

Script for Reenactment of *Brown v. Board* Oral Arguments

Any use of the script should include the following:

“This script was edited by the American Bar Association Division for Public Education from the full transcript of the 1952 and 1953 arguments in *Brown v. Board of Education* as published in *Argument: The Complete Oral Argument before the Supreme Court in Brown v. Board of Education of Topeka, 1952-55*, ed. Leon Friedman (New York: Chelsea House, 1969).”

THE NARRATOR: On May 17, the United States will observe the 50th anniversary of the Supreme Court’s decision in *Brown v. Board of Education of Topeka, Kansas*. With that decision came an end to the doctrine of “separate but equal” in public education, and the beginning of the effort to ensure that educational opportunities were available on equal terms to all United States citizens.

The stories of the *Brown* case were stories that would have been familiar to millions of Americans in the early 1950s. The cases that were consolidated for argument under the name of *Brown v. Board of Education* came from across the country – Topeka, Kansas, of course, but also South Carolina, Virginia, and Delaware. Also heard with the four *Brown* cases was a case from the District of Columbia, *Bolling v. Sharpe*, which was decided separately because the Fourteenth Amendment, on which the *Brown* plaintiffs based their equal protection claims, does not apply to the District of Columbia.

In some of these localities – including Topeka, Kansas – the differences between the physical facilities at the “white” and “colored” schools were minimal. In others – Clarendon County, South Carolina, for example – the differences were severe. Spending for black student was a mere fraction of what was spent for whites, and black students were relegated to unheated buildings without indoor plumbing where they were taught a limited curriculum. In all the cases, however, children from the plaintiffs’ families were educated in schools segregated by law, and it was the harmful effects of segregation *per se* – regardless of the purported physical equality of the segregated facilities – that was under attack in *Brown*. As you will hear tonight, a strategy pursued by some of the defendant states was to pledge to “equalize” segregated schools by

improving their facilities and curricula in an attempt to avoid desegregation. The task of the *Brown* plaintiffs was to convince the Court that separate could never be equal.

The South Carolina case, *Briggs v. Elliott*, brought together the most famous and most formidable of the lawyers on the two sides of the *Brown* cases, and the excerpts you will hear this evening come from the oral arguments in *Briggs*. _____ will be playing the part of Thurgood Marshall, the legendary head of the NAACP's Legal Defense Fund and, later in his career, the first African American to sit on the United States Supreme Court. _____ will be playing the part of John Davis, whose career highlights included serving in the Wilson administration, first as solicitor general and then as ambassador to the Court of St. James, running as the 1924 Democratic candidate for President, and, for 34 years, heading the New York law firm of Davis, Polk & Wardwell.

Tonight's program is a short excerpt from the many hours of argument that the Supreme Court heard before reaching its decision in *Brown v. Board*. The arguments for the consolidated cases began on Tuesday, December 9, 1952. Marshall and Davis began their arguments in *Briggs v. Elliott* late that day and concluded on the afternoon of Wednesday, December 10.

1952 ARGUMENTS

THE CHIEF JUSTICE: Case No. 101, Harry Briggs, Jr., et al., against Roger W. Elliott, chairman, J. D. Carson, et al., Members of Board of Trustees of School District No. 22, Clarendon County, South Carolina, et al.

THE NARRATOR: Counsel are present.

THE CHIEF JUSTICE: Mr. Marshall.

ARGUMENT FOR APPELLANTS

MR. MARSHALL: May it please the Court. The specific provision of the South Carolina Code at issue reads as follows:

it shall be unlawful for pupils of one race to attend the schools provided by boards of trustees for persons of another race.

The relevant provision of the South Carolina Constitution reads:

Separate schools shall be provided for children of the white races and no child of either race shall ever be permitted to attend a school provided for children of the other race.

These are the two provisions of the law of the State of South Carolina under attack in this particular case.

At the first hearing in the District Court, before the trial got under way, counsel for the appellees, in open court, read a statement in which he admitted that although prior to that time they had decided that the physical facilities of the separate schools were equal, they had concluded finally that they were not equal, and they admitted in open court that they did not have equality.

