SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 4

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 IN REPLY TO SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REARGUMENT

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Dated December 7, 1953.

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I.

PRELIMINARY STATEMENT

At the invitation of the Court, the Attorney General of the United States has submitted a brief which, in general, opposes the position taken by the Appellees in this case. We do not propose a detailed answer to his contentions, for time does not permit. But we do propose to comment generally on his more important conclusions for our study has convinced us of their error.

At the beginning, we dispose of his arguments as to the fourth and fifth questions submitted by the Court, which, in our view, are subsidiary to the main issue. With his proposals as to these matters, we are in substantial agreement. Only as to his suggestion that amalgamation be accomplished within a single year (Brief, p. 186) are we in substantial disagreement. The Court has in the records before it now no evidence as to the problems to be faced if segregation is to be abolished; no one knows the extent of these problems or the time that may be required for their solution. It seems to us an arbitrary suggestion that the Court now fix a time limit when it cannot have any real conception as to the adequacy or inadequacy of the limit so fixed. We repeat our view that the time is a matter for determination by the court below in the light of the evidence to be presented to it if the case be remanded. That court will then be able to require the best practical solution in the light of the facts.

But the important issue is the main question: whether segregated schools of themselves offend the Fourteenth Amendment. In the framework of this case, that question has three facets: the question of Congressional intent; the question of the intent of the States; and the question of the judicial power. To these three points we turn in the order given.

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I.

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II.

THE CONGRESSIONAL HISTORY

It cannot be denied that the anti-slavery movement had a broad humanitarian base; at the same time, it cannot be proved that one of its aims was the abolition of segregation by race in the public schools. The statements made by abolitionist leaders before the Civil War were all addressed to the abolition of slavery. Statements made by radical leaders in the 1870's, when school segregation was an issue of Congressional debate, are not reliable as to their opinions in the 1850's (Brief, pp. 12-13). Generalizations have no bearing on the question asked by the Court; that is a question as to a specific issue which merits and can be given a specific answer.

We come, then, to the first session of the 39th Congress. That was the session that passed the First Supplemental Freedmen's Bureau Bill and the Civil Rights Act of 1866. We agree with the Attorney General that they are important as a "relevant part of the background of the Fourteenth Amendment" (Brief, p. 22). We further agree as to the reason for their relevance; the facts are, as the Attorney General so well states, that "the rights intended to be secured to Negroes by these measures were the same as those subsequently embodied in the Fourteenth Amendment. . . ." (Brief, pp. 21-2) That is also our concept; the two bills and the Amendment covered the same ground and there is no substantial evidence to support the claim of the Appellants that the Amendment is of broader reach (Appellants' Brief, p. 118).

But after that determination we differ with the brief for the United States. Let us take first the conclusion there shown as to the two bills. The Attorney General says:

> "The debates on these bills show that some legislators, on both the majority and minority sides, expressed the

> view that this principle of equality under law would, if enforced, destroy racial segregation in state schools." (Brief, p. *32*)

We assume that the Attorney General speaks of separate equal State schools. We disagree with this conclusion.

To support this conclusion, the Attorney General quotes statements by Representative Dawson of Pennsylvania as to the Freedmen's Bureau Bill and Senator Cowan of Pennsylvania and Representatives Kerr of Indiana, Rogers of New Jersey and Delano of Ohio as to the Civil Rights Act. We shall take them up one by one.

Representative Dawson voted against the Freedmen's Bureau Bill.[1] He was, as the Attorney General says, not speaking of the meaning of the Bill but of the general policy of the radicals; he did not say what that Bill would do but what he thought the radicals wanted to do. He cannot be counted as one who said that the Bill would abolish segregated schools.

Senator Cowan of Pennsylvania was a strong opponent of the Civil Rights Act and voted against its passage.[2] He later modified radically the views that he expressed earlier in the debate which are quoted by the Attorney General (Brief, p. *27*). He followed Senator Trumbull's interpretation that the Act conferred only

> ". . . the rights which are here enumerated. . . ."[3]

He cannot be taken to have thought that the Act abolished school segregation.

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[1] Cong. Globe, 39th Cong., 1st Sess. (1866) 688.

