BROWN V. BOARD OF EDUCATION OF TOPEKA: ANATOMY OF A DECISION

by

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PREFACE

Brown v. the Board of Education of Topeka, decided by the Supreme Court in May, 1954, was one of the most controversial opinions in the long history of the Court. Chief Justice Earl Warren called it one of the most significant rulings of his tenure. This decision which outlawed public school segregation, greatly accelerated a major social revolution that is still in progress. Closely involved with the principle issue were problems connected with some of the basic conflicts in America. The power struggle between state and national governments, judiciary and legislature, and majority and minority groups was clearly apparent throughout the school segregation cases. The importance of the Brown decision lies as much in the manner in which these secondary issues were resolved as in the disposition of the primary problem.

The purpose of this study was to attempt a narrative history of why and how this decision was made. Prior to 1954 there were indications that the Court could have decided otherwise. Despite the certainty of hindsight, there was no clearcut inevitability about the outcome. The procedure followed in this study was to examine the original records of the four trial courts, the oral argument before the Supreme Court in 1952 and 1953, the written briefs of the parties to the cases, the primary decision in May, 1954,

and related earlier cases. A series of personal interviews with some of the individuals closely involved, including three Justices of the Supreme Court, contributed valuable insights. In addition much of the secondary literature on the decision was examined in order to evaluate the most significant interpretations of the key issues in the school segregation cases. Although the Brown opinion has been the subject of a voluminous body of writing, there has been no previous effort to develop a synthesis of the many interpretations concerning it. Most of this literature can be found in law journal articles and social science studies. Two book-length studies approach the school segregation cases from different viewpoints. Albert P. Blaustein and Clarence C. Ferguson, Jr., in Desegregation and the Law (New Brunswick, N.J., 1957), focus on legal theory and history, while Daniel M. Berman, in It Is So Ordered: The Supreme Court Rules on School Segregation (New York, 1966), emphasizes Supreme Court procedures.

Because the journal literature is so extensive, it was necessary to limit this study to the May 1954 decision. Furthermore the reaction to and the consequences of the Brown decision are other aspects which have not yet been thoroughly examined.

I am deeply indebted to a number of people for whom there is no adequate way of expressing my appreciation: to Professor Donald R. McCoy for his perceptive and stimulating suggestions as well as his patient support and encouragement

without which this study would never have been completed; to Professor Paul Wilson of the University of Kansas School of Law who generously made available his extensive collection of legal briefs relating to the school segregation cases; to Professor Hugh Speer of the University of Missouri-Kansas City who shared much valuable source material gathered during his study of the Brown case; to Justice Hugo L. Black who cordially spoke with me at some length about the Brown opinion; to Justices Charles E. Whittaker and Tom C. Clark who graciously granted interviews; to Charles Scott, attorney for the blacks in Topeka, Kansas, who provided background information on the local NAACP chapter and its legal tactics; to Helen Branyan, principle typist, for her patience with difficult copy; to several good friends who generously volunteered typing time for initial drafts--Ruth Crawford-Brown, Ann Davis, Jean Milstead, and Eve Atkinson; and finally to my family for indulging my long retreat behind a barricade of books.

CHAPTER I

INTRODUCTION

Precisely at noon on Monday, May 17, 1954, nine black-robed men stepped from behind ceiling-high red velvet curtains to take their seats in the Supreme Court of the United States. A few minutes later, as Chief Justice Earl Warren started to speak, word reached the press room that the decision in Brown v. Board of Education of Topeka was being read.[1] The reporters rushed pell-mell through the corridors arriving in time to hear the historic pronouncement:

> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. . . . Segregation of white and colored children in public schools has a detrimental effect . . . the impact is greater when it has the sanction of law . . . it is interpreted as denoting the inferiority of the Negro group . . . and affects the motivation of a child to learn. . . . We conclude that in the field of public education the doctrine of "separate but equal" has no place.[2]

State-imposed segregation of the races in the public schools of the United States was henceforth unconstitutional.

Across the land there was both rejoicing and

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[1]Walter White, How Far the Promised Land (New York, 1955), p. 34.

[2]Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

tearful laments. Although the decision had been expected all that spring, there had been no certainty as to the outcome. Tension was relieved by a torrent of praise and abuse of the decision. "The most decisive ruling on human equality since the first Negroes arrived in North America in 1619," wrote Walter White, executive director of the National Association for the Advancement of Colored People which had furnished legal counsel for the cases.[3] "Judicial enlightenment," applauded social scientist Kenneth B. Clark, one of the witnesses testifying in the cases.[4] "Momentous . . . a boon to the democratic principles upon which this country was founded," commented history professors Merle Curti, Arthur M. Schlesinger, Sr., and Avery O. Craven in a joint statement.[5]

Disapproval was equally vehement, understandably, in the South but also at a later date in the more tempered tones of national scholarly journals. "The end of Constitutional government," proclaimed Senator James O. Eastland of Mississippi.[6] "Bloodstains on white marble steps,"

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[3]White, p. 29. The National Association for the Advancement of Colored People will hereinafter be referred to as the NAACP.

[4]Kenneth B. Clark, "Desegregation: An Appraisal of the Evidence," Journal of Social Issues, Vol. 9 (1953), 3.

[5]Lucius J. Barker and Twiley W. Barker, Jr., Freedoms, Courts, Politics: Studies in Civil Liberties (Englewood Cliffs, New Jersey, 1965), p. 179.

[6]Albert P. Blaustein and Clarence C. Ferguson, Jr., Desegregation and the Law (New Brunswick, New Jersey, 1957), p. 135.

wrote a Jackson, Mississippi, news editor who feared mongrelization of the human race as the dire consequence of mixed schools.[7] Judge Tom P. Brady of the Mississippi Circuit Court called the day of the decision, "Black Monday" and denounced the NAACP as "drugged with the Lotus of Socialism."[8] Many Southern political leaders were openly insistent that the modern social science authorities cited by the Supreme Court in its decision were Communist-affiliated and ergo the Supreme Court itself under a cloud of suspicion.[9]

Criticism outside the South was more legalistic, less openly racist. Professor Edmond Cahn, New York University School of Law, expressed his distaste that the constitutional rights of Negroes should rest on such a flimsy foundation as the social science evidence in the cases.[10] Ralph T. Catterall in a 1956 article for the American Bar Association Journal was dismayed that the Court would resort to what he called the outmoded doctrine

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[7]Senator Eastland requested and received permission to incorporate an editorial entitled "Bloodstains on White Marble Steps" from the Jackson (Miss.) Daily News, May 18, 1954 in Congressional Record, 83rd Cong., 2d Sess., 1954 A3712.

[8]Blaustein, p. 7.

[9]Speech of the Hon. James O. Eastland of Mississippi in the Senate of the United States, Thursday, May 26, 1955. U.S. Gov. Printing Office, Washington, 1955.

[10]Edmund Cahn, "Annual Survey of American Law," 30 New York University Law Review 150 (1955).

of natural law plus the "eternal verities as revealed by Gunnar Myrdal" to outweigh the words written in the Constitution. He felt the decision destroyed the concept of the Constitution as a solemn and binding contract.[11]

After a year's interval in which the South waited to see how the high court would implement the decision, Southern official and private groups proposed a variety of plans including superficial compliance, financial non-support of public education, closing of the public schools and opening of private schools, interposition, and even amendments to the federal constitution.[12] Seventeen Senators and seventy-seven Representatives presented what was popularly called the "Southern Manifesto," formally entitled a "Joint Declaration of Constitutional Principles" in both Houses of Congress on March 12, 1956. In this resolution the action of the Supreme Court in the school segregation cases was called "an exercise of naked judicial power which substituted their personal political and social ideas for the established law of the land. . . ." Believing that the decision was not justified by either the language or the

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[11]Ralph T. Catteral, "Judicial Self-Restraint: The Obligation of the Judiciary," 42 American Bar Association Journal 829-833 (1956).

[12]H. Frank Way, Liberty in the Balance (New York, 1964), p. 8. See also Robert A. Leflar and Wylie H. Davis, "Devices to Evade or Delay Desegregation," 67 Harvard Law Review 377-429 (1954). Interposition is the extra-legal doctrine which asserts the right of a state to "interpose" its authority against what the state believes is a violation of the federal constitution--that is against an act of the federal government, in the Brown case, an act of the federal judiciary.

history of the Fourteenth Amendment, the Congressmen insisted that "the original Constitution does not mention education. Neither does the Fourteenth Amendment nor any other amendment."[13] This, of course, was true but it begged the whole question of interpreting a document deliberately expressed in broad generalities.

Although the Supreme Court had spoken, it required effective assistance from both the executive and legislative branches of government to realize results. Unfortunately for the aspirations of the Negroes, the Eisenhower administration affected a posture of deliberate non-interference and studied silence. Not until the incidents at Little Rock, Arkansas, in 1957, did President Eisenhower take strong affirmative action by directing federal troops to enforce the court-ordered school integration. Congress was also somewhat laggard in action. Finally in 1957, and then again in 1960, 1964, and 1965, Congress passed legislation to protect school desegregation from obstruction tactics and to halt interference with Negro voters in the South.[14] These laws gradually extended the powers of the

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[13] Congressional Record, 84th Cong., 2d Sess., 1956, Part 4, 4515-4516. Introduced by Representative Howard W. Smith of Virginia; the resolution was apparently merely read in the House and never voted on, inasmuch as it was never numbered. A similar resolution was introduced at the same time in the Senate.

[14] William Loren Katz, Teachers' Guide to American Negro History (Chicago, 1968), p. 163.

United States Attorney General in civil rights cases, provided restrictions on federal funds to government-associated projects that failed to eliminate discrimination, and restricted labor unions, businesses and public accommodations in practicing racial discrimination.

Although the promised land was not yet in sight, as ensuing events failed to match hopes, the decision nevertheless was a turning point. Expectations grew and patience diminished while the wheels of the Negro Revolution started turning.[15] One observer of the Washington scene wrote that the decision precipitated the Second American Revolution by creating a climate which encouraged Negroes to protest and awakened a complacent white society to the meaning of racism. Although the revolution began in the South, by the end of the decade it had spread to the North.[16]

It is difficult to comprehend the many facets of this extremely complex decision. First of all, Brown v. Board of Education of Topeka represented a consolidated opinion on four cases coming up from the states of South Carolina, Kansas, Virginia, and Delaware. The fifth and related case arising in the District of Columbia was called up by the Supreme Court for oral argument along with the other cases before it could be heard in the federal district court.

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[15]Louis Lomax, The Negro Revolt (New York, 1963) and Elridge Cleaver, Soul on Ice (New York, 1968), passim.

[16]Anthony Lewis, Portrait of a Decade (New York, 1964), p. 35.

Therefore there never was a trial on the facts of the District of Columbia case. Furthermore it was assigned a separate opinion because of the fact that the federal rather than a state government was involved.[17] Although the facts differed, the question of law was the same in the four state cases--was state-imposed segregation of the races in the public schools constitutional in light of the "equal protection of the laws" clause of the Fourteenth Amendment? In all instances, Negro parents sought to enjoin enforcement of the state school segregation laws. That the Kansas case contributed the title stemmed from the purely fortuitous circumstance that the appeal in Brown v. Board of Education of Topeka reached the Supreme Court earlier than the others.[18]

A second significant fact is that over three years elapsed between the time when the first case appeared on the Supreme Court docket and the final implementation decision of the Court in May, 1955. Unquestionably the Court itself was acting "with all deliberate speed." The first decision of the Supreme Court, issued on June 8, 1953, was actually no decision at all but an order for reargument in the following fall term on five questions concerning the meaning of the Fourteenth Amendment and the method of enforcing a

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[17] Bolling v. Sharpe, 347 U.S. 497 (1954).

[18] Paul E. Wilson, "Brown v. Board of Education Revisited," 12 Kansas Law Review 507 (1964).

desegregation decision if such should be decided. The real decision on the merits of the cases was given on May 17, 1954, and marked the legal end of state-imposed racial segregation in the public schools. Then the Court ordered further argument in the next term on the method of implementing the decision. The final decision on the question of relief, that is, on the matter of guidelines and procedures, was announced on May 31, 1955.

The principals in the segregation cases representing the parties, their attorneys, and members of the federal and state judiciary, numbered in the hundreds. Among them were Linda Carol Brown, an eight year old Negro girl in Topeka, Kansas, forced to travel a long and dangerous route through a busy railroad switchyard on her way to school. Esther Brown, a middle class white housewife in Merriam, Kansas, played an unexpectedly helpful role in the Negro cause. Impatient black parents in South Carolina decided to take matters in their own hands after repeated put-offs by local school officials. In nearby Virginia, angry Negro high school students went on a two-week strike in the spring of 1951 to dramatize the generally bad conditions of their buildings. In Delaware an elementary school girl was refused transportation on an all-white school bus. Meanwhile in the District of Columbia several black junior high school students decided to fight the segregation issue head-on, even though the Negro school system was substantially equal to the all-white schools.

This study will examine not only the facts in the above cases but the membership of the federal judiciary,

especially the Supreme Court. A Supreme Court composed of other men might very well have decided differently.[19] The very important role of legal counsel furnished the Negro plaintiffs by the NAACP will also be discussed. Since the Justices do not operate in a vacuum but, like other men respond to national and international events, the broad outlines of the domestic and world-wide scene must at least be noted. According to Justice Felix Frankfurter, "The Court is a good mirror, an excellent mirror... of the struggles of dominant forces outside the Court."[20] Furthermore the Court is sensitive in varying degrees to the words and actions of others, particularly to those in the legal profession, the academic world, and government. Therefore these aspects of the social milieu will be discussed.

Judicial decision-making is one of the most complex and baffling of human activities. Both conscious and subconscious processes are at work. Conscious forces operating on the judicial mind have long been acknowledged. Judicial traditions, the history of the Court, the high respect generally held for the bench, the weight of precedents, and the legal training and background of the judges all play their role. Men have long granted that

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[19]Television interview with Justice Hugo L. Black, "CBS Reports," December 3, 1968.

[20]Felix Frankfurter, "The Supreme Court in the Mirror of Justice," 105 University of Pennsylvania Law Review, 785 (1956).

judicial decision-making is one of the highest rational efforts of man. Less credit has been given to emotional and subconscious forces such as inherited instincts, childhood experiences, traditional beliefs, and acquired convictions. Increasingly, the Justices as well as students of the Court have acknowledged these other factors.

According to Benjamin N. Cardozo, Associate Justice of the Supreme Court from 1932 to 1938, "We shall never be able to flatter ourselves, in any system of judicial interpretation, that we have eliminated altogether the personal measure of the interpreter."[21] He felt that each Justice interpreted the spirit of the age, the "Zeitgeist," in terms of the spirit of the group to which he belonged--by accident of birth, education, occupation or fellowship. Cardozo was convinced that no effort of the mind could overthrow utterly and at all times the "empire of these subconscious loyalties." This belief that group loyalties were important was also endorsed by the historian, James Harvey Robinson. He wrote that opinions generally were formed by listening to the "still small voice of the herd"--that is, by accepting the traditions of the group to which one belonged--notwithstanding extraordinary efforts of rationalization.[22] Justice Oliver Wendell Holmes, Jr., of the Supreme Court also warned of the "subtle danger of

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[21] Benjamin N. Cardozo, The Nature of the Judicial Process (New Haven, 1921), p. 173.

[22] James Harvey Robinson, "The Still Small Voice of the Herd," Political Science Quarterly, XXXII (1917), 315.

unconscious identification of personal views with constitutional sanction."[23] As Justice William O. Douglas said, "We all come to the Court with our bags fully packed, though even we don't know what's in them."[24]

In recent times political scientists in particular have come to believe that the attitudes of the Justices, although intangible and difficult of precise measurement, are of extreme importance. Starting in the 1950's, with the work of Herman Pritchett at the University of Chicago, political behaviorists began to study judicial attitudes using quantative methods of analysis.[25] Scales of attitudes were constructed for the purpose of predicting future decisions. Tables of voting scores for individual justices indicated apparently predictable voting blocs. Naturally like-minded judges would find themselves voting together. This is not to say there was any agreement in advance but a certain amount of almost unconscious yielding of one judge to another on lesser points.[26] According to one

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[23]Robert Scagliano, The Courts: A Reader in the Judicial Process (Boston, 1962), p. 137.

[24]Liva Baker, Felix Frankfurter (New York, 1969), p. 103.

[25]Herman Pritchett, The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947 (Chicago, 1948). See also Glendon Schubert, Judicial Decision-making (New York, 1963). Schubert found that there was almost a complete absence of writings on judicial behavior until the 1950's, outside occasional references to the decision-making process by a few jurists such as Justices Holmes, Cardozo, Frankfurter, and Jackson, and incidental references in judicial biography.

[26]John P. Frank, Marble Palace: The Supreme Court in American Life (New York, 1968), p. 265.

legal scholar there is no evidence that this develops into any real sacrifice of principle or that there is indeed any decisive leadership in the Court.[27] Judicial blocs are obviously fluid and in no way automatic. Nevertheless Herman Pritchett and Glendon Schubert of Michigan State University found that in the Roosevelt Court, Justices Black, Douglas, Rutledge, and Murphy voted together in a significant number of cases.[28] Similarly Justices Felix Frankfurter and Sherman Minton were frequently found on the same side. According to Schubert, this consistency of response in individual voting explains why and how the Court makes its policy choices.[29]

Based on the premise that the judiciary was in the middle of group struggle and political conflict, the political scientists attempted to relate socio-economic attitudes of the Justices to their voting records. For example, selected attitudes on civil liberties, economic liberalism, and the authority of the federal government were identified by which a judge was rated "liberal" or "conservative." Liberals were identified with such attitudes as pro-union, pro-competition and anti-business.[30] Sympathy for the prosecution in criminal cases, for business concerns in government regulation cases, for the

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[27] Ibid., p. 266.

[28] Pritchett, pp. 190-192.

[29] Schubert, pp. 29; 79-81.

[30] Ibid., p. 195.

employer in workman's compensation cases, and for the party being sued (generally insurance companies) in motor vehicle cases were linked with conservatism. On such a scale, Justice Tom Clark was given a center position; Justices Douglas, Black, Warren and Brennan a position to the left; and Justices Frankfurter and Harlan to the right.[31]

Quite apparently there was a great deal of subjective evaluation on the part of the political scientists in this type of analysis. Although there were differences of interpretation, the conclusion of this school of thought was that the Court renders virtually all its decisions on the basis of a very few basic attitudes. Even though students of the Court can thank political scientists for certain insights into bloc voting and public policy attitudes, the complex nature of the judicial process defies such oversimplification. The behaviorists appear blind to the fact that their ultimate judgements rest on their own subjective evaluations of judicial attitudes.

What is the role of stare decisis in decision-making? Stare decisis--let the decision stand--is the doctrine of following rules or principles laid down in previous judicial decisions, of giving precedent the authority of established law. This, of course, is just the starting point for many exceptions to the rule, as is so often the case with rules of law. Precedent is by no means a universal, inexorable command. Justice Douglas was among

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[31]Harold Spaeth, "Warren Court Attitudes Toward Business," in Schubert, p. 100.

those who believed the rule should be relaxed particularly in constitutional law where there is an obvious need for flexibility as conditions change.[32] An English jurist wrote that it was a sign of an incompetent lawyer or judge that he was over-impressed by citation of particular authority--"Authority is but a guide to juridical understanding--a servant, not a dictator."[33] Political scientist Walter Murphy thought that the doctrine of precedent had a "Janus-face. . . . There is one set of rules for utilizing precedents that appear helpful, and another set for avoiding those precedents which seem troublesome. A skillful legal craftsman can usually reach the result he wants without directly overruling established cases or obviously making a new law."[34]

Nevertheless a deep-seated yearning for consistency and certainty gives rise to the doctrine of stare decisis and does give the law stability, predictability, and uniformity. Furthermore the task of the judge would be overwhelming if he had to decide every issue anew. The problem of what to do about a long line of precedents was one of the major legal issues in the school segregation cases. The first question presented was were the cases cited true precedents. The next question was should they still

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[32]William O. Douglas, Almanac of Liberty (Garden City, N. Y., 1954), p. 48.

[33]Karl Llewellyn, The Bramble Bush (New York, 1951), p. 149.

[34]Walter F. Murphy, Elements of Judicial Strategy (Chicago, 1964), p. 30.

control in the present situation. J. Lee Rankin, Assistant Attorney General of the United States, argued in the school cases that stare decisis did not give the "separate but equal" doctrine immunity from re-examination and rejection. He reminded the Court that "When the Court becomes convinced of former error, it has never been constrained to follow precedent."[35] The blend of emotion, reason, and legal citation apparently won the day because the Court did overturn established constitutional interpretations which permitted alternative decisions than the one finally made. Professor Edmund Cahn, of the New York University Law School, an astute observer of the Court, commented that, "If you wish a judge to overturn a settled and established rule of law, you must convince both his mind and his emotions, an indissociable blend, which constitutes his sense of injustice."[36]

For what reasons does the Court reverse long-established rules? The short answer is that the times and conditions change. Along with the times, the Court changes. Almost fifty years ago Justice Cardozo noted that, "The great tides and currents which engulf the rest of men do not turn aside in their course and pass judges by."[37] One of these "currents" very much in the minds of the Court

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[35]Brief for the United States, In the Supreme Court of the United States October Term, 1952, Brown v. Board of Education of Topeka, p. 26.

[36]Edmund Cahn, The Predicament of Democratic Man (New York, 1962), p. 34.

[37]Cardozo, p. 168.

was the American image on the international scene. Numerous briefs presented to the Court had gone to great pains to point this out. Quotations from the foreign press were included to emphasize that the world was closely watching to see how America would handle her racial problems.[38] As counsel for the Negro plaintiffs repeatedly brought out, the underdeveloped countries with their large non-white populations were especially sensitive to the spectacle of a democratic nation imposing racial segregation in the public schools.[39]

Did the 1952 presidential election influence the Court? The consensus of opinion is that it did not, although if the Court is to survive it must respect the social forces that determine elections.[40] Plainly judges do not have to flounder helplessly in the cross-currents of popular opinion. They inform themselves through conversations, newspapers, the Congressional Record, professional journals, and other sources. Moreover most Justices have had wide

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[38] e.g., Brief of the American Veterans' Committee, Inc., In the Supreme Court of the United States, October Term, 1952, Nos. 1,4,5. Brief for the Congress of Industrial Organization as Amicus Curiae In the Supreme Court of the United States, October Term, 1952, and Brief of the American Jewish Congress as Amicus Curiae, In the Supreme Court of the United States, October Term, 1952, No. 8.

[39] Oral Argument before the Supreme Court of the United States, Dec. 11, 1952 as reported in Argument ed. Leon Friedman (New York, 1969) p. 142, and in several written briefs prepared for the Court by the NAACP.

[40] Jack W. Peltason, Federal Courts in the Political Process (New York, 1955), p. 25.

experience in practical politics and from this past experience they can estimate the future courses of Congressmen or executive officials. In the summer of 1954, for example, the Judges, like other Americans, had access to a number of polls in the newspapers on the school segregation cases. All the polls recorded approval by well over a majority of the nation which indicated, though did not decisively prove, that the school segregation decision had solid and widespread public support.[41]

All of which is to say that the Supreme Court is very much involved in the political process, despite the theoretical separation of powers and the establishment of an independent judiciary. Chief Justice Taft called the Court "a stormy petrel in the politics of the country."[42] Similarly Justice Oliver W. Holmes commented that, "We are quiet here, but it is the quiet of the storm center."[43] This political involvement relates to one of the basic issues in the school segregation cases, that is, the charge that the Court had violated the true principle of federalism. Particularly in the South, the school authorities cried "violation of states' rights." That is, they claimed that

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[41]Walter F. Murphy, Congress and the Court (Chicago, 1962), p. 265.