At that time, however, we, as counsel for the appellants, made the position clear that the attack was not being made on the “separate but equal” basis as to physical facilities, but the position we were taking was that these statutes were unconstitutional in their enforcement because they not only produced these inevitable inequalities in physical facilities, but that evidence would be produced by expert witnesses to show that the governmentally imposed racial segregation in and of itself was also a denial of equality.

I want to point out that our position is not that we are denied equality in these cases. I think there has been a considerable misunderstanding on that point. We are saying that there is a denial of equal protection of the laws, the legal phraseology of the clause in the Fourteenth

Amendment. I say that because I think most of the cases in the past have gone off on the point of whether or not you have substantial equality. It is a type of provision that, we think, tends to get us into trouble.

So pursuing that line, we produced expert witnesses, who had surveyed the school situation to show the full extent of the physical inequalities. Appellees, in their brief comment, say that they do not think too much of them. I do not think that the District Court thought too much of them. But they stand in the record as unchallenged as experts in their field, and I think we have arrived at a stage where the courts do give credence to the testimony of people who are experts in their fields.

If you will remember, the testimony of one our expert witnesses, Dr. Redfield, was to this effect: that there were no recognizable differences from a racial standpoint between children, and that if there could be such a difference that would be recognizable and connected with education, it would be so insignificant as to be unworthy of anybody's consideration. In substance, he said that given a similar learning situation, a Negro child and a white child would tend to do about the same thing.

This Court has laid down the rule in many cases set out in our brief, that in the case of the object or persons being classified in a legislative act, it must be shown, one, that there is a difference between the two, and, two, that the state must show that the difference has a significance with the subject matter being legislated. The State of South Carolina has made no effort up to this date to show any basis for its racial classification other than saying that it would be unwise to do otherwise.

Witnesses testified that segregation deterred the development of the personalities of these children in Clarendon County. Two witnesses testified that it deprives them of equal status in

the school community, that it destroys their self-respect. Two other witnesses testified that it denies them full opportunity for democratic social development. Another witness said that it stamps the Negro child with a badge of inferiority. One witness, Dr. Kenneth Clark, examined the appellants in this very case and found that they were injured as a result of this segregation. The District Court completely disregarded that.

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

The only evidence produced by the appellees in this case was one witness who testified as to, in general, the running of the school system and the difference between rural schools and consolidated schools, which had no bearing whatsoever on the constitutional question.

So here we have a record that has made no effort whatsoever – no effort whatsoever – to support the legislative determinations of the State of South Carolina. And this Court is being asked to uphold those statutes because, it is urged, that these matters, as to whether or not we are going to have segregation, are legislative matters.

So here we have the unique situation of an asserted federal right which has been declared several times by this Court to be personal and present, being set aside on the theory that it is a matter for the state legislature to decide, and it is not for this Court. And that is directly contrary to every opinion of this Court.

There are always respectable people who can be quoted as in support of a particular statute. But in each case in the areas of what I might describe as the “sensitive areas” – civil rights, for example, or freedom of speech – this Court has made its own independent determination as to whether a statute is valid. Yet in this case, the Court is urged to give blanket approval that this field of segregation, and if I may say, this field of racial segregation, is purely

to be left to the states, the direct opposite of what the Fourteenth Amendment was passed for, and the direct opposite of the intent of the Fourteenth Amendment and the framers of it.

On this question of the sensitiveness of the field, and the need to leave it to the legislatures, I think we have a case in point that is persuasive to this Court. It is the *Elkison* decision by Mr. Justice William Johnson, appointed to this Court, if I remember, from South Carolina. The decision was rendered in 1823. It involved the State of South Carolina, which had provided that where free Negroes came in on a ship into Charleston, they had to be put in jail as long as the ship was in port and then put back on the ship when it left. It was argued that this was necessary to protect the people of South Carolina, and that a majority must have wanted it.

Mr. Justice Johnson made an answer to that argument in 1823, which I think is pretty good law as of today. Mr. Justice Johnson said:

But to all this the plea of necessity is urged; and of the existence of that necessity we are told the state alone is to judge. Where is this to land us? Is it not asserting the right in each state to throw off the federal constitution at its will and pleasure? If it can be done as to any particular article, it may be done as to all; and, like the old confederation, the Union becomes a mere rope of sand.

