BUCHMANN FACULTY OF LAW

ZVI MEITAR CENTER FOR ADVANCED LEGAL STUDIES

BERG INSTITUTE FOR LAW AND HISTORY

הפקולטה למשפטים ע"ש בוכמן

מרכז צבי מיתר ללימודי משפט מתקדמים

מכון ברג למשפט והיסטוריה

היסטוריה של המשפט – סדנת יגאל ארנון ושות'
The Yigal Arnon & Co. Law and History Workshop

משפט והיסטוריה – מאמרים בדרך
Law and History Working Papers
1/5777

Brown versus Board of Education
and
Robert Jackson's concurring opinion in *Brown v. Board of Education*

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16 November 2016

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Chapter 2

Brown versus Board of Education

If it had decided nothing else, the Supreme Court under Earl Warren would be remembered for its unanimous decision in *Brown v. Board of Education* (1954), declaring racial segregation in public schools unconstitutional.[1] It was perhaps the most important judgment ever handed down by the Supreme Court. Thurgood Marshall, at the time general counsel for the National Association for the Advancement of Colored People (NAACP), noted the sweeping nature of the decision: "In holding segregated public education unconstitutional, the Court eliminated one of the two primary pillars of the caste system (the other being disenfranchisement)."[2]

Because *Brown* has had such a pervasive influence on American history during the past half-century and more, the process of recovering its historical significance involves untangling the multiple webs of meaning that sixty years of continuing racial strife has engrafted onto the original decision.

But above all, it requires an historical leap of understanding. As *Brown* has become one of the few constitutional "icons" to which every justice appointed since 1954 has paid special deference, it has been swept up into an older narrative of progressive historical evolution that sees *Brown* as but another virtually predestined step in the long-term

[1] *Brown v. Board of Education*, 347 U.S. 483 (1954).
[2] Thurgood Marshall, *Law and the Quest for Equality*, 1967 Washington University Law Quarterly in THURGOOD MARSHALL, Mark V. Tushnet ed. (Chicago: Lawrence Hill Books, 2001) at 223.

expansion of liberty and equality that began with the Declaration of Independence. Many of these accounts assume that *Brown* was simply another inevitable step.[3]

But any close study of the circumstances under which *Brown* was decided underlines an opposite conclusion: just how unlikely it was that the final outcome would be a unanimous decision overruling *Plessy v. Ferguson* (1896), the constitutional foundation of the entire system of racial segregation in the South.[4]

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INTRODUCTION

As late as 1910, when approximately only 10 percent of America's blacks lived outside the South, the "Negro problem" was still largely thought of as an exclusively southern problem.[5] The jobs made available by the World War I, however, triggered the beginnings of the Great Migration of African Americans to the North and West. Between 1910 and 1940, an estimated 1.75 million blacks left the South; by 1940 approximately 25 percent of all African Americans lived beyond the reach of the states of the Old Confederacy.[6] Over the next two decades, the Great Migration became an exodus, as several million more southern blacks, attracted by wartime jobs and postwar prosperity, emigrated from the South. By 1950,

[3] For the classic work assessing historians' reliance on notions of inevitable steps and progress—engaging in Whig history, see H. BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY (London: G. Bell and Sons, 1931, reprinted New York: AMS Press, 1978).
[4] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[5] GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (New Brunswick: Transaction Publishers, 1996) (originally published by Harper & Row, 1944) [hereinafter cited as AMERICAN DILEMMA] vol. I at 183. In 1910, African Americans constituted less than 2 percent of the total population of the North and West. Id.
[6] AMERICAN DILEMMA, vol. I, at 183. In 1940, less than 4 percent of the total northern population was African American. Myrdal acknowledges: "There are no data available to determine the exact size of the net migration of Negroes from South to North between 1910 and 1940. The figure presented in the text is simply the difference between the Northern Negro population for 1940 and that for 1910 [derived from U.S. Bureau of Census data]." Id. at 1229.

approximately 33 percent of all African Americans lived in the North and West. The proportion reached approximately 40 percent in 1960.[7]

Myrdal's Grim Portrait of a Stagnant South

In *An American Dilemma* (1944), his monumental study of the position of blacks in American society, Swedish sociologist Gunnar Myrdal emphasized that, after 1900, economic progress for southern blacks had stalled.

At the time of Myrdal's writing more than forty years later, continuing economic decline had made African Americans' situation "grave."[8] Given the concentration of blacks in the rural South, the most important factor determining the economic condition of African Americans was the weakness of the southern agricultural economy and, in particular, the decline of cotton, its most significant commodity. "Negro farmers ha[ve] always been dependent on the cotton economy to a much greater extent than … white farmers in the South."[9] Myrdal observed: "There was a time when it really looked as if the rural Negro had some chance" of eventually becoming a landowner.[10] By 1900, 25 percent of all black farmers in the United States owned their own farms, a historic peak from which a long-term decline began.[11]

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[7] *See* Philip M. Hauser, *Demographic Factors in the Integration of the Negro*, in THE NEGRO PROBLEM (eds. T. Parsons and K.B. Clark) (Boston: Houghton Mifflin, 1966) at 74. As Myrdal correctly notes, the census data for migration of blacks from the South is, to some extent, "unreliable." AMERICAN DILEMMA, volume I, at 1229. Thus, I have used "estimated" and "approximately" when citing census data concerning migration.
[8] AMERICAN DILEMMA, vol. II at 1002.
[9] AMERICAN DILEMMA, vol. I at 233.
[10] Id. at 237
[11] Id. at 237. In absolute numbers, the peak of 220,000 Negro farmer-owners was reached in 1910 and declined by more than 20 percent over the next 30 years. Id.

Even before World War I, world agricultural trends had slowly eroded America's more than 50 percent world market share of cotton. This shift of production to other countries became substantial after the war, and the trend of cotton prices continued downward during most of the 1920s.[12] During the 1920s, a series of "calamities" further undermined the economic viability of cotton production. Soil erosion took a third of land out of production[13] and "the ravages of the boll weevil" wrought further devastation.[14] During the Great Depression, the cotton economy faced a further drastic decline, as world demand dried up and competition from abroad increased. "The cotton economy suffered much more from the [D]epression and recovered much less afterward than did American agriculture in general," Myrdal wrote.[15] "These changes are revolutionizing the whole structure of Southern agricultural economy. They have already rooted out a considerable portion of the Negro farmers and made the future of the remaining group extremely problematic."[16]

Despite his own grim evidence testifying to a steady, almost half-century decline in the economic position of black people, Myrdal offered surprisingly "hopeful" and "optimistic" predictions of imminent progress in race relations. And he was not shy in offering a prophetic conclusion: "[N]ot since Reconstruction," he wrote, " has there been more reason to anticipate fundamental changes in American race relations, changes which will involve a development toward the American ideals."[17] Myrdal later noted that his "most important conclusion" in *An American Dilemma* was "that an era of more than half a century

[12] Id. at 251.
[13] Id. at 232.
[14] Id. at 234-35.
[15] Id. at 251.
[16] Id. at 251. During the 1920s, the black rural farm population in the South fell 8.6 percent. During the 1930s, it shrank by another 4.5 percent. Id. at 1245, fn.13 (fns. to ch. 12).
[17] Id. at lxix (emphasis in original).

during which there had been no fundamental change was approaching its close."[18] This conclusion, he emphasized, attracted "little backing … in the contemporary literature on the Negro problem in America, nor could I feel myself to have much support from the social scientists then working in the field of race relations, whose views in the main were more static, fatalistic, and, more particularly, lacking in an appreciation of the importance for social change of the moral, ideological, and political forces in the nation."[19]

Caste was the central theoretical concept Myrdal used for portraying the system of racial subordination that had been reestablished in the South after Reconstruction. In the United States, he wrote, adding his own emphasis, "*a man born a Negro or a white is not allowed to pass from the one status to the other as he can pass from one class to another. In this important respect, the caste system of America is closed and rigid, while the class system is … always open and mobile*."[20] The foremost expression of the caste system were laws, on the books of thirty states, forbidding interracial marriages.[21]

Myrdal was prescient in recognizing the early indicators of fundamental social change that others had not yet identified. He was justly proud of having avoided a "static" and "fatalistic" mindset about the race problem, a problem that, after all, had humbled many a previous optimist in American history. Yet his own optimism about the possibilities of social change often obscured his bleak portrait of the material situation of the Negro in America in 1940. For many serious students of the race problem, there was not yet enough compelling evidence to lead them to agree with Myrdal's view that, suddenly, after more

[18] Id. at xxxiii (author's preface to the twentieth anniversary edition, 1962).
[19] Id.
[20] AMERICAN DILEMMA, vol. II at 668 (emphasis in original).
[21] Id.

than a half-century of soul-numbing fixity, the American system of racial subordination was drawing to a close.

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Compared to the Supreme Court's fairly consistent rejection of the legal claims of black people during the seventy-five years after the Civil War Amendments were ratified, the period between 1944 and 1950 stands out for its unexpected string of victories for the cause of racial equality. In 1944 the Court reversed itself and struck down the Texas all-white primary, one of the most successful devices in the South for disenfranchising African Americans.[22] It also held that the Railway Labor Act barred segregated labor unions from entering into labor contracts that discriminated against black workers who had been excluded from a union.[23] In 1946, it held that the Constitution's Interstate Commerce Clause barred segregated seating for interstate passengers.[24] In 1948 the Court unanimously overturned Oklahoma's refusal to admit a black woman to its all-white law school, suggesting that, if the state refused to admit her, it would have to choose between opening a black law school and closing down the existing all-white law school.[25]

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[22] *Smith v. Allwright*, 321 U.S. 649 (1944) overruling *Grovey v. Townsend*, 295 U.S. 45 (1935).
[23] *Steele v. Louisville and Nashville Railroad*, 323 U.S. 192 (1944).
[24] *Morgan v. Virginia*, 328 U.S. 373 (1946).
[25] *Sipuel v. Oklahoma State Bd .of Regents*, 332 U.S. 631 (1948). The Court, in *Sipuel*, unanimously overturned a ruling by the Oklahoma Supreme Court that had, on procedural grounds, upheld a lower state court's rejection, also on procedural grounds, of a black female's claim that she had been denied equal protection of the law when she was denied admission to the state's law school because of her race. The Court, in a short *per curiam* decision issued only four days after oral argument, interceded to prevent the state courts from using technicalities and procedural niceties to deny an equal protection claim brought pursuant to the Fourteenth Amendment. *Sipuel, supra*. (For some detail on the state court's rejection of Sipuel's claims on procedural niceties and technicalities, see MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (Chapel Hill: University of North Carolina Press, 1987) [hereinafter cited as NAACP LEGAL STRATEGY] at 121.) The Court made this clear in *Fisher v. Hurst*, 333 U.S. 147 (1948) (per curiam) at 150: "The Oklahoma Supreme Court upheld the refusal to admit petitioner [Ida Sipuel, now, after marrying, Ida Fisher] on the ground that she had failed to demand establishment of a separate school

In *Shelley v. Kraemer* (1948), the Court held racially restrictive real estate covenants unconstitutional.[26] The 6–0 ruling presented so loose a definition of the "state action" requirement of the Fourteenth Amendment that, for a time, it seemed possible that all judicial enforcement of discriminatory private contracts or wills might be barred by the Equal Protection Clause.[27]

By 1950, the Supreme Court had clearly begun to back away from the inertia, passivity, and outright racism that had characterized virtually all but its recent decisions applying the Civil War Amendments to former slaves and their descendants. On the last day of the 1949–1950 term, the Court announced three unanimous decisions (known as the "1950 trilogy") that underlined the change.

The first of these cases, *Sweatt v. Painter*, raised the question of whether the state of Texas could satisfy the *Plessy* "separate but equal" standard by establishing a separate Negro law school.[28] In just three years, the new black law school appeared to have become a

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and admission to it. On remand, the district court correctly understood our decision to hold that the equal protection clause permits no such defense." It is hard to see how this could correctly be characterized, as Kluger asserts, as a "setback." RICHARD KLUGER, SIMPLE JUSTICE (New York: Random House, 2004) (originally published in 1975) [hereinafter cited as SIMPLE JUSTICE] at 259. Indeed, "*The Chicago Defender*, a black newspaper, welcomed the decision in *Sipuel* as showing that 'the props of Jim-Crow are buckling.'" NAACP LEGAL STRATEGY AGAINST SEGREGATED EDUCATION at 123. Moreover, in practical terms, it was a success, as Sipuel was admitted to the all-white law school, albeit more than a year later, and graduated in 1951. THE SUPREME COURT IN CONFERENCE, Del Dickson, ed. (Oxford Univ. Press, 2001) [hereinafter cited as SUPREME COURT IN CONFERENCE] at 637.

The Court emphasized that the issue of "separate but equal" was not before it but, rather than being a setback, this helped the NAACP in its carefully constructed drive to achieve racial justice in education. Thurgood Marshall had been concerned that the minimal trial record in the Oklahoma litigation might lead the Court to reaffirm the "separate but equal" standard. THE NAACP'S LEGAL STRATEGY at 121. For this reason, Marshall wanted the Texas case, *Sweatt v. Painter*, to come before the Court first. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (New York: Oxford Univ. Press, 1994) [hereinafter cited as MAKING CIVIL RIGHTS LAW] at 129.

[26] *Shelley v. Kraemer*, 334 U.S. 1 (1948). The opinion in *Shelley* was unanimous; three justices, however, did not participate in the case.

[27] Louis Henkin, Shelley v. Kraemer*: Notes for a Revised Opinion*, 110 U. PENN. L. REV. 473 (1962). *Shelley*—frequency of citation.

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

credible educational institution. It had "a faculty of five full-time professors, twenty-three students, a library of 16,000 books serviced by a full-time staff, a practice court, and a legal-aid association."[29] Yet despite its arguably material equality, Chief Justice Fred Vinson, for a unanimous Court, declared that he could not find "substantial equality in the educational opportunities offered white and Negro law students" by the state of Texas.[30] "[M]ore important" than these tangible factors, Vinson wrote, are "those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige."[31] These qualities, Vinson concluded, "the University of Texas Law School possesses to a far greater degree" than the new black law school.[32] "It is difficult to believe that one who had a choice between these law schools would consider the question close."[33]

The nine lawyers on the Supreme Court understood that success at the Bar often depended not only on what but on whom you know. Though difficult to measure, the quality and prestige of a faculty in an established law school was surely of great significance. And while it was still more difficult to assess, the greater employment and networking opportunities offered at an established institution with generations of alumni who had achieved "position and influence" were also widely believed to be an important factor in achieving success in law. From their own experiences, the justices knew that such factors did affect one's chances at the Bar. If "greatness" in a law school depended on the steady

[29] RICHARD KLUGER, SIMPLE JUSTICE (2004 edition, Random House; originally published in 1975) at 281.
[30] *Sweatt v. Painter*, 339 U.S. at 633.
[31] *Sweatt*, 339 U.S. at 634.
[32] Id.
[33] Id.

accumulations of reputation and prestige over time, it meant that a new, racially separate, black law school could never be equal to an established white institution.

