1876-7, c. 38, p. 28.

and again in 1878,[24] still within the Reconstruction years of

[24] Acts of General Assembly 1877-8, c. 14, p. 10.

[25] C. 40, pp. 36, 37.

[26] Sec. 1492.

[27] Sec. 719.

signalized by the fact that it is the only racial segregation direction contained in the Constitution of Virginia.

Maintenance of the separated systems in Virginia has not been social despotism, the testimony points out, and suggests that whatever its demerits in theory, in practice it has begotten greater opportunities for the Negro. Virginia alone employs as many Negro teachers in her public schools, according to undenied testimony, as are employed in all of the thirty-one non-segregating States. Likewise it was shown that in 29 of the even hundred counties in Virginia, the schools and facilities for the colored are equal to the white schools, in 17 more they are now superior, and upon completion of work authorized or in progress, another 5 will be superior. Of the twenty-seven cities, 5 have Negro schools and facilities equal to the white and 8 more have better Negro schools than white.

So ingrained and wrought in the texture of their life is the principle of separate schools, that the president of the University of Virginia expressed to the Court his judgment that its involuntary elimination would severely lessen the interest of the people of the State in the public schools, lessen the financial support, and so injure both races. His testimony, corroborated by others, was especially impressive because of his candid and knowledgeable discussion of the problem. A scholar and a former Governor and legislator of the State, we believe him delicately sensible of the customs, the mind, and the temper of both races in Virginia. With the whites comprising more than three-quarters of the entire population of the Commonwealth, the point he makes is a weighty practical factor to be considered in determining whether a reasonable basis has been shown to exist for the continuation of the school segregation.

In this milieu 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. This ends our inquiry. It is not for us to adjudge the policy as right or wrong—that, the Commonwealth of Virginia "shall determine for itself."[28]

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[28] Judge Parker in *Briggs* v. *Elliott*, supra, 98 F. Supp. 529.

On the second phase of this case, the inequality in the Negro schools when compared with the white, the defendants confess that the building and facilities furnished for Negro high school education are below those of the white schools. We think the discrepancy extends further. We find inequality also in the curricula of the schools and in the provision for transportation of the students.

Undoubtedly frankness required admission by the defendants of their dereliction in furnishing an adequate school plant and facilities for the Negro. His high school is the Robert R. Moton. It is composed of one permanent brick building and three temporary, one-story, frame buildings. No gymnasiums are provided, no shower or dressing rooms to accompany physical education or athletics, no cafeteria, no teachers' rest room and no infirmary, to give some of the items absent in Moton but present in the white school. Moton's science facilities and equipment are lacking and inadequate. No industrial art shop is provided, and in many other ways the structures and facilities do not meet the level of the white school.

In offerings we find physics, world history, Latin, advanced typing and stenography, wood, metal and machine shop work, and drawing, not offered at Moton, but given in the white schools. While the school authorities tender their willingness to give any course in the Negro school now obtainable in the white school, all courses in the latter should be made more readily available to the students at Moton.

In supplying school buses the Negro students have not been accorded their share of the newer vehicles. This practice must cease. In the allocation of new conveyances, as replacements or additional equipment, there must be no preference in favor of the white students.

On the issue of actual inequality our decree will declare its existence in respect to buildings, facilities, curricula and buses. We will restrain immediately its continuance in respect to the curricula and conveyances. We will order the defendant to pursue with diligence and dispatch their present program, now afoot and progressing, to replace the Moton buildings and facilities with a new building and new equipment, or otherwise remove the inequality in them.

The frame structures at Moton were erected in 1948 and 1949 as temporary expedients, upon the advice and authority of the State Board of Education. Through the activities of the school board and the division superintendent, defendants here, $840,000.00 has been obtained, the land acquired, and plans completed, for a new high school and necessary facilities for the Negroes. Both local and State authorities are moving with speed to complete the new program. An injunction could accomplish no more.

A decree will be entered in accordance with this opinion.

(S.) ALBERT V. BRYAN,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.

Civil Action No. 1333

DOROTHY E. DAVIS, ET AL.,

vs.

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

Civil Action No. 1333

Final Decree

This cause came on to be heard upon the complaint, the answer of the original defendants, as well as the answer of the Commonwealth of Virginia, the intervening defendant, and upon the evidence, oral and documentary, adduced by all parties, and was argued by counsel.

Upon consideration whereof, the Court, for the reasons set forth in its written opinion filled herein, hereby

(1) (a) Denies the prayer of the complaint that the Court declare the provisions of section 140, Constitution of Virginia of 1902, as amended, and section 22-221, Code of

Virginia of 1950, as amended, as invalid and in conflict with the statutes or Constitution of the United States; and with the statutes or Constitution of the United States; and

(b) ADJUDGES AND DECLARES that the buildings, facilities, curricula and means of transportation furnished for the education of the Negro high school students in Prince Edward County, Virginia, are not substantially equal to those provided for the white high school students in said county; and hereby

(2) ADJUDGES, ORDERS and DECREES that the defendants, their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them be, and they are hereby, forthwith and perpetually enjoined and restrained from continuing to provide, or maintaining, curricula and means of transportation for the white high school students in said county without providing and maintaining substantially equal curricula and means of transportation to the Negro high school students of said county; and it is further

(3) ADJUDGED, ORDERED and DECREED that the said defendants proceed with all reasonable diligence and dispatch to remove the inequality existing as aforesaid in said buildings and facilities, by building, furnishing and providing a high school building and facilities for Negro students, in accordance with the program mentioned in said opinion and in the testimony on behalf of the defendants herein, or otherwise; and it is also

4. ORDERED that the plaintiffs recover their costs of their defendants.

Nothing further remaining to be done in this cause, it is stricken from the docket.

(S.) ARMISTEAD M. DOBIE,
United States Circuit Judge.
(S.) STERLING HUTCHESON,
United States District Judge.
(S.) ALBERT V. BRYAN,
United States District Judge.

APPENDIX "B"

CONSTITUTION OF THE COMMONWEALTH OF VIRGINIA

Article IX, section 140

White and colored children shall not be taught in the same school.

CODE OF VIRGINIA OF 1950

Title 22, Chapter 12, Article 1, section 22-221

White and colored persons shall not be taught in the same school, but shall be taught in separate schools, under the same general regulations as to management, usefulness and efficiency.