JUSTICE FRANKFURTER: Mr. Marshall, you have to face the fact that this is not a question to be decided by an abstract starting point of natural law, that you cannot have segregation. If we start with that, of course, we will end with that.

MR. MARSHALL: I do not know of any other proposition, sir, that we could consider that would say that because a person who is as white as snow with blue eyes and blond hair has to be set aside.

JUSTICE FRANKFURTER: Do you think that is the case?

MR MARSHALL: Yes, sir. The law of South Carolina applies that way.

JUSTICE FRANKFURTER: Do you think that the law in question was passed for the same reason that a law would be passed prohibiting blue-eyed children from attending public schools? You think that this is the case?

MR. MARSHALL: No, sir, because the blue-eyed people in the United States never had the badge of slavery which was perpetuated in the statutes.

JUSTICE FRANKFURTER: Do you really think it helps us not to recognize that behind this are certain facts of life, and the question is whether a legislature can address itself to those facts of life in despite of or within the Fourteenth Amendment? Can you escape facing those sociological facts, Mr. Marshall?

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

JUSTICE FRANKFURTER: No, you would not. It does not follow because you cannot make certain classifications, you cannot make some classifications.

MR. MARSHALL: I think that when an attack is made on a statute on the ground that it is an unreasonable classification, and competent, recognized testimony is produced, I think then the least that the state has to do is produce something to defend its statutes.

JUSTICE FRANKFURTER: I follow you when you talk that way.

MR. MARSHALL: That is part of the argument, sir.

JUSTICE FRANKFURTER: You may recall that this Court not so many years ago decided that the legislature of Louisiana could restrict the calling of pilots on the Mississippi to the question of who your father was.

MR. MARSHALL: Yes, sir.

JUSTICE FRANKFURTER: And there were those of us who sustained that legislation, not because we thought it was admirable or because we thought it comported with human notions or because we believed in primogeniture, but for different reasons, that is was so imbedded in the conflict of the history of that problem in Louisiana that we thought on the whole that was an allowable justification.

MR. MARSHALL: But Mr. Justice Frankfurter, I do not think that segregation in public schools is any more ingrained in the South than segregation in transportation, and in *Virginia v. Morgan*, the Court upset a Virginia law requiring segregation on buses as an improper burden on interstate commerce.

JUSTICE FRANKFURTER: It upset the law in the *Morgan* case on the ground that it was none of the business of the state; it was an interstate problem.

MR. MARSHALL: That is a different problem. But a minute ago the very question was raised that we have to deal with realities, and it did upset that.

JUSTICE FRANKFURTER: I am willing to suggest that this problem is more complicated than the simple recognition of an absolute “thou shalt not.”

MR. MARSHALL: I agree that it is not only complicated. I agree that it is a tough problem. But I think that it is a problem that has to be faced.

JUSTICE FRANKFURTER: That is why we are here.

MR. MARSHALL: That is what I appreciate, Your Honor. But I say, sir, that most of my time is spent down in the South, and despite all the predictions as to what might happen if we end segregation in the schools, I do not think that anything is going to happen any more than what happened on the graduate and professional school levels after this Court’s rulings in *McLaurin* and *Sweatt*.

In the brief for the appellees in this case and the argument in the lower court, I have yet to hear any one say that they denied that these children are harmed by reason of this segregation.

So there is a grant, I should assume, that segregation in and of itself harms these children.

And what do we have in the record? We have testimony of physical inequality. It is admitted. We have the testimony of experts as to the exact harm which is inherent in segregation wherever it occurs. But if this Court would reverse and the case would be sent back, we are not asking for affirmative relief. That will not put anybody in any school. The only thing that we ask for is that the state-imposed racial segregation be taken off, and to leave the county school board, the county people, the district people, to work out their own solution of the problem to assign children on any reasonable basis they want to assign them on.

JUSTICE FRANKFURTER: You mean, if we reverse, it will not entitle every mother to have her child go to a nonsegregated school in Clarendon County?

MR. MARSHALL: No, sir.

JUSTICE FRANKFURTER: What will it do? Would you mind spelling this out? What would happen?

MR. MARSHALL: Yes, sir. The school board, I assume, would find some other method of distributing the children, a recognizable method, by drawing district lines.

JUSTICE FRANKFURTER: What would that mean?

