

BROWN V. BOARD OF EDUCATION:
A MOOT COURT ARGUMENT

Washington, D.C.
Thursday, March 20, 2003

P R O C E E D I N G S

PROF. WERMIEL: It's my pleasure to welcome everyone. I'm Steve Wermiel, a professor here, and we're delighted at this phenomenal turnout.

* * *

There are a lot of people I need to thank, and I'll try to do it very quickly—quicker than the Academy Awards—without whom this conference would not have been possible. Dean Claudio Grossman of the law school; the co-directors of the Program on Law and Government, Thomas Sargentich and Jamie Raskin; our former colleague and education law practitioner extraordinaire Judith Winston.

As many of you know, a staff of a law school is what really makes a law school tick, and it's true here as well: Catherine Beane, the associate director of the Program on Law and Government; Natasha Rennie from the Office of Special Events and CLE; and Monica Phillips from the law school's Facilities Office.

We've had a host of student volunteers and I would thank them all except I don't think I could even name them all. There have been so many people that have helped us. But I would also like to thank the staff of the American University Law Review who have helped make this event possible as well, in particular Erin Chlopak, Jessica Waters, Megan Colloton, and Julie Wilson.

* * *

For a couple of hours tonight and a good part of tomorrow, we have assembled a wonderful and extremely distinguished group of people to consider the roles of *Brown v. Board of Education*¹ and *San*

1. 347 U.S. 483 (1954).

*Antonio Independent School District v. Rodriguez*² in the quest for equal educational opportunity and to help us try to look ahead to this struggle.

What we're going to do now is launch right into the moot court, and I'll tell you who the advocates and judges are in a second. We've given the advocates thirty minutes each to present their main argument, and then each side will have ten minutes for rebuttal. When we're done with that we will invite the judges to make any comments they want to make.

We're not asking to render a verdict, but we are asking them if they would like to comment, and then we'll try to have time to open it up to audience questions and do all of that before it gets too late. So, with that, let's get right to it.

On our panel tonight—I guess I'll try to do this with my back to them. To my right is Professor Jamie Raskin, who is a professor here and co-director of the Program on Law and Government. Next to Professor Raskin is Judge Paul Friedman of the U.S. District Court for the District of Columbia. Next to Judge Friedman is Judge Inez Smith Reid of the D.C. Court of Appeals.

In the center is Judge Damon Keith, who's acting as our Chief Justice tonight and who is a judge of the U.S. Court of Appeals for the Sixth Circuit. Next to Judge Keith on this side, Judge Nathaniel Jones, who retired from the Sixth Circuit and is now practicing law with the firm of Blank, Rome, and Cominsky. And on the end, Professor Earl Maltz of Rutgers Law School in Camden, New Jersey.

I could spend the entire rest of the time we have available tonight reading you longer introductions of all of them. They are a remarkably distinguished and accomplished group.

* * *

PROF. WERMIEL: We also have some very honored guests here tonight before I get to our advocates. In particular, Mrs. Cissy Marshall—Mrs. Thurgood Marshall—is with us and we're very honored that she will join us.

(Applause)

PROF. WERMIEL: A number of tomorrow's panelists are here as well. Professor Genna Rae McNeil, Bill Taylor, Judith Winston—all of whom we'll be hearing from tomorrow, and I hope we'll have lively discussions at that time.

Our advocates tonight are equally distinguished Professor Erwin Chemerinsky, representing the petitioner, Linda Brown, is a

2. 411 U.S. 1 (1973).

2003]

BROWN MOOT COURT ARGUMENT

1345

professor at the University of Southern California Law School, an extremely accomplished advocate, has handled numerous cases in the Supreme Court, and has accomplishments too prolific for me to mention.

Representing the respondents in this case, Professor Derrick Bell of New York University Law School, author of numerous books, accomplished advocate and scholar.

We're honored very much to have them both here and willing to do this.

So, without further ado, I think we will begin the oral argument.

JUDGE KEITH: Steve, may I just say this about Mrs. Thurgood Marshall, as a point of special privilege. I finished Howard University Law School so many years ago I won't mention it, but her husband taught me at Howard University, along with Charlie Houston and Jim Nabrit and George E. C. Hayes, Spottswood Robinson, and many others.

Justice Marshall and I and his family and my family became very close, and when we had his eightieth birthday party there were four of us who co-chaired that affair and our wives. Whatever fortune I've had as a lawyer or as a judge, I can, without reservation, say that her husband played a major role in my development. As luck would have it, a few years ago I had the opportunity of having Charles Hamilton Houston III as my law clerk for two years.

So I just want to personally acknowledge, Cissy, the love and affection and admiration I have for you and your family and what your husband has meant to my development and my growth. Thank you.

(Applause)

JUDGE KEITH: Counsel, you may proceed.

PROF. CHEMERINSKY: Thank you, Your Honor. Mr. Chief Justice, if it may please the Court. The issue before the Court today is of profound significance as to what kind of a country we'll be. The issue is whether a state may deem a race to be inferior and embody that judgement in a law that requires the racial segregation of the schools.

As we stand here in December 1953, 177 years after the Declaration of Independence declared that all men are created equal, ninety years after Abraham Lincoln issued the Emancipation Proclamation, I ask this Court to declare that separate but equal has no role in American public education.

There are two arguments today: first, that the Kansas law which requires the segregation of children in public schools violates equal

protection; and, second, as a remedy, this Court should hold that state-mandated segregation of education is unconstitutional. It should order the immediate desegregation of schools and equalization of resources for the education of all students.

JUDGE REID: Well, counsel, as to your first argument, there is nothing in the Fourteenth Amendment equal protection clause that speaks to education, nor have we been able to find any kind of legislative history suggesting that the Fourteenth Amendment was meant to apply to education, and, to the contrary, we have the history here in the District of Columbia where Congress has maintained a completely segregated school system for a long time.

Would you speak, then, to how the Fourteenth Amendment can be applied to this particular situation?

PROF. CHEMERINSKY: Yes, Your Honor. First, the clock can't be set back to 1896 when *Plessy v. Ferguson*³ was decided or to 1868 when the Fourteenth Amendment was adopted. Education plays a far greater role in the life of a person today than was the case a half-century or a century ago.

Second, the phrasing of the Fourteenth Amendment is clear—no person shall be denied equal protection of the law. For a state to mandate segregation is for the state to deem one race to be inferior, and that is a denial of equal protection.

PROF. MALTZ: Mr. Chemerinsky, what law has your client not been denied the equal protection of? Why doesn't the plain language of the Fourteenth Amendment simply say that you are entitled to equal protection of whatever laws are on the books?

PROF. CHEMERINSKY: The equal protection clause requires that the state not discriminate against people on the basis of their race. A state law that says that a black child cannot go to the same school as a white child is a form of discrimination against that child.

Here, Your Honor, I point your—

PROF. MALTZ: Where's your evidence in the history? You say the language requires that. The language on its face does not require that. If the historical understanding of the language is not to be our guide, would it make any difference if the language wasn't even in the Constitution?

PROF. CHEMERINSKY: Your Honor, the language is in the Constitution with regard to equal protection. It was unquestionably the goal of the 39th Congress that passed the Fourteenth Amendment to eliminate state-mandated segregation. It's notable

3. 163 U.S. 537 (1896).

that twenty-six states were in the Union when the Fourteenth Amendment was ratified.⁴ Twenty-two of those twenty-six states voted in favor of the Fourteenth Amendment,⁵ and not one of those twenty-two states at the time it ratified the Fourteenth Amendment had a state law mandating segregation of the races.⁶

That is powerful evidence that state-mandated segregation of education was never the intent of the states that ratified it.

PROF. MALTZ: Are you saying that schools were not segregated, that public transportation was not segregated in any of the states in the North?

PROF. CHEMERINSKY: No, Your Honor, what I am saying is that at the time the Fourteenth Amendment was ratified, none of the states that voted for its ratification had a law, like the one before the Court today from Kansas, which mandated segregation of the races in education.

PROF. MALTZ: But local school districts did, did they not?

PROF. CHEMERINSKY: Some local school districts did, but of course what we're focusing on, to the extent you believe that intent matters, is the intent of the 39th Congress that ratified the Fourteenth Amendment and the intent of the states that also ratified the Fourteenth Amendment, and what I think is key here is there is no indication that the 39th Congress or that any of those states meant to approve state laws that mandated segregation of races in education.

JUDGE REID: Well, there's one thing I don't understand, counselor, and that is why was it necessary to have a Fifteenth Amendment if the Fourteenth Amendment protected equal voting rights?

PROF. CHEMERINSKY: Your Honor, the equal protection clause of course applies to all of the services, programs, and activities of a state, including voting. However, the experience when the Fourteenth Amendment was adopted was that the former slaves continued to be disenfranchised. Because voting is so fundamental, as this Court said in *Yick Wo v. Hopkins*,⁷ it is so preservative of all

4. See David Chang, *Conflict Coherence and Constitutional Intent*, 72 IOWA L. REV. 753, 890 (1987) (pointing out that the southern states were not considered to be members of the Union at the time Congress passed the Fourteenth Amendment).

5. *Id.*

6. See Ronald Turner, *Was "Separate But Equal" Constitutional? Borkian Originalism and Brown*, 4 TEMP. POL. & CIV. RTS. L. REV. 229, 251 (1995) (discussing the practices of northern states with respect to segregation at the time the Fourteenth Amendment was passed).

7. 118 U.S. 356, 370 (1886) (stating that the right to vote is a "fundamental political right" because it is "preservative of all rights.").

other rights that it was necessary to add the Fifteenth Amendment to ensure equality with regard to that essential right.

As we talk about whether Kansas has violated the equal protection clause, it's important to focus on whether the Kansas law serves any legitimate purpose. For this Court has made clear that the Fourteenth Amendment, in both its due process and equal protection clauses, at a minimum, requires that the government action be reasonable to serve a legitimate purpose. There is no imaginable legitimate purpose to a state requiring segregation of the races.

JUDGE REID: Well, let's think about that, counsel. If we, as a court, were to decree that school segregation is in violation of the Fourteenth Amendment, would there not be an onslaught of violence in this country, and is that not a purpose that we need to examine?

PROF. CHEMERINSKY: It cannot be that racial prejudice, however virulent, serves as a justification for continuing race discrimination. If the concern is violence, then the appropriate response is for the executive at every level of government to prevent that violence, but it cannot be that white racism becomes the justification for the continuation of white racism that's embodied in the law.

PROF. RASKIN: Isn't it a rational interest, counsel, to legislate the established usages and traditions and customs of the people, and, in fact, didn't the *Plessy* case teach us that we must define equal protection with respect to the usages and traditions and customs of the people?

PROF. CHEMERINSKY: Your Honor, first I would suggest that *Plessy* does not deal with the issue of education. But, second, Your Honor, I would suggest that it is high time that *Plessy v. Ferguson* be overruled. Separate but equal is wrong in terms of equal protection. It was wrong in 1896, and the half century since has shown that it continues to be wrong. There is no legitimate purpose in requiring segregation of the races.

JUDGE FRIEDMAN: The premise of your answer to Judge Raskin I question. *Plessy v. Ferguson* specifically says, "Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other,"⁸ and then goes to say, "The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid

8. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

exercise of the legislative power even by courts in states where the political rights of the colored race have been longest and most earnestly enforced.”⁹

So, I question the premise of your answer to Judge Raskin, as well as your statement earlier to Judge Maltz.

