Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958

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By a process that has been the subject of considerable speculation, the United States Supreme Court reached a unanimous decision in the 1954 cases of Brown v. Board of Education and Bolling v. Sharpe, declaring unconstitutional statutory segregation in public school systems in the states and in the District of Columbia. Using previously unpublished material, Professor Hutchinson traces the rise and fall of unanimity in the segregation cases of the 1950's. The article delineates the Court's internal decisionmaking process and analyzes the role of unanimity in influencing the response of both the Court and the nation to the escalating challenges to the separation of the races.

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Abbreviations: Hugo L. Black Papers, Library of Congress, Manuscript Division, are cited as HLB(LC); Harold H. Burton Papers, Library of Congress, Manuscript Division, as HHB(LC); Tom C. Clark Papers, Tarleton Law Library, University of Texas at Austin, as TCC(UT); Felix Frankfurter Papers, Harvard Law School Library, as FF(HLS); Felix Frankfurter Papers, Library of Congress, Manuscript Division, as FF(LC); Fred M. Vinson Papers, University of Kentucky Library, as FMV(UK).

Manuscripts are identified, when possible, by file and container number; the Clark Papers have not yet been catalogued. Documents on file at the United States Supreme Court Library are noted (USSCL).
I. INTRODUCTION

“We conclude”—and here Warren departed from the printed text before him to insert the word “unanimously,” which sent a sound of muffled astonishment eddying around the courtroom—“that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”

The unanimity of the Supreme Court in the Segregation Cases, as they were then called, was both important and remarkable. In 1957 Professor Louis H. Pollak of Yale Law School wrote that the Court’s unanimity in Brown v. Board of Education and Bolling v. Sharpe was “second in importance only to” the decisions themselves. Twenty-five years later the achievement of


5. Pollak, supra note 2, at 304. Popular books and pamphlets supporting the decisions pointed to unanimity as evidence of the legitimacy of the rulings. One such volume stated:

Some persons have praised or blamed Chief Justice Warren and the Eisenhower administration for the decisions in these cases. Is this warranted?

The Supreme Court is a judicial, not a “political,” institution. The Justices are appointed for life, and there is no reason to assume that “politics,” in the narrow sense of that word, played a part in these decisions. On the first argument a Democratic Attorney General set forth the views of his administration; on the subsequent argument a Republican Attorney General set forth the views of his administration. On both occasions briefs and argument took essentially the same position. The Supreme Court is made up of Democrats and Republicans, Northerners and Southerners; and their opinion was unanimous.

unanimity seems no less impressive. Yet how and why the Court reached a unified position has not been fully examined. To attain a better understanding, we must turn the clock back prior to 1954, particularly to the “1950 Trilogy,” which first substantially undermined the “separate but equal” doctrine. It was there, not with Brown, that the Supreme Court developed its attitude to statutorily imposed racial segregation and came to value addressing the issue with one voice. Although Mr. Justice Fortas suggested a few years ago that the 1950 decisions made Brown “inevitable,” the eventual result in Brown was not a foregone conclusion in 1950. The 1950 cases did, however, play an enormous part in shaping the Court’s thinking about more broad-scaled attacks on segregation. Evidence of the deliberations on the 1950 Trilogy demonstrates that many members of the Court then had reason to feel that the hour of segregation had come round at last. Although the 1950 Trilogy, as eventually decided, avoided the ultimate issue of the constitutionality of segregation per se, the deliberations were far reaching in scope and began the internal process that culminated in the Segregation Cases of 1954. In particular, the unanimity achieved with the 1950 decisions helped to make unanimity in the later cases less momentous from an internal standpoint than it otherwise would have been.

Once established in 1954, unanimity ceased to be merely a desirable value; it became a routine practice. Between Brown and Bolling in 1954 and Cooper v. Aaron in 1958, the Court continued to speak with one voice in cases involving racial segregation, with one minor exception. The maintenance of unanimity during the period affected not only the decisions that the Court made and declined to make, but also the doctrine created by opinions announcing those decisions.

My purpose is to tell the story of the rise and fall of unanimity from 1948 to 1958 from the perspective of the judges who were faced with “the greatest
issue any of them had met or [were] likely ever to meet." The story is not only one of the influence of personality on the decisionmaking process, as is so often assumed, but of the dominance of ideas and doctrine as well. It is also the story of the balance sometimes struck by the members of the Supreme Court between the particular requirements of the cases with which they were presented and the capacity of the Court as an institution to address explosive social issues presented in those cases. Great cases strain not only the law but also the position and effectiveness of the Supreme Court.

The data for this study derive from the surviving, and presently available, evidence of the internal deliberations of the Supreme Court on cases involving racial segregation between 1948 and 1958. Although the evidence for the 1954 cases has been studied in detail, data from the post-1955 period have not been previously published, and the record for the entire period has been fortified substantially by the Tom C. Clark Papers at the University of Texas at Austin. Although it is too early to be final or definitive, the following account is the most complete that is possible at this time.

II. PRELUDE: BEFORE Brown

A. 1938-1948: FROM GAINES TO SIPUEL

The Supreme Court faced squarely for the first time the issue of racial segregation in education in the 1938 case of Missouri ex. rel. Gaines v. Canada. Lloyd Gaines had applied in 1936, at the age of thirty-four, to the

12. Pollak, Mr. Justice Frankfurter: Judgment and the Fourteenth Amendment, 67 YAL. L.J. 304, 304 (1967). It is well beyond the scope of this study to evaluate the evidence presented against models or theories of judicial decisionmaking. My limited concern is to help fill part of the evidentiary gap that has flawed attempts at theoretical models of adjudication. See Hurst, Old and New Dimensions of Research in United States Legal History, 23 AM. J.L. HIST. 1, 20 (1979) (discussing problems of reaching historical conclusions with insufficient evidence); Howard, Book Review, 1978 WASH. U.L.Q. 833, 838 (1978) (reviewing D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977)).


14. Additional evidence is presumably contained in the Earl Warren Papers and the William O. Douglas Papers now deposited in the Library of Congress but presently unavailable for research; the status of the Stanley F. Reed Papers is not known at this time.

15. In Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899), the Court, speaking through Justice John Marshall Harlan, held that blacks were required to pay taxes to help support a public high school system from which they were excluded. Id. at 545. The Court did not reach the issue of the constitutionality of racially separate schools. Id. at 543. In Gong Lum v. Rice, 275 U.S. 78 (1927), a unanimous opinion by Chief Justice William Howard Taft acknowledged past acceptance of the constitutionality of separate schools, but decided only that classification of a Chinese girl as a black did not violate the fourteenth amendment. Id. at 86-87; cf. Brown v. Board of Educ., 347 U.S. at 491 n.8 (Cumming and Gong Lum did not challenge validity of separate but equal doctrine).

University of Missouri law school, but had been rejected because it was "contrary to the constitution, laws and public policy of the state to admit a negro as a student in the University of Missouri." Claiming that his rejection violated the equal protection clause of the fourteenth amendment, Gaines unsuccessfully sought relief in state courts. The Missouri Supreme Court ruled that the state had satisfied its constitutional responsibilities in two ways: (1) it had declared its intent to establish a separate law school for blacks in Missouri, and (2) in the interim it provided tuition for blacks to attend all-black law schools in adjacent states. In the United States Supreme Court, Chief Justice Charles Evans Hughes, writing for a majority of six, rejected both arguments in a matter-of-fact opinion that ran only eleven pages. The tone of the opinion could not disguise its import: for the first time the Court had provided content to the "equal" branch of the "separate but equal" doctrine announced in Plessy v. Ferguson.

Hughes dismissed the state's first argument because the policy of establishing a separate law school for blacks, while commendable, had "not yet ripened into an actual establishment, and it cannot be said that a mere declaration of purpose, still unfulfilled, is enough." Rejecting the second argument as well, Hughes wrote:

The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.

The Court therefore reversed the state judgment and remanded the case. Justice James C. McReynolds, joined by Justice Pierce Butler, wrote a chilling two-page dissent. For McReynolds, who was suspicious of Gaines' good faith and contemptuous of the majority's insensitivity to the "difficult and highly practical" problem posed by the case, the costs of the decision were stark: "I presume [Missouri] may abandon her law school and thereby disadvantage her white citizens without improving petitioner's opportunities for legal instruction; or she may break down the settled practice concerning separate schools and thereby, as indicated by experience, damnify both races."

18. Id. at 132, 139, 113 S.W.2d at 788, 791.
19. See id. at 137-39, 113 S.W.2d at 790-91 (distinguishing Maryland case in which black held entitled to admission to state university law school).
20. 163 U.S. 537 (1896).
21. 305 U.S. at 345, 346.
22. Id. at 349-50.
23. Id. at 352.
24. See id. at 353 (McReynolds, J., with Butler, J., dissenting) (state offered Gaines chance to study law "if perchance that is the thing really desired").
25. Id.
Gaines later would be termed a “milestone” marking the “disintegrating” of the “separate but equal” doctrine announced in Plessy in 1896 and reaffirmed—both presumptively and explicitly, if off-handedly—for over a generation thereafter. But between 1938 and 1948, the year the Supreme Court decided Sipuel v. Oklahoma State Regents, its next case involving racial segregation in education, Gaines was no more than an isolated episode in the wake of the Constitutional Revolution of 1937. During the early and mid-1940’s, Gaines provided window-dressing—and nothing else—as the Court slowly and carefully chipped away at racially discriminatory practices involving juries, elections, transportation, and organized labor. At the same time, the Court consistently upheld wartime racial classifications involving Japanese residents.

When the petition for certiorari in Sipuel was filed on September 24, 1947, Gaines could no longer be regarded merely as a sport: in all material respects, Sipuel appeared to be a replication of Gaines. Ada Lois Sipuel, later Fisher, had applied for admission to the University of Oklahoma law school, but had been rejected solely because she was black. The state courts denied

28. See Gong Lum v. Rice, 275 U.S. 78, 87 (1927) (assuming Plessy correctly decided constitutionality of separate schools); Buchanan v. Warley, 245 U.S. 60, 79-82 (1917) (distinguishing Plessy from discriminatory zoning ordinances that interfere with property rights); Cumming v. Richmond County Bd. of Educ., 175 U.S. 528, 543 (1899) (not reaching issue of constitutionality of racially separate schools).
30. Gaines was cited in only four cases during the decade from 1938 to 1948—each time in a perfunctory manner and only in support of broad propositions, never as central authority. See Screws v. United States, 325 U.S. 91, 115 n.6 (1945) (Rutledge, J., concurring) (citing Gaines, inter alia, for proposition that officials’ abuse of powers conferred by state law subject to prosecution under federal criminal code); Steele v. Louisville & N.R.R., 323 U.S. 192, 203 (1944) (citing Gaines for proposition that union discrimination among members of craft solely on basis of race violates fourteenth amendment); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (citing Gaines for proposition that sterilization law applying to only certain types of felons is as invidiously discriminatory as if applied to only certain race or nationality); Mitchell v. United States, 313 U.S. 80, 94, 97 (1941) (citing Gaines for proposition that denial of equality of accommodations violates fourteenth amendment).
33. See Morgan v. Virginia, 328 U.S. 373, 386 (1946) (Virginia statute requiring segregation on interstate carriers invalid as burden on interstate commerce); Mitchell v. United States, 313 U.S. 80, 97 (1941) (forcing black who had paid first-class fare to ride second-class violates Interstate Commerce Act).
34. See Railway Mail Ass'n v. Corsi, 326 U.S. 88, 93 (1945) (state law forbidding labor organizations to discriminate against blacks in membership does not violate due process clause); Tunstall v. Brotherhood of Firemen, 323 U.S. 210, 211-13 (1944) (Railway Labor Act does not exclude nondiversity federal remedy for union’s failure to represent black workers); Steele v. Louisville & N.R.R., 332 U.S. 192, 202-03 (1944) (Railway Labor Act imposes duty on labor organization acting by its authority as exclusive bargaining representative to represent without discrimination).
37. Sipuel v. Oklahoma State Regents, 332 U.S. 631, 632 (1948) (per curiam), reversing and remanding
The Supreme Court heard argument in *Sipuel* on January 7 and 8, 1948, and only four days later issued a unanimous three-paragraph per curiam opinion reversing the Oklahoma courts on the sole authority of *Gaines* and directing the mandate to issue forthwith.\(^{39}\) If Justice Harold H. Burton's conference notes are a reliable index, as I believe they are, all of the Justices thought that *Sipuel*, thanks to *Gaines*, was an easy case—as long as the Court was careful not to go below the surface. The deeper complexities of the case, however, were not lost on the Court. It was clear at the outset that anything more than a bare-bones reversal citing *Gaines* would blow the case wide open, and that even that disposition might fail to satisfy the most liberal Justices, who viewed *Plessy* as ripe for burial. Justice Stanley F. Reed, who in his first Term on the Court had joined Hughes in *Gaines*, now noted that he was "not in sympathy with the Court's treatment of the problems that come here of this kind."\(^{46}\) Reed passed at the conference; every other member of the Court voted to reverse.\(^{41}\) Justice Robert H. Jackson said that the case in its present posture was "simple and easy"; he "hope[d] they could dispose of it per cur Monday."\(^{42}\) Burton noted that Justice Wiley B. Rutledge "would not do it per cur—but the rest agreed" to Jackson's proposal.\(^{43}\)

Reed was not the only member of the Court who was uncomfortable with the treatment of *Sipuel*. With the opposite concern in mind, Justice Frank Murphy, although voting to reverse, made a point of recording his opposition to the "equal and separate doctrine."\(^{44}\) Murphy's point did not come out of thin air: in the Supreme Court, if not clearly in the Oklahoma courts, *Sipuel* had argued not only that she was entitled to relief under *Gaines*, but also that the "separate but equal" doctrine failed to produce equality in fact.\(^{45}\) The Oklahoma Supreme Court had concluded that *Sipuel* had not pressed the issue at trial.\(^{46}\) It was therefore unnecessary and quite possibly inappropriate for the Supreme Court to reach the issue.

The Oklahoma courts reacted quickly to the Supreme Court's mandate. On January 22, the trial court on remand ordered that *Sipuel* either be admitted to the University of Oklahoma law school or be barred from admission until a hastily proposed "separate school is established and ready to function."\(^{47}\) Thurgood Marshall of the NAACP Legal Defense and Education Fund, Inc., who had directed *Sipuel*'s case from the outset, promptly filed a motion in the Supreme Court for leave to file a petition for a writ of mandamus against the Chief Justice of Oklahoma for evading the January 12 mandate of the Court.\(^{48}\)

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38. Id.
39. Id. at 631-33.
40. Burton, J., Conference Notes (Oct. Term 1947), No. 369 [Sipuel], Box 175, HHB(LC).
41. Id.
42. Id.
43. Id.
44. Id.
45. See Brief for Petitioner at 37, No. 369 [Sipuel v. Oklahoma State Regents] (Oct. Term 1947) (USSCL) ("there can be no separate equality").
46. 199 Okla. at 39, 180 P.2d at 138.
47. 333 U.S. at 149.
48. Id. at 147-48.
In a sense, the haste with which the Court had disposed of Sipuel had backfired. The Court's effort to treat it as an "easy" case and to avoid open division through brevity and dispatch had failed. Marshall's motion now threatened protracted and sharp dispute, both inside and outside the Court. To avoid such division, Justice Felix Frankfurter wrote Chief Justice Fred M. Vinson shortly after the motion was filed and urged him to bring up the matter quickly in Conference. Admitting that the motion raised "a number of serious questions, both on the merits and perhaps also of jurisdiction," Frankfurter wrote: "It occurs to me that just as it was a very healthy thing for us to decide the case with the dispatch with which the per curiam was announced by you, it would be equally healthy to accelerate the disposition of the present petition." Frankfurter suggested telegraphing the respondents and seeking a quick reply to Marshall's motion.

Even that idea involved more time than Vinson was ready to spend on the matter. After a brief discussion at Conference, Vinson circulated a draft per curiam order, the heart of which lay in two paragraphs:

The petition for certiorari in Sipuel . . . did not present the issue that a state might not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for negroes, the view taken by this Court in Missouri ex rel. Gaines v. Canada . . . . In oral argument, we understood counsel for petitioner to concede that it was not an issue in this case . . . .

Nothing which may have transpired since the orders of the Oklahoma courts were issued is in the record before us, nor could we consider it on this petition for writ of mandamus if it were.

To Frankfurter, Vinson's draft spelled trouble because it relied on interpretation, rather than narration, of what the Court had done and thus opened the door to differing views, both from Rutledge inside the Court (who was busy drafting a dissent) and from Marshall on the outside. On February 13, Frankfurter wrote Vinson and tried to persuade him to temper the first paragraph and to eliminate the second, which he viewed as "superfluous and I think every extra word in this per cur. is an undesirable word." Frankfurter, seeking to make the per curiam opinion as small a target as possible, explained to Vinson:

49. Letter from Frankfurter, J., to Vinson, C.J. (Jan. 26, 1946) [sic], File 2267, Box 108, FF(LC).
50. Id.
52. See id. ("Our per cur. should avoid every possibility of serving as a target for contention, either in the dissenting expression or by counsel for Fisher").
53. Id. In the same letter, Frankfurter suggested a substitute for the first paragraph in question:

The reason relied on for allowance for the writ of certiorari was: "The decision of the Supreme Court of Oklahoma is inconsistent with and directly contrary to the decision of this Court in Gaines v. Canada." It is for this reason that we granted the petition. It is on this basis that we rendered our decision and issued the mandate in accordance with that decision on January 12.

The quotation in Frankfurter's proposed paragraph was a direct quote of the petitioner's Reason Relied on for Allowance of the Writ. See Petition for Writ of Certiorari at 6 [Sipuel], supra note 36.
I . . . think it desirable that the *per cur* should set forth as briefly and as unargumentatively as possible that on the basis of the facts in the petition before us our mandate of January 12th has not been disrespected. In short, our *per cur.* should avoid every possibility of serving as a target for contention, either in the dissenting expression or by counsel for Fisher.\(^5\)

Vinson was unmoved. He retained both paragraphs, although in the first paragraph he eliminated the reference to *Gaines* and changed the sentence referring to Marshall's "concession" at oral argument to read, "On submission, we were clear it was not an issue here."\(^5\)\(^5\)

As Frankfurter had feared, the per curiam order denying Marshall's motion was not unanimous when it was handed down February 16, just over two weeks after the motion was submitted. Murphy dissented on the ground that there should be a hearing on the issue.\(^5\)\(^6\) Rutledge, too, dissented, but he swept past the potential ambiguities foreseen by Frankfurter to what he saw as the realistic merits. Calling the equality provided on remand a "legal fiction," he said:

> Obviously no separate law school could be established elsewhere overnight capable of giving petitioner a legal education equal to that afforded by the state's long-established and well-known state university law school. Nor could the necessary time be taken to create such facilities, while continuing to deny them to petitioner, without incurring the delay which would continue the discrimination our mandate required to end at once.\(^5\)\(^7\)

The dissents demonstrated that simply reaffirming *Gaines* was neither easy for the Court nor likely to dispose of issues that were beginning to emerge as states tried to create and maintain constitutionally permissible segregative practices.

The internal wrangles over *Sipuel* were symptomatic of larger problems within the Court. The outspoken impatience of Rutledge, and to a lesser extent Murphy, reflected tensions that had been building within the Court on the question of race during the past two months. The tensions were not only over results, but more importantly, over opinions: the tone of language used in opinions by Murphy and Rutledge in other cases involving racially related issues during January and February provoked strained exchanges between the ideological wings of the Court and Murphy or Rutledge.

A week after the first per curiam opinion in *Sipuel*, the Court in *Oyama v. California*\(^5\)\(^8\) held unconstitutional a California law providing that Japanese aliens could not hold land through minor children who were American citizens.\(^5\)\(^9\) Three Justices—Reed, Burton, and Jackson—dissented.\(^6\)\(^0\) Justice Hugo L. Black, joined by Justice William O. Douglas, and Justice Murphy,

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56. Id. at 151 (Murphy, J., dissenting).
57. Id. at 152 (Rutledge, J., dissenting).
59. Id. at 640.
60. See id. at 674 (Reed, J., with Burton, J., dissenting); id. at 684 (Jackson, J., dissenting).
joined by Justice Rutledge, filed concurring opinions asserting that the California Alien Land Law was invalid not only because it denied privileges of citizenship to the minors, as Chief Justice Vinson's opinion for the Court held, but also because the laws constituted racial discrimination. Black and Murphy each made essentially the same point, but Murphy's rhetoric bristled. Murphy wrote of the "uncompromising opposition of the Constitution to racism, whatever cloak or guise it may assume," and declared, "The California statute... is nothing more than an outright racial discrimination. As such, it deserves constitutional condemnation." Black wrote Murphy that "softer blows" would achieve the same results without providing unpleasant material for foreign propaganda, but Murphy refused to tone down his opinion.

Frankfurter, who described Murphy's Oyama concurrence in his Diary as "a long-winded soap-boxy attack against racism," was concerned even more with the domestic costs of using scorching language in race cases. In early January, Frankfurter expressed his concerns in a letter to Rutledge, whose passion against racial discrimination put him closer to Murphy than to any other member of the Court. The occasion for Frankfurter's letter was an opinion for the Court that Rutledge had circulated in Bob-Lo Excursion Co. v. Michigan. The Company had been convicted under a state civil rights law for refusing on racial grounds to carry a black girl on its tourist ship to an island in international waters. The Company argued that the state law unconstitutionally burdened foreign commerce in violation of article I, section 8 of the Constitution. Rutledge's opinion, affirming the company's conviction, concluded that because the business in question was "highly... localized," the Michigan statute did not impermissibly burden interstate or foreign commerce.

Frankfurter agreed with the treatment of the commerce clause issue, but he was disturbed over Rutledge's typically detailed rehearsal of the facts,
which in this case painted a cruel vignette of racial animosity toward the most vulnerable of victims. Frankfurter wrote Rutledge:

> With some reluctance I have indicated doubts and questions in execution and phrasing on pp. 2, 3, 5, 7, 9, 11 and 12. Before coming down here, when I was of counsel for the Association for the Advancement of Colored People, considerable practical experience with problems of race relations led me to the conclusion that the ugly practices of racial discrimination should be dealt with by the eloquence of action, but with austerity of speech. Time has only deepened that conviction and it has compelling force, I believe, in regard to opinions by this Court within this field. By all means let us decide with fearless decency, but express our decisions with reserve and austerity. It does not help toward harmonious race relations to stir our colored fellow citizens to resentment by even pertinent rhetoric or by a needless recital of details of mistreatment which are irrelevant to a legal issue before us. Nor do we thereby wean whites, both North and South, from what so often is merely the momentum of the past in them. Forgive this little sermon.\(^7\)

Rutledge, who was not easily nettled by Frankfurter's lectures, was forgiving but unrepentant.\(^7\) Bob-Lo was handed down on February 2 with only minor changes from Rutledge's draft.\(^7\)

A day after his largely unsuccessful exchange with Rutledge, Frankfurter wrote Murphy an almost identical letter\(^7\) trying to convince Murphy to rewrite more austerely a draft opinion for the Court in Lee v. Mississippi,\(^7\) a

\(^{71}\) Letter from Frankfurter, J., to Rutledge, J. (Jan. 2, 1947), supra note 65, quoted in J. Howard, Jr., Mr. Justice Murphy 354 n.h (1968).

\(^{72}\) See Letter from Rutledge, J., to Frankfurter, J. (Jan. 2, 1948), File 2042, Box 99, FF(LC) ("P.S. Sermonette: All racial discr[imination] is relevant to Chesterfieldian courtesy and bar-room roughness and, as they say, vice versa"); cf J. Howard, Jr., Mr. Justice Murphy 354 n.h (1968) (Rutledge reminded Frankfurter of mutual recital of racial facts in Fisher v. United States, said neither minded a little preaching now and then).

\(^{73}\) Douglas filed a concurring opinion, joined by Black. He cited Gaines and added that Bob-Lo was "controlled by a principle which cuts deeper than that announced by the Court”—the "federal policy" barring such discrimination in interstate commerce. 333 U.S. at 42 (Douglas, J., with Black, J., concurring). Jackson, joined by the Chief Justice, dissented to the interpretation of the commerce clause. Id. at 43 (Jackson, J., with Vinson, C.J., dissenting).

\(^{74}\) Letter from Frankfurter, J., to Murphy, J. (Jan. 3, 1947) [sic], File 1765, Box 86, FF(LC). Frankfurter said in part:

> I . . . [am] strongly of [the] opinion that in a domain where feelings are deeply rooted and easily stirred, a strong conclusion is reenforced [sic] by mildness of expression. Long experience on the firing line of dealing with racial problems, first as assistant to Secretary Baker in World War I, and later, untile [sic] I came down here, as counsel for the Association for the Advancement of the Colored People, has left me with the conviction that while we should deal with these ugly practices of racial discrimination with fearless decency, it does not help toward harmonious race relations to stir our colored fellow citizens to resentment, however unwittingly, by needless detail of even sturdy expression of sentiment. . . . For myself, I have always thought that the model opinion in these third degree cases involving also racial biases was Brandeis' merely austere recital of the facts in the Wan case, 266 U.S. 1 [1922].

\(^{75}\) 332 U.S. 742 (1948).
case involving the coerced confession of a black defendant. Privately, Frankfurter viewed Murphy's draft as a "characteristic harrangue, full of sophomoric rhetoric," and he complained both to Rutledge, Murphy's closest friend on the Court, and to Reed, who was preparing a "mild" concurring opinion. Pressed from all sides, Murphy capitulated. The resulting opinion, announced January 19, was restrained and unanimous.

The mid-Term strains within the Court over racial issues recurred only once during the rest of the Term. In June the Court, speaking through Justice Black in *Takahashi v. Fish & Game Commission*, held unconstitutional another California law affecting Japanese aliens, this time a statute forbidding the issuance of commercial fishing licenses to aliens ineligible for citizenship. Murphy, again joined by Rutledge, wrote separately to point out that the statute was a "direct outgrowth of antagonism toward persons of Japanese ancestry," disentitling it "to wear the cloak of constitutionality." In light of Murphy's outspoken crusade against racism in *Oyama* and *Takahashi*, it is remarkable that he wrote no opinion in early May when the Court—reduced to six by the recusals of Reed, Jackson, and Rutledge—struck down the enforceability of racially restrictive covenants in *Shelley v. Kraemer*, the "truly revolutionary opinion of the Vinson Court." The symbolic importance of *Shelley* was enormous: the central legal device for maintaining segregation in housing had been declared invalid. But the doctrinal effect was extremely narrow: the Court held only that the enforce-ment of racially restrictive covenants constituted state action and that court enforcement was therefore impermissible under the equal protection clause of the fourteenth amendment. The "revolutionary opinion" left other aspects of segregation technically unscathed.

*Hurd v. Hodge*, arising from the District of Columbia as the companion case to *Shelley*, presented a different doctrinal problem because the fourteenth amendment did not apply. Vinson ruled that judicial enforcement of the covenants was state action in the District of Columbia as well, but did not find it necessary to hold the covenants unconstitutional under the fifth amendment, which, of course, contains no equal protection clause. Instead, he held that enforcement violated the Civil Rights Act of 1866 and "public...

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76. See id. at 743 (seventeen-year-old black, indicted for assault with intent to rape, objected to testimony concerning alleged oral confession because secured by duress, threats, and violence).
77. FRANKFURTER DIARIES, supra note 63, at 337.
78. See id. at 337-38 (Rutledge agreed opinion "awful").
79. Dismas, supra note 63, at 652.
80. See FRANKFURTER DIARIES, supra note 63, at 337 (Reed agreed opinion "awful").
81. Letter from Frankfurter, J., to Murphy, J. (Jan. 3, 1947), supra note 74.
82. 334 U.S. 410 (1948).
83. Id. at 418-22.
84. Id. at 422 (Murphy, J., with Rutledge, J., concurring).
86. P. KURLAND, supra note 27, at 89.
87. 334 U.S. at 20.
89. Id. at 30-34.
policy.”\textsuperscript{91} This rationale was too much for Frankfurter to swallow, however, and he concurred specially—in the only separate opinion in either \textit{Shelley} or \textit{Hurd}—on the ground that enforcement of the covenants in the District would not be equitable.\textsuperscript{92}

The importance of \textit{Shelley} went beyond doctrine: by filing an amicus curiae brief against the constitutionality of the covenants,\textsuperscript{93} the Department of Justice put the federal government on record in the Court as against broad-based racial segregation. Although it was not the first time the government had filed an amicus brief in a civil rights case,\textsuperscript{94} it was the first time the government had filed such a brief in a case outside more traditional concerns—such as the interpretation of a federal statute\textsuperscript{95}—of the Department of Justice. Moreover, it was the first time the Department had put its full weight behind an amicus brief in a civil rights case: Attorney General Tom C. Clark and Solicitor General Philip B. Perlman both signed the document.\textsuperscript{96} The stated justification for filing the brief was somewhat novel.

In addition to discussing the government’s interests arising from its responsibility to enforce the Constitution and various civil rights laws, the brief noted that “the United States has been embarrassed in the conduct of foreign relations by acts of discrimination taking place in this country.”\textsuperscript{97} From the recently released—and politically controversial—report by the President’s Committee on Civil Rights,\textsuperscript{98} the brief quoted a lengthy excerpt condemning segregation in housing.\textsuperscript{99} The brief thus established forceful precedent for government involvement in the Supreme Court’s consideration of segregation.

\begin{enumerate}
\item The investigation which I made of the Civil Rights legislation, in connection with the \textit{Screws} case, had made me very wary of arguments drawn from that legislation. The scope and validity of that legislation have for me been left in confusion and doubt, and I prefer not to get involved with that legislation if a decision may clearly and cleanly be reached otherwise.
\item Even more do I want to avoid, whenever I fairly can, use of Congressional debates on the submission of the Fourteenth Amendment. This includes Black’s use of the debates. Resort to that debate leads to the arguments that Black made in his dissent in the \textit{Adamson} case, which for some of the reasons I indicated in my opinion in that case I reject both as scholarship and as law.
\end{enumerate}


91. 334 U.S. at 34.
92. \textit{Id.} at 36 (Frankfurter, J., concurring). Frankfurter wrote that enforcement of the covenants by a federal court in the District of Columbia would not be “in the exercise of sound judicial discretion” when enforcement of identical covenants would be unconstitutional in any state. \textit{Id.} Frankfurter felt it “important” to write separately for two reasons, which he explained in a letter written a week before the decisions were issued:

\begin{enumerate}
\item The investigation which I made of the Civil Rights legislation, in connection with the \textit{Screws} case, had made me very wary of arguments drawn from that legislation. The scope and validity of that legislation have for me been left in confusion and doubt, and I prefer not to get involved with that legislation if a decision may clearly and cleanly be reached otherwise.
\item Even more do I want to avoid, whenever I fairly can, use of Congressional debates on the submission of the Fourteenth Amendment. This includes Black’s use of the debates. Resort to that debate leads to the arguments that Black made in his dissent in the \textit{Adamson} case, which for some of the reasons I indicated in my opinion in that case I reject both as scholarship and as law.
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\textit{Cf.} R. KLUGER, SIMPLE JUSTICE 251-53 (1975) (first time government filed brief in civil rights case in which only private citizens were litigants).