MR. MARSHALL: The usual procedure.

JUSTICE FRANKFURTER: You mean that geographically the colored people all live in one district?

MR. MARSHALL: No, sir, they do not. They are mixed up somewhat.

JUSTICE FRANKFURTER: Then why would not the children be mixed?

MR. MARSHALL: If they are in the district, they would be. But there might possibly be areas—

JUSTICE FRANKFURTER: You mean we would have gerrymandering of school districts?

MR. MARSHALL: Not gerrymandering, sir. The lines could be equal.

JUSTICE FRANKFURTER: I think that nothing would be worse for this Court than to make an abstract declaration that segregation is bad and then have it evaded by tricks.

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

For example, the colored child that is over here in this school would not be able to go to that school. The only thing that would be of issue is that whatever line you set, it shall not be set on race.

JUSTICE FRANKFURTER: There is a thing that I do not understand. Why would not that inevitably involve – unless you have Negro ghettos, or if you find that language offensive, unless you have concentrations of Negroes, so that only Negro children would go there, and there would be no white children mixed with them, or vice versa – why would it not involve Negro children saying, “I want to go to this school instead of that school?”

MR. MARSHALL: That is in the interesting thing in this procedure. They could move over into that district, if necessary. Even if you get stuck in one district, there is always an out, as long as the statute is gone.

We have instances in the North where they have attempted to draw a line to enclose the Negroes, and in New York those lines have on every occasion been declared unreasonably drawn, because it is obvious that they were drawn for that purpose.

JUSTICE FRANKFURTER: Gerrymandering?

MR. MARSHALL: Yes, sir. As a matter of fact, they used the word “gerrymander.”

So in South Carolina, if the decree was entered as we have requested, then the school district would have to decide a means other than race, and if it ended up that the Negroes were all in one school, because of race, they would be violating the injunction just as bad as they are by violating what we consider to be the Fourteenth Amendment now.

But my emphasis is that all we are asking for is to take off this state-imposed segregation. It is the state-imposed part of it that affects the individual children. And the testimony in many instances is along that line.

I would like to save my remaining time for rebuttal.

THE CHIEF JUSTICE: Mr. Davis.

ARGUMENT FOR APPELLEES

MR. DAVIS: May it please the Court. I want to put this case in its proper frame, by reciting what has transpired up to this time.

When the first hearing in the District Court was at an end, the court entered its decree, demanding us to proceed forthwith to furnish, not merely physical facilities, but educational facilities, equipment, curricula, and opportunities equal on the part of the state for the Negro as for the white pupil. The court below went further. In order to ensure the obedience to its decree, it required the defendants within the period of six months, not later than six months, to report what progress they were making in the execution of the court’s order.

Equalization required the building of buildings and, of course, the court knew, as every sensible man knew, that you do not get buildings by rubbing an Aladdin's lamp, and you cannot create them by court decree. To say that the day following this decree, all this should have been done would have been a brute application of force, and no credit to the court or anybody else.

The District Court, in March of 1952, declared that the defendants had made every possible effort to comply with the decree of the court, that they had done all that was humanly possible, and that by the month of September, 1952, equality between the races in this area would have been achieved. So the record reads.

What could be done immediately was done. Salaries of teachers were equalized. Curricula were made uniform, and the State of South Carolina appropriated money to furnish school buses for black and white. Of course, in these days, the schoolboy no longer walks. The figure of the schoolboy trudging four miles in the morning and back four in the afternoon swinging his books as he went is as much a figure of myth as the presidential candidate born in a log cabin. Both of these characters have disappeared.

I come, then, to what is really the crux of the case. That is the meaning and interpretation of the Fourteenth Amendment to the Constitution of the United States. If, as lawyers or judges, we have ascertained the scope and bearing of the equal protection clause of the Fourteenth Amendment, our duty is done. The rest must be left to those who dictate public policy, and not to the courts.

How should we approach it? I use the language of the Court: An amendment to the Constitution should be read, you have said:

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

Still earlier, you have said it is the duty of the interpreters,

to place ourselves as nearly as possible in the condition of the men who framed the instrument.