PROF. CHEMERINSKY: Your Honor, as you read the language of this Court in *Plessy v. Ferguson*, it said that state-mandated segregation of the races does not convey a message of inferiority about one race.¹⁰ Your Honor, it is time for this Court to say that that was just wrong. There is no reason why any state mandates segregation of the races except a judgement that one race is superior and the other is inferior, and such a judgement goes against the very foundation of what equal protection of the laws is about.

JUDGE REID: Well, would you not agree that custom is tantamount to state law, and do we not have at least seventeen states that either permit or mandate segregated schools?

PROF. CHEMERINSKY: Those states mandate segregation of schools because this Court has never disapproved it, but the custom by itself can't be a justification for continuation of the practice if it's deemed by this Court to violate equal protection. My argument to this Court today is that there is no legitimate state interest in segregating the races.

Moreover, this Court has said that all racial classifications are immediately suspect and must be subjected to the most rigid scrutiny, and certainly there is not a compelling reason to continue the segregation of the races in education.

JUDGE JONES: Well, counsel, our—a response to the array of questions that have been put to you suggests that we are not to learn from history. What is your response to the suggestion that we are hide-bound to the notions of stereotypes and precepts of racial superiority and purity that were present at the time of *Plessy v. Ferguson* and reflecting that opinion? Is that binding upon this Court in light of what we have learned over time?

PROF. CHEMERINSKY: No, Your Honor, it is not binding on this Court. First, this Court could say that *Plessy* was wrong even at the time that it was decided, but if this Court is going to look at history, then the appropriate history to look to is the intent of the 39th Congress, and its records show that it intended to broadly eliminate race discrimination.

9. *Id.*

10. *Id.* at 551.

PROF. MALTZ: Can you give me one line from the 39th Congress where any member of the Republican Party explicitly said that the Fourteenth Amendment was designed to eliminate segregation in schools?

PROF. CHEMERINSKY: No, Your Honor, because that wasn't discussed in the 39th Congress, but I can show you—

PROF. MALTZ: In fact, wasn't the Fourteenth Amendment adopted against the background of a whole raft of cases, including the *Roberts* case¹¹ in Massachusetts where it was held that segregation of schools did not violate equal protection of the laws?

PROF. CHEMERINSKY: But, Your Honor, when you look to the intent of the 39th Congress, the issue is not whether they thought of schools or any particular activity. The question is what was their goal with regard to the equal protection clause. All of the legislative history indicates, as does the almost contemporaneous passage of the Civil Rights Act of 1866,¹² a broad desire to eliminate discrimination on the basis of race.

PROF. MALTZ: It's interesting that you refer to the Civil Rights Act of 1866 because they took care to catalog the rights. Is that what you're saying, that the Fourteenth Amendment is congruent with the Civil Rights Act of 1866?

PROF. CHEMERINSKY: No, Your Honor, what I'm saying is that the 39th Congress had a very broad intent to eliminate discrimination based on race.

PROF. MALTZ: Where is your evidence that they had a broad, open-ended intent rather than an understanding that they were only going to eliminate discrimination and rights which they considered fundamental?

PROF. CHEMERINSKY: Your Honor, the brief that was filed in this Court shows many instances in which Representative Bingham and others expressed a broad intent with regard to the Fourteenth Amendment.¹³

But I emphasize, as I said earlier, we can't turn the clock back to 1868. We can't turn the clock to 1896, to go back to Justice Jones's

11. *Roberts v. City of Boston*, 59 Mass. 198 (1849).

12. Act of April 9, 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-1982 (1987)).

13. John Bingham was a representative from Ohio and the primary author of Section One of the Fourteenth Amendment. For a thorough discussion of Representative Bingham and his involvement with the Fourteenth Amendment, see Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993).

question. You have to decide this case based on where we are today in 1953.

JUDGE REID: Well, let's talk about enforceability for a second, counsel. States, have they not, have historically ignored pronouncements of this Court. If you want to take one example—let's take *Strauder v. West Virginia*¹⁴ dealing with the juries. Despite the pronouncement of this Court in *Strauder*, we still have states, which do not allow blacks to be on jury pools. If we were to decree as you would have us do in this particular case, how would we deal with enforceability, and is it better not to decree if we know ahead of time that the decree will not be enforced?

PROF. CHEMERINSKY: Your Honor, this Court must assume that its decrees will be enforced and not disobeyed, for otherwise then lawlessness becomes the justification for lawlessness. This Court's orders with regard to desegregation of law schools have certainly been complied with. I point here to the recent decision, for example, in *Sweatt v. Painter*,¹⁵ the decision on the *McLaurin* case;¹⁶ the decision in *Missouri, ex rel. Gaines v. Canada*.¹⁷ In all of these instances, this Court's orders with regard to desegregation were complied with, so it must be assumed that the President, the governors, police officials at all levels will take the actions that this Court mandates.

JUDGE REID: But, counsel, we have a different situation here with the elementary and secondary schools than we have with the universities and professional schools. Here we're dealing with young children. We're dealing also with the custom of these things, a custom that says colored people, Negroes are inferior—our little children should not associate with them.

If this Court compels us to have our children associate with them, then we're just going to unleash violence throughout the school system and throughout the states. How do we react to that? How do we decree something that makes sense and that avoids that kind of unleashing of violence?

14. 100 U.S. 303 (1879) (invalidating a West Virginia statute that precluded blacks from jury service).

15. 339 U.S. 629 (1950) (ordering a white law school to admit a black student because of obvious inequality between the segregated schools).

16. See *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950) (holding that a previously all-white university could not force recently admitted black students to sit in segregated areas of the classrooms, libraries, and cafeterias).

17. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (holding that it was unconstitutional for Missouri to pay for black students to attend out-of-state law schools rather than admit black students to its own law school).

PROF. CHEMERINSKY: Your Honor, this Court cannot allow the prospect of white racist violence to justify racism continuing as a constitutional doctrine. The appropriate step is to ensure that the government does everything it can to prevent violence. Your question goes directly to the issue of remedy, and I think there are three things this Court needs to do as remedy: first, hold that separate but equal has no place in American public education, that laws that mandate the separation of races are unconstitutional; second, order the immediate desegregation of schools; and, third, order the immediate equalization of funding.

PROF. RASKIN: Counsel, I want to test the outer perimeters of that argument that you just made. Is this an attack just on *de jure* discrimination or also on *de facto*, because I anticipate a scenario in which the southern states have truly been ordered by this Court to wipe the statute books clean, will do that and nothing more, and are you saying if federal district courts all over the land are going to have to take over the administration of public schools and assign students and move them from district to district?

PROF. CHEMERINSKY: Your Honor, this case, and the others that are before this Court today, involve *de jure* segregation: this case involves a Kansas law that mandates segregation of the races;¹⁸ the *Briggs* case involving South Carolina;¹⁹ the case coming from Virginia;²⁰ *Bolling v. Sharpe*;²¹ all involved *de jure* segregation.²² This Court should say that the federal judiciary should use its traditional equitable powers to ensure desegregation.

Just as we pointed to the fact that this case involves young children, and instead of that being a reason for ruling for respondents, quite the contrary here, you need to focus on the fact-finding by the district court here. The fact-finding by the district court here was that segregation of the races mandated by law interferes with the educational opportunity of African American children.²³ In other words, the district court found as a matter of fact, which this Court must accept, that segregation is inherently harmful to the education and psychological development of African American children.

18. *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951).

19. *Briggs v. Elliot*, 103 F. Supp. 920 (E.D.S.C. 1952).

20. *Davis v. County Sch. Bd.*, 103 F. Supp. 337 (D. Va. 1952).

21. 347 U.S. 497 (1954). The lower court decision in this case is unreported.

22. All of the previous cases were consolidated and argued together.

23. *Belton v. Gebhart*, 87 A.2d 862, 865 (1952). *Belton* was one of the five cases challenging school segregation that were consolidated and argued simultaneously before the Supreme Court in *Brown*.

PROF. RASKIN: But the respondent says that integration of black children into white schools where white racism is still the dominant cultural and educational norm will be equally harmful and injurious to the psyches of the black children.

PROF. CHEMERINSKY: Your Honor, I would point you to what's in the record and not in the record of this case. We submitted to you an appendix of a brief from leading psychologists and sociologists based on the best research available, which shows, as the district court found, that state-mandated segregation affects the hearts and minds of African American children and interferes with their educational development.²⁴ There is nothing in the record to support the claim that ending segregation would have a similarly harmful effect.

Certainly we agree with respondent here that equalization of funding for schools between blacks and whites is imperative, but such equalization will never occur unless there is a unitary school system where the education of the African American children is not a matter of charity by whites for a separate school system but instead is the education of African American children is done together with the education of white children.

JUDGE FRIEDMAN: But the practical implications though, is that most public school students in most parts of this country in 1953 walk to school. They go to neighborhood schools. If we order the integration of the schools, do we also have to order the integration of housing? Do we have to move people from one part of the city to the other part of the city, tell them where to live?

Or is there some other remedy that you would propose so that the custom and practice of people walking to school, having their children in many cases walk home to lunch and then walk back to school in the afternoon is not disrupted? Is that all going to change once we issue some sort of an order?

PROF. CHEMERINSKY: Your Honor, based on the record in this case, the Court is not in a position to decide the details of the remedies. In this case, the Court should simply hold that state-mandated segregation is unconstitutional and leave to the lower

24. See Brief for Petitioners, *Bolling v. Sharpe*, 347 U.S. 497 (1952). The briefs submitted by the NAACP cited various works of contemporary social scientists to contradict the holding in *Plessy* that the harm suffered by the segregated blacks was only in their mind. See, e.g., Max Deutscher & Isidor Chein, *The Psychological Effect of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. OF PSYCHOL., 259, 261-62 (1948) (finding that 90.4% of responding psychologists believed that enforced segregation has detrimental psychological effects on those segregated even if equal facilities are provided).

courts to formulate the specifics of the remedies with regard to particular areas.

JUDGE FRIEDMAN: Well, some of us have been lower court judges. Judge Keith and I have to—and our friends who are on the lower courts—have to figure it out, have to decide whether to move people from one part of the city to the other part of the city, or—

PROF. CHEMERINSKY: But, Your Honor, in every city and every state the situation will be different. There are some cities where even though blacks and whites would naturally attend the same public school, state-mandated segregation forces them to attend separate schools.

PROF. MALTZ: Let me give you a concrete question, a concrete example, and ask if you believe it would violate the Constitution. Suppose the Board of Education of Topeka, Kansas, today took a person who didn't have any notion about what the racial distribution of students was in Topeka and asked that person to draw a tic-tac-toe board to place over the city, and it just turned out that that tic-tac-toe board ended up with most of the students in Topeka still attending segregated schools. Would that be unconstitutional, assuming that we also ordered the Board of Education to equalize the per-pupil expenditures in every school in the city?

PROF. CHEMERINSKY: If there were still a law that mandated the segregation—

PROF. MALTZ: The law has been—the law is off the books, and that's what they did. Is that constitutional?

PROF. CHEMERINSKY: Your Honor, I want to emphasize how very different that is than the cases before the Court today.

PROF. MALTZ: I understand that's different from the cases before the Court. I'm asking you whether it would be constitutional or not.

PROF. CHEMERINSKY: Your Honor, if it could be shown that the way in which the segregation existed was a function of and a reflection of state choices that caused segregation, then it would be unconstitutional.

JUDGE JONES: Counsel, let me bring you back to the real world.

PROF. CHEMERINSKY: A good place to be.

