SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 191

DOROTHY E. DAVIS, ET AL.,
Appellants,

v.

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

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR APPELLEES

T. JUSTIN MOORE
ARCHIBALD G. ROBERTSON
JOHN W. RIELY
T. JUSTIN MOORE, JR.
1003 Electric Building
Richmond 12, Virginia
Counsel for the Prince Edward County School Authorities

HUNTON, WILLIAMS, ANDERSON, GAY & MOORE
Of Counsel

J. LINDSAY ALMOND, JR.
Attorney General
HENRY T. WICKHAM
Assistant Attorney General
Supreme Court Building
Richmond, Virginia
For the Commonwealth of Virginia

Dated October 9, 1952.

TABLE OF CONTENTS

Page

I. Preliminary Statement 1

II. Opinion Below 2

III. Jurisdiction 2

IV. Questions Presented 2

V. Constitution and Statute Concerned 3

VI. Statement of the Case 3

1. The Parties 3
2. The Locale and Its Schools 4
3. The Suit 5
4. The Trial 6
5. The Decision 7

VII. Summary of Argument 8

VIII. Argument 12

A. Segregation Does Not of Itself Offend the Constitution .. 12

1. Introduction 12
2. The Guiding Legal Principles 12
3. The Virginia Background 17
4. The Psychological Issue 21
5. The Effect of Amalgamation 29
6. Conclusion 32

B. The Constitution Does Not Require Precipitate Action .. 33

1. The Issue 33
2. The Facts 34
3. The Wisdom of the Court Below 36

IX. Conclusion 39

TABLE OF CASES

Page

Briggs v. Elliott, 98 F. Supp. 529 (E.D.S.C. 1951) 28, 37
Carr v. Corning, 182 F. 2d 14 (App. D. C. 1950) 12, 22
Corbin v. County School Board, 177 F. 2d 924 (4th Cir. 1949) 34
Cumming v. Board of Education, 175 U. S. 528 (1899) 37
Eccles v. Peoples Bank, 333 U. S. 426 (1948) 11, 36
Gebhart v. Belton, ... Del. ....., ... A. 2d ..... (Sup. Ct., August 28, 1952) 37
Goesaert v. Cleary, 335 U. S. 464 (1948) 9, 16
Gong Lum v. Rice, 275 U. S. 78 (1927) 8, 14
McKissick v. Carmichael, 187 F. 2d 949 (4th Cir. 1951), *cert. denied* 341 U. S. 951 (1951) 29
McLaurin v. Oklahoma State Regents, 339 U. S. 637 (1950) 9, 15
Missouri *ex rel.* Gaines v. Canada, 305 U. S. 337 (1938) 8, 15
Plessy v. Ferguson, 163 U. S. 537 (1896) 8, 9, 13, 15
Railway Express Agency, Inc. v. New York, 336 U. S. 106 (1949) 9, 16
Shelley v. Kraemer, 334 U. S. 1 (1948) 13
Sipuel v. Board of Regents, 332 U. S. 631 (1938) 8, 15
Sweatt v. Painter, 339 U. S. 629 (1950) 9, 15, 28
Tigner v. Texas, 310 U. S. 141 (1940) 9, 16

CONSTITUTIONS AND STATUTES

28 U. S. C. § 1253 2
28 U. S. C. § 2101(b) 2
28 U. S. C. § 2281 4
Constitution of Virginia (1902), § 140 3
Constitution of Virginia (1869), Art. VIII 18
Virginia Code (1950), § 22-221 3
Acts of Assembly of Virginia:
1952, p. 1258 20
1952, p. 1262 19
1950, ch. 14 19

I.

PRELIMINARY STATEMENT

This case presents to the Court for decision the forthright contention that segregation of the races in high school is unconstitutional even though the facilities for the education of both races are as equal as they can be made. Two companion cases[1] present substantially the same contention. In each, the Court is asked to overrule established authority and to outlaw the fixed policies of the several States which are based on local social conditions well known to the respective legislatures. The contention is based on a proposal to revise the established interpretation of the Fourteenth Amendment and on testimony given in disregard of the way of life in the localities concerned.

The Appellants, who were plaintiffs below, assert also that, even if their primary contention fails, a court of equity must require immediate amalgamation of the schools even though substantial equality of education now exists in all respects except as to a school building and even though a new school building, better than that of the whites, will be in use when the next school year begins. They urge a strange contradiction: the application in equity of a harsh and unyielding rule to be applied without discretion.

These cases, therefore, present questions of immediate importance to great numbers of persons in a field where science is not yet reliable and individual feeling is strong.

---

[1] No. 8, *Brown* v. *Board of Education of Topeka,* and No. 101, *Briggs* v. *Elliott.*

II.

OPINION BELOW

The opinion of the three-judge District Court below (R. 617-23) is reported in 103 F. Supp. 337.

III.

JURISDICTION

The final decree of the Court below was filed on March 7, 1952 (R. 623). The Petition for Appeal was filed on May 5, 1952 (R. 625).

The jurisdiction of this Court rests on 28 U. S. C. §1253 and 28 U. S. C. §2101(b).

IV.

QUESTIONS PRESENTED

The questions presented are two:

1. Where equality exists between high schools for white and Negro as to all physical and essential elements, including buildings, equipment, transportation, curricula, quality of instruction and the like, and where the Court below has found as a fact that the evidence does not show that separate education is harmful to either race, does the Fourteenth Amendment require this Court to strike down Virginia's laws which for 80 years have provided for segregated education?

2. Where equality now exists between high schools for white and Negro as to all elements except the building and where the Court below has found as a fact that local and State authorities are moving with speed to complete a new building for the Negro which, the evidence shows, will be completed before

the next school session begins, does a court of equity lack the discretion to refrain from requiring immediate interracial schooling?

We submit that both of these questions should be answered in the negative.

V.

CONSTITUTION AND STATUTE CONCERNED

The Appellants seek, in the circumstances of this case, to invalidate Section 140 of the Constitution of Virginia and Section 22-221 of the Code of Virginia of 1950, as follows:

> "§140. Mixed schools prohibited.—White and colored children shall not be taught in the same school."
>
> "§22-221. White and colored persons.—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."

VI.

STATEMENT OF THE CASE

1.

The Parties

The Appellants are Negro pupils of high school age (or their representatives) living in Prince Edward County, Virginia. The Appellees are the school authorities of the County and the Commonwealth of Virginia which intervened below in support of the validity of its Constitution and the statute under attack.

2.