[42]Taft Papers, Library of Congress, William H. Taft to Charles Warren, October 28, 1922 in Frank, Marble Palace, p. 264.

[43]Oliver W. Holmes, Law and the Court: Speeches of O. W. Holmes (Boston, 1918), p. 98.

the Court had invaded the proper sphere of state legislatures--the regulation of public schools. That education was the business of state government no one denied, least of all the Court. Nor did any member of the Court relish the idea of the Court becoming a super school board.[44] The problem was to strike a balance, draw a line, between the constitutional rights of the Negroes and the demands of society as represented by the school boards.

Inevitably judges do invade the legislative branch. Chief Justice Earl Warren admitted this in an interview after his resignation from the Court, saying, "Well, I think that no one could honestly say that the Court makes no law. It doesn't make it consciously . . . but because of the very nature of our job . . . we make law."[45] Warren had also pointed out while still on the bench that "judges were not monks or scientists but participants in the living stream of our national life" so that inevitably they make law.[46] Justice Charles E. Whittaker, former Associate Justice of the Supreme Court, acknowledged that despite denials what is called "constitutional interpretation" is unavoidably policy-making.[47] This conflict

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[44]Interview with Justice Hugo Black on July 15, 1969.

[45]Kansas City Times, June 28, 1969.

[46]Murphy, Congress and the Court, p. 250.

[47]Interview with Justice Charles E. Whittaker, April 16, 1969.

between Congress and Court was built in by the very framework of our Constitution. Furthermore history shows the increasing strength of the Court vis-a-vis Congress until by the 1950's charges of "super legislature" are hurled at the Court.[48]

This debate has frequently assumed the form of a controversy over judicial activism versus judicial restraint. The terms refer to the fact that judicial activists supposedly interpret the Constitution broadly, based on their own social, economic, and political views. Judicial restraint on the other hand is usually characterized as applying the "law," slot-machine fashion, where the judge slips in the facts, squares them with unalterable principles, and out comes the decision automatically. This, of course, is pure theory, an attempted ideological explanation of a practical matter. It ignores the basic fact that judges function in the political process. A judge who defers to the legislature (judicial restraint) is actively taking a stand, just as much as the judge who avowedly writes his own preferences into his opinions (judicial activism). Judge Black admitted the relativism of these two concepts when he called himself both a judicial activist and a believer in judicial restraint.[49]

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[48] Congressional Record, 84th Cong., 2nd Sess., 1956, Part 4, 4515.

[49] Hugo L. Black, A Constitutional Faith (New York, 1968), pp. 12-15.

Although there has been increased interest in this subject in the last twenty years as evidenced by a spate of books, the debate actually goes back to the early years of the Republic.[50] Chief Justice John Marshall, involved in a bitter feud with President Thomas Jefferson, was castigated for his grandiose view of the Court's powers. Marshall could well be called the first judicial activist. By the end of Marshall's chief justiceship, almost all the basic measures to curb the Court had been seriously suggested or actually tried: impeachment, reduction of jurisdiction, congressional review of decisions, limited tenure, requirement for an extraordinary majority to invalidate a statute, court packing, presidential refusal to enforce a decision, and even resort to force. When the bricks began to fly after the 1954 school segregation decision, it was old ammunition that was used--charges of judicial activism, that is judicial legislation, usurpation of state government, substitution of the economic and social philosophy of the Justices for the "plain law of the land."

In addition to theoretical considerations there are important practical matters in judicial decision-making. There is the selection of either a Writ of Certiorari or an Appeal by which to send the case up to the Supreme Court. The main difference is that the Court controls the granting

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[50]See for example, Charles L. Black, The People and the Court: Judicial Review in a Democracy (New York, 1960); Learned Hand, The Bill of Rights (Cambridge, 1960); and Robert B. McCloskey, The American Supreme Court (Chicago, 1960), passim.

of the first but not the second. When four of the nine Justices agree to review a case or "certify" the record in the court below, a Writ of Certiorari is approved. The Judges' Act, passed in 1925, gave the Court complete discretion over whether to review a wide range of cases. The second method, that of Appeal, was designated by Congress to be granted automatically in two types of cases: (1) when a federal or state law allegedly violates the United States Constitution; or (2) when a state law supposedly conflicts with a valid federal law. The NAACP decided in the segregation cases to utilize the Appeal procedure for the cases from Kansas, South Carolina and Virginia and Certiorari in the Delaware and District of Columbia suits.

The Court informs itself by two main methods--written briefs and oral arguments. The parties first submit written briefs which state the grounds for the Court's jurisdiction, the facts of the case, the decision of the lower court, and the arguments in support of their position. The case is then scheduled for oral hearing during which time the Justices have an opportunity to ask questions of counsel. Since the Justices have in most instances read the written briefs first, they frequently reach individual decisions at the end of oral argument. A former law clerk of Justice Black said that the Justice usually wrote "affirmed" or "denied" on his notes at the end of oral argument.[51] Other Justices including Charles

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[51]Frank, p. 100.

Evan Hughes, William O. Douglas, and Tom Clark also indicated they frequently reached a decision at this point.[52] At other times if one of the Justices has a particular competence in the matter at hand, the oral arguments will not weigh heavily with him.

Obviously, too, the influence of the lawyers before the Court varies with the competence of counsel and the facts of the case. If the case is in an area in which the Justices have marked opinions to start with, the Court may be unpersuadable. In this case the argument and briefs are unimportant. If the oral argument is poor but the case important, the Court does its own homework. How much weight the brief carries and how effective the oral argument is, depend very much on the Judges. Since time is of the essence, it is apparent that the Justices must utilize every possible shortcut. Hardly ever is there time to explore much of the material cited in the briefs. The school segregation cases for example occupy over twelve thick volumes now housed in the Library of the Supreme Court. No Judge could possibly go through all this material. Justice Douglas admitted that he skimmed the record, looking for key phrases. Justice Black said that judges could cope with the volume of work assigned them only because there were so relatively few new issues. For the most part the Justices already knew their positions on issues previously tried.[53]

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[52] Ibid.

[53] Interview with Justice Hugo L. Black on July 15, 1969.

Following the hearings, the Court holds regularly scheduled Friday conferences in which the cases are discussed. These are conducted in secrecy; not even the law clerks are admitted to the conference room. The Chief Justice is the first to speak on a given case, followed by each Justice in order of seniority. Voting procedure is reversed with the junior court member voting first and the Chief Justice last. The Chief Justice, if on the majority side, assigns the writing of the opinion. Otherwise the senior Justice of the majority makes the assignment. This power of the Chief to assign, enables him to select a Justice whose views are closest to his own. Yet often other considerations determine his selection, such as the judicial reputation of the Justice, or even the section of the country from which he comes. In other words, the matter of inducing public acceptance of the decision may influence his choice.[54] The tradition is well established today that in the majority of the most important cases the Chief Justice should speak for the Court.[55] Therefore it was appropriate that Earl Warren should give the opinion in the school segregation cases.

In difficult cases as with the school segregation suits, many months may elapse before final decision. In the interim, many drafts of the opinion might make the rounds. If additional information were desired by any

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[54] Frank, p. 75.

[55] Ibid., p. 78.

Justice, he could assign his clerk to do research. Justice Frankfurter, during the segregation cases for example, assigned Alexander Bickel to do extensive research on the history of the Fourteenth Amendment. Bickel, later Professor of Law at Yale University, prepared a detailed report which Frankfurter circulated to each of his brethren on the bench.[56]

While the decision itself is sometimes easy (not so in Brown), opinion writing is almost always difficult. Justice Black confessed that it is especially difficult to write a concise opinion.[57] Upon occasions he has directed that a substantial number of books be brought to his office so that he might read on the topic for some days before attempting to put a word to paper.[58] Once the opinion is written its author circulates a draft to the other justices for acceptance, revision, or rejection. The final opinion thus represents something of a group compromise--the lowest common denominator, according to Justice Black, of what is acceptable to a majority of the Court. In many cases the final result is not completely satisfactory to anyone, but in judicial decision-making as in other branches of politics, the art of the possible often controls.

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[56] Burton papers, Library of Congress. Copy of Bickel's report with attached memorandum from Justice Felix Frankfurter regarding Bickel's research on the Fourteenth Amendment.

[57] Interview with Justice Black, July 15, 1969.

[58] Frank, p. 114.

Sometimes convictions are too strong for compromise in which case a Justice will issue either a concurring opinion agreeing with the decision but on different grounds, or else he will write a dissenting opinion. Quite obviously in decision-making there is of necessity both compromise and persuasion as well as considerable independence of judgment.

A unanimous decision such as in the Brown opinion sheds little light on the "deliberation process," on the conflicts around the conference table. The veil of secrecy is lifted only inadvertently by hints and clues in speeches, writings, or in the personal papers of the Justices. The personal papers of Justice Harold Burton in the Library of Congress, for example, are now classified and open for scholarly research. In them are many references to the Brown opinion, including a copy of Bickel's research on the Fourteenth Amendment and numerous memoranda circulated among the Justices with their penciled replies.

The basic problem for the Court in the school segregation cases was to strike a balance between individual rights and the demands of society. This is an age-old problem which must be fought anew in every generation. In our adversary system of justice, where one side wins and the other loses, the Negroes achieved a nominal victory. Just what and how will be explored in this study.

CHAPTER II

ACTION IN THE TRIAL COURTS

In the fall of 1952 five cases--from Kansas, South Carolina, Virginia, Delaware and the District of Columbia--reached the Supreme Court for consideration of the constitutionality of racial segregation in the public schools. This seemingly simple question required an interpretation of the Fourteenth Amendment, an analysis of countless legal precedents, the most intense intellectual effort, and a facing up to the deepest of emotions. Disposition of the question triggered a major social revolution which is still in progress.

The trials in the four states revealed the deep fears and fervent hopes of both Negroes and whites. The "Southern way of life," its customs, traditions, beliefs, and attitudes, were clearly on trial. Even though the question of official segregation was the same in all five cases, the Supreme Court issued a separate opinion for the District of Columbia case because the federal government and the Fifth Amendment were involved whereas in the four other cases, state government and the Fourteenth Amendment were involved.

The cases cover a four year time span from the first trial in Charleston, South Carolina in May 1951 to the

final decision by the Supreme Court in May 1955. They originated in two very poor Southern rural counties, one border-state urban area, one middle western city, and the national capital. The Negroes attacked on two fronts: (1) the constitutionality of segregation in itself and (2) the inequality of school facilities for Negroes. The issue of inequality, however, was present in only three states--South Carolina, Virginia, and Delaware. Educational facilities were substantially equal in Kansas and the District of Columbia.

This chapter will examine the facts, the legal issues, the arguments, the witnesses, and the lower court decisions. Since the use of social science evidence was so highly controversial, this aspect of the cases will be studied separately in a later chapter. Source materials included transcripts of the trial court proceedings, the written briefs presented to the Supreme Court, and some secondary accounts.

One interesting question concerns the initiation of the suits. Were these legitimate controversies or were they "trumped up" cases by the NAACP? The short answer is that they involved real plaintiffs who felt themselves aggrieved by actual circumstances in their communities. Nevertheless, legal counsel was furnished by the Association in all but the District of Columbia case. For several decades the Negro Legal Aid department of the NAACP had

been masterminding a long range strategy and program to attack segregation in the varicus areas of housing, jobs, transportation, voting, jury duty, public accommodations and education. It is also true that the Association was on the look-out during these years for valid cases to sponsor. So in one sense the NAACP was an unnamed but very real plaintiff in the suits. Consequently, there was an effective union of aggrieved parties and dedicated legal counsel to pursue these cases in their journey through the courts.

Briggs v. Elliot originated when more than one hundred Negro parents petitioned the board of trustees of School District No. 22 in Clarendon County, South Carolina on November 11, 1949, for educational facilities equal to those provided for white students. Clarendon County was one of the most ill-favored sections in the state, chiefly distinguished by eroded farms, unpainted ramshackle farm buildings and poor families weakened by pellagra. The Klu Klux Klan rode longer there than in any other part of the South.[1] The school board rejected the request of the Negro parents, stating that educational facilities were substantially equal. Years later, Thurgood Marshall indicated that had the Clarendon County school board acquiesced to the request for equalization of facilities, the NAACP might have let the matter rest for the time being, instead of mounting a legal offensive

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[1]Walter White, How Far the Promised Land (New York, 1955), p. 46.

against segregation per se.[2] Almost a year and a half later on May 16, 1951, a suit was filed in the federal district court at Charleston on behalf of sixty-six Negro parents and children of School District No. 22, Clarendon County.[3] Trial was heard on May 28 and 29 before a three-judge court.

The six attorneys for the Negroes alleged first that elementary and high school facilities provided for Negro children were inferior to those provided for white children and second that segregation in the public schools solely on account of race was in itself a denial of equal protection of the laws as guaranteed by the Fourteenth Amendment. Uncontradicted facts indicated that annual expenditures for white pupils exceeded those for Negro pupils although there were 2,375 white pupils and 6,531 Negro pupils in Clarendon County.[4] During the previous year, $395,329 was spent for the white schools, while only $282,000 was spent for the Negro schools. The explanation given by the County Superintendent of Schools was "In Clarendon County we have some thirty-odd Negro schools, whereas we have, I think, just about a dozen white schools, and in all of the rural schools, whether white or Negro,

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[2]Interview with Thurgood Marshall in Washington, D. C., by Dr. Hugh Speer of the University of Missouri at Kansas City, Feb. 11, 1967, subsequently related to the writer.

[3]Briggs v. Elliot, 103 Fed. Supp. 920 (1952).

[4]Transcript of the Trial in the Federal District for the Eastern District of South Carolina, May 16-18, 1951, p. 55, hereinafter referred to as the South Carolina Transcript.

the expenditures isn't anything like in proportion to the larger schools."[5] The reason for the financial disparity apparently was that most of the Negro schools were located in poor rural sections.

In general, classes were considerably larger in the Negro schools than in the white schools. There were as many as seventy-nine students in one Negro classroom in District No. 22 whereas thirty-one was the maximum number in any white elementary school. Testimony indicated that the Negro schools had an insufficient number of teachers and classroom space, and lacked bus transportation, fence protection, surfaced playgrounds, landscaping, gymnasium, auditorium, and visual aids. Uncontradicted testimony was also offered to show that the buildings for the Negroes were unhealthy, old, overcrowded, dilapidated, and without heat, except for an old stove in each room for which the children had to provide their own fuel. The cost of the three District Negro schools, all wooden structures, amounted to $10,900, whereas the cost of one white stone elementary school alone was $40,000. The same disparity existed in the comparative costs for grounds and furnishings. Twenty teachers taught a total of 808 Negro students, while 12 teachers were assigned 276 white students.

There was also testimony that the Negro schools lacked running water and had only outside "earth toilets."

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[5] Ibid., p. 53.

At one of the Negro elmentary schools there were only four such outdoor toilets serving 694 pupils.[6] In contrast, the white schools had adequate, modern sanitary facilities. In the same elementary school for Negroes, drinking water was supplied from an outdoor pump and brought into the building in an open galvanized bucket.[7] One Negro school had no desks, only several cracked wooden tables. Some of the chairs had broken bottoms or lacked supporting spokes. There was also a scarcity of blackboards, most of which were awkwardly placed as to height. In contrast, the white elementary school had a large auditorium with a balcony, an elevated stage, footlights, dressing rooms, in addition to a gymnasium, adequate blackboards, charts, maps, slides, stereopticons, and globes. The Negro schools lacked any visual aids except for a few blackboards.

Counsel for the school authorities explained the relative inadequacy of facilities by pointing out that the Negro schools were located in an especially poor section of the county where the nearby farms and towns lacked running water, sewerage facilities, and electricity. They also pointed to the high degree of absenteeism among the Negroes, especially on a seasonal basis, when the children were needed to help in the spring planting. Their major defense, however, was simply that the state constitution and

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[6] Ibid., pp. 76-77.

[7] Ibid., p. 75.

statutes required separate schools for the white and colored races.[8]

In support of the constitutionality of the state segregation laws, the defense argued that: (1) the controlling legal authorities, Plessy v. Ferguson and Gong Lum v. Rice stood as precedents for the "separate but equal" doctrine; (2) educational matters were a question for state legislatures and not for the federal judiciary; (3) segregation was a political matter and not a proper subject for social science witnesses; and (4) separate schools were not a violation of the equal protection clause of the Fourteenth Amendment. Another major contention was that the mere presence of large numbers of Negroes in a community made a decisive difference.[9] In a word, the defense was asking for recognition of the Southern "way of life" which contrasted with that of many non-Southern states where Negroes were only a small minority.

Admitting the existing inadequacies, the defense argued that steps were currently being taken to provide substantially equal facilities for Negro school children. Governor James Byrnes, a former United States Senator and Supreme Court Justice, had recommended in his January, 1951 inaugural address a $75,000,000 school construction program to provide substantial equality in school facilities for the races. "We should do it because it is right," he said.

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[8]Ibid., pp. 76-77.

[9]Ibid., pp. 73-74.

Governor Byrnes also had recommended state government bonds for rural school buildings because district property taxes were inadequate.[10]

A recurring theme stressed by the Negroes was the inconsistency of segregation with American democracy. The following hypothetical question was asked repeatedly of witnesses for the blacks: "Assuming only the fact that the Negro Children in District 22 are educated in segregated classrooms and schools from which the white children are excluded, in your opinion can the Negro children receive equal classroom instructional opportunities as compared to the opportunities of the average white children?"[11] Predictably of course, since these were witnesses for the plaintiffs, the answer was always "No." Invariably the reason given was that the purpose of education in a democracy was to develop respect for the individual and for the "historic concept of equality." The Negroes claimed that both races were being discriminated against in terms of education for a democracy. Also the separation inevitably implied a stigma and relegated the Negroes to second-class citizenship.[12]

Defense counsel called only two witnesses, both of whom were superintendents of schools in adjoining counties

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[10] Ibid.

[11] Ibid., p. 113.

[12] Ibid., p. 150.

of South Carolina. One of them, E. R. Crow of Sumter, South Carolina, testified that desegregation was not possible because the "feeling of separateness between the "races" would make it impossible to have "peaceable association" in the public schools.[13] Mixing of the races in the same school, in his opinion, would probably lead to a violent emotional reaction and eliminate public schools in most, if not all, of the communities in the state. He thought, however, that the problem of mixed groups and racial tension would be less in communities where the minority population was small. He said that he had spoken with a number of Negro public school administrators (an unidentified and unspecified number) who thought that the Negroes would prefer to have schools of their own and that segregation would probably continue on a voluntary basis even if the issue were settled legally. He further testified that he had grave doubts as to whether the General Assembly of South Carolina would appropriate money for public schools if segregation were eliminated. Again, as in the other state trials, the point was made that mixing the races in graduate courses or on the college level was entirely different from mixing them in the public schools because fewer yet more mature people were involved on the college level.

It was ironic that one of the three judges sitting

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[13]Ibid. p. 154.

on the bench for the South Carolina case should have confronted a representative of the NAACP which fourteen years earlier had worked for his defeat as a nominee to the Supreme Court of the United States, Back in 1930 the appointment of Judge John J. Parker to the Supreme Court by President Herbert Hoover was successfully blocked, according to some observers, by the concerted efforts of the NAACP, labor unions, and other groups. This campaign against Parker was allegedly because he had spoken out in 1920, favoring the "grand-father clause," successfully used by the white power structure in the South to block Negro votes and because he had also commented in a 1920 speech that the Negroes had not yet reached that stage in their development when they could share the burdens and responsibilities of government.[14]

Both Judge Parker and United States District Judge George Bell Timmerman concurred in an opinion in which the federal district Court held that the question of segregation *per se* was a matter of legislative policy for the states and not one of constitutional right. Parker held that federal courts should not perform legislative tasks or interfere with local affairs, saying, "It is not the function of the Court to determine what is the best educational policy, it is the function of the Court to see that all men are given their rights."[15]

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[14]Clement B. Vose, *Caucasians Only: The Supreme Court, the NAACP, and Restrictive Covenants* (Berkely, 1959), pp. 35-36.

[15]*South Carolina Transcript*, p. 101.

The Court pointed out that the cases cited as precedents were not dealing with hypothetical situations or mere theory but developed out of the relationship of the races throughout the country and as such were controlling the federal district court. Judge Parker also noted that segregation was by no means confined to the South but prevailed in many other states where Negroes were present in large numbers. Accepting the argument of the school board, he emphasized that the problem of segregation at the graduate and professional levels was "essentially different from that involved in segregation in education at the lower levels. . . . Persons in college and above were of 'mature personality'." He also stated that while it was difficult to provide equal educational opportunities for Negroes in segregated schools at the graduate and professional levels, at the lower level this could be done. Judge Parker also made the very important point that legislative classifications for separate schools which have a real basis in fact are legally valid.[16] He concluded that "if equal facilities are offered, segregation of the races in the public schools as prescribed by the constitution and laws of South Carolina is not of itself violative of the Fourteenth Amendment." He added that this conclusion was supported by overwhelming authority which the Court was not at liberty to disregard on the "basis of theories advanced by a few

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[16] Ibid.

educators and sociologists." If conditions have changed so that segregation is no longer wise, Parker continued, that would be a matter for the legislatures and not for the courts. "The members of the judiciary have no more right to read their ideas of sociology into the Constitution than their ideas of economics."[17] The Court, however, granted that the plaintiffs were entitled to equal educational facilities. Inasmuch as existing schools were patently unequal, the defendants were ordered to proceed forthwith on equalization plans and furnish a progress report to the Court within six months.

Much to the delight of the Negroes, Justice J. Waties Waring wrote a most eloquent and frequently quoted dissenting opinion, in which he pointed out that an equalization decree could not remedy the real harm in the case:

> If a case of this magnitude can be turned aside and a court refuse to hear these basic issues by the mere device of an admission that some building, blackboard, lighting fixtures and toilet facilities are unequal but that they may be remedied by the spending of a few dollars, then . . . these very infant plaintiffs, now pupils in Clarendon County, will probably be bringing suits for their children and grandchildren decades or rather generations hence in an effort to get for their descendants what are today denied to them.[18]

He added that the Court should not avoid the issue but should face without equivocation the question as to whether segregation in public schools was legal and whether it could exist under the American system as enunciated in the

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[17] Ibid., p. 103.

[18] Ibid., p. 195.

Fourteenth Amendment. The Amendment, he felt, was adopted to do away with discrimination between citizens.[19] He also referred to the testimony about race. "What possible definition can be found for the so-called white race, Negro race or other races? Who is to decide and what is the test?"[20] He noted that the law of South Carolina considered a person of one-eighth African ancestry to be a Negro. "Why this proportion? Is it based upon any reason: anthropological, historical or ethical? And how are the trustees to know who are 'white' and who are 'Negroes?'" To ask these questions, he said, was to answer them. The whole thing was unreasonable, unscientific, and based upon unadulterated prejudice.

Waring examined the legal history and noted that in many cases the Supreme Court had stricken discriminatory statutes, as for example the peonage cases where imprisonment for violation of contract was usually aimed at keeping the Negro "in his place." He also indicated that he thought the graduate and law school cases from Texas and Oklahoma established that separation on the grounds of race was a violation of the Fourteenth Amendment.[21] He pointed out that the frequently quoted Plessy case in reality involved only intra-state railroad transportation and not education. The Judge thought it noteworthy that

[19] Ibid.

[20] Ibid., p. 196.