[2] *Id.* at p. 607. He also voted to uphold the President's veto. *Id.* at p. 1809.

[3] *Id.* at p. 1781.

Representative Kerr of Indiana voted against the Act.[4] As his remarks quoted by the Attorney General (Brief, pp. 28-9) make clear, he did not talk about a situation where separate schools were provided for both races; he limited his remarks to the case where schools were provided for the white and not for the Negro. His views do not bear on our issue.

Representative Rogers voted against the Act.[5] His views both as to the Act and as to the Fourteenth Amendment and the school question were unique as we have already shown (Appellees' Brief, pp. 93, 106-7).

Representative Delano, alone of those here discussed, voted for the Act.[6] But as is again evident from the quotation in the Brief for the United States (Brief, pp. 30-1), he, like Mr. Kerr, was speaking of the situation where the Negro was excluded completely from the schools. He cannot be taken to have meant that the Act would strike down separate schools for Negroes.

Where, then, are those on the majority side who believed that these statutes would outlaw school segregation as we know it? There were none. But there were those on the majority side who considered that these statutes would not abolish school segregation. These, the Attorney General either minimizes or ignores.

First, there was Senator Trumbull of Illinois, patron of the Civil Rights Act and Chairman of the Senate Judiciary Committee. We quote his statement as to the Act again:

> "The first section of the bill defines what I understand to be civil rights: the right to make and enforce

[4] *Id.* at p. 1367. He was recorded as not voting on the question of sustaining or overruling the veto. *Id.* at p. 1861.

[5] *Id.* at p. 1367. He voted to uphold the President's veto. *Id.* at p. 1861.

[6] *Id.* at p. 1367. He also voted to override the veto. *Id.* at p. 1861.

> contracts, to sue and be sued, and to give evidence, to inherit, purchase, sell, lease, hold, and convey real and personal property.
>
> * * *
>
> "This bill has nothing to do with the political rights or status of parties. It is confined exclusively to their civil rights, such rights as should appertain to every free man."[7]

This we may note is the same Senator Trumbull who, in 1872, said:

> "The right to go to school is not a civil right and never was."[8]

In the House, there was Representative Wilson of Iowa, Chairman of the House Judiciary Committee and in charge of the progress of the Act through the House. He made his position unmistakable:

> "Do [the provisions of the bill] mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. . . . Nor do they mean that . . . their children shall attend the same schools. These are not civil rights or immunities."[9]
>
> * * *
>
> "He knows, as every man knows, that this Bill refers to those rights which belong to men as citizens of the United States and none other; and when he talks of setting aside the school laws and jury laws and franchise laws of the States by the Bill now under consideration, he steps beyond what he must know to be the rule of construction which must apply here, and as the result

[7] *Id.* at p. 475.

[8] Cong. Globe, 42nd Cong., 2nd Sess. (1872) 3189.

[9] Cong. Globe, 39th Cong., 1st Sess. (1866) 1117.

> of which this Bill can only relate to matters within the control of Congress."[10]

These statements cannot be minimized as the Attorney General attempts to do (Brief, p. 28). They are clear and directly on the point.

In accordance with the rule that this Court has established, we take these statements of the responsible Committee Chairmen as authoritative guides to the meaning of this legislation. The Civil Rights Act was not intended to abolish segregation in the schools.

Since the Attorney General and all others except the Appellants agree that the only purpose of the Fourteenth Amendment was to cover the same ground as the Civil Rights Act, our inquiry is nearly at an end. But we cannot stop here for the Attorney General continues by drawing conclusions which are quite at variance with what should have been his premises.

He concludes that

> "The civil rights legislation enacted by the 39th Congress was designed to strike down distinctions based on race or color." (Brief, p. 113)

If he means some distinctions, we agree; if he means all distinctions, we cannot agree for the evidence is to the contrary. He continues by stating that, when the minority expressed the view that the Civil Rights Act would strike down segregation in the schools,

> "This view was not disputed by the majority." (Brief p. 115)

Again we cannot agree for Trumbull and Wilson disputed it explicitly. We hasten to add that, even if the statement

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[10] *Id.* at p. 1294.

were supported by the record, uncontradicted statements of opponents are no guide to legislative interpretation.[11]

But our disagreement has still further to go. The Attorney General implies the opposite of his explicit statement that the Amendment and the Civil Rights Act cover the same ground when he asserts in connection with the Amendment that it was not

> " . . . necessary or appropriate to catalog exhaustively the specific application of its general principle."