93. The brief has been reprinted as T. CLARK & P. PERLMAN, PREJUDICE AND PROPERTY: AN HISTORICAL BRIEF AGAINST RACIAL COVENANTS (1969).

94. \textit{Cf.} R. KLUGER, SIMPLE JUSTICE 251-53 (1975) (first time government filed brief in civil rights case in which only private citizens were litigants).


97. T. CLARK & P. PERLMAN, supra note 93, at 22-24, 34.

98. \textit{President’s Committee on Civil Rights, To Secure These Rights} (1947).

B. THE 1950 TRILOGY

The issues raised both squarely and symbolically by *Sipuel* and the other cases involving race during October Term 1947 did not recur in the next Term until a few months before adjournment. On March 1, 1949, a jurisdictional statement was filed in *McLaurin v. Oklahoma State Regents*,100 and three weeks later a petition for certiorari was filed in *Sweatt v. Painter*.101 The cases presented issues that had not been raised in *Gaines*, and that—despite the NAACP's belated attempts to raise them on appeal and mandamus—had not been squarely presented in *Sipuel*.

In *McLaurin*102 a sixty-eight-year-old black man with a master's degree had been admitted to the University of Oklahoma's doctoral program in education, but on a "segregated basis:"103 he was required to sit in an anteroom adjoining regular classrooms and at a special table in the library and cafeteria.104 He challenged the conditions as violations of the equal protection clause but lost before a three-judge federal district court.105 In *Sweatt*106 a black was denied admission to the University of Texas Law School solely because of his race; he was instead offered admission, which he refused, to a newly created state law school for blacks that had neither the facilities nor the reputation of the University of Texas.107 *Sweatt* sued unsuccessfully in state court for admission to the all-white state school.108 The NAACP, which represented both McLaurin and Sweatt, argued that the treatment of the plaintiffs violated the equal protection clause of the fourteenth amendment.109 But more importantly, both the petition and the jurisdictional statement argued point-blank what the Court knew was coming after *Sipuel*: if found to be applicable, the "separate but equal" doctrine of *Plessy v. Ferguson* should be overruled.110 The petition in *Sweatt* concluded:

> The court below relied on *Plessy v. Ferguson*. The inconsistency between the judicial approval of laws imposing racial distinctions in *Plessy v. Ferguson* and the judicial disapproval of similar distinctions and classifications in more recent decisions including *Oyama v. California*, *Shelley v. Kraemer*, *Takahashi v. Fish and Game Commission* should lead this Court to review the correctness of the doctrine of *Plessy v. Ferguson* and overrule it.111


103. Id. at 639 n.1 (quoting An Act, §§ 1-3, 1949 Okla. Sess. Laws 608 (repealed 1953)).

104. Id. at 640.

105. 87 F. Supp. at 531.


107. 210 S.W.2d at 446.

108. Id. at 447.

109. See Petition for Writ of Certiorari at 13 [Sweatt], supra note 101 (treatment violates fourteenth amendment); Appellant's Statement as to Jurisdiction at 15-19 [McLaurin], supra note 100 (state has no power that justifies violating fourteenth amendment by excluding McLaurin).

110. Petition for Writ of Certiorari at 14 [Sweatt], supra note 101; Appellant's Statement as to Jurisdiction at 9-22 [McLaurin], supra note 100.

111. Petition for Writ of Certiorari at 14 [Sweatt], supra note 101; see Appellant's Statement as to
The Court took no action on the moving papers in *Sweatt* and *McLaurin* during the waning months of the Term. The delay may have been a result of hesitancy to act on such volatile cases or simply the product of lack of time; amici curiae briefs were still being filed in support of the *Sweatt* petition in late May, within four weeks of the end of Term.

While the moving papers in *Sweatt* and *McLaurin* were still pending, the composition of the Court changed dramatically. Frank Murphy, who had been seriously ill off and on for a year, died July 19, 1949, and within eight weeks, on September 10, Wiley Rutledge died suddenly. To replace them, President Harry S. Truman named a former Senate colleague, Sherman Minton of Indiana, then serving on the Seventh Circuit, and Tom C. Clark of Texas, the incumbent United States Attorney General, who was also a graduate of the University of Texas Law School.

Clark quickly plunged into the work of the Court, including the two race cases that had been pending since March. Within one week of taking his seat, Clark received from his law clerk a 5,500-word memorandum on *Sweatt* and *McLaurin.* Half the memo was devoted to two points: "The [Fourteenth] Amendment and the 'Intention' of the Framers," and "The Cases [on

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Jurisdiction at 19-22 [McLaurin], supra note 100 (conflict between early and recent Supreme Court decisions defining limits of state power to make racial classifications should be resolved).

112. The Court first discussed *McLaurin* at its certiorari conference on April 2, 1949, but took no action. The case was listed again for conferences April 16, April 23, April 30, May 7, May 14, May 28, and June 4, when *Sweatt* was added for discussion with *McLaurin.* The two cases were discussed but held for action until the final certiorari conference of the Term on June 24, 1949, when, according to Burton's notes, "those present (Douglas and Murphy absent)" voted to continue the cases to the 1949 Term. Docket Book (Oct. Term 1948), Box 188, HHB(LC); see Conference Sheets (Oct. Term 1948), Box 194, HHB(LC) (noting progress of cases). The reason that no action was taken during the last months of the 1948 Term may have been that although by June 24 four Justices wished to grant certiorari in *Sweatt* (Black, Douglas, Murphy, and Rutledge), the Court could not decide how to treat *McLaurin.* For example, Burton noted on his Conference Sheet for June 24 with respect to *Sweatt,* "(Best bet is to deny this and reverse [McLaurin] on Gaines)." Docket Book (Oct. Term 1948), Box 188, HHB(LC).

The Court did not vote to take *Sweatt* and *McLaurin* until the fourth certiorari conference of October Term 1949. The reason for the further delay was that the Court was informed at the beginning of the Term that McLaurin's standing at the University of Oklahoma was in doubt and that the faculty was meeting to review his examination papers to determine if he would be allowed to continue in residence. Conference List (Oct. 3, 1949), Box 302, HLB(LC). No vote was taken on either case at the October 3, 15, and 22 conferences. Conference Sheets (Oct. Term 1949), Box 302, HLB(LC). On October 25, McLaurin's counsel wrote the Clerk of the Supreme Court to advise the Court that McLaurin was still enrolled, taking more courses, and "being subjected to the same conditions as before." Letter from Thurgood Marshall to C. Cropley (Oct. 25, 1949), File 53516, Stack Area 4W-2, Row 26, Compartment 4, National Archives and Records Service. With the concerns over mootness thus resolved, on November 5, 1949 the Court unanimously voted to note probable jurisdiction in *McLaurin* and to grant certiorari in *Sweatt.* See McLaurin v. Oklahoma State Regents, 70 S. Ct. 139 (1949) (noting probable jurisdiction); *Sweatt v. Painter,* 338 U.S. 865 (1949) (granting certiorari).


Segregation] since 1870.\textsuperscript{115} The memo concluded with a summary of possible dispositions of \textit{Sweatt} and \textit{McLaurin} if the cases were accepted for review.\textsuperscript{116}

Clark was not the only Justice who was beginning to think in detail about \textit{Sweatt} and \textit{McLaurin} and their potential dispositions on the merits. At approximately the same time, mid-August of 1949, Felix Frankfurter received a 6,500-word memo on the cases from one of his outgoing clerks, William T. Coleman, Jr.\textsuperscript{117}—the first black ever to clerk at the Court. Coleman's memo recited the relevant facts in the cases, canvassed the arguments on both sides, and examined the Court's case law in the area. The memo concluded that \textit{Plessy} should be overruled.\textsuperscript{118} Harold Burton's clerks also produced a detailed memorandum on the cases.\textsuperscript{119} Attached to the memo, which recommended taking both cases, was a cover note that said in part, "The McLaurin case raises the issue whether segregated facilities can be equal about as squarely as any fact situation could raise it. We think this is a good time and a good case for reconsidering \textit{Plessy v. Ferguson}.\textsuperscript{120}

On November 7, 1949, the Court granted certiorari in \textit{Sweatt}\textsuperscript{121} and noted probable jurisdiction in \textit{McLaurin}.\textsuperscript{122} The cases were set for oral argument with a third case, \textit{Henderson v. United States}.\textsuperscript{123} In \textit{Henderson} a black passenger on the Southern Railway had been denied dining car service because white passengers occupied the table reserved for blacks at the time he wished to eat.\textsuperscript{124} Company rules prohibited serving blacks and whites at the same table. The rules also provided that when blacks ate at the designated table, a curtain was to be drawn between the ten white tables and the one black table.\textsuperscript{125} The statutory question in \textit{Henderson} was whether the rules and practices of the Railway violated section 3(1) of the Interstate Commerce Act, which prohibited any railroad in interstate commerce "to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."\textsuperscript{126} The narrower question was whether the

\begin{footnotesize}
\begin{enumerate}
\item[115.] Id. at 3-12.
\item[116.] Id. at 15-17.
\item[117.] Memorandum from W.T.C., Jr. [Clerk] to Frankfurter, J. (Aug. 5, 1949), File 4027 (original) or File 4029 (copy), Box 218, FF(LC).
\item[118.] Memorandum from W.T.C., Jr. [Clerk] to Frankfurter, J. at 22 (Aug. 5, 1949), supra note 81. The memo closed with a poignant passage that, in light of the extensive interlineations made by Frankfurter, appears to have struck a chord with the Justice:
\begin{quote}
Finally . . . the statement in the \textit{Plessy} case that segregation does not bring about the inferiority of the races has not been supported by history or the study of psychologists and sociologists . . . Segregation is always a humiliating experience, but even clearer evidence that to designate, on the basis of race, is a sign of the inferiority of a minority group, is contained in the adjudications of almost every Southern state . . . There are decisions in both Oklahoma and Texas which hold that it is libel per se to call a member of the white race a Negro. . . . There are no decisions, though, which hold libel per se the other situation.
\end{quote}
Id. at 23-24 (citations omitted).
\item[119.] Memorandum from [Clerks] to Burton, J. (no date), Box 204, HHB(LC).
\item[120.] Id.
\item[121.] \textit{Sweatt v. Painter}, 338 U.S. 865 (1949) (granting certiorari).
\item[122.] \textit{McLaurin v. Oklahoma State Regents}, 70 S. Ct. 139 (1949) (noting probable jurisdiction).
\item[124.] 339 U.S. at 818-19.
\item[125.] Id. at 821.
\item[126.] Id. at 823 (quoting 49 U.S.C. § 3(1) (1940) (current version at 49 U.S.C. § 3 (1976)).
\end{enumerate}
\end{footnotesize}
Court's interpretation in *Mitchell v. United States*\(^{127}\) of the same section of the Act controlled Henderson's claim.\(^{128}\) In *Mitchell* the Court had held that under the Interstate Commerce Act, equal facilities could not be denied an interstate rail passenger on the basis of race.\(^{129}\) Henderson also questioned whether the rules and practices violated the fifth amendment of the Constitution.\(^{130}\)

*Mclaurin, Sweatt, and Henderson* thus presented the Court with the questions of the constitutionality and statutory validity of segregated facilities in higher education and transportation. This description of the issues in the three segregation cases of the October 1949 Term, however, is misleading. The parties and amici took different tacks in delineating the questions the Court faced and in so doing provided the Court with a wide—and, in effect, disconcerting—variety of definitions of the Court's task in adjudicating the cases.\(^{131}\) The NAACP, representing Sweatt and McLaurin, attacked racial classifications in "public education" as arbitrary and unreasonable,\(^{132}\) but hedged its bets on *Plessy v. Ferguson*. Its brief for McLaurin, for example, argued both that *Plessy* was inapplicable because it involved transportation and not the "fundamentally different" environment of education\(^{133}\) and that, if applicable, *Plessy* should be overruled as inconsistent with the intent of the framers of the fourteenth amendment.\(^{134}\) The States, on the other hand, argued simply that the "separate but equal" doctrine was firmly established and had been consistently applied in the area of public education from *Cumming v. Richmond County Board of Education*\(^{135}\) through *Gaines* and even *Sipuel*.\(^{136}\)

Two amici briefs filed on behalf of Sweatt and McLaurin identified the issue much more broadly and attacked *Plessy* at its roots. The Committee of Law Teachers Against Segregation in Legal Education devoted fifteen pages of its lengthy amicus brief to showing that the "separate but equal doctrine" was fundamentally inconsistent with the equal protection clause, which was "intended to outlaw segregation."\(^{137}\) The brief also argued that the Court had never squarely extended *Plessy* to education, and concluded that "segregated legal education [in *Sweatt*] cannot under any circumstances afford equal

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127. 313 U.S. 80 (1941).
129. 313 U.S. at 95. Congressman Arthur W. Mitchell, holding a first-class ticket that entitled him to Pullman service, had been denied those accommodations and forced to occupy a second-class car because the area reserved for blacks was full. *Id.* at 89-90.
131. "Lawyers who draft briefs... know that the way they pose questions powerfully affects—if it does not determine—the answers they will receive. . . . The wise judge... knows that at the stage of opinion writing, the advantage of framing the question passes to the bench." Danzig, *How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion*, 1977 Sup. Cr. Rev. 257, 257.
134. *Id.* at 44-52.
135. 175 U.S. 528 (1899).
facilities”; “hence [Sweatt] has been denied equal protection even with the broadest application of Plessy v. Ferguson.”138 The United States also filed an amicus brief supporting Sweatt and McLaurin.139 Vigorously rhetorical, the brief condemned Plessy as inconsistent in principle with the fourteenth amendment and with a line of cases, from Strauder v. West Virginia140 to Shelley v. Kraemer141 in 1948, enforcing that amendment.142 To counter-nance the disregard of fully equal treatment of citizens because of race, the brief concluded, was “to sanction disrespect for law and thereby weaken the fabric of our society.”143

The United States did not rely only on rhetoric to attack Plessy. Its brief in Henderson was substantively important in three respects: (1) the brief abandoned the Government’s defense of the Railway’s rules and in thus “confessing error,”144 admitted that the segregated facilities were unlawful;145 (2) it stated, for the first time in a brief filed by the United States, that Plessy should be overruled;146 (3) and perhaps most importantly, it attempted to explain to the Court that the very fact of segregation, not the resulting inequality of facilities, was an evil prohibited by both the Interstate Commerce Act and the Constitution.147 Citing Gunnar Myrdal’s An American Dilemma148 and quoting the report by the President’s Committee on Civil Rights,149 the brief stated:

138. Id. at 38 (capitalization omitted).
140. 100 U.S. 303 (1880). Strauder held that a West Virginia law prohibiting blacks from serving on juries denied the black defendant equal protection of the laws. Id. at 310.
141. 334 U.S. 1 (1948).
142. Memorandum for the United States as Amicus Curiae at 14 [Sweatt], supra note 139.
143. Id.
144. “Confession of error” is an admission by the United States as appellee (or respondent) that the court below has committed a reversible error and that the judgment should not stand. See Gibson v. United States, 329 U.S. 338, 344 n.9 (1946) (confession of error entitled to great weight but does not displace judicial consideration) (quoting Young v. United States, 315 U.S. 257, 258-59 (1942)). See generally R. Stern & E. Gressman, Supreme Court Practice 367-68 (5th ed. 1978).
145. See Brief for the United States at 1-2, No. 25 [Henderson v. United States] (Oct. Term 1949) (USSCL) ("it is submitted that the judgment of the district court is erroneous and should be reversed"). At trial, the Department of Justice had successfully defended the order of the Interstate Commerce Commission upholding the Railway’s rules. Henderson v. Interstate Commerce Comm’n, 80 F. Supp. 32, 39 (D. Md. 1948), reversed, 339 U.S. 816 (1950). The Department’s reversal of positions is described in R. Kluger, Simple Justice 277-78 (1975).
146. The Brief for the United States read:

If this Court should conclude that the issues presented by this case cannot be considered without reference to the “separate but equal” doctrine, the Government respectfully urges that, in the half-century which has elapsed since it was first promulgated, the legal and factual assumptions upon which that doctrine rests have been undermined and refuted. The “separate but equal” doctrine should now be overruled and discarded.

Id. at 40.
147. Id. at 27-35.
149. President’s Committee on Civil Rights, supra note 98, cited in Brief for the United States at 28, 34 n.30 [Henderson], supra note 145.
Segregation of Negroes, as practiced in this country, is universally understood as imposing on them a badge of inferiority. It "brands the Negro with the mark of inferiority and asserts that he is not fit to associate with white people." Forbidding this group of American citizens "to associate with other citizens in the ordinary course of daily living creates inequality by imposing a caste status on the minority group." 150

The importance of this argument cannot be overstated. By emphasizing the actual harm to the individual black experiencing segregation, the Government was expanding the focus of the constitutional inquiry from the nature of the separate facilities to the nature and impact of the racial classification.

The point was not lost on the Court as it began to prepare for oral arguments in the cases, which were scheduled for April 3 and 4, 1950. The law clerks of Mr. Justice Burton prepared an extensive set of memoranda on the issues in the cases. By March 27, Burton had received a 4,800-word memo analyzing the "Relevant Cases" in the Court, 151 a 2,000-word "History of the Adoption of the Fourteenth Amendment Relevant to the Issue of Segregated Education," 152 and a 4,000-word memo outlining possible dispositions of Sweatt on the merits. 153 The final memo is the most important of the three, for two reasons.

First, the clerks' memo on possible dispositions of Sweatt shows that the Government's argument in Henderson had caught the attention of Burton's staff, who tried to drive it home to the Justice. The clerks wrote:

The fact of separate schools, even though they were physically equal, for colored and white students has a different impact on the colored students from that on the white students. The result . . . is and must be a poorer education for the colored student. We conclude that this must be so because the segregated school is one of the links in a complicated caste system designed to limit the opportunities of negroes. . . . For a dispassionate study of the operation of the caste system under the "separate but equal" slogan, see Myrdal, An American Dilemma, passim, but particularly pp. 575-582, 627-634, 640-644 and Vol. II, pp. 757-67. The cited references contain particular references to the segregated

150. Brief for the United States at 27-28 [Henderson], supra note 145 (footnotes omitted). After buttressing the argument with quotations from Harlan's dissent in Plessy and with pointed references to Shelley v. Kraemer, id. at 28-29, the brief concluded its presentation of the point:

It is bad enough for the Negro to have to endure the insults of individuals who look upon him as inferior. It is far worse to have to submit to a formalized or institutionalized enforcement of this concept, particularly when as in this case, it carries the sanction of an agency of government and thus appears to have the seal of approval of the community at large. Such enforced racial segregation in and of itself constitutes inequality. In this situation the phrase "separate but equal" is a plain contradiction in terms.

Id. at 34-35 (footnotes omitted).

151. [Clerks to Burton, J.], An Analysis of the Relevant Cases (no date), Box 210, HHB(LC).

152. [Clerks to Burton, J.], The History of the Adoption of the Fourteenth Amendment Relevant to the Issue of Segregated Education (Mar. 27, 1950), Box 210, HHB(LC).

153. [Clerks to Burton, J.], Suggested Disposition of the Sweatt Case (no date), Box 210, HHB(LC).
school systems. . . . cf. U.S. brief in *Henderson v. United States*, No. 25, this term, p. 27 to end. While the U.S. brief is directed against segregation in transportation, the cited passages contain as forceful a statement as we have seen of the intangible inequalities which result from even a system which provides equal physical facilities for the separated races. And see Myrdal, *supra*, Vol. I, pp. 575-582.154

Second, the clerks’ memo demonstrates that the range of possible dispositions of the cases had reached an almost bewildering number. Burton’s clerks listed five potential dispositions of *Sweatt* and assessed each one:

1. The Court could affirm, but “it is plain sophistry to say that a plan for the use of an unused building, originally built for other than school use, by a few negro students without moot court, law review, legal aid or other activities presents a school ‘equal’ to the Texas University Law School.”

2. The Court could reverse, upholding the “separate but equal doctrine” but finding no equality of facilities. This course was admittedly justified on the record, but was doctrinally unsound for two reasons: (a) the legislative history of the fourteenth amendment, although “admittedly inconclusive,” suggests that Congress “probably intended” to “prevent segregated public education”; and (b) to uphold *Plessy* would be to sanction segregation, itself an injury.

3. The Court could reverse on the grounds of inequality of facilities without reaching the validity of *Plessy*. This technique had been used in *Sipuel*, but was not justified here because, unlike *Sipuel*, *Sweatt* squarely presented the issue of the validity of *Plessy*. Moreover, on a practical level, the Court’s decisions would affect only “isolated situations . . . leaving the remainder of the regional systems of segregation intact.”

4. The Court could reverse on the ground that although not all laws requiring segregation are invalid, segregated education, unlike segregated transportation, can never be equal. Both clerks favored this position as the most prudent course of action, although both preferred a broader holding.

5. Finally, the Court could reverse on the ground that any classification on the basis of color presupposes the inferiority of blacks and is therefore inconsistent with the equal protection clause of the fourteenth amendment. The clerks commented, “Such a broad pronouncement is not required for the decision of this case [and] is open to the objection of being doctrinaire.”

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154. Id. at 5-6.
155. Id. at 1-2.
156. Id. at 1.
157. Id. at 4.
158. Id. at 5-6.
159. Id. at 1.
160. Id. at 6-7. The clerks added that disposing of the case by finding no equality of facilities would assume that if the facilities had been equal, the schools would be lawful. They argued against this disposition, to avoid giving currency to the assumption. Id.
161. Id. at 7.
162. Id. at 1.
163. Id. at 7.
164. Id. at 1.
165. Id. at 8.
The clerks pointed out that their list was "not exhaustive, but rather representative of the widely different grounds on which a decision might rest." Both clerks, clearly moved by Myrdal, privately favored holding all segregated education unconstitutional, but believed that "it is not necessary or wise to make such a broad pronouncement in this case." They recognized, however, the difficulty of limiting their proposed disposition to graduate education: "While the holding of this case, if this solution is used, does not mean that segregated grade high schools are also illegal, we think it must be recognized that it would foretell the invalidity of segregation in those schools as well, whenever the issue reaches the Court."  

Justice Clark's clerk also analyzed potential dispositions of *Sweatt* and *McLaurin*, some of which resembled those discussed in more detail in the Burton clerks' memo. Clark's clerk favored a similar course:

[a] compromise that would interpret the Constitution in the "right" way and would avoid, at least for the interim, most of the possibilities of defiance in the South. It is a solution which, I am told, was first suggested by Justice Frankfurter . . . : rule that segregation is a violation of the Constitution in graduate schools, and make no mention of other schools. . . . *Plessy* could be handled by saying "whatever the present validity of *Plessy v. Ferguson*, we will not apply its doctrine to graduate schools," or words to that effect.

Clark was attracted to the "compromise" disposition of *Sweatt* and *McLaurin* outlined by his clerk. Off and on during March of 1950, Clark worked on a memorandum to submit to the Conference (the Court's internal name for itself). Because of his background, Clark felt that he had special expertise, and perhaps a responsibility, to provide guidance on the cases. With some hesitation, he planned to circulate his memorandum prior to the Court's conference discussion of the cases. The memorandum was circulated April 7, three days after oral argument in the *Segregation Cases* and one day before conference.

A remarkable document, the Clark memorandum on *Sweatt* and *McLaurin* reveals a Justice thinking out loud for the benefit of the Conference and himself. Unlike most other internal memoranda circulated by Justices from time to time, Clark's memo is neither an analysis of applicable doctrine nor a review of material facts designed to focus conference discussion. Instead, it

166. Id. at 2.
167. Id. at 7.
168. Id.

170. See Clark, J., Memorandum to the Conference (Apr. 7, 1950), TCC(UT) or File 4029, Box 218, FF(LC). The memorandum is reprinted in full as Appendix A, *infra*.
171. See *id.* at 1 (because cases arise in his part of country, proper and perhaps helpful to express his views).
172. The earlier drafts of the memorandum began, "I hesitate to state my views prior to conference, but in these cases I think my convictions, based in part on my experience in Texas, might be helpful to the Court." Clark, J., Drafts for Memorandum to Conference (no date), TCC(UT).
is almost literally a position paper. Clark stated in the memo that reversal of the cases would cause no parade of horribles, as predicted by an amicus brief filed by several Southern States,174 as long as the decisions were not extended to the elementary and secondary schools.175 “Certainly this is not required now. I would be opposed to such extension at this time and would vote against taking a case involving same. Perhaps at a later date our judicial discretion will lead us to hear such a case.”176 Clark went on to outline potential dispositions of Sweatt and McLaurin. He felt that the issue of the application of Plessy v. Ferguson had to be met, but he pointed out that he was opposed to overruling Plessy, at least in the cases before the Court.177 He was persuaded that the Plessy doctrine should not be applied to graduate schools.178 He concluded, “I join with those who would reverse these cases upon the ground that segregated graduate education denies equal protection of the laws. . . . If some say this undermines Plessy then let it fall, as have many Nineteenth Century oracles.”179

If Clark intended his memo to provide a position that would synthesize disparate views on the Court,180 he was not successful—at least at the outset. It is impossible to reconstruct what happens in the Conference Room when the Justices meet to discuss argued cases and to take tentative votes. The surviving conference notes of Clark and Burton indicate, however, that each member of the Court felt it necessary in discussing Sweatt and McLaurin to state his views on the extent to which the fourteenth amendment condemned segregated public education.

Vinson said, according to Clark’s notes, that the issue was “settled by [the] legislative history surrounding [the] adoption of [the] 14th amend[ment].”181 He pointed out that separate schools had been established in the District of Columbia and in Northern States, and “when we have all this historical background, it is hard for me to say schools should not be separate.”182 Obviously referring to Clark’s compromise position, Vinson said, apparently

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174. See Brief of the States at 7-11 [Sweatt], supra note 136. The Brief pointed to riots that had occurred when public swimming pools were desegregated in St. Louis and Washington, D.C. in the summer of 1949, and suggested that violence would be greater in Southern States if desegregation were ordered. Id. at 9-10. The Brief foresaw the destruction of “the public school and recreational systems of the Southern States” if Plessy were undone. Id. at 10.
175. Clark, J., Memorandum to the Conference (Apr. 7, 1950), supra note 170, at 1.
176. Id.
177. Id. at 2.
178. Id.
179. Id. at 4.
180. Clark’s clerks summarized the strategy of the memorandum in a letter to him a week before the memo was circulated:

For those who think Plessy a good rule, we try to show that it is unsupportable, as a matter of analysis and justice, when applied to graduate professional education. For those who think that now is the time to terminate the doctrine altogether, we try to suggest that there is likely to be some degree of social unrest and dislocation if such sweeping action is taken. An effort is made to assure all that your position alone is supported by the present extent of social advancement in the South, and that adoption of it would not precipitate any difficulties of more than a temporary and inconsequential nature.

181. Clark, J., Conference Notes [Apr. 8, 1950], TCC(UT) [hereinafter Clark Notes (Apr. 8, 1950)].
182. Id.
somewhat emphatically, "How can you have [a] constitutional provision as to graduate but not as to elementary [schools]?" Vinson also doubted, however, that the record in Sweatt actually presented the issue of "separate and equal" facilities. Clark records Vinson as concluding, "I tend toward affirming." Burton's notes, unlike Clark's, show that Hugo Black spoke at great length. He spent much of his time arguing that the state in Sweatt could not set up equal facilities overnight and that diplomas from the two schools would "have different value." In essence, he saw "two roads open:" The Court could either hold that there was no equality "in either case" and "handle the cases one by one and not cause trouble" or hold that segregation in graduate education was "unreasonable." Burton noted parenthetically that Black said he would reverse all three cases, "but does not state he would go now beyond sep[arate] and equal."

Reed spoke next, expressing his concern over the Court's role in dealing with the segregation issue:

It is hard for me to say something that has been constitutional for years is suddenly bad. The 14th Amendment was not aimed at segregation—no statement by anyone such as Congress that segregation [was] unconstitutional. We have made great progress. It would be unfortunate at this time for us to say segregation [is] unconstitutional.

He voted quickly to reverse Henderson "on the statute," as both Vinson and Black had done, and to reverse McLaurin because "when you admit a student they must all be equal." Reed concluded that the question in Sweatt was whether there were in fact equal facilities. "I would say facilities are equal in Texas," he said, but added that he would remand "for correction and amendment of [the] record."

Frankfurter voted to reverse in all three cases, but as he was inclined to do, spoke at great length. His statement, as recorded by Burton and Clark, voiced two main concerns: first, that in light of the unique nature of the classroom and other facilities, two graduate schools could not provide equality, and second, that the Court "should not go beyond what is necessary.

183. Id. (emphasis in Clark's Notes).
184. Id.
185. Burton, J., Conference Notes (Apr. 8, [1950]), Box 204, HHB(LC) [hereinafter Burton Notes (Apr. 8, 1950)].
186. Id.
188. Burton Notes (Apr. 8, 1950), supra note 185.
189. Id. (emphasis in Burton's Notes).
190. Clark Notes (Apr. 8, 1950), supra note 181. Burton also notes that Reed was uncomfortable with the issue. Concerning Henderson, Reed stated, "[I]t is difficult for us who have felt the impact of segregation personally to pass on this issue. . . . It is impossible to say that segregation per se is forbidden by the Constitution. It's like child labor [or] capital punishment." Burton Notes (Apr. 8, 1950), supra note 185.
192. Id.
193. See Burton Notes (Apr. 8, 1950), supra note 185 (notation accompanying Frankfurter comments: "Rev (?)").
We should not go out and meet problems."

He added that the cases "should be decided aside from any doctrinaire [views] or intentions as we construe them of the 14th Amendment. No one knows what was intended." Attempting to minimize what he may have perceived as a growing sense in the conference room that the day of reckoning had arrived for segregation generally, Frankfurter said flatly, "Sweatt . . . is no Dred Scott case. The two schools are not equal."