[21] Ibid., pp. 207-208.

while the Negro plaintiffs produced a total of eleven witnesses, counsel for the defendants put on only two, one of whom was "significantly named 'Crow.'" Summarizing the social science testimony, Judge Waring commented that:

> From their testimony, it was clearly apparent, as it should be to any thoughtful person, irrespective of having such expert testimony, that segregation in education can never produce equality and that it is an evil that must be eradicated. This case presents the matter clearly for adjudication and I am of the opinion that all of the legal guideposts, expert testimony, common sense and reason point unerringly to the conclusion that the system of segregation in education adopted and practiced in the State of South Carolina must go now. Segregation is per se inequality. (emphasis is that of Judge Waring)[22]

Quite obviously Judge Waring had been impressed with the social science testimony presented by the Negroes during the trial. He referred to statements that actual tests with children showed their humiliation and disgrace in being segregated. Their feeling that they were unfit to associate with others of different color had an evil and ineradicable effect upon the mental processes of the young, an effect that remained throughout their maturity. Waring stated that the witnesses proved beyond a doubt that the evils of segregation and color prejudice came from early training. He concluded ". . . if segregation is wrong then the place to stop it is in the first grade and not in graduate colleges."[23] It is interesting to note Judge Waring's own reasons for his opinion. They are in a sense

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[22] Ibid., p. 208.

[23] Ibid.

a catalog of the elements of judicial decision-making--"legal guideposts, expert testimony, common sense and reason . . ."

The facts in Judge Waring's life illustrate the difficulties of a Southern judge sympathetic to Negroes. In 1947 he had issued a decision opening election primaries to the Negroes.[24] This resulted in threats to his life and an unsuccessful effort to condemn him in the state legislature. Following his dissent in the school segregation case, Waring received more personal abuse and ostracism. "My isolation was total," he said later. Soon thereafter Waring resigned from the bench at the age of seventy-two, and moved to New York City where he became active in various civil rights organizations.[25] By the time of the next federal district court ruling in February, 1952 another judge had been appointed to sit in Charleston. At that time the court was able to reach a unanimous decision holding that separate educational facilities for the Negroes if substantially equal satisfied their constitutional rights.

The Kansas case originated in Topeka in the spring of 1951 when Oliver Brown and other Negro parents sought admission for their children in all white schools. However Brown v. Board of Education of Topeka was associated with

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[24]Elmore v. Rice, 72 Fed. Supp. 516 (E.D.S.C., 1947).

[25]White, p. 48.

the efforts of a white Brown in Merriam, Kansas who was moved to righteous indignation over the plight of some Negro school children. One day in the spring of 1948, Mrs. Esther Brown was discussing with her Negro maid the recent passing of a school bond issue, hoping it would also mean improvements for the Negro school in Merriam which was in deplorable condition. When the maid indicated that financial help was not forthcoming, Esther visited the school to investigate the actual conditions, and was appalled to find no inside toilets, inadequate heating and lighting, overcrowding, forty-five students, and two unqualified instructors with forged teaching certificates.[26] Since Mrs. Brown was a Southerner in origin, improved facilities rather than integration was what she had in mind. Her vocal disapproval resulted in an invitation to speak at a meeting of school board members and interested citizens. Much to her consternation, she was faced with a hostile audience which hurled epithets of "nigger lover" at her, while one member tried to hit her. This response only fired Mrs. Brown to action. When efforts to get help failed, she hired two teachers on her own initiative, found a small house, and set up a private school, paying the salaries from her own funds and those of a few contributing Negro parents. In seeking help for her cause,

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[26]"Esther Brown," unpublished paper submitted in the spring seminar, 1967, to Dr. Hugh Speer, University of Missouri at Kansas City; student's name was deleted. A copy of this research paper is now in the possession of Dr. Speer. The paper was based on personal interviews with Mrs. Brown, NAACP leaders and the Kansas City Star.

she contacted the local NAACP which in turn was looking for test cases on the issue of integration in public schools.

All kinds of difficulties arose as a result of these activities. Some of the Negroes whom Mrs. Brown had befriended were threatened and had their credit cut off. The home of one family cooperating with her was bombed. Mrs. Brown could not get babysitters, neighbors refused to speak to her, the telephone rang all night long for two weeks with threats to burn down her house. In addition her husband, Paul Brown, lost his job because of the embarrassment of her activities.

In the meantime Esther Brown instituted suit against the Merriam Board of Education in what became known as the South Park case.[27] One lawyer after another, including several Negro attorneys, turned Esther down in her search for legal aid. To assist the operation of the private school, she baked cupcakes, competing for sales with the local Manor Bakery. Final determination of the South Park case by the Kansas Supreme Court in 1949 opened the doors of the all-white South Park School in Merriam to Negro children. By the fall of that year six Negro children were also accepted at the all-white Shawnee-Mission high school near Merriam, without any incident.

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[27] Webb v. Board of Education of Merriam, record of case can be found in the Olathe Court House, Johnson County, Kansas.

Esther Brown continued to work with the NAACP in its efforts to find a good case to test the legality of segregation in public schools. When Wichita was tentatively decided upon, she went there to talk with the teachers in the city system. Much to her amazement, the Negro teachers would not participate in a law suit, fearing loss of their jobs. After the decision was made to make a test case in Topeka, Mrs. Brown continued to help by locating and transporting witnesses, driving them to Topeka during the 1951 Kansas City river flood. She was also instrumental in raising the first $3,000 to help finance the Topeka trial. Many years later public acknowledgement of her efforts in behalf of the Negroes was made when she was honored at the Kansas City 1969 annual citation dinner of the National Conference of Christians and Jews. The story of Esther Brown's contribution to ending public school segregation illustrates how numerous individuals, white as well as black, were attracted to this nation-wide struggle.

The Topeka case was unique in many respects. For one thing the segregation issue was presented there in bold outline. Kansas alone among the four state cases presented a situation where school facilities were substantially equal. Therefore the question of the validity of the "separate but equal" doctrine was squarely before the court and was so acknowledged even in the pre-trial conference

between the court and the lawyers.[28] Kansas also differed from the other three states in that her statute regarding segregation was permissive rather than mandatory and it applied only to a few communities in the state--only to cities with a population over 15,000. Furthermore the statute was limited to elementary schools with the sole exception of the Kansas City high schools. All other Kansas high schools were integrated. Also, the public attitude was completely different from that in southern communities. Few Kansans expressed sympathy with the statute under attack, even though it represented a policy that had been implemented in Kansas since statehood.[29] In legal circles, Brown v. Board of Education of Topeka became known as the case of the "reluctant appellees" when the school board, victor in the lower court, chose not to defend upon appeal. They finally did so only when ordered to appear by the Supreme Court of the United States. Furthermore the case was almost thrown out of the Supreme Court because by the time of the December 1953 Supreme Court hearings, several of the parties to the suit had been integrated into white school systems. Justice Felix

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[28] Transcript of Record, Supreme Court of the United States, October Term, 1952, No. 8. Brown v. Board of Education of Topeka, p. 20, hereinafter referred to as Topeka Transcript.

[29] Paul E. Wilson, "Brown v. Board of Education revisited," 12 Kansas Law Review 503 (1964).

Frankfurter wondered if the case might not be moot (hypothetical, posing no real controversy) but Chief Justice Earl Warren requested that the case be heard.[30]

Perhaps the greatest anomoly of all, the trial court, in sustaining the segregation statute, provided the words used by the United States Supreme Court to overthrow segregation. Judge Walter A. Huxman of the United States Court of Appeals who delivered the opinion for the three-man court, stated some years later that he had been determined to get the social science argument into the record for the Supreme Court because he felt that the issue of segregation per se should be so plain that the Supreme Court could not "duck it."[31]

By a strange quirk of alphabetization and chronology, Oliver Brown of Topeka, Kansas, Negro carman welder and minister, gave his name to one of the most important judicial decisions of this century. This was due to the fact that he was first in alphabetical order among thirteen plaintiffs in the Kansas case which in turn became the No. 1 case on the Supreme Court docket.

It is interesting to recall that Kansas had always possessed qualities of both North and South. Settlers

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[30]Oral Argument In the Supreme Court of the United States, October Term, 1953 Brown v. Board of Education of Topeka, as reported in Argument, edited by Leon Friedman (New York, 1969) pp. 265-266.

[31]Kansas City Star, March 28, 1967.

initially came from all parts of the country and reflected both pro and anti-slavery sentiments. Although the Negro problem was in fact discussed in early Kansas politics, the issue was that of his freedom, not his equality. Initially in the early years of statehood, the practice developed of allowing segregation in elementary schools on an optional basis in cities of more than 15,000. When the laws were codified in 1876 there was no mention of segregation in schools. However, when the so-called great exodus--the mass migration of former slaves to Kansas, mostly to the larger cities--occurred in 1879, the state legislature enacted a law providing optional segregation of elementary schools, that is for the first six grades, in cities over 15,000. The act was amended in 1905 to provide for separate high schools for whites and Negroes in Kansas City, Kansas, although segregation was forbidden in all other high schools and junior high schools. This law remained in effect until the Supreme Court decision of 1954. By 1951, nine of the twelve Kansas cities authorized to have segregation in elementary schools still retained it. Topeka was one of those which was still segregated. Wichita had already abandoned segregation, Pittsburg gave it up two years before the Brown trial, and in 1952, Lawrence was in the process of abandoning public school segregation.[32]

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[32]Herbert Hill and Jack Greenberg, Citizens' Guide to Desegregation (Boston, 1955), p. 79.

Segregation existed, however, in Kansas restaurants, hotels and other places of public accommodation, although state law outlawed it at the state university and forbade city planning commissions to discriminate on racial grounds. Discrimination in employment for the state was also forbidden. Interestingly enough, discrimination in places of entertainment and on public transportation was a misdemeanor punishable by fines.[33]

It was in this setting that Oliver Brown and twelve other Negro parents of Topeka brought suit to enjoin enforcement of the state law permitting segregation in the elementary schools. Linda Carol Brown, forbidden to attend the white elementary school five blocks from her home, walked through busy railroad yards to a school bus which took her to a Negro school twenty-one blocks distant.[34] En route to the bus, Linda Carol had to cross busy thoroughfares which lacked such safety precautions as stoplights or stop signs.

Testimony during the trial indicated that educational facilities of the white and Negro schools were substantially equal. Curricula, courses of study, and qualifications of the teachers were "comparable," though obviously buildings erected and refurbished at different times could not be completely equal. Furthermore, since there were

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[33] Ibid., p. 80.

[34] Topeka Transcript, p. 92.

only four Negro schools in contrast with eighteen white schools in the Topeka School District, black children in some instances were required to travel great distances. To compensate for this inconvenience, the school district furnished free bus transportation for the Negro children, although no such service was furnished white children. There was, however, an admitted difference in the number of library books in white and Negro schools which the School Board explained was the result of private book donations by white parents.

Although some time was spent during the trial on a discussion of the equality of the two school systems, the major part of the testimony related to the issue of segregation per se. Social science witnesses for the plaintiffs argued that separate schools placed the stigma of inferiority on the minority race.[35] Dr. Hugh Speer, at that time Dean of the School of Education, Kansas City University, testified that the total school experience, including segregation, was more significant than the sum of its parts--the buildings, curricula, books and teachers.

One of the most effective witnesses for the plaintiffs was Dr. Louisa Holt, professor of social psychology at the University of Kansas, who stated that a sense of inferiority always affected motivation for learning. Phrases from her testimony were repeated in the opinion of

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[35] Ibid., pp. 117-187.

the district court as well as by Chief Justice Warren of the United States Supreme Court in his 1954 opinion. In discussing the adverse affects of enforced legal segregation of the races she stated:

> The fact that it is enforced, that it is legal, I think, has more importance than the mere fact of segregation by itself does because this gives legal and official sanction to a policy which inevitably is interpreted by both white people and by Negroes as denoting the inferiority of the Negro group. Were it not for the sense that one group is inferior to the other, there would be no basis, and I am not granting that this is a rational basis, for such segregation.[36]

Dr. Holt added that the trauma of attending a segregated school after the pre-school years of free play with others of different skin color, is one that occurs early and the earlier a trauma occurs, the more far-reaching its effects.

The school authorities as defendants, introduced only three witnesses, a school bus driver, the clerk of the Board of Education, and the Topeka Superintendent of Schools. The Superintendent emphasized that it was not up to the public school system to dictate the social customs of the people. He said that there was no evidence that a majority of the public desired a change in the segregated structure.[37] The defense spent considerable time in cross-examination of the social science witnesses, indicating that they were merely expressing opinions unrelated to the actual facts

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[36] Ibid., pp. 169-170.

[37] Ibid., p. 207.

of the Topeka situation. Nevertheless the nature of expert testimony in courts of law is such that under certain circumstances once expertise is established, opinion evidence is admissable.

The two major arguments of the plaintiffs were: (1) the State had no authority to make any classification based on race and color alone; and (2) the trend of the law since the 1938 Missouri law school case of Missouri ex rel Gaines v. Canada was that rights under the Fourteenth Amendment were individual rights, "personal and present," which could not indefinitely be postponed. The Oklahoma and Texas graduate school cases in 1950 were also relied on as whittling away the "separate but equal" doctrine.[38]

The defense denied the initial charges of inequalities and relied on the fact that the Supreme Court had, so far, expressly refused to overrule the Plessy doctrine of "separate but equal." They pointed out that the recent graduate and law school cases were limited to higher level education which should be distinguished from public school education. Finally the defense argued that public education fell within the scope of the police power of a state to provide for the public welfare.

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[38] Missouri ex rel Gaines v. Canada, 305 U. S. 337 (1938). McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950). Sweatt v. Painter, 339 U.S. 629 (1950).

The district court decided that segregation per se was not unconstitutional. Furthermore the court held that it was bound by past decisions of the Supreme Court which had not yet overruled the "separate but equal" holding. The court, however, made a most interesting finding of fact. After noting that there were no material differences in physical facilities, qualifications of teachers, and courses of study, the court significantly said:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of the law therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of the benefits they would receive in a racially integrated school system.[39]

This was 180° from the Plessy decision, when the majority opinion held that segregation in no way stamped the Negroes with the badge of inferiority or if it did so, it was only in their own minds. It was also interesting to note that the following year the Delaware Chancery Court made a similar finding about the detrimental effect of segregation on the Negro school children. These holdings seemed to augur eventual victory for the Negroes, yet in reality they still had formidable legal obstacles to overcome, as well as widespread public resistance in and outside the South.

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[39]Topeka Transcript, pp. 245-246.

About the same time in the spring of 1951 that the Brown case was being heard in Topeka, a group of Negro students in a poverty-stricken rural area of Virginia went on strike, protesting generally bad conditions in their high school. These actions eventually led to the case of Davis v. County School Board of Prince Edward County, Va.[40] The school was located in Prince Edward County, one of the poorest counties in the state where approximately half of the county's 15,000 population was Negro. Part of the problem was that within the previous decade there had been a great upsurge in Negro enrollment in the public schools. Although there had been twice as many white high school students as Negroes in 1941, by 1952 there were more Negro students than white.[41] Since there was no building construction immediately after World War II, two temporary buildings had been erected in 1947. By 1949 an overall school building plan was adopted, giving first priority to a new Negro high school. Yet construction of a suitable Negro high school out of current funds was beyond the financial ability of the county. Two possibilities existed. The first was a loan from the State Literary Fund, devoted to school purposes; the second was a bond issue approved by

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[40] Davis v. County School Board of Prince Edward County, 103 Fed. Supp. 337 (1952).

[41] Transcript of Record, Supreme Court of the United States, October Term, 1952, No. 4. Davis v. County School Board of Prince Edward County, p. 4. Hereinafter referred to as Virginia Transcript.

the voters. However, these possibilities were still in the planning stage.

The existing Negro high school had one permanent brick building and three temporary one-story frame buildings, covered with tarpaper and heated by coal stoves. The state had invested $131,000 in the Moton High School for Negroes compared to $487,000 in the new white high school. $18.75 worth of equipment was provided every Negro high school student in comparison with $53.07 per white student, yet it was admitted that in many particulars the Negro high school was superior to the inferior of the two white high schools of the county.[42] The two white high schools had a total of 384 pupils in comparison with 451 students at the one high school for Negroes. Specifically, the Negro high school lacked a gymnasium, showers, dressing rooms, cafeteria, teachers' rest rooms, infirmary, a private office for the principal, and an industrial-arts shop; in addition its science facilities and equipment were extremely inadequate. There were also significant differences in curriculum. Although the two white high schools taught physics, world history, Latin, advanced typing and stenography, wood, metal and machine shop work and drawing, Moton High School for Negroes taught none of these subjects. Negro school buses were often inferior hand-me-downs from the white schools. Not surprisingly the Negro high school and the one inferior white high school lacked regional

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[42] Ibid., pp. 59, 118.

accreditation, whereas the other white high school was accredited by the Southern Association of Secondary Schools and Colleges.[43] Likewise the Negro high school lacked a National Honor Society, an organization devoted to stimulating high scholastic achievement.

Over a period of years, Negro students and their parents had made many complaints without obtaining anything more than promises of future action.[44] By the spring of 1951, unable to contain their impatience any longer, the students struck for two weeks until the School Board and Superintendent gave them a definite promise of relief. During the strike, two lawyers, Oliver Hill from Richmond and Spottswood Robinson III from the NAACP Legal Department, were invited to a meeting of students and parents. Although they attended with the intent of convincing the children to return to school, the attorneys were persuaded by the students to take the case and file suit against the school board. Robinson said later that he could not refuse the case when confronted by angry and hurt parents with their legitimate grievances.[45] Suit was finally brought in the name of more than one hundred pupils of Moton High School and the case came on for trial before a three-man federal district court in Richmond, Virginia. The trial was the most lengthy of all the four state school segregation

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[43] Ibid., pp. 118-119.

[44] Hill and Greenberg, p. 83.

[45] Ibid., p. 84.

cases, lasting five days from February 25th through 29th, 1952. It was also the only case in which the school authorities introduced their own social science witnesses and evidence to rebut that of the Negroes.

As in the South Carolina case, there were two issues here: (1) the inferiority of educational facilities for the Negro students; and (2) the unconstitutionality of segregation in itself. Plaintiffs introduced a great deal of evidence regarding the physical inequalities. A series of witnesses including the Superintendent of Schools, a professor of education and the principal of the Negro high school offered reports and testimony to that effect. Regarding segregation per se the plaintiffs developed the two major themes of the incongruity of segregation with democratic values and the psychological harm resulting from separation of the races.

The state authorities introduced twelve witnesses including the President of the University of Virginia, the chairman of the Department of Psychology at Columbia University, the Superintendent of Schools, a private architect who had prepared plans for construction of the proposed Negro school, the President of the Farmville Manufacturing Company and School Board member, several officers from the State Office of Education, the Dean of Education at the University of Virginia, a retired clinical psychologist, the President of Longview College--a small Virginia college for white students--and a Richmond psychiatrist. The

psychiatrist testified that the abrupt termination of segregation would make for some very vicious and subtle forms of discrimination. He also gave his opinion that the greatest problem in elimination of segregation would occur at the junior and senior high school levels.[46] Although he testified that segregation, whether legal or voluntary, was adverse to healthy personality development, he believed that elimination of official segregation would not in itself change long established personality defects. In a word, what harm had been done would not be corrected over-night or perhaps for a long time.

One of the leading witnesses for the defense was Dr. Henry E. Garrett, Professor of Psychology, Chairman of the Psychology Department at Columbia University, and former teacher of the major psychologist for the plaintiffs, Dr. Kenneth Clark. Dr. Garrett, a former Virginian, testified that under local conditions, a segregated school system was best for the present. Interestingly enough, Dr. Garrett expressed the opinion that psychology probably had not reached the point where it could truly measure the impact of segregation on personality. He stated that mere separation of the races did not seem to be in itself discriminatory, nor did racial segregation necessarily leave a stigma.[47]

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[46] Virginia Transcript, p. 524.

[47] Ibid., pp. 101-102.

The defense also introduced the County Superintendent of Education who testified that prejudice was mostly developed in the home, as well as through community customs, habits, and traditions, implying that governmental action--legislative or judicial--was of little avail. For example, Virginians had been traditionally hostile to free public schools, for white or colored children, up to the 1930's. Yet by the 1950's Virginia was committed to public education. Desegregation would, in his opinion, lead to decreased support for public schools and fewer job opportunities for Negro teachers. Finally, he differentiated between segregation on the college level or above from that on the elementary and high school level, basing his argument on the premise that the younger, more flexible and easily influenced child would in some undefined way be harmed by integration whereas the older student would not. The real reason of course was emotional--that "the feeling of the people, and the customs and habits and traditions are such that I still come back to my original point that it would be a mistake to break segregation at this time."[48] He stated that the people of Virginia were in no way prepared for a drastic change. "You cannot legislate custom, nor can you legislate beliefs and feelings of individuals."[49] On the local level, he said, desegregation would be a

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[48] Ibid., p. 443.

[49] Ibid., p. 444.

catastrophe if applied immediately. On a state-wide basis he did not think that the people of Virginia would subscribe to large appropriations for desegregated schools. Such a situation would certainly result in increased private schools, so that the poorer people, both white and Negro, would suffer educational hardships. This is exactly what did happen after the 1955 decision of the Supreme Court when numerous private schools were formed in Virginia.

In 1951 the Negro population comprised 22.2% of Virginia's 3.8 million people, while the school ratio was 74.3% white and 25.7% Negro. Costs for a dual school system followed closely the population ratio. Although this was expensive in tax dollars, the defense insisted the people of Virginia were willing to pay.[50]

The defense had four major arguments: (1) the United States Constitution did not require precipitate action, the State of Virginia was in the middle of a building program for Negroes, and the new Negro high school in Prince Edward County would be ready by September of 1952; (2) segregation did not of itself offend the Constitution because the Congress which submitted the Fourteenth Amendment had simultaneously voted funds for segregated schools in the District of Columbia; (3) legislative classifications (here referring to race) measured against the "equal protection of the laws" standard were not to be considered in a vacuum but

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[50] Brief for Appellees. Supreme Court of the United States, October Term, 1952, No. 191, Davis v. County School Board of Prince Edward County, pp. 17-18. Hereinafter called Virginia Brief.

as practical matters; and (4) segregation must be viewed in the light of Virginia history, which had long recognized racial differences and established segregation in certain areas to prevent violence and reduce resentment.

The strong emotions evident in the trial were never far from the surface. At one point a Negro witness replied to a question about Negro pride by saying, "Let's stop all of this old bunk regarding white pride and race and Negro pride and race. Negroes are also proud of being Americans. I want the rights and respect that any other American gets anywhere else he goes."[51] Racial prejudice and feelings of white superiority were evident in the answers of some state witnesses and in one attorney for the defendants. The attorney questioned one of the witnesses about his Jewish background, as if that explained his testimony. This same attorney also made thinly veiled allusions to the influence of Communism on the plaintiffs and accused the NAACP of fomenting racial strife while stirring up litigation.[52] Defense counsel was also noticeably sarcastic about the social science testimony, doubting whether it was scientific.

The first major ruling of the trial court was to equalize school facilities for the Negroes. The County

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[51] Ibid., p. 19.

[52] Virginia Transcript, p. 329.

School Board was ordered to pursue "with diligence and dispatch" its already-begun building project, while curriculum, buses, and other facilities were to be equalized. The second major holding was a serious defeat for the Negroes. The court declared that segregated education was constitutional and not violative of the Fourteenth Amendment. Legal support for this position was found in the recent South Carolina segregation case upholding the state segregation laws.[53] The court also found support in the state police power, which included regulation of public schools. Aware of the vulnerability of racial classifications the court held:

> It indisputably appears from the evidence that the separation provision rests neither upon prejudice, nor caprice, nor upon any other measureless foundation. Rather the proof is that it declares one of the ways of life in Virginia. Separation of white and colored children in the public schools of Virginia has for generations been a part of the mores of her people. . . . The school laws chronicle separation as an unbroken usage in Virginia for more than eighty years.[54]

In a word, the court was saying that racial classification for public schools was reasonable as based on substance in fact and therefore not a question for the court to adjudge. The court also noted that, "The importance of the school separation clause to the people of the state is signalized by the fact that it is the only racial segregation direction contained in the Constitution of Virginia."[55] It was thus

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[53] Ibid., p. 285.