JUDGE JONES: There are several cases before this Court dealing with this very issue. You've made reference to the Virginia case, *Bolling v. Sharpe*, *Briggs v. Elliot*. Those issues, you've indicated, all involve *de jure* segregation. Now, can we take note as we work our way through this very difficult and complex issue—can we take, for instance, the record in Clarendon County, South Carolina, *Briggs v.*

2003]

BROWN MOOT COURT ARGUMENT

1355

Elliot? For instance, the comment was made by my colleagues here that people walk to school and they come home for lunch.

Does that square with the record in Clarendon County where black children were denied transportation, had to walk on muddy roads, while white students in buses went by and splashed them with mud and they—the school buildings were shanties with leaking roofs while white students were in first-class shiny buildings? Is that not part of the phenomenon that you are presenting to this court?

PROF. CHEMERINSKY: Exactly, Your Honor. The point of that example is why separate education never will be equal. . . . All of your examples indicate, Your Honor, as to why the only way to achieve equality in education is through a unitary school system where whites and blacks are treated the same. That's why separate can never be equal in the context of American public education.

JUDGE JONES: Counsel, have we not in prior cases dealt with the question of equalization of teachers' salaries where there were these great disparities between the salaries of teachers who taught black children and teachers who taught white children, and have we not ruled that that kind of disparity was unconstitutional?

PROF. CHEMERINSKY: Yes, Your Honor, but if this Court just focuses on equalizing resources, then there truly would be endless resistance and endless litigation, as every single tangible aspect of education would be litigated over in each city in terms of whether it's equal.

JUDGE JONES: So, you're asking us the state of the fundamental proposition now, that state-mandated segregation of education violates the Fourteenth Amendment's equal protection clause.

PROF. CHEMERINSKY: Yes, Your Honor.

PROF. RASKIN: Counsel, let me bring you to another part of the country, where you're standing, in Washington, D.C. The Congress has authorized and overseen the segregation of public schools in the District of Columbia, and the federal government makes the argument that even if you're right as to the Fourteenth Amendment, that applies only to the states. It's only states that shouldn't deprive persons of equal protection of the laws. What do you say as to the issue in *Bolling v. Sharpe*, which is even if you're right as to the states, the federal government certainly has the power to segregate schools in the District?

PROF. CHEMERINSKY: No, Your Honor, this Court has said on many occasions that equal protection applies to the federal government, even though there's no specific provision in the Constitution that says so. I would point this Court, for instance, to

the World War II cases involving Japanese internment, and *Ex parte Endo*, where the Court held internment camps were unconstitutional as not equal protection.²⁵ Even though, in *Korematsu*, this Court upheld the evacuation of Japanese-Americans,²⁶ the Court specifically said that racial classifications by the federal government must be subjected to the most rigid scrutiny.²⁷

JUDGE REID: But, counsel, here in the District of Columbia you have a different problem, do you not, because we have a constitutional provision that makes the Congress exclusive legislative authority for the District of Columbia,²⁸ and if Congress says that the schools shall remain segregated, then how can this Court say otherwise?

PROF. CHEMERINSKY: Because Congress must act in compliance with the Constitution. This Court said in *Marbury v. Madison*, and I quote, it is “the province and duty of the judicial department to say what the law is.”²⁹ And if this Court says that state-mandated or federally mandated segregation is unconstitutional, then Congress must act to bring the law in accord with this Court’s interpretation of the Constitution.

PROF. RASKIN: Does that mean Congress must give people in the District of Columbia the right to vote and be represented in Congress?

PROF. MALTZ: Change history a little bit.

JUDGE REID: Does not the Fourteenth Amendment give to Congress the enforcement authority with respect to equal protection?

PROF. CHEMERINSKY: Of course, Your Honor. Section 5 does allow Congress to enact laws, to enforce the Fourteenth Amendment, but that does not mean that Congress has the exclusive authority to interpret the Fourteenth Amendment. For to hold that would be to deny this Court its fundamental role in the American system of government in deciding what the Constitution means.

25. See *Ex parte Endo*, 323 U.S. 283, 304 (1944) (holding that a U.S. citizen of Japanese descent was entitled to unconditional release because the War Relocation Authority had no authority to subject citizens who were concededly loyal to its internment procedure).

26. See *Korematsu v. United States*, 323 U.S. 214 (1944).

27. See *id.* at 216 (noting that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect” and “courts must subject them to the most rigid scrutiny”).

28. See U.S. CONST. art. I, § 8, cl. 17 (providing that Congress shall have the power to “exercise exclusive Legislation in all Cases whatsoever” over the District of Columbia).

29. See *Marbury v. Madison*, 5 U.S. 137, 176-77 (1803).

Petitioner submits to the Court that this Court should say clearly and for the entire nation to understand that separate but equal is unacceptable in American public education, that it's time to ensure the desegregation of previously segregated schools and time to ensure the equalization of resources for every child's education.

JUDGE JONES: Counsel, I'm unclear as to whether—if the contention of your adversary with the response—whether we are writing on a clean slate. What do we do with *Gaines v. Missouri*,³⁰ *Murray v. Maryland*,³¹ *McLaurin v. Oklahoma*,³² *Sweatt v. Painter*³³—those cases that really could be considered stepping stones in terms of interpreting state-driven segregation. How can they be just wiped off the slate and we start anew because we're dealing with elementary schools?

PROF. CHEMERINSKY: Your Honor, you don't need to wipe those off the slate. In each of those cases, this Court held that the separate schools were not equal. Missouri was telling African Americans who want to go to law school that they can only go in another state.³⁴ Oklahoma was saying that it would admit African Americans to their law school but they would sit in a separate place.³⁵ Texas was saying that they have an African American school as well as a white school, but by every tangible measure, it was unequal.³⁶

I think this court should base its decision on the lessons from those earlier rulings because I think they show that so long as there are separate systems, they will never be equal. Those cases did not overrule *Plessy v. Ferguson*. It's time for this Court to take that step and say that separate but equal has no place under the Fourteenth Amendment.

30. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (deeming unconstitutional Missouri's attempts to pay black students to attend law school out-of-state, rather than admit black students to its own law school).

31. *See Pearson v. Murray*, 169 Md. 478 (1936) (affirming the lower court's decision that a black student was entitled to admission to a state law school, where the state could not furnish equal facilities otherwise). Although not titled as such, this case came to be referred to as *Murray v. Maryland*. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 189 (1975).

32. *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950) (holding that black students who were admitted to previously segregated schools could not be forced to sit in segregated areas of the school).

33. 399 U.S. 629 (1950) (ordering a white segregated school to admit a black student because the segregated schools were not substantially equal).

34. *See Gaines*, 305 U.S. at 342-43.

35. *See McLaurin*, 339 U.S. at 640.

36. *See Sweatt*, 339 U.S. at 632-33.

PROF. RASKIN: Counsel, are you asking us to embrace in full then-Justice Harlan's dissent in *Plessy v. Ferguson* about color blindness?³⁷

PROF. CHEMERINSKY: Your Honor, I think Justice Harlan's dissent can provide guidance for this court. Justice Harlan would have said in *Plessy* that any law that mandates segregation of the races inherently is about a judgement in message that one race is inferior. Justice Harlan said such a caste system has no place under the American Constitution,³⁸ and that's what this Court should say in holding that laws mandating segregation are unconstitutional.

PROF. MALTZ: Mr. Chemerinsky, is that why four years later Justice Harlan stated quite clearly that he believed that segregated schools were constitutional in the *Cumming* case?

PROF. CHEMERINSKY: Your Honor, in the *Cumming* case,³⁹ the Supreme Court accepted, as they did in the *Gong Lum v. Rice* case,⁴⁰ the segregation of schools, but the Court did not, either in the *Cumming* case or in the *Rice* case, deal with that issue.⁴¹

PROF. MALTZ: It's clear—I agree with you that *Cumming* did not hold that, but Justice Harlan rather clearly stated that he also concurred in *Pace v. Alabama*,⁴² which had different penalties for interracial fornication. It seems to me that you read Justice Harlan too broadly. He says, color blindness in civil rights common to all people of the United States.⁴³ Where in Justice Harlan's jurisprudence do you see that public education is a civil right common to all people of the United States?

PROF. CHEMERINSKY: I'm out of time. May I answer.

37. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our constitution is color-blind, and neither knows nor tolerates classes among citizens.").

38. *See id.* ("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.").

39. *See Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899) (upholding a Georgia county's decision to use certain tax revenues to benefit only white schools).

40. *See Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding a state law that segregated Chinese American students from white students).

41. *See Cumming*, 175 U.S. at 543 (stating that, although it was said at oral argument that the problem in Georgia's school system was the requirement that white and black children be educated separately, the court would not consider that question because no such issue was made in the pleadings); *see also Gong Lum*, 275 U.S. at 85-86 (stating that the question of school segregation is within the constitutional power of the state to settle without intervention from the federal courts).

42. *See Pace v. Alabama*, 106 U.S. 583 (1882) (upholding a statute that provided harsher penalties for couples who marry or engage in sexual acts with persons of another race than for couples who are both of the same race).

43. *See Plessy*, 163 U.S. at 559 ("In respect of civil rights, all citizens are equal before the law.").

2003]

BROWN MOOT COURT ARGUMENT

1359

JUDGE KEITH: Yes, you may.

PROF. CHEMERINSKY: Here I would point you to the majestic language from Justice Harlan's dissent in *Plessy v. Ferguson*.

But ultimately, Your Honor, the issue before this Court isn't what Justice Harlan thought in 1896 or in 1900. It's not even what the framers of the Fourteenth Amendment thought. Education is the most important service the government provides today. Those who are denied adequate, equal education are forever injured. It is for this Court to say now, in 1953, that separate is not equal in public education.

Thank you.

JUDGE KEITH: Thank you very much. Mr. Bell, you may proceed.

PROF. BELL: Thank you Chief Justice Keith, and thank you to the Court.

Respondents come forward and say immediately that we agree with petitioners' point with regard to separate but equal violating the Fourteenth Amendment, and we also agree that all children should have equal resources. But respondents would go further and make three points. Number one is that the racial segregation petitioners maintain violates the Fourteenth Amendment, with which respondents agree, may best be remedied by strict enforcement of the separate but equal standard. Number two is that racial segregation has done harm to white as well as Negro children, and the remedy should encompass both. And, three, the decisions in these cases will affect, as the Court has suggested in its questioning, thousands of school districts and thus requires a carefully planned and executed remedy focused on correcting the damage that segregated schools have done and are continuing to do to both black and white children.

JUDGE REID: Well, Counsel, if the states have not strictly enforced the separate but equal doctrine to date, what is there that tells us that they will strictly enforce it so that the Negro schools can have the same resources as the white schools?

PROF. BELL: I think, as petitioner has indicated in his response to Justice Reid, that there has been little requirement that they enforce. In fact, some support that they not enforce. *Cumming v. Board of Education*, an 1899 case, is a great example of that.⁴⁴ The citing to a State Supreme Court in *Roberts v. City of Boston* when approving

44. 175 U.S. 528 (1899) (stating that local authorities should be given great discretion in allocating funds to segregated schools, and that the federal government should not interfere unless in extreme cases).

segregation in *Plessy v. Ferguson* is an example.⁴⁵ I suggest that if this court provides specific enforcement—and I can suggest three areas of that—it will continue what this litigation in the last few years has already begun. That is, many school districts fearful of what this Court might do have already begun the equalizing of the schools. I don't think that's enough, but it's an indication that there is a different direction for writing about equal education opportunity than that in the petitioners' argument.

JUDGE REID: So, is it your thought that this Court would decree to state legislatures how they should spend money for schools?