In the second case, *McLaurin v. Oklahoma State Regents for Higher Education*, the NAACP successfully challenged the all-white University of Oklahoma's unequal treatment of an African American, who, after being admitted to a Ph.D. program in education "on a segregated basis," was required to sit all alone in an anteroom outside the regular classrooms and to segregate himself in an isolated, assigned seat in the library.[34] Even more than in *Sweatt v. Painter*, the *McLaurin* case raised the question of whether segregated facilities could truly be equal. If McLaurin were deprived of equal protection of the laws, as the Court unanimously decided, it was not because he was subjected to unequal material conditions, but rather because racial separation produced intangible negative effects that interfered with his equal chance to learn.

In a third unanimous civil rights decision in *Henderson v. United States*, the Supreme Court declared racially segregated dining cars in interstate transportation illegal.[35]

The three cases underlined a truth that had been all but ignored during the half-century after *Plessy* promulgated its "separate but equal" standard. That standard, which declared that the Equal Protection Clause of the Fourteenth Amendment required that even racially segregated schools be otherwise equal, had almost never been conscientiously applied. Had it been, virtually all segregated schools would have failed even the *Plessy* test, for most black schools in the South were not remotely equal to white schools by any

[34] *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950). Although, during trial, conditions were improved—plaintiff was assigned a seat in the classroom, in a row solely for black students, and to a table on the main floor of the library, one set aside for black students—the Court ruled the school's actions were still unconstitutional. 339 U.S. at 640.
[35] *Henderson v. United States*, 339 U.S. 816 (1950).

measure: whether the measure was physical facilities, the educational level of the teachers, or the per-student expenditure on teacher salaries or books.

Thus, when the Supreme Court signaled that it would no longer treat the separate but equal standard as an automatic formula for upholding segregation, it provided a possible road map toward eliminating segregated schools. That is, if the real meaning of the new decisions was that the Court would almost never find "separate" to be "equal," it seemed to lay the foundation for the gradual elimination of a dual school system in the South. Requiring equal expenditures on black and white schools could mean that an economically backward South might not be able to sustain the extra fiscal burden necessary to maintain a segregated system.

Interpretation of the Trilogy: Optimism or Pessimism?

In 1950–1951, legal reformers were divided over the meaning of the Trilogy. For some, it signaled the penultimate step before the Supreme Court overturned *Plessy v. Ferguson*. For others, the Court's conspicuous refusal to overrule *Plessy* signaled a future long, drawn-out struggle against segregation.

The NAACP exemplified this divide on the future of desegregation. The gradualists within the organization argued that the equalization strategy offered at least the possibility of achieving more immediate tangible gains in the quality of black schools, if not the sweeping goal of overturning segregation. Those in favor of equalization in the NAACP also received support from black educators, who worried about becoming the leading casualties of dismantling dual school systems.[36] "Where there are segregated schools," Myrdal observed,

[36] NAACP LEGAL STRATEGY at 111-13.

"the Negro teacher has usually a complete monopoly on the jobs in Negro schools. Where schools are mixed, Negroes have difficulty in getting in."[37]

Proponents of sweeping change, on the other hand, believed that racial segregation would not simply wither away because of economic strain on the system of separate but equal. Still, advocates of immediate change remained divided over whether it was realistic to pursue social change through the courts as an alternative to grassroots politics.

Thurgood Marshall's interpretation of the Trilogy further illuminates the confusion—and, ultimately, the pessimism among reformers—about a near-term reversal of segregation. At one level, Marshall—then the chief counsel at the NAACP—depicted the Trilogy to NAACP membership as by no means foreclosing future equality. "The fact that the Court did not decide segregation to be unconstitutional per se or in all areas," Marshall wrote, "is not fatal. The *Sweatt* and *McLaurin* cases indicate the Supreme Court's conviction that segregation is a denial of equality, and these decisions are potent weapons with which to continue the fight against segregation."[38]

Some scholars have thus characterized Marshall as optimistic about the near-term overthrow of *Plessy*. They highlight a 1950 NAACP resolution—in which Marshall led the call to challenge *Plessy* head-on—as evidence of Marshall's enduring hopefulness that *Plessy* would soon be overturned[39] as well as of his prescience in anticipating *Brown*. In this version of events, Marshall interpreted the 1950 Trilogy as a signal that the Supreme Court was on the verge of overruling *Plessy*—and, more important—that even in 1950, *Brown* was all but inevitable. All that was needed was a militant nudge by the NAACP.

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[37] AMERICAN DILEMMA, vol. I at 319.
[38] Thurgood Marshall, *The Supreme Court as Protector of Civil Rights: Equal Protection of the Laws* in *Annals of the American Academy of Political and Social Sciences*, vol. 275 (May 1951) reprinted in THURGOOD MARSHALL, Mark V. Tushnet ed., at 124.
[39] SIMPLE JUSTICE at 290-94; NAACP LEGAL STRATEGY at 135-37.

But these scholarly accounts defy a closer reading of history. Whatever measure of optimism existed prior to the Trilogy seemed to evaporate as Marshall studied the Supreme Court opinions. The "road markings," as Marshall referred to them, did not point to the imminent overthrow of *Plessy* but instead to the gradual retrenchment of the "separate but equal" standard on a case-by-case basis.

In this interpretation of the events of 1950–1951, Marshall ultimately viewed the Trilogy as a setback. The Court, Marshall reasoned, had addressed only isolated injuries to black plaintiffs rather than tackled the question of whether *Plessy* was constitutional. "The Court was content to solve only the specific problem presented, and explicitly refused to re-examine or reaffirm *Plessy v. Ferguson*."[40] Indeed, he read the cases as a deliberate decision by the Court "to whittle away" at segregation and to refuse to entertain a frontal assault on *Plessy* in the near future.

From this vantage point, the decision in *Brown* a mere three years later to overturn segregation in schools can hardly be considered inevitable; rather, it was altogether unlikely.

Justices Wrestle with Implications of Overturning *Plessy*

From the moment the justices heard the first modern challenge to school segregation in 1938,[41] they were deeply aware that the elimination of racially segregated schools would strike at the central nervous system of the southern way of life. While the Deep South might

[40] Id. Marshall added, "The Court's present strategy may be to breach the pattern of segregation area by area by dealing with specific problems as they are presented. It may feel that in whittling away the legal foundation upon which segregation is based, in that fashion, the protection afforded to civil rights may be more palatable to the community and hence more lasting." Here Marshall seemed to endorse gradualism despite his standard view that once the Court found segregated education unconstitutional, it needed to order immediate desegregation of schools.

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

eventually acquiesce in desegregation of graduate and professional schools, and the border states might even voluntarily desegregate the lower grades, it was difficult to imagine that, without a bitter struggle, the states of the old Confederacy would ever yield to a decision to eliminate segregation in the public schools. It was never far from the justices' minds that overruling *Plessy* might ignite widespread social disorder.

It was common for those justices who wished to retain *Plessy* to warn of disaster. Anticipating the "serious practical problems" that the abolition of segregated schools would entail, Chief Justice Vinson emphasized the difficulties of immediate desegregation "when there are large numbers" of blacks in a school district. "The situation is very serious and very emotional. We can't close our eyes to the seriousness of the problem in various parts of the country, although the problems are hotter in some parts of the country than in others. We face the complete abolition of the public school system in the South."[42]

As early as the *Sweatt* and *McLaurin* conference, Justice Jackson warned that "these cases are fraught with great harm to the Court and the country. These cases can do this Court more harm than any other case."[43] Like Vinson, Jackson offered the prediction that segregation was dying because it created such economic strain. With the system poised to self-destruct, why should the Court intervene? "Segregation is too expensive to whites. It is breaking down at the top [educational] levels. Maybe we will do the subject more harm than good [by intervening]."[44]

Justice Reed, who indicated clearly that he wished to affirm *Plessy*, also emphasized after the first argument in *Brown* that "Segregation is gradually disappearing. … There has been great, steady progress in the South in the advancement of the interests of the Negroes.

[42] SUPREME COURT IN CONFERENCE at 647.
[43] Id. at 640.
[44] Id. at 640.

… We must allow time. Segregation in the border states will disappear in fifteen or twenty years. Ten years in Virginia, perhaps. Ten years would make it really equal. Every year helps."[45]

Justice Clark also indicated that he might be prepared to affirm *Plessy*. In Texas, his home state, he noted, "the Mexican problem is more serious" and "more retarded" than for blacks.[46] Endorsing Jackson's call for delay, Clark added, "If we delay action … it will help. Our opinion should give the lower courts the opportunity to withhold relief in light of troubles. I would be inclined to go along with that."[47] Clark, the instinctive poker-player, had already begun to signal that he was prepared to agree to overrule *Plessy* if only he could be satisfied that implementation of desegregation would be gradual. In the next conference on *Brown*, after Warren joined the Court, Clark repeated that "[t]here is a danger of violence if this is not well handled. In some counties, it runs up to 60 per cent colored in Mississippi, and Alabama is much the same. … Violence will follow in the South. This is a very serious problem."[48]

"If segregation is unconstitutional," Justice Clark reasoned, "it must be handled very carefully, or we will cause more harm than good."[49] Yet he seemed immediately to reverse himself when he added: "I think that colored students in Texas get as good an education as the whites. Much progress has been made in voting there, in school boards, and so forth."[50]

Although he was unbending in favor of overruling *Plessy*, Justice Black also echoed the predictions of Vinson, Jackson, and Clark that "trouble" could be expected in the South.

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[45] Id. at 649. Reed added: "In the Deep South, separate but equal schools must be allowed. I uphold segregation as constitutional." Id. at 649.
[46] Id. at 653.
[47] Id. at 653.
[48] Id. at 659.
[49] Id. at 659.
[50] Id. at 659.

"There will be serious incidents and some violence if the Court holds segregation unlawful," Black told the Conference after the first argument.[51] "There will be trouble," Minton also predicted, as he announced that he too was prepared to overrule *Plessy.*[52]

THE THREE STAGES OF *BROWN*

There were three stages in the Supreme Court's deliberations over *Brown*. The case was first argued on December 9–11, 1952, before a court presided over by Chief Justice Fred Vinson. After it became clear that the justices were badly divided, Justice Frankfurter persuaded them to call for reargument on five questions submitted to the parties. By the time reargument took place a year later, Vinson had died of a heart attack and President Eisenhower had appointed Earl Warren to replace him. On May 17, 1954, the Supreme Court handed down *Brown v. Board of Education* (*Brown I*), unanimously declaring racial segregation in public schools unconstitutional.[53] After hearing further argument on the question of how to implement the desegregation decree, Warren announced one year later, in a short seven-paragraph opinion (*Brown II*), that the cases would be remanded to federal district courts for implementation "with all deliberate speed."[54]

The First Conference in Brown

When the justices assembled at their conference after the first argument in *Brown*, it was clear that the Court was badly divided. Four justices—Hugo Black, William O. Douglas,

[51] Id. at 648.
[52] Id. at 653.
[53] *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954) (*Brown I*) .
[54] *Brown v. Bd. of Ed.*, 349 U.S. 294 (1955) (*Brown II*) at 301.

Sherman Minton, and Harold Burton—unequivocally favored overruling *Plessy*. Chief Justice Vinson and three other justices—Stanley Reed, Robert Jackson, and Tom Clark—seemed opposed. Though it has been assumed that Justice Frankfurter represented a clear fifth vote for overturning *Plessy*, there is no convincing evidence that this was so.

Chief Justice Vinson, according to custom, opened the discussion. He first turned to *Bolling v. Sharpe*, the case that challenged segregated schools in the District of Columbia.[55] "There is a body of law in back of us on separate but equal," he began.[56] History showed that Congress—even the Congress that passed the Civil War Amendments—did not act to abolish segregation in Washington, D.C.[57] "It is hard to get away from that contemporary interpretation of the Civil War Amendments. … I don't see in the District of Columbia case how we can get away from this Court's long and continued acceptance of these patterns of Congress ever since the Civil War Amendments."[58]

Though Vinson never said explicitly that he favored affirming *Plessy*, his view of the companion cases to *Brown* from Delaware and Virginia was that although "[t]he schools here are not equal at the moment … they are moving toward it. I am inclined toward giving these states the time to make their facilities equal."[59] Burton ended his note of Vinson's

[55] *Bolling v. Sharpe*, 347 U.S. 497 (1954).
[56] SUPREME COURT IN CONFERENCE at 646.
[57] Id.
[58] Id. at 646-47. Vinson stated that he thought that "Congress has the power to act for the District of Columbia and for the states." Kluger misinterprets Burton's parenthetical addition in his conference notes: "May act for DC—probably *not* for the states" as a "more telling" concession from Vinson than it is, reading it as essentially contradicting the statement in the text. (SIMPLE JUSTICE (2004 ed.) at 593 (emphasis in original). But the editor of the Conference Notes translates Burton's entry to read: "Congress may act for the District of Columbia, but probably will *not* act for the states." SUPREME COURT IN CONFERENCE at 647 (emphasis in original). For him, Vinson was making only a forecast of political reality, not a statement of Congress' limited constitutional power.
[59] SUPREME COURT IN CONFERENCE at 647.

presentation at the conference with "Affirm?,"[60] suggesting that he thought Vinson was inclined to affirm *Plessy*.

But there were indications that even Vinson was far from set in his view. His statement that "boldness is essential but wisdom is indispensable," as Justice Clark heard it,[61] or Justice Burton's recorded version that "Courage is needed, but also wisdom,"[62] seem to point in the direction of overruling *Plessy*. And Vinson had been known to reverse himself abruptly. After announcing in conference that he would dissent in *Sweatt v. Painter*, Vinson changed his mind and eventually authored the Court's unanimous opinion.[63] In *Terry v. Adams* (1953), he again reversed himself in conference and joined an 8–1 majority overturning a second Texas effort to create an all-white primary.[64]

As the senior associate justice, Black spoke next. Already, two years earlier, with the support of Justice Douglas, he had boldly announced his willingness to overrule *Plessy*.[65] "Two roads are open," Black told his colleagues at the April 1950 conference that discussed the *McLaurin* and *Sweatt* cases.[66] The first road was to continue to decide under the *Plessy* standard while placing a "heavy … burden … on the state" to show the existence of equal facilities.[67] "The second road" was to overrule *Plessy*. The Fourteenth Amendment was designed "to prevent a caste system…. It is a hangover from the days when the Negro was a slave, and [whites felt] the racial humiliation of sitting together." The "premise" of the *Plessy* opinion "is not sound—it has been refuted by the facts and by history …. If I have to meet

[60] Id.
[61] Id.
[62] Id. at 647 fn. 41.
[63] Dennis J. Hutchinson, *Unanimity and Desegregation*, 68 GEO. L. J. 1 (1979) at 22-25.
[64] 345 U.S. 461 (1953).
[65] Only Justice Murphy had indicated an earlier willingness to overrule *Plessy*. He did so in 1948 at conference in *Sipuel*. SUPREME COURT IN CONFERENCE at 636.
[66] SUPREME COURT IN CONFERENCE at 638.
[67] Id.

the issue, there is nothing to make me subscribe to *Plessy*. … It was Hitler's creed—he preached what the South believed. … The caste system, throughout the country, is the negation of the idea of the Fourteenth Amendment."[68] Despite Black's eloquence, the Court followed his "first road": Unanimity in *McLaurin* and *Sweatt* was attained by stopping short of any consideration of overruling *Plessy.* As the only justice from the Deep South, Black's early and unqualified declaration undoubtedly had a powerful effect on the future course of Supreme Court deliberations.