And his general principle is, we are told, that the Amendment

> " . . . would prohibit all legislation by the states drawn on the basis of race and color." (Brief, p. 114)

Let us examine this general principle. In 1866, the Constitution contained no limitation on the power of the States to determine to whom the right of suffrage could be given. Many of the States, north and south, prohibited the Negro from voting by legislation. This was certainly legislation "drawn on the basis of race and color." Was the Fourteenth Amendment designed to abolish this?

Senator Howard of Michigan, a member of the Joint Committee on Reconstruction and the senator in charge of the Amendment in the Senate, is our guide on this question. He said:

> "But sir, the first section of the proposed amendment does not give to either of these classes the right of voting."[12]

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[11] *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951).

[12] Cong. Globe, 39th Cong., 1st Sess. (1866) 2765.

He said the same thing at a later date:

> "The Committee were of opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race."[13]

Why was not the right of suffrage included? Because, said Senator Howard, it was

> " . . . not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism."[14]

The Attorney General cannot therefore be correct in his conclusion that the Amendment proscribed "all legislation . . . drawn on the basis of race and color." Here is one field—a right that we now regard as most fundamental in our democracy—that the Amendment was designed not to cover. That was covered by a later and different amendment to the Constitution. And Senator Trumbull, patron of the Civil Rights Act, made it equally clear that the Act had no effect on statutes prohibiting miscegenation.[15] In sum, there was general agreement that the scope of operation of the Fourteenth Amendment was limited to "fundamental rights," as Senator Howard, its chief Senate proponent, made unequivocally clear. Most of these rights were, contrary to the conclusion of the Attorney General (Brief, p. 114), catalogued

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[13] *Id.* at p. 2896. Senator Poland of Vermont, another radical leader, spoke in the same vein. *Id.* at p. 2961.

[14] *Id.* at p. 2765.

[15] *Id.* at p. 600.

by Thaddeus Stevens.[16] They were also catalogued by Senator Howard.[17] In neither catalogue are schools included.

Despite his agreement twice stated (Brief, pp. 21-2, 109) that the Amendment was designed to cover only the same ground as that covered by the Civil Rights Act, the Attorney General implies that it may have gone further. He refers to Stevens' statement (Brief, p. 44). That statement, given in full in the Appellees' Brief, is repeated here:

> "Some answer, 'your civil rights bill secures the same things.' That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed. . . ."[18]

Here Stevens' meaning is clear: the two covered the same ground; the only difference lay in that the Amendment could not be repealed. And Stevens, like Howard, made it clear that the Amendment did not go all the way:

> "It falls far short of my wishes. . . ."[19]

Stevens, like Howard,[20] Garfield,[21] Rogers,[22] Poland,[23] Henderson[24] and many others, put it beyond doubt that the Amendment and the Civil Rights Act had the same application. This is the accepted interpretation.

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[16] *Id.* at p. 2459; Appellees' Brief, p. 105.

[17] Cong. Globe, 39th Cong., 1st Sess. (1866) 2765; Appellees' Brief, pp. 108-10.

[18] Cong. Globe, 39th Cong., 1st Sess. (1866) 2459.

[19] *Ibid.*

[20] *Id.* at p. 2896.

[21] *Id.* at p. 2462.

[22] *Id.* at p. 2538.

[23] *Id.* at p. 2961.

[24] *Id.* at p. 3031.

The Attorney General makes another point. He says:

> "It is noteworthy that one of the majority spokesmen . . . illustrated the racial discriminations which the Amendment would reach by reference to a state law discriminating against Negroes in public schools." (Brief, p. 114)

That is a true statement. But it tends to confuse the issue. The spokesman was Senator Howe of Wisconsin. His remarks are quoted by the Attorney General (Brief, p. 54). He complained of a Florida statute that taxed both whites and Negroes to support the white schools and then taxed the Negroes again to support the Negro schools.[25] There seems to us no question as to the inequality of this statute, but it seems to us to have little relevance to the constitutionality of segregated schools. The vice of the statute is obvious; the remarks, in this connection, are hardly "noteworthy."