[54] Ibid., p. 287.

[55] Ibid., p. 320.

apparent that the relation of the races in the public schools was a matter of special importance. Intermingling in other areas, yes, but the school room occupied a unique place in the hearts of Virginians.

The third major finding was that separate education did not constitute discrimination or social despotism. The court stated that segregation, whatever its demerits in theory, in practice actually gave greater opportunities for the Negroes. The employment of Negro teachers, and the increasing improvement of Negro schools was noted: ". . . it was shown that in twenty-nine of the one hundred counties in Virginia, the schools and facilities for the colored are equal to the white schools, in seventeen more they are now superior, and upon completion of work authorized or in progress, another five will be superior."[56]

In answer to the plaintiff's charge that segregation of the races stigmatized the Negro as inferior, the court found ". . . no hurt nor harm to either race. This ends our inquiry. It is not for us to adjudge the policy as right or wrong--that, the Commonwealth of Virginia shall determine for itself."[57]

Since each side had introduced social scientists, the court decided that neither side overbalanced the other. Thus the Negroes got only half a loaf, and in fact not the critical determination that they were seeking--namely a recognition of their equality and an end to the stigma of

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[56] Ibid., p. 321.

[57] Ibid.

racial segregation. It would seem doubtful that a Southern court could find otherwise, yet the decision in the next case occurring in the border state of Delaware was to bring victory to the Negroes in their battle for desegregation.

In March, 1952, within a month after the Virginia trial, two cases arose in Delaware which were ultimately consolidated for trial and decision in the opinion known as Belton v. Gebhart.[58] One case arose in Hockessin, a small community south of Wilmington, Delaware, where Mrs. Sarah Bulah sought school-bus transportation for her seven-year old daughter, Shirley Barbara. Every morning the bus passed the Bulah's house en route to one of the best equipped elementary schools for white children in the state. Because of state segregation laws, Mrs. Bulah was compelled to drive her daughter several miles distant to the Negro school. The necessity to drive her daughter to school was an additional hardship in that it prevented Mrs. Bulah from holding a day-time job. The mother's request for bus transportation for her daughter was refused because the Board of Education did not furnish bus transportation for the Negroes, only for the white pupils.

In addition to the transportation problem, the Negro elementary school was admittedly inferior to the white school. It was a "B" school whereas the white school was graded "A." Disparities existed in allocation of public funds, condition of the building and site, physical

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[58] Gebhart v. Belton, Del. Ch. 91 A2d 137 (1952).

facilities and equipment, and the formal preparation and rating of the teachers. Furthermore there were inequalities in the two systems in maintainance of the buildings, landscaping and in medical supplies and equipment.

The second Delaware case was brought by Ethel Louise Belton and other Negro high school students in Claymont, a suburb north of Wilmington. Miss Belton had to take a two-hour daily round trip, on transportation secured by herself, to the Negro high school in Wilmington, passing a white high school within one and a half miles of her home. Voluminous testimony was introduced showing the inferiority of the Negro high school in terms of buildings, site, budgets, teacher preparation, teaching load, and health services. It was also established that the Negro high school lacked a football, baseball, and hockey field as well as other regulation playing grounds. It was necessary to conduct physical education classes at a YMCA, three and a half blocks from the school. The vocational and commercial courses, housed in a very dilapidated auxiliary building, were nine blocks from the main structure. Testimony by the plaintiff brought out the inconvenience and additional time required to take stenographic classes in the annex. In contrast, the white high school was housed in one building.[59]

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[59] Brief for Petitioners (School Board), Supreme Court of the United States, October Term, No. 5, p. 6. Gebhart v. Belton.

Although the Negroes introduced thirteen expert witnesses in the fields of psychiatry, psychology, anthropology, sociology and education, the school authorities made no effort to refute the social science testimony with witnesses of their own. They introduced only school officials who testified as to state educational policies.

The plaintiffs had three major arguments: (1) the two school systems were unequal and the inequalities were not being corrected within a reasonable time. Although some of the building program was underway, the major part was merely in the planning stage and, "To postpone relief is to deny relief;"[60] (2) classification based on race or color was arbitrary, unreasonable, invalid, and violated the equal protection clause of the Fourteenth Amendment. To sustain this argument, the plaintiffs presented testimony by a Columbia University psychology professor that there were no racial differences in inborn intellectual capacity. They pointed out, as they had done in other states, that the Supreme Court already had condemned classifications of students on the basis of race--in the Texas and Oklahoma graduate school cases. They noted that colleges were unsegregated in Delaware. Furthormore, they rejected the idea that there was a difference in segregation at the college level and lower levels. They argued that to segregate at the elementary and high school level

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[60] Reply Brief of Respondents, Supreme Court of the United States, October Term, 1952, p. 4. Gebhart v. Belton (the Negro plaintiffs in the lower court).

would impair the quality of preparation for the unsegregated state college;[61] and (3) state-enforced racial segregation inflicted grievous mental injury on the Negro children.

For their part, the school authorities did not deny that the two school systems were unequal but they claimed that the Fourteenth Amendment did not require immediate action on admission of Negroes to the white schools. They pointed out that the inequalities were being remedied and that the schools could be made substantially equal by the fall term of 1953. They suggested that a court order equalizing facilities within a reasonable time was the proper ruling. Most important, they claimed that the Negro schools could be equalized even though segregated. Factors present on the graduate level such as need for specialization, distinction of the alumni, size of the student body, and opportunity for mingling with other students pursuing the same profession need not be considered on the elementary and secondary levels. They also denied that segregated schools violated the equal protection clause of the Fourteenth Amendment and raised an argument frequently heard even after the final decision in the segregation cases. This was the assertion that the "well established and settled interpretation of the Fourteenth Amendment should not be overthrown by the testimony of educators, psychologists, sociologists, and anthropologists, which . . . was

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[61] Ibid., p. 9.

imprecise and uncertain and had led to conflicting findings of fact in the Kansas and Virginia cases."[62]

Finally, the defense argued that racial classifications were reasonable, based on experience, and not arbitrary. While there were some bad psychological results of enforced segregation, separation of the races was the only way to prevent more serious trouble due to incompatibility of the white and Negro cultures and long established attitudes. They pointed out that even the plaintiffs' witnesses, experts in anthropology and education, testified that the elimination of segregation would involve delicate factors resulting from differences in the attitudes and mores of the races. In conclusion, the defense pleaded for a general community-wide program in the community aimed at elimination of segregation. Time, patience, and education were the recurring pleas of the South.

Although the trials in the other states were conducted in federal district courts, the Delaware case was heard during the spring of 1952 in a court of Chancery, presided over by a single Equity judge. For the first time the Negroes won their case in the initial hearing. Chancellor Collins J. Seitz ordered immediate admission of the Negro plaintiffs to the previously all-white schools because of the inequality of physical plants. He did not rule, however, that segregation in itself created inequality.

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[62] Brief for Petitioners, p. 10 (see f.n. 59).

Although he expressed his personal belief that the "separate but equal" doctrine in education should be rejected, he added,

> . . . by implication, the Supreme Court of the United States has said a separate but equal test can be applied, at least below the college level. This Court does not believe such an implication is justified under the evidence. Nevertheless, I do not believe a lower court can reject a principle of United States constitutional law which has been adopted by fair implication by the highest court of the land. I believe the "separate but equal" doctrine should be rejected but I also believe its rejection must come from that Court."[63]

The Court did add a postscript, saying that if at some future time, defendants could demonstrate that all the inequalities had been removed, then the school authorities had the option of coming to Court again--presumably a glimmer of hope for the segregationists.

The second finding of fact by the Court was that segregation caused serious psychological harm to the Negro child. Quite apparently the Chancellor had been impressed by the social science evidence. In his opinion he commented that, "One of America's foremost psychiatrists testified that state-imposed school segregation produces in Negro children an unsolvable conflict which seriously interferes with the mental health of such children."[64] Although he conceded that these results were not caused by school segregation alone, the Chancellor added that such segregation was continuous, "clear cut," and gave legal sanction

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[63] Belton v. Gebhart, Del. Ch. 91 2d 137 (1952).

[64] Ibid.

to racial differences. The results of such policy led to "lack of interest, extensive absenteeism, mental disturbances, etc."[65] He also held that such arguments that the State might not be "ready" for non-segregated education or that social problems could not be solved with legal force could not be used to defeat a constitutional principle.

Five months later in the fall of 1952, the Supreme Court of Delaware affirmed the decision of the Court of Chancery. The three-man appellate court made its own investigation of the two school systems and also found that substantial inequalities existed. The Court then upheld the lower court ruling for immediate relief. However, the Court indicated that the defendants might at some future date apply for a modification of the desegregation order if the inequalities were removed. Of interest to the countless other Negro students in Delaware who were not party to the suit, the appellate court noted that each case (the two Delaware suits) was a "so-called spurious class suit" brought for the benefit of plaintiffs "and others similarly situated."[66] This was judicial acknowledgment of the wide applicability of the decision.

The District of Columbia case, Spottswood v. Bolling, differed in several material respects from those in the four state trials. First, the federal government regulated

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[65] Ibid.

[66] Belton v. Gebhart, 87 A 2d 862, (1952).

the school system in the District rather than a state government. Because of this, counsel had to rely on the "due process" clause of the Fifth Amendment, instead of the Fourteenth Amendment, the legal foundation for the state cases. In addition the District laws had never explicitly required segregation of the races although Congress had always provided for separate schools in appropriation bills. Furthermore there was no allegation of inferior facilities since the Negro and white school systems were considered substantially equal. Finally the District case was never heard in a trial court. The United States District Court for the District of Columbia had dismissed the complaint. While it was still pending before the United States Court of Appeals, the Supreme Court of the United States in the fall of 1952 invited the parties to appear along with the litigants from the four states in hearings before the Supreme Court. The High Court thus hoped to dispose of all the cases at once. Interestingly enough, this was the only one of the five cases not directly sponsored by the NAACP, although the District of Columbia lawyers were members of the Association's National Legal Committee.[67] This was more of a nominal than actual difference since legal counsel for the Negroes in all the cases met for consultation and joint planning.

The District of Columbia case originated when

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[67]Hill and Greenberg, p. 86.

Spottswood Thomas Bolling, a Negro boy, and others had applied unsuccessfully for admission to the brand-new all-white Sousa Junior High School in Washington, D. C. Public school education for Negroes in the District had always been segregated ever since the Civil War when free public education for Negroes was first introduced. Prior to that time, there had been private schools with racially mixed classes. The first school solely for colored children was opened in 1862 in the basement of a private church. By 1865, private philanthropy had established the first public school for Negroes.[68] Numerous appropriation bills passed Congress during the following years, all implicitly acknowledging the dual system. Even during the same term of the debates on the Fourteenth Amendment, Congress voted on legislation setting up separate school buildings in the District.

Racial segregation was also established in almost all other areas of life in the District--in hotels, restaurants, most places of public accommodations, and even in some facilities operated by the government.[69] However by the time the school segregation cases reached the Supreme Court in the fall of 1952, legal or formal segregation in the District was lessening. The outstanding example of formal segregation in the District was in the public schools.

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[68] Ibid., p. 85.

[69] Ibid.

Segregation had been abandoned in such formerly all-white professional groups as the District of Columbia Medical Society, the American Institute of Architects, and the American Association of University Women. The United States government had prohibited segregation in employment. The National Capital Housing Authority had forbidden segregation in the new projects. This, of course, resulted in the inevitable white exodus to the suburbs and solid black housing areas within the District proper. All Catholic and most private and parochial schools had been desegregated. By 1951 theaters, concert and lecture halls, most motion picture houses, and the teachers' union no longer excluded Negroes. Some churches had integrated congregations. A breakthrough was made in restaurants which in 1953 admitted Negroes following the case of District of Columbia v. John R. Thompson Restaurant Company.[70] In this case the Supreme Court upheld an old unrepealed 1873 civil-rights law prohibiting discrimination in places of public accommodation.

Counsel for the Negro plaintiffs developed three main arguments in their brief for the Supreme Court: (1) the District school laws did not explicitly require segregation; (2) the Court should read the District school laws as if they contained a requirement that schools be non-segregated. This interpretation rested on the fact that courts should always interpret statutes in a manner which

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[70] District of Columbia v. John R. Thompson Restaurant, 346 U.S. 100 (1953).

will avoid the need to answer serious constitutional questions. However if the Court would not so read the statute, then it would have to face the question: Does segregation in the District's schools deny liberty as guaranteed by the due process of law clause in the Fifth Amendment? and (3) race was an unreasonable classification, unrelated to any proper legislative purpose, and consequently a denial of due process.[71] The issue in the District of Columbia case was clearly that segregation in itself was unconstitutional since there was no allegation that the Negro schools were inferior.

Thus the scene was set for the legal battle before the Supreme Court in the fall of 1952. However, to appreciate properly the legal questions involved it is necessary to look at the historical foundation of the state cases, namely the "equal protection of the laws" clause of the Fourteenth Amendment. The following chapter will therefore examine the historical background and the varying interpretations of the Fourteenth Amendment.

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[71] Hill and Greenberg, p. 86.

CHAPTER III

THE FOURTEENTH AMENDMENT

The elastic language of the Constitution provides endless debate on interpretation, and the Fourteenth Amendment is no exception to this debate. Did the requirement of "equal protection of the laws" from section one of the Amendment prohibit racial segregation in the public schools? The Negroes said "yes," the school boards said "no," and the Court ultimately said that the historical evidence was "inconclusive." However, after the initial round of written briefs and oral arguments on the facts and the law of the cases, the Supreme Court decided that a final determination rested on the meaning of the Fourteenth Amendment. Consequently the Court prepared a series of questions on the purposes of the Amendment and the powers of Congress and the judiciary to handle problems arising under it. The Court wished to know whether either the framers or ratifiers of the Amendment intended that it would abolish public school segregation or whether they understood that a future Congress or Court might do so?[1] Accordingly in the fall of 1953, the parties submitted additional briefs and were once again heard in oral argument

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[1]Intermediate Order of the Supreme Court, 345 U. S. 972 (1953).

on these questions. This chapter will examine briefly the historical background and various interpretations of the Fourteenth Amendment by the litigants, legal scholars, political scientists, and historians.

In order to properly understand the purpose of the Amendment, it must be viewed in the context of the struggle between Congress and President Andrew Johnson over reconstruction of the Southern states. Both politics and principles were involved.[2] Briefly, Johnson favored a quick return of the Southern states to the Union, generous amnesty provisions, and control of the racial situation in the hands of white Southerners. He also believed that as Commander-in-Chief of the armed forces, he possessed all the power needed to institute a plan of reconstruction, significantly without any provision for Negro suffrage. Congress on the other hand had no intention of letting the South off so lightly. Even conservative Republicans were fearful that northern and southern Democrats would unite and deprive the Union of the fruits of victory. Moreover the Radical Republicans were determined to elevate the Negro to a more equal status.

Passage of the Black Codes by the restored Southern state governments confirmed the Radicals' worst fears about the plight of the Negro. These statutes, in the tradition of the Southern caste system, were partially in response

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[2]Lawanda and John M. Cox, Politics, Principles, and Prejudice, 1865-1866 (New York, 1963), passim.

to a situation of temporary anarchy which followed the collapse of the old discipline in 1865, producing a state of near hysteria among Southern white people. Fear of black insurrection, revenge, and a belief that the Negroes would not work without compulsion contributed to this mood. Large numbers of temporarily uprooted and unemployed freedmen roamed the highways, congregated in towns, or joined the federal militia.[3]

The Black Codes, although varying from state to state, in general severely limited the civil rights of the ex-slaves. Almost uniformly they denied the Negro the privilege of sitting on juries and usually rejected black testimony in cases involving a white defendant. Among the codes highly criticized in the North were those requiring labor contracts to be in writing, any infraction of which by the Negroes resulted in loss of wages. There were also stiff apprenticeship laws for young Negroes under eighteen, large fines for vagrancy which if not paid were collected by selling the services of the offender, and laws prohibiting Negroes from carrying firearms, making seditious speeches, selling liquor, or preaching without a license.[4] In addition racial segregation was practiced on railroads, in schools, jails, hospitals, asylums, churches, military

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[3]C. Van Woodward, The Strange Career of Jim Crow (New York, 1955), pp. 22-23.

[4]John Hope Franklin, Reconstruction: After the Civil War (Chicago, 1961), pp. 48-49.

life, and in most public institutions.[5]

Resentment against the President's efforts to carry through his plan of reconstruction and anger at the Black Codes which seemed to the Radical Republicans a conscious effort to retain slavery led Congress to create its own plan of reconstruction. A Joint Committee on Reconstruction, consisting of six senators and nine representatives, proposed and Congress passed over presidential vetoes, a Civil Rights Bill and a bill to continue the Freedmen's Bureau. The Civil Rights Act declared the Negro to be a citizen and gave him the same civil rights as were enjoyed by the whites. By the summer of 1866 the Joint Committee on Reconstruction was ready with a congressional substitute for the President's plan of reconstruction. Its recommendations with slight modifications were incorporated in the Fourteenth Amendment.[6]

This plan included guarantees of the rights of the freedmen and provisions for representation of the ex-Confederate states in Congress. Section one of the Fourteenth Amendment as finally passed defined American citizenship and the rights attaching thereto. This section will shortly be discussed in more detail. Section two offered a new formula of representation, eliminating the mixed basis

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[5]Woodward, p. 24.

[6]J. G. Randall and David Donald, The Civil War and Reconstruction Second Edition (Boston, 1961), pp. 580-581.

(the three-fifths ratio for slaves) which the original Constitution prescribed. States which denied Negroes the right to vote were to have their representation in the lower House of Congress reduced proportionately. Section three repudiated presidential pardon of former Confederate civilian or military officials for a system of Congressional pardon. Section four affirmed Union debts incurred during the Civil War and repudiated Confederate debts. Section five established Congressional power to enforce the Fourteenth Amendment. Essentially the Amendment was a compromise between moderate and radical Republican desires, not entirely satisfactory to either faction but ambiguous enough to permit each to support it.[7]

Since section one became the basis of the Negroes' claim in the school segregation cases, it deserves careful attention. First, this section defined citizenship as belonging to all persons born or naturalized in the United States. Such persons, obviously including Negroes, were deemed citizens of the United States and of their state of residence. Second, the section prohibited a state from abridging the privileges and immunities of citizens of the United States, depriving any person of life, liberty, or property, without due process of law, or denying any person the equal protection of the laws. The ambiguity of these phrases was intentional inasmuch as in the minds of most

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[7]Ibid., pp. 581-584.

of the framers and supporters of the Amendment, the "equal protection" clause was "meant to apply neither to jury service, nor suffrage, nor anti-miscegenation statutes, nor segregation."[8]

The direct antecedent of the "equal protection of the laws" phrase came from the section on civil rights in the 1866 Civil Rights Act. In this Act, civil rights meant specifically that all persons were to have the same right to make and enforce contracts, sue and be sued, inherit and own property, and have the "full and equal benefit of all laws for the security of person and property."[9] Part of the Congressional debate over the Fourteenth Amendment centered on how broad or narrow an interpretation should be given to "equal protection." Democratic Senator Garrett Davis of Kentucky accused the Republican leadership of a bold and desperate political game. He said that the only object of section one was to give the Negroes full civil and political rights. Yet significantly there was no discussion of specific illustrations of "equality." Apparently the majority of Congressmen were more concerned with the general political implications of the Amendment.[10]

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[8]Alexander M. Bickel, "The Original Understanding and the Segregation Decision," 69 Harvard Law Review 1 (1955).

[9]Randall and Donald, p. 579.

[10]Supplemental Brief for the United States on Reargument, In the Supreme Court of the United States, October Term, 1953, p. 52, hereinafter referred to as the Government Brief.

The difficulty of ascertaining the original understanding of the Fourteenth Amendment is compounded by the fact that the Amendment was voted on by 218 Congressmen in 1866, discussed in hundreds of speeches and editorials, and voted on by thousands of state legislators between 1866 and 1868. Diversity of opinion was rampant among the various factions of Congress--the Radical Republicans, Northern Democrats, Northern Whigs, and moderate and conservative Republicans.[11] Nevertheless the Supreme Court in June, 1953, sought information on what the framers and ratifiers of the Amendment understood it to mean.

In order to meet this request of the Court, both sides examined Congressional debates, state legislative and ratifying convention reports, speeches by various leaders, and secondary accounts by historians and political scientists. The sheer quantity of materials was staggering. More than 2,000 pages of written briefs were submitted on the adoption of the Fourteenth Amendment, the most extensive presentation of historical materials ever made to the Supreme Court.[12]

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[11]John P. Frank and Robert F. Munro, "The Original Understanding of the 'Equal Protection of the Laws'," 50 Columbia Law Review 131-169 (1952).

[12]Bickel, p. 6. Professor Paul E. Wilson of the University of Kansas School of Law very kindly made available to the writer his substantial collection of law briefs for the school segregation cases. Professor Wilson had all the major briefs of the parties for the years 1952 to 1955 and many of the amici curiae briefs as well. The same briefs are available in the Library of the Supreme Court in Washington, D.C., and in a limited number of other libraries.

The NAACP enlisted some nationally known scholars to assist in its research on the Fourteenth Amendment including: Alfred H. Kelly, Professor of Constitutional History at Wayne State University; John Hope Franklin, Negro historian from Brooklyn College; C. Vann Woodward, specialist in Southern history, from John Hopkins University; and Howard J. Graham, Law Librarian from the University of California at Los Angeles. Funds to finance research came not only from the NAACP but also from labor unions and private donors.[13]

Alfred Kelly revealed the guiding principle of the NAACP research team in an address to the American Historical Association on December 28, 1961. He said that the researchers were engaged in "law-office history" when they were "using facts, emphasizing facts, bearing down on facts, sliding off facts, quietly ignoring facts, and above all interpreting facts in a way to do what Marshall [Thurgood] said we had to do--'get by those boys down there.'"[14] A few years later Kelly wrote that the NAACP brief interpreting the Fourteenth Amendment was "of course, not history in any professional sense; rather it was legal advocacy. . . .

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[13]Daniel M. Berman, It Is So Ordered: The Supreme Court Rules on School Segregation (New York, 1966), p. 81. Other scholars who participated in the legal research were Robert K. Carr, Robert Cushman, Jr., John P. Frank, Walter Gellhorn, and Milton R. Konvitz.

[14]Alfred H. Kelly, "An Inside View of Brown v. Board," Paper read at the Annual Meeting of American Historical Association, Washington, D.C., December 28, 1961.

It sought to place the most favorable gloss upon the critical historical evidence that the Association's staff and advisors could develop without going beyond the facts."[15] What was produced:

> was a piece of highly selective and carefully prepared law-office history. It presented, indeed, a great deal of perfectly valid constitutional history. But it also manipulated history in the best tradition of American advocacy, carefully marshalling every possible scrap of evidence in favor of the desired interpretation and just as carefully doctoring all the evidence to the contrary, either by supressing it when that seemed plausible, or by distorting it when suppression was not possible.[16]

The thesis advanced by the NAACP was that the framers and ratifiers of the Fourteenth Amendment understood that it would abolish public school segregation. This was based on their contention that the purpose of the Amendment accordingly was to provide for the complete legal equality of all men and to prohibit all caste and class legislation based on race or color.[17] In contrast, the school boards argued that neither Congress nor the

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[15]Alfred H. Kelly, "The School Desegregation Cases," in John A. Garraty, ed., Quarrels That Have Shaped the Constitution (New York, 1964), p. 264.