Two and a half years later, at the first *Brown* conference, Black again spoke forcefully against legalized segregation. The Civil War Amendments, he declared, "have as their basic purpose the abolition of such castes, and to protect the Negro against discrimination on account of color. … I can't go contrary to the truth that the purpose of these laws is to discriminate on the basis of color. The Civil War Amendments were intended to stop that. I have to say that segregation *of itself* violates the Constitution, unless the long line of decisions and stare decisis prevents such a ruling."[69] Black added: "*I have to vote that way*, to end segregation."[70]

Two real surprises at the first *Brown* conference were Justices Minton and Burton, who, after Vinson, were the second and third of Truman's four mediocre appointments to the Court. At the outset, Burton declared straightforwardly that racial segregation in public schools was unconstitutional. "With the Fourteenth Amendment, states do not have the choice—segregation violates equal protection. The total effect is that separate education is not sufficient for today's problems. It is not reasonable to educate people separately for a

[68] Id. at 639.
[69] Id. at 648 (emphasis in original).
[70] Id. at 648 (emphasis in original).

joint life."[71] Minton's position was announced equally forcefully. "The hour is late," he proclaimed. The Court had "chipped and chiseled" away at *Plessy*, but "[c]lassification by race does not add up." "There will be trouble," he predicted, "but this race grew up in trouble. The Negro is oppressed and has been in bondage for years after slavery was abolished. *Segregation is per se unconstitutional. I am ready to vote now*."[72]

The surprising positions of the normally ultraconservative Burton and Minton may be attributed, at least in part, to their ardent engagement as Cold Warriors. Much has been made of the relationship between the eventual outcome in *Brown* and the Cold War.[73] It is true that the brief for the U.S. government, advocating the end of legalized segregation, referred to the Soviet exploitation of American racial segregation in the newly independent post-colonial nations.[74] But it is also striking that the subject appears to have never been mentioned in the published deliberations of the justices. While there is no direct evidence that foreign policy concerns had any effect on Burton and Minton, they were certainly the most likely candidates to be influenced by the government's brief.

Frankfurter spent most of his discussion time in Conference advocating reargument. "This is *not* a delaying tactic," he told his skeptical colleagues.[75] But the goal of reargument

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[71] Id. at 653. A longer rendition is in a letter to Felix Frankfurter in SIMPLE JUSTICE at 612-13. "Dear Felix," wrote Burton, "… I have been increasingly impressed with the idea that under the conditions of 50 or more years ago it probably could be said that a state's treatment of negroes, within its borders, on the basis of 'separate but equal' facilities might come within the constitutional guaranty of an 'equal' protection of the laws, because the lives of negroes and whites were then and there in fact *separately* cast and lived. Today, however, I doubt that it can be said in any state (and certainly not generally) that compulsory 'separation' of the races, even with equal facilities, *can* amount to an 'equal' protection of the laws in a society that is lived and shared so '*jointly*' by all races as ours is now."

[72] Id. at 653 (emphasis in original).

[73] Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

[74] Brief for the United States as *amicus curiae* in *Brown* at 6-8, reprinted in LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES, Philip Kurland and Gerhard Casper, eds. (Arlington, Virginia: University Publications of America, Inc., 1975) [hereinafter cited as LANDMARK BRIEFS AND ARGUMENTS] Vol. 49 at 121-23. Much of the Soviet propaganda was aimed at the emerging post-colonial states in Africa. *Cf.* Dudziak, *supra*, at 62, 100, and 114-15.

[75] SUPREME COURT IN CONFERENCE at 650 (emphasis in original).

shaped his argumentative strategy, which was to highlight uncertainties and ambiguities that could be clarified only after further reargument and research. "How does Black know what the framers of the Civil War Amendments meant?" he asked. "I have read all of its history, and I can't say that they meant to abolish segregation … or vice versa. … What justifies us in saying that what *was* equal in 1868 is not equal *now*?"[76] While he was prepared immediately to hold that segregation in the District of Columbia violated the Due Process Clause of the Fifth Amendment,[77] Frankfurter was unwilling to decide anything else "going to the merits."[78] "I can't say [now] that it is unconstitutional to treat a Negro differently than a white," he declared.[79]

With these provocatively contrarian expressions, Frankfurter managed to ignite the always-smoldering suspicions and resentments that Justice Douglas harbored toward him. One and a half years later, on the very day that *Brown* was announced, Douglas dictated a "Memorandum for the File" in which he claimed that "[i]n the original conference there were only four who voted that segregation in the public schools was unconstitutional. Those four were Black, Burton, Minton and myself. … Frankfurter and Jackson viewed the problem with great alarm and thought that the Court should not decide the question if it was possible to avoid it. Both of them expressed the view that segregation in the public schools was probably constitutional. Frankfurter drew a distinction between segregation in the public schools [of the District of Columbia and segregation in the public schools] in the states. He thought that segregation in the public schools of the District of Columbia violated due

[76] Id. at 651 (emphasis in original).
[77] Id. at 650.
[78] Id. at 651.
[79] Id. at 651.

process, but he thought that history was against the claim of unconstitutionality as applied to the public schools of the States."[80]

At almost exactly the same time, Frankfurter made an equally bold effort to shape the historical record. In a letter to Justice Reed, three days after the *Brown* decision, Frankfurter reminded Reed that if a vote had been taken at the first conference, there would have been five votes, including Frankfurter's, for overturning *Plessy*.[81] After a year and a half of Supreme Court deliberations over *Brown*, however, this is the first time that Frankfurter appears to have claimed that he had favored overruling *Plessy* at the initial conference.

Warren Replaces Vinson

When the justices reassembled in conference on December 12, 1953, after reargument of the case, almost exactly one year after their first discussion of *Brown*, Earl Warren had replaced Chief Justice Vinson, who had died of a heart attack three months earlier. Warren's opening statement, echoing Black's earlier pronouncements, set the tone: "The more I read and hear," Warren declared, "the more I come to conclude that the basis of the principle of segregation and separate but equal rests upon the basic premise that the Negro race is inferior. That is the only way to sustain *Plessy*—I don't see how it can be sustained on any other theory."[82] In a manner that would eventually become his judicial trademark, Warren framed the issue before the Court as a moral issue involving fundamental questions of justice.

Warren immediately turned to the problems of enforcement. Overruling *Plessy* "will perhaps cause trouble," he acknowledged. "I recognize that the time element is important in

[80] William O. Douglas May 17, 1954 Memorandum for the File reprinted in THE SUPREME COURT IN CONFERENCE at 660-61.
[81] Frankfurter letter to Stanley Reed, May 20, 1954, FELIX FRANKFURTER PAPERS, HARVARD LAW SCHOOL, box 72, file 14.
[82] Id. at 654.

the Deep South. We must act, but we should do it in a tolerant way. It would be unfortunate if we had to take precipitous action that could inflame the issue more than necessary. The conditions in the extreme South should be carefully considered by the Court. Kansas and Delaware are not much different from California …. But not so in the Deep South. It will take all the wisdom of the Court to do this with a minimum of commotion and strife. How we do it is important. At present, my instincts and tentative feelings would lead me to say that in these cases we should abolish, in a tolerant way, the practice of segregation in public schools."[83]

Brown and Legal Realism

The Justices who decided *Brown* demonstrated the powerful influence of the reform movement called Legal Realism on their approaches to law. It is difficult to imagine that, without Legal Realism, *Brown* could have been decided in the way that it was.

There were three ways in which Legal Realism affected the outcome in *Brown*. First was the powerful influence of sociological jurisprudence, a pre–World War I early incarnation of Realism.[84] Its most influential thinker, Dean Roscoe Pound of Harvard Law School, criticized the "mechanical jurisprudence" of the Supreme Court after its decision in *Lochner v. New York* (1905).[85] The Court, he argued, based its decision on a system of legal thought that had lost touch with social reality. With his distinction between "law in books" and "law in action," Pound invoked the new spirit of Pragmatism to undermine the

[83] Id. at 654-55.
[84] For a discussion setting forth the close connection between sociological jurisprudence and legal realism, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960 (New York: Oxford Univ. Press, 1992) [hereinafter cited as TRANSFORMATION II], at 169-171.
[85] Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

legitimacy of the Court's confident formalism.[86] The distinction spawned the Brandeis Brief, with which future Supreme Court Justice Louis Brandeis won a surprising unanimous decision upholding a maximum hours law for women in *Muller v. Oregon* (1908).[87] The brief consisted of two pages of traditional legal argument and ninety-five pages of economic and sociological data about the conditions of working women in the factory system.[88] Like Pound, Brandeis's message was clear: to apply abstract ideas like "freedom of contract" justly, the Supreme Court must take account of changing social reality.

The criticism of legal formalism by Pound and Brandeis was music to the ears of NAACP lawyers planning their strategy to undermine *Plessy v. Ferguson*, one of the most representative decisions of the *Lochner* era.[89] To the charge that the system of legally imposed racial segregation was based on an unconstitutional assumption of the inferiority of black people, the *Plessy* court had responded with the dismissive counteraccusation that any such feelings of inferiority arose "solely because the colored race chooses to put that construction upon it."[90] In reaction, much of the thinking among racial liberals about how to challenge *Plessy* was devoted to showing that the formal equality of racial separation ("the law in books") masked the social reality of systemic racial subordination ("the law in action"). And with its gaping contradiction between an egalitarian American creed and the

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[86] Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).
[87] For a discussion of the Brandeis Brief, see PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE (Cambridge, MA: Harvard Univ. Press, 1984), at 114-131.
[88] Id. at 121. In addition to two pages of legal argument and ninety-five pages of economic and sociological data, the Brandeis Brief contained fifteen pages of "excerpts from state and foreign laws limiting women's hours," for a total of one hundred and twelve pages. Id. Thus, less than two percent of the brief consisted of traditional legal argumentation.
[89] *See generally* Mack, *Rethinking Civil Rights Lawyering*. For the view that Charles Hamilton Houston was a Legal Realist—indeed, "the most substantial contributor to Legal Realist thought … in the area of race relations"—see Note, *Legal Realism and the Race Question: Some Realism About Realism on Race Relations*, 108 HARV. L. REV. 1607 (1995) [hereinafter cited as *Legal Realism and the Race Question*] at 1621-1624. This Note also elaborates on the largely ignored writings concerning race relations of important Legal Realist thinkers Felix Cohen, Robert Hale, and Karl Llewellyn. Id. at 1611-1619.
[90] Plessy v. Ferguson, 163 U.S. 537 (1896) at 551.

social reality of a caste system, Myrdal's *American Dilemma* became the crown jewel in a generation of social science studies expressing the Legal Realist vision of an alliance between the social sciences and legal reform.[91] Within this context, NAACP lawyers became adept at casting the race problem in a historical and sociological framework.[92] When during the *Sweatt* and *McLaurin* conference, Justice Black first declared in favor of overruling *Plessy*, he concluded that the "premise in *Plessy* is not sound—it has been refuted by the facts and by history."[93] Two years later, during the first conference on *Brown*, Black added: "I am compelled to say for myself that I can't escape the view that the reason for segregation is the belief that Negroes are inferior. I do not need books to say that."[94] Yet despite this back-handed dismissal of Myrdal's significance, the influence of *An American Dilemma* is written all over Black's comments about race, especially his frequent appeal to the idea of "caste," one of Myrdal's signature concepts.[95] For example, Black declared that "the Civil War Amendments have as their basic purpose the abolition of … castes."[96] Above all, the idea, as Black put it, that *Plessy* could be "refuted by the facts and by history" seemed to acknowledge a Constitution whose meaning changes based on new understandings of the state of the world.

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[91] *See* Sanjay Mody, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793 (2002) [hereinafter cited as *Brown Footnote 11 in Historical Context*] at 826. The quintessential example of such scholarship was the magisterial ENCYCLOPEDIA OF THE SOCIAL SCIENCES, EDWIN R. A. SELIGMAN (ed.) (New York: The Macmillan Company, 1930-1935). See TRANSFORMATION II, AT 182-183 & 316 FN. 99. Interestingly and not fortuitously, the advisory editors for the encyclopedia were, in law, Roscoe Pound; in philosophy, John Dewey; and in political science, Charles Beard.

[92] See *Legal Realism and the Race Question*, *supra*, at 1623. *See generally* Mack, *Rethinking Civil Rights Lawyering*.

[93] SUPREME COURT IN CONFERENCE at 639 (conference of April 8, 1950).

[94] Id. at 648 (conference of December 13, 1952).

[95] See, e.g., AMERICAN DILEMMA, vol. I, chapter 10, at 221-224; vol. II, chapter 31, at 667-688. Myrdal did not invent the concept of caste, nor was he the first social scientist to apply the concept to the American race problem. Myrdal himself acknowledges this. See AMERICAN DILEMMA at 1377 fn. 5.

[96] SUPREME COURT IN CONFERENCE at 648. He also stated: "The caste system … is the negation of the idea of the Fourteenth Amendment." Id. at 639.

A second way in which Legal Realism affected the decision in *Brown* was through its influence in persuading a generation of New Dealers of the feasibility of social reform through law. Justice Douglas, who, as a professor at Columbia and Yale Law Schools, was one of the original group of Realists, applied his ideas about corporate reform during his service on the Securities and Exchange Commission. Justice Fortas, Douglas's student at Yale, advanced the cause of Legal Realism as a pro bono advocate in two famous cases, *Durham v. United States* (1954) and *Gideon v. Wainright* (1963).[97] His successful arguments for changes in the law of insanity in *Durham* and for the constitutional right to counsel in *Gideon* were infused with the Legal Realist ideal of progressive change through law. Increasingly, Legal Realists came to view law as a vehicle of social reform, to be mocked as "transcendental nonsense," in Felix Cohen's words, unless it could be adapted to a "functional" or "instrumental" role in fostering social change.[98] Gunnar Myrdal coupled his advocacy of social reform through law with a denunciation of the guru of late-nineteenth century American sociology, William Graham Sumner, whose supine mantra—"stateways cannot repeal folkways"—became a formula for justifying social passivity in the emerging laissez-faire state.[99]

The most important respect in which Legal Realism affected the justices who decided *Brown* was in their strikingly similar approaches to constitutional interpretation and their

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[97] *Durham*, 214 F.2d 862 (D.C. Cir. 1954); *Gideon*, 372 U.S. 335 (1963). See LAURA KALMAN, ABE FORTAS (New Haven: Yale Univ. Press, 1990) at 178-183.

[98] Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

[99] AMERICAN DILEMMA at 19-21. Myrdal stated at 1031-1032: "We must voice our grave skepticism toward the simple explanatory scheme concerning the role of valuations in social life typified by William Graham Sumner's concepts, 'folkways' and 'mores.' … The concept of mores actually implies a whole social theory and an entire *laissez-faire* ('do-nothing') metaphysics, and is so utilized. … The theory is … crude and misleading when applied to a modern Western society."

For a discussion of fn.11 in *Brown v. Board of Ed.*, in which, famously and not without controversy, Myrdal's magisterial work was cited along with other social science studies, see *Brown Footnote Eleven in Historical Context*.

agreement with the once-heretical proposition that constitutional meaning changes over time.[100] Except perhaps for Justice Black—whose own views on constitutional meaning evolved into inflexible textualism much later—it is fair to say that all the other justices who decided *Brown* believed in some version of a "living Constitution." Though he came ardently to deny that his vote in *Brown* was based on an evolving Constitution,[101] Justice Black, in his initial appeal to "facts and history" to refute *Plessy*, may indicate that even he had once subscribed to the Legal Realist claim that constitutional meaning varies with changing circumstances.