The Attorney General passes then to the history of school legislation in the District of Columbia (Brief, pp. 69-72). This history, he asserts, is of small significance; Congress was almost unconscious when it acted to establish and to retain segregated schools in the 1860's. The actions of Congress, he says, are unreliable; it is only the words that give enlightenment. Words, in his view, speak louder than actions. Merely to state this thesis is to refute it. When Congress first established schools for the District of Columbia in 1862, a conscious choice was required; schools should either be segregated or mixed. Congress chose the segregated course.[26] It reiterated its decision in 1864.[27] The 39th Congress that proposed the Fourteenth Amendment

[25] *Id.* at App. p. 219.

[26] 12 Stat. 394, 407, 537 (1862).

[27] 13 Stat. 187 (1864).

enacted, almost simultaneously with its proposal, two statutes relating to and retaining the District's segregated schools.[28] Can Congress have been unconscious of the segregation existing pursuant to its will under its nose? That cannot be true. Appellants have told us in some detail how Congress outlawed segregation in District transportation in 1865 (Appellants' Brief, pp. 77-78). That was just one year before the proposal of the Amendment. But that is not the end of the story. In 1868 and 1869, Congress acted again: a District school law was passed which did not abolish segregation.[29] This must have caused some thought for it was vetoed by the President.[30] Was Congress asleep for this whole period? It was certainly not asleep in 1871 and 1872 when it debated at length a bill to amalgamate the District schools (Appellees' Brief, pp. 130-4). No bill for this purpose could achieve passage.

We consider the record from the District convincing evidence of Congressional intention. It cannot be summarily dismissed as inconsequential. It is an accurate reflection of the temper of the Congress that proposed the Fourteenth Amendment.

As to the legislation that was proposed in the 1870's, the Attorney General presents no full discussion (Brief, pp. 76-86). He quotes Sumner and Butler and their generalizations on equality. But he misses the point. The point is that no one ever said that the Fourteenth Amendment abolished segregated schools; no one ever suggested that legislation was unnecessary because the Amendment had already done the job. In sum, all agreed that, in order to abolish segregated schools, additional legislation was required. The

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[28] 14 Stat. 216, 342 (1866).

[29] Cong. Globe, 40th Cong., 2nd Sess. (1868) 3900; Cong. Globe, 40th Cong., 3rd Sess. (1869) 919.

[30] *Id.* at p. 1164.

argument arose over the power of Congress to legislate and the expediency of the legislation. These were, to a large degree, the same men who proposed the Amendment. Their views confirm its meaning.

In conclusion, we cannot agree with the Attorney General that, in the legislative history, there is

> ". . . no conclusive evidence of a specific understanding as to the effect of the Fourteenth Amendment on school segregation. . . ." (Brief, p. 125)

We believe that there is substantial affirmative evidence that the Amendment was understood not to affect school segregation. We know from Senator Trumbull and Representative Wilson that the Civil Rights Act of 1866 was not to affect school segregation. We know from many, including the Attorney General, that the Amendment was designed to cover only the rights covered by the Civil Rights Act. We know that all through this period Congress fostered segregated schools in the District of Columbia. We know that the later civil rights history contains no assertion that the Amendment of its own force abolished school segregation.

In our view, the evidence is convincing. Congress did not intend to abolish segregated schools.

III.

THE STATE HISTORY

The Attorney General makes no thorough review of the history as it may be derived from the records of the several States.[31] He draws only three conclusions that require comment. And the comment may be quite brief.

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[31] It may be that such a review is made in the Appendix to his brief, but, at the time that this brief went to the printer, his Appendix has been promised (pp. 4, n. 3 and 90, n. 93) but not produced.

The Attorney General despairs of reaching a decision on the State question. That is, he says, because there is no evidence of

> ". . . an awareness that the Fourteenth Amendment might be relevant in determining the basis on which public education was furnished." (Brief, p. 99)

We agree to some extent with this point. And we consider it obvious that it is just the point. To show why is simple.