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

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

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

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

MR. DAVIS: Oh, well, of course, changed conditions may bring things within the scope of the Constitution which were not originally contemplated, and of that perhaps the aptest illustration is the interstate commerce clause. Many things have been found to be interstate commerce which at the time of the writing of the Constitution were not contemplated at all. Many of them did not even exist. But when they come within the field of interstate commerce, then they become

subject to congressional power, which is defined in terms of the Constitution itself. So circumstances may bring new facts within the purview of the constitutional provision, but they do not alter, expand, or change the language that the framers of the Constitution have employed.

JUSTICE FRANKFURTER: Mr. Davis, do you think that “equal” is a less fluid term than “commerce between the states”?

MR. DAVIS: Less fluid?

JUSTICE FRANKFURTER: Yes.

MR. DAVIS: I have not compared the two on the point of fluidity.

JUSTICE FRANKFURTER: Suppose you do it now.

MR. DAVIS: That what is unequal today may be equal tomorrow, or vice versa?

JUSTICE FRANKFURTER: That is it.

MR. DAVIS: That might be. I should not philosophize about it. But the effort in which I am now engaged is to show how those who submitted this amendment and those who adopted it conceded it to be, and what their conduct by way of interpretation has been since its ratification in 1868

I am saying that equal protection in the minds of the Congress of the United States did not contemplate mixed schools as a necessity. I am saying that, and I rest on it.

It is true that in the Constitution of the United States there is no equal protection clause. It is true that the Fourteenth Amendment was addressed primarily to the states. But it is inconceivable that the Congress which submitted it would have forbidden the states to employ an educational scheme which Congress itself was persistent in employing in the District of Columbia.

I therefore urge that the action of Congress is a legislative interpretation of the meaning and scope of this amendment, and a legislative interpretation of a legislative act, no court, I respectfully submit, is justified in ignoring.

What did the states think about this at the time of the ratification? At the time the amendment was submitted, there were 37 states in the Union. Thirty of them had ratified the amendment at the time it was proclaimed in 1868. Of those 30 ratifying states, 23 either then had, or immediately installed separate schools for white and colored children under their public school systems. Were they violating the amendment which they had solemnly accepted? Were they conceiving of it in any other sense than that it did not touch their power over their public schools?

How do they stand today? Seventeen states in the Union today provide for separate schools for white and colored children, and 4 others make it permissive with their school board. Those 4 are Wyoming, Kansas, New Mexico, and Arizona, so that you have 21 states today which conceive it their power and right to maintain separate schools if it suits their policy.

What does this Court say? I shall not undertake to interpret for Your Honors the scope and weight of your own opinions. In *Plessy v. Ferguson*, *Cumming v. Richmond County Board of Education*, *Gong Lum v. Rice*, *Berea College v. Kentucky*, *Sipuel v. Board of Regents*, *Gaines v. Canada*, *Sweatt v. Painter*, and *McLaurin v. Oklahoma*, and there may be others for all I know, certainly this Court has spoken in the most clear and unmistakable terms to the effect that this segregation is not unlawful.

It would be an interesting, though perhaps entirely useless, undertaking to enumerate the numbers of men charged with official duty in the legislative and the judicial branches of the Government who have declared that segregation is not per se unlawful. The members of

Congress, year after year, and session after session, the members of state constitutional conventions, the members of state legislatures, year after year and session after session, the members of the higher courts of the states, the members of the inferior federal judiciary, and the members of this tribunal – what their number may be, I do not know, but I think it is reasonably certain that it must mount well into the thousands, and to this I stress for Your Honors that every one of that vast group was bound by oath to support the Constitution of the United States and any of its amendments – is it conceivable that all that body of concurrent opinion was recreant to its duty or misunderstood the constitutional mandate, or was ignorant of the history which gave to the mandate its scope and meaning? I submit not.

