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Brief for Respondents

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Brief for Respondents

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1952

BROWN, ET AL.,

PETITIONER,

-V.-

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS,

RESPONDENT.

BRIEF FOR RESPONDENTS*

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I. SEEING THE LIGHT

Plessy v. Ferguson, 163 U.S. 537 (1896) upheld the constitutionality of a statute requiring railroads carrying passengers to provide separate but equal accommodations for white and colored races. Respondents acknowledge that (1) during Reconstruction, Negro leaders did much to establish public schools in the southern states and, (2) along with much of the South, those school systems after Reconstruction, and particularly after *Plessy*, were operated on a basis that seriously under funded schools serving Negro children. The school systems rigorously enforced the "separate" in the "separate but equal" standard, but their treatment of "equal" has served as a total refutation of equality. However, in varying degrees, states have come to realize that they must make all schools separate and equal, in tardy compliance with the *Plessy* standard. Additionally, many have already made progress in equalization.

In recent years, this Court has acknowledged states' flaunting of the "separate but equal" standard at the graduate school level by ordering Negro plaintiffs admittance into previously all-white graduate programs. *See McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 642 (1950) (holding that the plaintiff is entitled to the same treatment as other students pursuing a doctorate in education, and that by assigning the student to designated colored seats and rooms, the school violated the petitioner's rights to equal protection under the law); *see also Sweatt v. Painter*, 339 U.S. 629, 635-36 (1950) (finding that the educational opportunities offered to white and black students at the University of Texas were not substantially equal, therefore the petitioner should be admitted to the law school); *Sipuel v. Oklahoma*, 332 U.S. 631, 632 (1948) (compelling the University of Oklahoma to admit petitioner to the law school of University of Oklahoma because there were not similar facilities available for black students); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 352 (1938) (requiring that the state of Missouri either furnish equal legal education facilities for Negro students if the State offered legal education facilities to white students or allow Negro students into the legal facilities furnished for whites).

Encouraged by those decisions, Petitioners now urge that we extend those holdings to encompass segregation in literally thousands of public school districts. In support, the Petitioners' counsel speaks eloquently of both the great disparities in resources, and the damage segregation does to Negro children's hearts and minds. We recognize and do not wish to rebut petitioner's evidence of this psychological damage. Indeed, while Respondents have not

submitted social science testimony, we submit that school segregation causes harm to white children that, while different, is no less serious in degree than that suffered by Negro children.

Given the acknowledgments set out above, Respondents will accept specific court orders mandating the school equalization process. However, Respondents are greatly concerned that relief Petitioners seek, namely overturning the *Plessy* principle and ordering immediate integration of the schools, will result in enormous pressures to terminate the equalization process and frustrate compliance with any effort to eliminate the dual school systems.

No less a personage than Justice Oliver Wendell Holmes acknowledged the limits of judicial authority when, speaking for the Court in a 1903 voting rights case from Alabama, *Giles v. Harris*, 189 U.S. 475 (1903), he denied the relief sought by black voters. Justice Holmes reasoned that if the white population intends to keep blacks from voting, it would do little good to give black voters an order that would be ignored at the local level. *Id.* at 488. "Apart from damages to the individual," Holmes explained, "relief from a great political wrong, if done, as alleged by the people of a state and the state itself, must be given by them or by the legislative and political department of the Government of the United States." *Id.*

II. THE ROOTS OF SEGREGATION ARE FAR DEEPER THAN *PLESSY V. FERGUSON*

We agree with Petitioners and the amicus briefs filed by the United States government that reversing the *Plessy* decision would greatly serve the Nation's foreign policy and domestic concerns. However, Respondents believe it would provide Petitioners with no more than a semblance of the racial equality that they and theirs have sought for so long.

The harm Petitioners allege they have suffered as a result of racial segregation can be neither understood nor redressed effectively without comprehension of the economic, political, and psychological advantages whites gained because of that harm. As suggested previously, this comprehension must also recognize that whites may have been harmed by racial segregation. The presence of an officially-designated out group (the African slave and the segregated Negro) gives whites a false sense of their superior status, one that blinds them to an economic and political status that, save for color, renders them only marginally better off than the Negroes.