He cannot mean that there was no general awareness of the Fourteenth Amendment and of its purpose. Certainly the Amendment created an issue of paramount importance and interest from 1866 until 1870.

By the same token, he cannot mean that there was no general awareness of schools, and particularly segregated schools. The nation was in educational ferment in the period just following the Civil War. This was particularly true in the southern States where systems of public schools were universally established for the first time.

He means that no one had any awareness that the Fourteenth Amendment had the effect of abolishing segregated schools. From this he can draw no conclusion. But it seems to us that the conclusion is obvious. If the framers of the Fourteenth Amendment in Congress and the legislators that voted to ratify it had intended that it should abolish segregation in the public schools, there would have been and have been evidence of the awareness which the Attorney General has sought and cannot find. We take that lack of evidence to be the best evidence that the legislators did not intend to put segregated schools beyond the constitutional pale when they voted to ratify the Fourteenth Amendment.

But from that basic misconception, the Attorney General moves on to prove too much. He asserts that legislation

(contemporaneous with ratification) to establish segregated schools has no significance in establishing the climate of legislative opinion because there is no evidence of awareness. He asserts that 5 different hypotheses may be established from that apparently unrelated evidence (Brief, pp. 105-6). Of these he asserts as most likely the hypothesis that some but not much education was required for both races if any were offered to either (Brief, p. 108). He asserts as least likely that the legislators chose the separate but equal standard (Brief, p. 106).

But it seems to us that there is some evidence of awareness and evidence of awareness of the separate but equal standard. We have not examined all the school statutes of the reconstruction period; time has not permitted. But here are two examples.

The Virginia statute of 1870 is in almost the same words as the statute of today. It stated:

> ". . . provided, 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. . . ."[32]

The Georgia statute of 1870 provided:

> "Section 32. And be it further enacted, that it shall be the duty of the trustees, in their respective districts, to make all necessary arrangements for the instruction of the white and colored youth of the district in separate schools. They shall provide the same facilities for each, both as regards school-houses and fixtures, and the attainments and abilities, length of term-time, etc.; but the children of the white and colored races shall not be taught together in any subdistrict of the State." [33]

[32] Va. Acts (1869-70) 413.

[33] Ga. Laws (1870) 57.

Can these statutes have more than one interpretation? We think not. They wrote the separate but equal doctrine into the public school laws of Virginia and Georgia. And these statutes were both enacted by legislatures that ratified the Fourteenth Amendment.

We believe this to be substantial evidence that the State legislatures had an awareness of their obligation to provide equal schools. Many of them may not have formalized the constitutional standard of separate but equal into their statutes but at least some recognized the standard and enacted it into law. We do not believe that the evidence supports the conclusion that the separate but equal doctrine was a thing unknown.

That schools may not have been in fact at once equal is no secret. But local prejudices cannot be overlooked; those who paid most of the taxes were reluctant to see much of their money go for the exclusive benefit of those that paid few of the taxes. But that factor has no relevance to legislative intent or understanding.

Finally, the Attorney General concludes that the early State decisions fail to

> "... evidence any general and definite contemporaneous judicial construction of the Amendment as applied to school segregation." (Brief, p. 104)

We may, with him, disregard those State cases that depend entirely on State law. But it is difficult for us to agree that no conclusion may be drawn from the other cases cited by the Attorney General. The decisions are almost all on our side. The Attorney General cites, as do we, cases from the highest courts of California, Indiana, New York and Ohio holding that segregated schools did not offend the Fourteenth Amendment. His only authority to the contrary is a

case from "a lower court in Pennsylvania" so obscurely reported that it had escaped our notice (Brief, pp. 103-4).[34] His conclusion, derived from this balance of authority, seems erroneous, no matter how partisan the observer may be.

We conclude that the lack of direct evidence as to the relationship of the Amendment and the schools is firm evidence that the legislators neither contemplated nor understood that the Amendment required the end of school segregation. We conclude further that there is affirmative evidence from legislatures that ratified the Amendment that equality in education was required. The early State decisions confirm these conclusions.

We invite the Attorney General here, as in the case of the record from Congress, to climb down from his historical fence.

IV.