"A Living Constitution"

At stake in *Brown* was not simply the view that racial segregation was inherently unequal, but also the notion that changing social conditions and realities had fundamentally changed the meaning of racial equality in America.

The notion of a living Constitution owes its debt in part to concepts and an approach to the law developed during the New Deal. Indeed, Jackson's unpublished draft concurrences illustrate the extent to which committed New Dealers had come to take for granted the idea of a dynamic Constitution. "Of course," Jackson wrote, "the Constitution must be construed as a living instrument and cannot be read as if written in a dead language."[102] "It is neither

[100] For the history of the notion of a changing constitution, see Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 41-70 (1993).

[101] Writing in dissent in 1966 in *Harper v. Virginia Bd. of Elections*, Justice Black insisted that he "did not join the opinion of the Court in *Brown* on any theory that segregation where practiced in the public schools denied equal protection in 1954 but did not similarly deny it in 1868 when the Fourteenth Amendment was adopted. … In *Brown* …, the Court today purports to find precedent for using the Equal Protection Clause to keep the Constitution up to date. I did not vote to hold segregation in public schools unconstitutional on any such theory. I thought when *Brown* was written, and I think now, that Mr. Justice Harlan was correct in 1896 when he dissented from *Plessy v. Ferguson*." 383 U.S. 663 (1966) at 677-78, fn.7.

[102] Jackson draft of March 1, 1954 at 11. See Appendix 4 for a discussion of Jackson's draft opinions.

novel nor radical doctrine that statutes once held constitutional may become invalid by reason of changing conditions," Jackson continued, "and those [statutes] held to be good in one state of facts may be held to be bad in another."[103]

Justice Harold Burton exemplifies the extent to which even a thoroughly conventional judge had absorbed the constitutional lessons of the New Deal. At the first argument in *Brown*, in response to a southern legal argument suggesting that for seventy-five years state and federal courts and legislatures had reflected the view that the Fourteenth Amendment did not bar racial segregation, Burton asked: "Don't you recognize it as possible that within seventy-five years the social and economic conditions and the personal relations of the nation may have changed so that what may have been a valid interpretation of them seventy-five years ago would not be a valid interpretation of them constitutionally today?"[104]

Frankfurter, too rejected the notion of an unchanging Constitution, insulated from the realities of a changing world. As a professor, Frankfurter had helped to shape the Legal Realist critique of a static Constitution.[105] In a two-page memo written while the Court was deliberating over *Brown*, Frankfurter gave voice to the idea of a changing constitution:

"[T]he equality of laws enshrined in a constitution which was 'made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues,' *Hurtado v. California*, 110 U.S. 516, 530, 531, is not a fixed formula defined with finality at a particular time. It does not reflect, as a congealed summary, the social arrangements and beliefs of a particular epoch. It is addressed to the changes wrought by

[103] Jackson draft of March 1, 1954 at 11 (also in Jackson draft of March 15, 1954 at 22).
[104] Oral Argument in *Brown*, December 9, 1952 at 24, reprinted in LANDMARK BRIEFS AND ARGUMENTS, *supra*, vol. 49 at 301. See also Burton at note 71 and accompanying text.
[105] See, e.g., Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353 (1916); Felix Frankfurter and Nathan Greene, *Labor Injunctions and Federal Legislation*, 42 HARV. L. REV. 766 (1929); Felix Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 HARV. L. REV. 33 (1931).

time and not merely the changes that are the consequences of physical development. Law must respond to transformation of views as well as to that of outward circumstances. The effect of changes in men's feelings for what is right and just is equally relevant in determining whether a discrimination denies the equal protection of the laws."[106]

The centerpiece of the new approach was the way in which the Court treated the history of the Fourteenth Amendment. Four days before the reargument that had been ordered to answer the Court's questions about history, Frankfurter circulated to the justices a lengthy memorandum on the history of the Fourteenth Amendment written by his law clerk, Alexander Bickel.[107] Frankfurter declared that Bickel's memorandum showed that the legislative history concerning whether the Equal Protection Clause barred segregated schools was "inconclusive, in the sense that the 39th Congress as an enacting body neither manifested that the Amendment outlawed segregation in the public schools, or authorized legislation to that end, nor that it manifested the opposite."[108] In his memo, Bickel, the future Yale constitutional scholar, also included his own conclusion about the proper scope of constitutional interpretation: "[T]he Congress was on notice that it was enacting vague language of indeterminate reach," he declared. While congressmen entertained "[h]opes both for a broad and a narrow application of the general language being voted," in the end, they "trusted to the future to solve future problems."[109]

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[106] FELIX FRANKFURTER PAPERS, HARVARD LAW SCHOOL, box 72, file 14 (undated memo), quoted in SIMPLE JUSTICE at 688.

[107] FELIX FRANKFURTER PAPERS, HARVARD LAW SCHOOL, box 72, file 7. Bickel's memo was eventually published in the Harvard Law Review. Alexander M. Bickel, *The Original Understanding and the Segregation Decision, 69* HARV. L. REV. 1 (1955).

[108] FELIX FRANKFURTER PAPERS, HARVARD LAW SCHOOL, box 72, file 7. Frankfurter's covering letter was entitled *Memorandum for the Conference* and dated December 3, 1953.

[109] FELIX FRANKFURTER PAPERS, HARVARD LAW SCHOOL, box 72, file 14. In his unpublished drafts, Justice Jackson, remarkably, was developing ideas similar to Bickel's, about the original meaning of the Fourteenth Amendment. "The Fourteenth Amendment," wrote Jackson, "does not attempt to say the last word on the concrete application of its pregnant generalities." He continued: "It thus makes provision for giving

The consequence of the Bickel memo was that, by the time the cases were finally reargued on December 7–9, 1953, the Court's focus on the historical background of the Fourteenth Amendment seemed to have vanished, and "the most pointed questions from the bench focused on remedy."[110] In the Conference following reargument, on December 12, 1953, further interest in the original meaning of the Fourteenth Amendment "appeared to be dead."[111]

Chief Justice Warren's *Brown* opinion embraced Bickel's finding that the historical evidence was "inconclusive" as to whether the Equal Protection Clause was meant to bar racially segregated schools.[112] This freed Warren to declare that changing historical circumstances could justify a departure from *Plessy*. "[W]e cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written," the Chief Justice declared.[113] When the Fourteenth Amendment was adopted, only a rudimentary system of public education had been established in America. Since that time, circumstances had changed, and widely available public education—especially in Warren's home state of California—had become one of the glories of American democracy. "We must consider public education in the light of its full development and its present place in American life throughout the Nation," Warren concluded.[114]

The most striking instance of how deeply the Legal Realist vision had penetrated into the justices' consciousness is the example of Justice Reed of Kentucky, the last holdout in

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effect from time to time to the changes of conditions and public opinion always to be anticipated in a developing society." Jackson draft *Brown* concurrence of March 15, 1954 at 11. Jackson added: "exhaustive research to uncover the original will and purpose expressed in the Fourteenth Amendment yields for me only one sure conclusion: it was a passionate, confused … era." Id. at 6.

[110] Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEORGETOWN L.J. 1 (1979) at 38.

[111] Id. at 40.

[112] *Brown*, 347 U.S. 483 (1954) at 489.

[113] Id. at 492.

[114] Id. at 492-93.

Brown and the one justice who may have thought that racial segregation could be morally justified. In spite of his announced opposition to overruling *Plessy*, he could not ignore the views on constitutional interpretation that he had absorbed during his own prior service as solicitor general defending New Deal constitutional innovations before the Supreme Court. "I agree that the meaning of the Constitution is *not* fixed," he told his fellow justices at the first conference on *Brown*.[115] At the second conference, he continued to "recognize that this is a dynamic Constitution, and what was current in *Plessy* might not be current now."[116] Replying to Frankfurter's letter expressing "deep gratitude" to Reed for making *Brown* unanimous, Reed explained why he finally had agreed to join Warren's opinion. "While there were many considerations that pointed to a dissent," Reed wrote, "they did not add up to a balance against the Court's opinion. From [*Missouri ex rel Gaines v. Canada*] through *Smith v. Albright*, *Sweatt*, *Morgan*, *Steele* to Jay Bird [Terry v. Adams] the factors looking toward a fair treatment for Negroes are more important than the weight of history."[117] Myrdal could not have hoped for a more perfect expression of the triumph of the American Creed.

The Triumph of Gradualism

It is not fully appreciated that by the time the justices agreed unanimously to overrule *Plessy*, they already had reached consensus on the idea that the implementation of any desegregation order would be gradual.

Of the original holdouts, Jackson and Clark seem from early on to have been willing to join an overruling opinion, if only they could be assured that implementation of

[115] SUPREME COURT IN CONFERENCE at 649.
[116] Id. at 655.
[117] FELIX FRANKFURTER PAPERS, HARVARD LAW SCHOOL, box 72, file 14. For Frankfurter's letter dated May 20, 1954, expressing "deep gratitude," to which Reed was responding, see box 72, file 14.

desegregation would be gradual. "I won't be a party to immediate unconstitutionality," Jackson declared at the first conference. "[S]egregation is nearing an end. . . . .We should perhaps give them time to get rid of it, and I would go along on that basis. I would not object to such a holding with a reasonable time element. There are equitable remedies that can be shaped to the needs."[118]

Speaking next, Justice Burton, while declaring for overruling, agreed that "we can use time—I would give plenty of time in this decree."[119] Endorsing Jackson's views, Justice Clark declared: "If we delay action … it will help. Our opinion should give the lower courts the opportunity to withhold relief in light of troubles. I would be inclined to go along with that."[120] Even Justice Douglas, who favored immediately overruling *Plessy,* acknowledged that "the answer is simple, though the application of it may present great difficulties." Time, he agreed, was a relevant factor. "It will take a long time to work it out."[121]

All of this was in the background, when, on December 12, 1953, newly appointed Chief Justice Earl Warren initiated the second round of discussion of *Brown*. As we have seen, after firmly declaring his conviction that racial segregation in public schools was unconstitutional, Warren added that he "recognize[d] that the time element is important in the Deep South. We must act, but we should do it in a tolerant way. It would be unfortunate if we had to take precipitous action that could inflame the issue more than necessary."[122] Five days later, Justice Burton noted in his diary: "After lunch the Chief Justice told me of his plan to try [to] direct discussion … toward the decree—as providing … the best chance of unanimity

[118] SUPREME COURT IN CONFERENCE at 652.
[119] Id. at 653.
[120] Id.
[121] Id. at 652.
[122] Id. at 654.

in that [later] phase."[123] Both Kluger and Schwartz interpret this as meaning that Warren hoped that, even if the Court failed to achieve unanimity on the merits, it might still avoid dissent at the decree phase.[124] Yet, there was only a small step to a dramatically different conclusion that a seasoned politician like Earl Warren could have been expected to understand—that if he could reassure the potential dissenters that any remedy would be gradual, he might also be able to produce unanimity on the merits.

A month later, Justice Frankfurter sought to provide just such assurance. In a four-page memo circulated to the Court on January 15, 1954, Frankfurter, who still "cagily"[125] refused to tip his hand on the merits, made clear that he stood with the gradualists on the question of implementation of any desegregation order. "A decree in this case in favor of the appellants of necessity would be drastically different from decrees enforcing merely individual rights before the Court," Frankfurter began. Instead, the remedy issue more closely resembled cases under the Sherman Anti-Trust Act or the law of nuisance, where "so-called considerations of public convenience are balanced against the rights of the plaintiff in molding an appropriate decree. Attention is paid to the element of time for obedience." Earlier cases involving segregation in higher education were also different, he continued, in that they involved only, at most, a few plaintiffs and were therefore "amenable to individual treatment." But "[t]his is not so in the situations before us," Frankfurter observed, since the Court was being "asked in effect to transform state-wide school systems."[126]

The justices reassembled to discuss *Brown* for a second time under Warren the day after Frankfurter circulated his memo. This meeting appeared to be an informal luncheon

[123] SIMPLE JUSTICE at 689.
[124] SIMPLE JUSTICE at 689 & SUPER CHIEF at 90-91.
[125] SIMPLE JUSTICE at 604.
[126] FELIX FRANKFURTER PAPERS HARVARD LAW SCHOOL, box 72, file 14.

gathering, since none of the usual note-takers—Burton, Douglas, Clark, Jackson—took notes of the discussion. Only Frankfurter, not usually a note-taker at conference, sketchily recorded the deliberations. His notes suggest that the nature of the decree was the only subject discussed.[127]

Opening the discussion, Warren outlined his ideas about the two elements of a decree that were designed to satisfy potential dissenters. The first stressed a decentralized approach in which implementation would be delegated to the district courts, which were presumably more familiar with local conditions; the second emphasized flexibility to allow for gradual implementation of the Court's order. The justices also reached agreement on scheduling another round of argument to focus on the nature of the decree. Their reactions to Frankfurter's and Warren's ideas suggest that they already had forged a consensus on a gradualist decree. Oddly, Jackson appears to have remained silent, though, in earlier discussions, he had hardly ever missed a chance to insist upon gradualism. His silence at this moment may be explained by the fact that he was still in the process, apparently unknown to his colleagues, of drafting a dissent, which would soon evolve into a concurrence. Yet, even in the last of his unpublished drafts, Jackson remained vociferously against delegating the task of implementation to the district courts.[128] Since Jackson died during the one year interval between *Brown 1* and *Brown II*, we will never know whether he would have held out against this essential element of the gradualist degree in *Brown II*.

[127] Frankfurter's hand-written notes regarding the conference were dated "Saturday 16." FELIX FRANKFURTER PAPERS, HARVARD LAW SCHOOL, box 72, file 14.

[128] Jackson wrote: "I will not be a party to thus casting upon the lower courts a burden of continued litigation under circumstances which subject district judges to local pressures and provide them with no standards to justify their decisions to their neighbors, whose opinions they must resist." Jackson draft *Brown* concurrence of March 15, 1954, at 17.

There were no voices for immediate across-the-board desegregation. All the justices, including Black and Douglas, endorsed gradualism. "Leave it to the district courts," Black urged, while also endorsing a vague decree. "Vagueness is not going to hurt…. If necessary let us have 700 [law]suits" to work out the process. The meeting closed with a strong declaration by Justice Black on the need for flexibility in enforcement. "Let it simmer…. Let it take time. It can't take too long." He predicted that any politician in the Deep South who supported desegregation "would be dead politically forever…. In Alabama most liberals are praying for delay."[129]

It has often been suggested that the Supreme Court that decided *Brown* did not foresee the backlash that would ensue. It has also been asserted that the Court was unaware of how its opinion in *Brown II* might encourage resistance in the South. However, the process of decision presented here shows that, from the beginning of their deliberations, the justices had never failed to focus on the potential for violent backlash. The opinion in *Brown II* was no casual effort at phrase-making. Rather, the justices reached consensus on a gradualist decree much earlier in their deliberations than we have heretofore realized, and the phrase "all deliberate speed" was an apt summary of that gradualist consensus. Indeed, it does seem clear that, without this prior consensus, there could not have been unanimity in *Brown I.* The result reflected the justices' understanding that they were initiating a social

[129] Id., quoted in SUPER CHIEF at 93. Black's prescience about the South's reaction to *Brown* extended to his own son's career. After graduating from Yale Law School, Hugo Jr. returned to Alabama to practice law, awaiting the opportunity to enter politics. Shortly before *Brown* was handed down, his chance came to run for a vacant congressional seat in Birmingham. When he called the Justice for advice, he "was surprised and a little alarmed" when his father asked him to fly up to Washington. When he arrived, the Justice told him "something in the strictest of confidence that has a lot to do with your decision." He informed him that *Brown* would soon be decided, and that, after that, it would be impossible to engage in southern electoral politics "unless, of course, you are willing to abuse the Supreme Court." "You understand, Son. I've got to do it even though it's going to mess up your plans." HUGO BLACK, JR., MY FATHER: A REMEMBRANCE (New York: Random House, 1975) at 207-08. Hugo Jr. decided not to run. Id. at 208. He also was eventually forced to abandon his labor law practice and move out of state. Id. at 212-215.

revolution. The Court feared that because deeply entrenched southern attitudes and institutions were completely unprepared for immediate desegregation, anything more than a gradualist approach would inevitably lead to violence.