Plessy is viewed by Petitioners as the constitutional justification for segregated schools. *See Plessy*, 163 U.S. at 544 (justifying the statute

ordering segregated accommodations in railways cars by discussing the judicial and legislative approval of segregated educational facilities). However, *Plessy* is only fortuitously a legal precedent. In actuality, it is a judicial affirmation of an unwritten, but no less clearly understood, social compact based on a belief in white superiority that has been incorporated into the Constitution and continually affirmed. *See Dred Scott v. Sanford*, 60 U.S. 393, 407 (1857) (stating that Negros "had no rights the white man was bound to respect").

Any decision overturning *Plessy* will be viewed as a triumph by Negro Petitioners and the class they represent. However, without recognizing and attempting to dismantle the racial compact, in particular the indirect and misleading promises made to whites and the opportunities surrendered by whites to gain racial privileges, a decision overturning *Plessy* will be condemned by many whites as a breach of the racial compact. The expected outrage and resistance by whites will undermine and eventually negate even the most committed judicial enforcement efforts. Thus, within the limits of judicial authority, the Court should view these cases as an opportunity to lay bare the simplistic hypocrisy of the "separate but equal" standard, not as Petitioners urge by overturning *Plessy*, but by ordering its strict enforcement.

Respondents urge that equating the constitutional and educational harm, without cognizance of the sources of that harm, will worsen the plight of black children for decades to come. It will also perpetuate white children's belief that their privileged status as whites is deserved in fact rather than granted by law and tradition. Racial segregation afflicts white children with a life-long mental and emotional handicap that is as destructive to whites as the required strictures of segregation are damaging to Negroes.

In summary, Respondents reiterate that the decisions of this Court affirming the constitutionality of segregation have been heavily relied on by the states. *See Cummings v. Richmond County Board of Education*, 175 U.S. 528, 545 (1899) (declining to overrule the separate but equal doctrine); *see also Plessy*, 163 U.S. at 544 (reiterating the constitutionality of the separate but equal doctrine); *Tyler v. Harmon*, 104 So. 200, 203 (La. 1925) (reasoning that the *Plessy* decision prohibited a court from declaring an ordinance providing segregation of residences of blacks and whites unconstitutional). A ruling in these cases that state supported racial segregation is now an obsolete artifact of a by-gone age, one that no longer conforms to the Constitution, will set the stage not for compliance, but for levels of

defiance that will prove the antithesis of the equal educational opportunity the Petitioners' seek.

III. THE EDUCATIONAL CHALLENGE

The desegregation of public schools is a special matter, the complexity of which is not adequately addressed in the Petitioners' arguments. In urging this Court to strike down state-mandated segregation, the Petitioners ignore the admonishment of W.E.B. Du Bois, one of the Nation's finest thinkers. Commenting on the separate school, integrated school debate in 1933, Dr. Du Bois observed that "Negro children needed neither segregated schools nor mixed schools. What they need is education." W.E.B. Du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935), *available at* http://www.jstor.org/journals/jne.html.

Respondents are aware that despite the tremendous barriers to good schools posed by the *Plessy* "separate but equal" standard, some Negro schools through great and dedicated efforts by teachers and parents achieved academic distinction. Many of the most successful blacks today are products of segregated schools and colleges. In urging what they hope will be a brighter tomorrow, Petitioners need not cast aside the miracles of achievement attained in the face of monumental obstacles.

Again we turn to Dr. Du Bois, who wrestled with the issue two decades ago of whether black children were better off in integrated or in separate schools. *Id.* He wrote:

> A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad. Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal, and in that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer.

Id.

Respondents commend to this Court Dr. Du Bois' wisdom. He is right as an educational matter and as a legal matter, and his admonition can be given meaning within the structure of the *Plessy* holding. The three phases of relief that we will describe below focus attention on what is needed presently by the children of both races. It is the only way to avoid a generation or more of strife over an ideal

that, while worthwhile, will not achieve the effective education Petitioners' children need. Further, the existing constitutional standards, interpreted as Respondents urge, can provide the effective education needed by the children.

While declaring racial segregation harmful to black children, the Petitioners treat these policies as though they descended unwanted from the skies and can now be mopped up like a heavy rainfall and flushed away. The unhappy fact is that as the Nation's racial history makes clear, a great many white as well as Negro children have been harmed by segregation. Requiring school systems to operate a duplicate set of schools results in schools that are as educationally inefficient as petitioner's contend they are constitutionally deficient.