William O. Douglas spoke briefly. Clark's notes record Douglas as saying, "We should meet [the] issue head on." But Clark's notes also record that Douglas added he "might go along [in Sweatt] on separate and equal if [there were] no overtones [in the opinions] that segregation in education is constitutional." Burton's notes on the same conference, on the other hand, record Douglas as stating, "Should overrule Plessy faced with segregation issue in McLaurin." Taken together, the Clark and Burton notes make it unclear whether Douglas felt compelled to overrule Plessy in Henderson and McLaurin.

Robert H. Jackson, according to both Burton and Clark, found no basis in the fourteenth amendment for its application to schools. "In effect, we would be amending the Constitution." Jackson also stated, however, that it was desirable to reverse in all three cases, apparently due to the lack of equality in fact. His final remark captures the tentative nature of his thinking at this point: "My views are fluid enough to join any theory."

The remaining Justices—Burton, Minton, and Clark—did not speak at length. In Burton's view of McLaurin, equal treatment was required once a student was admitted; "separate but equal" was inappropriate at the post-graduate level. Clark, speaking with authority as a Texas graduate, thought it "ridiculous" to claim that the two Texas law schools in Sweatt were equal. He concluded, "[W]e should do as J[ackson] says. [W]e should say it can't be equal. Otherwise, they will try to make it equal." Minton agreed with Burton on McLaurin; regarding Sweatt, Minton viewed the racial classification as "unreasonable." Concerning the larger issues Minton said, "Perhaps we can meet grade and high schools when we get to them."

When the conference was over, it was clear that a unanimous Court wished to reverse McLaurin and Henderson. In Sweatt, seven solid votes favored reversal. Vinson was leaning toward affirmance, but had spoken in conference before any of his brethren. Reed's view was in doubt—affirm or remand?

194. Id.
195. Burton Notes (Apr. 8, 1950), supra note 183; see Clark Notes (Apr. 8, 1950), supra note 181 ("On Sweatt—This is no Dred Scott case. . . . To have two schools is not equality.").
196. Id. (at post graduate level cannot have equal and separate).
197. Burton Notes (Apr. 8, 1950), supra note 185; cf. Burton Notes (Apr. 8, 1950), supra note 185 ("Find no basis for idea that XIV reached schools . . . . Raised the question of the wisdom of amending the Constitution").
Although the tentative voting made the results certain, the broad diversity of views expressed made it equally clear that the Court had only begun to deal with the issues. The test of the Court's consensus would come at the opinion-drafting stage. Because Vinson was possibly still in the minority in Sweatt, Hugo Black, the senior associate Justice, assigned both Sweatt and McLaurin to himself; Vinson assigned Henderson, which troubled no one, to Burton.\textsuperscript{207} On April 15, however, Black abandoned the assignment of the graduate school cases and Vinson took over.\textsuperscript{208}

On May 17, Vinson circulated draft opinions in Sweatt and McLaurin, both of which were brief and narrow.\textsuperscript{209} Despite the wide theoretical divisions in Conference, Vinson received indications of agreement in both opinions from all but one Justice within two days.\textsuperscript{210} Vinson wrote in the Sweatt draft that the separate black law school did not provide legal education equivalent to the University of Texas Law School, and thus that Sweatt's "personal and present" fourteenth amendment rights had been violated.\textsuperscript{211} In the other case

\textsuperscript{207} M. Berry, supra note 13, at 122.
\textsuperscript{208} See Burton, J., Diary (Apr. 4, 1950), Box 2, HHB(LC) (notation of change in assignments, dated April 15, in April 4 diary entry) [hereinafter 1950 Burton Diary].
\textsuperscript{210} See Circulation Record, Sweatt v. Painter (Oct. Term 1949), Box 262, FMV(UK) (indicating agreement of all Justices but Douglas); Circulation Record, McLaurin v. Oklahoma State Regents (Oct. Term 1949), Box 262, FMV(UK) (same). According to the Circulation Records (forms for noting drafting stages and Justices' responses), by May 29 Vinson received concurrences in both opinions (with suggested changes) from everyone except Douglas, who did not finally agree on the opinions until May 31. Douglas' suggestions for Vinson's opinions were minor. His singular failure to join the Vinson drafts promptly may have been attributable to his plan to write separately in Henderson and his desire to have that opinion speak for his views in all three cases. See notes 231-34 infra and accompanying text (discussing Douglas' threatened separate opinion in Henderson).
\textsuperscript{211} May 17 Sweatt Draft, supra note 209, at 5-6 (applying analysis of "personal and present" rights established by recent segregation cases). Aside from minor stylistic suggestions, the other Justices generally accepted Vinson's first draft of Sweatt as written. The only portion of the opinion that caused concern was the following paragraph:

Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the human relationships with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.

\textit{Id.} at 4-5. Mr. Justice Reed wrote Vinson on May 18 suggesting that "human relationships" be changed to "exchange of views." Letter from Reed, J., to Vinson, C.J. (May 18, 1950), Box 262, FMV(UK). Frankfurter supported Reed's suggestion, but added that he would prefer that the entire paragraph be excised; he felt that the previous paragraph "states the considerations that are decisive, and it seems to me desirable now not to go a jot or little beyond the Gaines test. The shorter the opinion, the more there is an appearance of unexcitement and inevitability about it, the better." Letter from Frankfurter, J., to Vinson,
Vinson wrote that the restrictions placed on McLaurin made his graduate training unequal to that of his white classmates, thus depriving McLaurin of equal protection of the laws.\footnote{212} In both cases Vinson emphasized that it was unnecessary to reach the broader contentions that Plessy should be overruled.\footnote{213}

The other Justices responded to the drafts with enthusiasm, particularly because the narrow reasoning avoided the divisive question of the constitutionality of segregation per se. Vinson had produced drafts that, with tinkering, could gather unanimous agreement. Black and Frankfurter both wrote the Chief Justice expressing their hope that the Court would be

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\footnote{C.J. (May 19, 1950), Box 262, FMV(UK). Vinson accepted Reed's suggestion, but kept the paragraph intact otherwise. See Vinson, C.J., Draft Opinion (May 23, 1950), \textit{Sweatt v. Painter}, Box 262, FMV(UK) [hereinafter May 23 \textit{Sweatt} Draft]. Frankfurter did not object further and joined Vinson's redraft the day it was circulated. \textit{Circulation Record, Sweatt v. Painter, supra note 147}. With these minor changes the drafts became the final \textit{Sweatt} text.}

\footnote{212. \textit{May 17 McLaurin Draft, supra note 209}, at 5. Vinson changed the description of the considerations leading to the conclusion of inequality at the suggestion of Reed and Frankfurter. Vinson's first draft said of the restrictions:

\begin{quote}
Whether these restrictions reflect a general purpose to stigmatize a specific group or a particular attempt to attain technical compliance with the state statutes, they can have but one effect: to serve as a reminder that the state considers McLaurin different from his white fellows. The reminder may be a fence and sign, a line painted on the floor, or assignment to a particular row of seats. It is the presence, not the nature, of the reminder which is significant. It requires no great knowledge of human behavior to recognize the psychological handicaps to effective study which are necessarily imposed upon a graduate student who is set apart and distinguished because of his race, a factor over which he has no control and which he could not alter if he so desired.
\end{quote}

\textit{Id.} at 3-4. Reed's letter to Vinson on May 18 suggested that the paragraph be dropped and the following paragraph, or "something like" it, be substituted:

\begin{quote}
The restrictions imposed upon petitioner have obviously been made to comply, as nearly as could be, with the statutory requirements of Oklahoma. The result is that graduate students of the colored race are set apart in the Graduate School by rule from opportunities to learn his [sic] profession by discussion of the studies and lectures with all the other students. The valuable experience of testing their approach to conclusions in comparison with the approach of others is limited. These are handicaps to an effective education.
\end{quote}

\textit{Id.} at 3-4. Reed felt that his suggested substitution narrowed the scope of the paragraph in Vinson's draft, which, "[w]hile limited to a graduate student, to me . . . carries further." \textit{Id.}

Frankfurter again seconded Reed's suggestion, but added that "handicaps to an effective education" should be changed to "handicaps to graduate instruction." Letter from Frankfurter, J., to Vinson, C.J. (May 19, 1950), \textit{ supra note 148}. With some stylistic changes, Vinson accepted both suggestions. See Vinson, C.J., Draft Opinion at 3-4, \textit{McLaurin v. Oklahoma State Regents} (May 23, 1950), Box 262, FMV(UK) [hereinafter May 23 \textit{McLaurin} Draft]. At the suggestion of Mr. Justice Douglas, Vinson changed the opening sentence of the preceding paragraph from "It is apparent that the separations imposed by the States in this case are less tangible than symbolic" to "It is said that the separations imposed by the State in this case are in form merely nominal." Notations by Douglas, J., on May 23 \textit{McLaurin} Draft (rec'd May 31, 1950), Box 262, FMV(UK) (handwritten). With these changes the draft became the final \textit{McLaurin} text.}

\footnote{213. \textit{See May 17 Sweatt Draft, supra note 209}, at 1 (constitutional questions decided only when necessary to case at hand); \textit{May 23 Sweatt Draft, supra note 211}, at 1 (same); \textit{May 17 McLaurin Draft, supra note 209}, at 1 (same); \textit{May 23 McLaurin Draft, supra note 212}, at 1 (same); \textit{cf. Sweatt v. Painter}, 339 U.S. at 631 (same); \textit{McLaurin v. Oklahoma State Regents}, 339 U.S. at 638 (same).}
unanimous in its opinions. Both Justices clearly recognized the added weight that unanimity would provide to the opinions and results in *Sweatt* and *McLaurin*.\(^{214}\) Vinson’s willingness to accommodate suggestions from his colleagues, even slight ones, helped to achieve the desired unity. Unanimity in the results was beyond doubt by May 19, but not until the end of the month—when Vinson had made the last of his colleagues’ suggested changes—could Vinson be sure that the *Sweatt* and *McLaurin* opinions would also receive the entire Court’s agreement.\(^{215}\)

Burton did not begin working on *Henderson* until May 10, because of other opinion work. Two weeks and two painstaking, handwritten drafts later, Burton finished writing and circulated his draft to the Conference.\(^{216}\) Within two days Burton “had a Court”: four other Justices—Vinson, Minton, Reed, and Black\(^{217}\)—expressed agreement. Jackson agreed to join the opinion if Burton deleted a reference in the draft to the Constitution.\(^{218}\)

214. On May 18, Black wrote a note to Vinson on the *Sweatt* draft:

> This is written in beautiful style and I sincerely hope it can obtain a unanimous approval. Certainly I shall say nothing unless some one writes in a way that impels me to express separate views—Full Court acceptance of this and the *McLaurin* opinions would add force to our holdings.

Note from Black, J., to Vinson, C.J. (May 18, 1950), Box 262, FMV(UK). The following day, at the conclusion of his letter suggesting changes in the two opinions, Frankfurter wrote Vinson, “Perhaps these minor changes will commend themselves to you. I hope very much that we can get an all-but unanimous, if not a unanimous, Court in the final form of your opinions.” Letter from Frankfurter, J., to Vinson, C.J. (May 19, 1950), supra note 148.

215. Vinson agreed to very minor stylistic changes proposed by Clark and Douglas. Vinson even agreed, with obvious reluctance, to strike the word “expanding” from his sentence summarizing the larger costs of the restrictions on *McLaurin*: “State imposed restrictions which produce such expanding inequalities cannot be sustained.” *May 17 McLaurin Draft*, supra note 209, at 4; 339 U.S. at 641. In a draft letter to Frankfurter (no evidence exists that it was sent), Vinson said:

> I certainly would not want to have anything in the opinion which would stir up feeling[s] of anger and resentment in any portion of the country [as Frankfurter apparently said he feared]. I agree that there is a growing recognition in the South that the Fourteenth Amendment is a part of the Constitution. Much progress has been and is being made in this field, but it is my thought that the regional school idea, the devices used by Oklahoma, and the Texas action here are in the nature of circumventions, and I would not be surprised but what there are other techniques which are or might be used. It was this thought that caused me to use the word “expanding.”

Draft Letter from Vinson, C.J., to Frankfurter, J. (May 24, 1950), Box 262, FMV(UK).

216. See Burton, J., Draft Opinion (1st Print), *Henderson v. United States* (May 1950), Box 210, HHB(LC).

217. Note from Vinson, C.J., to Burton, J. (May 26, 1950), Box 210, HHB(LC); Note from Minton, J., to Burton, J. (May 27, 1950), Box 210, HHB(LC); Note from Reed, J., to Burton, J. (May 27, 1950), Box 210, HHB(LC); Note from Black, J., to Burton, J. (May 27, 1950), Box 210, HHB(LC).

218. Jackson wrote Burton, “I agree, but I should be happier if the reference to the Constitution in the last sentence, page 8, were omitted. Since decision is based on the statute, is it necessary?” Note from Jackson, J., to Burton, J. (May 26, 1950), Box 210, HHB(LC). The offending sentence read, “What this Court has said of rights protected by the constitutional guaranty of the equal protection of the laws is applicable to the personal rights protected by the Interstate Commerce Act. The protection is not achieved through ‘indiscriminate imposition of inequalities.’ *Shelley v. Kraemer*, 334 U.S. 1, 22.” Burton, J., Draft Opinion at 8-9 (2d Print), *Henderson v. United States* (May 1950), Box 210, HHB(LC). The language of the final opinion reads, “Discriminations that operate to the disadvantage of two groups are not the less to be condemned because this impact is broader than if only one were offended. Cf. *Shelley v. Kraemer*.” *Henderson v. United States*, 339 U.S. at 825-26.
complied. Clark had recused himself, no doubt because he had been Attorney General while the case was in the lower courts. Only Douglas and Frankfurter remained unaccounted for. On May 26 Frankfurter wrote Burton and urged him to delete the following paragraph from his draft:

We need not multiply instances in which these rules [of the Railway] sanction unreasonable discrimination. The division between the tables is at most symbolic. The curtains, partitions and signs emphasize the artificiality of a division which serves only to call attention to a racial classification of passengers holding identical tickets and using the same dining facility. Cf. McLaurin v. Oklahoma State Regents, decided today. They violate § 3(1) [of the Interstate Commerce Act].

Frankfurter told Burton that the draft adequately disposed of the case by relying on Mitchell v. United States, which had construed section 3(1) to condemn the denial of equal facilities to interstate rail passengers on the basis of race. If the Court went beyond discrimination in dining facilities to discrimination in general, it would be deciding issues outside the case and, Frankfurter admonished, “borrowing future trouble.” Frankfurter recognized that the draft could be used to argue in future cases that even separate but equal facilities were impermissible because the symbolic separation in and of itself constituted discrimination.

Burton did not want to change the draft. Frankfurter, insistent, talked with Burton in his chambers on May 26 and 27 about the point, but got nowhere. At the May 29 conference on opinions, Frankfurter brought up the problem before the entire Court and suggested—probably as a tactic only—that he might have to concur in the result and thus not join Burton’s opinion. Two days later Frankfurter circulated to the Conference a three-page memorandum spelling out his objections. He pointed out that Mitchell required only equal facilities, but that Burton’s draft “can and will be fairly read to do more.” Then, step by step, Frankfurter explained the perils of Burton’s language:

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219. See Burton, J., Draft Opinion at 8 (3d Print), Henderson v. United States (June 5, 1950), Box 210, HHB(LC).
220. Letter from Frankfurter, J., to Burton, J. (May 26, 1950), Box 210, HHB(LC).
221. Burton, J., Draft Opinion (2d Print), supra note 218, at 8.
222. 313 U.S. 80 (1941).
223. Id. at 94-95.
224. Letter from Frankfurter, J., to Burton, J. (May 26, 1950), supra note 156. Frankfurter wrote that he strongly condemned racial inequalities,

[but I also feel very strongly, as you well know, against borrowing future trouble in the exercise of our jurisdiction. Sufficient unto the day is the goodness thereof! No single cause has got this Court into more needless trouble than needlessly deciding issues not before the Court or going needlessly beyond an adequate ground of disposing of a controversy, particularly where popular passion is involved.

Id. 225. 1950 Burton Diary (May 26-27, 1950), supra note 208.
226. See Frankfurter, J., Memorandum to the Conference (May 31, 1950), Box 210, HHB(LC) (referring to May 29 meeting).
227. Id.
For this Court to indicate objection to the division at tables as being "symbolic" is to introduce legal objection to separateness as such. "Symbolic" is an anti-segregation slogan. That is precisely the social objection to segregation, namely, that it represents a symbol of inferiority. We cannot introduce it into an opinion without giving just ground to the notion that we have ruled out segregation as such.

Even in the opinions dealing with graduate education we should not give currency to the term "symbolic." I cannot put too strongly my conviction that if we put the Court behind that term we have opened the door to the very thing which, at least for the moment, we have agreed to keep out—passing on segregation as such—reaching down to primary instruction. Indeed it would affect not only the whole question of education but all other aspects of segregation. It seems to me we ought to avoid language which will do the very thing we have decided not to adjudicate.

Frankfurter was being neither timid nor pedantic. He realized that the Court's step-by-step process of addressing the legality of segregation would be jeopardized if the opinion included the volatile language that he wished deleted. The future costs were obvious: the Court would be backed into a corner and forced to decide pervasive and difficult issues partially on the basis of careless diction. Either outcome would be unsatisfactory. If the Court struck down "segregation as such" in partial reliance on the offending paragraph, it could be fairly accused of bootstrapping. If, on the other hand, the Court upheld the constitutionality of segregation in whole or in part, it would have to do so in the face of a unanimous—or near-unanimous—opinion condemning the discriminatory nature of the symbols of inequality. To prevent these problems, Frankfurter attached to his May 31 memo a proposed paragraph to replace the objectionable portion of Burton's draft. Burton elected not to use Frankfurter's suggested paragraph, but he omitted the sentence containing the loaded word "symbolic" and changed "division" in the following sentence to "difference in treatment." Frankfurter then joined Burton's opinion.

Only Douglas was now "out," not having voted one way or the other on Burton's opinion. On the same day that Frankfurter circulated his memo to the Conference, Douglas, according to Burton's Diary, circulated a "dissent." Because Douglas agreed with the majority's result, however, his opinion must have been a concurrence in the result. Douglas now says that he then felt Henderson should have overruled Plessy, and that he wrote to that effect but then decided to withdraw his opinion. If his recollection is accurate, he decided not to publish at the very last minute. Burton's Diary for June 5, 1950, the last day of Term, notes that the Court met in conference for

228. Id.
229. Id.
230. See Burton, J., Draft Opinion (3d Print), supra note 219, at 8.
231. 1950 Burton Diary (May 31, 1950), supra note 208.
thirty minutes to make “final arrangements for opinions. Justice Douglas decided to concur in [the] result in [Henderson].” That afternoon Vinson announced Sweatt and McLaurin, and Burton announced Henderson. Short and undramatic, the opinions decided no more than necessary to support reversals.

III. THE SEGREGATION CASES (1954-1955)

Despite Frankfurter’s successful efforts to narrow Sweatt and McLaurin and the Justices’ express refusal to reconsider Plessy v. Ferguson, the immediate doctrinal effect of the 1950 Trilogy was ominous ambiguity. The opinions were read like tea leaves, providing, apparently, whatever the reader wanted to find. To The New Republic, “Jim Crow” was in “handcuffs”; one Southern law journal concluded that “a careful reading of the cases indicates most decidedly that the attitude of the Court must be interpreted definitely to be that segregation is unconstitutional per se.” On the other hand, another Southern law journal reassured its readers that although segregation may amount to inequality at the graduate, and perhaps undergraduate, levels, “it seem[ed] very unlikely” that the decisions were meant to upset the “wide discretion” exercised by the states in segregated public school systems below the college level.

The ambiguity developed for two principal reasons. First, by granting any relief at all, the Court had demonstrated that it was no longer content simply to reiterate Gaines without also scrutinizing a state’s assertion of equal facilities. Second, despite the attempts to confine the reasoning of the Court’s decisions, the opinions could be fairly read to apply to contexts outside of graduate schools; that is, the opinions provided limiting facts, but not limiting principles. For example, in Sweatt the Court said that for constitutional purposes equal treatment may require not only equal physical facilities, but also equalization of “qualities which are incapable of objective measurement.” In McLaurin the Court said that equal treatment may also require elimination of separation-caused handicaps that “impair and inhibit” the student’s ability to use the facilities for effective learning.

The Court compounded the ambiguity at the beginning of the next Term by implying that the Sweatt and McLaurin doctrine applied not only to graduate schools, but also to golf courses. On October 16, 1950, in Rice v.

234. 1950 Burton Diary (June 5, 1950), supra note 208.
235. Henderson, at nine pages, ran twice as long as either Sweatt or McLaurin. Burton’s clerks, sensitive to the Court’s desire to say as little as possible, tried to convince the Justice to shorten his opinion by pruning the facts: “This case being a companion or at least a near relative of the Sweatt and McLaurin cases, it would be out of step to have it appear in the reports in more than twice the length of each of those opinions.” Memorandum from H.L. and N.C. [Clerks] to Burton, J. (no date), Box 210, HHB(LC). They were not successful.
236. THE NEW REPUBLIC, June 19, 1950, at 5.
238. 2 MERCER L. REV. 272, 273 (1950).
240. 339 U.S. at 633-34.
241. 339 U.S. at 641.
Arnold, the Court issued a routine per curiam order granting certiorari and vacating and remanding the Florida Supreme Court's judgment "for reconsideration in light of the subsequent decisions of the Court in [Sweatt and McLaurin]." Rice, a black, had sought mandamus to compel the operator of a municipal golf course in Miami to let him play "during all of the hours in which the course is usually open" instead of the one day per week that the course was normally open to blacks. The Florida Supreme Court had concluded that Rice enjoyed "substantially equal accommodations provided for persons of the different races" and that the low demand by blacks for use of the course made the one-day limitation reasonable. On remand, the Florida Supreme Court upheld its denial of relief to Rice. The Florida court noted that the United States Supreme Court had not disturbed Plessy, but found it unnecessary to rest its denial of relief on the merits. Instead, for the first time in two years of litigation, the Florida Supreme Court ruled that Rice had sought the wrong remedy: he should have sought a declaratory judgment, not mandamus, and therefore he was not entitled to relief. Rice again sought review in the United States Supreme Court, but this time, on March 3, 1952, his petition was denied because the decision on remand had "a nonfederal ground adequate to support it." Justices Black and Douglas dissented.

Within three months the Court had to face the segregation issue again. On June 9, 1952, after a false start, the Supreme Court noted probable jurisdiction in two cases challenging the constitutionality of segregated public school systems in South Carolina and in Kansas—Briggs v. Elliott and Brown v. Board of Education. The chronology of the Court's disposition of

243. 340 U.S. 848 (1950) (per curiam), vacating 45 So. 2d 195 (Fla. 1950), on remand, 54 So. 2d 114 (Fla. 1951) (en banc), cert. denied, 342 U.S. 946 (1952).

244. 340 U.S. at 848. The Court had apparently "held" the petition for certiorari in Rice while Sweatt and McLaurin were pending. The Court "holds" a petition or jurisdictional statement when the judgment below may be affected, even tangentially, by the decision in a pending case. R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 364 n.37 (5th ed. 1978). On rare occasions, as in Rice v. Arnold, the Court may cause confusion about the scope of a decision when it summarily vacates or reverses a "held" case with only a citation to the principal decision. For a recent example, see High Court Rules Out Execution of Rapists, N.Y. Times, June 30, 1977, at 1, col. 1 (discussing Eberhart v. Georgia, 433 U.S. 918 (1977)).

245. 45 So. 2d at 196.

246. Id. at 198.

247. 54 So. 2d at 118.

248. Id. at 119-20.

249. 342 U.S. at 946.

250. Id. (Black & Douglas, JJ., dissenting).


253. 72 S. Ct. 1078 (1952) (noting probable jurisdiction), decided, 347 U.S. 483 (1954), enforced, 349

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Briggs and Brown, and the other three cases later added on the same issue, is by now familiar. On December 9, 10, and 11, 1952, the Court heard oral argument in the cases, but on June 8, 1953, it announced that the cases would be reargued in the fall. The Court directed the parties to file supplemental briefs on specified questions dealing with the legislative history of the fourteenth amendment, the power of the judiciary to decide the issue raised, and the possible forms of relief. On September 8, 1953, a month before

U.S. 294 (1955). The district court decision in Brown is reported at 98 F. Supp. 797 (D. Kan. 1951). Brown had been held since December 29, 1951, pending the decision in Gray v. Board of Trustees, 342 U.S. 517 (1952) (per curiam). Frankfurter, J., Docket Record (no date), File 5, Box 72, FF(HLS). Gray challenged the refusal of the University of Tennessee to admit qualified black students solely on the basis of their race. Gray was argued on January 9 and 10, 1952, and was dismissed as moot on March 3, 1952, because the plaintiffs had secured admission. 342 U.S. at 518.


Also on October 8, 1952, the Court noted probable jurisdiction in Davis v. County School Bd., 103 F. Supp. 337 (E.D. Va. 1952), and consolidated it with Brown. Brown v. Board of Educ., 344 U.S. 1, 1 n.*, 3 (1952) (per curiam) (consolidating cases). All subsequent Supreme Court action in Davis—decision and enforcement—took place as part of Brown.


1. What evidence is there that the Congress which submitted and the State legislature and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?

2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment (a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or

(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

3. On the assumption that the answers to question 2(a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on
reargument, Chief Justice Vinson died. He was replaced by Earl Warren, and reargument was postponed until December 7, 8, and 9, 1953. On May 17, 1954, Warren announced the Court's unanimous opinion declaring segregation in public schools unconstitutional in the states256 (Brown I) and in the District of Columbia.257 The Court ordered further reargument on the question of relief, and the cases were argued a third time on April 11, 12, 13, and 14, 1955. On May 31, 1955, the Court—again in a unanimous opinion by Warren—ordered desegregation to proceed "with all deliberate speed"258 (Brown II).

Brown is probably the best known decision in the history of the Supreme Court. No other decision has received so much popular and scholarly attention. In the last ten years the focus of consideration has shifted from the legitimacy of the decision259 to the process by which the decision was made. 260 The briefs and oral arguments have been published,261 and several attempts have been made to recreate what the late Alexander M. Bickel called the "inner history" of the decision. 262 The most sustained account of the process is also one of the most recent—Richard Kluger's Simple Justice.263 Thanks to Kluger's massive book, it is unnecessary here to rehearse in detail the Court's deliberations between the time the cases were accepted for review and the date of Brown II.

Even for its wealth of illuminating detail, Simple Justice cannot be denominated the definitive account of the decisionmaking process in the Brown cases. The book's limitations are attributable to what one reviewer has called the "reductive" nature of the chronicle:264 the account "is so weighted

5. On the assumption on which 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

(a) should this Court formulate detailed decrees in these cases;
(b) if so, what specific issues should the decrees reach;
(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees,
(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

Id.

256. 347 U.S. at 495.
260. See note 13 supra (listing studies).
with the knowledge of what eventually prevailed that the reader finds it hard to keep any flavor of the issues and risks that faced litigants and judges before May 17, 1954.” The Court is made to appear tangled in a political and doctrinal Gordian Knot one Term, only to be delivered by the master stroke of one man—in this instance, Earl Warren—the next. Over forty years ago, Felix Frankfurter, then a law professor, warned against characterizing decisionmaking in the Supreme Court in such a fashion: “The reduction of history to the efforts of a very few personalities is an expression of the ineradicable romantic element in man. We want to dramatize life, and also to simplify it.”

Despite vastly richer data, it is no easier now to “disentangle individual influences in the combined work of a Court” than it was when Frankfurter wrote in 1937. It is possible, however, to suggest why a Court unable to decide Brown in October Term 1952 could emerge so united a year later. It is also possible to shed light on an artifact uniformly neglected by the “inner histories” of the decision—the law announced by the famous opinions in Brown and especially Bolling v. Sharpe.

A. BROWN I (1954)

From the day the Court announced Brown and Bolling, Earl Warren has been credited with forging unanimity for the two opinions declaring the end of legal segregation in public schools. The oft-told explanation of Warren’s pivotal role in the cases proved so irresistible over time that when Warren agreed, in retirement, to answer questions about the decisions, he was asked not if he had accomplished unanimity in the opinions, but how he had. His answer was characteristically bland and self-effacing:

Well, I didn’t do it. It was done by nine men. . . . And it had been argued you know, the term before I came, and it had been put over

265. Id. at 1293. The very title of the book invites the reader not to forget what he knows to be the conclusion. The problem, to some extent, arises from the book’s perspective. Kluger chose to tell the story of the decision in Brown from the standpoint of the NAACP—that is, the culmination of a 30-year litigation strategy designed to destroy the legal underpinnings of racial segregation. Despite occasional excursions behind the scenes in the Court, Kluger’s narrative essentially recounts the success of the NAACP’s strategy. The Court is the object, not the subject, of the study. As a result, the inability of the Court to reach promptly the known outcome at times seems inexplicable. The book’s perspective, although admirable, is not novel. See C. Vose, Caucasians Only (1959) (historical study of NAACP attack on residential restrictive covenants culminating in Shelley v. Kraemer).

266. See R. Kluger, Simple Justice 582-616 (1975) (Court “at loggerheads” over segregation cases in early 1950’s).

267. See id. at 657-99 (“Arrival of the Superchief”).


269. Id. at 9.


271. See A Conversation with Chief Justice Earl Warren, in AMERICAN COURT SYSTEMS 520, 521 (S. Goldman & A. Sarat eds. 1978) (reprinting Brandeis Television Recollections (first telecast May 3, 1972) (conversation with Chancellor of Brandeis University videotaped and broadcast)).
for reargument. They had a long time to think about it. . . .

[T]here was some division, but I think there had been a lot of
thought given to it before it was even argued in my time.272

This answer, and the somewhat more detailed explanation provided by
Warren's posthumously published Memoirs,273 has struck some readers as
unduly modest.274 Felix Frankfurter, however, emphasized similar reasons for
the unanimity in the cases. Writing to Judge Learned Hand two months after
Brown I, Frankfurter declared that the story of unanimity was a long and
"not at all dramatic one," but he added that "[i]t could not possibly have
come to pass with Vinson."275 Three years later, in identical letters to
Grenville Clark and C.C. Burlingham,276 Frankfurter wrote:

[T]he wise use of time in the Court's dealing with the problem
raised by segregation under the Fourteenth Amendment was
probably the chief factor in the ultimate decision. The process
which culminated in the Court's decision is very complicated and a
long story. One thing is clear, however. No doubt Warren had a
share in the outcome, but the notion that he begot the unanimous
Court is nonsense. Things are not that simple. Unfortunately, a
historic account cannot now be given. I can assure you, however,
that the ultimate outcome was in a significant way influenced by
factors that antedated Warren's being here. I do not mean to
minimize the personal influence wisely exerted by a Chief Justice in
the work of the Court. On the other hand, the journalistic view that
somehow or other one strong man brings eight others together is
baseless. If I were free to give a true account of how it all happened,
I would have to write a longish essay.277

Neither Warren nor Frankfurter was telling the full story of the process
that led to Brown I, even if either could.278 It is striking that, speaking

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272. Id. at 521. Excerpts from the original broadcast transcript are provided in Recollections of Mr.