DESEGREGATION AFTER LITTLE ROCK

The autumn of 1958 brought major acts of defiance by the governors of Virginia and Arkansas. After the Supreme Court decision in C*ooper v. Aaron,*[130] Arkansas governor Orval Faubus closed the Little Rock public schools for the 1958–59 school year.[131] The voice of Virginia's "massive resistance" strategy, Governor Lindsay Almond, also closed public schools in three of the Commonwealth's counties.[132] Alongside these dramatic acts of defiance, all but one of the states of the old Confederacy also enacted Pupil Placement laws, an "elaborately conceived alternative to defiance" that stopped desegregation of public schools virtually in its tracks for another five or six years.[133]

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[130] 358 U.S. 1 (1958).

[131] J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978 (New York: Oxford Univ. Press, 1979) [hereinafter cited as WILKINSON] at 94; MARK WHITMAN, THE IRONY OF DESEGREGATION LAW (Princeton: Markus Wiener Publishers, 1998) [hereinafter cited as WHITMAN] at 36.

[132] Governor Almond closed public schools in Norfolk, Charlottesville, and Warren County in September 1958. JAMES W. ELY, JR., THE CRISIS OF CONSERVATIVE VIRGINIA: THE BYRD ORGANIZATION AND THE POLITICS OF MASSIVE RESISTANCE (Knoxville: Univ. of Tennessee Press, 1976) at 74; BENJAMIN MUSE, VIRGINIA'S MASSIVE RESISTANCE (Bloomington: Indiana Univ. Press, 1961) at 74-75; WHITMAN at 36.

[133] WHITMAN at 36 & 37; Note, *The Federal Courts and Integration of Southern Schools: Troubled Status of the Pupil Placement Acts*, 62 COLUM. L. REV. 1448 (1962) at 1452, fn.23. Patrick E. McCauley, *"Be It Enacted," in* WITH ALL DELIBERATE SPEED (New York: Harper & Brothers, 1957) (Don Shoemaker, ed.) at 136-39.

"The difference between pupil-placement laws and massive resistance was purely cosmetic,"[134] Lucas Powe bluntly concluded. "In practice," as J. Harvie Wilkinson III, observed, "pupil-placement laws suited segregationist aims quite nicely."[135] They were an ideal delaying device, a maze of administrative hearings and appeals through which Negroes on an individual basis had to wind before reaching federal court. And the loose, multiple criteria in the statutes allowed officials to hold to an absolute minimum the number of blacks setting foot in white schools.[136] The laws, "functioning as intended," one commentator noted, "make mass integration almost impossible, place the burden of altering the status quo upon individual Negro pupils and their parents, establish a procedure that is difficult and time-consuming to complete, and prescribe standards so varied and vague that it is extremely difficult to establish that any individual denial is attributable to racial considerations."[137]

As these laws were being enacted, a perceptive *Washington Post* journalist noted that "[h]opeful liberal observers … saw in [these laws] a means of effective selective gradualism in adjusting to the Supreme Court ruling," while the actual proponents of the Pupil Placement Laws simply sought "to make it possible to deny Negroes admission to white schools or to hold desegregation to a minimum when it could no longer be prevented."[138] For a time, each group found comfort in these laws.

As mounting evidence of the extent of southern white resistance continued to accumulate during the fall of 1958, the Supreme Court may itself have come to the grim conclusion that tokenism was the best that could be expected until things calmed down. In

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[134] LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS at 165.
[135] WILKINSON at 84.
[136] WILKINSON at 84.
[137] WILKINSON at 84 (quoting Note, *The Federal Courts and Integration of Southern Schools: Troubled Status of the Pupil Placement Acts*, 62 COLUM. L. REV. 1448 (1962) at 1453).
[138] WHITMAN at 38 quoting BENJAMIN MUSE, TEN YEARS OF PRELUDE (New York: Viking Press,1964) at 68-69.

Shuttlesworth v. Birmingham Board of Education,[139] decided in November 1958, the Court, in a curt, one sentence opinion, upheld Birmingham, Alabama's Pupil Placement Law against a claim that it was discriminatory "on its face." While the Supreme Court emphasized "the limited grounds" upon which it was affirming the lower court ruling, even this limited "facial" challenge ought to have enabled the black plaintiffs to prevail. Like the lower federal court, however, the Supreme Court chose to ignore the plain discriminatory purpose written all over the Alabama Pupil Placement Law. The three-judge federal panel below had maintained, with a wink and a nod, that since there was nothing on the face of the school law that required a dual school system, the plaintiffs could prevail only if they were able to offer evidence of discrimination in the actual administration of the law.[140] While there was clear evidence that Alabama had passed the law as part of its strategy of massive resistance, Judge Rives, writing for the three judge panel, was not to be persuaded. He acknowledged that the plaintiff had argued "[w]ith much force" that the Resolution of Interposition and Nullification, passed by a Special Session of the Alabama Legislature in 1956, had declared *Brown* **"**null, void, and of no effect**"** and vowed to maintain segregation in Alabama public schools.[141] Though both the Resolution of Nullification and the Pupil Placement Act were part of the same legislative package expressing open defiance of the Supreme Court's ruling, Rives reached the hyper-technical conclusion that because the legislative declaration was "a joint resolution" that "does not have the force and effect of law," it could not be taken as evidence that the Pupil Placement plan was "tainted" and therefore discriminatory on its face.[142]

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[139] 358 U.S. 101 (1958).
[140] *Shuttlesworth v. Birmingham Bd. of Ed.*, 162 F. Supp. 372 (1958).
[141] 162 F. Supp. at 380 & at fn. 9.
[142] 162 F. Supp. at 381.

Four years later, Judge Rives's colleague on the Fifth Circuit, John Minor Wisdom, cut through this fog of legalism to observe that Pupil Placement laws were a ploy "to maintain segregation by allowing a little token desegregation."[143] Had the *Shuttlesworth* Court been similarly inclined, it would not have been difficult to decide that the Alabama Pupil Placement Law was discriminatory on its face. Instead, the justices apparently concluded that they had little choice but to acquiesce even in a school plan whose overt purpose was to resist *Brown*. Two months after *Cooper v. Aaron*, then, the Supreme Court began to "rehibernat[e]."[144] With the Court still under siege, the tactical retreat in *Shuttlesworth* foreshadowed a decade-long strategy of withdrawal from the school desegregation struggle itself.

As "it became clear" during the early 1960s that "the sole purpose of [Pupil Placement] statutes was to frustrate desegregation," the U. S. Court of Appeals for the Fifth Circuit enjoined their application.[145] Southern legislatures responded by enacting "Freedom of Choice" plans that permitted students to choose to transfer to any school within the school district that had space available. Initially, Courts of Appeals responded positively to the newly enacted Freedom of Choice plans although they did not ultimately result in any meaningful integration in the Deep South. The problem with Freedom of Choice Plans was that while "[i]n theory, each child's school choice was free; in practice, it was often anything but. … [The] opportunity for pressure, covert and overt," from white employers and school officials "was built into every pore of the 'free' choice system. In the very communities

[143] *Bush v. Orleans Parish School Bd.*, 308 F.2d 491 (5th Cir. 1962) at 499; WHITMAN at 45.
[144] WILKINSON at 93.
[145] *Frank T. Read, Judicial Evolution of the Law of School Integration Since* Brown v. Board of Education, 39 LAW & CONTEMPORARY PROBLEMS 7 (1975) at 19. *See, e.g., Bush v. Orleans Parish School Board*, 308 F.2d 491 (5th Cir. 1962) (Judge John Minor Wisdom writing for the three-judge panel) at 499-500: "This Court … condemns the Pupil Placement Act when, with a fanfare of trumpets, it is hailed as the instrument for carrying out a desegregation plan while all the time the entire public knows that in fact it is being used to maintain segregation by allowing a little token desegregation. … The Act is not a plan for desegregation at all."

where blacks were most disadvantaged and illiterate, freedom of choice would be least likely to work."[146]

In 1964–1966, the Fifth Circuit Court of Appeals, under the leadership of Judge John Minor Wisdom, moved vigorously to end judicial paralysis over school desegregation. In three opinions striking down important aspects of Freedom of Choice plans that had ensured no more than token integration, "Wisdom transformed the face of school desegregation law. … [His] critical premise was that school boards had a positive duty to integrate, not merely to stop segregating."[147]

After a decade spent mostly on the sidelines, the Supreme Court in 1968 boldly reentered the fray, striking down a Virginia Freedom of Choice law in *Green v. County School Board.*[148] The case involved the school system of New Kent County, Virginia, which by 1967 had 115 African-American students attending public school with white students—up

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[146] WILKINSON at 109-110.

[147] WILKINSON at 111-12. *Singleton v. Jackson Municipal Separate School District*, 348 F.2d 729 (5th Cir. 1965) (*Singleton I*); *Singleton v. Jackson Municipal Separate School District*, 355 F.2d 865 (5th Cir. 1966) (*Singleton II*); *U.S. v. Jefferson County Bd. Of Ed.*, 372 F.2d 836 (5th Cir.1966) (*Jefferson)*. Judge Wisdom, in *Jefferson, supra,* stated: "As we see it, the law imposes an absolute duty to desegregate, that is, disestablish segregation. *And an absolute duty to integrate*, in the sense that a disproportionate concentration of Negroes in certain schools cannot be ignored." *Jefferson*, fn.5 (emphasis added). Later in his lengthy and important opinion, Judge Wisdom said of Freedom of Choice plans: "School authorities in this circuit, with few exceptions, have turned to the 'freedom of choice' method for desegregating public schools. The method has serious shortcomings. Indeed, the 'slow pace of integration … is in large measure attributable to the manner in which free choice plans have operated.' When such plans leave school officials with a broad area of uncontrolled discretion, this method of desegregation is better suited than any other to preserve the essentials of the dual school system while giving paper compliance with the duty to desegregate." 372 U.S. at 888. The detailed and demanding remedial portion of Judge Wisdom's *Jefferson* opinion significantly limited school board discretion that had impededed integration and required school authorities "to take affirmative action to bring about a unitary, non-racial system." 372 F.2d at 894. Judge Wisdom's opinion of December 29, 1966, also declared that delay would not be tolerated: "[A]fter twelve years of snail's pace progress toward school desegregation, … the clock has ticked the last tick for tokenism and delay in the name of 'deliberate speed.'" 372 F.2d at 896.

[148] 391 U.S. 430 (1968). Although inactive, for the most part, in school desegregation cases after *Cooper v. Aaron* and before *Green*, the Court did assert itself a few times in the mid-1960s. *See, e.g., Rogers v. Paul*, 382 U.S. 198 (1965) ; *Griffin v. Prince Edward County*, 377 U.S. 218 (1964). Indeed, Judge Wisdom noted "the Supreme Court's increasing emphasis on more speed and less deliberation in school desegregation." *Jefferson*, *supra*, at 861. In doing so, he quoted from the Warren Court's 1964 *Griffin* opinion, *supra*, 377 U.S. at 229: "There has been entirely too much deliberation and not enough speed in enforcing the constitutional

from zero in 1964, 35 in 1965, and 111 in 1966. But 85 percent of African-American students in the county were still enrolled in a school with no white students.[149] The Supreme Court, in *Green*, found this unacceptable. Justice Brennan, writing for a unanimous Warren Court, stated: "a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is … intolerable. 'The time for more "deliberate speed" has run out,' *Griffin v. County School Board*, …. The burden on a school board today is to come forward with a plan that promises to work, and promises realistically to work *now*."[150]

The change was dramatic. In 1964, the year of the enactment of the monumental Civil Rights Act and the tenth anniversary of *Brown*, only 1.2 percent of black school children in the South attended school with whites. (Excluding Texas and Tennessee, the percent dropped to less than one-half of one percent.[151]) By 1971, a "judicial blitz" resulted in 44 percent of

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rights which we held in *Brown* … had been denied Prince Edward County Negro children." *Jefferson*, *supra*, fn.55.

Moreover, it should not be forgotten that after *Cooper* and prior to *Green*, the Supreme Court issued several landmark opinions protecting the NAACP, which was essential to school desegregation efforts. *See, e.g.*, *Bates v. Little Rock*, 361 U.S. 516 (1960) ; *Shelton v. Tucker*, 364 U.S. 479 (1960); *NAACP v. Button*, 371 U.S. 415 (1963); *Gibson v. Florida Legislative Investigating Committee*, 372 U.S. 539 (1963). Much of the school desegregation litigation, including *Green*, was spearheaded by the NAACP Legal Defense Fund.

[149] WILKINSON, *supra*, at 115.

[150] 391 U.S. at 438-39 (emphasis in original). The Court reinforced *Green* in two companion cases, both also unanimous opinions authored by Justice Brennan, and litigated for African-American students by the NAACP Legal Defense Fund. *Monroe v. Bd. of Commissioners*, 391 U.S, 450 (1968); *Raney v. Bd. of Ed.*, 391 U.S. 443 (1968). *See* POWE at 296-97. For a discussion of what he labels "the *Green* trilogy" and also Judge Wisdom's opinion in *Jefferson*, *see* WHITMAN at 89-103.

[151] In his well-known book HOLLOW HOPE, Gerald Rosenberg has offered a misleading account of desegregation between 1964 and 1971 in support of his claim that "*Brown* and its progeny stand for the proposition that courts are impotent to produce significant social reform." GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (Chicago: Univ. of Chicago Press, 1991) at 71. Adopting an arbitrary distinction between "direct" and "indirect" causes of desegregation in the Deep South, he asserts that *Brown* was not a direct cause of desegregation. Instead, he maintains that while *Brown* directly caused the Southern backlash against the decision, it had little influence on the growth of the Civil Rights Movement or, indeed, on the passage of the historic Civil Rights Act of 1964. He concludes that the clear increase in desegregation between 1964 and 1971 cannot be attributed to *Brown*, but rather to the belated support of Congress and the executive to desegregating southern public schools.