THE JUDICIAL POWER

Counsel in these cases have shown a marked disagreement as to the investigation desired by the Court in response to its question as to the judicial power. The Attorney General, although he touches upon occasion on the field that we attempted to explore, has for the most part taken off in another direction.

He states first that a case or controversy exists before the Court; we are in agreement (Brief, pp. 133-5). He states last that the cases involving "political questions" are not in point (Brief, pp. 149-51). With that view, we are less in

[34] Compare *Ward* v. *Flood*, 48 Cal. 36 (1874), *Cory* v. *Carter*, 48 Ind. 327 (1874), *People* ex rel. *Dietz* v. *Easton*, 13 Abb. Prac. (N. S.) 159 (1872), and *State* ex rel. *Garnes* v. *McCann*, 21 Ohio State 198 (1871), with *Commonwealth* v. *Davis*, 10 Weekly Notes 156 (Court of Common Pleas, Crawford County, Pennsylvania, 1881). The judge there cited no relevant authority.

agreement. It is true that no decision in this case will interfere with the conduct of foreign affairs by the executive branch of the government. But that is a superficial analysis. Many of the same considerations are applicable (Appellees' Brief, pp. 37-40). The Court is not dealing here, as it was in the graduate school cases, with a dozen or so institutions to which a mere handful of applicants of color sought admission.[35] The Court is, in the last though not the first analysis, dealing with thousands of local school districts and schools. Is each to be the subject of litigation in the District Courts? Are those courts to manage the local school systems for a time? That merely points up that this Court, as in the political question cases, is dealing with a problem normally outside the scope of the judicial machinery. The shoe does not fit the foot. That fact is, of itself, evidence that the proper place for solution of the problem is in the legislature.

We do not quarrel with the Attorney General when he says that the Fourteenth Amendment is self-executing without further Congressional implementation (Brief, pp. 135-8). Indeed, we agree. We have expressed our view on the limits of the power of Congress (Appellees' Brief, pp. 39-41). Nor do we complain of his quotations from early decisions of this Court which declare that the purpose of the Fourteenth Amendment was to protect the Negro in his fundamental rights (Brief, pp. 118-25). Those decisions accord exactly with what was said in the 39th Congress.[36] But those decisions do not declare that those fundamental rights included the right to go to a mixed school or that the

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[35] There are now only 7 Negroes in the graduate schools of the University of Virginia, none in those of the University of South Carolina.

[36] See the words of Senator Howard quoted above at page 8.

separate but equal doctrine offends the Amendment. When that doctrine first came before this Court, it was upheld.[37]

The Attorney General injects a new idea in his argument about the recent school cases (Brief, pp. 143-9). He begins with a statement that the Fourteenth Amendment requires the maintenance of public schools (Brief, p. 143). This is a novel thought, not shared by President Grant[38] and unsupported by any decision of this Court. He then seems to go on to say that, prior to the *Gaines* case,[39] this Court said simply that education was a "privilege" and not a "right" and that a State could grant or deny "privileges" unequally at will and with impunity. Then, he asserts, in the *Gaines* case for the first time the Court required equality of "privilege."

We assume that the Attorney General would make the same argument as to transportation. But there his argument can hardly be valid. This Court was careful to speak of equality when the matter was first before it. In *Plessy* v. *Ferguson,* 163 U. S. 537, 543 (1896), this Court said:

> "A statute which implies merely a legal distinction between the white and colored races . . . has no tendency to destroy the legal equality of the two races. . . ."

Would the result in *Plessy* v. *Ferguson*[40] have been the same if the Louisiana statute had required the railroad to refuse transportation to the Negro? That can hardly be imagined.

In *Gong Lum* v. *Rice,* 275 U. S. 78 (1927), there was no assertion of factual inequality. That was not an issue. The Supreme Court of Mississippi had found that the school system there required schools for both races

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[37] *Plessy* v. *Ferguson,* 163 U. S. 537 (1896).

[38] Brief for Appellees, p. 146.

[39] *Missouri* ex rel. *Gaines* v. *Canada,* 305 U. S. 337 (1938)

[40] The case came up on a writ of prohibition. Factual inequality was neither alleged nor in issue.