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

I do not impugn the sincerity of these learned gentlemen and lady. I am quite sure that they believe that they are expressing valid opinions on their subject. But I want to refer just a moment to that particular witness, Dr. Clark. Dr. Clark professed to speak as an expert and an informed investigator on this subject. His investigation consisted of visits to the Scott's Branch primary and secondary school, at Scott's Branch in Clarendon County, South Carolina, which he undertook at the request of counsel for the plaintiffs. He called for the presentation to him of some sixteen pupils between the ages of six and nine years, and he applied to them what he devised and what he was pleased to call an objective test. That consisted of offering to them

sixteen white and colored dolls, and inviting them to select the doll they would prefer, the doll they thought was nice, the doll that looked bad, or the doll that looked most like themselves. He ascertained that ten out of his battery of sixteen preferred the white doll. Nine thought the white doll was nice, and seven thought it looked most like themselves. Eleven said the colored doll was bad, and one that the white doll was bad. And out of that intensive investigation and that application of that thoroughly scientific test, he deduced the sound conclusion that segregation there had produced confusion in the individuals – I now use his language – “and their concepts about themselves conflicting in their personalities, that they have been definitely harmed in the development of their personalities.”

That is a sad result, and we are invited to accept it as a scientific conclusion. But I am reminded of the scriptural saying, “Oh, that mine adversary had written a book!” And Professor Clark, with the assistance of his wife, has written on this subject and has described a similar test which he submitted to colored pupils in the northern and nonsegregated schools. He found that 62 per cent of the colored children in the South chose a white doll; 72 per cent in the North chose the white doll; 52 per cent of the children in the South thought the white doll was nice; 68 per cent of the children in the North thought the white doll was nice; 49 per cent of the children in the South thought the colored doll was bad; 71 percent of the children in the North thought the colored doll was bad.

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

The witness Trager, who is the lecturer and consultant on curricular, had never been in the South except when she visited her husband who was stationed at an Army post in Charleston

during the war. And I gather that visit was of somewhat brief character. She also was in search of scientific wisdom, and she submitted that same scientific test to a collection of children in the schools of Philadelphia, where segregation has been absent for many years. She made as a result of that what seems to have been surprising to her, the fact that in children from five to eight years of age, they were already, both white and colored, aware of racial differences between them.

Now that may be a scientific conclusion. It would be rather surprising, if the children were possessed of their normal senses, if they were ignorant of some racial differences between them, even at that early age.

I am tempted to digress, because I am discussing the weight and pith of this testimony, which is the reliance of the plaintiffs here to turn back this enormous weight of legislative and judicial precedent on this subject. I may have been unfortunate, or I may have been careless, but it seems to me that much of that which is handed around under the name of social science is an effort on the part of the scientist to rationalize his own preconceptions. They find usually, in my limited observation, what they go out to find.

Now, these learned witnesses do not have the whole field to themselves. They do not speak without contradiction from other sources. We quote in our brief – I suppose it is not testimony, but it is quotable material, and we are content to adopt it – from many authorities on education and conditions in the South, and from authorities on the race question in the United States, all of them opposing the item that there should be an immediate abolition of segregated schools.

Let me read a sentence or two from one of these authorities, Dr. W.E.B. DuBois. I may be wrong about this, but I should think that he has been perhaps the most constant and vocal opponent of Negro oppression of any of his race in the country. Says he:

It is difficult to think of anything more important for the development of a people than proper training for their children; and yet I have repeatedly seen wise and loving colored parents take infinite pains to force their little children into schools where the white children, white teachers, and white parents despised and resented the dark child, make mock of it, neglected or bullied it, and literally rendered its life a living hell. Such parents want their children to “fight” this thing out—but, dear God, at what a cost!

He goes on:

We shall get a finer, better balance of spirit; an infinitely more capable and rounded personality by putting children in schools where they are wanted, and where they are happy and inspired, than in thrusting them into hells where they are ridiculed and hated.

If this question is a judicial question, if it is to be decided on the varying opinions of scholars, students, writers, authorities, and what you will, certainly it cannot be said that the testimony will be all one way. Certainly it cannot be said that a legislature conducting its public schools in accordance with the wishes of its people—it cannot be said that they are acting merely by caprice or by racial prejudice.

Once more, Your Honors, I might say, what underlied this whole question? What is the great national and federal policy on this matter? Is it not a fact that the very strength and fiber of our federal system is local self-government in those matters for which local action is competent? Is it not of all the activities of government the one which most nearly approaches the hearts and minds of people, the question of the education of their young?

Is it not the height of wisdom that the manner in which that shall be conducted should be left to those most immediately affected by it, and that the wishes of the parents, both white and colored, should be ascertained before their children are forced into what may be an unwelcome contact?