273. Supra note 13, at 285-86.

modest appraisal of Brown role uncharacteristic of Memoirs as whole); Powe, Book Review, 56 N.C.L.


276. Charles Culp Burlingham (1858-1959) was a leader of the New York City bar and a long-term
correspondent with Frankfurter. The Frankfurter-Burlingham correspondence, which began in 1912,
occupies several large containers in the Frankfurter Papers, Manuscript Division, Library of Congress
(Boxes 33-38). See generally Frankfurter, A Legal Triptych, 74 Harv. L. Rev. 433 (1961) (brief essay on
Burlingham and two other associates, Zechariah Chafee, Jr., and Monte M. Lemann).

277. Letter from Frankfurter, J., to Grenville Clark & C.C. Burlingham (Apr. 15, 1957), File 17, Box
71, FF(HLS) (carbon copy), quoted in Freedman, Justice Frankfurter and Judicial Review, in M.
Freedman, W. Beane & E. Rostow, Perspectives on the Court 25-26 (1967); see Letter from
Frankfurter, J., to C.C. Burlingham (May 28, 1954), File 633, Box 37, FF(LC) (although personalities had
impact, time perhaps most important factor). Burton also thought time was an important factor. Burton,
J., Diary (May 12, 1954), Box 3, HRB(LC) [hereinafter 1954 Burton Diary].

278. Only Warren, of course, knew the steps he had taken to achieve unanimity. Frankfurter was in no
better position than any other Justice to know to whom Warren had talked privately or what Warren had
independently of each other, both emphasized pre-Warren “factors” as critical to the unanimous decisions in 1954. There is now no way of knowing to what circumstances they referred or if they were referring to the same or similar ones. There is evidence, however, from both public and private records, that suggests that at least some of the considerations related directly to the views of Chief Justice Vinson and went back, in effect, to October Term 1947.

The Court’s conference on the Segregation Cases on December 13, 1952, revealed the obstacles to unanimity. Kluger has reported the conference in elaborate detail, based on the two sets of notes available to him—those of Justices Jackson and Burton. Since Kluger wrote, Justice Clark’s notes for that conference have become available. Clark’s notes, which are much briefer than those of Burton, add little to Kluger’s account: they confirm that the Court was “severely divided” over the results and analyses of the issues in the five cases. The Clark notes, however, do disclose two important facts. First, apparently responding to the severity of the division among the Justices, Burton suggested that no vote be taken on the merits. The Justices accepted the suggestion at least formally, although several took their own speculative head counts. And second, much more importantly, Clark records Vinson as being deeply troubled over the possibility that the Court might have to reverse Plessy.

In other words, as the full statement of Vinson’s views in Clark’s notes shows (reprinted in Appendix B), Vinson was worried that the costs of the remedy might outweigh the benefit of declaring the right, even if he could see his way to doing so.

Vinson’s hesitation was not simply a function of his anxiety over the practical problems of implementing the Court’s decision. He prefaced his agreement to do in order to avoid dissents or other opinions. The problem of scanty evidence, which confronts any study of the internal operations of the Supreme Court, is exacerbated in the Segregation Cases by the Justices’ extreme sensitivity to secrecy and disinclination to reduce their concerns to writing because of fear of leaks. See note 321 infra.

279. See R. KLUGER, SIMPLE JUSTICE 589-613 (1975).
280. The notes and Clark’s other Court papers are on deposit at the Tarleton Law Library, University of Texas at Austin. The notes are printed in full as Appendix B, infra. They are included both to supplement the historical record and to demonstrate what a problematic evidentiary source conference notes can be. See R. KLUGER, SIMPLE JUSTICE 614 (1975).
281. CLARK, J., CONFERENCE NOTES [DEC. 13, 1952], TCC(UT) [hereinafter Clark Notes (Dec. 13, 1952)].
283. Burton’s Diary for December 13, 1952, notes, “We discussed the segregation cases thus disclosing the trend but no even tentative vote was taken.” Burton, J., Diary (Dec. 13, 1952), Box 2, HBB(LC).
285. Commentators have drawn still different conclusions. Kluger reports that Frankfurter thought the Court stood 5-4 to reverse Plessy, that Burton thought it was 6-3 for the same result, and that Jackson foresaw two to four dissenters if Plessy were reversed. See R. KLUGER, SIMPLE JUSTICE 614 (1975). Berry believes that if the votes had been counted, Burton, Minton, Clark, Douglas, and Black would have favored overruling Plessy, and Reed, Frankfurter, Vinson, and Jackson would have opposed it. See M. BERRY, supra note 13, at 125. Ulmer infers from Burton’s Diary that the vote in December 1953 stood 7-2 for barring public school segregation. See Ulmer, supra note 13, at 696-97.
286. Jackson’s notes record Vinson’s position as “Face complete abolition of public school system in South—Serious.”
worries, according to Clark, by noting, "In Sipuel and McLaurin we said right was personal. More serious when you have large numbers."286 The point was critical to Vinson. In Shelley v. Kraemer, Sweatt, and McLaurin, all bearing Vinson's signature for a unanimous Court, and in Sipuel, authored by Vinson as a per curiam decision, the Court had emphasized that the rights of the black plaintiffs were "personal."287 In Sweatt, for example, Vinson declared: "It is fundamental that these cases concern rights which are personal and present."288 With five years of unequivocal precedent in his name, Vinson could not declare a right "personal" but not susceptible to immediate relief. Moreover, because the cases were class actions, the right would have been "personal" to millions of black school children in seventeen states.

During the October 1952 Term the school segregation cases were not the only cases in which the shape of the remedy troubled the Court. Slightly more than a month after the conference on Brown, the Court heard oral argument in Terry v. Adams,289 the "Jaybird Primary" case from Texas. The Jaybirds were members of a private association open to all qualified white voters in Fort Bend County, Texas. Each election year, a few weeks before the state primary, the Jaybirds selected candidates to run in the county Democratic primary. For sixty years the Jaybirds' candidates had invariably been nominated in the county primary and elected to office in the general election.290 Black voters, unable to join the Jaybirds, challenged the scheme in federal court as a violation of the fifteenth amendment.291 They won in the Supreme Court. The Justices split widely, however, in their reasons for reaching the result. Black announced the Court's judgment in an opinion that only Douglas and Burton joined. Frankfurter concurred in the result with his own opinion. Clark filed a concurring opinion that Vinson, Reed, and Jackson joined.292 The Court was divided not only on reasoning, as the

288. 339 U.S. 629, 635 (1950) (quoting Sipuel and Gaines). Vinson's opinion continued:

This Court has stated unanimously that "The State must provide [legal education] for [petitioner] in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group." Sipuel v. Board of Regents, 332 U.S. 631, 633 (1948). That case "did not present the issue whether a state might not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes." Fisher v. Hurst, 333 U.S. 147, 150 (1948). In Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 351 (1938), the Court speaking through Chief Justice Hughes, declared that "petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity."

Id.
289. 345 U.S. 461 (1953), reversing 193 F.2d 600 (5th Cir. 1952).
290. Id. at 463.
292. 345 U.S. at 462 (Black, J., with Douglas & Burton, JJ.); id. at 470 (Frankfurter, J., concurring); id. at 477 (Clark, J., with Vinson, Reed, & Jackson, JJ., concurring).
opinions demonstrate, but also, as Clark's File and Burton's Diary reveal, on remedy. For over three months the rival camps negotiated in an attempt to achieve a clear-cut majority opinion and pointed mandate.293 The efforts failed. On May 4 the Court issued its judgments with an equivocal decree to the district court "to enter such orders and decrees as are necessary and proper."294

The disagreements and negotiations over Terry v. Adams absorbed a disproportionate amount of the Court's time during the spring of 1953.295 It is not surprising that the Justices, deadlocked over a case in which all but one agreed in the ultimate result, felt unable to come to grips with five cases involving far more explosive issues and much more severe division. In addition, brief illnesses that kept several Justices away from the Court for short periods of time during the spring296 made it even more difficult to find the much-needed time to address the issues still unresolved from the December conference.

During May 1953, the Court agreed to set the Segregation Cases for reargument in the fall. On May 27 Frankfurter circulated a draft of five questions to be submitted to the parties on reargument.297 The Court agreed to the questions in substance; Frankfurter recirculated the questions, with minor changes, on June 4. Four days later the order restoring the cases to the docket and announcing the five questions to be briefed and argued was released.298

Vinson's death one month before the beginning of Term forced postponement of the cases, because Warren needed time to familiarize himself with the extensive records and briefs. When the cases were finally reargued in December of 1953, the most pointed questions from the bench focused on remedy. To be sure, there were questions on the propriety of the Court's deciding the issue299 and on various technical problems in the cases,300 but Jackson, Frankfurter, and Reed—the Justices who dominated the questioning—focused sharply on the nature of the decree and the type of standards it should impose.301 Solicitor General J. Lee Rankin, making the first appearance of the United States at oral argument in the cases, suggested "a year for the presentation and consideration of a plan, not because that is an exact
standard, but with the idea that it might involve the principle [from antitrust cases] of handling the matter with deliberate speed."\textsuperscript{302} Jackson in particular was dissatisfied with such an empty standard. With successive questions eliciting no clear guidelines from the Solicitor General, Jackson stated impatiently, "I foresee a generation of litigation if we send [the cases] back with no standards, and each case has to come here to determine it standard by standard."\textsuperscript{303} Frankfurter, echoing Jackson’s frustration, unhappily foresaw "looking forward to having endless lawsuits of every individual child in the seventeen states [with compulsory segregation laws] for the indefinite future."\textsuperscript{304}

On December 12, 1953, three days after the conclusion of oral arguments, the Court met in conference to discuss the cases. Warren urged, as Jackson had a year before, that no formal vote be taken, for he realized "that when a person once announces he has reached a conclusion it is more difficult for him to change his thinking."\textsuperscript{305} Although the conference was thus framed as purely exploratory, a clear trend emerged.\textsuperscript{306} In a low-key, almost matter-of-fact tone, Warren indicated that he felt the segregation laws were unconstitutional. Black was absent from the conference, but had left word that he also favored striking down the laws. The other Justices who had clearly indicated a year before that they would hold segregation unconstitutional—Douglas, Burton, and Minton—adhered to their views. Stanley Reed, who one year before had been the Justice least sympathetic to invalidating segregation in public schools, stood by his position.\textsuperscript{307} Frankfurter, Clark, and Jackson then revealed their views. Although Frankfurter’s position is difficult to determine with precision from Burton’s notes,\textsuperscript{308} it appears that Frankfurter quickly realized—vote or no vote—that a majority of the Court was prepared to hold segregation unconstitutional. Thus, Frankfurter’s remarks at conference focused on the tone and manner with which such a decision, if made, should be presented.\textsuperscript{309} The Justice whose position had changed the most in the last year was Clark. He spoke at length. He said that he would be willing to go along with the growing consensus, provided that the terms of relief were flexible.\textsuperscript{310} Robert Jackson bridled at the suggestion made by Douglas and later implied by Clark that the Court hold segregation unconstitutional but defer the question of relief. Jackson made two points: he found no legal basis for the "congenial political conclusion" toward which the Court seemed to be moving, and he was flatly unwilling to "throw in the hopper" the ruling on the merits without reaching the question of remedy.\textsuperscript{311}

\textsuperscript{302} Id. at 538.
\textsuperscript{303} Id. at 541.
\textsuperscript{304} Id. at 544.
\textsuperscript{306} See M. Berry, supra note 13, at 156 (clear majority for Warren’s position at conference); R. Kluger, Simple Justice 678-83 (1975) (five Justices against segregation, other four expressed various concerns); Ulmer, supra note 13, at 696 (majority with Warren).
\textsuperscript{307} See R. Kluger, Simple Justice 680 (1975) (Reed’s position unchanged despite Warren’s remarks).
\textsuperscript{308} Burton’s notes are relied on here because Frankfurter’s notes, as Kluger accurately observes, are "exceedingly scratchy and cryptic." Id. at 678. No notes by Clark of the conference have yet been found.
\textsuperscript{309} Burton, J., Conference Notes (Dec. 12, 1953), Box 337, HHB(LC).
\textsuperscript{310} Id.
\textsuperscript{311} Id.
It is just as difficult now as it must have been for the Justices in the conference room to assess how Jackson’s statements would translate into action. It is too much to say, as Kluger concludes, that Jackson “was telling the [C]onference that he would file a separate concurring opinion if whoever wrote the opinion of the Court feigned that the Justices were doing anything other than declaring new law for a new day.”312 Jackson, after all, had spoken strongly at the conference on Sweatt and McLaurin against “amending the Constitution”313 to reach a politically desirable result, but in the end had joined Vinson’s technically narrow opinions. Jackson was obviously troubled that no matter how narrowly Brown was expressed, it would still have enormous impact. His record suggested, however, that he could be flexible, depending on the tone and shape of the opinion presented to him.

The most important feature of the December 12, 1953 conference, of course, was the growing, if tentative and somewhat precarious, consensus that segregation in public schools was unconstitutional. But the conference was also striking for what was not discussed. In the 1952 conference, the nature and effect of the legislative history of the fourteenth amendment had substantially troubled three Justices—Vinson, Reed, and Jackson.314 In the 1953 conference, that issue, despite the Court’s stated interest in it,315 appeared to be dead. It was a victim, in large measure, of Felix Frankfurter. During the 1952 Term, Frankfurter had assigned one of his clerks, Alexander Bickel, to read the entire legislative history of the fourteenth amendment and to prepare a memorandum on his findings.316 On December 3, 1953, four days before rearguments were to begin, Frankfurter circulated to the Conference copies of Bickel’s sixty-three page printed memo with a cover memo declaring that the research was “inconclusive in the sense that the Congress as an enacting body neither manifested that the amendment outlawed segregation to that end, nor that it manifested the opposite.”317

Warren, hoping to achieve agreement on the merits if possible,318 acted quickly to broaden the emerging majority of the December 12 conference. On December 17, Burton noted in his Diary, “After lunch the Chief Justice told me of his plan to try [to] direct discussion of segregation cases toward the decree—as presenting . . . the best chance of unanimity in that phase.”319 The Diary entry is somewhat cryptic and admits of differing interpretations.320 Warren may have realized that his goal of unanimity could not be

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312. See note 159 supra and accompanying text (discussing Jackson comment).
314. See R. KLUGER, SIMPLE JUSTICE 590, 595-96, 608-09 (1975) (Vinson found it hard to get away from framers’ view that fourteenth amendment did not prohibit segregation; Reed saw neither equal protection nor due process clause as plausible basis for holding segregation unconstitutional; Jackson found nothing in legislative or judicial history suggesting segregation ever thought to be unconstitutional).
315. See Questions 1 & 2 for reargument, supra note 255.
316. See Letter from Frankfurter, J., to Alexander Bickel (May 26, 1955), File 356, Box 24, FF(LC) (referring to memo requested by Frankfurter). Frankfurter later suggested that Bickel rework the memo for scholarly publication. Id. The memo was published as Bickel, The Original Understanding and the Segregation Decision, 69 HARV. L. REV. 1 (1955).
317. Frankfurter, J., Memorandum to Conference (Dec. 3, 1953), Box 263, HHB(LC), quoted in M. BERRY, supra note 13, at 154.
320. Cf. Uler, supra note 13, at 697-98 (entry suggests no unanimity at December 12 conference and poor judgment on Warren’s part).
achieved, at least at that time, by a proposal to hold segregation in public schools unconstitutional but to defer the question of remedy. Jackson, and perhaps Clark, had as much as said that they would not sign on without more attention to the decree.

There is almost no hard evidence of the Court’s deliberations between the December conference and early May. Secrecy and fear of leaks became obsessions. Moreover, Warren pursued a strategy of informal discussion; thus, the cases were considered over lunch and, from time to time, informally discussed at the Court’s regularly scheduled conferences. One document, typed “under conditions of strictest security,” was circulated to the Conference: on January 15, 1954, Frankfurter distributed a 1200-word memorandum outlining his own considerations “in regard to the fashioning of a decree.” Frankfurter noted the unique nature of the decree required by the cases and the time that would be required to work out the administrative problems attendant to creating “integrated schools” in the affected states. He wrote, “When the wrong is a deeply rooted state policy the court does its duty if it decrees measures that reverse the direction of the unconstitutional policy so as to uproot it ‘with all deliberate speed.’” Frankfurter added that appointment of a special master might be the most effective way to provide the type of complicated factfinding and locally tailored relief that the cases needed.

Although the memo was delivered to each Justice, it might as well have been addressed to only Clark and Jackson. Frankfurter provided a framework for the flexibility that Clark desired. Perhaps more importantly, Frankfurter tried to demonstrate, particularly for Jackson’s benefit, that the issues and the problems of factfinding on remand would be so enormously difficult and complex that the Court could not at present formulate effective and comprehensive decrees.

Sometime in February or March the Court finally took a formal vote on the cases. Warren wrote in his Memoirs that the Justices agreed unanimously that Plessy v. Ferguson “had no place” in public education. Warren then assigned to himself the writing of the opinions for the Court. At approximately the time of the formal vote, three other members of the Court—Frankfurter, Jackson, and Reed—each reduced some thoughts to writing, either as potential draft opinions or as working memoranda, to focus individual

322. Ulmer, supra note 13, at 698 n.17, 699.
324. Frankfurter, J., Memorandum to Conference (Jan. 15, 1954), Box 263, HHB(LC).
325. Id.
326. See id.
328. Frankfurter, J., Memorandum to Conference (Jan. 15, 1954), supra note 324.
331. See R. KLUGER, SIMPLE JUSTICE 683-85 (Frankfurter), 688-91 (Jackson), 692-93 (Reed) (1975). Frankfurter later revealed to Judge Learned Hand that “Bob Jackson tried his hand at a justification for leaving the matter to § 5 of Art. XIV, ‘The Congress shall have powers to enforce, etc.’ and he finally gave up.” Letter from Frankfurter, J., to Hon. Learned Hand (Feb. 13, 1958), File 1255, Box 65, FP(LC).
concerns. There is no documentary evidence that any of the three ever had his memo adapted to final opinion form, much less printed.

On May 7, with Jackson in the hospital, Warren personally circulated to each Justice his typewritten drafts in Brown and Bolling. Warren's cover letter modestly referred to the drafts as "bas[es] for discussion of the segregation cases." He noted that he had prepared two separate memos because Bolling presented issues different from those of the other four cases. He added, "Because of the divergent conditions calling for relief and because this subject was subordinated to a discussion of the substantive question in both the briefs and oral argument, the cases should be restored to the calendar for further argument [on the question of remedy]." He closed by saying, "The memos were prepared on the theory that the opinions should be short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory."

Warren's characterization of the "subordination" of the remedy question troubled no one on the Court. Although the issue had been discussed at length at oral argument, the Court had not received the detailed guidance it apparently had sought. Moreover, Frankfurter's memo in January had pointed to other avenues of inquiry. Burton's Diary for May 8 recorded that he had given Warren "my enthusiastic approval—with a few minor suggestions. He has done, I believe, a magnificent job that may win a unanimous court."

Burton's suggestions in Brown were indeed minor. He proposed, for example, that Warren add to the first footnote the precise case names of the four segregation cases in the main opinion. Other Justices offered other minor suggestions.

Warren incorporated the suggested changes and recirculated his drafts, this time in printed form, on May 15. The Court met in conference that day to discuss the opinions, with only Jackson absent; Warren had, however, shown Jackson the opinions on May 10 during a visit to the hospital. At the conference the Justices agreed to hand down the opinions on Monday, May 17 to avoid rumors or possible leaks about the decisions.

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333. See Letter from Warren, C.J., to Members of the Court (May 7, 1954), Box 263, HHB(LC) (accompanying draft opinions) (Jackson had suffered a heart attack March 30).
334. Id.
335. Id.
338. See Burton, J., Memorandum (May 7, 1954), Box 263, HHB(LC) (handwritten annotations).
341. R. Kluger, Simple Justice 697 (1975). According to Kluger, Warren accepted Jackson's suggestion that a sentence be added to the Brown draft to emphasize the progress made by blacks since the framing of the fourteenth amendment. Id. The purpose of the sentence was to help demonstrate the difference between the status of public education "at that time," Brown v. Board of Educ., 347 U.S. at 489, and at present. Jackson's sentence read, "Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world." Id. at 490. There were no similar sentences in Warren's first draft. See Warren, C.J., Memorandum on the State Cases at 4 (no date), Box 263, HHB(LC).
Kluger has demonstrated convincingly that Stanley Reed was the last holdout to Warren's opinions.343 Three days after the decisions were announced, Frankfurter wrote Reed to congratulate him on his "share in what I believe to be a great good for our nation."344 The following day Reed sent Frankfurter a short, handwritten note explaining his silent concurrence in both the results and the opinions. Reed wrote in part:

While there were many considerations that pointed to a dissent they did not add up to a balance against the Court's opinion. From Canada through Smith and Allwright, Sweatt, Morgan, Steele to Jay Bird the factors looking toward fair treatment for Negroes are more important than the weight of history.345

Although Warren has been generally credited with achieving unanimity by exercising his considerable personal skills of persuasion, he demonstrated in Brown that he was also capable of skillfully utilizing the Court's precedents to fashion opinions that would be attractive—or, perhaps more accurately, acceptable—to his colleagues. After stating that the history of the fourteenth amendment on the point was "inconclusive"346—mirroring the conclusion of the Bickel/Frankfurter memorandum—Warren's opinion stated in a narrow but technically correct reading of the cases that the validity of Plessy had not been reexamined since its inception.347 Warren then concluded that the intangible injuries of separation condemned in Sweatt and McLaurin "appl[ied] with added force to children in grade and high school."348 That statement, plus one footnote that later created a storm of controversy,349 constituted all the support for the conclusion that Plessy "ha[d] no place" in public education.350 Warren made his opinion acceptable to Reed, and

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344. Letter from Frankfurter, J., to Reed, J. (May 20, 1954), supra note 284. Frankfurter's letter read in part:

History does not record dangers averted. I have no doubt that if the Segregation cases had reached decision last term there would have been four dissenters—Vinson, Reed, Jackson, and Clark—and certainly several opinions for the majority view. That would have been catastrophic. And if we had not had unanimity now inevitably there would have been more than one opinion for the majority. That would have been disastrous.

345. Letter from Reed, J., to Frankfurter, J. (May 21, 1954), File 14, Box 72, FF(HLS). Reed added, "While 'due process' seemed a better ground to me, there really isn't much difference. Equal protection comes close in this situation." Id.


347. Id. at 491-92.

348. Id. at 494.


350. 347 U.S. at 495. By thus concluding that Plessy was presently inapplicable to public education,
perhaps also to Clark, by appearing to do no more than rest the decision on prior precedents and at least superficially analogous language from those precedents. The elements producing unanimity in Brown included not only the refinement of the issues over time, but also the appeal to a slowly growing body of case law that, by its very existence, rebutted the claim by the States—and the notion of Reed, and perhaps others—that history was on the side of segregation.

It has recently been suggested that the achievement of unanimity in the Segregation Cases was neither necessary nor ultimately beneficial to the implementation of the decisions. Whatever the merits of this idea, it ignores in retrospect the Court's perception of the stakes at the time. The Court—particularly Warren, Black, and Frankfurter—feared that the alternative to unanimity was not a simple 6-3 or 7-2 vote, but a sharply fractionated Court. It is arguable, of course, that Brown might have been enhanced if, for example, one or two dissenters had stated that Plessy could not be overruled so late in the day or that some notion of federalism precluded the majority's ruling. The forceful rejection of such arguments by a strong majority opinion would have added meaning and ameliorated ambiguities in Brown that were resolved only later at substantial costs. As the Steel Seizure Case had recently demonstrated, however, bright-line divisions—especially in a "great case"—are inherently unmanageable and multiple opinions in such circumstances are less than satisfactory.

B. BOLLING V. SHARPE (1954)

The "inner histories" of Brown and Bolling have assumed that the only changes in the two opinions between May 7, when Warren personally circulated the typescript copies, and May 17, when the decisions were announced, were trivial—perhaps stylistic at most. Although this characterization is accurate with respect to Brown, it is not with respect to Bolling. The reasoning in the District of Columbia case changed dramatically between the first (reprinted in Appendix C) and second drafts. The reason the changes have gone unnoticed is probably that Burton's Diary entry for May 12 has been taken too much at face value. On that day Burton wrote: "The Chief Justice also read to me his latest revision (slight) of the drafts in the Segregation cases. It looks like a unanimous opinion. A major accomplishment for his leadership."

Warren avoided overruling Plessy expressly. See id. at 494-95 (because detrimental effect of segregation amply supported by modern authority, language to contrary in Plessy rejected). The tactic was most likely an effort by Warren to make the opinion as noninflammatory as possible.


352. See supra note 6, at 1950-51.


354. See R. Kluger, Simple Justice 696-98 (1975) (Frankfurter made "textual suggestions" to Warren; Burton noted slight changes); Ulmer, supra note 13, at 698-99 (Burton noted "minor" suggestions and "slight" changes).

355. See Warren, C.J., Memorandum on the District of Columbia Case (no date), Box 263, HHB(LC) [hereinafter Memo on D.C. Case].

Both the first and the final versions of the opinion in *Boiling* are brief, approximately 750 words long. Because the constitutional challenge to segregation in the District of Columbia rested not on the equal protection clause of the fourteenth amendment, which applies only to states, but on the due process clause of the fifth amendment, *Boiling* was a separate opinion. Warren's first draft, like his final, began by noting that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive."

The draft went on to state that racial classifications required close scrutiny and pointed out that *Buchanan v. Warley* had condemned, as a violation of the fourteenth amendment, a statute "which limited the right of a property owner to convey his property to a person of another race." Then came the heart of the proposed opinion:

This Court has applied similar reasoning to analogous situations in the field of education, the very subject now before us. Thus children and parents are deprived of the liberty protected by the Due Process Clause when the children are prohibited from pursuing certain courses, or from attending private schools and foreign-language schools. Such prohibitions were found to be unreasonable, and unrelated to any legitimate governmental objective. Just as a government may not impose arbitrary restrictions on the parent's right to educate his child, the government must not impose arbitrary restraints on access to the education which the government itself provides.

A footnote to the first sentence of the paragraph cited four cases upholding educational liberties from the era of the "Four Horsemen": *Meyer v. Nebraska*, *Bartels v. Iowa*, *Pierce v. Society of Sisters*, and *Farrington v. Tokushige*. The draft went on, "We have no hesitation in concluding that segregation of children in the public schools is a far greater restriction on their liberty than were the restrictions in the school cases discussed above."

357. Memo on D.C. Case at 1 (no date), *supra* note 355.
358. 245 U.S. 60 (1917).

361. 262 U.S. 390, 399 (1923) (invalidating on fourteenth amendment grounds state statute prohibiting teaching of foreign languages to public or private school students in or below eighth grade).
362. 262 U.S. 404, 409 (1923) (striking down three state laws that prohibit teaching of foreign languages to students under eighth grade).
363. 268 U.S. 510, 534 (1925) (invalidating on fourteenth amendment grounds state statute requiring parents to send children to public rather than parochial schools).
365. Memo on D.C. Case at 3 (no date), *supra* note 355.
stating that "due process is not a static concept," the draft concluded, "We have declared that the Constitution prohibits the States from maintaining racially segregated public schools. It would be unthinkable that the Federal Government should have a lesser duty to protect what, in our present circumstances, is a fundamental liberty."366

When the second and final draft of Bolling v. Sharpe was circulated on May 15,367 much of the language quoted above from the first draft was omitted. The final sentence was rewritten in its now well known form: "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."368 Warren made other changes in the draft to eliminate references to the "fundamental liberty" analysis, but the alterations required little more than rewording here and there in the text. With a flick of the wrist he changed Bolling v. Sharpe from an education case into a race case, and the equal protection component of the fifth amendment was born.369

The sea change between drafts raises two questions: Why did Warren use the "fundamental liberty" analysis in the first draft? And why did he drop that analysis so quickly and so completely in the second draft? The first question is much easier to answer than the second.

From the outset, the plaintiffs' theory in Bolling v. Sharpe was that the separation of students on a racial basis in the District of Columbia public schools was unconstitutional.370 Unlike the plaintiffs in the four companion cases, the Bolling plaintiffs did not complain of unequal facilities; they complained only of racial classification. The constitutional basis of their claim was a doctrinal amalgamation of the wartime Japanese cases,371 which they claimed made racial classifications "suspect,"372 and the "fundamental liberty" cases,373 which they said proclaimed "fundamental rights protected by the Fifth Amendment against unreasonable or arbitrary restrictions."374 In their

366. Id. at 3-4. For the present law, see San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-35 (1973) (school funding based on local property tax does not disadvantage suspect class or impermissibly interfere with fundamental right).
By 1975 the Court could say:

[While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process." Schneider v. Rusk, 377 U.S. 163, 168 (1964); see also Bolling v. Sharpe, 347 U.S. 497, 499 (1954). This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment. See, e.g., Schlesinger v. Ballard, 419 U.S. 498 (1975); Jimenez v. Weinberger, 417 U.S. 628, 637 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973).

371. See Korematsu v. United States, 323 U.S. 214, 223 (1944) (internment necessitated by wartime fear of espionage and sabotage); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (strict curfew a denial of equal protection if not for war).
372. Brief for Petitioners at 13 [Bolling], supra note 370.
374. Brief for Petitioners at 13 [Bolling], supra note 370.
initial brief before the Court, the plaintiffs quoted directly from *Meyer v. Nebraska* to demonstrate the fundamental nature of the right to education:

> While this Court has not attempted to define with exactness the liberty thus guaranteed . . . it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children. . . . [T]his liberty may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. . . .