The Locale and Its Schools

Prince Edward is a small county in south-central Virginia (R. 303). Its population is about 15,000. Almost one-third of these live in Farmville, the only incorporated community (R. 362). Roughly half of the population is white and half Negro (R. 305). The County is poor; it ranks among the lowest fifth of Virginia counties in average wealth per school child (R. 432; D. Ex.[2] 94).

There are 3 high schools in the County (R. 56, 361). Two are for white children and 1 for Negro. The white schools are Farmville, in the town on the northern boundary of the County, and Worsham located near the geographical center of the County (R. 361).[3] The Negro school is Moton now located in Farmville (R. 82). White children attend either Farmville High School or Worsham, according to their place of residence; all the Negro children attend Moton (R. 57). In 1951, 405 children were enrolled at the 2 white schools and 463 were enrolled at Moton (D. Ex. 102).

These enrollment figures have shown a complete change in relationship in a very short period of time. In 1941, only 10 years before, there were more than twice as many white high school students as there were Negro. The figures were 540 white and 208 Negro. It was only in 1947 that the Negro students equalled the white in number (D. Ex. 102).

Faced with this upsurge in Negro enrollment, the local authorities did everything possible to keep up with the tide. A survey of school needs by State authorities was

---

[2]Exhibits introduced by the Appellees are referred to as D. Ex. .....

[3]Worsham is a small school combining elementary and high school grades admittedly inferior to Farmville (R. 59; D. Ex. 97).

instituted by the local board in 1947 just after the war (R. 293). Since immediate permanent building was impossible, two temporary buildings were erected at the Negro school (R. 295). Later another was added (R. 296). These doubled the available floor space (R. 146). In 1949, an overall school building plan was adopted with a new Negro high school given first priority (R. 297-8).

Construction of a proper Negro high school out of current funds was beyond the financial ability of the County. Two alternatives were possible. The first was a loan from the State Literary Fund. But in 1949 and 1950 that was impossible for all the money in that fund had already been allocated to loans (R. 298-9). The School Board then planned to follow the other alternative, a bond issue requiring approval by the voters. This program was pushed along as rapidly as possible (R. 303-4). In the meantime, a site for the new school was selected and proceedings for its acquisition initiated (R. 301).

The Negro pupils, however, blocked this attempt at financing by a 2-week strike (R. 304-5) which their principal testified that he was unable to control (R. 134, 147). The local authorities persisted, however, in their efforts at financing and by June, 1951, had obtained all the funds required for the construction of the new Negro high school (R. 309-10; D. Ex. 4).

3.

The Suit

The Appellants, however, disregarding the substantial efforts of the School Board in their behalf, filed their lengthy complaint in this suit in May, 1951. In essence, the complaint asserted that facilities for the Negro pupils were not equal to those for the white and that, even if

they were, segregated education was *per se* unconstitutional (R. 1-30).

The Appellees promptly filed their answer and admitted that the school facilities were inferior, but pointed to their building program which "is under way" and will result in equal facilities "as rapidly as can be done" (R. 33). Since the case was of State-wide or, as the Court below noted (R. 44), even broader importance, the Commonwealth intervened as a defendant and is now here as an Appellee.

4.

The Trial

The trial was before a specially constituted District Court of 3 judges as required by 28 U. S. C. §2281. Evidence and argument were heard for the 5 days, February 25-29, 1952.

The Appellants produced two types of evidence. First, they presented testimony as to physical inequalities among the 3 high schools. This was done through photographs, statistics and a survey by an educator. They rested their main case on the evidence of an educator and 3 psychologists, none of whom had ever been in Prince Edward County, but all of whom testified that educational segregation is, in the abstract, bad.

The evidence for the Appellees related directly to the setting in which this case is presented. It first disclosed the history and background of education in Prince Edward County. This was followed by a survey of present conditions and an explanation of future plans. Next, since this case is primarily an attack upon segregated education throughout the Commonwealth, a similar review was given to the Court as to Virginia as a whole. Finally, the

Court was offered the views of educators, psychologists and a psychiatrist that, in the circumstances existing in Virginia and in Prince Edward County, education of the races in separate high schools is better for the Negro and the white.

5.

The Decision

On the first question here presented, the Court below was very clear in its decision. Two bases were found.

First, the Court held that, as a matter of law, separate education is not unconstitutional. Its words were:

> ". . . Federal courts have rejected the proposition, in respect to elementary and junior high schools, that the required separation of the races is in law offensive. . . . We accept these decisions as apt and able precedent." (R. 619)

Secondly, and perhaps more important, the Court found, as a matter of fact, that separate education did not constitute discrimination. Its words were:

> ". . . the facts proved in our case . . . potently demonstrate why nullification of the cited sections is not warranted. . . ." (R. 619)
>
> ". . . 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 nor harm to either race." (R. 621-2)

We ask this Court's particular attention to that finding. Unlike the two companion cases, where little expert evidence was available to the defendants, here the factual

case for segregation was fully presented by experts and the Court below found as a fact that segregation caused no harm.

On the second issue, the Court found that disparity extended beyond buildings and equipment. It found inequality to exist also as to curricula and transportation. It restrained continued inequality in these fields at once. It ordered the Appellees to proceed with diligence to complete the new Negro high school which will be ready by September, 1953. It refused further relief:

> "Both local and State authorities are moving with speed to complete the new program. An injunction could accomplish no more." (R. 623)

A final decree was entered accordingly and from that decree this appeal was taken.

VII.

SUMMARY OF ARGUMENT

A.

Segregation Does Not of Itself Offend the Constitution

Segregation in education existed at the time when the Fourteenth Amendment was adopted and had the approval of the Congress that submitted the Amendment and a majority of the States in the Union at the time of its ratification. Thereafter it was approved by this Court in *Plessy* v. *Ferguson,* 163 U. S. 537 (1896), and *Gong Lum* v. *Rice,* 275 U. S. 78 (1927). Later decisions of this Court are not in point, since they concern either situations where the State provided no instruction for the Negro but did so for the white (*Missouri* ex rel. *Gaines* v. *Canada,* 305 U. S. 337, 1938; *Sipuel* v. *Board of Regents,* 332 U. S. 631, 1948), or

situations where the Court found factual inequality to exist in circumstances which do not exist here (*McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637, 1950; *Sweatt* v. *Painter,* 339 U. S. 629, 1950).

The equal protection of the laws requires only that the State be reasonable in establishing the classifications in which its policy is to function. If *Plessy* v. *Ferguson* is to be re-examined, principles established by this Court for the equal protection determination must be followed. These include a consideration of the significance of the historical background (*Goesaert* v. *Cleary,* 335 U. S. 464, 1948) and of the practical setting in which the case arises (*Tigner* v. *Texas,* 310 U. S. 141, 1940; *Railway Express Agency, Inc.* v. *New York,* 336 U. S. 106, 1949).