There are a number of difficulties with Rosenberg's thesis. In a situation of multiple causation, he forces his account into a linear narrative rather than seeing the process as the result of the convergence of multiple influences. For example, he marginalizes the important work of the courts of appeals in producing

black children in the South attending majority-white schools compared to only 28 percent who did so in the North and West. The last three years of this "judicial blitz" (1969–1971) occurred despite the newly elected Nixon Administration's reversal of the aggressive enforcement policies of HEW. **"**The Court that once badly needed executive support now moved in the face of executive opposition." The results were astonishing. "The South,

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early and widespread desegregation in the border states. He also fails to give credit to Judge John Minor Wisdom and the Fifth Circuit for independently striking down Pupil Placement and Freedom of Choice laws, which had slowed desegregation to a snail's pace in the Deep South during the previous decade. Yet, it must be acknowledged that any attribution of sole causation to these Fifth Circuit opinions, which spanned the years 1964–1966, will be debatable since it is not possible to separate out the clearly acknowledged deference to Supreme Court opinions from other causes like the Civil Rights Movement, the election of President Kennedy, the Civil Rights Act, or executive enforcement by HEW.

Despite Rosenberg's claim, there does seems to be a close, "direct," link between *Brown* and the Civil Rights Movement in the person of Martin Luther King, Jr., who launched the Montgomery Bus Boycott in December 1955 after acknowledging that *Brown* provided legitimacy and inspiration to the movement. In his first sermon as newly appointed minister of Ebenezer Baptist Church, King declared that, unlike white people, there "will be nobody among us who will stand up and defy the Constitution of this nation…. And we are not wrong. We are not wrong in what we are doing. If we are wrong—the Supreme Court of this nation is wrong." Taylor Branch, PARTING THE WATERS at 140.

Finally, the significant number of cases brought by the NAACP casts doubt on Rosenberg's effort to portray the newly active HEW as the primary cause of the lawsuits that ended segregation.

Despite Rosenberg's efforts to portray school desegregation as dramatically increasing after 1964, ROSENBERG at 52, it is clear from his own statistics that, through 1966, little had changed. In 1966, in Alabama, only .43 percent of black children were in school with whites, 2.7 percent in Georgia, .85 percent in Louisiana, .59 percent in Mississippi, and 1.7 percent in South Carolina. By 1970–71, the figures for Alabama had skyrocketed to 80 percent, for Georgia, 83.1 percent, Louisiana, 75.9 percent, for Mississippi, 89.1 percent, and for South Carolina, 92.9 percent. See Rosenberg, Appendix I, at 345–46.

As we can see, the remarkable change that did occur took place only between 1966 and 1971, during the last three years of which newly elected President Nixon reversed the aggressive stance of HEW. Ironically, it may have been the Supreme Court's unanimous 1968 decision in *Green* that provided the needed spark of inspiration and expression of support to the judges of the Fifth Circuit Court of Appeals.

The six or seven year interval between the passage of the Civil Rights Act and any substantial desegregation in the South is similar to the decade between *Brown* and the passage of the Civil Rights Act. The later interval, Rosenberg uses to attribute direct causation to the Civil Rights Act; the earlier interval, he treats as illustrating that *Brown* had little causal influence.

The post-Warren Court 1969 *Alexander* case, *Alexander v. Holmes County Bd. of Ed*., 396 U.S. 19 (1969) (per curiam), as well as the 1970 *Carter* case, *Carter v. West Feliciana Parish School Bd*., 396 U.S. 290 (1970) (per curiam), also undeniably played a role in reinforcing the Court's position in *Green*. (The Justices sitting for both of these cases were all Warren Court Justices, with the exception of Chief Justice Burger having replaced Earl Warren.) And the NAACP Legal Defense Fund's efforts were essential, especially since the U.S. Department of Justice (as well as the U.S. Department of Health, Education, and Welfare) opposed the position argued by the NAACP in *Alexander* and adopted by the Court to brook no further delay. WILKINSON at 119-20. For a discussion of the importance of *Green*, *Alexander*, and *Carter*—one that implicitly but effectively counters Rosenberg's thesis—see Frank T. Read, *Judicial Evolution of the Law of School Integration Since* Brown v. Board of Education, 39 LAW & CONTEMP. PROBS. 7 (1975) at 28-32.

seventeen years after *Brown* …, became America's most integrated region."[152]

MEASURES OF CHANGED RACIAL CONSCIOUSNESS, 1961–1991

With the perspective of more than a half-century, should the decision in *Brown* be regarded a success or a failure? Gerald Rosenberg raised this question in his provocative 1991 book, *The Hollow Hope*, which emphasized the Supreme Court's inability to produce any significant desegregation in the Deep South until Congress and the president collaborated in pressing southern school districts to comply.[153] If the measure of the success of *Brown* is to be found in the degree of public school desegregation it achieved, the decision must be judged a failure, at least as of the time the Warren Court passed into history fifteen years after *Brown* was decided.

But the success of *Brown* should be understood from a different perspective. In initiating a challenge to the premises of white supremacy, the Supreme Court in *Brown*, I hope to show, began a long-term process that eventually succeeded in fundamentally altering white racial consciousness and overthrowing the caste system.

In order to make the case for this version of success, I shall offer several snapshots of the racial consciousness of white America over time.

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[152] WILKINSON at 121. These figures cited by Wilkinson are estimates from the U.S. Department of Health, Education, and Welfare. Id. at 121. **"**A half century [after *Brown*], racial segregation is still the norm in northern public schools. The five states with the highest rates of school segregation … are all outside the South." THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STUGGLE FOR CIVIL RIGHTS IN THE NORTH (New York: Random House, 2008) at xix.

[153] Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

Beginning with the earliest public opinion polls in 1939 on equality and race, it is possible to sketch white racial consciousness before the Second World War. While data from this inaugural period in the history of polling must be used cautiously, it does provide a fairly grim portrait of the racial attitudes of white Americans in the years immediately before and after the Second World War.

The available polling data during the fifteen years before *Brown* supports Myrdal's picture of a caste system built upon the conviction of white Americans that African-Americans were inferior. In September 1939, a Roper/Fortune survey reported that 71 percent of its respondents thought that Negroes generally were of lower intelligence than whites.[154] A July 1945 Office of Public Opinion Research survey asked respondents which among four statements best described their attitude toward Negroes. Thirty-three percent answered that Negroes should have either "more" (14 percent) or "the same" (19 percent) opportunities as white people—we might call them "racial liberals"—compared to the 64 percent who might be called "white supremacists." The latter answered either that "although Negroes should not be mistreated by whites, the white race should always keep its superior

[154] "Roper Fortune #9: Roosevelt Balance Sheet; Tariffs; Negroes; Sex; General" (survey, The Roper Organization and Fortune Magazine, September 1939), retrieved from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut, http://www.ropercenter.uconn.edu/ (henceforth, RCPOR) (USRFOR1939-009). The poll results illustrate why one must not draw too rigorous conclusions from data assembled during the early days of polling, when organizations were experimenting with different ways of asking questions. The Roper question on black and white intelligence cited in the text was followed up with a second question that was asked only of the 71 percent who originally replied that blacks were less intelligent. The second question inquired about the causes of lower intelligence among Negroes. Thirty-two percent replied that blacks "lacked opportunities," 43 percent answered that they were "less intelligent," and 21 percent replied "both." While both questions seemed designed to elicit beliefs about inherent or biological inferiority, the second set of answers makes clear that at least 40 percent of the respondents did not understand "intelligence" that way. Those who designed the survey probably understood intelligence as a measure of "capacity to achieve or perform" but not of "inherent" ability or "native intelligence." As we shall see, later questions sought to cure this ambiguity.

position" (44 percent), or "because Negroes are so different from white people as a race, I believe they should not be allowed to mix with whites in any way" (20 percent).[155]

In May 1944, a University of Chicago poll asked respondents whether, "as far as you know," "Negro blood" was different from "white blood." Thirty-two percent of the respondents replied that "Negro blood" was different while 36 percent thought they were the same; 32 percent answered that they did not know.[156] Separation of donated white and black blood was standard operating procedure in the military during World War II.[157] It continued to be practiced in blood banks in postwar America, expressing the still widespread belief among whites that African Americans were biologically inferior. Similarly, a May 1948 Gallup poll reported that 63 percent of Americans opposed President Truman's plan to integrate the armed forces by executive order.[158]

Polling data on equality and race supported one of Myrdal's important observations about the structure of the southern system of racial segregation—the most intense support for separation of the races existed in those relationships that tested the boundaries of intimacy between blacks and whites. As one moved from the private to the public sphere, the insistence on racial segregation diminished. This can be illustrated by poll reactions to various forms of legally imposed racial separation.

In realms such as marriage and social intimacy, poll respondents after World War II continued to be virtually unanimous in rejecting both intermarriage and social mixing across racial lines. In 1948, 81 percent of respondents to a Roper/Fortune poll declared themselves

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[155] "OPOR Poll: Roosevelt Survey #52" (survey, Office of Public Opinion Research, July 19, 1945), RCPOR (USOPOR1945-052).

[156] "NORC Survey #1944-0225: Attitudes Toward Negroes" (survey, National Opinion Research Center, University of Chicago, May 1944), RCPOR (USNORC1944-0225).

[157] Thomas Sugrue, *Sweet Land of Liberty: The Forgotten Struggle for Civil Rights in the North* (New York: Random House, 2008), 64.

[158] "Gallup Poll #419" (survey, Gallup Organization, May 28–June 2, 1948), RCPOR (USAIPO1948-0419).

opposed to a close relative marrying a Negro, and 63 percent were opposed to having a black person as a neighbor.[159] Housing was a major area where large majorities favored racial separation. A 1939 Roper/Fortune survey found overwhelming support among Americans for residential segregation by race. Only 13 percent believed that blacks should be allowed to live in whatever neighborhoods they wished. The remaining respondents divided between those who believed that blacks should be prevented by law from living in white neighborhoods (41 percent) and those who believed that there should be no laws but "there should be an unwritten understanding, backed up by social pressure, to keep Negroes out of the neighborhoods where white people live" (42 percent).[160]

Even as late as 1963, when large majorities of Americans had shifted to support Kennedy's Civil Rights bill, the old white racial animosities continued to persist in the area of housing. As large majorities of white Americans approved of public accommodation laws that would outlaw discrimination in public transportation, restaurants, and even schools, a larger number continued to resist fair housing laws. Still, a 1963 Gallup poll of white racial attitudes seems to show a dramatic decline in white resistance to black neighbors. When asked whether they would move if "colored people came to live next door," 21 percent of white people answered that they would definitely move and 24 percent said they "might move." But 55 percent of white people replied that they would not move—in marked contrast to the 83 percent in 1939 who believed that black people should be prevented by law or custom from living in white neighborhoods.[161]

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[159] "Roper Fortune #69: Anti-Minority Sentiment in the U.S. Today" (survey, The Roper Organization and Fortune Magazine, September 1-13, 1948), RCPOR (USRFOR1948-069).

[160] Fortune Magazine, "Roper Fortune #9."

[161] Gallup Organization, "Gallup Poll #1963-0673: Kennedy/Cuba/Race Relations/Presidential Election" (survey, Gallup Organization, May 23–28, 1963), RCPOR (USAIPO1963-0673).

A series of surveys of northern opinion recorded other dramatic reversals of racial attitudes. Beginning in 1942, respondents were asked: "If a Negro with the same income and education moved into your block, would it make any difference to you?" In 1942, 42 percent of northern whites said it would make no difference; by 1963, this group had grown to 70 percent. By similar numbers (40 percent in 1942, 75 percent in 1963), white northerners approved of desegregated schools. If the racial caste system was based on the conviction that black people were inferior, we can see dramatic evidence of its disintegration in the North over a quarter century. In 1939, we recall, 71 percent of respondents answered that African-Americans were of inferior intelligence. In 1963, by contrast, four-fifths of northern whites agreed that "Negroes are as intelligent as white people."[162]

As one moved away from the more intimate realms of family, friends, and neighbors to the question of enforced racial separation in public accommodations, the responses grew more divided. In a 1944 survey, Americans, by a margin of 51 percent to 42 percent, said they would eat in a restaurant that served both blacks and whites. But when the 51 percent majority were pressed to say whether they would sit next to a Negro at a restaurant, 10 percent of them said no.[163] There does seem to have been somewhat more acceptance of

[162] Sugrue, *Sweet Land of Liberty*, 247-248.

[163] "NORC Survey #1944-0225: Attitudes Toward Negroes." Here one encounters the fascinating process of seeing the early pioneers of polling test run different versions of a question. Two questions on desegregating restaurants, with a slight difference in wording, yielded a significant shift in answers. To the question: "Do you think that some restaurants in this town should serve both Negro and White people?" respondents answered in the negative by a 47 percent to 46 percent margin. When the question was rephrased as "Do you think you would eat in a restaurant that served both Negro and White people" the answer became 51 percent to 42 percent in favor. Due to the apparently more personalized wording, the proponents gained by 5 percent while the opponents shrank by 5 percent.

desegregation in public transportation. Gallup polls in 1948 and 1949 revealed a small but consistent majority in favor of desegregating interstate buses and trains.[164]

Sharply ambivalent attitudes toward equal employment rights were recorded in the post–World War II era. In a May 1944 poll, 50 percent of respondents said it was "all right" with them if blacks "with the same kind of training" were hired to do "the [same] kind of job as you"; 43 percent replied that they "wouldn't like it." Yet, in the same set of polls, 51 percent simultaneously asserted that "whites should have first chance" at such a job, while only 42 percent answered that Negroes should have "as good a chance."[165]

Many polls recorded these sorts of conflicts or ambivalences over equal employment rights. Differently worded questions often produced dramatically different answers. A June 1945 Gallup poll asked about a proposed state law that "would require *employers* to hire a person if he qualified for the job regardless of his race or color"; 43 percent were recorded in favor, 44 percent opposed. A changed question that shifted the focus and asked about a proposed law that required "*employees* to work alongside persons of any race or color" was opposed by a 56 percent to 34 percent margin. Simply shifting the focus of the question resulted in a 22 percent margin of opposition instead of 1 percent![166]

After President Truman's 1948 proposal for a Fair Employment Practices Act, several surveys focused on attitudes toward Truman's federal plan. As a 1952 Roper survey demonstrated, poll responses typically divided into three: between those who favored the law (33 percent), those who opposed the law (32 percent), and those who believed that states, not

[164] "Gallup Poll #1948-0414: Foreign Policy/States/Civil Rights/Presidential Election" (survey, Gallup Organization, March 5–10, 1948), RCPOR (USAIPO1948-0414); "Gallup Poll #450," (survey, Gallup Organization, November 27–December 1, 1948), RCPOR (USAIPO1949-0450).
[165] "NORC Survey #1944-0225: Attitudes Toward Negroes."

[166] "Gallup Poll #349" (survey, Gallup Organization, June 14–20, 1945), RCPOR (USAIPO1945-0349). Oddly enough, when Gallup asked these two questions again in July 1947, the difference had vanished and an identical 46 percent to 48 percent margin opposed both of these laws.

the federal government, should decide whether a law was needed (26 percent).[167] It was never clear to what extent devotion to states' rights was simply a cover for opposition to any fair employment law. Another three-way split occurred in response to a Gallup question asking "how far" the federal government should go in requiring employers to engage in equal hiring. Thirty-three percent replied "all the way," 6 percent answered "part of the way," and 47 percent said "none of the way." [168] After *Brown*, many polls asked how long the respondent thought it would take to desegregate American public schools. The choices were again divided into three categories: immediate desegregation, gradual desegregation over a period of years, and never. It was hardly clear whether the large group of gradualists who predicted there would be a very long delay actually favored the delay or was simply pessimistic about whether an otherwise desirable goal could ever be reached.