The only technical problem with the citation of this expansive language from the pen of Mr. Justice McReynolds in *Meyer*, and his equally expansive language in *Pierce*, was that both *Meyer* and *Pierce* were interpretations of the fourteenth, not the fifth, amendment. Mr. Justice Black pressed this point on counsel for *Bolling* in the 1952 oral argument. Counsel replied that *Farrington v. Tokushige*, another McReynolds opinion, "incorporated" the due process clause of the fourteenth amendment and "assumed [it to be] part of the fifth amendment." Black and Frankfurter tried to pursue the point later in the argument to make sure that counsel was not equating the fifth and the fourteenth amendments. Counsel replied, "I was not attempting to equate them. We are relying on due process." Mr. Justice Douglas asked, "Your closest case in point so far as decisions go is *Farrington*?" Responded counsel, "Yes, your honor; and in fact, the *Farrington* case embraced the *Meyer*, *Bartels*, and the *Pierce* case."

*Farrington* was the plaintiffs' only case on the fifth amendment, and it was a weak reed. True, it had been cited with approval along with *Meyer* and *Pierce* in footnote four of *United States v. Carolene Products Co.* But *Farrington*, like *Meyer* and *Pierce*, was a product of an era whose "due process philosophy," the Court had said in 1949, "has been deliberately discarded." In addition, *Farrington* was technically not even a decision on the merits: McReynolds held only that the trial court had not abused its discretion in granting a temporary injunction against enforcement of the provisions, and he hinted that the case might change with a more complete record. The Justices did not explore the weaknesses in the plaintiffs' constitutional arguments when *Bolling v. Sharpe* was reargued a year later. Instead, much of
reargument was devoted to determining the precise extent of the authority of defendants' counsel to speak for the School Board.386

Warren had not been present, of course, at the 1952 oral arguments when the Justices had first discussed the "fundamental liberty" cases. But he did have access to all the briefs filed by counsel for the plaintiffs, and each brief pressed the Meyer-Pierce-Farrington line of reasoning.387 The source of the fundamental liberty analysis in the first draft of Bolling is thus apparent.

Warren's reason for dropping the fundamental liberty analysis by the second draft of Bolling, however, remains uncertain. If only on the basis of circumstantial evidence, two Justices suggest themselves: Hugo Black and Felix Frankfurter. Mr. Justice Douglas now suspects, although he admits he has no way of knowing, that it was Black who urged that Warren abandon his reliance on the McReynolds opinions.388 Douglas assumes it was Black because Warren spent a great deal of time talking with Black about the opinions in all of the cases.389 Black also was the author of Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.,390 which had taken pains to trace the development and ultimate "discarding" of the McReynolds-era "due process philosophy."391 There is more substantive, if still circumstantial, evidence that Black would have reacted strongly against making the McReynolds opinions the focal point of Bolling. For more than a decade, Black had waged a determined campaign against what he called the "natural law concept" of the due process clause, "whereby the supreme constitutional law becomes this Court's views of 'civilization' at a given moment."392 And ten years after Bolling, Black wrote scathingly to "point out that the reasoning stated in Meyer and Pierce was the same natural law due process philosophy which many later opinions repudiated."393 He added that Bolling merely recognized what had been the understanding from the beginning of the country, an understanding shared by many of the draftsmen of the Fourteenth Amendment, that the whole Bill of Rights, including the Due Process Clause of the Fifth Amendment, was a guarantee that all persons would receive equal treatment under the law.394

386. R. KLUGER, SIMPLE JUSTICE 676 (1975).
388. See Interview with Mr. Justice Douglas in Washington, D.C. (June 8, 1979) (notes on file at Georgetown Law Journal) ("I don't know for sure. . . . I think that Black said something to Warren about those cites.").
389. See id. (Warren looking for help and Black there to give it); cf. R. KLUGER, SIMPLE JUSTICE 706 (1975) (Black questioned use of Myrdal).
390. 335 U.S. 525 (1949).
391. Id. at 537.
392. Black, J., Memorandum to Conference (Mar. 23, 1945), No. 367 [Malinski & Rudish v. People of New York], File 4022, Box 218, FF(LC); see Rochin v. California, 342 U.S. 165, 176-77 (1952) (Black, J., concurring) (Court has no power to use due process clause to invalidate all "unreasonable" or "uncivilized" laws); Adamson v. California, 332 U.S. 46, 90 (1947) (Black, J., dissenting) (Court should not substitute its own standards of justice for due process clause).
394. Id. at 517 n.10.

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Mr. Justice Frankfurter was an outspoken critic of the McReynolds opinions—their implications, if not their results—even before Black. Writing anonymously in The New Republic in 1925, Frankfurter welcomed the liberal results in the cases, but warned that the method used to provide content to the due process clause—"the disposition of the Justices"—could just as easily produce another Lochner v. New York. Frankfurter's conclusion was that "the cost" of the Court's action was "on the whole . . . greater than its gains."

Once on the Court, Frankfurter hardened his position. Writing to Mr. Justice Rutledge in 1944 concerning Rutledge's draft opinion for the Court in Prince v. Massachusetts, Frankfurter said:

On the road to your conclusion in the Prince case you are guided by several landmarks to which thus far I do not yield acceptance. As for instance, Pierce v. Society of Sisters and Meyer v. Nebraska. Holmes' dissent in the latter case, 264 U.S. at 412, still seems to me compelling, and I shall turn out to be a very bad prophet indeed if this Court will not come to rue the implications of Pierce v. Society of Sisters.

But, in any event, in view of the foregoing you will, I know, not misunderstand if I ask you to note merely my concurrence in the result in [Prince].

Frankfurter reiterated, at points verbatim, his 1925 editorial position only three years before Bolling in Dennis v. United States. A quarter century and

397. 198 U.S. 45 (1905) (invalidating as deprivation of liberty without due process state statute restricting working hours of bakers).
398. F. Frankfurter, supra note 396.

I deemed it on the whole a misfortune that the Due Process Clause (more so than the Equal Protection Clause) had not been regarded like unto some other provisions of the Constitution as raising "political questions" and therefore unfit for the adjudicatory process, or at least to be restricted for purposes of judicial enforcement to the historic procedural concepts of due process. Of course I could not act on that view when I came here, except in so far as the nature of my understanding of what was involved led me to a restrictive exercise of judicial review in due process cases.

Letter from Frankfurter, J., to Hon. Learned Hand (Feb. 13, 1958), supra note 331.
400. 321 U.S. 158, 167 (1944) (upholding conviction of guardian, despite interest of parent or guardian in child's religious upbringing, for allowing ward to sell religious newspapers on street in violation of child labor laws).
401. Letter from Frankfurter, J., to Rutledge, J. (Jan. 22, 1944), File 2040, Box 99, FF(LC); see J. Howard, Jr., Mr. Justice Murphy 345 n.d. (1968) (Frankfurter refused to join Prince opinion because it relied on Meyer and Pierce).
402. 341 U.S. 494, 524-27, 555-56 (1951) (Frankfurter, J., concurring) (by reading due process clause...
ten years on the bench had not changed Frankfurter’s assessments of the costs of the McReynolds trilogy.

In light of Frankfurter’s philosophy of due process and his performance on the Court, it would have been thoroughly consistent for him to have urged Warren to eliminate the McReynolds opinions from the first draft of Bolling v. Sharpe. Others may have made the same suggestion, but Frankfurter almost certainly would have made his objections known to Warren. Moreover, reliance on Meyer and Pierce in the 1954 Segregation Cases would be much more costly than the use of expansive language in the 1950 Trilogy.

The identity of Warren’s editor or editors may never be known. It is clear, however, that some time after the Segregation Cases were decided, perhaps before the end of the Term, Frankfurter provided Warren with a crash course on the due process clauses. Replying to a letter from Frankfurter in early August of 1954, Warren wrote, “I have also been reading all of your decisions on ‘Due Process.’ Perhaps you will remember you gave them to me some time ago at my request. I am still endeavoring to orient myself in that field.”

Warren may have redrafted Bolling to prevent Frankfurter from writing separately, as Frankfurter had done in Hurd v. Hodge and threatened in Henderson. In any event, Warren preserved the Court’s unanimous voice on May 17, 1954, at a substantial price. Although the “fundamental liberty” analysis stood on shaky, even discredited, ground, it was at least precedent. The doctrine that finally emerged lacked both precedent and the analytical inevitability that Warren ascribed to it. The unanimity in Brown and Bolling thus masked not only the passing of “the qualms about judicial capacity that had slowed [the Justices] down in recent years,” but also their willingness to sacrifice established, if dubious, precedent for naked moral parity between Brown and Bolling.

C. BROWN II (1955)

By emphasizing the psychological injuries to black school children who were segregated by law on the basis of race, and by limiting rejection of Plessy to the field of public education, Warren had made clear that the “separate but equal” doctrine, at least in the public schools, was a dead letter. Contemporary observers debated, however, whether Plessy was dead as a whole. Writing in June of 1954, Paul G. Kauper declared that Brown “mark[ed] a milestone in the decline of Plessy v. Ferguson,” but not its “final and decisive repudiation.” He concluded that the “Court’s opinion still [left] room for the application of the separate-but-equal idea in the interpretation of the equal protection clause.” Robert B. McKay, in an exhaustive study entitled broadly, Court acts as super-legislature); A. Bickel, THE SUPREME COURT AND THE IDEA OF PROGRESS 29-30 (1970).

404. 334 U.S. 24, 36 (1948) (Frankfurter, J., concurring).
405. 339 U.S. 816 (1950); see notes 220-28 supra and accompanying text (Frankfurter’s objections to Burton draft led him to threaten to concur in result).
409. Id. at 1153.
Segregation and Public Recreation, a few months later reached the same conclusion. The Court, he said, “while postponing final determination, is inviting further inquiry on a case-by-case basis into the various facets of segregation, certainly including recreation.”

McKay’s use of “certainly” was neither speculative nor wishful. On May 24, 1954, a week after Brown and Bolling, the Supreme Court vacated and remanded the judgment of the United States Court of Appeals for the Sixth Circuit in Muir v. Louisville Park Theatrical Association “for consideration in light of [Brown] and conditions that now prevail.” The plaintiffs in Muir were blacks who sought to patronize a theater leased by a private company but located in a public park. The lower court had denied relief, and the court of appeals had affirmed on the ground that the leasing arrangement did not constitute state action. The Supreme Court’s disposition of Muir, McKay wrote, “suggests that the Court finds some relationship between segregation in schools and in public recreational facilities.”

The Court was eager to take on neither the question of the scope of the Segregation Cases nor the thorny issue of the exact meaning of state action while reargument on the remedy in Brown I was pending. On the contrary, the Court wanted to adopt a low profile after Brown I until the November general elections were over. In late July of 1954, Frankfurter suggested to Warren that the hearings on remedy be delayed until “the distorting opportunities of a fall election are wholly behind us” because “in the primaries of some of the States segregation is exploited as a political issue.” Warren agreed that “it would be sound judgment to place the cases on the calendar shortly after the fast approaching ‘sound and fury.’”

Frankfurter, who was spending a considerable amount of his summer time thinking about the Brown decree, had substantive as well as tactical suggestions for Warren. Frankfurter maintained in an earlier letter to Warren that the “most important problem is to fashion appropriate provisions against evasion.” Frankfurter also suggested that detailed studies of the intricacies

411. Id. at 725.
412. 347 U.S. 971 (1954) (per curiam), vacating 202 F.2d 275 (6th Cir. 1953) (per curiam).
413. 347 U.S. at 971. With the same per curiam order, the Court vacated and remanded two other cases, Florida ex rel. Hawkins v. Board of Control, 47 So. 2d 608 (Fla. 1950) (en banc) (black denied admission on racial grounds to law school of University of Florida), and Tureaud v. Board of Supervisors, 207 F.2d 807 (5th Cir. 1953) (black denied admission on racial grounds to Louisiana State University).
414. 202 F.2d at 275.
415. Sweeney v. City of Louisville, 102 F. Supp. 525, 531-32 (W. D. Ky. 1951) (city did not unlawfully discriminate because lease did not prohibit use of theater by other organizations). The district court did grant relief to Muir with respect to the golf courses and a fishing lake in the park that “the City of Louisville owns, maintains, and operates.” Id. at 532.
416. 202 F.2d at 275.
417. McKay, Segregation and Public Recreation, supra note 410, at 699; see id. at 723-25 (school segregation cases have precedential value for public recreation facilities).
of school districting might be useful in the Court's deliberations. Whether prompted by Frankfurter or motivated by his own assessment, Warren assigned six law clerks later in the summer to prepare a full report to the Court on the problems of school desegregation. On November 17, 1954, Warren circulated to the other members of the Court the clerks' product, a printed Segregation Research Report running more than eighty pages and discussing six main issues: 1) A survey of "normal" school districting practices; 2) a state-by-state summary of Southern reactions to the May decisions; 3) a summary of desegregation experiences in border states prior to the May decision; 4) an analysis of plans to abolish public schools, already proposed in a few Southern States; 5) a "discussion of the difficulties of judicial supervision of attendance area districting"; and 6) a set of sample maps showing attendance area districting practices in several communities and also "indicating the magnitude of the problems which desegregation will involve." The elaborate report attempted to outline the problems of implementation by analyzing examples. It did not propose or recommend the contents of a decree; Warren would have the same clerks prepare those recommendations later, after the Term began.

On October 8, 1954, a few days before October Term 1954 was to begin, Mr. Justice Jackson died of a heart attack. The concerns of Warren and Frankfurter over the timing of the rearguments in Brown were thus grimly resolved. To replace Jackson, President Dwight D. Eisenhower nominated John Marshall Harlan, who had been serving for a year as a judge on the United States Court of Appeals for the Second Circuit. Harlan was at last confirmed on March 16, 1955 and took his seat March 28. The arguments on remedy were postponed until April 11.

The Court used the intervening time to continue its own studies of the implementation problems and to consider the mountain of briefs filed by the parties and amici in response to the directions announced at the end of the Brown and Bolling opinions. On April 10, 1955, a day before the arguments were to begin, Warren circulated a memorandum prepared in response to his

423. Id.
424. See Law Clerks' Recommendations for Segregation Decree (Apr. 10, 1955), Box 337, HHB(LC) or File 4044, Box 219, FF(LC) (containing views of six law clerks who prepared Segregation Research Report).
426. Burton, for example, drafted the following decree on the basis of his own study:

It is accordingly rendered, adjudged, and decreed that the defendants proceed at once to furnish the plaintiffs and Negro pupils of said district educational facilities, equipment, curricula and opportunities equal to those provided white pupils; and it is further ordered that the defendants make report to this Court within six months of this date as to the action taken by them to carry out this order.

Burton, J., Draft Decree (no date), Box 263, HHB(LC), quoted in M. Berry, supra note 13, at 157. The problem with Burton's draft decree, and perhaps one of the reasons he abandoned it, was that as a decree its language in effect enforced Plessy and not Brown. In February, Burton sent Frankfurter a sample decree from an unreported lower court decision that to him demonstrated "the importance of local discretion in this field." Note from Burton, J., to Frankfurter, J. (Feb. 14, 1955), File 4043, Box 219, FF(LC).
427. The Court had directed further briefing and argument on "Questions 4 and 5 previously propounded by the Court for the reargument this term." Brown v. Board of Educ., 347 U.S. at 495-96; Bolling v. Sharpe, 347 U.S. at 550. The questions are printed at note 255 supra and the briefs at 49A Kurland & Casper, supra note 261, at 631-1070.
request for a discussion of the possible contents of a decree in the cases and written by the same clerks who had written the lengthy Segregation Research Report.\textsuperscript{428} The 6,000-word memo, styled Law Clerks' Recommendations for Segregation Decree, recommended that the cases be remanded to the appropriate district courts for implementation of a "simple decree" formulated by the Supreme Court.\textsuperscript{429} Part of the memo was devoted to the question whether the Court's opinion should set out guidelines for compliance; all but one of the clerks recommended that it should.\textsuperscript{430} The clerks could not, however, agree on the precise content of the guidelines.\textsuperscript{431}

On April 14, 1955, the last day of oral argument in the cases,\textsuperscript{432} Mr. Justice Frankfurter circulated a memorandum to the Court outlining his thoughts on the decree.\textsuperscript{433} The memo, which Frankfurter had written and rewritten over a period of several months,\textsuperscript{434} began by stating:

Two principal alternatives are open to the Court:

(1) a "bare bones" decree, permanently enjoining exclusion of the named Negro schoolchildren and those coming within the defined class (e.g., Prince Edward County) from public schools in the relevant school districts because of race, and returning the cases to the respective lower courts to carry out this broad mandate;

(2) a decree which would take due, even if not detailed, account of considerations relevant to the fashioning of a decree in equity in a situation enmeshed in what are loosely called "attitudes" as well as physical, financial and administrative conditions, and all bearing on the power of equity to enforce any decree it may write and not merely issue a brutum fulmen.\textsuperscript{435}

Frankfurter wrote that the "bare bones" decree "would maximize flexibility with its implication of due regard for relevant local circumstances," but that "local conflicts would [thus] be left on the doorsteps of local judges . . . without any guidance for them."\textsuperscript{436} He cautioned that the problem of lack of guidance could "in part be mitigated by a time limitation in the decree," but he worried aloud that fixing a terminal date would appear to be "arbitrary" and would "seem to be an imposition of our will" without consideration of local problems, which would "tend to alienate instead of enlist favorable or

\textsuperscript{428} Law Clerks' Recommendations for Segregation Decree (Apr. 10, 1955), supra note 424.
\textsuperscript{429} Id. at 1.
\textsuperscript{430} Id. at 1-3 (lack of guidelines increases confusion and encourages delay).
\textsuperscript{431} Id. at 4-9. One clerk favored immediate desegregation. Another preferred to give district courts full discretion. A third proposed a twelve-year grace period before compliance need be achieved. Three clerks advocated a one-year grace period, after which school districts would have to demonstrate good faith efforts toward desegregation. Id.
\textsuperscript{432} The oral arguments are published in 49A Kurland & Casper, supra note 261, at 1071-317. They are described in R. Kluger, Simple Justice 729-36 (1975) and S. Wasby, supra note 13, at 109-20.
\textsuperscript{433} Frankfurter, J., Memorandum on the Segregation Decree (Apr. 14, 1955), File 4041, Box 219, FF(LC).
\textsuperscript{434} It appears that Frankfurter began to work on sample decrees, with specific language, some time in January. See id. (sample decrees dated Jan. and Feb. 1955 included with memorandum).
\textsuperscript{435} Id. at 1. Frankfurter had abandoned, probably some time in January or February, his original thought (expressed in his January 15, 1954 memo to the Conference, see note 324 supra) of having special masters find facts and formulate decrees.
\textsuperscript{436} Frankfurter, J., Memorandum on the Segregation Decree at 1 (Apr. 14, 1955), supra note 433.
educable local sentiment." 437 Frankfurter clearly favored the second alternative, which he argued would "recognize local difficulties and variations, and yet not serve as the mere imposition of a distant will." 438 The trick, as Frankfurter saw it, was to formulate "criteria not too loose to invite evasion, yet with enough 'give' to leave room for variant local problems." 439

On April 16, 1955, two days after Frankfurter's memorandum circulated, the Court met in conference to discuss the decree in the Segregation Cases. In the briefs and at oral argument, the parties and amici had presented the Court with a wide variety of options on the shape of the remedy best suited to the cases. The options under scrutiny were more thematic than formular. The NAACP argued for immediate desegregation; a fixed date must be set, argued Thurgood Marshall, or implementation of the principles of Brown I would be reduced to a matter of "local option" in the affected states. 440 The United States asserted that segregation should be terminated "as speedily as feasible." 441 School boards should be required, the Government added, to make an immediate and substantial start toward desegregation by providing plans for desegregating the schools within ninety days of the decree. 442 The States argued generally that the cases should be returned to the local district courts, which could work out necessary details of time. 443

The broad diversity of the arguments was reflected in the Court's conference. 444 Warren began the discussion by noting that he had not reached a fixed decision on remedy, and that the Court "might talk" the problem over as it had in the main cases. 445 Despite the disclaimer, Warren spoke at length.

437. Id. at 2.
438. Id.
439. Id. at 2-3. Frankfurter's memo concluded:

Platitude though it be, it does become relevant to say that we do not propose to operate as a super-school board. But the Court can say that school districts must be "geographically compact and contiguous." The experience with political gerrymandering should be drawn upon. The term "gerrymandering" carries sufficient meaning to justify its inclusion in our decree.

This would not, however, prevent a biracial school district containing more than one school from continuing segregation school by school. Thus, it should be considered whether our decree should also exclude: (a) setting up of attendance areas on grounds other than such relevant educational factors as distance, hazards and facilities; (b) arbitrary assignment of pupils to schools on the basis of race; (c) achievement of the same goal through spurious "optional" attendance areas or Hobson's choice by pupils in selecting a school.

Id. at 3.

On the same day the memo circulated, Frankfurter also circulated a copy of a letter to the New York Times from the Southern writer, Hamilton Basso. Basso's letter noted that the South feared that it was being "pressed" into a quick reorganization of its whole society." Letter from Hamilton Basso to N.Y. Times, N.Y. Times, Apr. 10, 1955, § 4, at 10, col. 6. Frankfurter said in his cover letter that Basso's view has "the persuasiveness not of novelty but of emphasis," and that he was drawing attention to the statement because he believed that "how we do what we do in the Segregation cases may be as important as what we do." Letter from Frankfurter, J., to Conference (Apr. 14, 1955), Box 337, HHB(LC).

440. 49A Kurland & Casper, supra note 261, at 1162.
441. Id. at 1285.
442. Id. at 1285-87, 1293-95.
443. Id. at 1163-1211.
He made clear what he thought the Court should not do: follow the Government's suggestion of appointing a master, fix any date for completion of desegregation, or require the district courts "to call for a plan." He preferred that the opinion suggest circumstances to be taken into account in implementing the 1954 decisions. Frankfurter's notes record that Warren emphasized, "[W]e ought to give some guidance—make it much easier. Rather cruel to shift back and let them flounder." Warren concluded by stating his "ground rules" for an opinion: 1) the cases are class actions and do not affect only the named plaintiffs, and 2) the district courts on remand should be entitled to take into consideration "physical facts" affecting plans for desegregation.

As the conference proceeded, it became obvious that no one on the Court had clear views about the precise form and scope of the decree. There was sharp disagreement on some issues—for example, whether the relief should benefit the named plaintiffs only or should be class relief. Warren, Burton, Clark, and Harlan stated unequivocally that the cases were class actions, and that relief should be granted accordingly. Reed remarked that the cases were class actions, but that the Court need not fashion its relief to reflect that fact—perhaps a "Jaybird" decree would be sufficient. Frankfurter said that the class action issue was "extraneous" to the question of the decree, given the practical effect of any direct relief to the plaintiffs. Black and Douglas asserted that the decree should be limited to the named plaintiffs only.

Despite the diversity of views over general and specific issues, the Court appeared to be united on one point. The final opinion, if at all possible, should be unanimous—as the opinions the year before had been. Four Justices expressly stated their hope for unanimity: Black ("If humanly possible, will do everything possible to achieve unanimous result"), Burton ("Unanimous action of the Court is of primary importance"), Minton ("Ought to be unanimous"), and Harlan ("Vital to be unanimous"). The statements at conference by Warren and Frankfurter suggest that they shared that

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446. Id.
447. Id.
448. Id.

449. The Solicitor General was asked at oral argument to file a supplemental brief on that issue. 49A Kurland & Casper, supra note 261, at 1301.
450. See Frankfurter Notes (Apr. 16, 1955), supra note 445 (Warren: "these are class actions"; Burton: "class suit"; Clark: "Class-suit"; Harlan: "Decree: 1. Reiterate what was held"); Burton Notes (Apr. 16, 1955), supra note 448 (same).
453. See Frankfurter Notes (Apr. 16, 1955), supra note 445 (Black: "My present ideas today— I would render decree: (1) unconstitutional (2) these 7 children (3) enjoin Board not to refuse—avoid contempt"; Douglas: "Class suit—bothers him—agrees with Hugo").
454. Id.
455. Burton, J., Memorandum as to Segregation Cases for Conference (Apr. 16, 1955), Box 337, HHIB(LO); Frankfurter Notes (Apr. 16, 1955), supra note 445 ("unanimous action").
457. Id.
458. See id. (Warren: "Have not reached fixed opinion and might talk over as in main cases"); R. KLUGER, SIMPLE JUSTICE 739 (1975) (Warren's statement that open to extended discussion indicated willingness to wait for unanimous Court).
459. See R. KLUGER, SIMPLE JUSTICE 740 (1975) (Frankfurter welcomed "candid relaxed")
desire. The remaining Justices—Reed, Douglas, and Clark—said nothing at the conference to indicate they harbored particular views that would lead them to write separately, especially in the face of what was a growing and strongly held goal for the rest of the Court.

Warren again assigned himself the opinion for the Court. Ironically, the consensus for a unanimous opinion, emerging even before it was drafted, was far from a luxury for Warren. Instead of having carte blanche for whatever he wrote, Warren faced the difficult task of accommodating in one statement eight other views that had been far from harmonious at conference.

By early May, Warren had completed a draft opinion. He did not circulate his first draft to the other members of the Court, but instead showed it to individual Justices and solicited their suggestions. Burton's Diary for May 11 notes, "Returned the Chief Justice's draft of segregation case memorandum with suggestions. (Already submitted [illegible] suggestions from Black, Reed, Frankfurter and Clark)." Warren obviously was taking pains to accommodate first those Justices whose feelings about the content and tone of the opinion were the strongest. On May 26, two weeks after meeting with Burton, Warren circulated his revised draft opinion. The Court met in conference the following day and discussed the language of the draft in detail for two hours. The Justices formally approved and agreed that the opinion should be announced the following Tuesday, May 31. The only remaining question was whose signature—if anyone's—should appear on the opinion. Frankfurter reiterated a suggestion he had made a few days earlier: the opinion should be a per curiam, with no individual Justice's name affixed to it. The Court rejected Frankfurter's suggestion by a formal 8-1 vote, with only Frankfurter supporting his own suggestion.

The final opinion in Brown II, announced as agreed on May 31, was very brief—only seven paragraphs. It reflected compromise and equivocation in virtually every line. Because "[full implementation of the constitutional principles [of Brown I] may require solution of varied local problems," the Court remanded the cases to the lower courts that had originally heard them. "In fashioning and effectuating the decrees," the lower courts were to be "guided by equitable principles." This guideline meant "practical discussion)."

460. See Frankfurter Notes (Apr. 16, 1955), supra note 445 (Reed: "Firm belief considerable group willing to give sympathetic consideration"; Douglas: "Ought to have an opinion"; Clark: "Closer to Felix than anyone else").

461. See Burton, J., Diary (May 11, 1955), Box 3, HHB(LC) (Warren showed Burton draft opinion) [hereinafter 1955 Burton Diary].

462. Id.

463. At conference, according to Frankfurter, Black said, "How to say and do as little as possible is my present desire." Frankfurter Notes (Apr. 16, 1955), supra note 445. Clark stated, "[We must be] careful what we say—."

464. See Warren, C.J., Memorandum for the Conference (May 26, 1955), Box 337, HHB(LC).


466. Id.

467. Id. (May 25 & 27, 1955).

468. Id. (May 27, 1955). The opinion, of course, was ultimately in Warren's name.


470. Id. at 301. The Delaware case, Gebhart v. Belton, in which the state courts had ordered the School Board to admit the black plaintiffs immediately, was affirmed, but remanded "for such further proceedings as the Supreme Court of Delaware may deem necessary in light of this opinion." Id.

471. Id. at 300.
flexibility in shaping" the remedies, including "adjusting and reconciling public and private needs." Although the courts were to consider the "public interest" in effecting the transition to nondiscriminatory schools, implementation could not "be allowed to yield simply because of disagreement" with constitutional principles.

After outlining the equitable notions that were to apply on remand, the Court went to the heart of the matter and declared that the lower courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system.

The theme of gradualism was enshrined in the opinion's penultimate sentence. The Court remanded the cases to the lower courts "to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases." The sentence is striking, not only for the oxymoron that came to symbolize the decision, but also for the scope of relief. At the April 16 conference, only Black and Douglas had stated that relief should be limited to the named plaintiffs in the cases. There had appeared to be a tentative majority, or near majority, for issuing relief on a class-wide basis. Warren's May 26 second draft reflected that understanding; the penultimate sentence read in pertinent part, "[T]o admit to public schools on a racially non-discriminatory basis with all deliberate speed the plaintiffs and those similarly situated in their respective school districts who may within such time as may be fixed by the District Courts become parties to these cases." The final version limited relief to the present parties. There is no documentary evidence of what prompted the last-minute change, but reasons are not hard to imagine. The Court wanted to "say and do as little as possible," as Black had said at the

472. Id.
473. Id.
474. Id. at 300-01.
475. Id. at 301.
477. See A. BICKEL, THE LEAST DANGEROUS BRANCH 247-53 (1962) (Court may have been attempting to diffuse anticipated opposition and to act within its power to enforce decree).
April 16 conference, and in Clark’s words, to say it “careful[ly].” 478 There was no need to make the opinion appear to expand Brown I beyond its apparent posture as announced the year before. Although Warren’s language in the May 26 draft technically provided no greater relief than that contemplated by traditional class action rules, it could be read as broadening the decision in the guise of defining relief. For a Court that wished to “present as small a target as possible,” 479 the risk was too great. It was also unnecessary, if Frankfurter was correct that the practical effect of implementation would be no different whether relief was granted only to the named plaintiffs or to the entire class: desegregation for a few could literally open the door for all. 480

Mr. Justice Frankfurter’s role in the compromise on the class action issue is uncertain. It is clear, on the other hand, that he was responsible for that “most elusive phrase” 481 “all deliberate speed.” 482 The expression was a pet of Frankfurter. It was first used in a Supreme Court opinion by Frankfurter’s friend and model, Justice Oliver Wendell Holmes, in 1918 in Virginia v. West Virginia. 483 Since taking his seat on the Court in 1939, Frankfurter had used the phrase—and he was the only Justice during the period who used it—five times in opinions. 484 He normally used it in passing, to indicate an appropriate period for action by an agency or to suggest a manner for further proceedings by a litigant in state court. He elaborated on the expression only once, in a 1946 dissenting opinion involving a suit against the Federal Power Commission: “In any event, mere speed is not a test of justice. Deliberate speed is. Deliberate speed takes time. But it is time well spent.” 485

The first mention of the expression in the Segregation Cases occurred during oral argument by Solicitor General J. Lee Rankin in 1953, 486 although the 1952 brief of the United States made pointed reference to the notion—if not the phrase. 487 Frankfurter immediately seized upon the expression and

478. Frankfurter Notes (Apr. 16, 1955), supra note 445; full quotation at note 463.
480. See Frankfurter, J., Memorandum to Conference at 1 (Jan. 15, 1954), supra note 324 (“To be sure, we have before us only individual claimants. . . . This fact, however, does not change the essential subject-matter of the litigation—we are asked in effect to transform state-wide school systems in nearly a score of states.”).
482. See R. Kluger, Simple Justice 742-43 (1975) (Frankfurter had fondness for phrase); A. Lewis & N.Y. Times, Portrait of a Decade 30 (1964) (Frankfurter often invoked phrase).
483. 322 U.S. 17, 20 (1919); cf. Letter from Hon. Oliver Wendell Holmes to Frederick Pollock (Mar. 7, 1909), in 1 Holmes-Pollock Letters 152 (M. Howe ed. 1941) (Court took steps to deal with contempt of its authority “with all deliberate speed” in United States v. Shipp, 214 U.S. 386 (1909)).