For this purpose, Virginia history and present Virginia conditions are important. The basic historical facts are so familiar as not to require repetition. In education, Virginia lagged until 1920 but has since made great strides, high school enrollment having increased 5 times. Fifteen years ago, education for the white was better than for the Negro. For example, salary scales and average teacher training then were lower for the Negro; now salaries are equal and average Negro teacher training is higher. Increasing sums are being spent on schools, a larger proportionate amount going for the Negro.

School facilities for the Negro equal the white in half of Virginia's school districts and are better in one quarter. Future construction plans are large with more to be spent for the Negro than his proportionate share.

These facts indicate that the Virginia people overwhelmingly believe that segregated education is proper, are willing to provide equality and are completely prepared to bear the burdens of a dual school system.

The evidence of the Appellants disregards this Virginia

background. It is presented by experts unfamiliar with Virginia conditions or even, in general, with conditions existing in any segregated State. It is not based on sound scientific knowledge; their purported scientific "tests" are obviously unreliable. Constitutional determinations cannot be based on speculations which, they admit, are "on the frontiers of scientific knowledge."

On the other hand, the Appellees presented testimony of witnesses at least equally expert and, in addition, of broad experience not only in Virginia but throughout the nation. Their conclusions are that, with conditions in Virginia as they are today, school amalgamation would do harm to the children of both races. They are firm in their views that the Negro high school child is better off in his own school than he would be in a mixed school. They point out that the high school level, with children not yet mature and the influence of parents strong, involves entirely different considerations from those at the graduate or professional level.

High school amalgamation would bring on further difficulties. All administrative opinion was that Virginia schools would deteriorate due to reduced financial support. Furthermore, the opportunities of Negro teachers for employment would be drastically reduced.

In the light of all these facts, the Court below found that segregation in Virginia high schools was not "without substance in fact or reason." Its finding of fact was that segregation caused "no hurt or harm to either race." Its conclusions were amply justified by the evidence of record and should be affirmed.

B.

The Constitution Does Not Require Precipitate Action

This is a narrow issue. The Court below ordered the Appellees to equalize curricula and transportation; that has

been substantially accomplished and, if the Appellants have any complaint, it should be addressed to the Court below which is fully equipped to enforce its decree.

The Court below also ordered the Appellees to proceed as quickly as possible with their plans to equalize buildings and facilities. The Appellants urge that, since the building will not be ready until after the end of the present school session, this Court should as a matter of law order amalgamation now in the middle of a school session, although segregation would then be required next year. As a subsidiary argument, they urge that the Court below would have such difficulty enforcing any equalizing decree that segregation should be outlawed.

A new Negro high school building is in the course of construction in the County. It will provide better facilities than any provided for the white. It will be ready for occupancy by September, 1953.

The contention of Appellants violates fundamental equitable principles (*Eccles* v. *Peoples Bank,* 333 U. S. 426, 1948). If adopted, it would mean chaos in the County schools, just for the remainder of this school session. It would hurt the children of both races and help no one. The Constitution does not require such fruitless action.

The decree of the Court below is now being given substantial compliance. There is nothing to indicate impossibility of enforcement. It is only when that is indicated that the Appellants may seek to destroy segregation on this novel ground.

The determination of constitutional limitations is a practical matter. The Court below acted wisely. The Appellants have no cause for complaint.

VIII.

ARGUMENT

A.

Segregation Does Not of Itself Offend the Constitution

1.

Introduction

The issue so sharply presented to the Court in this case has come before it so often in recent years that the Court is quite familiar with the authoritative decisions. The Appellants have pitched their case to a minor degree on the due process of law provision of the Fourteenth Amendment; but that is not a serious contention: they seek primary support in the clause requiring equal protection of the laws. We shall look first to the specific authorities and then briefly at guiding principles which this Court has held, without variance, to control the equal protection determination. With those principles in mind, we shall review the factual setting in Virginia and expert opinion based on those facts to show that segregation at the high school level provides equal protection. For it is only when the whole picture is viewed that the Court may reach a conclusion as to the constitutional reasonableness of the State action.

2.

The Guiding Legal Principles

The Congress that submitted the Fourteenth Amendment to the States enacted laws dealing with segregated schools in the District of Columbia (where, under the scrutiny of Congress, segregated education still exists).[4] A majority of the States in the Union when the Amendment was ratified

[4] See *Carr* v. *Corning*, 182 F. 2d 14, 17-18 (App. D. C. 1950).

had segregated schools. It is inconceivable that, at that time, a serious contention could have been made that the Amendment outlawed segregated schools.

These precedents are important. As the Chief Justice said in *Shelley* v. *Kraemer,* 334 U. S. 1 (1948):

> "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten." (p. 23)

But they have been presented so often to this Court and are so ably presented now[5] that no detail is required here. Nor need we dwell long on the cases decided by this Court relating directly to the issue.

It is idle to say that *Plessy* v. *Ferguson,* 163 U. S. 537 (1896), does not support the position of the Appellees here. The Court's opinion there gives direct support here:

> "The most common instance of [laws requiring segregation] is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced." (p. 544)

Indeed, the Court then faced and decided the fundamental issues that this case presents. The exact contentions made by the Appellants here, such as the "badge of inferiority" argument, were presented to this Court in that case. But this Court dismissed those contentions in language as apt now as it was 50 years ago:

> "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with

[5]Brief for Appellees, *Briggs* v. *Elliott,* No. 101, pp. 15-16.

> the badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals." (p. 551)

It is equally idle to say that *Gong Lum* v. *Rice,* 275 U. S. 78 (1927), provides no support for the Appellees. The Court there said:

> "The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, ... we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution." (pp. 85-6)

Nor are the cases relied on by the Appellants in point.[6]

[6]The cases cited by the Appellants on pp. 9-11 of their Brief are irrelevant to the determination to be made here. They concern situations where the parties seeking relief were wholly denied the right in question without being afforded "separate but equal" treatment. Where coördinate facilities or opportunities are provided, different considerations must be taken into account to reach the proper result.