It is difficult to generalize broadly about the surveys of public opinion before *Brown*. They show that in most segregated areas of American life, a broad consensus of white Americans favored the status quo. In some areas involving the more intimate realms of family, friends, and neighborhood, whites were virtually unanimous in disapproving of social relations across racial lines. In areas involving public accommodations—restaurants, transportation—the public was equally divided over segregation, and the poll results show dramatic shifts depending on small changes in the wording of the questions. This last phenomenon may suggest not so much differences among white people in their racial attitudes as an internal conflict within most white Americans reflecting the chasm between

[167] "Roper Commercial #1952-059: NBC Political Study" (survey, The Roper Organization and National Broadcasting Company, May 1952), RCPOR (USRCOM1952-059).
[168] "Gallup Poll #1949-0439: Pyramid Clubs/Lobbyists/Taxes/Japan/Truman" (survey, Gallup Organization, March 19–24, 1949), RCPOR (USAIPO1949-0439).

the nation's ideals and its racial attitudes.

White Attitudes toward Blacks, 1954–1960

If one were looking for signs after *Brown* of progress in white racial attitudes, the regular Gallup surveys on approval or disapproval of *Brown* would seem to offer all that one needed. Between 1954 and 1959, *Brown*'s approval rating increased steadily from 53 percent to 60 percent.[169] But, for whatever reason, Roper surveys undertaken during the same period show a clear majority against *Brown*. In three surveys between 1956 and 1958, Roper offered the respondent four choices. The first two asked whether the respondent was for immediate desegregation or desegregation in "a reasonable time."[170] Third and fourth choices were:

> 3. "The time may come when Negro and white children should go to the same school, but it will take years in some places and it shouldn't be pushed."
>
> 4. "The Supreme Court decision was a mistake and white and Negro students should never be forced to go to the same schools."

In all three Roper surveys between 1956 and 1958, the percentage of respondents agreeing with statements 3 or 4 varied between 58 percent and 63 percent. By contrast, the percentage approving of *Brown* (choices 1 or 2) varied between 35 percent and 44 percent. In September 1958, Roper recorded only 44 percent approval of *Brown*, a still substantially higher number than the 35 percent recorded only two years earlier or the 37 percent that favored *Brown* only four months earlier.[171]

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[169] "Gallup Poll #531" (survey, Gallup Organization, May 21–26, 1954), RCPOR (USAIPO1954-0531); "Gallup Poll #614" (survey, Gallup Organization, May 29–June3, 1954), RCPOR (USAIPO1959-0614).

[170] A less-favorable-to-*Brown* "more time should be given to work out problems" was substituted for "reasonable time" in the last two surveys.

[171] "Roper Commercial #64" (survey, The Roper Organization, Late August–September 8, 1956), RCPOR (USRCOM1956-064); "Roper Commercial #1958-106: Party Line IV—The Public Pulse" (survey, The Roper

Why the Roper and Gallup polls differed so much is not easy to fathom. Among polling professionals, it has long been suspected that, where there are binary choices, some percentage of people will always choose "approve" out of fear that they will otherwise be thought too negative. Others speculate that some respondents, regardless of their views on the merits, are reluctant to say they disapprove of a Supreme Court decision. Whatever the explanation, the dramatically different attitudes toward *Brown* recorded in the Roper and Gallup surveys should lead to caution in supposing that racial consciousness had progressed during a period otherwise known for successful resistance to the Supreme Court desegregation decision.

Changing Racial Consciousness, 1961–1991

Looking back, after a period in which, like Lincoln, a black man came almost out of nowhere to be elected president of the United States, it does seems clear that when *Brown v. Board of Education* was decided only a utopian dreamer could have believed that a person of color would be elected president in his or her lifetime. As a delegate to the Democratic Convention that nominated Barack Obama replied, when asked whether she ever thought that the dreams inspired by Martin Luther King, Jr.'s great civil rights speech would come to pass in her lifetime: "About 10 years ago, I thought: I won't see this. This is something for my grandchildren."[172]

The rise of Obama to the presidency and the decision in *Brown* both came as surprises to most contemporaries. And because historians are trained to find those factors in

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Organization, June 7, 1958), RCPOR (USRCOM1958-106); and "Roper Commercial #107" (survey, The Roper Organization, October 4, 1958), RCPOR (USRCOM1958-107).

[172] Michael Powell, "Witnesses to Dream Speech See a New Hope," *New York Times*, August 28, 2008, A1.

the past that shaped the present, they have often treated the unexpected as, in retrospect, hardly surprising at all. "History," Philip Roth wryly observed, is "where everything unexpected in its own time is chronicled on the page as inevitable."[173] As Michael McFaul, a democracy expert on the National Security Council, wrote: "In retrospect, all revolutions seem inevitable. Beforehand, all revolutions seem impossible."[174]

As I have indicated, my treatment of *Brown* is an effort to restore the sense of surprise, contingency, and historical discontinuity that the unanimous decision actually represented.

* * *

In August 1961, the same month in which Barack Obama was born, Gallup asked Americans whether they would vote for a black person for president if their party nominated him. Forty-one percent said they would not, while 50 percent said they would, the first time that a majority of Americans said they would vote for an African American for president.[175] These polls themselves signified a shift in racial consciousness from just three or four years earlier. In September 1958, as the Little Rock crisis was unfolding, only 38 percent of the respondents said they would vote for an African American for president, while 54 percent said they would not.[176] A year later, 49 percent said they were prepared to vote for a black person for president while 46 percent said they were not.[177] To put the point another way,

[173] Philip Roth, *The Plot Against America* (Boston: Houghton Mifflin, 2004), 114.
[174] Quoted in David Brooks, "Fragile at the Core," *New York Times*, June 19, 2009, A27.

[175] "Gallup Poll #1961-0649: Presidential Election/Electoral College" (survey, Gallup Organization, August 24–29, 1961), RCPOR (USAIPO1961-0649).
[176] "Gallup Poll #604" (survey, Gallup Organization, September 10–15, 1958), RCPOR (USAIPO1958-0604).
[177] "Gallup Poll #622" (survey, Gallup Organization, December 10–15, 1959), RCPOR (USAIPO1959-0622).

three Gallup polls between September 1958 and August 1961 showed that opposition to a black president fell from 54 percent to 46 percent to 41 percent. Fortunately, various polling organizations continued to ask this same question seven more times between 1961 and 1978. The results provide us with one of the best measures of change in white racial consciousness that we have. Between 1958 and 1978, the percent of respondents who said they were prepared to vote for an African American for president grew from 38 percent to 76 percent.[178]

Another illuminating marker of changed racial consciousness can be observed in a Pew Research Center survey question, asked every other year between 1987 and 2003. Respondents were asked whether they agreed or disagreed with the statement "I think it's right for blacks and whites to date each other." During those 16 years, the level of agreement rose steadily. In 1987, 48 percent agreed; in 2003, 77 percent agreed.[179]

At this point, one would wish to invite into the discussion the cultural historian who might identify the actual mechanisms by which popular consciousness on the race question was transformed. Left to my own devices, I will offer my own crude sketch of the process.

There are two basic propositions. The first is that during the half century after *Brown*—in significant part as result of *Brown*—the black middle class grew substantially. Perhaps the best measure of black entry into the middle class is the percentage of black college graduates. From 1955 to 1990, the number of college students aged 18–24 who were

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[178] "Gallup Poll #1107G" (survey, Gallup Organization, July 21–24, 1978), RCPOR (USAIPO1978-1107G).
[179] "Times Mirror Poll #1987-PS0487: The Press and the Presidency" (survey, Gallup Organization and the Times Mirror Center for the People & the Press, April 25–May 10, 1987), RCPOR (USTM1987-PS0487); "Pew Research Center Poll: Politics and Values" (survey, Princeton Survey Research Associates International and Pew Research Center for the People & the Press, July 14–August 5, 2003), RCPOR (USPEW2003-VALUES). There was no poll in 1999. Among white people in 2003, 72 percent agreed.

black grew from 4.9 percent to 11.3 percent.[180] Between 1987 and 2007, the percentage of black adults with bachelor's degrees grew from 11 percent to 17 percent.[181]

The growth of a black middle class was accompanied by a somewhat separate phenomenon—an increased acceptance by and identification of whites with African American cultural figures. Nat King Cole, Sidney Poitier, Bill Cosby and, in our own time, Oprah Winfrey, were each influential in changing white perceptions of black people. Through these figures, many white people arrived at the conclusion that "they're not that different from me," and, in the case of Winfrey, large numbers of whites have actually treated her as a cultural prophet.[182]

If we look for signs of acceptance of blacks in public service, the first major gains came before *Brown*, with President Truman's desegregation of the federal civil service. But mostly life continued as before *Brown*. By 1961, the year of Obama's birth, the only African American ever to be appointed to the federal bench, Judge William Hastie of the Third Circuit, continued to be the sole black judge in the federal system.[183] He was joined in 1962 by President Kennedy's appointment of Thurgood Marshall to the Second Circuit Court of Appeals.[184] Between the Hastie and Marshall appointments, twelve years had passed, including the entire eight years of the Eisenhower presidency, without a single black

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[180] **Need citation.**

[181] Mikyung Ryu, *Minorities in Higher Education Twenty-Third Status Report, 2009 Supplement* (Washington: American Council on Education, 2009), 5.

[182] Needless to say, one can begin the story of cultural crossover much earlier with, say, gospel music, or, as is well understood by cultural historians, jazz. Likewise, sports figures like Joe Louis, or opera singers Marian Anderson and Leontyne Price were much admired by some whites. But these earlier crossover successes cannot be compared to the King Cole-Poitier-Cosby-Oprah phenomenon that produced not simply white acceptance but identification. The rise of mass media, especially radio, television, and movies, was a necessary precondition for the growing influence of African Americans stars on the shape of white popular consciousness.

[183] Hastie had previously been appointed a district court judge in the Virgin Islands, a non–Article III jurisdiction. Two other African Americans followed him in this position.

[184] Marshall was nominated in 1961 but took his seat in 1962.

nomination to the federal bench. When President Obama was born, no African American had yet been elected a state governor or United States senator since Reconstruction. Nor had any black person served in the president's cabinet. The first black ambassador was appointed in 1967. The first big city black mayor to be elected was Carl Stokes in Cleveland in 1967. In 1961, just four African Americans served in Congress—from Chicago (since 1943), New York (1945), Detroit (1955), and Philadelphia (1958). In 2008, there would be forty-two black members of the Congressional Black Caucus.

APPENDIX 4: ROBERT JACKSON'S CONCURRING OPINION IN *Brown v. Board of Education.*

Robert Jackson's unpublished concurring opinion in *Brown v. Board of Education* represents a bold, blunt, and brilliant effort to express his deep reservations about overruling *Plessy v. Ferguson*. As the only written opinion in *Brown* besides Chief Justice Earl Warren's, it both underlines the vulnerability of Warren's approach and suggests that Jackson may have had more of an influence in shaping that approach than has been previously thought.

Jackson's draft has never been published in full. It went through six versions, one in December 1953, two in January, one in February, and two in March 1954. Jackson's heart attack and hospitalization on March 30 brought further possible revisions to an end, culminating in Warren's hospital-room visit and Jackson's agreement to sign on to Warren's opinion and not publish a separate concurrence.[1]

The drafts permit us to trace the evolution of Jackson's thinking and to pinpoint the period in which he reached the conclusion that *Plessy* should be overruled. His December 7, 1953, draft was written one week before Warren convened the first Conference discussion of *Brown* since the Chief Justice's arrival on the Court. Both the December 7 and the January 6, 1954, drafts seem to have been written to justify refusing to overrule *Plessy*. Likewise, the January 11 revision offers no clue that Jackson has changed direction, until the last paragraph of a fourteen-page draft announced: "I favor at the moment going no further than to enter a decree that a state statute holding segregation necessary is unconstitutional ...."[2] It is clear from his February 15 additions that Jackson had found a way to

[1] RICHARD KLUGER, SIMPLE JUSTICE (New York: Random House, Inc., 1975) (2004 ed.) [hereinafter cited as SIMPLE JUSTICE] at 699, 701.
[2] Justice Jackson, *Brown* draft concurrence, January 11, 1954 (The Papers of Robert H. Jackson, box 184, Library of Congress, Manuscript Division) at 13-14.

overcome his doubts about overruling *Plessy*. The March 1 revisions of the previous draft make clear that, despite continuing doubts, he had begun to justify overruling *Plessy*.

Even Jackson's final draft of March 15 cannot be read as a ringing endorsement of Warren's *Brown* opinion. Twenty-three pages long, the draft keeps the reader in suspense until page 21 before revealing that Jackson is prepared to strike down *Plessy*. The seriously unbalanced structure of Jackson's last draft was succinctly captured by his law clerk, E. Barrett Prettyman, Jr., who pointedly told Jackson that his declaration of willingness to overrule *Plessy* was presented in the opinion as "almost an afterthought."[3]

Most of Jackson's final draft continued to express quite open sympathy with the southern constitutional position. If it had been published, the opinion would certainty have supplied additional ammunition to southern white resistance to *Brown*.

From the earliest of his drafts, Jackson refused to draw any conclusion about the original meaning of the Fourteenth Amendment.[4] In this respect, in his second draft he agreed with Chief Justice Warren's eventual conclusion that the legislative history was "inconclusive."[5]

> All that I can fairly get from the legislative debates in searching for the original will and purpose expressed in the Amendment, is that it was a passionate, confused and deplorable era, [Jackson wrote]. As often is characteristic of legislative history, the sponsors played down the consequences of the legislation they were proposing in order to ease its passage, while the opponents exaggerated the consequences in order to frighten away support. ... [M]ost of the leaders and spokesmen for the movement that put the Civil War Amendment through appear never to have reached a point in their thinking where either negro education or negro segregation

[3] SIMPLE JUSTICE at 694 (quoting Prettyman).
[4] Jackson draft of December 7, 1953 at 5-6.
[5] *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954) at 489.

was a serious or foreseeable problem, let alone reaching any conclusion as to a solution. The legislative debates, as I read them, result in either a blank or a match [tie].[6]

The greatest contrast between Warren's opinion and Jackson's was expressed in the latter's next point. "But, if deeds, rather than words, count as evidence of understanding, there is little to show that these Amendments condemn the practice here in question." Jackson piled on legal history to show that even northern jurists after the Civil War assumed the constitutionality of racial segregation. "The layman must wonder how it comes that the best informed judges who had risked their lives for these Amendments did not understand their meaning, while we at this remote time do understand them."[7] Warren's opinion, by contrast, chose simply to remain silent concerning the mass of judicial and legislative precedents supporting segregation that had accumulated during the eighty-six years since the Fourteenth Amendment became law. Jackson pointedly inquired, "Can we honestly say that the states which have maintained segregated schools have not, until today, been justified in understanding their practice to be constitutional?"[8] "Convenient as it would be to reach an opposite conclusion, I simply cannot find in the conventional material of constitutional interpretation any justification for saying that in maintaining segregated schools any state or the District of Columbia ... violated the Fourteenth Amendment."[9] By highlighting Warren's resounding silence on the constitutional legitimacy of state-imposed segregation before *Brown*, Jackson's opinion would surely have fed southern white resistance if it had been published.