> "'. . . each having the same curriculum, and each having the same number of months of school term. . . .'" (275 U. S. at p. 84)

This Court apparently took that as an assertion of equality unchallenged by the Appellant. Factual inequality was for the first time at issue in the *Gaines* case, and this Court, having found factual inequality, was quick to apply the well established rule that, absent equality, separation offends the Constitution. That case and its successors did not give education a constitutional sanction which it had not previously enjoyed; the Court there merely applied the established doctrine, a doctrine that it refused to re-examine even though asked to do so.[41]

We now approach the Attorney General's final argument on the Fourteenth Amendment. First, we are told that although the background of a constitutional provision is of assistance in determining its meaning, there is no necessity to find specific evidence that the framers intended that specific meaning (Brief, p. 126). But the question rather is where, as here, the intent and meaning of the framers is unmistakable (this Amendment shall not be construed to abolish segregated schools), may this Court adopt the opposite interpretation (the Amendment is hereby construed to abolish segregated schools). The Attorney General, denying the premise, provides no assistance in reaching the proper answer. Again, we repeat our view that such an interpretation is an unwarranted extension of the judicial power.

But, for the purpose of argument, we will assume the erroneous premise of the Attorney General that the meaning of the framers as to the effect of the Amendment on school segregation is indeterminate. Then, he says, whether segregated schools met the constitutional test of the Nine-

[41] *Sweatt* v. *Painter*, 339 U. S. 629, 636 (1950).

teenth Century is irrelevant, for conditions have so changed that a statute establishing them is today an arbitrary fiat (Brief, pp. 142-3). And the test to be applied is a simple one:

> "But reasonableness is not measured in the abstract; the standard of reasonableness is found in the provisions and policy of the Fourteenth Amendment." (Brief, pp. 138-9)

We do not agree with his statement of the standard for the standard that he suggests cannot possibly be applied. The test, as this Court has told us, is whether the classification is reasonable in the light of the particular facts. The Amendment provides the standard of reasonableness; the standard cannot lead us directly back to the Amendment. Reasonableness can only be determined from the facts; unreasonableness must appear from the facts.

If we are to look for changed conditions and evidence of unreasonableness, we turn first to the record. There we find it urged by witnesses for the Appellants that segregated schools constitute "an official insult" (R. 195) and are evidence of "prejudice" (R. 210). In 1872, Charles Sumner spoke of

> ". . . the prejudice of color which pursues its victim in the long pilgrimage from the cradle to the grave. . . ."[42]

He spoke again:

> "The separate school has for its badge inequality."[43]

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[42] Cong. Globe, 42nd Cong., 2nd Sess. (1872) 384.

[43] *Id.* at p. 434. These same arguments were presented and disregarded in *Plessy* v. *Ferguson.* See Appellees' Brief, pp. 48-9.

His arguments are identical with those of record here. The record provides no evidence of changed conditions.

Of course, conditions have changed greatly since 1870. We cannot overlook the jet plane and the atomic cannon. Yet the record is bare of evidence of the extent of the pertinent changes in Prince Edward County, Virginia. And the fact of change is irrelevant unless the change has made segregation in the schools beyond the bounds of reason.

The Attorney General has remarked upon the record and the findings in the Kansas case (Brief, p. 149). He has not mentioned the record and the findings in this case. He will find little to comfort him there. The evidence is that in the Prince Edward County high schools segregated education is best for the pupils of both races. The findings based on that evidence are clear:

> "We have found no hurt or harm to either race. That ends our inquiry." (R. 621-2)

In these circumstances, are segregated high schools in Prince Edward County, Virginia, beyond reason? We submit that a negative answer is required. As a result, the Amendment is not offended. That should end the inquiry for this Court as it did for the court below.

V.

CONCLUSION

In this short brief we have attempted to make clear our chief points of disagreement with the brief of the Attorney General. He asks the Court to take a long stride into a field where history is clear, traditions are long and emotions are strong. We ask the Court to exercise the restraint that accords with its highest traditions.

State action is proper until it has been shown to be clearly wrong. There has been no such showing in this case, either before the court below or by the Appellants or by the Attorney General here. On the contrary, the evidence is, as the court below found, that the State action is reasonable and proper.

Dated December 7, 1953.

Respectfully submitted,

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