Where the State has provided no facilities for the Negro in a certain field of instruction, he is entitled to admission to the institution in his State offering that instruction to the white. That is all that was decided in *Missouri* ex rel. *Gaines* v. *Canada,* 305 U. S. 337 (1938), and *Sipuel* v. *Board of Regents,* 332 U. S. 631 (1948). *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637 (1950), was a case of manifest harshness, and the facts there presented provide adequate distinction here. Only in *Sweatt* v. *Painter,* 339 U. S. 629 (1950), was the issue presented here to any degree raised, and that case is no authority here for two reasons: first, as we shall show below, the considerations relative to education at the graduate level are entirely different from those bearing on the high school, and secondly, the Court there found inequality because of circumstances which have no substantial bearing here and, having found inequality, did not

> ". . . reach petitioner's contention that *Plessy* v. *Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation." (p. 636)

The contention that the petitioner made there, the Appellants make here. To uphold their assertion that segregation at the high school level is unconstitutional purely on psychological grounds would be to hold that equality can never be attained. The doctrine of "separate but equal" would lose all force. *Plessy* v. *Ferguson* would not only be re-examined; it would be effectively overruled.

We assert that the doctrine of *Plessy* v. *Ferguson* has today the vitality here that it had 50 years ago. We believe its doctrine sound. We believe that it will withstand re-examination. But if it is to be re-examined, that should be done

in the light of the guiding principles which this Court has established to determine what is the equal protection of the laws.

The equal protection of the laws does not mean that all men at all times must receive the same treatment. The State is entitled to protect its people against the lunatic and the leper. One basic standard is established: if, in making its classifications, the State acts reasonably, its action meets the constitutional test.

The difficulties of application come with the determination of reasonableness. But 2 rules are clear. As Mr. Justice Frankfurter has said:

> "The Fourteenth Amendment did not tear history up by the roots. . . ." (*Goesaert* v. *Cleary,* 335 U. S. 464, 465, 1948)

Thus the historical background is significant; it cannot be disregarded.

Similarly, classifications to be measured against the equal protection standard are not measured in a vacuum:

> "The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." (*Tigner* v. *Texas,* 310 U. S. 141, 147, 1940)

Or again:

> "It is by such practical considerations based on experience rather than by theoretical inconsistencies that

> the question of equal protection is to be answered." (*Railway Express Agency, Inc.* v. *New York,* 336 U. S. 106, 110, 1949)

Thus the action of the State must be viewed in the light of the historical background and of the present practical problem before the question of reasonableness can be determined. When the history and the practicalities in regard to educational segregation in Virginia are examined, the reasonableness of the Virginia action is clear. The record abounds in evidence on these points and we shall now briefly review it.

3.

The Virginia Background

Any problem involving the races in Virginia can be understood only in the light of the history of the last century. Violence breeds resentment in both races. The passage of time has removed violence and substantially removed resentment in Virginia. But it would be idle to say that Virginians of both races—despite scientific tests (R. 181)—do not recognize that differences between them exist. Virginia has established segregation in certain fields as a part of her public policy to prevent violence and reduce resentment. The result, in the view of an overwhelming Virginia majority, has been to improve the relationship between the different races and between individuals of the different races.

One field in which segregation is basic Virginia policy is that of education. Public education at the secondary level does not have a long history. By the end of the War between the States, free schools existed but they were called the "pauper" schools, the number in attendance was few and the facilities were miserable (R. 453). General public educa-

tion was initiated about 1870.[7] Its development lagged. In 1920 there were only 31,000 students in the Virginia public high schools (R. 454).

The last 30 years have been a period of phenomenal growth. There are now 155,000 students in Virginia's public high schools (R. 454). This growth has placed a severe strain upon the State's economy. Conditions today are far from ideal, but the testimony is that Virginia has met the challenge.

It is true that in the early years the Negro and the white did not receive equal treatment. But no complaint was made to this Court then. When complaint is made now, substantial inequality no longer exists; in many cases the Negro has better educational facilities than the white. The record is full of statistics which make that clear. A review of a few of them may be helpful.

Fifteen years ago, the white school term was longer than the Negro; today they are the same (R. 466). Then the average Negro high school teacher received a salary only 70% as large as that of the white (D. Ex. 110, p. 2). Salary scales are now equal (R. 409, 428) and are based in part on training and experience. The average pay for a white high school teacher slightly exceeds that for the Negro. But on the elementary level that differential is reversed and the Negro receives more on the average than the white (D. Ex. 110, p. 2; *cf.* D. Ex. 108, Table VI). In 1940, 53% of the white teachers had 4 years of college training while only 36% of the Negro teachers had that training; in 1950, 77% of the Negro teachers had 4 years of college training while only 62% of the white teachers met that standard (R. 442). The Negro teachers on the whole have better training than the white (R. 450).

---

[7] See Constitution of Virginia of 1869, Art. VIII.

Virginia's population is 77.8% white and 22.2% Negro; its school population is 74.3% white and 25.7% Negro (R. 440). The total amount spent in Virginia for instruction in 1950 was divided 76.4% for white and 23.6% for Negro (D. Ex. 108, Table II (a)). The amount spent for instruction has in the last 7 years increased 161% for the Negro as compared with 123% for the white (R. 426). Total annual expenditures for public education in Virginia had grown from 59 millions of dollars in 1946 to 120 millions 5 years later (D. Ex. 108, Table IX).

After all these expenditures, the result is that today general instruction for the Negro is as good as or better than that for the white. As far as facilities go, no two buildings are identical. A survey was made, however, and it was determined that in 63 of Virginia's 127 cities and counties facilities for Negro high school education are equal to those for the white and in 30 of these counties and cities they are or soon will be better than those for the white (R. 341-3, 349, 621; D. Ex. 10). This the court below found (R. 621).[8]

This tremendous program has hardly more than got under way. A major source of construction money for Virginia's schools is, as we stated above, the State Literary Fund. Loans from this fund made or approved are 48 millions of dollars for white projects and 16.5 millions for Negro (D. Ex. 108, Table XX). In addition, in 1950, the General Assembly of Virginia appropriated 45 millions of dollars (known as the Battle Fund) as State grants for a school construction program (R. 430; Acts, 1950, ch. 14).[9] This

[8]There were in Virginia at the time of the hearing below 100 counties and 27 cities. The cities are not included within the counties in Virginia, but are separate and coordinate parts of the State government.

[9]An additional 15 million was appropriated in 1952 (Acts, 1952, p. 1262).

law required localities to prepare overall 4-year plans for school construction to be submitted to the State Department of Education. These reports indicate plans to spend 189 millions of dollars on white projects and 74.5 millions on Negro projects (D. Ex. 108, Table XVI). Specific projects included in these programs were divided 168 for the white and 73 for the Negro (R. 431). These statistics assume significance when related to each other:

	White	*Negro*
Population	77.8%	22.2%
School Population	74.3	25.7
Literary Fund Loans	74.4	25.6
Battle Fund Plans (Dollars)	71.7	28.3
Battle Fund Plans (Projects)	69.7	30.3

The conclusions which must be drawn from those facts are these:

1. Virginia has for the past decade been engaged in a program designed to improve its school system both as to physical plant and as to quality of instruction. In connection with this program a very substantial and successful effort has been made to eliminate inequalities between the races. As a result, the general level of instruction in the Negro schools exceeds that in the white.