Jackson's second draft—elaborating on a point introduced in his first draft—ended with the conclusion that only Congress, not the Court, had the power to ban school segregation. "It is said, however, that the South has enough representation to prevent such a step. But that is to say that the

[6] Jackson draft of January 6, 1954 at 6.
[7] *Id*. at 6-8.
[8] Jackson draft of March 15, 1954, at 5.
[9] *Id*. at 10.

Court should intervene to promulgate as a law that which our Constitutional representative system will not enact. ... It means nothing less than that we must act because our representative system has failed."[10] "The premise is not a sound basis for judicial action."[11]

Jackson's second draft introduced a theme that, in later drafts, became the entering wedge for Jackson's willingness to overrule *Plessy*. "No informed person can be insensitive to the fact that the past few years have witnessed a profound change in the responsible and rational public opinion towards segregation and all related problems," Jackson declared. Alluding to his own service as chief U.S. prosecutor at Nuremberg, Jackson pointed to a growing "revulsion" against racism in reaction to "[t]he awful consequence of racial prejudice revealed by the post mortem upon the Nazi Regime." But in a characteristic mid-paragraph surprise, he began to question the role public opinion should play in decisions of the Court. He went on to dismiss this evidence of a shift in public opinion as an inadequate basis for changing constitutional interpretation: "if construed in the light of public opinion, [it] would mean that it was being construed by those who have not had the advantage of studying an argument instead of by those who had."[12]

By the fourth draft (February 15), only five weeks later, changing perceptions of African-Americans over time became the key to Jackson's shift. "I think the change which warrants our decision [to overrule *Plessy*] is not a change in the Constitution but in the Negro population," he wrote.[13] "Certainly in the 1860's and throughout the nineteenth century the Negro population, as a whole, was a different people than today." In the aftermath of slavery, African-Americans had not yet demonstrated a "capacity for education or assimilation or even … that they could be self-supporting or in our public life

[10] Jackson draft of January 6, 1954, at 13-14. See draft of December 7, 1953, at 13.
[11] Jackson draft of March 15, 1954 at 17.
[12] Jackson draft of January 6, 1954, at 11-12.
[13] Jackson draft of February 15, 1954, at 13.

anything more than a pawn for white exploiters." Nor was segregated education "wholly to the Negro's disadvantage," given their "spectacular ... progress" under these conditions.[14]

But important changes had occurred, as described in three observations: "Whatever may have been true at an earlier period, the mere fact that one is in some degree colored no longer creates a presumption that he is inferior, illiterate, retarded or indigent."[15] "Tested by the pace of history, the rise of the Negro in the South, as well as the North, is one of the swiftest and most dramatic advances in the annals of man."[16] "Moreover, we cannot ignore the fact that assimilation today has proceeded much beyond ... earlier periods. ... More and more a large population with as much claim to white as to colored blood baffles any justice in classification for segregation."[17]

Finally, in a paragraph that anticipated a similar statement in Warren's *Brown* opinion, Jackson observed that since the nineteenth century "the place of public education has [also] markedly changed."[18]

> Once a privilege conferred on those fortunate enough to take advantage of it, it is now regarded as a right of a citizen and a duty enforced by compulsory education laws. Any thought of public education as a privilege which may be given or withheld as a matter of grace has long since passed out of American thinking.[19]

Jackson had navigated his way to reversal through a convergence of two premises. The first was his belief that the "spectacular … progress" of African-Americans since slavery required eliminating the presumption of inferiority on which segregated institutions had been built. Indeed, it was very important to Jackson that he could narrowly characterize the point as a change in "not a legal, so much as a factual assumption"—a change in the "state of facts" that every common lawyer would recognize as involving

[14] *Id*. at 8-9.
[15] *Id*. at 12.
[16] *Id*. at 9.
[17] Jackson draft of March 15, 1954, at 21.
[18] *Id*. at 21.
[19] *Id*. at 21-22.

the familiar problem of applying a common law rule to changed circumstances.[20] But Jackson's broad-brush conclusion that a "spectacular" advance of black people under segregation justified eliminating racial classifications was surely subject to debate, to precisely the sort of debate on historical, sociological, or "extra-legal" grounds that, in all of his drafts, Jackson did his best to mock as too subjective or legally irrelevant.

The second premise that permitted Jackson to reverse *Plessy* was his all-too-brief discussion of the effect of "changing conditions," which, as Jackson knew, had a long and rich Progressive history dating back to the *Brandeis Brief*.[21] Jackson's emphasis on the changing social situation of black people and the recent development of public education was invoked in the service of the "changing circumstances" doctrine, which as solicitor general he had often deployed before the Court to justify New Deal constitutional innovations. "Of course," he reasoned, "the Constitution must be construed as a living instrument and cannot be read as if written in a dead language." "It is neither novel nor radical doctrine that statutes once held constitutional may become invalid by reason of changing conditions," Jackson continued, "and those [statutes] held to be good in one state of facts may be bad in another."[22] "In recent times, the practical result of several of our decisions has been to nullify the racial classification for many of the purposes as to which it was originally held valid. I am convinced that present-day conditions require us to strike from our books the doctrine of separate-but-equal facilities

[20] Jackson draft of March 15, 1954, at 19-22. In his memo to himself, while trying to work out his position in *Brown*, Felix Frankfurter proposed a much broader version of the "changing circumstances" doctrine. "Law must respond to transformation of views as well as to that of outward circumstances," he wrote. "The effect of changes in men's feelings for what is right and just is equally relevant in determining whether a discrimination denies the equal protection of the laws." FELIX FRANKFURTER PAPERS, HARVARD LAW SCHOOL, box 72, file 14 (undated memo), quoted in SIMPLE JUSTICE at 688.

[21] *See* Morton J. Horwitz, *Foreword, The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 32 (1993).

[22] Jackson draft of March 15, 1954, at 11.

and to hold invalid provisions of state [laws] which classify persons for separate treatment in matters of education based solely on possession of colored blood."[23]

But there remained in Jackson's last draft a chilling pessimism about the likely success of social reform initiated by the judiciary. "[I]n embarking upon a widespread reform of social customs and habits of countless communities we must face the limitations on the nature and effectiveness of the judicial process," Jackson observed. "The futility of effective reform of our society by judicial decree is demonstrated by the history of this very matter"—by the fact that the requirement of equality in *Plessy*'s "separate but equal" doctrine had "remained a dead letter in a large part of this country. ... I see no reason to expect a pronouncement that segregation is unconstitutional will be any more self-executing or any more efficiently executed than our pronouncement that unequal facilities are unconstitutional. ... With no machinery except that of the courts to put the power of the Government behind it, it seems likely to result in a failure that will bring the court into contempt and the judicial process into discredit."[24]

Court decisions striking down segregation, Jackson believed,

> will not produce a social transition, nor is the judiciary the agency to which the people should look for that result. Our decision may end segregation in Delaware and Kansas, because there it lingers by a tenuous lease of life. But where the practice really is entrenched, it exists independently of any statute or decision as a local usage and deep-seated custom sustained by the prevailing sentiment of the community. School districts, from habit and conviction, will carry it along without aid of state statutes. To eradicate segregation by judicial action means two

[23] Jackson draft of March 15, 1954, at 22.
[24] Jackson draft of March 15, 1954, at 12-13.

generations of litigation. It is apparent that our decision does not end but begins the struggle over segregation.[25]

It is difficult to believe that Jackson wrote these paragraphs after he had persuaded himself to overrule *Plessy*, for they seem to be a carryover from the first draft's conclusion that only Congress has power under the Fourteenth Amendment to eradicate segregation.[26] The contradictory coexistence of these sentiments with Jackson's support for overruling *Plessy* was the source of his law clerk's pointed observation that Jackson's willingness to overrule came as "almost an afterthought" in the opinion.[27] It demonstrated that Jackson had never managed entirely to overcome his greatest fear: that the unenforceability of a desegregation order would "bring the court into contempt and the judicial process into discredit."[28]

Jackson's final draft remained contrarian in one other important respect. Though he remained a leader of the gradualist camp, he differed dramatically on how to achieve that result. While the justices, in mid-January, appeared to arrive at a consensus on the wisdom of a gradualist decree by informally endorsing Warren's and Frankfurter's proposal that federal district judges should fashion their decrees taking "local conditions" into account, Jackson, who said nothing on that occasion, made a point of disapproving of this arrangement in his final draft written two months later.

He blamed the problem on the government brief, which also had proposed remanding the cases to district courts with few standards to guide them. "Nothing has raised more doubt in my mind as to the wisdom of our decision than the character of the decree which the Government conceives to be necessary to its success."[29]

> New facilities are necessarily to be provided, and that

[25] *Id*. at 14.
[26] *See* Jackson draft of December 7, 1953, at 12-14.
[27] SIMPLE JUSTICE at 694 (quoting Jackson's law clerk, E. Barrett Prettyman, Jr.).
[28] Jackson draft of March 15, 1954, at 13.
[29] Jackson draft of March 15, 1954, at 17.

> involves taxation, the sale of bonds, and the votes of taxpayers and affirmative actions by public bodies. ... While our decision may invalidate existing laws and regulations governing the school, the Court cannot substitute constructive laws and regulations for their governance. Local or state or federal action will have to build the integrated school systems if they are to exist. A gigantic administrative job has to be undertaken.[30]

But the justices and the government together had arrived at the conclusion that the only available judicial institutions that could undertake the daunting task of desegregating southern public education were the federal district courts. Jackson disagreed:

> I will not be a party to thus casting upon the lower courts a burden of continued litigation under circumstances which subject district judges to local pressures and provide them with no standards to justify their decisions to their neighbors, whose opinions they must resist.[31]

Jackson ignored the fact that, under the system of "senatorial courtesy," many lower federal court judges from the South owed their positions to a United States senator and shared southern senators' segregationist sentiments. But there were also many conscientious southern federal judges who, as Jackson predicted, were "subject to local pressures," including threats of violence.[32]

There seems to be little doubt that as of March 15, 1954, Jackson was preparing a concurring opinion that would not only have substantially challenged the grounds of Warren's eventual opinion but would also have bluntly predicted that the judiciary would fail in any broad effort to implement the *Brown* decision.

Jackson was prescient about a political truth that only slowly began to emerge after *Brown*. During the first decade after the landmark decision, the Supreme Court stood institutionally

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[30] *Id*. at 16.
[31] *Id*. at 17.
[32] *Id*. J. W. Peltason, Fifty-eight Lonely Men: Southern Federal Judges and School Desegregation (New York: Harcourt, 1961).

alone and almost helpless in attempting to desegregate southern schools. As Gerald Rosenberg highlighted, there was virtually no desegregation in the Deep South a decade after *Brown*. Until the Civil Rights Act of 1964 brought Congress into the fray, the congressional leadership on desegregation that Justice Jackson had hoped for had not materialized. Nor was there any serious support from the executive until President Johnson approved cutting off federal funding to any non-complying school district.[33]

Not only was Jackson's pessimism about the Supreme Court's capacity to achieve social change arguably justified by subsequent events. His concurrence was also filled with New Deal legal learning about the inferior institutional competence of the judiciary—as compared to legislative or administrative bodies—in achieving broad social change through law.[34]

Postscript: It should be noted that seventeen years after Jackson drafted his opinion, its orientation became a controversial item in William Rehnquist's 1971 confirmation hearings as associate justice.[35] Rehnquist had served as Jackson's law clerk during the Vinson Court's initial deliberations over *Brown*. After it was revealed that Rehnquist had written a memo to Justice Jackson stating that "*Plessy v. Ferguson* was right and should be re-affirmed," the nominee defended the memo as written to support Justice Jackson's own views.[36] Rehnquist's claim has been subject to much scholarly scorn; "most

[33] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (Chicago: Univ. of Chicago Press, 1991) at 46, 52.
[34] *See,e.g.,* Jackson draft of March 15, 1954, at 12-14. For an elaboration of Jackson's views in this regard, see ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS (New York: Alfred A. Knopf, 1941). In this work, written while serving as Franklin Roosevelt's solicitor general, Jackson stated that courts were "inherently ill suited, and never can be suited, to devising or enacting rules of general social policy." *Id*. at 288.
[35] *See* Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383 (2000) [hereinafter cited as Snyder] at 439-46.
[36] SIMPLE JUSTICE at 609 (quoting Rehnquist from his infamous 1952 memo entitled "A Random Thought on the Segregation Cases"); quote with analysis also appears in Snyder, *supra*, at 441. For the full text of Rehnquist's 1952 memo, and also Rehnquist's 1971 letter claiming that the memo did not reflect his own views, see the *New York Times*, December 9, 1971, at 26.

scholars have concluded that Rehnquist's account that the *Plessy* memo represented Justice Jackson's views, but not his own, cannot be totally accurate."[37]

University of Chicago law professor Phillip Kurland, the custodian of Justice Jackson's papers, pointedly contradicted Rehnquist at the time, labeling the future chief justice's contention that he was merely expressing Justice Jackson's views "implausible."[38] Kurland revealed at the time the existence of an unpublished Jackson draft that, if submitted, could have served as a concurring opinion to Warren's opinion for the Court—that is, an opinion that supported overruling *Plessy*. Presumably, Kurland was referring to the final March 15 Jackson draft. The professor, however, failed to mention Jackson's first two drafts, written two and three months earlier, which seemed to point in the direction of affirming *Plessy*. Rehnquist's memo to Jackson, written two years earlier, might well have corresponded to Jackson's probable inclination at that time to uphold the infamous 1896 decision. Although Jackson's first two drafts seemed to point in the direction of exercising judicial restraint and affirming *Plessy*, this does not mean the memo at issue reflected Jackson's views and not those of his law clerk. The tenor and rationale of the memo would need to be examined, not simply the result. Moreover, it is important to note that Professor Kurland's reasons for asserting the implausibility of Rehnquist's claims were not primarily based on the March 15 Jackson draft.[39]

The most comprehensive and damning analysis of Rehnquist's account, legal scholar Brad Snyder asserts, was set forth by Richard Kluger in *Simple Justice*.[40] Kluger concluded, Snyder explains, "that Jackson never asserted that *Plessy* was 'right and should be re-affirmed,' as Rehnquist's memo

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[37] Snyder at 451; *See* Brad Snyder & John Q. Barrett, *Rehnquist's Missing Letter: A Former Law Clerk's 1955 Thoughts on Justice Jackson and* Brown, 53 BOSTON COLLEGE L. REV. 631 (2012) at 633-34: "Jackson's former secretary and law clerks believed that Rehnquist had falsely impugned Jackson ... as pro-*Plessy*."
[38] Snyder at 451.
[39] *Washington Post*, December 11, 1971 (article by John P. MacKenzie, staff writer) at A6.
[40] SIMPLE JUSTICE, multi-paged footnote beginning on page 609; *See* Snyder, *supra*, at 451-53. For a cogent critique of Rehnquist's assertions, see the statement of Senator Edward Brooke, Republican of Massachusetts and the first African-American U.S. senator since Reconstruction, at Rehnquist's 1971 Senate confirmation hearings. CONG. REC., Vol. 117, Part 35 (December 9, 1971) at 45815.

suggested. Rather, Jackson [initially] could not find a legal reason for overruling segregation."[41] The arguments of Kluger and other legal scholars, and the evidence introduced to buttress their assertions, persuasively show that the clear language of Rehnquist's memo, in conjunction with much other evidence, supports the conclusion that he, personally, advocated affirming *Plessy*.

[41] S*nyder* at 452.