[16]Alfred H. Kelly, "Clio and the Court: An Illicit Love Affair," in Philip B. Kurland, ed., The Supreme Court Review, (Chicago, 1968), p. 144.

[17]Reply Brief for Appellants on Reargument, In the Supreme Court of the United States, October Term, 1955, No. 2 and No. 4. Hereinafter called the NAACP Brief. See also Argument: The Oral Argument Before The Supreme Court in Brown v. Board of Education of Topeka, 1952-1955. ed. Leon Friedman (New York, 1969), pp. 183-186. Hereinafter referred to as Oral Argument.

ratifying states understood that the Amendment would abolish segregation in public schools.[18]

Looking at the same data the parties disagreed on the meaning of "equal protection of the laws," the relevance of the 1866 Civil Rights Act, the importance of "customs, usages, and traditions" of the Southern states, the right to a public school education--whether education was a constitutional right or a privilege within the police power of the state, and the relevancy of segregated schools in the District of Columbia during passage of the Fourteenth Amendment. Both sides committed sins of commission, selection, and interpretations. Words were taken out of context, emphasis was misplaced, and contemporary conditions were ignored.[19]

A few examples of the conflicting interpretations offered by the parties will indicate the problems facing the Supreme Court. According to the NAACP the meaning of the "equal protection" clause could be found in the 1866 Civil Rights Act passed just prior to the Fourteenth Amendment. The Negroes claimed that this Act destroyed all state legislation which classified or distinguished on the basis of race. Referring to the Declaration of Independence as the source of the concept of the doctrine of

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[18] Oral Argument, p. 207.

[19] This distortion was clearly evident in a reading and comparison of the legal briefs in the school segregation cases.

equality, the NAACP argued that "equal protection" meant literally the equality of all men.[20] Although the Association claimed a broad, expansive interpretation of equality, their attorneys were conspicuously silent on any Congressional references to public school segregation.

In contrast the school boards argued that the Civil Rights Act in no way intended that white and Negro children should attend the same school. As support, they referred to a speech during congressional debate on the Civil Rights Bill by Republican Representative James J. Wilson of Iowa, Chairman of the Judiciary Committee to which the Bill had been committed. Leading the debate on the Bill, Wilson explained that the provision against discrimination on account of race or color by no means intended the integration of the races.[21]

In arguing for a broad construction of "equal protection," the NAACP explored the role of Charles Sumner in the early history of the Fourteenth Amendment. The NAACP Brief, for example, portrayed Sumner as the apostle of enlightenment in racial equality, leading the rest of the populace down the True Path. The Negroes pointed out that his arguments for desegregated schools in Roberts v. City of Boston (5 Cush. 59 Mass. 198, 1849) were widely

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[20] NAACP Brief, p. 34.

[21] Brief for Appellees on Reargument, Supreme Court of the United States, October Term, 1953, No. 2 p. 12, hereinafter referred to as South Carolina Brief.

publicized throughout the country immediately preceding consideration of the Fourteenth Amendment. In other words the NAACP was trying to establish a widespread public connection between "equal protection" and prohibition of segregation.[22] The school board attorneys on the other hand argued that Sumner's views represented only one segment of opinion, that of the Radical Republicans and not even all of them.[23]

Another disagreement between the parties centered on the 1869 constitution of South Carolina which provided that "schools be free and open to all children and youths in the State, without regard to race or color." The South Carolina school board attorneys argued that this merely meant that the State had an obligation to furnish education to all youth and had no reference to abolishing segregation.[24] The NAACP brief on the other hand interpreted this very same constitutional provision as prohibiting segregation in public schools.[25]

There was also debate over the significance of the pre-war abolitionist rhetoric as the ideological origin of the "equal protection" clause. On the one hand the NAACP interpreted the abolitionist crusade as being directed

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[22] NAACP Brief, p. 70.

[23] South Carolina Brief, p. 14.

[24] Ibid., p. 34.

[25] NAACP Brief, p. 147.

against both slavery and segregation. On the other hand the school board attorneys asserted that the abolitionists were only seeking to end slavery.[26]

The existence of segregated public schools in the District of Columbia during and subsequent to the period of the Fourteenth Amendment was the subject of much discussion by the parties. The uncontested facts were that the thirty-ninth Congress passed a bill in July, 1866, providing that certain lots in the District be set aside for colored schools. Furthermore the bill was passed with hardly any debate and no one even suggested that there was an anomaly in providing for segregated schools in the District at the same time that the Fourteenth Amendment was being submitted to the states for ratification. School board attorneys argued that there could hardly be a "more striking manifestation of the view that Congress believed that the Amendment had no effect upon segregated schooling. If the Amendment had not compelled Congress to desegregate in the District of Columbia, why should it compel desegregation by the sovereign and independent states?"[27] Significantly the NAACP brief nowhere mentioned segregation

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[26]Oral Argument, pp. 207-208.

[27]South Carolina Brief, p. 19. Similar interpretations of segregation in the District of Columbia were also made in two other briefs: Brief For Appellants on Reargument, Supreme Court of the United States, October Term, 1953, p. 5, hereinafter cited as the Delaware Brief and Brief For Appellees on Reargument, Supreme Court of the United States, October Term, 1953, p. 17, hereinafter cited as the Virginia Brief.

in the District of Columbia in 1866, so damaging to their position.

The problem of determining Congressional views about public school segregation was complicated by the fact that public education was not fully established by 1866. In most of the Southern states a system of public education was not created until after the Civil War. Understandably, therefore, there were few references to segregation in the public schools during the debates on the Amendment. In fact, the NAACP conceded that their search through Congressional records revealed only one reference to public school segregation during the debates on the Fourteenth Amendment. This occurred during an attack on the Amendment by Democratic Representative Andrew J. Rogers of New Jersey who contended that the Amendment gave Congress the power to invalidate segregated schools, because of the "equal protection of the laws" clause. Since no one contradicted or denied Roger's statement, the NAACP claimed that Congressmen understood that the Amendment prohibited segregated schools.[28]

In sum, both sides trotted out isolated statements made during debate on the Fourteenth Amendment as proof of Congressional intent. Furthermore, each side interpreted silence on various points as supportive of their position. Whether uncontradicted statements by Congressmen during

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[28] NAACP Brief, p. 20.

debate or failure to speak proves Congressional intent is indeed a highly questionable matter.

In regard to the intent of the ratifiers of the Fourteenth Amendment, the NAACP claimed that the ratifying states understood that the Amendment prohibited public school segregation. As proof, counsel pointed to the Southern state laws requiring segregated schools. These laws were passed after readmission to the Union. Prior to ratification of the Amendment all eleven Southern states adopted constitutions in which there was no provision for segregated public schools--silence on this subject. Yet after ratification of the Amendment, Arkansas, North Carolina, Alabama, Georgia, Virginia, and Tennessee passed such school segregation laws. By means of rather tortuous reasoning, the NAACP attorneys claimed that the new state laws were a deliberate attempt to evade what the states considered was a clear command of the Fourteenth Amendment--desegregate schools.[29]

The school board attorneys on the other hand examined data from the thirty-seven states in existence in 1866 and concluded that there was affirmative evidence from twenty-three of these states that it was understood that the Fourteenth Amendment would not abolish school segregation. In fourteen states, no evidence either affirmative or negative, was available. In not one state did counsel

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[29] Ibid., pp. 142-144.

find substantial affirmative evidence that it was understood that ratification of the Amendment would mean that segregation in the public schools was abolished.[30]

The Department of Justice brief on the Fourteenth Amendment was of particular interest because of the close working relationship between the government attorneys and the Supreme Court. For example, Phillip Elman, Special Assistant to the Attorney General, who helped prepare the government brief, was a former law clerk for Justice Frankfurter. Some preliminary behind-the-scenes maneuvering occurred before the Department of Justice decided on a policy position. Assistant Attorney General J. Lee Rankin, a Truman appointee, along with several others in the Department, favored the adoption of a strong stand against school segregation in 1952. But by 1953, with a change in administration, there were spokesmen for a different view who had hopes of attracting Southern votes to the Republican party. This group felt that an outspoken anti-segregation brief might dash the party hopes of breaking up the Solid South.[31]

A newsman close to the Department of Justice claimed that Attorney General Herbert R. Brownell, in 1953, would have personally likedto include a direct statement on the unconstitutionality of segregation but did not

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[30] Virginia Brief, pp. 24-26.

[31] Berman, pp. 83-85.

believe President Eisenhower would approve it.[32] Brownell allegedly advised the President that Assistant Attorney General Rankin, if asked by the Supreme Court during the oral argument what the Justice Department's position was, would say that segregation should be struck down. Apparently the President did not object, so that when this question was asked, it was answered as planned.[33]

Despite the Department of Justice's decided anti-segregation position, the government brief was forced to concede that

> the legislative history does not conclusively establish that the Congress which proposed the Fourteenth Amendment specifically understood that it would abolish racial segregation in the public schools . . . [nevertheless the Amendment had] established the broad constitutional principle of full and complete equality of all persons under the law, and that it forbade all legal distinctions based on race or color. Concerned as they were with securing to the Negro freedmen these fundamental rights of liberty and equality, the members of Congress did not pause to enumerate in detail all the specific applications of the basic principle which the Amendment incorporated into the Constitution.[34]

In regard to the intent of the ratifiers of the Amendment, the government brief noted that state legislative debates for the period were not reported, except in Pennsylvania and Indiana. It was also pointed out that official records of state action were limited to the messages

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[32]Anthony Lewis, Portrait of a Decade (New York, 1964), p. 27.

[33]Ibid., p. 96.

[34]Government Brief, p. 115.

of the Governors transmitting the proposed Amendment to the state legislatures, frequently merely as a minor item in the annual message, or else to occasional committee reports or to minimum entries in legislative journals. The Justice Department concluded that the available materials relating to the ratification proceedings in the various state legislatures were too scanty and incomplete, and the specific references to school segregation too few and scattered, to justify any definite conclusion as to the existence of a general understanding of the effect of the Fourteenth Amendment on school segregation.[35]

The Supreme Court, after considering 2,000 pages of written briefs followed by five days of oral arguments on the relationship of the Fourteenth Amendment to public school segregation, disposed of the evidence in one word--"inconclusive."[36] Whatever importance the Court had originally assigned to the meaning of the Fourteenth Amendment, it was no longer a factor in the final determination.

Legal interpretations of the meaning of the Amendment for public school segregation varied considerably. The view that the Amendment did not prohibit segregation was persuasively argued by Professor Alexander Bickel of the Yale School of Law. Bickel, clerk to Justice Frankfurter during the 1952 term, participated in a research

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[35] Ibid., 187-188.

[36] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

project under Frankfurter on the history of the Fourteenth Amendment. His conclusions from that project and further studies convinced him that in the minds of most Congressmen, the right to an unsegregated public school education in the decade after the Civil War lay in a "fringe area along with suffrage, jury service, and intermarriage." In his opinion "equal protection of the laws" referred to the right of free movement, to freedom to engage in an occupation of one's choice, and to equal benefits from the state educational system--in a word, to the civil rights as spelled out in the Civil Rights Act of 1866. There was no evidence, according to Bickel, that the civil rights formula had anything to do with unsegregated public schools. In fact, Bickel said, section one was hardly debated; instead debate turned on section three.[37]

John P. Frank, former clerk to Justice Black, concluded from his research that there was too wide a diversity of opinions on the Amendment during the Reconstruction Era to claim any general understanding that it either prohibited or permitted public school segregation. There was a general understanding during that period that "equal protection" barred discrimination in acquiring real and personal property, entering business enterprises, conducting a civil or criminal trial, or riding on public transportation. However educational policies varied

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[37]Alexander M. Bickel, Politics and the Warren Court (New York, 1955), p. 211.

enormously, even among Northern states, from Massachusetts which abolished school segregation before the Civil War to Indiana which both ante- and post-bellum barred Negroes from schools altogether.[38]

A broad interpretation of the Fourteenth Amendment was advanced by Justice Abe Fortas during a centennial conference on the Amendment in October, 1968. He conceded that the generality and ambiguity of the Amendment invited erosion and partial nullification as well as growth and adaption to life's changing facts. He felt that the Brown decision was not therefore a departure from, but a return to, the original purpose of the Amendment. Interestingly enough, he stated that the forward thrust of the Court in the 1950's with respect to Negro rights could be found not in the personnel of the Court but in a pervasive social movement. This movement included a developing idealism among the people, the levelling effect of military service, forceful Negro leadership, the African liberation movement, and economic dislocations of rural groups moving to the city, particularly Negroes.[39]

Other legal scholars conceded that the original purpose of the Amendment might not have been to prohibit public school segregation, nevertheless they were so enthusiastic about the Brown decision that they found an

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[38]Frank and Munro, p. 133.

[39]Abe Fortas, "The Amendment and Equality Under Law," pp. 100-114 in The Fourteenth Amendment: Centennial Volume, ed. Bernard Schwartz (New York, 1970).

assortment of reasons to defend it. Bernard Schwartz, Professor of Law at New York University School of Law, claimed that the Brown opinion was so plainly right in its conclusion that segregation denied equality that "he doubted whether the additional labor in spelling out the obvious was really necessary."[40] Howard J. Graham, characterized as the greatest authority on the history of the Fourteenth Amendment by Professor Leonard W. Levy, conceded that the framers and ratifiers probably regarded public school segregation as unaffected by the Amendment. Nevertheless he subscribed to the "living constitution" theory, saying "dare it follow that we today are bound by that imperfect understanding of 'equal protection of the laws'. . . . Can one generation fetter all that come after it."[41] Graham's major argument was that the antislavery background of the Fourteenth Amendment supported a broad construction of section one. These antecedents reached back to the Declaration of Independence, the preamble to the Constitution, and the Bill of Rights to provide the three primary concepts of protection, freedom, and equality later incorporated in section one of the Amendment.[42]

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[40]Bernard Schwartz, "The Amendment in Operation: A Historical Overview," p. 32 in The Fourteenth Amendment: Centennial Volume.

[41]Howard J. Graham, Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the "Conspiracy Theory," and American Constitutionalism (Madison, State Historical Society of Wisconsin, 1968), pp. 291-292.

[42]Ibid.

There were, however, lawyers who argued that the Fourteenth Amendment did prohibit public school segregation. Over 200 attorneys from the Committee of Law Teachers Opposing Segregation in Legal Education signed an amicus curiae brief in the Sweatt case upholding this position. After much circumlocution they rested their case on the fact that the Supreme Court had never ruled or even carefully considered that segregation might be enforced in education.[43]

Subsequent legal interpretations, like those advanced during the school segregation cases, upheld either a broad or narrow interpretation of "equal protection," often depending apparently on personal predilections. Clearly no one could "prove" what the intent of the framers or ratifiers was because there was no unitary intent. Instead there were as many interpretations then about the Fourteenth Amendment as there are today.

The most frequently cited political scientist on the Fourteenth Amendment was Jacobus tenBroek of the University of California at Berkely. Professor tenBroek studied the anti-slavery origins of the Fourteenth Amendment in great detail and arrived at a broad interpretation of the "equal protection" clause. He credited the Brown decision for looking to the underlying purposes of current racial segregation laws, which he said were to uphold

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[43]"Segregation in Legal Education," 64 Harvard Law Review 129 (1951). See also John P. Roche, "Education, Segregation, and the Supreme Court--A Political Analysis," 99 University of Pennsylvania Law Review 949 (1951).

white supremacy and to subordinate the Negro, purposes clearly forbidden by the constitutional demand of equality. In his opinion, the Amendment embodied an affirmative duty of government to protect men in their natural rights. Accordingly, the Brown opinion rightfully sensed the needs of the times and realized the potentiality of the "equal protection" clause in declaring great moral truths.[44]

The most intensive historical analysis of the Fourteenth Amendment and its relationship to racial segregation was made by Alfred H. Kelly who did the research for the NAACP brief on this question. Kelly studied not only the debates on the Civil Rights Act and the Amendment, but the antislavery background of the concepts in section one. He concluded that the precise meaning of the Amendment was in as fluid a state throughout the Reconstruction era as it was in the minds of the many men who voted for it in 1866. Nevertheless Kelly arrived at certain tentative conclusions. First, the principal Radical Republican leaders--Bingham, Stevens, Morrill, and Fessenden--sought to establish a broad construction of the "equal protection" clause, placing all civil rights under a federal guarantee of equality against discriminatory state laws. These leaders, long associated with the pre-war anti-slavery movement, had deliberately incorporated some of its expansive phraseology into section one. Second, despite

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[44]Jacobus tenBroek, Equal Under Law (New York, 1951, revised, 1965), pp. 22-25.

these convictions, the Radical Republican leadership at the same time deliberately represented section one during Congressional debates as a narrow, restrictive concept, merely constitutionalizing the Civil Rights Act. The Civil Rights Act had specifically enumerated the civil rights to be protected; the right to make and enforce contracts, sue and be sued, inherit and own property, and the catch-all phrase--the right "to full and equal benefit of all laws for the security of person and property." Third, inescapably, the very phrases used in section one ("privileges and immunities," "due process," and "equal protection of the laws") were vague and amorphous. They were not subject to precise legal definition, nor was it to the best interests of the Radicals to attempt such definition. Political strategy called for ambiguity, not clarity, because passage of the Amendment required a 2/3 vote and there still remained a considerable bloc of moderate Republicans not yet committed to the Radical position on reconstruction. Precision of definition was not possible, moreover, because "equal protection of the laws" had no antecedent legal history, only an ideological background in abolitionist rhetoric. Ultimately the Fourteenth Amendment passed both Houses of Congress by large majorities without any resolution of the ambiguity inherent in the Radicals' assertion that section one merely constitutionalized the Civil Rights Act and their proposal that section one would

"abolish all class legislation in the United States."[45]

Kelly concluded, as had so many others before him, with a plea for a broad construction of the "equal protection" clause. The Amendment was now a part of a living and dynamic constitutional system. In his opinion, the meaning of the Amendment was ultimately to reflect through the judicial process the evolution of democratic aspirations, hopes, will, and myth in the American social order on the question of race and caste.[46]

This investigation into interpretations of the Fourteenth Amendment in respect to public school segregation revealed two basic approaches, both usually found in the same analysis. First, there was the historical and legal investigation into the Congressional debates on the Civil Rights Act and the Amendment, the pre-war abolitionist background, and the equalitarian concepts appearing early in the American experience. Second, there was clearly an adversary pleading for a desired result--the end of official public school segregation. Perhaps the two approaches were inseparable. At any rate, the Supreme Court was undoubtedly correct when it dismissed all the evidence on the original purpose of the Fourteenth Amendment as "inconclusive."

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[45]Alfred H. Kelly, "The Fourteenth Amendment Reconsidered: The Segregation Question," 54 Michigan Law Review 1048-1086 (1956).

[46]Ibid., p. 1086.

What was really involved in these attempts to interpret the Fourteenth Amendment was an approach to constitutional interpretation, the so-called broad versus the narrow construction. This inevitably leads back to basic social as well as judicial philosophy on the part of the Court, the parties, and subsequent students of the decision. Nevertheless having dismissed the constitutional basis of the school segregation cases, the Court was forced to rely on some other framework. Logically this suggests the next point of inquiry, the matter of legal precedents.

CHAPTER IV

LEGAL BACKGROUND

The heavy hand of the past is quite as apparent in law as in history. All parties to the school segregation suits drew on previous decisions as authority in support of their position. Interestingly enough, both sides quoted many of the same cases but drew from them only help for their own cause. For example the 1950 Texas law school case was quoted by all parties at all levels during the federal district trials as well as in the briefs and arguments before the Supreme Court.[1] Attorneys for the Negroes cited it as indicating a clear stand against segregated public schools. On the other hand the school board authorities insisted that the case supported segregation, pointing out that the Court had expressly refrained from considering the doctrine of "separate but equal" which therefore was still the law of the land. This latter interpretation was held by the high court itself when it acknowledged during the oral hearings in 1952 and in the 1954 Brown opinion that the doctrine of "separate but equal" in

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[1]The transcripts of the trial court proceedings, the written briefs, and oral arguments consulted for this study clearly reveal this use of the same sources. See Chapters II and VII. The Texas law suit case was Sweat v. Painter 339 U.S. 629 (1950).

public schools was here before the Court for the first time.[2]

The list of cases cited by the parties ran into the scores. For example the 1953 United States Government brief by the Attorney General listed 143 cases. The 1953 South Carolina brief submitted in behalf of the school board listed 86 cases, and so it went. It is impossible in this study to examine in detail all the legal citations. Obviously, the Supreme Court as professionals in law were familiar with an even broader background of legal precedent. Only a few select cases with a significant bearing on the school segregation decision will be noted here. These will include a few key nineteenth century decisions, the seven education cases mentioned by Chief Justice Warren in his 1954 opinion, and finally cases involving racial discrimination in other areas--transportation, housing, jobs, voting, jury duty and criminal procedures. All these cases were cited by either the Supreme Court in its 1954 decision, the parties, the lower federal courts, or in some instances by all of the aforementioned.

Two important pre-Civil War cases have a bearing on the Negroes' efforts to overcome discrimination. The first in point of time was an 1849 Massachusetts case involving the racially segregated public schools of Boston, Roberts v.

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[2]Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

City of Boston.[3] This was a notable case for a number of reasons: it was the first time the doctrine of "separate but equal" was enunciated by a court; the Negroes' suit was argued by the eloquent Boston abolitionist, Charles Sumner; and Sumner's plea anticipated the social science argument presented over a century later in the school segregation cases. Massachusetts, the heart of the anti-slavery movement, had made several notable advances in the years before the Civil War. In 1843, the state had rescinded the law prohibiting intermarriage of colored and white inhabitants. During that same year the intra-state railroads were forced to abandon their Jim Crow cars. Sections of the Massachusetts state constitution were construed as similar to the "equal protection of the laws" phrase later written into the Fourteenth Amendment.[4]

By the mid-1840's, Salem, Lowell, Bedford and Nantucket had abolished separate schools for Negroes. Boston, however, had maintained separate schools for over half a century, despite efforts of the Massachusetts Anti-Slavery Society in 1846 to abolish them. The Boston School Committee insisted that the distinctions between Negro and white were established by God and founded deep in the physical, mental, and moral natures of the two races. With

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[3]Roberts v. City of Boston, 5 Cushing 198, 59 Mass. 198, (1849).

[4]Leonard Levy and Harlan Phillips, "Roberts Case--Source of the Separate But Equal Doctrine," American Historical Review, April, 1951, 510-518.

the very same arguments used by the state boards of education in the 1950's, the Committee argued that neither legislation nor social custom can efface these distinctions. However, a determined and astute Negro parent, Benjamin Roberts, decided to fight for the right of his five-year old daughter, Sarah, to enter a nearby white school. Charles Sumner was persuaded to volunteer his services in this effort.[5]

Sumner's arguments, widely publicized after the trial, have subsequently been praised by historians Leonard Levy and Harlan Phillips as deserving "to be included in a volume of great documents on American democracy, for its nobility of sentiment, literary excellence, and grasp of principles which have been validated by modern sociology."[6] "Which way soever we turn," Sumner told the Court, "we are brought to one single proposition--the equality of men before the law."[7] He argued that in accordance with Massachusetts law, every form of inequality and discrimination in civil and political institutions was thereby condemned. One of Sumner's most telling pleas was that segregation should not be permitted to "brand a whole race with the stigma of inferiority and degradation." (emphasis by this writer). This allegation of a stigma attaching to segregation was to appear in 1896 and again in the segregation

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[5] Ibid., p. 511.