2. Virginia has undertaken and is actively engaged in carrying out a well-developed plan for the further improvement presently and in the immediate future of its school system. This program involves the expenditure of funds which, while not comparable to expenditures by the Federal government, are enormous by Virginia standards.[10] In

[10] Appropriations from the general fund for the operation of Virginia's State government approximate 100 million dollars a year (Acts, 1952, p. 1258).

carrying out this program Virginia is giving to the Negro more than his proportionate share.

3. The people of Virginia overwhelmingly believe that segregated education is best for all the people. This must be so. It is crystal clear that segregation is more expensive than amalgamation. Yet Virginia citizens are willing to pay the cost. They are firmly determined to root out factual discrimination; they are equally determined to follow the segregated course.

This was the finding of the Court below, amply supported by the evidence:

> "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." (R. 620)

When the great majority of the people feel so certain that segregated schooling is desirable in the circumstances under which they live, in what way is it irrational or arbitrary?

4.

THE PSYCHOLOGICAL ISSUE

The Appellants ignore the Virginia background; they say that it is immaterial (Brief, p. 25). They thus disregard this Court's admonitions that matters to be decided under the Fourteenth Amendment must be decided in the light of history and in the practical setting in which the conflict arises.

The testimony they presented in the Court below like the

tract they now offer to this Court as an Appendix to their brief[11] discussed segregated education in the air. No definite facts and no particular location affect the vista of the perfect life to come.

They avoid the Virginia situation. That can be quickly demonstrated.

The Appellants presented as their principal expert witnesses Drs. Brooks, Smith, Chein and Kenneth Clark. Dr. Brooks is the administrator of an experimental school in New York City (R. 170). He has had some experience in Georgia but none in Virginia (R. 154, 169-70). Dr. Brooks admitted that different localities and social conditions might result in different answers (R. 159), but he never thereafter throughout his testimony distinguished between localities. He concluded that segregated education was harmful and contrary to principles established by Virginia's Department of Education (R. 157-61), although those principles were established with segregated education in view (R. 439-40).

Dr. Smith, a professor of psychology at Vassar College (R. 179), has never lived in the South and his conclusions were based on "some personal experience" and "general reading" (R. 194). Without any knowledge of or regard to Virginia conditions, he condemned segregation because it cut down "on the variety of experiences" (R. 185). He thought the "official insult" of segregation by law worse than the "informal insult" of segregation in fact (R. 199).[12]

---

[11] This is fundamentally a patent attempt at the rehabilitation of their witnesses repudiated by the Court below. It is expert testimony given unsworn and without opportunity for cross-examination. The Appendix is improper and should not be considered by this Court. *Cf. Carr* v. *Corning*, 182 F. 2d 14, 21 (App. D. C. 1950), for a proper holding where the situation was less blatant than here.

[12] This conclusion was described by a witness for the Appellees as the statement of an "idealistic person" "strongly prejudiced on the side of abstract goodness" not tempered with "common sense." (R. 552-3)

Dr. Chein was another psychologist. He has never had any experience in the South (R. 214, 218-9, 261-2). He sent out a questionnaire, called a "comprehensive study", to 849 Social Scientists (R. 204) of whom there are at least 6,000 in the United States (R. 224), and received 517 replies (R. 204). Of these only 32 came from the 13 Southern States and apparently none from Virginia (R. 232). The main question presented could be answered in only one way (R. 226); it was a "shotgun" or "blunderbuss" question (R. 554). He submitted his questionnaire to a group obviously too small to give reliable results (R. 554-5). He testified that he was "not . . . an authority on Virginia" (R. 217). His conclusion was that segregated education breeds "feelings of inferiority and of insecurity" and "a sense of guilt" (R. 208-9).

Dr. Clark, a third psychologist, is a native of the Panama Canal Zone. His background included 6 months at Hampton Institute in Virginia and a number of years as a student and teacher at Howard University in Washington, D. C. (R. 245-6). His experiences at Howard so warped his judgment that, because of segregation alone, his entire career was changed (R. 267-8).

Dr. Clark's testimony deserves somewhat less abbreviated treatment than his co-witnesses for he based his conclusions on "tests". The first was the doll test; Negro children (not in Virginia) were asked to choose between dolls of different colors (R. 248-53). From the reactions he obtained, he concluded that segregated education was psychologically evil (R. 253). The record in this case shows that another expert thinks that the test is "a very variable one" in which the administering psychologist can obtain "a slightly controlled answer" (R. 519). But we need not linger on the dolls; the identical testimony has been proved unreliable on expert authority in a companion case.[13]

---

[13] Brief for Appellees, *Briggs* v. *Elliott*, No. 101, pp. 20-23.

Dr. Clark conducted one "test" on the Virginia scene. He questioned 14 of the plaintiffs who were brought from Prince Edward County to Richmond especially for the interview (R. 273). He gave to the Court an example of the interview with ludicrous results (R. 280-2). The answers given by the children were critical of their school (R. 255-60). These reactions were similar to those among children in New England (R. 278). He concluded that the plaintiffs have "an excessive preoccupation with matters of race" (R. 260).

This is certainly far from remarkable. The plaintiffs had engaged in a two-week strike 10 months before and the pendency of this suit was a matter of intense interest in the County. If answers such as Dr. Clark received had not been given, "you should be very much surprised" (R. 555). Neither of Dr. Clark's "tests" forms a reliable basis for the firm scientific opinion on which constitutional issues must be decided.