PROF. BELL: Absolutely not. I don't think it's either necessary or, as you point out in your earlier answer, necessarily effective. It seems to me, though, that while we don't have much of a record on it, I think we can take judicial notice that segregation has been harmful to white children in any number of ways. The fact that there are two school districts means that funds that could go to effectively educating everyone have gone toward making separate, albeit unequal, schools. Second, that it has provided white children—we talk about the harm that it's done to the black children—but to give white children the sense that they are entitled to a superior position based on their worth rather than based on the mandate of law certainly has a harmful effect on them, as it has in the past and will continue to have. Therefore, if this court—recognizing separate but equal has done serious damage to black and white children—orders school districts to come up with a norm of what a school district should be doing and what other school districts are doing of a similar size and financial resources, provides that information to all parents—not just black parents—and orders those school districts within a very reasonable period of time to upgrade, then the pressure will be from white parents, as well as black parents, to improve the schools.

All parents want the best for their children. It is that the leadership in the south have, over time, given whites the sense that—if they are in a better position than blacks, if they can relate on the basis of race to people making the decisions—that everything is okay, and anything that departs from that is going to be to their disadvantage.

45. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (quoting *Roberts v. City of Boston*, 59 Mass. 198 (1849)). *Roberts* was a Massachusetts state case upholding segregation in public education.

2003]

BROWN MOOT COURT ARGUMENT

1361

JUDGE KEITH: Mr. Bell, I would like to know how you would respond to Judge Waring's dissent in the *Briggs v. Elliott* case⁴⁶—at least this portion of it. He said, "From their testimony, it was clearly apparent, as it should be to any thoughtful person, irrespective of having such expert testimony, that segregation in education can never produce equality and that it is an evil that must be eradicated."⁴⁷

PROF. BELL: I agree with the Judge. The question is what we're doing often enough is confusing constitutional harm—because there has been constitutional harm, and educational harm, and how you go about remedying that educational harm. I don't think the school boards want to stand here today and deny that there's been educational harm. We don't want to repeat an earlier counsel who argued on behalf of the boards that the *Plessy* doctrine has been around so long, has been so long followed, has been so long adhered to, that it deserves a period of repose. We reject that. JUDGE JONES: Counsel, that segregation is, *per se*, inequality. Do you agree with that?

PROF. BELL: I don't disagree. The question is what petitioner is asking is that segregation—is suggesting that segregation is one bad weed in an otherwise beautiful racial garden and that this Court can, with one swipe of its judicial hoe, wipe out that weed and bring about harmony.

The fact is that segregation is only the most recent of a long series of what I would call racial compacts in which white people gave up rights and opportunities in return for a sense—segregation now, slavery before—that they are superior to blacks.

They look like the people at the top. Slavery could not have gotten started unless the slave owners were able to convince the white yeomen that they had to stand together on the basis of skin color and keep the slaves from escaping or revolting. The fact is once slavery was established, white yeomen, white working class people were always going to be at a disadvantage.

JUDGE JONES: Well, what is your advice to this Court as to the remedy for that condition?

PROF. BELL: I think that we need—the Court needs to point out the harm—and we developed this more in our papers—that segregation has done to whites, as well as blacks, and order remedies starting with what I suggested in terms of having every school in the

46. 98 F. Supp. 529 (E.D.S.C. 1951).

47. *See id.* at 547-48 (Waring, J., dissenting).

districts covered here and in subsequent districts that may come before the Court to equalize those facilities.

Number two, we need to—we need to recognize that those school boards are put in place on the basis of maintaining segregation. We need to—and I think the Court can do this as a part of enforcing separate but equal and require that each of these districts appoint from the black community at least one representative, based on the size of the black community, to that school.

Third, I think that this court should order monitoring committees; one [member] from the black community, one from the white community, one selected by a vote [of the first two], who will report to those district courts frequently and with this Court ordering those district courts to enforce the three areas that I've just discussed.

JUDGE REID: But, counsel, as you know our job is not as sociologists or as politicians. Our job is to interpret the Constitution, and I guess what's puzzling me a bit about your argument—maybe not puzzling but bothering me a bit about your argument—is that the Fourteenth Amendment historically has been chipped away, giving it less meaning than was presumed at the very beginning when the Amendment was drafted. If we buy into your line of reasoning, doesn't that even further weaken the Fourteenth Amendment to the Constitution?

PROF. BELL: Judge Reid, I think my approach, with the Board's approach, will resurrect, will give a new [viability] to the Fourteenth Amendment that, as you indicated, after its initial passing was soon relegated to the background, at least as far as black people are concerned. It was a great help to railroads and trusts and banks, you see.

But after those early cases, as you pointed out earlier, like *Strauder* that the states ignored, but it's really had no value for black people until, say, the 1940s with some of the voter cases.⁴⁸

PROF. RASKIN: Professor Bell, if you're right about the history—and I think you are, and we're writing, we're inscribing a decision on the background of centuries of slavery and racial oppression and white supremacy and segregation—why would you stand here to defend separate but equal spending as opposed to a compensatory remedy where we would order the school districts to spend a lot more

48. See, e.g., *Smith v. Allwright*, 321 U.S. 649 (1944) (holding that the right to vote in a primary election for congressional candidates is protected by the Constitution and may not be abridged on account of race); *United States v. Classic*, 313 U.S. 299 (1941) (finding that acts of election officials who willfully altered and falsely counted ballots deprived voters of their constitutional rights).

2003]

BROWNMOOT COURT ARGUMENT

1363

on the black schools than the white schools in order to rectify the historical injustice?

PROF. BELL: I guess Justice Holmes said that “the law is not simply logic; it is also experience.”⁴⁹ I think “experience” means “politics.” I think that as a starting point, if we can get these districts to move all schools up to a certain norm, then that will get us going on the educational [aspects of the] decision as the petitioners urge it . . .

It will be a great symbol to Negroes who over the years have gotten very little from the government or the courts. But I urge that both the school boards and the petitioners need to hear more than just the symbol that, as some of you have suggested, is likely to be ignored. The reason the petitioners are here, the reason the school boards are here, is precisely because other government areas—the executive, the legislature—have not—

It is not in some sense fair that we be here, but we also recognize that courts, in interpreting law, in a sense make law, and here I don’t think with the suggestions that I’m making there need be very much of making law, [but rather enforcing the separate but equal standard. This is clearly] within your enforcement powers. [There is likely to be] far less resistance than if [the Court tries] to strike down segregation with one swipe of the judicial hoe. . . .

PROF. MALTZ: Mr. Bell, I have one problem with your remedy, as I understand it. Maybe I just do not understand it. As I understand the remedy in your papers, it would basically tell Mississippi that they had this increased per-pupil spending to the level of, for example, New York. Is that—

PROF. BELL: No.

PROF. MALTZ: Then I misunderstood it.

PROF. BELL: No, the norm would be established from other districts around the country with similar financial resources.

PROF. MALTZ: Oh, similar financial resources.

PROF. BELL: Right, similar size.

PROF. MALTZ: Well, then my—I still—I understand it better now, but I still have a formal question, and the formal question is that it says no state shall deny to any person equal protection of the laws but seems to compare two people in Mississippi, that it says in the state of Mississippi you should treat two people in Mississippi equally. It doesn’t—I don’t understand how it says that you should treat a person in Mississippi, a fourteen-year-old child in Mississippi equally

49. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

to a fourteen-year-old child in the state of New York in a county with similar resources, et cetera, et cetera, et cetera, which may have a different tradition with respect to public education generally. Could you speak to that, please?

PROF. BELL: I think that one of the things about equality and the concept of equality is it is so movable, so flexible that it often—particularly as petitioner and his group have tried to utilize it, the equal protection clause is slippery. It moves back and forth. I would suggest that in this instance, the Court has flexibility to require Mississippi districts to be the equal of other similar districts rather than New York.

PROF. MALTZ: I still have a—I understand that the problem—that the issue of equality generally is a slippery issue, but I guess my problem is with the text, which seems to ask the state of Mississippi to compare two people in Mississippi.

PROF. BELL: Well, I think the textual problem is not insurmountable. The framers in their wisdom or otherwise have made those clauses that we most look at very general, very—say it—vague, and that this Court has had to give over the years meaning, usually in precise situations, precise cases, and I suggest that this—is it ideal? Probably not. But as compared to what petitioners are seeking, I think it's much more manageable by this Court than simply striking down *Plessy v. Ferguson*.

JUDGE FRIEDMAN: So, your argument is that separate but unequal violates the Fourteenth Amendment, but separate but equal does not violate the Fourteenth Amendment? So long as there's equality of resources spent and services provided it's okay to have separate schools?

PROF. BELL: I said at the outset—

JUDGE FRIEDMAN: I know what you said at the outset, but then I thought some of what followed was inconsistent with what you said.

PROF. BELL: No, I still—I still think that the Fourteenth Amendment is violated by segregated schools. My question is how do you go about—given the history of segregation and slavery that went before it—how can you go about it so that there's at least a possibility of gaining compliance?

JUDGE FRIEDMAN: So, is the notion of ensuring or directing or mandating equality of resources and services and quality of education an interim step toward something else?

PROF. BELL: I think yes, but I think something else. I think one of the arguments the petitioner has made—not so much this evening but in some of the earlier papers, the earlier cases—is that blacks

2003]

BROWN MOOT COURT ARGUMENT

1365

deserve relief because we are a damaged race. There's no doubt that segregation, as I suggested earlier, has harmed both blacks and whites, but it is also true that blacks have done amazing things in education despite the fact of unequal facilities, unequal salaries, and what have you. We can certainly look at the Dunbar High School in Washington and its equivalent in Baltimore and Atlanta and other major cities. But it's not only that. Even in the poorer schools, what black schools were providing was a model, and what I urge this Court is not to treat those schools as though they are nothing but, rather, to build on the strengths they have with the resources and all. I suggest, Justice Friedman, that once those schools are shown to be functioning, and we have other experiences like this, white parents will not only want to be admitted with their children but will insist on being admitted.

JUDGE FRIEDMAN: Well, is the thrust of your argument then that courts use their power and authority in limited ways and if we do a little bit then society itself, or the legislative branch of government, will take the next steps?

PROF. BELL: I think that's right. I think that—

JUDGE JONES: Counsel, if that's true, why should we not fashion a decree that would direct lower courts and other courts to use their equitable powers in a way that would address the myriad of circumstances that would be presented, which would—

PROF. BELL: I think—

JUDGE JONES: Pardon me.

PROF. BELL: I'm sorry, go ahead.

JUDGE JONES: Which would include the power to deal with recalcitrants and schemes of evasion.

PROF. BELL: That is in the context of striking down *Plessy v. Ferguson*.

JUDGE JONES: Providing remedies, providing remedies. If I understand you, you were saying that you concede that segregation is—segregated schools are—

PROF. BELL: Are harmful and unconstitutional.

JUDGE JONES: What you're pressing us to do today is to deal with the issue of remedy to correct the effects of that system.

PROF. BELL: I'm suggesting that the remedy that petitioners seek is one that is going to not deal effectively with the—with the harms. Early on, and probably some of you did, I used to be very exasperated with Justice Oliver Wendell Holmes writing that case, I guess 1903,

Giles v. Harris.⁵⁰ You remember, that's the case where black people from Alabama had come up seeking court orders to protect their right to vote.⁵¹ Holmes said—in rejecting their petition, he said “If the petitioners are right and that all the forces of the citizenry and the law are opposed to Negroes voting, then there is nothing this Court can do.”⁵² I thought that was an awful decision. But as I get older and more experienced with just the depths and extents of racial domination of this country, it seems to me, reluctantly, that he was right, and I think that we can learn from that decision not to do nothing, but to do that which is going to move the situation along.