I respectfully submit to the Court, there is no reason assigned here why this Court or any other should reverse the findings of ninety years.

THE CHIEF JUSTICE: Mr. Marshall.

REBUTTAL ARGUMENT ON BEHALF OF APPELLANTS

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

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

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

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

MR. MARSHALL: Yes, sir.

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

MR. MARSHALL: I agree, sir. And I think that the only issue is to consider as to whether or not that individual or small group, as we have here, of appellants, that their constitutionally protected rights have to be weighed over against what is considered to be the public policy of the State of South Carolina, and if what is considered to be the public policy of the State of South Carolina runs contrary to the rights of the individual, then the public policy of South Carolina,

this Court, reluctantly or otherwise, is obliged to say that this policy has run up against the Fourteenth Amendment, and for that reason his rights have to be affirmed.

But I for one think that all of these predictions of things that were going to happen, they have never happened. And I for one do not believe that the people in South Carolina or those southern states are lawless people.

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

JUSTICE REED: Is it fair to assume that the legislation involving South Carolina was passed for the purpose of avoiding racial friction?

MR. MARSHALL: I think that the people who wrote on it would say that. You bear in mind in South Carolina—I hate to mention it—but that was right in the middle of the Klan period, and I cannot ignore that point.

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

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

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

MR. MARSHALL: I think that the legislature should, sir. But in considering the legislatures, I know of no Negro legislator in any of these states, and I do not know whether they consider the Negro's side or not. It is just a fact. But I assume that there are people who will say that it was

and is necessary, and my answer to that is, even if the concession is made that it was necessary in 1895, it is not necessary now because people have grown up and understand each other.

They are fighting together and living together. Today, they are working together in other places. As a result of the rulings of this Court, they are going to school together on the higher levels. I think when we predict what might happen, I know in the South, where I spent most of my time, you will see white and colored kids going down the road together to school. They separate and go to different schools, and they come out and they play together. I do not see why there would necessarily be trouble if they went to school together.

THE CHIEF JUSTICE: Thank you.

MR. MARSHALL: Thank you, sir.

1953 ARGUMENTS

NARRATOR: In the first conference of the justices following the 1952 arguments, it became clear that the Supreme Court was poised to split over the decision whether it would declare an end to segregation in the public schools. The prospect of a closely divided court in the case had the potential for disaster. Justice Felix Frankfurter devised a solution to delay the Court's decision. Lawyers for the two sides would be asked to appear again for a second round of arguments on five questions posed by the court. These questions, summarized here, asked

- Whether the Fourteenth Amendment contemplated the abolition of segregation, at the time of ratification or at some future date;
- Whether it would lie within the judicial power to abolish segregation through construal of the amendment, if the intent of the amendment's framers was unclear;

- Whether, in the case of a finding of segregation, a decree would necessarily follow providing the admission of black children to schools of their choice immediately, or whether the court could permit a gradual adjustment to a desegregated system to be brought about; and
- What would be the specifics of implementing the Court’s decree?

Before the second round of arguments was heard, Chief Justice Fred Vinson died. Upon his passing, Justice Frankfurter is reported to have remarked, “This is the first indication I have ever had that there is a God.”

When the lawyers appeared again for arguments in December, 1953, a new Chief Justice, Earl Warren, was on the bench, and he would eventually lead the Court to its unanimous decision in *Brown*.

Our final excerpts this evening are from Mr. Davis’s and Mr. Marshall’s closing remarks from the 1953 arguments. You will hear traces of the detailed arguments they made regarding the history of the Fourteenth Amendment and the post-Civil War years in these summations. Mr. Davis refers to what he describes as the “tragic era” of Reconstruction. Mr. Marshall compares the South Carolina statute mandating segregated education to the “Black Codes” promulgated by Southern legislatures in the wake of the Civil War, which were intended to keep emancipated blacks in a subordinate position through restrictions on voting rights, jury service, holding public office, inter-racial marriage, and labor rights.

We begin with Mr. Davis.

ARGUMENT FOR APPELLEES

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

In fact, because of their being newer, they may even be better. There are good teachers, the same curriculum as in the schools for the 295 whites.

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

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

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

Would white children be prevented from getting a distorted idea of racial relations if they sat with 27 Negro children? I have posed that question because it is the very one that cannot be denied.