These witnesses, basing their opinions on a lack of knowledge of Virginia and in a field which, they have now so well stated, "is admittedly on the frontiers of scientific knowledge" (App. to Brief for Appellants, p. 18), are the Appellants' case.[14] But they were by no means the only experts who testified before the Court below. The Appellees presented 4 educators, a psychiatrist and 2 psychologists. Here are their conclusions:

Dr. Howard, Virginia's Superintendent of Public Instruction, with 30 years of experience as a teacher and administrator in Virginia schools (R. 438): "It has been my experience, in working with the people of Virginia, including both white and Negro, that the customs and the

[14]The testimony of Dr. English (who found jokes depressing), Dr. Mamie Clark and Dr. Lee given in rebuttal is fragmentary, insubstantial and need not be discussed.

habits and the traditions of Virginia citizens are such that they believe for the best interests of both the white and the Negro that the separate school is best. . . ." (R. 444)

Dr. Lancaster, former State Superintendent of Public Instruction, now President of Longwood College, Farmville, Virginia (R. 463): "I have no evidence that segregation in the schools per se has created warped personalities, and so forth. . . ." "But there is certainly nothing to indicate that [Negro students] are thwarted in their development or affected adversely." (R. 472) If segregation be stricken down, "the general welfare will be definitely harmed." (R. 472) ". . . there would be more friction developed." (R. 468) ". . . the progress of Negro education . . . would be set back at least half a century. . . ." (R. 469)

Dr. Darden, former Member of Congress and Governor of Virginia, now President of the University of Virginia (R. 452): ". . . I think the races separated, if given a fairly good opportunity, are better off." (R. 458) ". . . given good schools and good teachers, the children in separate schools in Virginia would be better off than in mixed schools." (R. 459)

Dr. Stiles, Dean of the Department of Education of the University of Virginia, not a native Virginian and with wide experience in States where schools are not separate (R. 486-9): In mixed schools, the Negroes "keep to themselves", "may become very aggressive . . . or . . . very submissive." (R. 489-90) The Negroes are not accepted by the white students (R. 490) or by teachers. "The teacher's acceptance of a child . . . is a vital factor in her ability to teach him, or the child's being accepted in a group . . . is a vital factor in how well he learns." (R. 500-1) If the Negro children were placed in the same schools as the white, ". . . I think they would be worse off at the present time." (R. 504) "The Negro child gets an opportunity to participate in segregated

schools that I have never seen accorded to him in non-segregated schools. He is important, he holds offices, he is accepted by his fellows, he is on the athletic teams, he has a full place there." (R. 512)

Dr. Kelly, child psychiatrist, a native of Michigan with national experience and 6 years in Virginia (R. 515-6): "I think that the abrupt termination of segregation [by law] would make for some very vicious and very subtle forms of segregation. . . ." (R. 523) "When the two groups are merged, the anxieties of one segment of the group are quite automatically increased and the pattern of the behavior of the group is that the level of group behavior drops. . . ." (R. 524) ". . . given equal opportunities of physical equipment and teacher background, I could visualize no great harm coming to either group." (R. 525)

Mr. Buck, clinical psychologist educated in Philadelphia's mixed public schools and with a broad Virginia experience (R. 530-4): "I don't think that any thoroughly objective and sufficiently large study [of the effect of segregated schools] has ever been done." (R. 539) "I do not" think it would be possible for the Negro child to obtain general acceptance by white teachers and students (R. 537-8). "I do not know of any instance in history where a social ill was corrected by coercion or by a dramatic or sudden change, where the results were beneficial to either group or both groups." (R. 536)

Dr. Garrett, Chairman of the Department of Psychology of Columbia University, a leading national authority under whom Dr. Chein and Dr. Clark studied, a native Virginian and a graduate of a Virginia College (R. 545-8): "So long as the facilities which are allowed are equal, the mere fact of separation does not seem to me to be, in itself discriminatory." (R. 550) "It seems to me that in the State of Virginia today, taking into account the temper of its people,

its mores, and its customs and background, that the Negro student at the high school level will get a better education in a separate school than he will in mixed schools." (R. 555)

It will not do to say, as the Appellants do (Brief, p. 23), that the witnesses for the Appellees admitted that segregation is harmful. They did not do so in the overall Virginia surroundings. Dr. Garrett made his position completely clear on this point:

> "What I said was that in the state of Virginia, in the year 1952, given equal facilities, that I thought, at the high school level, the Negro child and the white child—who seem to be forgotten most of the time—could get better education at the high school level in separate schools, given those two qualifications: equal facilities and the state of mind in Virginia at the present time.
>
> * * *
>
> "If a Negro child goes to a school as well-equipped as that of his white neighbor, if he had teachers of his own race and friends of his own race, it seems to me he is much less likely to develop tensions, animosities, and hostilities, than if you put him into a mixed school where, in Virginia, inevitably he will be a minority group. Now, not even an Act of Congress could change the fact that a Negro doesn't look like a white person; they are marked off, immediately, and I think, as I have said before, that at the adolescent level, children, being what they are, are stratifying themselves with respect to social and economic status, reflect the opinions of their parents, and the Negro would be much more likely to develop tensions, animosities, and hostilities in a mixed high school than in a separate school." (R. 568-9)

Like the witnesses for the Appellants, these experts presented by the Appellees are eminent men. They do not stand alone; they are quite representative of a great number of experts not available for presentation to the Court below.

This Court is now presented with the conclusions of other outstanding scholars who give unquestioning support to their views.[15]

The Court below was plainly justified in its finding that the Appellants' evidence did not overbalance that for the Appellees on this phase of the case (R. 619). That is almost all that need be said. But one further facet of the expert testimony should be mentioned. Here, as in *Briggs* v. *Elliott,* it is urged that the factors which this Court found determinative in *Sweatt* v. *Painter,* 339 U. S. 629 (1950), are equally determinative here (Brief, p. 22).

Judge Parker disposed of this contention in a most admirable manner in his opinion in *Briggs* v. *Elliott* (98 F. Supp. 529, 535, E. D. S. C. 1951; Record on appeal, pp. 185-6). In this case, his views are supported by expert testimony:

Dr. Stiles: "I think as people are more alike in their adult status and in their cultural attainments there is a greater chance of . . . mutual acceptance." ". . . the problem in the high school level is accentuated by the attitudes of parents." "I think [the high school] would be the most difficult level at which to bring about the abolition of segregation." (R. 493)

Dr. Lancaster: "I think it has been pretty clearly brought out that we have a state of maturity that is obtained, certainly on the graduate and professional levels, where there is far more tolerance than there is among children. . . ." (R. 468)

Dr. Garrett: ". . . I think that graduate students . . . are mature enough to meet their own responsibilities and to decide for themselves who their friends will be . . . so that it is no longer on a strictly racial basis." (R. 565)

These expert opinions support from a psychological point of view the obvious fact that different sets of values obtain

[15] Brief for Appellees, *Briggs* v. *Elliott,* No. 101, pp. 27-35.

at the high school level from those in graduate schools or even in colleges. People do not mature with a high school diploma; maturity comes gradually. But nowhere is the level of maturity more important than in the field of race relations.