JUDGE FRIEDMAN: If something's unconstitutional, if something is clearly a violation of the provision of the Constitution, how can we say it's unconstitutional but our remedy is to say it's half unconstitutional or twenty-five percent unconstitutional and you must do a little bit now and we'll check back with you in ten years or we won't check back with you at all. We'll let the state legislatures of Mississippi and Alabama and Georgia deal with it ten years from now.

PROF. BELL: But isn't that what will likely happen if you grant the petitioners' relief? Isn't it when you finally hit this—because as soon as you issue the order, the outcries of resistance and opposition will be mammoth, and the likelihood is—not predicting—but the likelihood is this Court is going to, in some general language, send these cases back to the district courts to deal with the administrative problems and what have you. But in doing that, it's going to give the only opening these folk need, particularly the politicians, to raise the kind of resistance that's going to prevent any desegregation and is going to halt the slow, but at least steady, equalization of facilities that's been going on.

JUDGE FRIEDMAN: I'll stop after this, but it seems to me you're suggesting on the one hand that if we go slow we can rely on those very same state legislatures to, on their own—you know, the light bulb will go on one day and they will say, “Now we are going to go the next step,” but if we—but if we demand too much too quickly they will resist forever.

PROF. BELL: Let me answer it this way. If you look—what I don't want, Judge Friedman, is for this Court to repeat the Emancipation Proclamation. I don't want *Brown* in the twentieth century to repeat

50. 189 U.S. 475 (1903).

51. *Id.* at 482.

52. *See id.* at 488 (“The bill imports that the great mass of the white population intends to keep blacks from voting. . . . If the conspiracy and the intent exist, a name on a piece of paper will not defeat them.”).

2003]

BROWN MOOT COURT ARGUMENT

1367

the Emancipation Proclamation, which was a great strike symbol that black people, Negroes, should be free—followed by nothing, you see. I want this Court to be able to take seriously these matters and to move this process along in the light of the depths of the segregation and racism that is existing.

JUDGE REID: Counsel, one thing is not clear to me with respect to your argument and the equalization point. If we are to look at public education in this country after we've issued a decree along the lines that you suggest, would we still have a dual system where you have strong Negro schools with strong Negro superintendents on the one hand and white schools with white superintendents on the other hand but the expenditures would be equal. Is that your—

PROF. BELL: I think in the short run along the monitoring systems that I've suggested give the courts information on, on an ongoing basis, that would be the case. But there would be a movement—

JUDGE REID: If that's the case, doesn't it suggest to Negro people in this country that their aspirations must, of necessity, be limited? They can rise to be head of the Negro school system but they may not be—they may not aspire to be head of an American school system—a Mississippi school system.

PROF. BELL: I don't know, Justice Reid, that a white school is an American school, although many people out there want us to have that view. You see, the black schools may in fact be better than the white schools. I think that—let me say this. Every major civil rights advance in this country—the Emancipation Proclamation, the Post-Civil Rights, Post-Reconstruction, or the Reconstruction Amendments—all of them, and other things as well that have come with—those in the white power structure recognize it is in their interest.

There are arguments in the brief by the government in this case that if you strike down *Plessy v. Ferguson*, our foreign policy is going to be—is going to be improved because we are having great difficulty with winning over the hearts and minds of third-world people who point to the segregation in this country and say, "Why shouldn't we follow the communist route?" We are having great problems in this country with what many fear is subversion. In fact, this decision as sought by the petitioners is going to be much more an anti-Communist than it is going to be an educationally oriented decision, and I think that we should take the knowledge that we have gained about what gets people to function on behalf of disadvantaged—

PROF. RASKIN: Counsel, doesn't that argument, which I think will be articulated one day by a very great law professor, the interest-convergence theory argument⁵³—doesn't that argument cut precisely against your position that you're representing here today? In other words, if we really want the white community to invest in public schools generally and in public schools where African American children go, then we need to have them integrated, but if we don't have that convergence of interest, if they really are separate, as Justice Reid suggested, then it will be a constant struggle and a losing struggle to try to get the white community, which is the majority, really to invest in those schools.

PROF. BELL: It may be a losing struggle either way we go because of this [country's racial history.] I'm simply suggesting—and I thought your question was going to go to the point—that initially the petitioners' argument, combined with the value of the decision they seek for our foreign policy and our concern about subversion at home, fit the interest-convergence model. The problem with it, as with the Emancipation Proclamation, as with the early civil rights—

PROF. RASKIN: Let me stop you here for just one second because I have a sort of different reading of the Emancipation Proclamation. Wasn't the problem with it that it applied on its terms only to slaves in the south where Lincoln had no power but it excluded from its terms slaves in the border states and in the northern states. It wasn't until we—

PROF. BELL: That's right.

PROF. RASKIN: —amended the Constitution—

PROF. BELL: But it would not have been issued at all, and Lincoln admitted as much, had it not been of help in disrupting the war forces in the south, keeping England and France out of coming in on the side of the confederacy and freeing up all of these Negroes, former slaves, who had left, enlisting them, and enabling them to make a major contribution to the winning of the Civil War.

So, you have that initial thing, but after the interests change and whites move on to something else, then the blacks are left below, and I'm afraid that happened with the Emancipation Proclamation. It certainly happened—we didn't point it out—that the Thirteenth, Fourteenth, and Fifteenth Amendments were really motivated by the fact that the Republicans in Congress were afraid that they could win the war and lose the peace if they let all the southerners back into

53. See Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524-25 (1980) (arguing that civil rights advances for blacks come about only when they converge with white self-interest).

Congress, and making the requirements—particularly the Fourteenth Amendment, which was almost kind of blackjacked over them—making that a requirement for them to come back.

But after several years, the interest in the freedman was dropped, and then we got the Hayes-Tilden compromise,⁵⁴ and after that it was an absolute disaster. What I am suggesting is that I see a short-term enthusiasm if the petitioners' argument prevails in this Court. But I see a great deal of resistance and, more importantly, a longer-term loss of interest in matters of school desegregation or equalization.

JUDGE JONES: Professor Bell, I have two questions I wish to have you address. Number one, you've referred several times to the concern for resistance and social reaction by the majority. Do you foresee that resistance taking the form of violence that might require at some point a President of the United States to send in the paratroopers to, say, like Little Rock or—

PROF. BELL: I think in areas where judicial authority is flaunted, the President, even if he's not for school desegregation, and this Court will assert itself. But unless—

JUDGE JONES: But you would support—

PROF. BELL: Oh, certainly. Certainly.

JUDGE JONES: Okay. Now, the second point is if we go where I think you're taking us, would not we be required to close our eyes to some political realities, given that the legislatures who appropriate the funds and who control the fisc are dominated by majorities who would perhaps be hostile to the very notion of equalization of opportunities for persons of color?

PROF. BELL: My time is—

JUDGE KEITH: You may proceed, counsel, unless you don't want to answer the question.

PROF. BELL: There's a former—there is an individual who became general counsel of the NAACP, and one of his arguments, as I understand it, was that we had to go ahead with integration because green followed white, and that that was the reason for doing it. I think that our history has indicated that while the sense of white domination is strong, the sense of pocketbook interest in getting elected is stronger, and if we have white parents demanding that their schools be brought up to snuff, and now they learn that they really

54. See Derrick Bell, *Brown v. Board of Education: Forty-five Years After the Fact*, 26 OHIO N.U. L. REV. 171, 175 (2000) (explaining that, under the Hayes-Tilden Compromise, Hayes won the disputed presidential election of 1867 over Tilden, and in return Southern Democrats were promised that federal troops would be withdrawn and that "domestic issues" would be left to the South).

aren't because they're so busy comparing them with the blacks, then I think legislative pressures will be brought to move the process along.

One last thing is that I predict that [if the Court grants petitioners' relief for desegregation, the resistance will be tremendous.] Civil rights attorneys handling these cases in the south will be frustrated as school board members get up on the stand and lie about what they've been doing, and then those same school board members during the break will saddle over to the civil rights lawyer and say, "Heh-heh-heh, you know I had to say that but I'm glad you are here because we can't afford two separate schools."

Thank you.

JUDGE KEITH: Each side will have ten minutes for rebuttal.

PROF. CHEMERINSKY: I think it's important at the outset to clarify where petitioner and respondent agree and then where we disagree.

Both petitioner and respondent agree that this Court should rule in favor of the petitioner and hold that state-mandated segregation of race in education is unconstitutional.

Petitioner and respondent both agree that segregation is harmful for both African American and white children and for all of society.

Petitioner and respondent certainly agree that this Court should order as a remedy the equalization of expenditures for all students.

But where petitioner and respondent disagree is that respondent would say that separate but equal is constitutional whereas petitioner would say separate but equal can never be constitutional and consistent with the Fourteenth Amendment. I would make three points in terms of why separate can never be equal. First, history shows that separate never will be equal. Ever since the Civil War, whenever there have been separate school systems they have been unequal. Now, respondent says that there are many excellent African American schools, and of course respondent is correct, but the reality is, as Justice Jones pointed out, the record in the *Briggs* case before this Court shows that three times as much is spent in South Carolina on a white child's education than an African American child's education.⁵⁵ Shouldn't a black child have a chance to be as disappointed by the failure of money as a white child is? The reality is that in South Carolina the per-pupil ratio is twice as great in the African American schools as in the white schools, and the reality is the per-pupil ratio does matter with regard to education.

55. 342 U.S. 350, 351 (1952) (recognizing that the court below found that the educational facilities for African American pupils were not "substantially equal" to those provided to white children).

PROF. RASKIN: But, counsel, the respondent agrees with all that. He is saying that this Court should order equal spending and he's suggesting that what you're proffering is sort of a feel-good solution where we will maintain a pretense that separate but equal has been abolished but in truth will allow segregation to take place as a *de facto* matter and we won't even have the benefit of guaranteeing economic equity among the schools.

PROF. CHEMERINSKY: Respondent and petitioner are in total agreement that this Court should order equalization of expenditures and all tangible resources. But the question is how can we achieve it. As petitioner submits to the Court—

PROF. RASKIN: When you say "equalization," you're asking for integration, so I'm not sure what you mean by that because most school districts are funded according to property taxes, and in poor districts there's much less money that gets raised than in richer districts, and you're saying we would have to equalize among the rich and poor districts?

PROF. CHEMERINSKY: Yes, Your Honor, but that of course is not the issue before this Court. I think petitioner and respondent would both agree that there must be an equalization of expenditures and all tangible resources and that relying on property taxes to cause equality isn't acceptable.

But here's the difference between petitioner and respondent. Respondent would maintain a dual system of schools—one for whites and one for blacks. But in this society it is whites who are much more likely to control the political process than are blacks. Then funding for the black schools would always depend on the largess of whites who are in charge, and whites would never have a sufficient interest in the right of equality for the African American schools as they haven't through history.

JUDGE FRIEDMAN: Yes, but part of the remedy he proposes is that the Court direct the creation of school boards that are made up of one black, one white, and a person they can mutually agree upon to be a monitor that would report back to the Courts made up of a similar mix—so that in itself, whether you think it's sufficient or not, is a huge step ahead of where we are today in most school districts.

PROF. CHEMERINSKY: Petitioner would agree with every one of those proposals submitted by respondent. But petitioner would say this Court needs to go further and create unitary school systems so that the education of every child, black and white, is linked together because only a unitary system can do that.

Second, Your Honor, it's important to note that maintaining separate schools would continue to transmit a message of African American inferiority. The reality is everyone would know why there are two separate school systems. There would be two separate school systems because of a legacy of whites who control state legislatures mandating segregation of the races.