Frankfurter also used the expression in private communications. For example, in a 1950 conference memorandum he wrote, “The purpose of this memorandum is to ask of my brethren suspension of judgment [on a circulating opinion for the Court in Darr v. Burford, 339 U.S. 200 (1950)] until they have had an opportunity to examine the observations upon the opinion which I shall circulate with all deliberate speed.” Frankfurter, J., Memorandum for the Conference (Feb. 8, 1950), File 4027, Box 218, FF(CC). 485
485. First Iowa Coop. v. FPC, 328 U.S. 152, 188 (1946).
486. 49A Kurland & Casper, supra note 261, at 538.
suggested its use in his January 15, 1954 Memorandum to the Conference. When Warren adopted the phrase in \textit{Brown II}, Frankfurter unsuccessfully protested that Holmes should receive explicit credit for the line. Three years after \textit{Brown II}, Frankfurter was still trying to trace what he assumed to be the English Chancery origins of the expression. Holmes may have subconsciously amalgamated the Chancery phrase “all convenient speed” with a line of Francis Thompson’s 1893 devotional poem, \textit{The Hound of Heaven}. “That refrain,” Professor Bickel later remarked, “is ‘Deliberate speed, majestic instancy,’ and the reference is to the Hound of Heaven’s unrelenting pursuit of the sinner fleeing from grace.”

Years after \textit{Brown II}, when deliberation had swallowed up speed, critics would condemn the phrase for sanctioning postponement of constitutional rights. But at the time, as the Court’s deliberations indicate and the opinion in \textit{Brown II} demonstrates, the Justices had no clear vision of precisely how
Brown should, and could, be implemented; nor was it apparent what action would be taken by enemies or allies of the decision. Indeed, the Court may have hoped that it would have help in enforcing Brown II, as the Attorney General for the new Eisenhower Administration seemed to promise in the Government’s brief on reargument: “The responsibility for achieving compliance with the Court’s decision in these cases does not rest on the judiciary alone. Every officer and agency of government, federal, state, and local, is likewise charged with the duty of enforcing the Constitution and the rights guaranteed under it.”

IV. PER CURIAM: 1955-1958

Between Brown II in 1955 and Cooper v. Aaron in 1958, the Supreme Court did not grant plenary consideration to any case involving racial segregation in education. But public controversy over Brown increased rather than subsided during the period, in part, ironically, because of the Court’s attempts to minimize debate by acting summarily. At the beginning of October Term 1955, the Court issued per curiam rulings without explanation in Mayor v. Dawson and Holmes v. City of Atlanta; the orders outlawed separate but equal facilities at public beaches and public golf courses. A year later, again by per curiam order, the Court extended Brown in Gayle v. Browder to condemn segregation on municipal buses.

Legal scholars soon sharply criticized the manner, if not the result, of the decisions. The warmth with which many law journals had greeted Brown I as “illustrating the functioning of the judicial process at its best” turned icy and barely restrained charges that the Court was short-circuiting the judicial process. In a 1957 article, Professors Alexander Bickel and Harry Wellington charged:


496. 358 U.S. 1 (1958).

497. During this period the Court did, however, grant plenary consideration to cases involving racial issues not directly related to Brown. One case concerned state discrimination in education under the terms of a testamentary trust. See Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230, 231 (1957) (per curiam) (fourteenth amendment forbids state as trustee from denying blacks admission to school for white male orphans established by testamentary trust). The Court also considered several cases involving racial discrimination in the selection of grand and petit juries. E.g., Eubanks v. Louisiana, 356 U.S. 584, 587 (1958); Michel v. Louisiana, 350 U.S. 91, 96, 100-01 (1955); Reese v. Georgia, 350 U.S. 85, 85-90 (1955). Procedural issues in cases concerning racial discrimination in labor unions also came before the Court. Conley v. Gibson, 355 U.S. 41, 47 (1957); Syres v. Oil Workers Local No. 23, 350 U.S. 892, 892 (1955) (per curiam).

498. 350 U.S. 877 (1955) (per curiam) (mem.).
499. 350 U.S. 879 (1955) (per curiam) (mem.).
503. Id. at 903.
504. Sacks, Foreword to The Supreme Court, 1953 Term, 68 HARV. L. REV. 96, 96 (1954).
505. See generally Bickel & Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills
[S]ince handing down its judgment in the Segregation Cases, the Court has declined to write further on the general subject, disposing by per curiam orders of a number of other cases which can only in the loosest way be held to be governed by the decision of May, 1954. This is not to say that the per curiam orders were wrong. Nor is it to say that they could not be founded in reason, only that the Court made no effort to do so.506

Bickel and Wellington saw the Court's actions as an understandable but unacceptable response to the controversy over the Brown decision; "unity, unanimity if possible,"507 and brevity were defense mechanisms.

But summary treatment was only one of the Court's defense mechanisms. The Court also attempted to avoid controversy by shunning cases that appeared to fall squarely within its jurisdiction. The most famous, and most controversial, non-decision during the period was Naim v. Naim,508 a Virginia miscegenation case. Bickel praised the Court's tortuous maneuver in Naim,509 but others condemned it as additional evidence that the Court was acting lawlessly.510

Where legal scholars found impropriety, or at least a close question, political scientists have detected the operation of conscious strategy. In a comprehensive and detailed study of Supreme Court decisionmaking in desegregation cases between 1954 and 1969,511 Stephen L. Wasby, Anthony A. D'Amato, and Rosemary Metrailer have concluded that the Court resorted to summary dispositions and decision-avoidance for strategic purposes—to maximize the effect of Brown and to minimize controversy and resistance.512 The evidence that the authors use to support their conclusion consists primarily of the Court's opinions, decisions at the certiorari stage,

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507. Id. at 3.
511. See S. WASBY, supra note 13.
512. The authors give a rather elastic definition of "strategy." Id. at 10-11.
513. The authors observe, "A basic rule of strategy is not to jeopardize a large goal for the sake of a small issue." Id. at 132; see id. at 132-49, 266-76 (Court avoided issues of racially restrictive cemeteries and miscegenation laws, denied certiorari or dismissed appeals in cases involving racial discrimination in transportation and other public facilities); cf. Shapiro, Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis, 2 LAW IN TRANSITION Q. 134, 145-46 (1965) (Court made commitment to desegregation with Brown, but extended it to public facilities only serially, as cases arose). See generally W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964).
It is possible, however, to test their conclusions on the basis of further and more revealing evidence: the records, admittedly fragmentary, of Justices Burton, Clark, and Frankfurter for the Court's certiorari conferences in October Terms 1955, 1956, and 1957.

A. OCTOBER TERM 1955

The moving papers (petitions for certiorari and jurisdictional statements) in Naim, Mayor v. Dawson, and Holmes were all discussed at the Court's fourth certiorari conference of the Term on November 4, 1955. Naim and Dawson put the Court on the spot because both, as appeals, had to be faced on the merits. In Naim a white woman sued to have her marriage to a Chinese man annulled on the ground that the marriage, which occurred in North Carolina, violated the Virginia miscegenation statute. The Supreme Court of Appeals of Virginia granted the plaintiff relief and rejected the husband's claim that the statute violated the fourteenth amendment. The Virginia court relied on Plessy v. Ferguson and on Pace v. Alabama, in which the Supreme Court in 1883 had upheld an Alabama statute prohibiting interracial cohabitation. The Virginia court concluded that neither Brown nor Bolling affected the issue before it and noted that "as recently as November 22, 1954" the Supreme Court had denied certiorari in a case in which a black woman had been convicted of violating the Alabama miscegenation statute.

Naim obviously presented the Court with a highly explosive issue. A memorandum prepared by Justice Burton's law clerk prior to conference neatly summarized the Court's dilemma:

514. See S. Wasby, supra note 13, at xv-xviii (discussing value of oral arguments as evidence).
515. From the evidence of judicial working papers consulted for this study, it appears that Justices do not regularly record discussions at conferences on petitions for writs of certiorari and jurisdictional statements. Preconference notations by Justices on working papers, such as memoranda prepared by law clerks and conference sheets, may reflect only tentative conclusions.
519. Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (mem.), reversing 223 F.2d 93 (5th Cir.).
520. See Conference Sheets (Nov. 4, 1955), Box 286, HHB(LC) (agenda).
521. 197 Va. at 81, 87 S.E.2d at 750; see VA. CODE. § 20-54 (1950) (repealed 1968) (marriage void if parties of different races marry outside state to avoid miscegenation law and then return to state).
522. 106 U.S. 583 (1883).
In view of the difficulties engendered by the segregation cases it would be wise judicial policy to duck this question for a time. If cert was involved our course would be clear. But what to do here? In the instant case a state statute has been upheld against a claim of invalidity on federal constitutional grounds. I don’t think we can be honest and say that the claim is insubstantial. Consequently appellant has tapped our obligatory jurisdiction. I don’t think we should render a judgment on the merits without oral argument since the problem is of real importance. . . . It is with some hesitation, however, that I recommend that we NPJ [note probable jurisdiction]. This hesitation springs from the feeling that we ought to give the present fire a chance to burn down. On the other hand I simply see no alternatives if it is agreed that the issue is of real substance.\textsuperscript{527}

Burton’s preconference notes indicate that Burton was undecided about the disposition of the case: he wavered between dismissing for want of a substantial federal question, and noting probable jurisdiction and setting the case down for argument.\textsuperscript{528} Clark too appears to have been undecided, although his preconference notes indicate that he tended toward noting probable jurisdiction.\textsuperscript{529}

In \textit{Mayor v. Dawson}\textsuperscript{530} the United States Court of Appeals for the Fourth Circuit held unconstitutional municipal ordinances requiring racial segregation at public beaches and bathhouses maintained by the State of Maryland and the City of Baltimore.\textsuperscript{531} The court of appeals reasoned that the “combined effect” of \textit{McLaurin, Henderson}, and the 1954 cases had “destroyed the basis” of prior state and federal decisions that had upheld such practices on the authority of \textit{Plessy v. Ferguson}.\textsuperscript{532}

\textit{Holmes v. City of Atlanta}\textsuperscript{533} was easier to dispose of than \textit{Naim} and \textit{Dawson}, because as a petition for certiorari, it fell outside the Court’s obligatory jurisdiction. In \textit{Holmes} blacks sought declaratory and injunctive relief from municipal ordinances prohibiting them from using the Atlanta municipal golf course.\textsuperscript{534} The district court granted limited relief by requiring the City to make the facilities available on a “substantially equal basis,” but under \textit{Plessy}, not on a desegregated basis.\textsuperscript{535} Construing the relief as consistent with the plaintiff’s pleadings, the Court of Appeals for the Fifth Circuit

\textsuperscript{527}Burton’s preconference notes indicate that Burton was undecided about the disposition of the case: he wavered between dismissing for want of a substantial federal question, and noting probable jurisdiction and setting the case down for argument. Clark too appears to have been undecided, although his preconference notes indicate that he tended toward noting probable jurisdiction.

\textsuperscript{528}Burton wrote across the top of his clerk’s memo on \textit{Naim}, “Reversing a State Supreme Court should be after oral argument only. Note.” See JEN [Clerk] to Clark, J., Certiorari Memo (Oct. Term 1955), No. 366 [\textit{Naim v. Naim}], TCC(UA).

\textsuperscript{529}350 U.S. 877 (1955) (per curiam) (mem.), \textit{affirming} 220 F.2d 386 (4th Cir.) (per curiam).

\textsuperscript{530}350 U.S. 879 (1955) (per curiam) (mem.), \textit{reversing} 223 F.2d 93 (5th Cir.).

\textsuperscript{531}223 F.2d at 94.

\textsuperscript{532}Id.

\textsuperscript{533}Id. at 95 n.4.
affirmed.\textsuperscript{536} The plaintiffs sought certiorari and argued that the Fifth Circuit's holding was inconsistent with \textit{Dawson} and created a conflict between the circuits.\textsuperscript{537}

Burton's preconference notes indicate that he thought \textit{Dawson} "should [be] hear[d] on the merits,"\textsuperscript{538} and he tentatively planned to vote to note probable jurisdiction.\textsuperscript{539} Clark appears to have planned to vote to note probable jurisdiction or to dismiss for want of a substantial federal question.\textsuperscript{540} Both Justices were prepared to vote to grant certiorari in \textit{Holmes}.

At the November 4 conference, the Court agreed to affirm \textit{Dawson} summarily and to remand \textit{Holmes} for entry of a decree in conformity with \textit{Dawson}.\textsuperscript{542} There is no record of the deliberations on \textit{Dawson} and \textit{Holmes}, but there is evidence of at least part of the consideration of \textit{Naim}, which the Court found much more difficult to handle. Burton's Docket Book for the Term indicates that at least three Justices—Warren, Black, and Reed—and possibly a fourth—Douglas—voted to note probable jurisdiction in \textit{Naim}.

The case was not noted that day,\textsuperscript{544} however, perhaps because Mr. Justice Clark asked that the case be held over one week so that he could study it further—possibly with an eye toward suggesting a disposition that avoided a judgment on the merits. Although Clark was technically responsible for delaying action on \textit{Naim}, the moving force behind the Court's non-decision was Mr. Justice Frankfurter. During the discussion of \textit{Naim}, Frankfurter read a prepared statement to the Conference (reprinted in Appendix D) urging that the case not be decided, if at all possible.\textsuperscript{545} For Frankfurter, the "technical considerations" of the Court's obligatory jurisdiction were outweighed by the "moral considerations," namely, "the Court's responsibility in not thwarting or seriously handicapping the enforcement of its decision in the segregation cases."\textsuperscript{546} Frankfurter said that he assumed "serious division on the merits," and he feared that a decision overturning the law would "very seriously . . . embarrass the carrying-out of the Court's decree of last May."\textsuperscript{547} At the end of his statement Frankfurter implied that a way out

\textsuperscript{536} Id. at 95.
\textsuperscript{537} [Clerk] to Burton, J., Certiorari Memo at 2 (Oct. Term 1955), No. 396 [Holmes], Box 283, HHB(LC).
\textsuperscript{538} Conference Sheets (Nov. 4, 1955), supra note 520.
\textsuperscript{539} PJ [Clerk] to Burton, J., Certiorari Memo (Oct. Term 1955), No. 232 [Dawson], Box 282, HHB(LC). Burton wrote at the top of the memo, "Set with 396 [Holmes] and NPJ." See id. (handwritten notation).
\textsuperscript{540} See JEN [Clerk] to Clark, J., Certiorari Memo (Oct. Term 1955), No. 232 [Dawson], TCC(UT) (Clark's handwritten notation: "Dismiss or affirm," "I think appeal okay").
\textsuperscript{541} See PJ [Clerk] to Burton, J., Certiorari Memo (Oct. Term 1955), supra note 539 (Burton's handwritten notation: "Set with 396 [Holmes]"); JEN [Clerk] to Clark, J., Certiorari Memo (Oct. Term 1955), No. 396 [Holmes], TCC(UT) (Clark's notation: "grant").
\textsuperscript{542} Docket Book (Oct. Term 1955), Box 279, HHB(LC).
\textsuperscript{543} Id. Clark recorded only three votes to note probable jurisdiction: Warren, Black, and Reed. The others were noted as voting to dismiss. Docket Book (Oct. Term 1955), TCC(UT).
\textsuperscript{544} See Docket Book (Oct. Term 1955), supra note 542 (noting votes on jurisdictional statement on Nov. 4 (Note-4, Dismiss-5) and on Nov. 11 (Note-2, Vacate-7)).
\textsuperscript{545} See Memorandum of Mr. Justice Frankfurter on \textit{Naim v. Naim} (Read at Conference, Friday, Nov. 4, 1955), File 4040, Box 219, FF(LC).
\textsuperscript{546} Id. at 2.
\textsuperscript{547} Id. at 3. Frankfurter later confided, or perhaps at least suggested that he was prepared to argue, that \textit{Brown} did not necessarily foreclose the constitutionality of miscegenation laws. Writing to Judge
existed: his reading of the record suggested that the "main issue" in the case was not "free from subsidiary or preliminary questions." 548

For several days following the conference, Frankfurter worked closely with Clark to formulate a per curiam opinion that would remand the case on jurisdictional grounds. 549 Frankfurter suggested a per curiam order dismissing the appeal

for the reason that the record is inadequate for a decision of the only questions presented by the Statement as to Jurisdiction and for the reason that other federal questions of substantiality appearing on the record are not properly before us because not passed upon by the court below nor included in the question presented. 550

Clark liked the suggestion, but wanted to be more specific. 551 He rewrote the Frankfurter draft to point out that the record was inadequate as to the "citizenship of the parties at the time of their marriage" and that the appellant had failed "to raise questions here, such as full faith and credit, which might be dispositive." 552 His draft concluded that because the issue was not presented "in a clean cut and concrete form"—citing Rescue Army v. Municipal Court 553—the appeal had to be dismissed. 554

Clark's revisions generally pleased Frankfurter, who wrote to him:

Your proposal fills me with hope, confident hope, that my anxiety will soon be lifted.

I shall be glad to settle on the final form of this, agreeable to S.R. [Stanley Reed] & perhaps the Chief (your quote from Rescue Army is perfect). My preference is for the shortest and least explicit formula, & so I would substitute for f.f.& c. [full faith and credit] its deletion, leaving the idea to some such generality [as] "to raise all questions relevant to the disposition of the case."

Many thanks. 555

Clark adopted Frankfurter's suggestion, and the draft went into its final form. Mr. Justice Black, either hoping to forestall Clark's proposal or simply wishing to register his disagreement, circulated a dissenting statement: "Mr. Justice Black, being of the opinion that this record properly presents a

Hand in 1958, Frankfurter said: "I cannot square your present attitude toward the Segregation Cases with views you expressed to me about the miscegenation statutes. I myself do not see—at least as yet—why as a matter of intellectual honesty in starting with the Segregation Cases the invalidity of the miscegenation laws follows." Letter from Frankfurter, J., to Hon. Learned Hand (Feb. 13, 1958), supra note 331.

548. Id. Memorandum of Mr. Justice Frankfurter on Naim v. Naim (Read at Conference, Friday, Nov. 4, 1955), supra note 545.


550. Id. At the end of the proposed per curiam, Frankfurter added two citations: "International Brotherhood of Teamsters etc. v. Denver Milk Producers, 334 U.S. 809; United States v. Petrillo, 332 U.S. 1, 5." Id.

551. Clark's notes reveal that he considered pointing out that Mrs. Naim may have been "estopped" from attacking the Virginia statute because she knew of it when she married. Note from TCC [Clark, J.] to Bob [Clerk] (no date), File 366 [Naim] (Oct. Term 1955), TCC(UT).

552. Clark, J., Draft Opinions (no date), supra note 549.

553. 331 U.S. 549, 584 (947).

554. See Clark, J., Draft Opinions (no date), supra note 549.

question arising under the United States Constitution, would note jurisdiction
and set the case for arguments on that question.\textsuperscript{556} Black withdrew his
statement before the per curiam opinion was issued with the Court's Orders
List on November 14, 1955. The opinion, in full, reads:

\textit{Per Curiam:} The inadequacy of the record as to the relationship of
the parties to the Commonwealth of Virginia at the time of their
marriage in North Carolina and upon their return to Virginia, and
the failure of the parties to bring here all questions relevant to the
disposition of the case, prevents the constitutional issue of the
validity of the Virginia statute on miscegenation tendered here
being considered "in clean-cut and concrete form, unclouded" by
such problems. \textit{Rescue Army v. Municipal Court}, 331 U.S. 549,
584. The judgment is vacated and the case remanded to the
Supreme Court of Appeals in order that the case may be returned
to the Circuit Court of the City of Portsmouth for action not
inconsistent with this opinion.\textsuperscript{557}

On remand, the Virginia Supreme Court of Appeals balked at the Supreme
Court's enigmatic mandate. After rehearsing the facts, the Virginia court
stated that the record was adequate to decide the issues in question, that the
issues had been fully and finally adjudicated, that state law contained no
provision for remanding the cause to the trial court to be reopened.\textsuperscript{558} The
court therefore adhered to its prior decision.\textsuperscript{559} On March 2, 1956, Mr. Naim
filed a motion in the Supreme Court to recall the November 14 mandate and
set the case for oral argument on the merits or alternatively to recall and
amend the mandate.\textsuperscript{560} On March 12, the Supreme Court denied both motions
in a two-sentence per curiam order dismissing the appeal and concluding that
the decision on remand "leaves the case devoid of a properly presented federal
question."\textsuperscript{561} There is no evidence of the Court's deliberations on \textit{Naim} in
March, but neither is there reason to suspect that the Court's "awareness of
the volatile nature of the problem"\textsuperscript{562}—there were miscegenation laws in over
half the states\textsuperscript{563}—had changed between November and March.

There were no more potential "bombshells"\textsuperscript{564} during the Term, and with
minor exceptions\textsuperscript{565} the Court was able to police the implementation of \textit{Brown}
by summarily affirming or denying certiorari to pro-desegregation judgments
by the lower courts.\textsuperscript{566} These actions, unlike the elliptical extensions of \textit{Brown}

\textsuperscript{556.} Black, J., Handwritten Note (no date), File 366 \textit{(Naim)} (Oct. Term 1955), TCC(UT).
\textsuperscript{557.} \textit{Naim v. Naim}, 350 U.S. 891, 891 (1955) (per curiam), \textit{on remand}, 197 Va. 734, 90 S.E.2d 849,
motion to recall mandate denied \textit{per curiam}, 350 U.S. 985 (1956).
\textsuperscript{558.} 197 Va. at 735, 90 S.E.2d at 850.
\textsuperscript{559.} \textit{Id}.
\textsuperscript{560.} Docket Book (Oct. Term 1955), \textit{supra} note 542.
\textsuperscript{561.} 350 U.S. at 985.
\textsuperscript{562.} W. MURPHY, \textit{ELEMENTS OF JUDICIAL STRATEGY} 193 (1964).
\textsuperscript{563.} S. WASBY, \textit{supra} note 13, at 141.
\textsuperscript{564.} See W. MURPHY, \textit{ELEMENTS OF JUDICIAL STRATEGY} 193 (1964) (quoting one Justice as saying
after \textit{Naim} conference, "One bombshell at a time is enough").
\textsuperscript{565.} See Florida ex rel. Hawkins v. Board of Control, 350 U.S. 413, 421 (1956) (per curiam) (ordering
admission of black applicant to state law school according to rules applicable to other qualified applicants);
Lucy v. Adams, 350 U.S. 1, 1 (1955) (per curiam) (reinstating injunction restraining university dean from
denying admission to black women on basis of race).
\textsuperscript{566.} See S. WASBY, \textit{supra} note 13, at 164-69 (detailing cases).
in *Dawson* and *Holmes* and the devious treatment of *Naim*, were doctrinally respectable. They served, moreover, to put the lower federal courts on notice that the Court meant what it said in *Brown II* when it placed the primary responsibility for implementation of desegregation plans on the local courts. The lower federal courts were not to await detailed guidance from the Supreme Court before acting at the local level.

Despite the Court's consistent efforts to minimize controversy over the *Brown* decisions, resistance was beginning to intensify. On March 12, 1956, one hundred and one United States Congressmen from eleven Southern States issued the "Southern Manifesto," condemning *Brown* and pledging the "use [of all lawful means] to reverse it and to "prevent the use of force in its implementation." The Manifesto urged restraint from "disorder and lawless acts" in resisting *Brown*, but as Anthony Lewis later wrote, "The true meaning of the Manifesto was to make defiance of the Supreme Court and the Constitution socially acceptable in the South—to give resistance to the law the approval of the Southern Establishment."

B. OCTOBER TERM 1956

During the 1956 Term, the Court underwent two changes in personnel. Mr. Justice Minton retired in mid-October, and President Eisenhower appointed William J. Brennan to replace him. Brennan took his seat October 16 under a recess appointment and was formally confirmed by the Senate in March. In February of 1957 Mr. Justice Reed retired and was replaced by Charles E. Whittaker, who took his seat March 25, 1957. Even with these changes, the Court continued routinely to deny certiorari to school desegregation judgments.

The Court granted plenary consideration to only two cases involving racial issues during the 1956 Term, but neither was directly related to *Brown*. In a brief per curiam order, however, the Court in effect overruled *Plessy v. Ferguson* without mentioning it by name. On November 13, 1956, the Court issued the following order in *Gayle v. Browder*, an appeal from a three-judge district court in Alabama: "The motion to affirm is granted and the judgment is affirmed. *Brown v. Board of Education*, 347 U.S. 483; *Mayor and City*

Gayle grew out of the Montgomery bus boycott.5 Aurelia S. Browder and others sought declaratory and injunctive relief from municipal ordinances and state statutes requiring racial segregation on publicly operated buses.57 A three-judge district court had granted relief, with one judge dissenting, in a detailed opinion by Circuit Judge Richard T. Rives.578 Judge Rives relied on Henderson, Brown I, Dawson, Holmes, and a recent decision by the United States Court of Appeals for the Fourth Circuit holding segregation on public buses unconstitutional,579 to conclude that Plessy "has been impliedly, though not explicitly, overruled, and that, under the later decisions, there is now no rational basis upon which the separate but equal doctrine can be validly applied to the public carrier transportation."580 The City appealed, and because the decision was by a three-judge court, the case fell within the obligatory jurisdiction of the Supreme Court.

The only available set of preconference notes are those of Mr. Justice Burton.581 Burton’s notes are fragmentary—and the notes of one Justice are thin evidence at best—but they are revealing. Burton, as he customarily did, made two preconference notations of dispositions of the case that appealed to him. On the top of his law clerk’s memorandum on the case, he wrote, "Aff. with p. c. opinion."582 On his Conference Sheet, which listed the cases to be considered at the November 2 conference, he wrote a short summary of Gayle and noted in the margin, "Amounts to overruling Plessy v. Ferguson on intra-state buses—could do it from our [illegible] cases and brief opinion overruling Plessy v. Ferguson. Excellent opinion in DC deserves recognition."583 The two notations demonstrate that Burton, for one, was fully prepared to vote to affirm Gayle summarily and to announce, in effect, the demise of Plessy in a brief per curiam order. Unlike his, and Clark’s, preconference consideration

575. Id. at 903.
576. See A. LEWIS & N.Y. TIMES, PORTRAIT OF A DECADE 780-84 (1964) (discussing black boycott to end segregation on buses).
577. 142 F. Supp. at 710-11.
578. Id. at 710.
580. 142 F. Supp. at 717.
581. Mr. Justice Clark’s preconference notes on Gayle, if they still exist, have not been found. Other sources of notes on the cases are the papers, not yet accessible, of Chief Justice Warren, Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Brennan (Manuscript Division, Library of Congress), and Mr. Justice Harlan (Mudd Manuscript Library, Princeton University). Mr. Justice Frankfurter apparently left no notes, and the notes of Mr. Justice Reed are not available.
582. See RCC [Clerk] to Burton, J., Certiorari Memo (Oct. Term 1956), No. 342 [Gayle v. Browder] and No. 343 [Owen v. Browder], Box 296, HBB(LC) (Burton’s handwritten notation). The notation suggests a break, or at least a tension, with Mr. Justice Burton’s general policy that the Court should only sparingly affirm appeals from federal courts summarily, “because the appellant often does not present his case fully on the merits when filing his jurisdictional statement,” and even then only when “the question is one which is well covered by previous decisions.” Letter from Burton, J., to Levin & Colquoun [Clerks] (July 19, 1949), Correspondence Box, Harold H. Burton Papers, Bowdoin College.
583. See Conference Sheet (Nov. 2, 1956), Box 302, HBB(LC) (Burton’s handwritten notations) (emphasis in original).
of Dawson the preceding year, Burton saw no need for oral argument or a full opinion on the scope of Brown.

It is too much to conclude that the Court had by the 1956 Term adopted a formal strategy for policing Brown and resolving the questions Brown left unanswered about the remaining vitality of Plessy. The evidence instead suggests that the Justices had changed, or were changing, their assumptions about the necessity of plenary consideration of the unresolved issues in Brown. When Dawson and Holmes arrived at the Court, the Justices viewed plenary consideration as an open option. Burton’s reaction to Gayle, however, strongly suggests that by 1956 the Court viewed summary treatment and not plenary consideration as the desirable method for policing Brown. In the following Term the Court further indicated its willingness to rely on summary treatment of Brown-related issues. The evidence is provided not by additional summary dispositions during the 1957 Term but by the Court’s internal handling of a case that did receive plenary consideration, *NAACP v. Alabama ex rel. Patterson*.

C. OCTOBER TERM 1957

Certiorari was granted by unanimous vote on May 27, 1957, in *NAACP v. Alabama ex rel. Patterson* to review the constitutionality of a state court decision holding the NAACP in contempt for refusing to turn over its membership lists, dues accounts, books, and other records to the Attorney General of Alabama. The Alabama law requiring such disclosure was one of several that were enforced in Southern States at the time and that had the transparent aim of driving out of business the most accessible and troublesome protagonist of desegregation, the NAACP.

Whatever hopes the Court had entertained for minimizing the intensifying controversy over segregation became futile with events that intervened between the grant of certiorari in May of 1957 and the oral arguments on January 15 and 16 of 1958. During the Court’s 1957 summer recess, Representative William E. Jenner of Indiana launched what became, in Walter Murphy's words, “the most fundamental challenge to judicial power in twenty years.” Prompted by the Court’s recent decisions curtailing antisubversive programs and statutes, Jenner introduced a bill to curb the

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584. See S. WASBY, supra note 13, at 171-73 (discussing denial of certiorari in three school segregation cases in 1957 Term).
586. Docket Book (Oct. Term 1956), Box 309, HHB(LC).
590. 357 U.S. at 451.
593. On “Red Monday,” June 17, 1957, the Court decided the following cases: Service v. Dulles, 354...
jurisdiction of the Court. The Jenner attack did not gain momentum until later, but the mere introduction of the bill meant that the Supreme Court was under fire now from more than one section of the country. The South remained the focus of criticism of the Court, with Southern resistance becoming increasingly violent. Reaction to *Brown II* precipitated a national crisis shortly before the beginning of the 1957 Term when President Eisenhower ordered federal troops to ensure the desegregation of Little Rock Central High School. The ultimate implication of *Brown II* was desegregation at fixed bayonet point.