The testimony of the expert witnesses presented by the Appellees that, in the Virginia situation, segregated education at the high school level is best for the individual students of both races is not a suggestion that Virginia may properly deny constitutional rights by an *ex parte* determination of what is best for the individual students. See *McKissick* v. *Carmichael,* 187 F. 2d 949, 953-4 (4th Cir. 1951), *cert. denied* 341 U. S. 951 (1951). The police power is designed for exercise in the general welfare. The State may not, where facilities are unequal, declare that segregation is still required, for such a requirement offends the Constitution. But where facilities are equal the State is not exercising any arbitrary paternalism in requiring segregation for there is no discrimination and where there is no discrimination State action must be upheld.

We conclude therefore that psychology, a "new science" (R. 547), cannot provide any satisfactory basis for a determination that segregated schooling in the Virginia background is unreasonable The consensus of social scientists, despite the statement of Appellants (Brief, p. 22) and their remarkable polemic (App. to Brief), is not as they say it is. At most, there is a conflict. The social traditions of half the nation should not be overthrown on such surmise and speculation.

5.

The Effect of Amalgamation

We do not seek here to threaten or to coerce. We seek simply to show that the end of segregation by law will not be the millennium. We say this with expert backing.

Let it be noted at the beginning that there is no precedent that, if high schools in Virginia are amalgamated, interracial difficulties will not arise. The graduate school cases are not in point. As Dr. Garrett said:

> "Whenever there are just a few members of a different racial group, they are . . . not regarded as a distinct minority group—there are too few of them." (R. 565)

So far in Southern graduate institutions, the Negro is a rarity; it is only when the number becomes a substantial proportion, as it would be in high school, that the problem will become acute.

The main difficulty with amalgamation is that it will result in all children receiving a worse education. The views of the witnesses for the Appellees, the only ones at all familiar with the Virginia problem, were unanimous on this point. Virginians, as Dr. Howard said, would no longer permit sizeable appropriations for schools on either the State or local level; private segregated schools would be greatly increased in number and "the masses of our people, both white and Negro, would suffer terribly." (R. 444) Mr. Buck said that, in that event, he thought many white parents would withdraw their children from the public schools and, as a result, the program of providing better schools would be abandoned (R. 536-7). Dr. Darden was equally specific:

> "You are dealing with people who are now aware of the necessity of carrying the double burden to a greater extent than they have ever been aware in Virginia. In my belief, they are not of the opinion that they are going to support mixed schools, and I don't think they are going to appropriate the money for them." (R. 459)

So with the demise of segregation, education in Virginia would receive a serious setback. Those who would suffer most would be the Negroes who, by and large, would be economically less able to afford the private school.

Strangely enough, the Negro would suffer in another way. There are approximately 75,000 Negro teachers in the United States but only about 5,000 of them are employed in unsegregated States, a percentage, of course, much less than the percentage of Negroes living in those States (R. 494). Virginia employs 22,241 teachers of whom 5,243 are Negro, roughly the same percentage as in the school population (R. 450, 440). If segregation be outlawed, a great many Negro teachers will lose their jobs (R. 450, 456-7, 470-1, 493-6, 537). Dr. Stiles stated the reasons very clearly: school superintendents in the non-segregated states employ Negro teachers to teach Negro children but they will not employ Negro teachers to teach white children (R. 494-5). He stated that, if segregation were to be abolished in Virginia, he could not recommend Negro teachers for mixed schools:

> ". . . it would be foolish to ignore the practical reality of how people feel and make a recommendation that you know would not work." (R. 496)

If constitutional determinations were made on a theoretical basis, these considerations might be irrelevant. But they must be made, as this Court has said, on the practical basis of existing conditions. These factors serve to highlight the reasonableness of the Virginia decision under present circumstances to favor segregated high school education.

6.

Conclusion

The Court below recognized the practical considerations that it faced in this case and decided the case in their light. It said:

> "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. . . . 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.' " (R. 621-2)

It is difficult to add to these findings. The decisions of this Court support segregation in schools. The sole legal question is whether such segregation constitutes a reasonable classification. In the Virginia background, expert opinion is that segregation at the high school level is better for the children of both races. If the schools were amalgamated, the result would be that the children would not be helped but hindered in their attempt to gain an education for living. Segregation at the high school level is thus clearly reasonable.

We submit, therefore, that segregation of children between the races in Virginia high schools does not of itself offend the Constitution.

B.

The Constitution Does Not Require Precipitate Action

1.

The Issue

We assume for this portion of our argument that this Court holds, as it rightly should, that segregation of the races in high school does not without more violate constitutional limitations. We pass then to the question whether, since facilities which are to be equalized in the immediate future are, however, presently unequal, the Court below as a court of equity could not in its discretion refuse to order immediate school amalgamation.

This issue is a narrow one. The Appellees admitted below that the buildings and related facilities for the Negro were not as good as those for the white, though they pointed to their building plans to equalize (R. 32-3). In addition, the Court below found inequality as to curricula and transportation (R. 622-3) and ordered immediate equalization in these two fields.

The Appellees assert here as a fact, although not of course with the support of the printed record, that equality now exists for all practical purposes as to curricula and transportation. But even if that were not true, this is not the forum in which that question should be argued. The Court below retains plenary power to deal with it; if the Appellees still offend, and they do not, the Appellants may obtain quick and effective redress from the Court below and that is the place for them to seek it.

The only question left before this Court is present inequality as to buildings and facilities. This inequality, unlike that as to curricula and transportation, cannot be corrected overnight. It is important that the Court understand the facts in this regard before a decision is reached.

2.

The Facts

The Appellees admitted that the building and facilities at the Moton High School for the Negro children are not as good as those at the Farmville High School for the white. They are, however, better at least in some respects than those enjoyed by the white children at the third high school, Worsham. The expert witness for the Appellants admitted this (R. 59).

This simply points up the problem for the local school authorities. It is manifestly undesirable to build 2 buildings every time that one is built. Even if 2 were built, the teachers could not be identical. Identity is therefore impossible; all that is possible and what meets constitutional obligations is "substantial equality", for absolute equality is "impractical" (*Corbin* v. *County School Board,* 177 F. 2d 924, 928, 4th Cir. 1949). Obviously, under any dual system, schools for one race may at any particular time be slightly better in unimportant and incidental ways than schools for the other, the position to be reversed shortly thereafter. The same is equally true as between 2 schools for the same race.