[6] Ibid., p. 513.

[7] Ibid.

cases of the 1950's. Sumner also argued that the classification of race was unreasonable, the assumption by the Boston School Committee that "an entire race possesses certain qualities which make necessary a separate classification of that race, was an unreasonable exercise of the Committee's discretion."[8]

Anticipating the "separate but equal" doctrine, Sumner argued that the segregated school could not be an

> equivalent because of the inconvenience and the stigma of caste which it imposed and because a public school was by definition for the benefit of all classes meeting together on a basis of equality. . . . The matters taught in the two schools may be precisely the same, but a school devoted to one class must differ essentially in spirit and character from that common school known to law, where all classes meet together in equity. . .whites themselves are injured by the separation. . . . They are taught to deny the Brotherhood of Man. . .nursed in the sentiment of caste. . .unable to eradicate it from their natures. . . . The school is the little world in which the child is trained for the larger world of life. Prejudice is the child of ignorance. It is sure to prevail where people do not know each other.[9]

According to David Donald, his biographer, Sumner borrowed the idea of equal opportunity from the Jacksonian Democrats and the phrase "equality before the law" from the French Revolutionary philosophers.[10]

The Massachusetts Supreme Court, however, held against Sumner. Chief Justice Lemuel Shaw, in an unanimous

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[8] Ibid., p. 516.

[9] Ibid., p. 517.

[10] David Donald, Charles Sumner and the Coming of the War (New York, 1960), p. 181.

opinion, upheld the power of the school committee to enforce racial segregation, pointing out that all individuals did not possess the same legal rights. He denied that the principle of equality before the law could be applied to all persons in society, giving as examples the differences in rights of men and women or children and adults. The Chief Justice stressed that the school committee after long deliberation had acted on the assumption that the good of both races was promoted by separation. Then, forecasting future segregationist arguments, he noted, "prejudice is not created by law and probably cannot be changed by law." Instead prejudice would actually be fostered by compelling association of the races.[11]

The postscript to the Roberts case was added in 1855 when Massachusetts, by statutory enactment, finally abolished educational segregation. The significance of the Roberts case, however, lay in its use by pro-segregation forces down through the years as a precedent for upholding segregated education. State courts in New York, Arkansas, Missouri, Louisiana, West Virginia, Kansas, Oklahoma, South Carolina and Oregon have relied on Roberts for this purpose.[12] The Roberts case was first discussed by the United States Supreme Court in Hall v. DeCuir in 1877, as authority for the rule that "equality does not mean identity,"

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[11] Roberts v. City of Boston p. 209.

[12] Levy and Phillips, p. 517.

that equality under the law did not require racial integration.[13]

The second most frequently cited pre-Civil War case involving Negro rights was the 1857 case of Dred Scott v. Sandford, concerned with the question of Negro citizenship. Briefly, Dred Scott, a Negro, was transported by his master in 1834 from the slave state of Missouri to the free state of Illinois and from there to what is now the state of Minnesota, free territory according to the Missouri Compromise of 1821. Some four years later, Scott was returned to Missouri. At this point, with the financial and legal help of some Eastern abolitionists and the permission of his owner, Scott sued for his freedom in the state court of Missouri. The Missouri Court decided against Scott on the basis that residence in a free territory did not make a slave free. Ultimately the case reached the Supreme Court of the United States where a bitterly divided court issued the significant ruling that Negroes lacked federal citizenship under the federal constitution. This legal liability was not corrected until the passage of the Fourteenth Amendment which specifically granted citizenship to the Negroes, overruling Dred Scott.[14]

Following ratification of the Fourteenth Amendment, there were a number of state court decisions regarding the

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[13] Hall v. De Cuir, 95 U.S. 485 (1877).

[14] Dred Scott v. Sandford, 19 How. 60 U.S. 393, 15 L. Ed. 691 (1857).

Amendment and segregated schools. In 1871 the statutory provisions of Ohio requiring separate schools were challenged as being in contravention of the Fourteenth Amendment. In this case the Court upheld the segregation law, noting that classification based on color was not a denial of citizenship or of equal protection of the law. The Court asserted that the general assembly of Ohio, in its wisdom and discretion, was the proper authority to regulate the rights of Negroes.[15] In 1872 a New York court similarly held that a statute providing for separate but equal schools for Negroes and whites did not violate the Amendment.[16]

The very first Supreme Court interpretation of the Fourteenth Amendment came in 1873 in the Slaughter House cases.[17] Interestingly enough this first major case did not involve Negroes at all. In 1869 the Louisiana legislature granted a charter of incorporation to "The Crescent City Livestock Landing and Slaughter-House Company" and at the same time gave the company the exclusive privilege of slaughtering animals in and around New Orleans. Rival butchers, unhappy with this monopoly, sued, declaring that the charter was unconstitutional on the basis of the

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[15] State ex rel Carnes v. McCann, 21 Ohio St. 198 (1871).

[16] People ex rel Diety v. Easton, 13 Abb. N. Y. Pr. N.S. 159 (1872).

[17] Slaughter-House Cases, 16 Wall. 36; 21 L. Ed. 394 (1873).

"privileges and immunities," "due process," and "equal protection" clauses of the Fourteenth Amendment. The Supreme Court, however, upheld the legislative grant of the Louisiana legislature. The Fourteenth Amendment, wrote Justice Samuel Miller for the majority, was solely intended to protect the newly freed Negroes from discriminations based on color. Since the butchers could not qualify as members of that class, they were denied the protection provided in the Amendment.[18]

Of more importance to the status of the Negro was the Court's construction in the Slaughter House cases of the privileges and immunities" clause of the Fourteenth Amendment, designed to protect "citizens of the United States." The Court held that only the privileges of national citizenship were protected by the clause--which included such matters as free access to seaports and the right to travel to Washington, D. C. on official business. This interpretation did little to protect the Negro since the right to share in public education and public transportation was considered incidental to state citizenship. Unfortunately, this restricted interpretation set the pattern for the future, since there has been no substantial change in the judicial interpretation of the privileges and immunities clause since it was first expounded by Justice Miller.[19]

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[18] Ibid., p. 410.

[19] Albert P. Blaustein and Clarence C. Ferguson, Jr., Desegregation and the Law (New Brunswick, New Jersey, 1957), p. 90.

A few years later in 1876, the Supreme Court further cut down the protection afforded Negroes by excepting private action from the prohibitions of the Amendment. In the United States v. Cruikshank, the Court refused to punish private persons who had broken up a meeting of Negroes. The Court held that interference in Negro affairs by private individuals could be a crime only where the meeting was held for some purpose connected with national citizenship.[20] What became increasingly clear was the determination of the Supreme Court to uphold the sanctity of state power in the areas of domestic and local government, including regulation of civil rights and the rights of person and property. The attempt of the Radical Republicans in Congress in the 1875 Civil Rights Act to prohibit discriminatory practices against every person within the jurisdiction of the United States was thwarted by the Cruikshank case.

The Court's opinion that the Fourteenth Amendment merely prohibited state and not private action was a real setback for the Negro cause. This view of the Amendment was further strengthened by the Civil Rights Cases of 1883, which struck down sections 1 and 2 of the Civil Rights Act of 1875, the last serious effort of the Radical Republicans to establish civil equality for Negroes. The Civil Rights Act prohibited discrimination in places of

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[20] United States v. Cruikshank, 92 U.S. 542 (1876).

public accommodation--inns, public conveyances, theaters, and other places of public amusement--and imposed penalties directly against persons guilty of such discrimination, regardless of whether the state was in any way involved. The statement by the Court that the Fourteenth Amendment was "prohibitory upon the States" but not upon private individuals, that "individual invasion of individual rights is not the subject matter of the amendment," stood until the Civil Rights Acts of the 1960's.[21] The Supreme Court has never subsequently departed from that interpretation.[22] Since only state-supported schools were involved in the Brown decision, the doctrine regarding private action was only noted by Chief Justice Earl Warren in passing. After the demise of the Civil Rights Act of 1875, Congress played little part in the further implementation of the Fourteenth Amendment until the 1960's, whereas henceforth the Supreme Court took center stage.

The most important single precedent in the Brown case was an 1896 Supreme Court case, Plessy v. Ferguson.[23] This case is repeatedly cited as the foundation of the "separate but equal" doctrine. Nowhere in the opinion, however, is there an express declaration that separation of the races is to be permitted if the facilities provided are equal. Such development came later, from lower court

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[21] Civil Rights Cases, 109 U.S. 3 (1883).

[22] Blaustein, p. 93.

[23] Plessy v. Ferguson, 163 U.S. 537 (1896); 16 L. Ed. 1138.

decisions which added gloss to the Plessy principle.[24] Erroneously therefore, despite the fact that the case involved only intra-state transportation facilities, it is considered the bedrock foundation for the school segregation cases.

The facts concern a suit by one Homer Plessy, one-eighth Negro and seven-eighths white, who was arrested in Louisiana when he refused to ride in the "colored" coach of a railroad train as required by a state statute. In this deliberately contrived test case, Plessy sued to restrain enforcement of the statute on the grounds that it violated the Thirteenth and Fourteenth Amendments. Because an interpretation of the United States Constitution was involved, the Supreme Court accepted jurisdiction upon appeal. The problem squarely at issue was the power of the state to segregate on grounds of race--in this instance on a public carrier. In a lengthy opinion, Justice Henry B. Brown spelled out, for a majority of eight, his understanding of the Fourteenth Amendment which in no way sustained Plessy's claim. The dissenting opinion by Judge John Marshall Harlan on the other hand, vigorously upheld Plessy, in the process of which he uttered some notable and frequently quoted statements. More important, his reasoning was finally accepted over fifty years later when the the school segregation cases reached the Supreme Court.

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[24]Blaustein, p. 98. The judges in the Plessy case merely upheld the "reasonableness" of the Louisiana transportation laws.

Counsel for Plessy had argued that state-enforced segregation stamped the Negroes with a badge of inferiority. The Court majority disagreed, saying that such laws did not necessarily imply inferiority of race. If the facilities furnished were equal to those from which he was excluded, Plessy could suffer no damage. Justice Brown read the Fourteenth Amendment as securing the "absolute equality of the two races before the law although in the nature of things it could not have been intended to abolish distinctions based on color, or to enforce social, as distinquished from political equality."[25]

A second major issue was the question of the reasonableness of the state law. The Court firmly upheld the right of the state to act, saying

> there must be large discretion on the part of the state legislature. In determining the question of reasonableness it is at liberty to act with respect to the established usages, customs and traditions of the people, and with a view to their comfort and the preservation of the public peace and good order.[26]

The Court concluded that the Louisiana statute was reasonable, since it was based on the "established usages, customs and traditions of the people." As proof that the segregated transportation system in Louisiana was reasonable, the Court pointed to school segregation laws in other states and in the District of Columbia. In law, such "asides" are called "dicta," meaning not directly material

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[25] Plessy v. Ferguson, p. 1143.

[26] Ibid.

to the issue at hand--what the Court was considering was transportation, not public education. Theoretically, dicta are not binding as precedent on future courts. In the Plessy case, however, the dicta were increasingly referred to by later courts searching for authority to uphold segregated public school systems.

The answer to the question of whether separation per se was discriminatory depended on the reasonableness of the classification. It had long been recognized that governments may make regulations for different groups within the community but the classification must be reasonably related to the purpose of the legislation. What the Court had to weigh were the arguments of "public peace, comfort, and good order" against "arbitrary and unconstitutional classifications" as claimed by Plessy. Basic to this argument were certain unexpressed but fundamental ideas regarding race itself. The majority opinion rested on the premise of white supremacy, widely prevalent in society and in the social sciences of the 1890's. The Darwinian doctrine of survival of the fittest as interpreted by the Englishman Herbert Spencer supported this reasoning.

Although Justice Harlan, in his dissenting opinion, conceded that the white race was dominant in prestige, achievement, education, wealth, and in power, he did not doubt that the colored race would achieve progress "if it remains true to its great heritage, and holds fast to the

principles of constitutional liberty."[27] Harlan's major point was that race was an arbitrary and unreasonable classification, prohibited by the Fourteenth Amendment. In eloquent prose he argued that in law, in respect of civil rights, all citizens are equal, "there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind and neither knows nor tolerates classes among citizens, and does not permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights."[28]

Justice Brown for the majority denied Harlan's basic premise. He held that, "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. . . . if this be so it was not by reason of anything found in the act of Louisiana but solely because the colored race chooses to put that construction upon it."[29] In other words, any idea of inferiority, according to Justice Brown, was not because of state legislation but merely existed in the mind of the colored man. The Justice argued in the same manner as the school boards did some fifty years later that social prejudice may not be overcome by legislation

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[27] Ibid., p. 1146.

[28] Ibid., p. 1145-1146.

[29] Ibid., p. 1143.

and equal rights could not be secured to the Negroes, "except by an enforced commingling of the two races."[30] Social equality must rest on a foundation of voluntary consent which could not be accomplished by laws which conflict with the "general sentiment of the community upon whom they are designed to operate." Again in line with the Social Darwinism of the 1890's, ". . . legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences. . . . If one race be inferior [which Justice Brown quite obviously thought true] the Constitution of the United States cannot put them upon the same plane."[31]

What the Court did in the Plessy opinion was to declare that a state could compel "reasonable" racial segregation. It classified the right to ride an unsegregated train or attend an unsegregated school as social rather than political. The Fourteenth Amendment protected only political rights; therefore Plessy had no right to invoke the Amendment.

For purposes of both the Plessy and Brown cases it is important to distinquish between a state-required separation and a state-required commingling. These cases merely removed state-imposed segregation which is significantly different from ordering integration. Plessy did not request a ruling that white and Negroes be compelled

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[30] Ibid.

[31] Ibid.

to ride together. He did ask that the state-imposed limitations of freedom of choice be ended. As a precedent for Brown it is also significant that Plessy involved only intra-state public transporation (and, as one wit said, only North-bound trains at that[32]) and not public schools, which in theory should weaken the case as a basic precedent. Nonetheless it was heavily relied on by the states in the 1950's.

A comment over fifty years later by Justice Felix Frankfurter offers an interesting interpretation of the highly vaunted liberalism of Justice John M. Harlan in the Plessy case. Frankfurter questioned Justice Harlan's devotion to racial equality. In a personal letter to Justice John Marshall Harlan II, grandson of the first Harlan, Frankfurter wrote, "I cannot get away from the incongruity that a fellow who indulged in the broad rhetoric that the 'Constitution is color blind' should have sponsored such a narrow result in Cummings."[33] Frankfurter referred to the fact that the first Harlan had written the majority opinion in the 1899 Cummings case, decided three years after Plessy, in which the Supreme Court declined to consider the question whether segregation in education resulted in an inequality. Frankfurter pointed out that

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[32]Hugh W. Speer, The Case of the Century, 1966, unpublished manuscript. A copy of this may be found in the law library of the University of Missouri at Kansas City.

[33]Felix Frankfurter papers in the Library of Congress, letter to John Marshall Harlan II, dated July 31, 1956.

Harlan's dissent in Plessy was no justification for assuming that Harlan would have found segregation unconstitutional. He based this on the fact that Harlan repeatedly restricted discussion in his dissenting opinion to the particular facts of the case--namely that the segregation involved was discrimination on "the public highway" within the state boundaries of Louisiana. Frankfurter considered it highly significant that Harlan omitted mention of school segregation inasmuch as the majority opinion in Plessy had pointedly referred to it. Frankfurter also pointed out that Harlan did not usually restrict his opinions to the narrow scope of the facts of a case. Therefore the widely prevalent notion that Justice Harlan anticipated striking down school segregation in his Plessy dissent simply was not historically accurate. Noting that the Georgia jurist, Judge Caldwell, in the lower court trial of the Cummings case had decided that the equal protection of the laws was violated by the separate though admittedly inferior school for Negroes, Frankfurter said that it was rather surprising that Harlan should not have been at least as un-color blind as was the Georgia judge. "Anybody who felt passionately against school segregation could easily have reached at least the result that the Georgia nisi prius

judge reached."[34] The significance of these observations is that they were made by a legal scholar thoroughly familiar with constitutional history. At the same time, this interpretation of Justice Harlan and his dissent in the Plessy case must be viewed in light of Frankfurter's well-known views on the right of states to govern in such fields as public education.

With the above background in mind, it is necessary to look at the seven education cases involving racial segregation which came before the Supreme Court in the fifty years after Plessy. The following cases were all specifically referred to in Chief Justice Warren's opinion of 1954, as a basis for consideration of the school segregation issue.

The first of the seven cases to reach the Supreme Court was that of the aforementioned Cummings v. Board of Education in 1899.[35] The Negro plaintiffs had asked for an injunction closing the white schools in Richmond County, Georgia, until a separate school was provided for Negroes. They complained that the Board of Education used

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[34]Frankfurter Papers, letter to John Marshall Harlan, II, dated July 18, 1956. The Supreme Court in Cummings v. Board of Education 175 U.S. 528 (1899) upheld the Georgia state court decision which had denied a request by the Negro plaintiffs to close the all-white high school because the Negro high school was temporarily closed for financial reasons. Nisi prius is a court in which cases may be tried by a jury as distinguished from an appellate court in which cases are heard by judges only.

[35]Cummings v. Board of Education, 175 U.S. 528 (1899).

the funds at hand to assist in maintaining a high school for white children without providing a high school for Negro children because by then the available funds were exhausted. There was an obvious inequality in this situation. During the oral argument before the Supreme Court the plaintiffs made the additional claim that separation in itself was unconstitutional--"that the vice in the common school system of Georgia was the requirement that the white and colored children of the State be educated in separate schools."[36] The Supreme Court denied this claim on the basis that it was made too late--that is, no such issue had been made in the pleadings in the state court. The Georgia court upheld the Board of Education, saying that its allocation of funds did not involve bad faith or abuse of discretion. The Supreme Court in an opinion by Mr. Justice Harlan affirmed the lower court decision stating expressly that racial segregation in the school system was not at issue.[37]

The next case involving racial segregation in schools came before the Court in 1908. Although Berea College v. Kentucky involved a private college rather than public schools, the issue of compulsory racial segregation was the same.[38] The question before the Court was the

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[36] Ibid., p. 543.

[37] Ibid., pp. 542, 546.

[38] Berea College v. Kentucky, 211 U.S. 45 (1908).

constitutionality of a 1904 Kentucky statute requiring separation of the races in all colleges, schools, or institutions of learning. Even though Berea College was open to all persons without restriction, its charter was considered amended by the 1904 statute. The statute provided, among other things that white and Negroes could not be taught together in any private school unless that school maintained separate buildings for each race at least twenty-five miles apart. In the Berea case the Supreme Court sustained the law on the ground that a corporate charter was subject to reasonable regulations of the state legislature which had granted the charter. The Court carefully omitted discussing the principle of "separate but equal," holding that, "it is unnecessary for us to consider anything more than the question of its (statute) validity as applied to corporations."[39]

Here again Justice Harlan dissented proclaiming that the statute requiring segregation was "an arbitrary invasion of the rights of liberty and property guaranteed by the Fourteenth Amendment against hostile state action . . ."[40] He added that if Kentucky could make it a crime to teach white and colored children together at the same time in a private institution, it could also forbid assembling of the two races in the same Sabbath or Sunday

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[39] Ibid., p. 54.

[40] Ibid.

School, in the same church, or forbid the association in the same private school of pupils of Anglo-Saxon and Latin races or of the Christian and Jewish faiths. Even intermingling in the same market place could be prohibited. Harlan did however, qualify his position with the statement that he had "no reference to regulations prescribed for public schools established at the pleasure of the state and maintained at the public expense."[41] (emphasis supplied by author.) No such question regarding public education was presented in Berea and Harlan pointedly refused to discuss it. Obviously, "separate but equal" in public schools was not really before the Court.

The next case to come before the Supreme Court involving segregated schools was brought by Gong Lum, a Chinese resident of Mississippi, who objected to a school board order requiring his nine-year old daughter, Martha Lum, to attend a school maintained for Negroes.[42] Since there were no separate schools for Mongolians, he claimed that his daughter was entitled to attend the school for white children. The trial court ordered Martha's admission to the white public school but the Supreme Court of Mississippi overruled it. On appeal to the Supreme Court of the United States, Chief Justice William H. Taft, for a unanimous court, accepted the finding of the Mississippi

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[41] Ibid.

[42] Gong Lum. v. Rice, 275 U.S. 78 (1927).

Appellate Court that for purposes of public education, all those who were not white belonged to the colored race. The state Supreme Court had held that educable children were divided into pure white or Caucasian on the one hand and the brown, yellow, and black races on the other. Martha Lum had the choice of attending the public school for Negroes or finding a private school. Taft said that the question before the Court was whether a child of Chinese ancestry, born in this country and a citizen of the United States, was denied equal protection of the laws by offering her common school education in a school for colored children. This action was not unconstitutional because, according to Taft, education in public schools was strictly a matter for the states to regulate. Taft not only cited the Plessy and Roberts cases but fifteen lower court cases as precedents upholding racial segregation in separate but equal facilities. The basic question before the Court, however, was really whether the Chinese should be classified as part of the colored race. The plaintiff accepted the system of segregation in the public schools but merely contested her classification within that system. For all practical purposes the doctrine of "separate but equal" had achieved de facto constitutionality in the field of public education as proclaimed by Chief Justice Taft.

Part of the background in Brown was a ruling in a

University of Maryland Law School case, Pearson v. Murray.[43] Donald Murray, a 1935 black graduate of Amherst College, was denied admission to the University of Maryland Law School solely because of his race. Thurgood Marshall represented Murray in a suit against university officials. In accordance with Maryland law, Murray had been offered a scholarship to attend any law school which would accept him but as a citizen of Maryland he sought the right to attend the state school. The Maryland Court of Appeals held that the out-of-state tuition scholarship was inadequate because of the added expense for the student living away from home. The Court also agreed that Murray was deprived of the advantages of in-state law study, such as learning local pleadings and acquiring familiarity with the courts where he hoped to practice. For these two reasons the Court held that the out-of-state tuition grant constituted a factual inequality which fell below the standard of "substantial" equality required by the equal protection clause. The proper remedy, according to the Court, was to admit the plaintiff to the existing state university law school. This was a significant breakthrough. Earlier attempts in several Southern state university law schools had failed because of the inadequate qualifications of the black candidate selected for admission.[44] The

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[43] Pearson v. Murray, 169 Md. 478 (1936).