JUDGE REID: Counsel, I have one last question. For us to rule in your favor, is it essential that we explicitly overrule *Plessy v. Ferguson*?

PROF. CHEMERINSKY: No, it is not essential that this Court should do so. It's not essential because *Plessy* did not deal with separate but equal in the context of education. No decision of this Court has ever considered that directly. But, Your Honor, *Plessy v. Ferguson* should be overruled because *Plessy v. Ferguson* maintains a system of apartheid in this country that is inconsistent with the core principle of the equal protection clause of the Fourteenth Amendment.

Finally, Your Honor, if you follow the approach of respondent and allow there to be separate schools, all of the harms that petitioner identifies for white and black students will be maintained. The appendix submitted by petitioner in this case shows you the sociological and psychological evidence that points to the harms that come when there is separation of schools. The only way to deal with those harms is to end the segregation.

PROF. RASKIN: Is there a constitutional right for every student to go to an integrated school?

PROF. CHEMERINSKY: No, Your Honor, there's a constitutional right that states not maintain segregation, that the legacy of segregation be uprooted root and branch. The requirement that the Constitution imposes is that the constitutional wrong be remedied. The constitutional wrong is segregation, so the remedy must be desegregation and equalization of educational opportunity.

PROF. RASKIN: But I guess my question is why—it seems you might not be going far enough. If the message sent by segregated schools *de facto* is one of inferiority or apartheid, then why should there not be a constitutional right for all students to go to integrated schools?

PROF. CHEMERINSKY: Your Honor, petitioner would not disagree with that. Petitioner admits that this Court need not go that far in its remedy today, that the remedy today need only hold that state-mandated segregation is unconstitutional, that petitioner and respondent agree equalization of resources is essential and that the dual system of education must be dismantled immediately.

2003]

BROWN MOOT COURT ARGUMENT

1373

Respondent suggests that this Court is limited in what it should do, so its aspiration should also be limited. Here as well petitioner and respondent disagree. If this Court holds today that separate but equal has no role in education, and it remains true to that vision in decades to come, there is no reason why we cannot achieve equal educational opportunity.

Courts have the ability to fashion remedies to accomplish desegregation. In areas where there's a separation of cities and suburbs along racial lines, inter-district remedies can be ordered. Where there's inequality of funding between cities and suburbs, such as you mentioned, Justice Raskin, this Court can hold that such inequality is violating group protection. If this Court stays true to that vision, it will not only be a moral leader, it will be true to the responsibility as a judiciary to say what the Constitution means and to say that segregation is inherently discrimination and a violation of the Fourteenth Amendment.

Thank you.

PROF. BELL: I think it was Ella Fitzgerald who made popular the song "It ain't what you do, it's the way that you do it. That's what gets results."⁵⁶ I think if there is—if there is a difference, as petitioner seems to think, between us, it isn't what should be done, it's how you go about doing it. Simply waving the flag of equality will not do it. I would predict in years to come desegregation orders may require racial balance and we will go in as the kids go in the door and we'll see black kids and white kids and our hearts will thrill. But then when we get into the school, we will see that most of the black kids have been shifted over in one section, in one set of classes, and most of the whites in another. We can go back to court, as it likely will happen. But the desire to maintain segregation—if that is what is perceived is in their interest—is very, very strong, as we've seen.

We have the advice of one of the great men of the twentieth Century, W. E. B. DuBois, who over his long life went back and forth on many issues, including education, but in his famous 1935 essay, he said, "Black children need neither separate schools nor integrated schools. What they need is effective education."⁵⁷ So I think that the absolute requirement is how to bring that about.

PROF. RASKIN: But, counsel, you don't deny that the major, the lead-in groups in the black community are on the side of the

56. Ella Fitzgerald, *Tain't What You Do (It's the Way that Cha Do it)*, on THE EARLY YEARS—PART 2 (GRP Records 1997).

57. W. E. B. DuBois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935).

petitioners in this case—right?—and are arguing for precisely desegregation of the schools?

PROF. BELL: Oh, yes. No, I don't disagree with that at all. But the—and I think that what happens—and it certainly happened to me when I went in the south for the first time—is segregation seemed like the greatest evil ever. I was afraid, even wearing my lieutenant's uniform and the bars all shined up, that I could be knocked off the street by any white man who came along and I'd have no real effective remedy. That's how—that's why striking down *Plessy* appears so important. But one of the initial counsel, Robert L. Carter, counsel for the petitioners, said later that segregation seemed like the evil. We learned later that it was only a manifestation of the evil, that the real evil was racism, and it could survive and function and grow in many different ways. I think we need to keep that in mind.

Let me end, if I may, with a story of a man many people remember, attorney Robert Ming, from Chicago. In 1960s, Ming was hired by Martin Luther King's group to represent King who had been brought up on charges of violating the Alabama income tax law, and the basis of the charge was that King was not paying taxes on all the money that went through his bank account. Well, some of that money, of course, was SCLC money, what have you, but they said "Oh, boy, we got it."

So, Ming went down and he represented King. He didn't worry about jury discrimination. He didn't argue that King was being persecuted by the hostile forces in Alabama. Rather, he pointed out to the jury, and he made sure that there were as many businessmen on it as possible, that King was being prosecuted because all the money went through his bank account.

So he argued—he said, "If you want the government of this state to set your tax rate based on all of the money that goes through your bank account, then you fine this man and enjoy it." The jury came back within about an hour—"not guilty."

Black people have always had to use the knowledge of how the system works, have had to use it in terms of not being guiled, and I think the Court, sitting there alone—no help from the executive, no help from the legislature—has to look at this overall issue and bring to it the kind of knowledge that the black folk have had to have to survive.

You know, it's precisely because of the unstinting faith in this country's ideals that Negroes deserve better than the expression of merited, denied fraternalism no matter how fervently sought by the petitioners, no matter how well intended by this Court, because it will

2003]

BROWN MOOT COURT ARGUMENT

1375

serve as a sad substitute for the needed empathy of action when a history of subordination of both races is to be undone.

Thank you.

JUDGE KEITH: Thank you very much. It's my understanding that the Court will now—is that right?—invite questions from—

PROF. WERMIEL: Well, if the members of the bench want to make some comments, we would certainly do that. If not, we could open it up to questions.

PROF. RASKIN: What's the pleasure of the Court? Well, I think we should just congratulate them on a splendid performance, both of them.

(Applause)

PROF. RASKIN: That also goes for the outstanding job counsel did. I want to thank both of you.

All right, we'll open it up now for any questions? I'm sure. Judge?

JUDGE KEITH: I'd ask that you come up with the microphones in the aisles, please.

AUDIENCE: I wanted to probe the approach that Professor Bell has taken with respect to the fact that time and serious equalization and provision of effective education to African American children.

It seems to me that much of the problem with this notion of racial superiority, white supremacy, that has so permeated, that was the foundation of *Plessy*, that is a result of the lack of interaction, racial isolation in many places where white people and black people are. It just was isolation.

What is it about the provision of effective education on a segregated basis that would have led, in your view—that would lead, in your view—to the eventual desegregation of schools?

PROF. BELL: Or this society.

AUDIENCE: Or this society. Thank you.

PROF. BELL: You know when I—

AUDIENCE: Professor Bell, would you repeat the question so we all could hear it, please?

PROF. BELL: She wonders if the races are still going to be isolated, how will we ever reach that integrated society that everybody talks about. Is that—

AUDIENCE: Yeah, that's—you know, with effective education for African American children, equalization of their schools.

PROF. BELL: You know, my one best-selling book now ten years old, *Faces at the Bottom of the Well*,⁵⁸ has as its subtitle, "The Permanence

58. DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF*

of Racism,” and I think that this society is so much of its stability is based on white folk thinking that they are superior. What did C. Vann Woodward say? He said something like, “It must take a heck of a lot of racism in the bosom of the white man to feel so superior to a black while he’s working for a black man’s wages,”⁵⁹ you see.

So, this is deep. It goes way down, and we’re not going to be able to overcome it. But that is not a discouraging thing, it’s a reality thing. When the people at AA, as I understand it, go to their meetings and get up and say, “I am an alcoholic. I will always be an alcoholic. But today I’m going to try to get through the day without taking a drink.”

That’s an uplifting thing, so that when we—particularly those of us in a disadvantaged group—say racism is permanent, then we can accept—or, not accept—we can deal without being bowled over the constant hammering on those things that we care about, those people that we care about, and we can keep on fighting.

One of the reasons it’s sort of an advantage over the petitioner is we do have fifty years of trying to do what petitioner argued when I tried to do it. I supervised 300 school desegregation cases and I thought my place in Heaven was secure. I thought I was doing God’s work, you see, and I came to realize that my ideals for integration and my clients’ interests for education had moved apart, and it took a long time for some of my NAACP colleagues to come to that point—some of them may not have come to it yet. Give them time.

We now have as many or more separate schools than we did in 1954, and if anything the thing is growing, you see. That’s the unhappy news. The happy news is that black educators and social scientists are recognizing that it is possible to have effective education in black schools, even with inferior facilities if you aim the education for the needs of those children.

What’s that old education expression? “You take the kids where you find them and move them as far as they can go.” So, what I was trying to do in my argument was to try to take that knowledge, go back, and make an argument that school boards would never have made but which they should have made.

AUDIENCE: Good evening, my name is Jesse Fenty. I’m a second-year student here at American. This question is for Professor

RACISM (1992).

59. See C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH 1877-1913, 211-12 (Wendell Holmes Stephenson & E. Merton Coulter eds., 1951) (“It took a lot of ritual and Jim Crow to bolster the creed of white supremacy in the bosom of a white man working for a black man’s wages”).

2003]

BROWN MOOT COURT ARGUMENT

1377

Chemerinsky. I was wondering why you didn't use more of the sociological evidence that was presented in *Brown*, which kind of changed, I guess, the nature of the argument. You seemed to rely mostly on the legal aspect, the Fourteenth Amendment aspect of it, and you didn't refer to that kind of testimony, you know, in your argument.

I guess maybe I'll also comment on what you thought about—maybe what you think in general about the kind of scenario that is presented, I guess the inferiority of black students, you know, in white schools, you know, in general.

PROF. CHEMERINSKY: The literature since 1954, has been quite critical of how much the Supreme Court in *Brown* relied on the sociological and psychological studies.⁶⁰ Some of the concern is what if now psychological/sociological studies would show the opposite? Does that then mean that conclusions of *Brown* are wrong?

* * *

I think one of the best things petitioner had going for it from the legal perspective in *Brown* was the findings of fact of the district court in Kansas that separation causes psychological and sociological harms.

But I was trying to present it more as a constitutional imperative that separate can never be equal.

Just to respond to what Professor Bell said, I think there's one sense in which the *Brown* case isn't the ideal forum for us to discuss this. I think there's no doubt that both of us would agree that in *Brown* the court did the right thing in saying that separate can't be equal. I think the question is, post-*Brown*, how much emphasis should there have been on desegregation versus just on equalization.

I think what Professor Bell says is absolutely right. Right now schools are more segregated than they've been in decades, and it's going in the wrong direction. The question is what caused that? I know there are many causes. I think part of it is the failure of the judiciary to live up to the promise of *Brown*. I think that, had the Court much quicker than in *Swann*,⁶¹ seventeen years after *Brown*,

60. See, e.g., Roger M. Smith, *Black and White After Brown: Constructions of Race in Modern Supreme Court Decisions*, 5 U. PA. J. CONST. L. 709, 718 (2003) (arguing that Justice Warren should not have decided *Brown* based on psychological studies because by classifying African Americans as a "damaged race" the Warren Court implied that whites were superior); Dean M. Hashimoto, *Science as Mythology in Constitutional Law*, 76 OR. L. REV. 111, 141 (1997) (noting criticism that *Brown* reliance on psychological studies was flawed).

61. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (holding that district courts have broad authority to formulate remedies in desegregation cases).

outlined what needed to be done; I think that had the Court in *Milliken v. Bradley* ordered inter-district remedies;⁶² I think that had the court in *Rodriguez* said that inequalities in funding violate equal protection;⁶³ I think that we could have achieved far more in desegregation and equalization of educational opportunity than we've achieved. But I don't see that as pointing to an inherent failure of the Court. I think it points to a failure of will on the part of the courts that succeeded the *Brown* Court.

PROF. MALTZ: Can I just address the student's question about the sociological and psychological evidence?

Without in any way diminishing the importance of the studies as science or in anyway suggesting that the lawyers should have achieved that, my sort of sense of what was going on—you know, I wasn't there but my sense of what was going on is that if you think—for people who think that that was probably dispositive, I think that—you know I always say to my students I have sort of a bridge I want to sell them because I think that what was really going on, that certainly the Court used that evidence, but where they—what really drove the decision was a very deep sense that it was just wrong. Yes, they could rely upon that psychological evidence for part of their opinion, but I think that Professor Chemerinsky's driving on the point that, "this is just wrong" is what really drove the decision in *Brown* and what was going to drive the decision in *Brown*, whatever the sociological and psychological evidence was.

JUDGE KEITH: Any further questions?

AUDIENCE: I agree with the statements that *Brown* was not—despite what was in Earl Warren's opinion—*Brown* was not based on social science evidence but on the principle in *Strauder*⁶⁴ that the Court ought to view that the Fourteenth Amendment should strike down legislation which is intended as hostile to the Negro race. But I guess I think also that the social science evidence since *Brown* has tended to support *Brown* and that connection.

I'd like to ask Derrick and everybody else what do you make of the fact that in the period when we had enforcement of *Brown*, after *Green*⁶⁵ and *Swann*,⁶⁶ that the gap between black children and white

62. See *Milliken v. Bradley*, 418 U.S. 717 (1974) (limiting a court's remedial powers in desegregation cases by holding that multi-district remedies are unconstitutional).

63. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that disparities in school funding do not violate equal protection).

64. *Strauder v. West Virginia*, 100 U.S. 303 (1879).

65. See *Green v. County School Bd.*, 391 U.S. 430 (1968) (striking school board's "freedom-of-choice" plan, which allowed pupils to choose which public school to

2003]

BROWN MOOT COURT ARGUMENT

1379

children—as measured by national assessment of educational progress cost—was cut almost in half during the seventies and eighties, that black children went on to college at much greater rates than they ever had before, and that the economic status of black families ultimately improved significantly. With all the problems we have today, that is a fact of life. Do you think there was another course less torturous that might have gotten us to the same place or further, and—I mean, you’ve stated what course you believe in, but—

PROF. BELL: You know, you just can’t know, and certainly the Court was under pressure at all times and it finally collapsed with *Milliken v. Bradley*.⁶⁷ What they recognized is that whatever Joe Louis could boast about when he was going to fight Billy Conn and Billy Conn was going to move all about the ring and Lewis said, “He can run but he can’t hide.” White people and their parents could run and hide. They did that, you see.

So the school desegregation progress that had been made—many of us worked very hard on it—started to regress. I’ve seen them in your counter-statistics. Some people did well, others not so well.

I represented Birdie May Davis down in Mobile, Alabama, and she was my ideal because I put her on the stand and she talked about how the kids were messing with her but she didn’t mind because she was getting an education and how when those kids said Martin Luther King was a communist she argued them down, and I said, yes, that’s what this thing is supposed to be about.

But I focused on Birdie May Davis. I didn’t focus on all those kids who couldn’t stand the strain and the hostility and what have you and who dropped out or did not do well in the integrated schools.

If I were the principal of an integrated school, I’d have to do three things if I wanted to keep it integrated. I’d have to make the white parents happy that the academic standards were going to be maintained, and that would lead to some form of tracking. Second, I’d have to make the white parents feel secure about their children, so I’d have a disciplinary code that one way or another would weigh down more heavily on the black kids than the whites. Then on the area of social things, they would still want to have their music for the dances and you’d be back in who’s going to be class president and the senior queen. You’d have sort of a range of problems, even in situations where the white parents couldn’t do—had the courts

attend, on the ground that it was not a sufficient means of desegregation).

66. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

67. 418 U.S. 717 (1974).

maintained their stance that they finally got to [do, namely, run and hide].

Maybe it would work but the courts are not there forever. The membership changed. It reflected a more conservative administration. The Justices who were appointed did not have the same vision as Marshall and Brennan and Warren, and their interest and enthusiasm, particularly with the difficulties in school desegregation, just wavered. So, it's just hard to know.

JUDGE KEITH: Thank you. Yes, sir.

AUDIENCE: If I may be indulged to make two comments. I think, to begin with, I unfortunately have to disagree with both of the esteemed professors in saying that we're returning to segregated schools. I think in fact we're returning to neighborhood schools and to schools as a backlash against busing, and that is quite often being done at the request of minority groups because they find—or they feel it's going to be a better way to educate their children. I don't think anyone—well, I don't think this can be seen as a state-sponsored return to segregation was the feeling I got from earlier statements.

My real question is, Professor Bell, I'm even more confused than usual, and I wonder if you could tell me—you stated in your brief and in your oral argument that the lack of integration hurt both the white and black students, and I couldn't figure out exactly why you took that tack to say that it hurt both parties rather than saying there was simply an equalization of monetary funds that you brought up together.

PROF. BELL: Well, the easy answer is it's true.

AUDIENCE: It may very well be true but—

PROF. BELL: I was speaking some place and I was really very passionate [about the need for whites to see that racism was harmful to them.] An old black guy came up to me and said, "Professor, you're trying your best but it ain't going to work." I said, "What do you mean it's not going to work?" He said, "Because white folk be stupid." What he meant—what he meant is that racism has offered whites a sense of privilege, [and it is hard for many to see how costly that privilege is].

The reason [the affirmative action cases from the University of] Michigan are going to the Supreme Court is because those plaintiffs, now petitioners, see themselves as disadvantaged if any black person with lower scores gets in over them. The fact that white people, white students get in with lower scores—they don't care about that. Now, that's stupid. They should have been [looking at standardized tests

2003]

BROWN MOOT COURT ARGUMENT

1381

that disadvantage less well-off applicants of both races]. Don't get me started. Look at the administration. Black people did not put George W. Bush in office.

AUDIENCE: Maybe this is a discussion for later, but I think that characterization of the Michigan case is somewhat inaccurate and if we could just—

PROF. BELL: Why is it inaccurate?

AUDIENCE: Because it's not simply a tip that's occurring. It's twenty-five points on an outset.

PROF. BELL: How many do they give to the white kids coming from upper Michigan?

AUDIENCE: How many do they give to the black students coming from Grosse Pointe South whose parents are doctors? That's why it's not nearly—this isn't the discussion—

PROF. BELL: Well, no, no, no. I wish they hadn't taken the case. I was just making a point about why we have these cases because whites allow other privileged whites to just have an easy road. But if blacks, who are far more entitled, based on past disadvantage, have even a little bit of that, suddenly it's the blacks that are keeping them out.

Ms. Hopwood felt that she was denied her constitutional rights down in Texas because some black kids got in with lower scores. A whole lot of white kids got in with lower scores. She didn't notice that many of them had gone to prestigious colleges. She'd gone to a community college and to a state school and got downgraded in the admissions process, you see.

Rather than push to open up that process the black folk got started, she wanted to strike the whole thing down, which would not get her in, and would not help all the other disadvantaged whites like her, you see.⁶⁸

JUDGE KEITH: Let's sort of stop this. The lady—I think the lady—

PROF. CHEMERINSKY: Could I address this first point about resegregation?

JUDGE KEITH: Yes.

PROF. CHEMERINSKY: Because I do think it's important that—I highly recommend a study that Gary Orfield⁶⁹ has done. It's available

68. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (challenging the University of Texas Law School's affirmative action admission program).

69. Professor of Education and Social Policy, Harvard Graduate School of Education.

on a website of the Harvard Education Department.⁷⁰ It's also published in a symposium.⁷¹ It demonstrates the statistics with regard to resegregation, especially of southern schools. There are many causes of it but one of the most important causes of it is the end of desegregation orders which were successful as to many southern school systems.

The Supreme Court's decisions in cases like *Oklahoma v. Dowell*,⁷² *Freeman v. Pitts*,⁷³ and *Missouri v. Jenkins*⁷⁴ have caused district courts and courts of appeals to end desegregation orders that were working extremely well. The reality right now, and I'm sure we'll talk about this tomorrow, is separate and unequal schools. Twenty percent less is spent on the average black child's elementary and secondary schools than a white child's elementary and secondary schools. So, I don't think this is some return to exalted neighborhood schools. I think this is just returning to segregation in its worst form.

JUDGE KEITH: Would you state your name, please?

AUDIENCE: Sure. My name is Erin Chlopak, and I'm a third-year law student here. My question is actually for all the judges, as well as you professors, but I'm particularly interested in the response of Professor Bell. In a couple of weeks, the Supreme Court's going to be hearing oral arguments in a case regarding the constitutionality of affirmative action at the University of Michigan Law School,⁷⁵ and I'm just interested both in what your thoughts are on what the Supreme Court should do and also what you think it will do.

PROF. BELL: What—

AUDIENCE: What you think the Supreme Court will do and what you think it should do. They're not the same thing.

70. Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation* (July 2001), available at http://www.civilrightsproject.harvard.edu/research/deseg/call_separateschools.php?Page=2.

71. Symposium, *The Resegregation of Southern Schools? A Crucial Moment in the History (and the Future) of Public Schooling in America: Do Southern Schools Face Rapid Resegregation?*, 81 N.C. L. REV. 1375 (2003).

72. *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991) (holding that the Court of Appeal's test, which required a desegregation decree to remain in effect until the district court can show "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions," to be more stringent than that required by the Equal Protection Clause).

73. 503 U.S. 467 (1992) (holding that a district court has the authority to relinquish supervision of a school district desegregation plan before full compliance has been achieved).

74. 515 U.S. 70 (1995) (finding that the district court order requiring state funding for remedial education classes extended beyond racial desegregation and therefore was beyond the district court's jurisdiction).

75. *Grutter v. Bollinger*, No. 02-241 (argued Apr. 1, 2003).

2003]

BROWN MOOT COURT ARGUMENT

1383

PROF. BELL: I would like them to win, although I urged them not to take the case. After they lost in the district court it seemed to me that they should have gone up and asked Michigan to come up with a set of admission criteria that did not use race. I mean, it can be done. Rice University is doing it.

JUDGE KEITH: Well, of course, Professor Bell, they won in the Sixth Circuit⁷⁶ where Judge Jones was—

PROF. BELL: I'm not sure you all did them a favor.

JUDGE KEITH: Well, maybe not but they did win.

PROF. BELL: So that made it harder to do what I suggested after the district court. Not impossible, but harder. The problem is even if they win it gives a major argument to the Republicans who are going to first introduce and make a big play over anti-affirmative action legislation, and then in the next presidential election, next year, the Republican party is going to, as a major play, bring back fairness and merit—which is not the case—to the issue. So, it's just that we're not looking in a broad enough view on this issue. So, I hope—

JUDGE KEITH: Professor Bell—

PROF. BELL: But I fear they're going to lose.