The problem in Prince Edward County has been a serious one. As we stated above, Negro high school enrollment has grown out of all expectation in comparison with the white. In 1951, Negro high school enrollment was 223% of what it had been in 1941; in the same period white enrollment declined 25% (D. Ex. 102). Tax collections in the County

have doubled in that period (D. Ex. 5), yet the true wealth per child in the County is substantially below the average for the counties of the State even without regard to the cities (D. Ex. 108, Table XIX). But in local effort, the percentage of local wealth applied to the support of local government, the County ranks ninth among the 100 counties of the Commonwealth (R. 432; D. Ex. 108, Table XIX). In the past 5 years, while methods of financing a new school were being actively investigated and plans for it brought to a head (see pp. 4-5 above), the County added 3 temporary buildings for the Negro school and doubled the number of Negro high school teachers (R. 142; D. Ex. 102).[16]

The Appellants must admit that the future for Negro high school students in Prince Edward County looks better than the future for white students. The County now has in hand almost $900,000 for the construction of a new Negro high school (R. 309-10). The School Board has acquired 63 acres of land in an advantageous location for the construction of the school (R. 301-2; D. Exs. 1-3). Architects had been employed and were in the course of preparation of detailed plans and specifications at the time of the hearing below (R. 311, 330).

The new school will be a good one. It will have classrooms, agricultural and other vocational facilities for both boys and girls, auditorium, library, music rooms, gymnasium, locker rooms and showers, cafeteria, clinic and administrative suite (R. 331-4; D. Exs. 8 and 9). The facilities to be provided in this building will be better than those provided anywhere in the County for white children (D. Ex. 97) and the uncontradicted testimony is to that effect (R. 337, 383, 386).

---

[16]This tremendous growth in number of teachers over such a short period of course accounts for the fact that average teaching experience is less for the Negro than for the white (R. 388).

This building, providing these facilities, is not a dream of the future; it is now under construction. It will be ready for use by the time that school opens in September, 1953, less than 12 months from this time (R. 311, 329, 338).

3.

The Wisdom of the Court Below

Despite these facts, the Appellants urge that the Court below, having determined that the Constitution and statutes of Virginia did not infringe upon rights guaranteed by the Constitution of the United States, had no discretion except to adopt the Draconian solution of immediate temporary amalgamation. They urge further that amalgamation should be required on a permanent basis because it may be a burden to the Court below to have to hear contempt proceedings in connection with the enforcement of its own decree.

The Appellants seek a harsh and unyielding rule. This Court sits here as a court of appeal to review the action taken below by a court of equity:

> "A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest. . . . It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief." *Eccles* v. *Peoples Bank,* 333 U. S. 426, 431 (1948).

The consequences of giving the Appellants the relief desired by them in this case would be chaotic. If segregation is not *per se* unlawful, in September, 1953, separate education in Prince Edward high schools will be constitutionally permissible and will be required in accordance with valid provisions of Virginia law. What the Appellants seek is

amalgamation in the middle of a school year to last only for the rest of that year.[17] Such action could not result in educational benefit. *Cf. Cumming* v. *Board of Education,* 175 U. S. 528, 544 (1899). It would mean either that the high schools of Prince Edward County would have to be closed for the remainder of this school session or that the educational process there would be thrust into such confusion that schooling would become practically impossible. Revolutions in social structure, if ever justified by court decree, must be of a permanent nature. What the Appellants ask the Court to do will not help the children of either race but will hurt the children of both races. Such useless tumult is inconceivable.

These consequences are undesirable and needless. The same plea was made in *Briggs* v. *Elliott* and Judge Parker met the issue squarely:

> "In as much as we think that the law requiring segregation is valid, however, and that the inequality suffered by plaintiffs results, not from the law, but from the way it has been administered, we think that our injunction should be directed to removing the inequalities resulting from administration within the framework of the law rather than to nullifying the law itself. . . . In directing that the school facilities afforded Negroes within the district be equalized promptly with those afforded white persons, we are giving plaintiffs all the relief that they can reasonably ask and the relief that

[17]This is apparently substantially the result reached in *Gebhart* v. *Belton,* ..... Del. ....., ... A. 2d ..... (Sup. Ct., August 28, 1952). There, the Supreme Court of Delaware affirmed as not an abuse of discretion a chancellor's order requiring school amalgamation but "the defendants may at some future date apply for a modification of the order if . . . the inequalities . . . have then been removed." We have been advised by the Attorney General of Delaware that a petition for a Writ of Certiorari is being prepared on this particular point in that case and will be promptly filed in this Court.

> is ordinarily granted in cases of this sort. . . . The court should not use its power to abolish segregation in a state where it is required by law if the equality demanded by the Constitution can be attained otherwise. This much is demanded . . . if our constitutional system is to endure." (98 F. Supp. 529, 537; Record on appeal, pp. 189-90; 103 F. Supp. 920, 922-3; Record on appeal, pp. 304-5)

Nor is anything to be gained by urging that the Court below cannot properly enforce its decree. The Federal courts are entirely competent to handle complex problems of human relations; in the comparable field of labor relations, the reports are full of cases where courts have been concerned with the detailed enforcement of decrees dealing with complicated arrangements between employer and employee.[18] But the best answer to the contention of the Appellants is that there is no evidence that strict adherence to the decree is not now being given; the finding of the Court below on that point is clear:

> "Both local and State authorities are moving with speed to complete the new program. An injunction could accomplish no more." (R. 623)

There may be cases where it is apparent that a court is so powerless to control a condition that it may destroy the condition. That is not true here and argument that segregation must be destroyed because it cannot be controlled is irrelevant.

The consequences of giving the relief desired here by the Appellants would harm everyone and help no one. It would particularly hurt the children in school. It would result in a

---

[18] Judge Parker made this point explicit in colloquy with counsel in *Briggs* v. *Elliott,* Record on appeal, p. 281.

lost year. Even if the constitutional principle abstractly applied suggested what the Appellants urge, practical considerations show the absurdity of its application here.

The Court below wisely and constitutionally adopted the practical course. The Appellants have no cause for complaint.

IX.

CONCLUSION

This case concerns an area where traditions and customs have long been fixed, where science has not yet replaced experience. Evolution is desirable and is occurring; revolution is not desirable and can only breed new and aggravated resentments more difficult to control. The law is now settled in accordance with principles designed for the solution of an intensely practical problem and the constitutional issue cannot be redetermined in disregard of those principles.

The Court below properly did not do so. Its decree should be affirmed.

Dated October 9, 1952.

Respectfully submitted,

T. JUSTIN MOORE
ARCHIBALD G. ROBERTSON
JOHN W. RIELY
T. JUSTIN MOORE, JR.

Counsel for the Prince Edward County School Authorities

HUNTON, WILLIAMS, ANDERSON, GAY & MOORE
Of Counsel

J. LINDSAY ALMOND, JR.
Attorney General
HENRY T. WICKHAM
Assistant Attorney General

For the Commonwealth of Virginia