[44] Herbert Hill and Jack Greenberg, Citizen's Guide to Desegregation (Boston, 1955), p. 59.

happy ending of Donald Murray's story is that he progressed through the formerly all-white University of Maryland Law School without friction or disturbance. Several years after his graduation he testified in the Texas law school case that he had not been segregated, ostracized or mistreated in any way.[45]

Undoubtedly the success of Murray's efforts in the Maryland courts contributed to the first real breakthrough at the Supreme Court level in 1938. This occurred in the case of Lloyd Gaines, who sought admission to the all-white University of Missouri Law School. Lloyd Gaines was a 1935 honor graduate of Lincoln University, a state college for Negroes in Jefferson City, Missouri. In the fall of that year he applied for admission to the state-supported law school in Columbia, Missouri. Missouri, like Maryland, provided out-of-state tuition grants for graduate or professional education not available at the all-Negro university within the state. Gaines, like Murray, objected to the additional expenses in traveling out of state and the lack of an opportunity to study state pleadings and practice. Counsel for the University officials showed through their

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[45] Transcript of Record, Supreme Court of the United States, October Term, 1948, Heman Marion Sweatt v. Theophils Schickel Painter, et. al. A copy of this transcript is in the Federal District Court of Travis County, Texas. Details from the Sweatt trials in the next few pages will be taken from this transcript which was made available to the writer by Dr. Hugh Speer, University of Missouri at Kansas City. Hereafter cited as Sweatt Transcript.

cross-examination of Gaines that the case was financed and directed by the NAACP. They also tried without much success to show that the case was instituted by the Association. Whether admissable as evidence or not, it was a well-known fact that the NAACP was launching a many-pronged attack on segregation in the schools.[46]

After a lengthy course through the Circuit and Supreme Courts of Missouri, the case arrived at the Supreme Court of the United States in December, 1938. The basic question was whether an out of state tuition grant was a denial of the "equal protection of the laws" under the Fourteenth Amendment. In a seven to two decision, Chief Justice Hughes ruled that a denial of equal educational opportunities within the state offended the intent of the Fourteenth Amendment. An out-of-state offering was not substantial equality within the state. It is important to note that neither the parties nor the Court was talking about segregation per se. What the High Court did was to refine the definition of equality, holding, "that for one intending to practice [law] in Missouri there are special advantages in attending a law school there, both in relation

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[46]Unpublished seminar paper submitted to the University of Missouri at Kansas City by the author in June, 1965. The author interviewed the editor and financial director of the Kansas City Call, Negro newspaper. Both of these people knew Lloyd Gaines personally. The author also examined back issues of the Kansas City Call and the original records of the Gaines case, located at the Boone County Courthouse in Columbia, Missouri.

to the opportunities for the particular study of Missouri law and for the observation of the local courts, and also in view of the prestige of the Missouri law school among citizens of the State, his prospective clients."[47]

Unfortunately for Gaines, by the time the High Court handed down its decision granting him the right to immediate admission to the University of Missouri Law School, he had disappeared. In the interim he had acquired an M.A. degree from the University of Michigan in the field of political science and was last heard from working in a menial job in Chicago.[48] Acquaintances of his on the Kansas City Call (Negro newspaper) speculated that he simply became discouraged with the four-year legal battle. There had also been a mixed reaction on the campus of the University of Missouri to the announcement of his possible attendance which might have discouraged Gaines. There were nasty threatening letters to the editor of the campus newspaper as well as some encouraging, friendly ones. Unfortunately for the cause of desegregated education, the State of Missouri, within six months of the final decision by the Supreme Court, established a separate law school for Negroes. Not until 1950 were Negroes admitted to the University of Missouri Law School. Nonetheless, the Gaines case was a small but notable beginning by the federal

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[47] Missouri ex. rel. Gaines v. Canada, 305 U.S. 337 (1938), p. 349.

[48] See f. n. 46.

courts, an opening wedge, in the struggle to end racial segregation in the public schools. The permissible area of segregation was becoming more narrowly defined and that of equality gradually extended.

Two Justices, James C. McReynolds and Pierce Butler, in a dissenting opinion in the Gaines case repeated arguments heard in Roberts, Plessy and later in Brown. Custom, traditions and the peace of the community were pleaded in defense of the Missouri system.

> For a long time Missouri has acted upon the view that the best interests of her people demand separation of whites and Negroes in schools. Under the opinion just announced, I presume she 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.[49]

During the years 1948 to 1950, three key cases in the field of educational segregation were brought before the Supreme Court by the NAACP. Of significance is the fact that the composition of the court in those years included from seven to nine justices who would still be sitting on the bench when the school segregation cases were heard in the years 1952 to 1955. Although the effect of this "exposure" on the thinking of the judges cannot be definitely ascertained, obviously it was of some import that the Court was subject to a continued legal barrage on the segregation issue.

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[49] Gaines v. Canada, p. 353.

With the post-war boom in education, more Negroes wished to enter Southern universities and more cases involving segregation reached the courts at all levels. In Oklahoma, Ada Louise Sipuel had been barred from the state university law school solely on the grounds that she was a Negro. Both the district court and the Supreme Court of Oklahoma held that Miss Sipuel had no right to attend the white school, even though there was no Negro law school within the state. Her remedy, according to the courts, was to request an all-Negro law school. This peremptory order was reversed, however, by the Supreme Court of the United States. In a nine-man per curiam decision, that is, an opinion of the whole Court with minimum explanation, the Court declared that:

> The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for the applicants of any other group.[50]

The Court held that the right to an equal education was both "personal and present." Since the rights were "present," the law could not ask the plaintiff to await the establishment of a law school. Immediate admission to the existing school, therefore, was the only adequate remedy. Once again the Supreme Court had affirmed the

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[50] Sipuel v. Board of Regents, 332 U.S. 631 (1948).

conditions of equality--existence within the state of equal educational facilities. Footdragging on pretext of future equality was temporarily stopped--at least until the 1955 "with all deliberate speed" signal.

Following the decision of the Supreme Court, the Oklahoma court then ordered either: (1) that a separate law school be set up for the plaintiff; or (2) that the law school for white students suspend operations as long as Miss Sipuel was denied legal training; or (3) that she be admitted to the white law school. Miss Sipuel then took her case to the Supreme Court once more on the basis that the proposed segregated law school violated the equal protection clause of the Fourteenth Amendment. This time, however, the High Court denied her plea on the ground that segregation itself had not been in issue.

A separate law school in a roped-off section of the state university was hastily set up, but Miss Sipuel refused to attend. Student opinion on the Oklahoma campus was with her and faculty members on the staff of the Oklahoma law school spoke for her. One professor testified in her behalf pointing out that the segregated law school "was a fake, it is a fraud, and it is a deception, and to my mind is an attempt to avoid the clear-cut mandate and orders of the Supreme Court of the United States. I think it is indecent."[51] Although Miss Sipuel sued once more

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[51]Hill and Greenberg, p. 67.

in the Oklahoma courts, this time attacking segregation per se she lost her case because the state legislature had admitted her to the all-white state university, even though on a segregated basis. Subsequently she enrolled in the state university and shortly thereafter all restrictions separating her from the other students were removed. Her problem was thus settled without ever reaching the Supreme Court a second time.

Two additional cases arrived in the Supreme Court, from Texas and from Oklahoma, the decisions in which gave much encouragement to the Negro cause and forebodings of doom to Southern white segregationists. The Texas case had to do with the application in 1946 of one Heman Sweatt to the all-white law school of the University of Texas. Although qualified academically, he was rejected on grounds of race. Thereupon Sweatt with the aid of the NAACP sued the University for denying him equal protection of the laws. The federal district court in Austin held that it was unconstitutional to bar Sweatt but allowed six months for the state officials to establish separate but equal legal education for Negroes.

The state first set up a makeshift law school for Negroes in Houston, as part of the Prairie View State Normal and Industrial Colleges for Negroes. Within the year a law school was established in Austin, in the basement of a small building near the state capitol. The University of Texas Law School Faculty was to provide four

instructors who, however, maintained their offices at the University. By the time of the second federal district court hearing in May of 1947, few of the volumes ordered for the library had arrived although a full-time librarian was installed. Predictably, the newly established law school for Negroes lacked accreditation. As Sweatt testified, there was no Order of the Coif, honorary law fraternity, law journal, moot court, scholarship funds, distinguished alumni, or above all a sizeable student body. The administrators for the newly-established school argued, however, that the same courses, with the same textbooks, and the same instructors would be available to the Negro law students as were offered the white students at the University of Texas. Furthermore, they maintained that with fewer students, the Negroes would actually receive a superior education in that each student would recite more frequently in class and receive more individual attention from his professor.[52] When it finally became clear that neither Sweatt nor several other prospective Negro law students would attend this segregated school, and that segregation was being attacked in earnest, the State of Texas finally built a separate new $2,000,000 building for Negro education, including a law school.[53]

In 1949 a poll of teachers in eleven Southern

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[52]Sweatt Transcript, p. 325.

[53]Hill and Greenberg, pp. 68-69.

state universities revealed that 69% of the faculty believed that Negroes should be admitted to existing graduate schools. Significantly 76 % of the faculty at the University of Texas also desired this.[54] In the meantime the Sweatt case, by agreement of the parties, was sent back from the Circuit Court of Appeals to the federal district court in Austin for a new trial, based not on an inequality of facilities but upon the unconstitutionality of segregation itself. Sweatt's lawyers alleged that Texas laws requiring segregation of the races were in direct violation of the Fourteenth Amendment. If the case should reach the Supreme Court the plaintiffs intended that for the first time the doctrine of "separate but equal" should be challenged head on.

During this second trial in 1949 in the federal district court, there was a parade of expert witnesses for Heman Sweatt. Several law school professors testified from northern universities including the University of Chicago and the University of Pennsylvania. They generally gave their opinion of the qualities which make up a good law school including association with other law students. All this testimony emphasized how impossible it would be for Heman Sweatt to obtain training in a small, newly established Negro law school equal to that offered by the University of Texas.

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[54] Ibid.

Once again, however, the Negroes lost in the federal district court which held that segregation was constitutional. At this point the case moved on appeal up to the Supreme Court. This was the first time segregation *per se* in professional schools was attacked at the Supreme Court level. Again there was an impressive array of legal talent on both sides. NAACP lawyers represented the plaintiffs and state attorneys general argued for the defendants. The Department of Justice filed an *amicus curiae* brief highly supportive of the Negroes' case. The government brief argued three major points: (1) equal rights meant identical rights, therefore "separate but equal" was obsolete; (2) segregation imposed severe psychological harm; and (3) racial segregation was damaging to United States foreign policy--the painful gap between democratic principles and practice.[55] Derogatory excerpts from the foreign press about United States racial policy were included. Although these three arguments were welcome ammunition for the NAACP fight, the Supreme Court to this day has not yet decided that equality means identity.

A number of other briefs attacking segregation were filed in the *Sweatt* case. Outstanding among these was the brief of the Committee of Law Teachers Against Segregation in Education signed by over 200 nationally known and respected legal scholars. This brief argued

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[55] *Ibid.*, p. 74.

that segregation in law schools was unconstitutional in light of the history of the Fourteenth Amendment and because it blocked the development of a good legal education. The Supreme Court members could not have been unmoved by the number and quality of the legal profession represented therein. Well-known legal scholars including former clerks of the Supreme Court Justices were represented.[56] Support for the segregationist position came from the attorneys general of eleven Southern states who signed a brief asking the Supreme Court not to strike down their power to keep peace and order for their public schools by maintaining equal though separate facilities.

The Supreme Court in 1950 was not yet ready either to repudiate or affirm the "separate but equal" doctrine in the field of public education. Generally the Court decided constitutional questions as narrowly as possible and only when necessary to the disposition of the case at hand. On this basis Chief Justice Vinson speaking for a unanimous court restricted his ruling to the question of inequality of the Negro law school. In the Sweatt case inequality existed in regard to such tangible factors as size of faculty, number of library volumes, variety of physical plant and location. Also important were the

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[56] John P. Frank, Marble Palace: The Supreme Court in American Life (New York, 1968), p. 92. See also Hill and Greenberg, p. 75.

intangible differences:

> What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question closed. . . 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.57

The Court added that since these rights are "personal and present" the State must provide legal education for the petitioner as soon as it does for applicants of any other groups and therefore ordered immediate admission of Heman Sweatt to the University of Texas Law School. After laboring many months what the Negroes achieved was a restatement of the requirement of equality.

The Supreme Court dismissed as "unnecessary" the excellent research and voluminous social science testimony presented in the course of the lower trials. The NAACP had wisely chosen a law school for this first important test case before the Supreme Court on the question of segregation per se, realizing that the justices knew only too well from their own personal education how important the "intangible" qualities were that made for a

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57 Sweatt Transcript, p. 635. See also Sweatt v. Painter 339 U.S. 629 (1950).

great law school. This proved of inestimable value to the Negroes' cause.

Another case was moving up from Oklahoma about the same time Sweatt was passing through the federal courts of Texas.[58] Decisions involving both these cases were handed down by the Supreme Court on the same day, June 5, 1950. G. W. McLaurin, a Negro, had sought to enroll in the University of Oklahoma for a doctorate in education. There was no such course for blacks at that time in any institution in Oklahoma. Not only was McLaurin excluded from the University because of race but the state was authorized to impose a fine of from $100 to $500 a day upon any institution that instructed whites and Negroes together. Furthermore, any white students attending an integrated school could be fined from $5 to $20 per day.[59]

Again the NAACP provided legal assistance. The first ruling from a federal district court held that the state was under a constitutional duty to provide the plaintiff with the education he sought as "soon as it does for applicants of any other group." The judges had obviously done their homework on the recent segregation decisions. However, Governor Turner of Oklahoma, in a delaying tactic, recommended an amendment of state laws at the next session of the state legislature. He suggested that Negroes

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[58] McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

[59] Hill and Greenberg, p. 72.

should attend all-white institutions of higher learning in the state only if the courses they desired were not offered in separate schools for Negroes.[60]

By the time McLaurin's case was heard for a second time in the federal district court he had been admitted to the University of Oklahoma by order of the Board of Regents. He was still segregated, however, and was forced to sit at a desk in an anteroom outside the regular classrooms. Furthermore he sat at a separate table in the school cafeteria and in a special alcove of the library. Interestingly enough many white students resented this segregation as much as McLaurin did and frequently tore down the signs requiring separation.

Thurgood Marshall, representing McLaurin before the federal district court, stressed the psychological harm resulting from this separation. Marshall pointed out that this deliberately contrived isolation made concentration and study difficult. It placed upon McLaurin "a badge of inferiority which affects his relationship, both to his fellow students, and to his professors."[61] McLaurin himself testified that he could not study or concentrate. By the time the case arrived in the Supreme Court for a hearing, McLaurin had been moved out of the anteroom into the classroom itself, though he was still confined to a particular seat, while white students had

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[60] Ibid.

[61] Ibid., p. 73.

freedom of choice.

The issue before the Supreme Court in the McLaurin case was clearly segregation per se in that there was no question of physical inequality--McLaurin was receiving the same instruction as white students. But once again the Supreme Court bypassed the "separate but equal" doctrine. Instead, Chief Justice Fred M. Vinson stressed the inequalities produced by segregation. As in the Texas case, the Court was propelled close to a head-on confrontation with segregation itself yet it steadfastly refused to outlaw separation of races on any grounds other than that of inequality. With sympathy for McLaurin, the Court found that:

> The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession. Our society grows increasingly complex and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State-imposed restrictions which produce such inequalities cannot be sustained.[62]

Legally the segregationists were probably still ahead with the final decision in McLaurin although the practical result was to end the enforced separation of

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[62] McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

McLaurin from the white student body. With a nod to the fears of white Southerners dreading integration, the Court pointed out that there was

> a vast difference--a Constitutional difference--between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits.[63]

De facto, private, and "social" segregation was not to be touched. Only state-imposed, or de jure, segregation was considered. Despite the legal footdragging, there were considerable practical results in Southern schools after 1950. Either voluntary or enforced desegregation occurred in state graduate and professional schools in all but five Southern states. Florida, Georgia, Mississippi, Alabama, and South Carolina still held out. Fortunately for the course of Negro rights, many private schools also followed suit whereby countless Negro students were soon able to enter formerly all-white schools.[64]

What the Court was saying about racial segregation in areas other than education was also important. The Negro obviously suffered discrimination in housing, transportation, employment, voting, jury duty, and in

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[63] Ibid.

[64] Hill and Greenberg, p. 77.

numerous other areas. Many of these cases reached the Supreme Court but even more never reached any courts at all. The cases which did reach the High Court, however, formed a legal background upon which the Brown decision was ultimately formulated. Therefore some of the more significant cases will be examined to see if there was any noticeable decisional trend. Generally from 1865 to 1937, the Supreme Court upheld laws which enforced separation of the races and struck down laws which permitted contact between them on a level of equality. During those years it was quite clear that the Court reflected views of that segment of the country that did not want to advance minority rights.[65]

E. F. Waite, writing for the Minnesota Law Review, tallied Supreme Court cases involving racial segregation from 1868 to 1937 with the following results:

> 1. Negroes won only two of fourteen cases in which they claimed the right to use the same facilities as whites in common carriers, public places, and schools or housing. In this period there were no cases at the Supreme Court level regarding intermarriage.
>
> 2. Negroes won only six of sixteen cases in which they sought federal protection of their right to vote, or of other rights attributable to federal citizenship.
>
> 3. Negroes won twelve of twenty-one cases in which they sought to obtain a fair trial in criminal cases. In five of the nine cases decided unfavorably to the Negro, the Court fully recognized the constitutional rights of the minority, but did not grant the litigant's specific request.

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[65]Morroe Berger, Equality By Statute (New York, 1950), p. 69. See also Jack Peltason, Federal Courts in the Political Process (New York, 1955), p. 50.

4. Negroes won all three cases in which they sought federal protection from peonage.[66]

The Court was most consistent in the protection of Negroes' rights to a fair trial, to exemption from forced labor, to equal but separate public facilities, to enter any business or occupation, and to make contracts. It is interesting to note that the exercise of these rights were least likely to bring Negroes into close personal association with whites on a level of equality.

A noticeable shift in direction occurred in 1937; since then no decision of the Supreme Court has sustained the segregation interests. Instead, the Court majority has consistently moved toward desegregation.[67] Reflecting basic changes in the philosophy and practice of government, the Court emphasized protection of civil rights. A major depression, World War II, the New Deal philosophy, threat of a third war, the emerging importance of the underdeveloped nations, and the leading position of the United States in world affairs all contributed to the change in judicial direction.[68] As will be shown in a later chapter, the changing composition of the Court itself was also of great importance. In the area of economic

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[66] E. F. Waite, "The Negro in the Supreme Court," 30 Minnesota Law Review, 219 (1946).

[67] Peltason, p. 50.

[68] Ibid., p. 51.

regulation the Court allowed the federal and state governments considerably greater freedom than they ever had enjoyed, but in the area of civil rights the Court became less willing to permit governmental freedom.

The Fourteenth Amendment was increasingly used after the 1930's to bolster Negro rights in areas other than education. It is interesting to speculate why it took the courts longer to apply the same principles of equal protection of the laws in education. It could have been because the courts generally dealt with familiar subjects in these other areas. Property rights had always been protected by the courts. It was thus easier to see why the Court rejected racial zoning laws. The right to vote was specifically protected by the Fifteenth Amendment as well as by a number of federal statutes. Fair administration of the criminal law had been a chief concern of courts since early common law days in England. Compulsory public education was, on the other hand, a relatively new concept for the courts to deal with. Many observers also felt that in the earlier education cases the lawyers did not present the issue effectively. Not until the early 1930's was there a planned, co-ordinated effort by the NAACP which, combined with accompanying social changes, contributed directly to the line of decisions leading to the Brown decision.[69]

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[69] Ibid., p. 51.

Racial discrimination in transportation, jury duty, housing, voting, jobs, fair trial and relocation centers were therefore very much part of the background picture. The earliest post Civil War segregation case concerned transportation. As early as 1873 the Supreme Court for the first time repudiated segregation in public transportation on a District of Columbia streetcar. The Court held that this was a violation of the equal protection clause of the Fourteenth Amendment and the common law obligation of public carriers to take all comers. The opinion stated that a "separate but equal" arrangement in providing two identical but separate cars for Negroes and whites evaded a requirement in the company charter to provide equal services for the races.[70]

The Civil Rights Act of 1875, the last serious effort of the Radical Republicans to establish civil equality for Negroes, had provided that all persons were entitled to the equal enjoyment of public accommodations in inns, theaters, places of amusement, and public conveyances on land or water. By 1883, in the Civil Rights cases however, in line with the restoration of white supremacy, the Court declared the 1875 act void. Justice Joseph P. Bradley in an eight to one decision pointed out that the Fourteenth Amendment was prohibitory upon the states only and not upon actions of private individuals.

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[70] Railroad Company v. Brown, 17 Wall. 445 U.S. (1873).

Congress lacked the power to deal with "individual invasion of individual rights."[71] This opinion was clear notice that the federal judiciary would not protect Negroes against acts of private discrimination.

In view of the Civil Rights cases, it was probably not surprising that the Court upheld the right to separate transportation facilities in the 1896 Plessy case. Less than twenty years after Plessy, the Supreme Court invalidated an Oklahoma law which provided separate and unequal facilities. In this case a railroad company in theory provided separate sleeping, dining, and chair cars for the races but in practice provided these facilities only for whites, on the basis that there were not enough Negroes demanding them. The Court ruled that the essence of the constitutional right of "equal protection" was that it was personal to the given plaintiff and such arguments as limited demand were irrelevant.[72]

A real breakthrough in segregated transportation, however, did not occur until the 1940's when several important cases were decided. In 1940, Congressman Arthur W. Mitchell, a Chicago Negro, was forced to give up a Pullman seat at Memphis during a journey from Chicago, Illinois to Hot Springs, Arkansas. The Chicago, Rock

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[71] Civil Rights Cases, 109 U.S. 3 (1883).

[72] McCabe v. Atchison, Topeka, and Santa Fe Ry., 235 U.S. 151 (1914).

Island, and Pacific Railway, transferred him to a seat in a Negro coach because there were no Pullman cars provided for Negroes. The Interstate Commerce Commission dismissed the complaint for the reason that there was little demand by Negroes for the requested accommodation. Rejecting this logic Chief Justice Charles E. Hughes, speaking for a unanimous Supreme Court, reversed the I.C.C. ruling, pointing out that the denial of a personal right could not be justified by the fact that there were few persons who wanted to exercise it.[73]

Five years later the High Court for the first time invalidated a state law squarely on the grounds of segregation. Using the interstate commerce approach the Court held that state statutes requiring segregation interferred with the uniformity of interstate commerce. In this instance a Negro woman refused to take a back seat on a bus bound from Virginia through the District of Columbia en route to Baltimore, Maryland. Justice Stanley Reed for the majority said that a state law materially affecting interstate commerce might be invalid even in the absence of conflicting Congressional legislation.[74] This ruling of course touched only inter-state and not intra-state transportation.

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[73] Mitchell v. U.S., 313 U.S. 80 (1941).

[74] Morgan v. Virginia, 328 U.S. 373, (1946).

A few years later the Supreme Court again invoked the commerce clause to outlaw segregation on two ships transporting patrons between Detroit and a Canadian-owned island. The shipping company had been convicted of violating the Michigan civil rights act providing that all persons were entitled to "full and equal accommodations . . . of . . . public conveyances on land and water." The High Court upheld the conviction of the carrier by the lower federal court and denied the assertion by the company that this was foreign commerce, exempt from state control. Instead the Court ruled that the island was economically and socially, though not politically, an adjunct of the city of Detroit, hence the company was engaged in local commerce.[75] The Court was obviously straining to protect minority rights even though it still did not feel justified in invoking the equal protection clause.

Again in 1950, the Supreme Court invoked the anti-discrimination section of the Interstate Commerce Act to invalidate a regulation requiring segregated dining cars.[76] Although the case was not settled until some years later, it arose during World War II when a Negro member of the wartime Committee on Fair Employment Practice was refused service in a dining car because the two rear tables

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[75] Bob-Lo Excursion Co. v. Michigan, 33 U.S. 28, 1948.

[76] Henderson v. United States, 339 U.S. 816 (1950).

reserved for Negroes were occupied by whites. Upon complaint by the passenger, the company set aside one table in each dining car exclusively for Negroes and separated it from the others by a curtain or partition. Although the Interstate Commerce Commission upheld this arrangement, the Supreme Court in an opinion by Justice Harold Burton said that this practice violated the anti-discrimination clause of the Interstate Commerce Act. The partition only called attention to the racial classification of passengers.