IV. A SUGGESTED COURT ORDER

Realistic rather than symbolic relief for segregated schools will require a specific, judicially monitored plan designed primarily to provide the educational equity long denied under the separate but equal rhetoric. Respondents believe that this Court has the authority to grant such relief under the precedent of *Plessy*. *See Plessy*, 163 U.S. at 550 (describing the role of the court in securing equality of rights and protection under the law). Therefore, as a primary step toward what may eventually prompt the voluntary disestablishment of the dual school system, Respondents urge this Court to order relief that must be provided to all children in racially segregated districts in the following components.

1. Equalization: Effective immediately on receipt of this Court's mandate, lower courts will order school officials of the respondent school districts to:

(A) ascertain through appropriate measures the academic standing of each school district as compared to nationwide norms for school systems of comparable size and financial resources. This data, gathered under the direction and supervision of the district courts, will be published and made available to all patrons of the district;

(B) all schools within the district must be fully equalized in physical facilities, teacher training, experience, and salary, with the goal of each district, as a whole, measuring up to the norms as determined in Section (A) above within three years;

(C) every year, school districts must provide a report to the Court on the equalization progress as measured by resources, teacher-pupil ratio, years of teacher training, teaching experience, and other measures to be determined by the district courts.

2. Representation: The battle cry of those who fought and died to bring this country into existence was "taxation without representation is tyranny." Effective relief in segregated school districts requires the immediate restructuring of school boards and other policy-making bodies to insure that those formally excluded by race from representation have persons selected by them in accordance with the percentage of their children in the school system. This restructuring must take effect no later than the start of the 1955-56 school year.

3. Judicial oversight: To effectuate the efficient implementation of these orders, federal district judges will be instructed to set up three-person monitoring committees with the Negro and white communities each selecting one monitor. The selected monitors will then agree on a third monitor. The monitoring committees will work with school officials to prepare the necessary plans and procedures to enable the school districts' compliance with phases one and two. The district courts will give compliance oversight priority attention and will address firmly, through contempt orders and other similar means, any actions intended to subvert or hinder the compliance program. Either party may appeal, on an accelerated basis, compliance orders of the district court.

School districts that fail to move promptly to comply with the equalization standards set out above should be deemed in non-compliance. Following a judicial determination of non-compliance, courts can determine whether such non-compliance with the "separate but equal" standard justifies relief similar to this Court's orders in the graduate school cases, including orders to promptly desegregate their schools by racially balancing the students, faculty and administrative populations in each school.

V. THE DISESTABLISHMENT OF SEGREGATION GOAL

Respondents suggest that the Petitioners' goal of achieving a disestablishment of the dual school system will be more effectively achieved for all individuals connected directly or indirectly with the school system by these means rather than by a ringing order for immediate desegregation. Our expectations in this regard are strengthened by the experience in the Delaware case, where school officials unable to finance the equalization of separate schools, opted to desegregate those schools. *See Belton v. Gehart*, 87 A.2d 862, 871 (1952) (ordering a white public school to admit black students).

Respondents recognize that the action we urge on this Court neither comports with the Petitioners' hopes for orders requiring

immediate desegregation, nor the contentions of many in the South that this Court should simply reject those petitions and retain the racial status quo. Respondents urge that this Court's goal should not be to determine winners and losers. Rather, it is this Court's obligation to unravel the Nation's greatest contradiction as it pertains to the public schools.

Justice Harlan, dissenting in *Plessy*, perhaps unwittingly, articulated this contradiction in definitive fashion when he observed:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.

Plessy, 163 U.S. at 559 (Harlan, J., dissenting).

The existence of a dominant white race and the concept of color-blindness are polar opposites that the Fourteenth Amendment's Equal Protection Clause cannot easily mediate. U.S. CONST. amend. XIV, § 1. The Equal Protection Clause all too readily lends itself to the staid formalisms that both "separate but equal" and "color blindness" exemplify. The Clause's formalist predilection should not be too surprising. After all, equal protection generally seeks to vindicate rights by evaluating the relationships between legally authorized, if not manufactured, categories rather than squarely addressing the validity of the state's exercise of coercion against a whole group.

In conclusion, Respondents do not ignore the value of simply recognizing the evil of segregation, an evil Negroes have experienced first-hand for too long. There is, we acknowledge, a place for symbols in law for a people abandoned by law for much of the nation's history. We recognize and hail the impressive manner in which Negroes have taken symbolic gains and given them meaning by the sheer force of their beliefs. It is precisely because of their unstinting faith in this country's ideals that they deserve better than an expression of benign paternalism, no matter how well intended. It will serve as a sad substitute for the needed empathy of action called for when a history of subordination of both races is to be undone.