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

Say that we make special provisions for the aboriginal Indian population of this country, it is not racism.

Say that the twenty-nine states have miscegenation statutes now in force which they believe are of beneficial protection to both races. Disraeli said, "No man," said he, "will treat with indifference the principle of race. It is the key of history."

And it is not necessary to enter into any comparison of faculties or possibilities. You recognize differences which racism plants in the human animal.

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

Assuming, in the language of the old treaties about war, it is not to be expected and that God forbid, that the Court should find that the statutes of the State of South Carolina violated the Constitution, it can so declare.

If it should find that inequality is being practiced in the schools, it can enjoin its continuance. Neither this Court nor any other court, I respectfully submit, can sit in the chairs of the legislature of South Carolina and mold its educational system, and if it is found to be in its present form unacceptable, the State of South Carolina must devise the alternative. It establishes the schools, it pays the funds, and it has the sole power to educate its citizens.

What they would do under these circumstances, I don't know. I do know, if the testimony is to be believed, that the result would not be pleasing.

Let me say this for the State of South Carolina. It does not come here in sack cloth and ashes. It believes that its legislation is not offensive to the Constitution of the United States.

It is confident of its good faith and intention to produce equality for all of its children of whatever race or color. It is convinced that the happiness, the progress, and the welfare of these

children is best promoted in segregated schools, and it thinks it a thousand pities that by this controversy there should be urged the return to an experiment which gives no more promise of success today than when it was written into their Constitution during what I call the tragic era

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

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

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

ARGUMENT FOR APPELLANTS

MR. MARSHALL: The children in these cases are guaranteed by the states some twelve years of education in varying degrees, and this idea, if I understand it, to leave it to the states until they work it out—and I think that is a most ingenious argument—you leave it to the states, they say; and then they say that the states haven't done anything about it in a hundred years, so for that reason this Court doesn't touch it.

The argument of judicial restraint has no application in this case. There is a relationship between Federal and State, but there is no corollary or relationship as to the Fourteenth Amendment.

The duty of following the Fourteenth Amendment is placed upon the states. The duty of enforcing the Fourteenth Amendment is placed upon this Court.

We hereby charge them with making the same argument that was made before the Civil War, the same argument that was during the period between ratification of the Fourteenth Amendment and the *Plessy v. Ferguson* case.

It is our position that whether or not you base this case solely on the intent of Congress or whether you base it on the logical extension of the doctrine as set forth in the *McLaurin* case, on either basis the same conclusion is required, which is that this Court makes it clear to all of these states that in administering their governmental functions, at least those that are vital not to the life of the state alone, not to the country alone, but vital to the world in general, that little pet feelings of race, little pet feelings of custom—I got the feeling on hearing the discussion yesterday that when you put a white child in a school with a whole lot of colored children, the child would fall apart or something. Everybody knows that is not true.

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

There is some magic to it. You can have them voting together, you can have them not restricted because of law in the houses they live in. You can have them going to the same state university and the same college, but if they go to elementary and high school, the world will fall apart. And it is the exact same argument that has been made to this Court over and over again, and we submit that when they charge us with making a legislative argument, it is in truth they who are making the legislative argument.

They can't take race out of this case. From the day this case was filed until this moment, nobody has in any form or fashion, despite the fact I made it clear in the opening argument that I

was relying on it, done anything to distinguish this statute from the Black Codes, which they must admit, because nobody can dispute, say anything anybody wants to say, one way or the other, the Fourteenth Amendment was intended to deprive the states of power to enforce Black Codes or anything else like it.

We charge that they are Black Codes. They obviously are Black Codes if you read them. They haven't denied that they are Black Codes, so if the Court wants to very narrowly decide this case, they can decide it on that point.

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

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

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

The only thing can be an inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that stage as is possible. And now is

the time, we submit, that this Court should make it clear that that is not what our Constitution stands for.

This script was edited by the American Bar Association Division for Public Education from the full transcript of the 1952 and 1953 arguments in *Brown v. Board of Education* as published in *Argument: The Complete Oral Argument before the Supreme Court in Brown v. Board of Education of Topeka, 1952-55*, ed. Leon Friedman (New York: Chelsea House, 1969).