In *NAACP v. Alabama ex rel. Patterson* the Court for the first time agreed to hear a case involving the legal fallout of the Segregation Cases. The case was difficult from a technical standpoint. The State had a forceful argument that the Court lacked jurisdiction because the judgment of the Supreme Court of Alabama rested on an independent and adequate state ground. On the merits, the NAACP conceded that its asserted right of "freedom of associa-


Congressional reaction to decisions in other areas, such as criminal law and bar admissions, also fueled the attack. See *Mallory v. United States*, 354 U.S. 449, 455-56 (1957) (reversing rape conviction because of unnecessary delay in appearance before magistrate); *Jencks v. United States*, 353 U.S. 657, 672 (1957) (reversing conviction of labor union president for falsely swearing he had never belonged to Communist Party); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957) (overruling disqualification of applicant from admission to the practice of law because of prior membership in Communist Party); *W. Murphy, Congress and the Court* 127-83 (1962) (discussing *Jencks* Bill and subsequent congressional attacks upon Court's jurisdiction).

594. The bill would have eliminated the Court's jurisdiction over cases concerning contempt of Congress, the loyalty-security program, state antisubversive statutes, regulation of employment and subversive activities in schools, and admission to the practice of law. *P. Kurland, Politics, the Constitution, and the Warren Court* 29 (1970). See generally *W. Murphy, Congress and the Court* 157-70 (1962) (discussing proponents' efforts to pass Jenner bill).

595. See *W. Murphy, Congress and the Court* 157-70 (1962) (discussing instances of Southern resistance to school desegregation).


597. Id. at 52-53.

598. A contemporary newspaper reportedly editorialized,

> The gleaming bayonets are ugly, and the cause for their presence is enough to grieve the heart of a nation. But they carry a proud and beautiful message. They say what too long was unsaid before, that ours is a government of law, that the Constitution is the supreme law of the land, that the Supreme Court is the final interpreter of the Constitution, that edicts of the Court are not to be flouted.


599. See Brief and Argument for Respondent at 5-14, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), reprinted in 54 Kurland & Casper, supra note 261, at 296-301 (judgment based on state procedure left no federal question to be reviewed by Supreme Court).
tion” was unprecedented, but argued that the right could be “distilled” from a variety of prior decisions.600

At conference after oral argument the Court voted to reverse.601 On January 21, 1958, the Chief Justice assigned Mr. Justice Harlan to write the opinion of the Court as a brief per curiam.602 Harlan worked for three months on the opinion. He finally circulated it on April 22, but his cover letter expressed disquiet over the proposed form of disposition:

My work on this case has left me with the firm conviction that it would reflect adversely on the Court were we to dispose of the case without a fully reasoned opinion. In my view, the considerations here are quite different from those which have led us to per cur all of the cases in this field which have come to us since the original segregation cases were decided. Having found it impossible to write a satisfactory opinion within the normal compass of a per curiam, as originally proposed, I have ventured to prepare a full-scale opinion. In doing this, I have thought it important that the opinion should be written (1) with the utmost dispassion, (2) within an orthodox constitutional framework and (3) as narrowly as possible.603

He added that he had “no personal objections” to releasing the opinion as a per curiam and that he would be willing to have the opinion issued “under some other name if that be deemed wise.”604 He concluded, “However, I think there are compelling reasons against handing down an opinion of this length as a per curiam, and that there are also good affirmative reasons for not having a per curiam at all in this instance.”605

Harlan succeeded in convincing his colleagues that the opinion should not be per curiam. Although the Court agreed in both form and substance to Harlan’s draft, several Justices offered suggestions for the discussion of the merits of the NAACP’s claim of freedom of association.606 To accommodate those suggestions and others concerning the tone of the opinion,607 Harlan circulated on May 2, May 8, May 15, and June 20 four more revisions of his April 22 draft.608
On the same day that Harlan circulated his final revised draft, Mr. Justice Clark, after much thought, circulated a one-page dissenting opinion.  The dissent, against which Clark's law clerk unsuccessfully argued for substantive and “policy reasons,” objected to the majority's disposition of the jurisdictional issue. Clark circulated a revised draft of his dissent on June 25 and received the same day a letter from Mr. Justice Frankfurter trying to talk him out of the dissent. Frankfurter acknowledged “the torturing difficulty for you” in the case and said that he could understand a dissent on the merits. He argued, however, that a dissent on procedural grounds doesn't seem to me a good enough starting point for a break in the unanimity of the Court in what is, after all, part of the whole Segregation controversy. The sky is none too bright anyhow. The mere fact that you are dissenting on the ground that the State’s interests have not been adequately put to us—though I thought at the time that the State’s interests were put to us on the merits very effectively—would be blown up out of all proportion to what you yourself would subscribe to.

Frankfurter’s letter concluded by asking Clark “to consider whether the use that is bound to be made of what you have written is worth the price.” On June 30, the last day of the Term, Clark circulated a one-sentence memorandum to the Conference withdrawing his dissent.  NAACP v. Alabama ex rel. Patterson was released that morning as a unanimous decision reversing the contempt order and vacating the $100,000 fine against the NAACP. Other issues were remanded.

The decision thus preserved the unanimity of the Court in the “Segregation controversy,” as Frankfurter had styled it to Clark. The April 22 letter by

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610. The law clerk wrote to his Justice, [The only point on which a dissent seems possible to me is squarely on the merits . . . . For my own self, I think the merits properly decided by the majority thus far. But, apart from that, there also seems strong policy reasons militating against any division of the Court on the merits of these segregation-aftermath cases.]
612. Id.
613. Id.
615. 357 U.S. at 466-67.
616. Because the question had not been decided below, the Court remanded the question of the right of Alabama to enjoin the NAACP from doing business in the state. The case was back in the Supreme Court on three more occasions. See NAACP v. Alabama ex rel. Patterson, 360 U.S. 240, 244-45 (1959) (reversing Alabama Supreme Court decision reaffirming original contempt conviction); NAACP v. Gallion, 368 U.S. 16, 16-17 (1961) (ordering hearing on motion to dissolve temporary state court order restraining NAACP from doing business in Alabama); NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 307-10 (1964) (reversing state decision permanently enjoining NAACP from doing business in Alabama).
Harlan and the Frankfurter letter to Clark confirm what by then was obvious to everyone following the Court's treatment of the questions developing in the segregation controversy: if at all possible, when faced with issues even indirectly involving segregation, the Court placed a high value on speaking with a unanimous voice. But the evidence from the Court's disposition of segregation and segregation-related cases during the 1955, 1956, and 1957 Terms suggests that the Court did not have a formal, uniform "strategy" for dealing with the fallout from Brown. Instead, the Court's attitude to the aftermath of Brown evolved, and rather uncertainly at that.

The preconference consideration of Dawson and Holmes indicates that some members of the Court assumed that the cases were to be considered, like others, as candidates for plenary consideration or summary action. After agreeing to dispose of Dawson and Holmes summarily, the Court needed to take only a short step to treat Gayle v. Browder in the same manner. But, as Harlan's April 22 letter shows, NAACP v. Alabama ex rel. Patterson posed "considerations . . . quite different." The case was doctrinally too far removed from the logical, if unexplained, elaboration of Brown in which the Court indulged in the 1955 and 1956 cases. Moreover, the controversy over the behavior of the Court had broadened menacingly since Gayle. The Court's full opinion in NAACP v. Alabama ex rel. Patterson suggests that summary treatment was a presumption after Gayle, but a presumption that could, and did, yield to other considerations. Summary treatment was a value that emerged slowly, was confined to eradicating Plessy in toto and to overseeing Brown II, and was discarded readily as circumstances became more complex. Unanimity in both result and opinion, on the other hand, remained a much higher value during the period. Yet in Cooper v. Aaron, slightly more than three months after NAACP v. Alabama ex rel. Patterson, even unanimity yielded. The irony is that unanimity was broken by one of the Justices who had worked hardest to preserve it from the outset, Mr. Justice Frankfurter.

V. Cooper v. Aaron (1958)

"There was but one event that greatly disturbed us during my tenure," wrote Earl Warren in his Memoirs, "and that was the aforementioned Little Rock case (Aaron v. Cooper) which gave Governor Faubus the national spotlight." Orval E. Faubus, Governor of Arkansas, had attained the

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618. To say that the Court employed a conscious strategy beyond unanimity—in the sense of "conscious activity and planning," as Wasby, D'Amato, and Metralier seem to suggest—proves too much. See S. WASBY, supra note 13, at 11 (defining "strategy"). The authors qualify their thesis: "Just as the justices' awareness of the Court's effects did not mean they always planned to have those effects, to say that the Court is engaged in strategy is not to say that strategy governs all its actions." Id. at 10. The problem, of course, is that exceptions to a strategic "plan" may alter or abrogate the plan depending on the frequency of the exceptions and the reasons for them. This problem renders treacherous the use of a notion of "strategy."

619. "[S]ummary treatment may, even more than another full opinion could, finally foreclose the segregation issue, because such matter-of-fact handling itself indicates that the Court thinks the matter well-settled and would regard any attempt to distinguish or limit its decision in the Segregation Cases as mere hair-splitting." Note, supra note 505, at 714 (footnote omitted).


national spotlight (by gift or desire) in September of 1957 when President Eisenhower sent federal troops to thwart the Governor’s attempt to prevent court-ordered desegregation of Little Rock Central High School.622 The Supreme Court became directly involved in the Little Rock crisis only in the last days of the 1957 Term. The Court’s response to Little Rock, neatly understated by Warren’s Memoirs, can be understood only against a detailed chronology of the litigation. Unlike the other cases considered here, Cooper v. Aaron moved very quickly after the district court gave judgment, and day-to-day reactions at the local level substantially affected the shape and tone of the Supreme Court opinion.

On February 20, 1958, the Little Rock School Board and the Superintendent of Schools, citing disruptions at Central High and the climate of local resistance, petitioned the district court for a two-and-one-half-year postponement of the desegregation order that was in effect.623 The Board’s position was that it had made “a prompt and reasonable start” toward desegregation in “good faith” as required by Brown II, but that “problems of administration” warranted a finding “that additional time is required to carry out the ruling in an effective manner.”624 The original plaintiffs, now respondents, argued that delay was foreclosed by another passage in Brown II: “But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.”625 On June 20, 1958, after an extensive hearing and months of deliberations, Judge Harry J. Lemley granted the petition for delayed implementation of the plan.626 Three days later Lemley declined to stay his order.627 Seeing a major setback in what was popularly becoming the test case for the implementation of Brown, the plaintiff black parents appealed to the United States Court of Appeals for the Eighth Circuit and simultaneously petitioned for certiorari in the Supreme Court. On the last day of the 1957 Term, the Supreme Court issued a three-paragraph per curiam order denying certiorari, but noting that the circuit court undoubtedly “will recognize the vital importance of the time element in this litigation, and that it will act upon the application for a stay or appeal in ample time to permit arrangements to be made for the next school year.”628 The Board scheduled the school year to begin September 2, 1958.629

The court of appeals convened en banc on August 4, one week after Arkansas Democrats had overwhelmingly nominated Faubus for a third term

623. Aaron v. Cooper, 163 F. Supp. 13, 17 (E.D. Ark.), cert. denied, 357 U.S. 566, reversed en banc, 257 F.2d 33 (8th Cir.), affirmed, 358 U.S. 1 (1958). The order, proposed by the School Board and approved by the district court, provided for desegregation in three phases: Grades 10-12, followed by Grades 7-9, and then Grades 1-6. The succeeding phases were to begin after successful implementation of the prior phases. Aaron v. Cooper, 143 F. Supp. 855, 859-60 (E.D. Ark. 1956) (approving desegregation plan by defendant school board), affirmed, 243 F.2d 361 (8th Cir. 1957).
625. Id. (quoting 349 U.S. at 300).
626. Id. at 32.
627. Id. at 13.
On August 18, the court of appeals reversed Judge Lemley by a 6-1 vote; three days later, however, the circuit court stayed its mandate to permit the School Board to petition for certiorari in the Supreme Court.

With the beginning of the school term approaching rapidly, the original plaintiffs applied to Mr. Justice Whittaker as circuit justice for a stay of the circuit court’s stay of mandate and also for a stay of Judge Lemley’s original order. Whittaker referred the application to the entire Court. Because the October 1958 Term was not scheduled to begin until October 6, Warren convened a Special Term, and on August 28 the Court heard oral arguments on the applications for a stay. Concluding that the application “necessarily involved consideration of the merits of the litigation,” the Court gave the School Board until September 8 to file a formal petition for certiorari and set oral arguments for September 11, with the United States invited to participate as amicus curiae.

Between the special hearing on August 28 and the oral argument on September 11, the record and issues in the case were supplemented in an unorthodox fashion. The Arkansas legislature, called into special session by the Governor on August 26, passed a “raft of bills” authorizing, inter alia, the Governor to close any public schools facing integration and to transfer funds earmarked for public schools to private, segregated schools. Faubus, satisfied that he held trump cards, did not sign the bills immediately, but awaited further developments. The Little Rock School Board, faced in another bill with procedures for recall of its members, asserted its authority against Faubus by delaying the opening of the school term until September 15. Attorney General William P. Rogers wrote letters on September 7, and released them publicly two days later, assuring the City Manager of Little Rock and the President of the School Board that the Department of Justice,
utilizing an expanded United States Marshal’s Office, was “ready to cooperate fully” with local officials to prevent violence “within the limits of our respective responsibilities.” The letters were filed in the Supreme Court by the Solicitor General and distributed to the Justices.

With the complexion of the case changing almost daily, the Supreme Court became increasingly uneasy. Justice Clark worried privately that the Special Term would appear to belittle the measured pace and local flexibility in desegregation promised in Brown II. Mr. Justice Frankfurter worried aloud, in a September 2 letter to Mr. Justice Harlan, that the case was developing in Chief Justice Warren’s mind into a constitutional fight between Faubus and the Court. Frankfurter, who was closely following newspaper editorials on the case, added that the courage of the School Board in standing up to Faubus “carries some important implications as to the elements of public opinion which are relevantly to be kept in mind by us in the procedures we adopt, when choice is open, and in how we express what we do.” Frankfurter explained that Southern moderates, such as the President of the School Board, Wayne Upton, and the Board attorney, Richard C. Butler,

ought to be won, and I believe will be won, to the transcending issue of the Supreme Court as the authoritative organ of what the

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642. Press Release, Department of Justice (Sept. 9, 1958), Box 325, HHB(LC).
644. At some point between August 28 and September 12, when the Supreme Court issued its per curiam order affirming the court of appeals, Mr. Justice Clark wrote in longhand two outlines for a statement dissenting from the judgment. There is no evidence that he ever had the outlines typed, much less printed. The more complete outline begins by noting that his dissent “is not to be construed in any respect whatsoever as a change in position from that taken in Brown. I adhere steadfastly to my vote there.” Clark, J., Draft Dissenting Opinion (no date), File 1 [Cooper] (Aug. Spec. Term 1958), TCC(UT). He went on to voice two concerns. “However, as I understood Brown, integration was not to be accomplished through push button action but rather by ‘deliberate speed.’” Id. The Justice’s primary concern appears to have been the accelerated consideration of the case:

I know of no reason why we should set aside all procedural rules in this case and still require other litigants to comply with the same. The case should be considered in its regular course, not by forced action. Of all tribunals this is one that should stick strictly to the rules. To do otherwise is to create the very situation that the Constitution prohibits, the existence of a preferred class.

For all practical purposes it makes no difference whether the petitioners enter integrated schools on September 8th or October 6th, the day we convene our next Term. But to strip from the respondent its right under the rules of the Court to the regular period for appeal means much in the administration of justice. “Equal Justice under Law” requires at least that much. I would let the case take its regular course.

Id.
646. See Letter from Frankfurter, J., to Warren, C.J. (Sept. 11, 1958), File 4052, Box 220, FF(LC) (“Washington Post was right the other day in its editorial, in characterizing the action of the School Board as courageous.”). Developments in the Little Rock case were the subject of repeated editorials. See Due Process, N.Y. Times, Aug. 30, 1958, at 14, col. 1 (decision in Little Rock case would be “another important document in the history of American democracy”); Before the High Court, N.Y. Times, Aug. 28, 1958, at 27, col. 1 (Court has chance to keep desegregation efforts going without further need for federal troops); A Historic Court Session, N.Y. Times, Aug. 27, 1958, at 28, col. 1 (future course of Southern desegregation depends on Supreme Court decision in Little Rock case).
Constitution requires. In everything we do, and how we do it, we must serve as exemplars of understanding and wisdom and magnanimity to the Butlers and Uptons of the South, as well as to the younger generation who not only recognize the inevitability of desegregation but want to further the acceptance in action of such inevitability.\footnote{648}

To put his thesis into action, on the morning of oral arguments Frankfurter wrote Warren and suggested “the desirability of having you say, when Mr. Butler gets to his feet, that the Court takes note of the fact of the Board’s vote not to open the schools until the 15th.”\footnote{649} Frankfurter, agreeing with the \textit{Washington Post} that the Board’s action was “courageous,” explained to Warren as he had to Harlan:

My own view has long been that the ultimate hope for the peaceful solution of the basic problem largely depends on winning the support of lawyers of the South for the overriding issue of obedience to the Court’s decision. Therefore I think we should encourage every manifestation of fine conduct by a lawyer like Butler.\footnote{650}

Before oral arguments on September 11, the Court met in conference for thirty minutes to discuss procedures at the special session, but did not adopt Frankfurter’s suggestion.\footnote{651} The most important feature of the argument was the change in the Court’s perception of the central issues of the case. In the district court the question had been whether delay was warranted by the disruption of the educational process that occurred after the Board’s “prompt” and “good faith” start at desegregation.\footnote{652} In the court of appeals the central question had become whether local opposition to desegregation, which caused the disruption, was a valid justification for delay under \textit{Brown II}.\footnote{653} In the Supreme Court the Chief Justice rhetorically asked Butler whether “the real issue before this Court is not just whether the School Board is frustrating the rights of these children, but whether the acts of any agency of the State of Arkansas are preventing them from exercising their constitutional rights?”\footnote{654} The Court, obviously concerned by the laws passed at the special legislative session,\footnote{655} pressed Butler to state what the Board planned to do during the two-and-one-half-year postponement that it sought.\footnote{656} Butler

\begin{itemize}
\item \footnote{648. \textit{Id.}}
\item \footnote{649. Letter from Frankfurter, J., to Warren, C.J. (Sept. 11, 1958), \textit{supra note} 646.}
\item \footnote{650. \textit{Id.}}
\item \footnote{651. Burton, J., Diary (Sept. 11, 1958), Box 4, HHB(LC) [hereinafter 1958 Burton Diary]. The argument has been published in 54 Kurland & Casper, \textit{supra note} 261, at 665-730, and has been rehearsed in J. Peltason, \textit{58 LONELY MEN} 189-90 (1961) and in S. Wasby, \textit{supra note} 13, at 179-77.}
\item \footnote{653. 257 F.2d at 37.}
\item \footnote{654. 54 Kurland & Casper, \textit{supra note} 261, at 674. Mr. Justice Brennan later asked Butler whether the actions of the Governor, legislature, and state judiciary violated the supremacy clause of the Constitution. \textit{Id.} at 685-86.}
\item \footnote{655. See \textit{Id.} at 680-82, 687-88 (Warren asked Butler about law “to frustrate the rights” of black school children).}
\item \footnote{656. \textit{Id.} at 677-79, 695.}
\end{itemize}
had no precise answer, although he suggested broadly that time was needed to
clear the air and perhaps to test the new state legislation. Frankfurter later
asked Butler:

Am I right to infer that you suggest that the mass of people in
Arkansas are law-abiding, are not mobsters; they do not like
desegregation, but they may be won to respect for the Constitution
as pronounced by the organ charged with the duty of declaring it,
and therefore adjusting themselves to it, although they may not like
it?

Butler replied, "Your honor, you have said it so much better and so much
more accurately and so much more concisely than I could that I adopt it
wholeheartedly."

The Court had few pointed questions for either of the
other lawyers who argued for the respondents, Thurgood Marshall and
Solicitor General Rankin.

The Court met in conference immediately after the oral arguments
concluded. Within thirty minutes, according to Burton's Diary, it was
"decided to affirm tomorrow [and] hand down [the] opinion later (by October
6). Frankfurter and Harlan to draft the order of tomorrow. Brennan to draft
opinion for Court."

On September 12, the Court issued a unanimous three-
paragraph per curiam order affirming the court of appeals and thereby
dissolving the stay.

Faubus reacted immediately to the Court's decision. He signed into law the
bills passed during the special session of the legislature and announced that he
was closing the Little Rock High Schools: "I have determined that domestic
violence within the Little Rock School District is impending."

Utilizing a provision of the school closing law, he called a special election for
September 27 on the question of whether all of the public schools in Little
Rock should be integrated. Faubus reassured the voters that a proseggregation
vote would be costless. He announced that if the electorate rejected

657. See id. at 678 (delay warranted "to let things . . . simmer down").
658. Id. at 703-04.
659. Id. at 704.
660. See id. at 711-17 (arguments of Marshall), 722-27 (Rankin).
661. 1958 Burton Diary (Sept. 11, 1958), supra note 651.
662. See 358 U.S. at 5 n.* (reproducing order). The order read in part:

The Court, having fully deliberated upon the oral arguments had on August 28, 1958, as
supplemented by the arguments presented on September 11, 1958, and all briefs on file, is
unanimously of the opinion that the judgment of the Court of Appeals for the Eighth Circuit
of August 18, 1958, 257 F.2d 33, must be affirmed. In view of the imminent commencement
of the new school year at the Central High School of Little Rock, Arkansas, we deem it
important to make prompt announcement of our judgment affirming the Court of Appeals.
The expression of the views supporting our judgment will be prepared and announced in due
course.

Id. Burton's Diary for September 12 noted, "We are anxious that the Little Rock opinion come down by
664. See 3 RACE REL. L. REP. 1048-49 (1958) (reprinting bill authorizing Governor to close schools and
call special election if court orders and federal troops enforce school integration).
integration, he would guarantee that the recently chartered Little Rock Private School Corporation would take over and operate the public school buildings on a fully segregated basis. Thus, the Governor promised, the voters could have segregation and tax-supported schools as well.\textsuperscript{666}

On September 17, Mr. Justice Brennan circulated a draft opinion under his signature for the Court.\textsuperscript{667} The draft, which was eighteen pages in length, meticulously catalogued the facts of the case, beginning with the original desegregation order of the previous year.\textsuperscript{668} It proceeded in restrained tones to declare that \textit{Brown} was binding on the State and its agencies under the supremacy clause and decisions of the Court.\textsuperscript{669} It then pointed out, using illustrations from lower court decisions, that the Board had a duty to adopt a detailed desegregation plan and suggested some content to "all deliberate speed."\textsuperscript{670} Although recognizing the difficulties facing the Board, the draft concluded that delay was not warranted.\textsuperscript{671}

Other members of the Court immediately sent Brennan numerous suggestions for changes in the draft.\textsuperscript{672} Like Warren in \textit{Brown II}, Brennan discovered that the unanimity of the Court meant that rather than having a free hand in drafting the Court's opinion, he was a supervising editor, accommodating the various views and suggestions of his colleagues. Two days after the first draft circulated, Mr. Justice Harlan produced an alternate draft for the final six pages of the opinion.\textsuperscript{673} The Court met in conference for two hours that day, Friday, September 19, to discuss the first draft and Harlan's proposal.\textsuperscript{674} It was decided that the opinion of the Court should be signed not by a single Justice, but by each member of the Court. Warren explained the decision in his Memoirs:

Mr. Justice Frankfurter called our attention to the fact that there had been a number of changes in the membership of the Court since Brown \textit{v. Board of Education}. He suggested that in order to

\textsuperscript{666} Id.
\textsuperscript{667} See Brennan, J., Draft Opinion (Sept. 17, 1958), Box 325, HHB(LC) or File 1 [Cooper] (Aug. Spec. Term 1958), TCC(UT). Because the Clark Papers are not yet catalogued, citations are to the Burton Papers only.
\textsuperscript{668} Id. at 1-8.
\textsuperscript{669} Id. at 9-11.
\textsuperscript{670} See id. 12-14 (specific timetable for prompt desegregation necessary for compliance with Brown).
\textsuperscript{671} See id. at 14-16 (delay justified only if proper motivation and good faith compliance). The final section noted that "the problem of securing the constitutional rights of the school children by individual law suits against each school board may be such as to warrant the attention of the Congress in formulating laws pursuant to § 5 of the Fourteenth Amendment." Id. at 16-17. This suggestion, even in passing, was too much at least for Clark, who noted on his copy of the draft and in his notes, "Leave out about Congress. Close with hoopla—remind nation what issues are involved here." Clark, J., Notes re Draft Opinion of Sept. 17, 1958 (no date), File 1 [Cooper] (Aug. Spec. Term 1958), TCC(UT) (handwritten list). Clark's notes on the first draft of the opinion also mention that "Black suggested more punch and vigor" in the portion of the opinion dealing with the supremacy clause issue. Id. Clark further suggested, "After admonishing State cannot evade by ingenuity etc. [discussion] should be enlarged to include any scheme supported by public funds though tagged private." Id.
\textsuperscript{672} See Clark, J., Notes re Draft Opinion of Sept. 17, 1958 (no date), supra note 671 (objecting to suggestion of congressional action and suggesting expanded discussion of supremacy clause); Letter from Burton, J., to Brennan, J. (Sept. 18, 1958), Box 325, HHB(LC) (making minor suggestions).
\textsuperscript{673} See Letter from Harlan, J., to Clark, J. (Sept. 19, 1958), Box 325, HHB(LC) (accompanying alternate draft).
\textsuperscript{674} 1958 Burton Diary (Sept. 19, 1958), supra note 651.
show we were all in favor of that decision, we should also say so in
the Little Rock case, not in a per curiam or in an opinion signed by
only one Justice, but by an opinion signed by the entire Court. I do
not recall this ever having been done before. However, in light of
the intense controversy over the issue and the great notoriety given
Governor Faubus' obstructive conduct in the case, we thought well
of the suggestion, and it was done.675

Brennan streamlined his opinion, omitting the details of the lower court
decisions and trimming his analysis of the School Board's position, and
circulated an unsigned second draft on Monday, September 22.676 Not yet
satisfied, Harlan submitted alternate concluding pages the next day.677
Harlan's cover letter emphasized that his "problem" with the second draft
was not of substance but "basically one of organization of the opinion."678

Brennan undertook a third draft and circulated it on Wednesday, Septem-
ber 24.679 The draft remained low-key but firm. For example, the discussion of
Marbury v. Madison,680 which reaffirmed that the Court's interpretation of
the fourteenth amendment in Brown was the supreme law of the land, noted:

This established the basic principle that the federal judiciary is
supreme in the exposition of the law of the Constitution. This
decision was not without its critics, then and even now, but it has
never been deviated from in this Court. The country has long since
accepted it as a sound, correct and permanent interpretation.681

On the same day that Brennan circulated his third draft, the Court met again
in conference to discuss the opinion.682

The morning of the conference, a banner headline in the Washington Post
announced: "Faubus Plan Put Up to Court."683 The Little Rock School
Board, reacting to Faubus' closing of the high schools and to the formation of
the Little Rock Private School Corporation, went into federal district court to
determine the constitutionality of the private school plan.684 The next day,
Thursday, September 24, attorneys for black students who were unable to
attend Central High when Faubus ordered it closed, also went before Judge
John E. Miller; they sought a temporary restraining order to prevent the
School Board from cooperating with the Private School Corporation.685
Miller, relying on a dubious jurisdictional ground, denied the motion in an

676. See Brennan, J., Draft Opinion (Sept. 22, 1958), Box 325, HHB(LC).
677. See Letter from Harlan, J., to Brennan, J. (Sept. 23, 1958), Box 325, HHB(LC) or File 4052, Box
220, FF(LC) (accompanying substitute pages).
678. Id.
679. See Brennan, J., Draft Opinion (Sept. 24, 1958), Box 325, HHB(LC).
680. 5 U.S. (1 Cranch) 137 (1803).
681. Brennan, J., Draft Opinion (Sept. 24, 1958), supra note 679; see Cooper v. Aaron, 358 U.S. 1, 18
(1958) ("This decision declared the basic principle that the federal judiciary is supreme in the exposition of
the law of the Constitution, and that principle has ever since been respected by this Court and the Country
as a permanent and indispensable feature of our constitutional system.").
682. 1958 Burton Diary (Sept. 24, 1958), supra note 651.
685. See id. at 875 (reprinting Petition for Order Against Leasing).
oral opinion Thursday afternoon—the first judicial action since the Supreme Court's per curiam order September 12.

The fourth and substantively final draft of Cooper v. Aaron circulated on September 25. The fourth draft retained the general analytical structure and reasoning of the previous two, but the tone had changed dramatically. Instead of beginning the opinion with an understated factual catalogue, the draft began:

As this case reaches us it involves questions of the highest importance to the maintenance of our federal system of government. It squarely presents a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's deliberate and considered interpretation of the United States Constitution.

The draft for the first time expressly pointed out the unanimity of those prior decisions supporting its analysis: Buchanan v. Warley, Marbury v. Madison, Abelman v. Booth, United States v. Peters, Sterling v. Constantin, and Brown. At the suggestion of Mr. Justice Harlan, the draft also noted for the first time:

Since the first Brown opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in the basic decision as to the inescapability and soundness of that decision. All the members of the Court, therefore, are together in steadfast adherence to the principles of the Brown decision which we here unanimously and wholeheartedly reaffirm.


687. See Brennan, J., Draft Opinion (Sept. 25, 1958), Box 325, HHB(LC).

688. Id. at 1.

689. Id. at 13-16.

690. 245 U.S. 60 (1917).

691. 5 U.S. (1 Cranch) 137 (1803).


693. 9 U.S. (5 Cranch) 115 (1809). Peters held that a state legislature could not annul the judgment of a United States court. 9 U.S. at 139. Perhaps because of Cooper v. Aaron, constitutional lawyers no longer discuss the case. During the period of "massive resistance," however, Peters was prominent. See generally Douglas, United States v. Peters, 5 Cranch 115, 19 F.R.D. 183 (1956) (address to the Judicial Conference of the Ninth Circuit Court of Appeals, June 27, 1956), reprinted as Interposition and the Peters Case 1778-1809, 9 STAN. L. REV. 3 (1956).