JUDGE KEITH: Well—they may well, but we have to stand by principle—

PROF. BELL: Ah, there it goes.

JUDGE KEITH: Okay.

PROF. BELL: By the law.

JUDGE KEITH: But I look at Mrs. Marshall here and I think that out of all of this, these students are very fortunate this time to be witnessing two great oral arguments about *Brown v. Board* when the Michigan case is going to be argued on April the 1st. This reminds me of the moot courts we used to have at Howard University, not in elaborate quarters like this. We were in the founders' library in the basement. But to see Thurgood Marshall and Charlie Houston and Bob Ming and Spottswood and Jim Nabrit argue the cases like you two have done today. But I think underlying all of this, Justice Marshall and the men and women who—Charlie Houston—who outlined this whole legal theory would not give up on integration, and they should not, and we should not. I think that should continue to be our goal, that we should live in an integrated society and do everything in it we can.

Now, the Supreme Court is integrated. It's got two women and a black male. When Justice Marshall and Jim Nabrit and them were

76. *Gutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002).

arguing the cases, there were all males on the Supreme Court. Now, could we say that the diversity that is now on the Supreme Court of the United States is a liability or an asset? Do the other members of the Court who gather information and views differently than if they would have had if it were an all-male court?

But I think diversity's important, and the students here and this faculty should be commended for putting this together because we're witnessing history, and it will be written after April the 1st. But I would hate for us to leave this very important conference giving up on integration. I think that should continue to be our goal. Diversity should continue to be our goal. Doing the best we can with what we have wherever we are. I just wanted to throw that in as the Chief Justice of this dispute.

AUDIENCE: My name is Andrew Faucett, and my question once again is to Professor Bell. You've spoken a lot about the effects of racism on both races—on white and black—but I can't help noticing that all of your examples are very class specific. They relate to lower class—economically lower-class white people who are disadvantaged, as you've argued, because they buy into this myth of white superiority.

I'm curious if you would elaborate on that and answer this question: Do you think that racism is also harmful for upper-class white people or is it harmful for everyone or is there actually some sort of privileged elite who uses racism as a way to pit different groups against each other?

PROF. BELL: Well, the latter certainly is true. But it's also harmful for upper-class whites. Look at what happens at almost every law school after they've hired the first black. The second one gets very tough, you see. The third—whew! It really is tough.

PROF. RASKIN: That's not true at the Washington College of Law, I've got to say.

PROF. BELL: You see, so it is very harmful. Read—oh, God, my mind—*The Rage of a Privileged Class*⁷⁷ by Ellis Cose. Thank you very much. Where he talks about black successful business corporate types and all of the stuff that they go through because they're black, you see. And they're talking with highly educated people all up and down, so the problems, the sense of privilege, the sense of entitlement, the presumption of regularity.

You know, when we walk into the class—now, I've been a troublemaker for thirty-two years at teaching, so people know what they're going to get, but with the average, particularly new, black

77. ELLIS COSE, *RAGE OF A PRIVILEGED CLASS* (1993).

2003]

BROWN MOOT COURT ARGUMENT

1385

faculty person, sometimes a young white woman walks into the first-year class and [because the students don't see] them as fitting the model [of a law teacher from the "Paper Chase," they] have a lot of trouble.

These are highly educated young folk and yet they [have less tolerance than they do for white male teachers—including those who are boring and incomprehensible]. So, it's still pervasive, still pervasive. Maybe less so than ten years ago but I wouldn't want to bet on even that.

JUDGE KEITH: Anything further?

PROF. WERMIEL: Erwin, did you want to respond to the affirmative action question earlier, and Scott, since you're a Supreme Court watcher extraordinaire—

JUDGE KEITH: Yeah, he spoke at our Sixth Circuit judicial conference last year and Erwin, with his brilliance, said, "I predict it will be a 5-4 decision but I don't know which way."

PROF. CHEMERINSKY: I said 5-4 and Justice O'Connor would be in the majority. Hardly a profound prediction.

AUDIENCE: Should be in the majority?

AUDIENCE: Yes.

JUDGE KEITH: Erwin, would you like to say something with your eloquence?

PROF. CHEMERINSKY: I said to Judge Keith before we came in that if this were a better world we really could address you as Chief Justice Keith. I think I'd leave it at that.

PROF. WERMIEL: We have a couple more questions up here and then we may be running out of time, so why don't we take these two.

AUDIENCE: Hi. First I'd like to thank both of you.

Professor Bell, I'd like to ask, as a law student—many law students, with the Michigan Law School case coming before the Court, have filed a brief that there is a governmental interest and a value in diversity in the classroom in and of itself, and I wonder where that fits with your argument and how you feel about that.

PROF. BELL: Oh, I absolutely agree. It's clearly better. I think I have a hundred students in my criminal law class: twenty-three blacks, fourteen Asians, about equal mix of men and women, except the black women outscore the—but that's another whole issue. But the question is how do you get there? How is the best way of getting there? That's the tough question.

I think that those who still believe in litigation should litigate. Those who are filing litigation papers with regard to reparations, they should do it. I think their chances are not great, but I think one of

the things that we've learned over the years is to try to get away from rigidity. There's only one way, and if you don't follow my way, you know, it's the highway, so to speak.

This issue is so difficult, so likely to be long term that those who have an idea and an approach should be able to follow it, particularly given the situation that they're—these are peaceful litigations, peaceful protests, and what have you, and I think folks should go to it.

PROF. CHEMERINSKY: I obviously agree that we shouldn't be rigid. There are many approaches. I think what I'd like to do is talk about it in the context of the Michigan affirmative action cases. I had the occasion two years ago to teach at UCLA.

They needed someone to teach Federal Courts, and I had a hundred students in my Federal Courts class and there were no African American students and there were just a couple of Latino students. My UCLA students always said to me, "What's the difference between USC and UCLA?" and my answer was, "The difference is there's almost no minority students here because Proposition 209 eliminated affirmative action California."⁷⁸

One woman said to me in response that, "I'm a third-year law student right now, and I've yet to be in a class where there was an African American student." This was the spring of 2001 in the most diverse city that exists in the country—Los Angeles. In her entire first year of law school class there were three African American students out of 300 because of elimination of affirmative action.

The reality is if the challengers win in Michigan, that's going to be true in every elite law school and most elite universities. So, I agree with Professor Bell that we can't be rigid. I also think that at this point in time there isn't an alternative to affirmative action to achieve diversity, and with everything else that he said, the reality is that in college admissions we give lots of preferences to alums of the school and their children, to athletes who might have lower scores. We always measure merit in so many ways, and one of those has to be diversity. I'm hopeful that Justice O'Connor will see it that way.

JUDGE KEITH: Professor Bell?

PROF. BELL: It just seems to me that this—and I was kidding Nate a little bit about the principle. One of the things that I learned over

78. Fifty-four percent of California's voters passed Proposition 209 on November 5, 1996. Proposition 209 prohibits the state from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. CAL. CONST. art. 1, § 31(a).

2003]

BROWN MOOT COURT ARGUMENT

1387

the years is to be very wary of principle. I try to be a principled person, but not every strategy, every tactic, needs to be principle, you see. There are a lot of ways we can—just on a—because they have a racial classification, it has to serve a compelling state interest in being the least restrictive with no less restrictive alternatives, you see.

Now, how can you argue that when Rice University has done away, on its own, with all racial classifications, and yet by a number of interesting criteria, which we could come up with if we want to sit here for another hour, they have brought back their diversity to the point that it was before, you see. Texas has adopted this ten percent plan.⁷⁹ It's not going to work forever, but it's working now.

The sense that it's right that we should be able to use race is not effective in a court that is hostile to that view, the majority of it, and when there are other alternatives.

JUDGE KEITH: What are the other alternatives?

PROF. BELL: I just mentioned—Texas decided—its legislature decided—

JUDGE KEITH: The ten percent?

PROF. BELL: Ten percent.

JUDGE KEITH: Well, Lani Guinier disagrees with you on that.

PROF. BELL: Ten percent from schools is achieving diversity.

JUDGE KEITH: Professor Bell, I would like to just say this. I know we're going on, but as a black man there's not a day in my life in some way large or small that I'm not reminded of the fact that I'm black. We live in a racist society. You've heard me give this example before—I know Judge Jones has—but it shows you the depth of racism in our country.

Chief Justice Rehnquist appointed me the national chairman of the Bicentennial of the U.S. Constitution, and on our committee was Chief Justice Warren Burger, Justice Blackmun, and all federal judges, and we had our final conference at the College of William and Mary. Over 300 federal judges were there, and I was the national chairman.

Judge Altimari and I were staying—Judge Altimari, who has since passed, who was on the Second Circuit and I were staying at the Williamsburg Inn at this beautiful place, and I walked out of the Williamsburg Inn with Judge Altimari and a white man drove up in

79. In response to *Hopwood*, Texas adopted the “ten percent plan,” under which all students in the top ten percent of the graduating class from each Texas high school was eligible for admission to the University of Texas’s flagship campus. See Michael Selmi, *Getting Beyond Affirmative Action: Thinking About Racial Inequality in the Twenty-first Century*, 55 STAN. L. REV. 1013, 1027-28 (2002) (describing the Texas ten percent plan).

his car and said, "Boy, will you park this car." Judge Altimari was angry. He was just so angry. He said, "Damon, don't you take that." I said, "Frank, if that were to upset me I'd be in an institution now because every day of my life I'm reminded in this racist society that I'm black."

So, I went to the judges' conference where I was to speak with all these judges and I told them why I was a little late, and some of the—Judge Ginsburg was there. She was on the federal court of appeals at that time, and others, and they said, "Well, Damon, why didn't you take the man's keys and drive the car over. . .?" They gave me all sorts of reasons of what I should do.

But I think we have to start with the premise—at least the way I do—that we live in a good society, but it's a racist society, and we have to develop a strategy that—I don't know what it is. I'm hoping that we can develop it as Thurgood and Charlie Houston and Bob Ming and Jim Nabrit—but I think we have to recognize that as black people in this country, when people see our face, there's something that springs up in their mind. I don't know what it is, whether they say we're inferior, we're not worthy of it.

But here I was, the national chairman of the Bicentennial of the U.S. Constitution, appointed by the Chief Justice of the United States Supreme Court, and that's the type of treatment I received as I walked out of the Williamsburg Inn. Now think about these other blacks all over the country that are going through similar experiences more demeaning than that and how they should handle it. How are we going to eradicate that? What's the formula for it?

PROF. BELL: Read my next book. I think we need to move away from this idea of racial equality, which, as you see, has—with the Fourteenth Amendment, it's turned the equal protection clause on its head over the years and we need to take on a more realistic, realism kind of sense with regard to race, which in the context of these affirmative action cases—

This country—I think if this country had to vote about what is the greatest danger to the country: the growing gap in the wealth and income or affirmative action. I might be wrong—I am a little paranoid—but I think a majority of whites would say affirmative action is the greater danger.

So now how do you deal with that when at least one party is willing to ride that anti-affirmative action thing on into the state house and to the White House, and the other party that we look to remains silent for the most part.

2003]

BROWN MOOT COURT ARGUMENT

1389

It seems to me that with regard to affirmative action, because there are other things, we shouldn't stand on principle with regard to using racial classifications. I think that if the case goes against us, a lot of colleges and institutions see the value of diversity and they will, as Rice University did, adopt other criteria that will enable them to maintain diversity.

JUDGE KEITH: Thank you, Professor Bell.

* * *

(ADJOURNED)