694. 287 U.S. 378 (1932). Like Peters, Sterling v. Constantin was revived in the legal debate over "massive resistance." In this case, the Texas governor was prevented from using military force to take oil wells in the face of a federal injunction prohibiting expropriation of the wells. Id. at 404; see Freund, Storm over the American Supreme Court, 21 MOD. L.R. 345, 352-53 (1958) (lecture at London School of Economics, March 5, 1958) (citing Sterling as example of federal-state tension in discussion of 1957 congressional effort to limit Supreme Court jurisdiction).

695. Brennan, J., Draft Opinion at 16 (Sept. 25, 1958), supra note 687. Harlan had suggested the
In the same paragraph that reaffirmed Brown, the draft stated for the first time, “Whatever historical practice may be offered in justification of racial segregation, state support of segregated schools with public management, funds or property cannot be squared with the Amendment’s command” of equal protection. The statement was clearly directed at the laws passed by the special session of the legislature and at the resulting plan for the Private School Corporation:

The Court’s critics were quick to point out that the issue of publicly supported private schools had not been presented to the Supreme Court by the Little Rock ruling of Judge Lemley. Therefore, the Supreme Court’s dictum that the use of public funds to operate segregated private schools is unconstitutional, was itself a violation of the taboo against advisory opinion. The Supreme Court’s defenders responded that the Court’s boldness conformed to long-established practice and that a more timid judicial attitude would have played right into the hands of those trying to evade the Constitution. Several Justices offered minor, if significant, changes in the wording of the opinion. Clark successfully suggested that the second sentence of the opening paragraph say that the case “necessarily involves” rather than “squarely presents” the claim by the Governor and legislature. Burton thought that the reaffirmation of Brown should state its “correctness” rather than its “inescapability.” With a number of other changes in phrasing, the draft was recirculated in final form on Monday, September 29. At noon on September 29, the Court convened for forty-five minutes to announce its opinion in Cooper v. Aaron. The unprecedented signing of the opinion by all nine Justices dramatically underscored the unanimity of the decision. As Burton’s Diary for September 29 notes, however, the members of the Court suspected that the last word on the case had not yet been said: “Nothing was said about any separate opinion[s] [to] follow, but we expect one to [be] filed by Frankfurter, who joins the Court’s opinion but wants to say something more. We were unable to dissuade him but did succeed in getting him not to announce it from the bench today.”

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Harlan, J., Substitute Draft (Sept. 23, 1958), Box 325, HHB(LC) or File 4052, Box 220, FF(LC).
699. See Burton, J., Notes on Sept. 25 Draft (no date), Box 325, HHB(LC) (handwritten notation).
700. See Brennan, J., Draft Opinion (Sept. 29, 1958), Box 325, HHB(LC).
701. 1958 Burton Diary (Sept. 29, 1958), supra note 651; see J. PELTASON, 58 LONELY MEN 190-91 (1961) (discussing announcement of opinion); S. WASBY, supra note 13, at 177-79 (same).
702. 1958 Burton Diary (Sept. 29, 1958), supra note 651.
recorded by Burton were confirmed the following Friday, October 3, when Mr. Justice Frankfurter circulated a draft of his concurring opinion among the other members of the Court.\textsuperscript{703}

The Court met in conference on Monday, October 6, the first day of the October 1958 Term, to discuss Frankfurter's plan to file his opinion.\textsuperscript{704} Two members of the Court, Black and Brennan, declared that if Frankfurter persisted, they would file a statement dissenting from his filing.\textsuperscript{705} The good humor of Mr. Justice Harlan helped to avoid a divisive public exchange. When Black and Brennan proposed their dissenting statement, Harlan distributed his own statement:

\begin{quote}
MR. JUSTICE HARLAN concurring in part, expressing a \textit{dubitante} in part, and dissenting in part.

I concur in the Court's opinion, filed September 29, 1958, in which I have already concurred. I doubt the wisdom of my Brother FRANKFURTER filing his separate opinion, but since I am unable to find any material difference between that opinion and the Court's opinion—and am confirmed in my reading of the former by my Brother FRANKFURTER'S express reaffirmation of the latter—I am content to leave his course of action to his own good judgment. I dissent from the action of my other Brethren in filing their separate opinion, believing that it is always a mistake to make a mountain out of a molehill. \textit{Requiescat in pace.}\textsuperscript{706}
\end{quote}

Harlan's draft statement apparently helped to defuse the disagreement. Frankfurter filed his opinion that morning, but it was not announced from the bench; no other statements were published.\textsuperscript{707}

\textsuperscript{703} See Frankfurter, J., Draft Concurring Opinion (Oct. 3, 1958), Box 325, HHB(LC).

\textsuperscript{704} Frankfurter, J., Note (Oct. 6, 1958), File 4052, Box 220, FF(LC) (apparently intended as diary entry).

\textsuperscript{705} The draft dissenting statement said:

The joint opinion of all the Justices handed down on September 29, 1958 adequately expresses the views of the Court, and [we] stand by that opinion as delivered. [We] desire that it be fully understood that the concurring opinion filed this day by Mr. Justice Frankfurter must not be accepted as any dilution or interpretation of the views expressed in the Court's joint opinion.

\textsuperscript{706} Harlan, J., Draft Statement (Oct. 6, 1958), File 4052, Box 220, FF(LC) or File 4052, Box 325, HHB(LC) or File 1 [Cooper] (Aug. Spec. Term 1958), TCC(UT) or File 7, Box 107, FF(HLS).

\textsuperscript{707} Mr. Justice Frankfurter described these events in an entry apparently intended for his Diary:

\begin{quote}
After my concurring opinion in \textit{Aaron v. Cooper} was circulated, Black and Brennan, JJ. felt it important that an opinion be filed dissociating themselves from what I wrote. This is what they decided on filing as a joint opinion and hoped for the other members of the Court to join them [see note 705 supra]. At a Conference held Monday, October 6, at 10 o'clock, the matter was fully discussed. I was ready to sign such a memorandum because to me it is impossible to conceive how anyone can reasonably find that my concurring opinion constituted a "dilution or interpretation of the views expressed in the Court's joint opinion," or in any wise intimated any disagreement with the Court's opinion or ever so remote a difference with any part of their opinion. It was the consensus of all the other six that it would be very unwise to file the proposed memorandum of Black and Brennan and after this sense of the meeting was expressed, Black and Brennan withdrew the memorandum.
\end{quote}

Frankfurter, J., Note (Oct. 6, 1958), supra note 704.
As described in Chief Justice Warren’s Memoirs, Frankfurter’s decision to break ranks, even in a short concurring opinion, “caused quite a sensation” within the Court.\(^7\) Since the 1950 Trilogy the Court had taken great pains to speak with one voice in the segregation cases. Opinions for the Court had been altered to accommodate differing views; less had been written than many members of the Court might have desired in some cases; and separate opinions had been strongly discouraged—particularly by Frankfurter himself. Unanimity had been a value since the 1950 Trilogy and had become a routine with Brown I. Why would Frankfurter, who had worked so hard to achieve and then maintain unanimity, be the first to write separately?

There is no surviving evidence now available that demonstrates when Frankfurter decided to file a separate opinion in Cooper v. Aaron.\(^7\) There is evidence in his own words, however, of why he decided to do so. Writing to his friend C.C. Burlingham on November 12, 1958, Frankfurter asked the question of himself and then answered it:

> Why did I write and publish the concurring opinion? I should think anybody reading the two opinions would find the answer. My opinion, by its content and its atmosphere, was directed to a particular audience, to wit: the lawyers and the law professors of the South, and that is an audience which I was in a peculiarly qualified position to address in view of my rather extensive association, by virtue of my twenty-five years at the Harvard Law School, with a good many Southern lawyers and law professors. I myself am of the strong conviction that it is to the legal profession of the South on which our greatest reliance must be placed for a gradual thawing of the ice, not because they may not dislike termination of segregation but because the lawyers of the South will gradually realize that there is a transcending issue, namely, respect for law as determined so impressively by a unanimous Court in construing the Constitution of the United States.\(^7\)

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\(^{709}\) Frankfurter began work on the concurrence, or at least on a memorandum that eventually formed the basis of his concurrence, well before Cooper v. Aaron was announced. On August 27, 1958, he circulated to the Conference a memorandum concerning the relevant facts and a memorandum of his own thoughts on the case (the second paragraph of which became the second paragraph of his concurring opinion). See Frankfurter, J., Facts Pertinent to No. 1 Misc., Aaron v. Cooper Prior to Proceedings Before Judge Lemley (Aug. 27, 1958), Box 325, HHB(LC); Frankfurter, J., Memorandum on Little Rock (Aug. 27, 1958), File 8, Box 107, FF(HLS).

\(^{710}\) Letter from Frankfurter, J., to C.C. Burlingham at 2 (Nov. 12, 1958), File 644, Box 37, FF(LC). Warren provided a similar account: “After the decision was announced, Mr. Justice Frankfurter informed us that he had many friends in the Southern states, and that he intended to reach them by writing and circulating a concurring opinion of his own, to be officially filed at a later date.” E. W ARREN, THE MEMOIRS OF EARL W ARREN 298 (1977); see Freedman, supra note 277, at 8-9 (criticism of separate opinion reflects misunderstanding of Frankfurter’s purpose to effectuate compliance by addressing argument to responsible Southern lawyers).
Although newspaper editorials construed the separate opinion as both a “blueprint for eventual solutions of integration questions”\textsuperscript{711} and as a tongue-lashing of Faubus,\textsuperscript{712} Frankfurter felt, based on private correspondence with Southern lawyers, that his action had been vindicated soon after the opinion was announced.\textsuperscript{713} Frankfurter also reported to Burlingham:

> Several of my colleagues who were dubious about the wisdom of my publishing that opinion have very generously said that in view of the returns that have come in, they were wrong and I was right in the expectation which led me to write what I did and to make public what I had written.\textsuperscript{714}

Neither the Court’s dramatically unanimous opinion nor Frankfurter’s separate opinion reversed the situation in Little Rock immediately. At the September 27 special election the vote was overwhelmingly against integration.\textsuperscript{715} On September 29, the day the Supreme Court announced its opinion, the School Board signed an agreement leasing the public schools to the Private School Corporation,\textsuperscript{716} but a temporary restraining order from the court of appeals countermanded the action.\textsuperscript{717} The Little Rock schools remained closed for the 1958-1959 school term despite the order of the Eighth Circuit Court of Appeals for Judge Miller to instruct the School Board to take “affirmative steps” to reinstate the desegregation plan.\textsuperscript{718} The schools were reopened for the 1959-1960 school term.\textsuperscript{719}

“Like poetry, then,” as Professor Bickel said of Brown, the Little Rock case “made nothing happen.”\textsuperscript{720} Cooper v. Aaron, despite the flexed muscle of the Court’s opinion, did not alone restore the process of desegregation in Little Rock.\textsuperscript{721} Progress there, and in other locations in the South, moved slowly and uncertainly for over five years in the lower federal courts before the Supreme Court again granted plenary consideration to a case involving school desegregation. In 1963, speaking unanimously in a six-page opinion by Mr. Justice Clark, the Court invalidated a desegregation plan providing for voluntary transfers between schools.\textsuperscript{722} The next decision by the Court

\textsuperscript{711} Frankfurter Speaks to the South, Philadelphia Inquirer, Oct. 8, 1958, at 28, col. 1.


\textsuperscript{713} See Letter from Frankfurter, J., to C.C. Burlingham at 2 (Nov. 12, 1958), supra note 710 (responses from Southern lawyers favorable); Letter from Frankfurter, J., to C.C. Burlingham at 1 (Nov. 20, 1958), File 644, Box 37, FF(LC) (same).

\textsuperscript{714} Letter from Frankfurter, J., to C.C. Burlingham at 2-3 (Nov. 12, 1958), supra note 710.

\textsuperscript{715} See J. Peltason, 58 Lonely Men 198 (1961) (19,470 opposed to integration, 7,561 in favor).

\textsuperscript{716} Id. at 199.

\textsuperscript{717} Aaron v. Cooper, 261 F.2d 97 (8th Cir. 1958) (per curiam), on remand, 169 F. Supp. 325 (E.D. Ark. 1959).

\textsuperscript{718} Id. at 108. See generally J. Peltason, 58 Lonely Men 193-207 (1961) (tracing Faubus’ battle to have school board operate private school corporation and prevent opening of integrated public schools).

\textsuperscript{719} J. Peltason, 58 Lonely Men 207 (1961).

\textsuperscript{720} A. Bickel, The Least Dangerous Branch 245 (1962).

\textsuperscript{721} The Court later held that Cooper v. Aaron had settled the then much-mooted question in the South of the constitutionality of “interposition.” See Bush v. Orleans Parish School Bd., 364 U.S. 500, 501 (1960) (per curiam) (rejecting state claim that it had interposed itself in field of public education and had exclusive control in area). The treatment of the supremacy clause issue in Cooper was not without critics. See P. Kurland, Politics, the Constitution, and the Warren Court 116-18 (1970) (Court carried away with own sense of righteousness); Gunther, supra note 510, at 25 n.155 (Cooper misapplied Marbury to achieve judicial exclusiveness on constitutional questions).

involving school desegregation, *Griffin v. County School Board* in 1964,723 produced the first dissenting votes on any aspect of the issue. Mr. Justice Clark and Mr. Justice Harlan appended a one-sentence dissent to the Court's opinion to record their disagreement with that part of the judgment empowering the federal courts to order the reopening of public schools in Prince Edward County.724 “But,” as one author has recently stated, “probably because of the tradition of unanimity in school desegregation cases, [Clark and Harlan] declined to elaborate.”725

*Cooper v. Aaron* provided little doctrinal guidance for the Court's future deliberations in school desegregation cases. Indeed, *Cooper* began as a case involving the interpretation of *Brown II* but was transformed by events both inside and outside the courtroom to such an extent that it is not too much to say that “the Court's most searing modern statement in a racial case was in behalf of its own power.”726

**VI. Conclusion**

One of the persistent myths about the Warren Court is that Earl Warren was responsible for achieving unanimity in the Segregation Cases in 1954. The internal evidence of the Supreme Court's deliberations from 1948 through 1954 confirms what Philip B. Kurland has argued before: unanimity in 1954 was the ultimate step in a gradual process that had begun with the 1950 Trilogy.727 In those cases both Vinson and Burton, drawing on the explicit desire for unanimity articulated by Black and Frankfurter, took pains to accommodate every substantial change in the opinions suggested by their colleagues, even well after a clear majority, perhaps even a unanimous Court, had agreed on both the results and the opinions.

723. 377 U.S. 218 (1964). *Griffin* held that the Prince Edward County school board had denied black school children equal protection of the laws by closing the public schools while giving tuition grants and tax concessions to white children in private segregated schools. *Id.* at 232.


725. J. Wilkinson, supra note 567, at 324 n.51.


The giant substantive step from the 1950 Trilogy to Brown required time—time for the Court to come to grips with the larger issues and for individual Justices to work out their reservations over a decision requiring desegregation and its implementation. After the first argument of Brown in 1952, time was also needed to learn what position the United States, which had been important in the area since 1948, would take in a newly elected administration. Once decided, the 1950 Trilogy exercised a kind of hydraulic pressure on the reservations expressed in 1950 by Reed and Clark—two of the Justices most uncomfortable with broad-based challenges to segregation. If Vinson could have overcome his concern with the timing and scope of relief in Brown and its companion cases, it is probable, as Professor Kurland has suggested, that Vinson—not Warren—could have authored the unanimous decisions in 1954.728

But why did the Court go to such lengths to remain unanimous in subsequent cases involving Brown and its fall-out? The answer is three-fold. First, the Court continued to feel, as Black and Frankfurter had said in 1950, that unanimity would enhance the acceptability of desegregation decisions. Second, a united front provided a more solid defense to critics who attacked the Court over not only the Segregation Cases, but also other expansive decisions involving civil liberties. Third, and perhaps most importantly, unanimity both masked the uncertainty within the Court over how to police Brown and contained what otherwise could have erupted into severe and debilitating division over the precise meaning of the revolutionary decision.

The achievement of unanimity in Brown and afterward only partially accomplished the desired objectives. In fact, unanimity—and especially summary treatment—operated in time to obscure rather than enhance the Court's decisions in the area. Indeed, the Court's continuing desire to be united outweighed its responsibility to be persuasive on enough occasions729 that it has been recently asked if, on balance, unanimity was worth the price.730 The question, which is now compelling in hindsight, is anachronistic: to the judges faced with Brown and its aftermath, the costs of disunity were much too high to accept.

730. See Beiser, supra note 6, at 1950-51 (divided Court would have produced thorough discussion of issues and strong justification for majority position).
APPENDIX A. MEMORANDUM ON Sweatt AND McLaurin
FROM MR. JUSTICE CLARK TO THE CONFERENCE (APRIL 7, 1950)*

Since these cases arise in “my” part of the country it is proper and I hope helpful for me to express some views concerning them:

1. The “horribles” following reversal of the cases pictured by the States, excepting Oklahoma, are highly exaggerated. There would be no “incidents,” in my opinion, if the cases are limited to their facts, i.e., graduate schools. Oklahoma was frank enough to admit this. Its concern was the extension of the doctrine to the elementary and secondary schools. Certainly this is not required now. I would be opposed to such extension at this time and would vote against taking a case involving same. Perhaps at a later date our judicial discretion will lead us to hear such a case.

2. The issue of Plessy v. Ferguson’s application to these cases must be met. The only way to avoid it in Sweatt is to remand for findings re the new law school; and that would really be deciding against petitioner’s contention that however similar the two schools may be, they can’t be “equal” when segregated.

3. I think Sweatt should be reversed. There are two courses:
   (a) Overrule Plessy v. Ferguson, which would carry with it subsequent cases based on that doctrine. I am opposed to this course.
   (b) Hold Plessy not applicable because it does not involve education; and state that the cases cited therein are not apposite to the Sweatt case. Distinguish Gaines as holding the State cannot avoid its obligation by furnishing funds for its Negro citizens to attend out-of-state institutions. Gong Lum involved elementary schools and merely held the State was not obliged to furnish separate facilities for each race. Fisher and its companion Sipuel are not controlling for the question of “separate but equal” was excepted in the Fisher opinion. [Footnote omitted]

There are good reasons for us not to extend the Plessy doctrine to graduate schools. I am opposed to such an extension. Limitation to graduate schools ignores, of course, the influence of segregation upon children’s minds when they are four or five years old; but I see no reason why we should not concern ourselves here with the equality of education rather than social recognition. These are, after all, education cases. And it is entirely possible that Negroes in segregated grammar schools being taught arithmetic, spelling, geography, etc., would receive skills in these elementary subjects equivalent to those of segregated white students, assuming equality in the texts, teachers, and facilities.

But it is obvious to me that the same would not apply to graduate schools. There are many reasons: (1) white schools have higher standing in the community as well as nationally, which means much to the graduate professional man; (2) the older and larger college has more alumni, which gives the graduate more professional opportunities; (3) the larger and older

*File 4029, Box 218, FF(LC) or TCC(UT).
school attracts better professors; (4) competition among schools is much keener in the older and more established school, thus affording a wider professional competition; (5) the larger and older institution attracts a cross section of the entire State in its student body—affords a wider exchange of ideas—and, in the combat of ideas, furnishes a greater variety of minds, backgrounds and opinions which is most important in the professions; (6) it takes years and years to establish a professional school of top rank, affording law reviews, competitions, medals, societies, etc., which a Negro school would never attain; (7) acquaintance is important in the professions and segregation prevents it, thus depriving the Negro of many state-wide opportunities. These and other reasons are those which I am sure have led all but nine of the States to abandon the "separate but equal" doctrine at the graduate level.

4. McLaurin can, I think, be handled rather summarily. Some of the reasons for reversing Sweatt—particularly the seventh listed above—apply to McLaurin. Besides, once a Negro has been admitted he is obviously handicapped psychologically by being subject to all sorts of restriction. Discrimination in the cafeteria, library and classroom would certainly hurt one's ability to concentrate on the business at hand. Alternatively, reversal could be placed upon the ground that there is no evidence of the reasonableness of the classification based on race—there is no contention that any disturbance would result if the rules were not abrogated. This latter ground would, of course, leave the door open to contentions by other States that disorders would result—and perhaps even encourage the staging of these disorders.

I join with those who would reverse these cases upon the ground that segregated graduate education denies equal protection of the laws. I would follow the lead of the Congress in the only graduate school which it supports in the District of Columbia, Howard University, which is not segregated. As to the elementary schools in the District, I leave them to the Congress and the Fifth Amendment, at least for the present.

If some say this undermines Plessy then let it fall as have many Nineteenth Century oracles.
Chief Justice:

Harlan's dissent [in Plessy v. Ferguson] does not refer to schools. Then later he wrote Cumming [Cumming v. Richmond County Bd. of Educ.].

Hard to get away from long continued interpretations of Congress ever since the Amendments—and at that time. As to having mixed classes I think Congress would have power for D.C. or the States. They may try it for D.C. but not States.

In regard to S[outh] C[arolina] you have equal facilities. Took some time to make them equal. In Sipuel and McLaurin we said right was personal. More serious when you have large numbers. We can't close our eyes to problems in various parts of country altho “hotter” in some. It is said we should not consider this but I can't throw it all off. When you face the complete abolition of public schools in some areas then it is most serious. Boldness is essential but wisdom indispensable.

Delaware: Not equal. Same as Va. But history of S.C. case shows what time can do. Hard to say where you have large % colored then cannot be equal.

Question in S.C. + Kansas finding it is detrimental to have segregation—but Va. is contrary. Commingling would bring on humiliation etc.

Black:

Not sure Congress is barred by same limitations as States.

1. Segregation per se violation? To so hold would bring drastic things—S.C., etc. One of wor[st] features is courts are put on battle front. Don't believe in injunctions.

At first blush I would have said it was up to Congress, but if we can declare confiscation or other laws unconstitutional then we can segregation. I'm compelled for myself to believe the idea of segregation is because negro is inferior. Nor can I escape that the Amendments had as their basic purpose the abolition of such castes. That is what is behind opposition now.

If I have to meet it, the purpose of the law is to discriminate on account of color—that the Amendments were designed to stop it—unless the long line of decisions barred this course. I don't think Congress went as far as they thought Amendments went.

I have to vote that way.

On equal + separate if that is going to be rule then wide latitude should be given findings in State Courts.

Reed:

*TCC(iJT). Clark's notes are not labeled or dated; they presently are filed not in the file for the Segregation Cases but in the McLaurin file (Nos. 34 & 44, Oct. Term 1949). I have retained Clark's paragraph style and his abbreviations; some punctuation has been added for readability. Clark made no record of his own remarks, a common practice for him and for other Justices whose conference notes for various cases I have examined.
I approach from different view. Negroes have not been assimilated. There has been some amalgamation of the races as shown by the counsel who appeared here. There is a reasonable body of opinion that segregation is beneficial to both. *Think of advancement*: transportation, voting, FEPC, etc.

We don't have same problems as South (in Ky.). Facilities are not equal in Ky. but better than they are in South. If legislature is to pass on questions then that is place for it to be done. I agree Constitution *not fixed*.

Should allow time for equalizing the opportunity—the facilities. Maybe take 10 years to accomplish in Va.

I would uphold *separate + equal*.

Frankfurter:

D.C. case raises different questions.

I would set down for re-argument. The D.C. is nation's capital. I am prepared today to vote that segregation in D.C. *does* violate due process. *Intolerable* that D.C. would permit segregation. I deprecate any activities by force of law *that might* be used. Should hold all cases. The social gains of having them accomplished with executive action would be enormous. Set them down very specific questions:

1. manner in which it would be carried out—etc.

As to States—can't take questions *as sociological*. How do we know what the framers of Amendments meant? You can't fairly say, "Yes, these fellows meant to abolish segregation" or [vice] versa. *Highly desirable* to set down cases for reargument, *say 1st March*.

Douglas:

Cases very simple for me. I can't avoid conclusion Hugo has reached in State cases—same in D.C. Would not mind setting down DC cases—*but not others*—*not rush pronouncements*.

Jackson:

Don't take any vote now. Start as a lawyer. Nothing in text that tells me this is unconstitutional (Marshall's briefs starts + ends with sociology) and nothing in legislative Acts. *Not conscious* of the problem until I came here. We had segregation in [illegible].

If can work it out so we can say segregation "bad"—under approval of court + support of Congress—*and must* be done in certain period.

Burton:

We have Constitution and must be guided by those. We must not depart. But we can use time.

Minton:

We have chiseled away "*separate but equal*" doctrine. Can't classify as to race bad—*invidious*. This is a race that grew up in trouble.
MEMORANDUM ON THE DISTRICT OF COLUMBIA CASE

This case challenges the validity of segregation in the public schools of the District of Columbia. The petitioners, minors of the Negro race, allege that such segregation deprives them of due process of law under the Fifth Amendment. They were refused admission to a public school attended by white children solely because of their race. They sought the aid of the District Court for the District of Columbia in obtaining admission. That court dismissed their complaint. We granted a writ of certiorari before judgment in the Court of Appeals because of the importance of the constitutional question presented. 344 U.S. 873.

We have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the States from maintaining racially segregated public schools.1 The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the States. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. Although equal protection has been the basis of most decisions involving racial discrimination,2 we have previously recognized that discrimination may also constitute a denial of due process of law.3 As long ago as 1896, this Court declared the principles "that the Constitution in its present form, forbids, as far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race."4

Unreasonable and arbitrary classifications may be a denial of due process of law. Classifications based solely upon race must be closely scrutinized, since they are contrary to our traditions and hence constitutionally suspect.5 Thus, in Buchanan v. Warley, 245 U.S. 60, this Court held that a statute which limited the right of a property owner to convey his property to a person of another race was, as an unreasonable discrimination, a denial of due process of law.

This Court has applied similar reasoning to analogous situations in the field of education, the very subject now before us.6 Thus children and parents...
are deprived of the liberty protected by the Due Process Clause when the children are prohibited from pursuing certain courses, or from attending private schools or foreign-language schools. Such prohibitions were found to be unreasonable, and unrelated to any legitimate governmental objective. Just as a government may not impose arbitrary restrictions on the parent’s right to educate his child, the government must not impose arbitrary restraints on access to the education which the government itself provides.

Although the Court has not defined “liberty” with any great precision, that term is not restricted to mere freedom from bodily restraint. The essence of liberty is the full range of conduct which the individual is free to pursue. We have no hesitation in concluding that segregation of children in the public schools is a far greater restriction on their liberty than were the restrictions in the school cases discussed above. Segregation in the public schools places the brand of inferiority on the minority group, saps them of their motivation to obtain an education, and thus hampers them throughout life. Segregation in public education is not reasonably related to any proper governmental objective, and it imposes on these children a burden which constitutes an arbitrary deprivation of liberty in violation of the Due Process Clause.

Due process is not a static concept: “It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits of the essentials of fundamental rights.” We have declared that the Constitution prohibits the States from maintaining racially segregated public schools. It would be unthinkable that the Federal Government should have a lesser duty to protect what, in our present circumstances, is a fundamental liberty. Accordingly, we hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.

For the reasons set out in Brown v. Board of Education, this case will be restored to the docket for reargument on Questions 4 and 5 previously propounded by the Court. 345 U.S. 972.

510; Farrington v. Tokushige, 273 U.S. 284.
7. Meyer v. Nebraska, supra note 6, at 399.
APPENDIX D. MEMORANDUM OF MR. JUSTICE FRANKFURTER ON Naim v. Naim (Read at Conference, November 4, 1955)*

So far as I recall, this is the first time since I've been here that I am confronted with the task of resolving a conflict between moral and technical legal considerations. If the question came up on a petition for certiorari, I would have no hesitation in denying the petition. Not because I think petitions for certiorari may be granted or denied as a matter of caprice, but because due consideration of important public consequences is relevant to the exercise of discretion in passing on such petitions.

But in this case we have an appeal, and Congress has provided for appeals in a few categories of cases including the one here. If it were the settled practice of the Court, since the Judiciary Act of 1925 came in force, that jurisdiction is to be taken as a matter of course where an appeal formally appears, I would bow to the inevitable. But this is not the Court's established practice. The opposite is the practice. I have not made a count of it, but my impression is strong that numerically we do not take most of the cases which are formally appeals. Indeed, so strong is this tendency that it has been frequently said, both at the Conference table and by learned commentators, that the Court's practice has assimilated appeals to certiorari.

The criteria for determining whether a question raised by the jurisdictional statement is so obviously "substantial" as to preclude an exercise of discretion, are of course not self-defining or automatically determinative. There have been a number of striking instances in which this Court on successive occasions declined to entertain an appeal, where eventually the question was entertained and was found to present a claim having constitutional validity. This was true of the question decided in Lovell v. Griffin, 303 U.S. 444; it was true of the Flag Salute issue. See Board of Education v. Barnette, 319 U.S. 624, 664.

I do not imply that the question in this case is obviously insubstantial. I do say that a Court containing Holmes, Brandeis, Hughes, Stone and Cardozo would only the other day have dismissed the appeal as such. And I further say that even as of today, considering the body of legislation involved, both North and South, and the reach of the problem, namely, divers assumptions by legislatures affecting the regulation of marriage, indicate such a momentum of history, deep feeling, moral and psychological presuppositions, that as of today one can say without wrenching his conscience that the issue has not reached that compelling demand for consideration which precludes refusal to consider it.

Even if one regards the issue, as I do, of a seriousness that cannot be rejected as frivolous, I candidly face the fact that what I call moral

*File 4040, Box 219, FF(LC). At the top of the memorandum, in Frankfurter's hand, a notation reads: "Read at Conference on Friday, Nov. 4, '55, as my attitude toward No. 366, O.T. 1955, Naim v. Naim." The final paragraph of the memorandum is, unlike the balance of the memo, not typed but written in Frankfurter's hand.
considerations far outweigh the technical considerations in noting jurisdiction. The moral considerations are, of course, those raised by the bearing of adjudicating this question to the Court's responsibility in not thwarting or seriously handicapping the enforcement of its decision in the segregation cases. I assume, of course, serious division here on the merits. For I find it difficult to believe that there is a single member of this Court who does not think that to throw a decision of this Court other than validating this legislation into the vortex of the present disquietude would not seriously, I believe very seriously, embarrass the carrying-out of the Court's decree of last May.

The foregoing assumes that the main issue in this case is presented of the record free from the subsidiary or preliminary questions. Such is not my reading of the record. I believe the contrary is true.