The right of Negroes to sit on juries or be tried by juries which included Negroes was affirmed by three cases decided in 1879. State laws excluding Negroes from juries existed in West Virginia, Kentucky, Missouri, and Oregon. For the first time in Strauder v. West Virginia the Supreme Court invalidated a state law involving racial discrimination. The West Virginia law limited the right to sit on juries to white males, twenty-one years of age, and citizens of the state. The Court held that this law lessened the security of the colored race, was a step toward reducing them to a condition of servility, and denied them the equal protection of the laws. In reference to the Fourteenth Amendment, the Court said:

> What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination

> shall be made against them by law because of their color? . . . The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens and may be in other respects fully qualified, is practically a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.[77]

Similar discriminatory jury duty laws were struck down in two other cases. In Virginia v. Rives, the Court referred to the Civil Rights Act of 1875 stating that "the plain object of these statutes, as of the Constitution which authorized them was to place the colored race in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same."[78] Similarly, in Ex parte Virginia, the Court stated:

> One great purpose of these (Thirteenth and Fourteenth) amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color.[79]

Protection against state infringement of the Negroes right to jury duty was further extended in 1935. In Norris v. Alabama the Court held that discrimination could be inferred from the continued absence of Negroes

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[77] Strauder v. West Virginia, 100 U.S. 303 (1879), p. 311.

[78] Virginia v. Rives, 100 U.S. 313 (1879), p. 318.

[79] Ex parte Virginia, 100 U.S. 339 (1879), pp. 349-45.

from the lists of jurors and from juries. Previously it had been necessary to prove discrimination by direct evidence that the exclusion was on racial grounds alone. After this ruling, evidence that for over a generation no Negro had been called for service on any jury in the county and no names of Negroes were placed on the established jury roll was sufficient proof of discrimination.[80]

Finally in 1939 the Supreme Court ordered a retrial in a murder case where a Negro had been convicted by an all-white jury. In Louisiana, Negroes were found to have been "improperly excluded" from juries from 1896 to the time of the trial.[81] A year later in 1940, the Court unanimously ordered a new trial in a Texas case on the same ground.[82] Several other jury cases arose in Texas within the next few years, in all of which the Court continued to protect and expand the right of Negroes to be included on juries. In one instance, absence of Negroes from grand juries for the previous sixteen years was considered to have amounted to systematic exclusion so that it was not necessary to show deliberate racial discrimination.[83]

In the area of housing there also was some measurable progress. An ordinance of the city of Louisville,

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[80] Norris v. Alabama, 294 U.S. 587 (1935).

[81] Pierre v. Louisiana, 306 U.S. 354 (1939).

[82] Smith v. Texas, 311 U.S. 128 (1940).

[83] Hill v. Texas, 316 U.S. 400 (1942).

Kentucky, which restricted Negroes from living in certain sections of town was struck down by the Supreme Court in 1917.[84] Despite a plea for segregation by the city to preserve the public peace, the Court held that "this aim [public peace] cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." No state or local government could pass a law limiting a person's right to occupy, buy, or sell property merely because of color. Note that the Court was prohibiting government action only and remained conspicuously silent regarding private action. This led to a rash of private restrictive covenants, finally challenged in Corrigan v. Buckley, where the Court held that such private agreements did not violate the Fifth, Thirteenth, or Fourteenth Amendments.[85]

Success for the Negroes in the field of restrictive housing covenants was deferred until 1948. Four cases in that year finally brought to a head the NAACP's concerted attack on judicial enforcement of private restrictive covenants. Two of these cases dealt with covenants in Washington, D.C., where a unanimous court held that enforcement of restrictive covenants by a District of Columbia court was prohibited by the federal Civil Rights Act of

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[84] Buchanan v. Warley, 245, U.S. 60 (1917).

[85] Corrigan v. Buckley, 271 U.S. 323 (1926).

1866 even though the agreements themselves were not prohibited.[86] Similarly in two other cases, the Court ruled that enforcement of restrictive covenants by state courts was state action within the meaning of the Fourteenth Amendment.[87]

The Negroes suffered a set-back two years later when the Supreme Court ruled that the racially discriminatory action of the Metropolitan Life Insurance Company was private, not state action, and thus protected.[88] The insurance company had built a huge apartment complex in New York City with the very substantial aid of city condemnation proceedings of East River property, tax exemption for twenty-five years, and the closing of certain streets within the area. Nevertheless the Court, with Justices Black and Douglas dissenting, held that this was the action of private individuals.

Progress in the area of equal voting rights was slow. Despite the Fifteenth Amendment, Negroes were effectively deprived of voting rights after the Civil War. A variety of devices were used by the Southern states at the end of the Reconstruction period to disenfranchise the Negro. As early as 1876, in United States v. Reese

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[86] Hurd v. Hodge and Urciolo v. Hodge, 334 U.S. 24 (1948), consolidated opinion.

[87] Shelly v. Kramer and McGhee v. Sipes, 334 U.S. 1 (1948).

[88] Dorsey et al. v. Stuyvesant Town Corporation, 339 U.S. 981 (1950).

the Supreme Court pointed out that the Fifteenth Amendment did not "confer the right of suffrage upon anyone" but merely prohibited the states and the federal government from excluding a person from voting because of race, color or previous servitude.[89] The primary control of suffrage was to remain with the states. In 1898 the Court ruled that a law giving local officials authority to require any voter to read and interpret any part of the Constitution to the satisfaction of the election officials was valid.[90] Although this interpretation seemed to open the way for mass disenfranchisement of Negroes, the Court within a few years refused to validate the so-called "grandfather laws," which gave the vote only to those whose ancestors had the right to vote in 1866. The Court rejected its 1898 interpretation when it decided in 1915 to strike down an Oklahoma law requiring a literacy test, including the grandfather clause.[91]

A further blow for political equality was struck in 1927 when the Court on the basis of the Fourteenth Amendment invalidated a Texas statute forbidding the Negro to vote in the Democratic primary.[92] Five years later the

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[89] United States v. Reese, 92 U.S. 214 (1876).

[90] Williams v. Mississippi, 170 U.S. 213 (1898).

[91] Guinn v. United States, 238 U.S. 347 (1915).

[92] Nixon v. Herndon, 273 U.S. 536 (1927).

Court defeated a Texas attempt to continue the illegal exclusion in a law making it appear that it was no longer the state that was denying the right in question. The Texas law empowered the executive committee of the Democratic party to prescribe the qualifications for membership in the Party. White Democrats found a temporary reprieve in 1935 when the High Court unanimously held that the exclusion of Negroes by the Texas Democratic Party in the State convention did not violate the Fourteenth Amendment.[93] However in 1941, the Court reversed this earlier decision in the case of United States v. Classic.[94] In this case dealing with ballot-box tampering by state officials in a primary election, the Court held that the federal government could lawfully regulate a state primary where the Democratic party primary was the only election in which there was any contest for a federal office.

With the Classic decision establishing federal control over Southern primaries for national offices, the NAACP turned to the problem of discrimination in party conventions. By 1944, in Smith v. Allwright the Court held that the party convention barring Negroes was "state action within the meaning of the Fifteenth Amendment." Where membership in a party was "also the essential

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[93] Grovey v. Townsend, 295 U.S. 45 (1935).

[94] United States v. Classic, 313 U.S. 299 (1941).

qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state."[95] Southern political leaders, however, did not give in without a fight. They announced that they had no intention of permitting the Negro to take over their election system or even attend their white schools, that in fact the South intended to maintain its political and social institutions in the best interest of its people.[96]

The Governor of South Carolina in 1944 called the state legislature into special session to circumvent the Texas primary case of Smith v. Allwright. The Governor stated that it was absolutely necessary that all laws pertaining to primaries be repealed in order to maintain white supremacy in the Democratic primary of South Carolina. The legislators then proceeded to repeal one hundred and fifty laws which referred to the primaries.[97] Georgia adopted the same course. Following this action, one Elmore, a Negro, was refused a Democratic party primary ballot in Richland County, South Carolina, and the case went to court. Federal District Judge J. Waties Waring

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[95] Smith v. Allwright, 321 U.S. 649 (1944).

[96] "Negro Disenfranchisement--a Challenge to the Constitution," anonymous 47 Columbia Law Review 78 (1947).

[97] Vladimir O. Key, Jr., Southern Politics in State and Nation (New York, 1949), p. 631. See also Elmore v. Rice, 72 F. Supp. 516, E.D.S.C. (1947).

ruled that this action of the Democratic Party in South Carolina was "state action" and thus prohibited. Thanks to Judge Waring, Negroes began to vote in increasing numbers in Southern elections.[98]

In 1953 the Supreme Court circumvented another evasion by Southern white political leaders when it ruled that a county Democratic party association in Texas, called the Jaybird Party, was not "private action" but, in fact, a political party which had since 1889 systematically excluded Negroes from voting.[99]

Concerning employment the Supreme Court has fairly consistently protected the rights of minorities against attempts of certain states to place them at a disadvantage. As early as 1886 the Supreme Court had made some encouraging statements in this regard. An example of this protection occurred in Yick Wo v. Hopkins (1886) which involved a San Francisco licensing ordinance which discriminated on the basis of Chinese ancestry.[100] The Supreme Court unanimously invalidated this ordinance which regulated the laundry business with the obvious intent of driving Chinese laundry owners out of business. In 1915 an Arizona statute with a discriminatory provision was invalidated. The Arizona law required that in all

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[98] Ibid.

[99] Terry v. Adams, 345 U.S. 461 (1953).

[100] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

establishments with five or more workers, 80% of them must be citizens of the United States. The Court ruled here that this was an unreasonable classification: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure."[101]

Similar cases reached the Court in the late 1930's and 1940's. For example in 1938, the Court permitted a Negro organization to picket a Washington store with placards reading: "Do Your Part! Buy Where You Can Work! No Negroes Employed Here!" The Court held that this activity was protected under the Norris-LaGuardia Act even though the picketers were not a labor union but a voluntary association for the mutual improvement of colored persons. Ruling for the Negroes, the Court stated that "race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation."[102]

Decisions by the Supreme Court in the area of fair trials gave an additional boost to the Negro in his fight for equal rights. In 1932 the Court ruled that lack of access to counsel both before and during trial in a

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[101] Truax v. Reich, 239 U.S. 33 (1915).

[102] New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).

criminal prosecution was a clear denial of due process under the Fourteenth Amendment. This case involved a conviction for rape in the Alabama courts where the Negro defendants lacked assistance of counsel.[103] A few years earlier a case came up to the Supreme Court involving the 1928 Arkansas race riots which followed when a white man fired into an organizational meeting of Negro tenants. Justice Holmes stated that "if in fact a trial is dominated by a mob so that there is an actual interference with the course of justice, there is a departure from due process of law."[104]

The Japanese evacuation cases during World War II showed the anguish of the Court when it was forced to weigh national security against the doctrine of racial equality. Although no Negroes were involved, these decisions revealed the sensitivity of the Court to racial discrimination. The cases turned on the curfew and evacuation orders applied to American citizens of Japanese ancestry. Although unanimously sustaining the curfew order on the West Coast, the Court divided bitterly on the question of evacuation orders. The curfew, ordered March 24, 1942, required that all persons of Japanese, German, or Italian ancestry residing in a prescribed military area--the entire Pacific coastal area--be within their place of residence

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[103] Powell v. Alabama, 287 U.S. 45 (1932).

[104] Moore v. Dempsey, 261 U.S. 86 (1930).

daily between the hours of 8:00 P.M. and 6:00 A.M. A second military order of May 9, 1942, decreed the exclusion of all persons of Japanese origin from the area. "Relocation Centers," detention camps in fact, were created for these Japanese-Americans some of whom were detained for periods up to four years.

The relocation program first came before the Supreme Court in June, 1943, when an American citizen of Japanese ancestry was charged with violating the military curfew. Although the Court acknowledged that the curfew was an appropriate exercise of the war power where national security was involved, it ruled that "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."[105] Justices Douglas, Murphy, and Rutledge each wrote separate concurring opinions in this case. Douglas emphasized that the decision could only be sustained because the "peril is great and the time is short." Murphy, acknowledging the needs of public safety and military security, pointed out that "distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals."

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[105] Hirabayashi v. United States, 320 U.S. 81 (1943).

In Korematsu v. United States Justice Black for the majority again upheld the conviction of a Japanese-American who remained in the proscribed military region contrary to military orders. This ruling was made on the basis that "the need for action was great and time was short." Black denied that the case could be "cast . . . into outlines of racial prejudice, without reference to the real military dangers, which were presented." The Court was far from unanimous as Justices Murphy, Roberts, and Jackson entered vigorous dissents based on the element of racial discrimination. Murphy said the exclusion program fell into "the ugly abyss of racism."[106]

"Equal protection of the law" was becoming a reality through judicial action though the legislative branch of government was hedging. Civil rights laws were effectively blocked in Congress by an alliance of Southern Democrats and Northern Conservative Republicans. This very reason in fact forced the Negroes to turn to the Courts, while segregationists turned to federal and state legislatures. One branch of the federal government, however, was firmly committed to supporting the desegregation efforts. This was the Department of Justice which from the 1940's on, submitted amici curiae briefs favorable to the Negroes in racial discrimination cases. As early as 1941, in Mitchell v. United States, the railroad transportation

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[106]Korematsu v. United States, 323 U.S. 214 (1944).

case, the Justice Department had sided with the Negroes against rulings of the Interstate Commerce Commission. By the late 1940's, in the restrictive covenant cases, the Department was coming out strong in support of the NAACP.

During the same decade many suits were brought to secure salaries for Negro teachers equivalent to those paid white teachers. More than forty such cases were pressed by the NAACP alone, none of which was ever decided by the Supreme Court because most were won or settled at lower levels. Legally these cases set the face of the law even more clearly against discrimination.[107]

Still one must ask to what extent did these precedents control the Court in the school segregation cases? Were there alternatives in 1954? What had the Court said in the past which limited the possibilities? By the 1950's the Court had legally opened up inter-state transportation to Negroes on an equal basis. Minimum demand by blacks for such items as Pullman cars or dining room accommodations was no longer adequate excuse for denying these services, although in actual practice there were many evasive devices. The Court had also struck down political party conventions, private clubs, and primary elections which excluded Negroes. Such devices as the "grandfather clause" to prevent voting in federal elections were outlawed. The right to trial by a jury where Negroes were not excluded

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[107]Hill and Greenberg, p. 64.

and the right to serve on juries were established. Racially restrictive housing contracts were no longer enforceable by the Courts. Public accommodations--such as restaurants, theaters, hotels--had been opened to Negroes on an equal basis in many areas including the District of Columbia. Many racial restrictions interfering with the right of livelihood were taboo.

Most significant of all for the disposition of the school segregation cases was the stand taken by the Supreme Court in the Japanese exclusion cases during World War II. Only stringent reasons of national security were sufficient to sustain the racially discriminatory curfew and relocation orders. The Court clearly spelled out here what became the basic issue in Brown. In Hirabayashi v. United States the Court had said that legislative classifications or discrimination based on race or color alone were by their very nature "odious to a free people whose institutions are founded upon the doctrine of equality." Here were the basic issues later found in the school segregation cases: legislative classifications based on race alone; the doctrine of equality in the American heritage; and public peace, order, and security. In both cases the Court was asked to weigh the constitutional rights of individuals against society's rights--peace, security, customs, and traditions.

What the Court had not done by the 1950's was also

significant. It had not interfered with the actions of private individuals or institutions, only with state actions. Nor had it intruded into areas of "social" activity--a poorly defined, yet frequently expressed catagory. Yet the Court had moved toward a more explicit definition of equality. Equality must be established within state boundaries. Newly established institutions, such as graduate or professional schools, could not be considered equal to any long established ones. Finally the Court had spelled out the requirement that constitutional rights were "personal and present" which meant that individuals were entitled to immediate relief.

Knowing all this, the Court was still confronted for the very first time with the issue of segregation per se in public schools. "Separate but equal" was still the law of the land, notwithstanding the Texas and Oklahoma law and graduate school cases. Even though there might well have been a decisional trend in the wind, there were still viable alternatives in 1954. The Court could have retained "separate but equal" while scrutinizing facilities to see if they were equal. This would have left precedents undisturbed, while opening up possibilities for endless litigation. The Court might also have reversed Plessy and the "separate but equal" doctrine as inconsistent with the earlier case of Strauder v. West Virginia which had held that the Fourteenth Amendment had assured Negroes the same civil rights as whites. Or the Court

could have reversed "separate but equal" on grounds of the historical circumstances surrounding the Fourteenth Amendment.[108] Thurgood Marshall noted that the Court might also have based its decision on the ground that race was not a legally acceptable basis for classification.[109]

Instead the Court chose to reverse the "separate but equal" doctrine for ostensibly non-legal reasons--such as changes in public education and developments in psychological knowledge. The widespread furious reaction to the Brown opinion was caused as much by the apparent basis for the decision as for the overthrow of "separate but equal" doctrine. The next chapter therefore will examine the controversial social science evidence which many believed was the basis for the Brown decision.

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[108] Robert J. Harris, The Quest for Equality: The Constitution, Congress, and the Supreme Court (Baton Rouge, 1960), pp. 143-146.

[109] Interview with Thurgood Marshall by Dr. Hugh W. Speer on February 11, 1967 as related to the writer.

CHAPTER V

THE SOCIAL SCIENCE EVIDENCE IN THE TRIAL COURTS

One of the most controversial aspects of the Brown decision was its alleged reliance on social science evidence. Lavish praise and bitter denunciation followed announcement of the decision. Controversy centered not only on the validity of the evidence, but on whether the Supreme Court did in fact base its decision on these grounds. The basis of a decision, the reasons for it, are almost as important as the decision itself for the future course of the law. Therefore it is important to study the use of this evidence in the school segregation cases. This chapter will examine the actual testimony produced in the four trial courts. The following chapter will show the emphasis placed on this evidence in the written briefs, oral arguments, and in the Supreme Court opinion.

The use of non-legal information to inform the Court, especially in cases involving constitutional questions, has been common ever since the appearance of the Brandeis brief in 1908. At that time Louis D. Brandeis, a Boston attorney and subsequently an Associate Justice of the United States Supreme Court, argued the constitutionality of an Oregon statute regulating the working hours of women in laundries. In his brief to the Supreme Court,

Brandeis disposed of the constitutional precedents in two pages while devoting over one hundred pages to statistics on the effects of long hours of labor on the health and morals of women. Justice David J. Brewer of the Supreme Court who ruled on this case implied that social and economic philosophy and not mere constitutional precedent had been decisive. Justice Brewer said,

> It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis is a very copious collection of all these matters. . . . The legislation and opinions referred to . . . may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that women's physical structure and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil.[1]

The Brown brief however differed significantly from the Brandeis brief. In the latter, non-legal arguments were used to validate an existing state law, to show some rational basis for the Oregon statute. In the Brown briefs, non-legal arguments were used to invalidate laws, a much more difficult task, since there always is a presumption of statutory legality. It was almost impossible in 1952-1953, to show that no reasonable basis existed for state segregation laws. The novel element in the Brown case was the use of non-legal materials to influence the

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[1]Muller v. Oregon 208 U.S. 412 (1908).

Court in the creation of a new constitutional standard, that "separate" could no longer be considered "equal." It was not, therefore, that the state laws were found deficient, so much as the fact that a new standard was applied. If the social scientists had merely testified against the constitutionality of state segregation legislation their efforts would probably have failed. The plaintiffs achieved spectacular success, however, in convincing the Court that a new rule of law was needed.[2] The interesting and curious aspect of this development was that several members of the 1954 Court as well as numerous legal commentators did not believe that the social science evidence was of much significance as we shall see in Chapter VI. That a new standard was applied to state laws in the Brown case, however, can not be denied. Whether the Court was induced to do this on the basis of the social science evidence is still an open question which will now be examined in detail.

Preliminary to examining the social science evidence, one complaint by the school board attorneys should be noted. This was the charge that the social scientists were merely giving opinion evidence and not firsthand testimony. Few of the witnesses had ever been in the community before the trial, few of them were even familiar

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[2]Albert P. Blaustein and Clarence C. Ferguson, Jr., Desegregation and the Law (New Brunswick, New Jersey, 1957), p. 134.

with the section of the country as a whole, and only two or three had dealings with the plaintiffs in the cases. Those who objected to this opinion testimony ignored the fact that the use of expert opinion evidence had long been established practice. Testimony of witnesses, as a general rule, is limited to direct knowledge of the events in issue. Where witnesses lack firsthand information, their testimony is excluded by one of the rules of evidence such as the hearsay rule or the opinion rule. Some issues, however, cannot be resolved on the basis of firsthand evidence, especially those believed to involve matters beyond the competence of the "fact finders," be they jury or court. In such instances, experts may give testimony involving their areas of special competence, even though their narration includes the expression of opinion. In all but a few instances, the social scientists who took the witness stand in the school segregation cases did not give evidence based upon direct knowledge of the events in the case. Instead they gave their opinion, as experts, on the effect of segregation--that segregation was detrimental to Negro children. Despite objections from opposing counsel, all four courts admitted this evidence.

A uniform pattern was followed in establishing expertise. This was done by a series of questions eliciting educational background, experience, professional associations, and pertinent publications. In most instances the

thirty-one social scientists who appeared in the four trials possessed a Ph. D., were engaged in university teaching, belonged to the appropriate professional organizations, and had published either books or articles in the field of race relations. Only a few of the witnesses had national pre-eminence at the time of the trial, although at least one of the authorities referred to in footnote eleven of the 1954 Brown opinion was highly prominent, as for example Gunnar Myrdal, author of An American Dilemma (New York, 1944).[3]

Certain basic issues reoccurred in the testimony of the social scientists throughout the four federal district trials. These were the issues of race, the democratic creed, the learning process, and the psychological impact of segregation. Implicitly involved were such questions as the relationship of segregation to feelings of inferiority, of inferiority feelings to the learning process, and consequently of segregation to learning. The social scientists also discussed the differences between the school community and the society of which it was a part, relating to the controversy over de facto v. de jure segregation. Obviously these important questions were not conclusively settled by the Brown opinion, but it was instructive to observe the witnesses, lawyers, and court struggle with these problems whose ultimate solution is so essential to American domestic peace and harmony.

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[3]Blaustein and Ferguson, p. 131.

Clarendon County, South Carolina was the site of the first of the four trials on May 16, 1951. Only the Negro plaintiffs presented social science experts. The school board confined itself to two witnesses, a county superintendant of schools and a school board official.

The key social science witness for the blacks was Kenneth B. Clark, Assistant Professor of Psychology at the College of the City of New York and Associate Director of the North Side Center for Child Development in New York City. The North Side Center was a child guidance clinic founded by Clark and his wife, Mamie Clark, also a psychologist. By the time of the trials, Clark had published twenty-five articles in scholarly journals on the social psychology of childhood personality problems.[4] In addition he had recently prepared a report on the effects of prejudice on children for the Mid-Century (1950) White House Conference on Children and Youth. As social science consultant to the legal staff of the NAACP, Clark had been invited to help plan overall strategy, secure witnesses for the trials, and appear in these trials himself.[5]

Considerable trial time in these three states was spent by counsel for the Negroes on the results of a doll test, a projective test developed by Clark. Projective tests were devised by psychologists to elicit information

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[4]Transcript of Record, Supreme Court of the United States, October Term, 1953. No.2 Harry Briggs et al v. Elliot, Chairman of the Board of Trustees of School District No. 22, Clarendon County, South Carolina, pp. 47-58, hereinafter referred to as the South Carolina transcript.

[5]Ibid., p. 73.

about emotions and attitudes, especially useful with young children where it was difficult to gain insight by direct questions. These tests employed pictures, objects, and sometimes a narrative story form. While less formally structured than many written tests, they had been successfully used by psychologists for a number of years.[6] Clark's test consisted of showing two dolls and asking the children a series of questions. These dolls, or in some instances, pictures of dolls, were identical in every respect except for skin color, one being white and the other brown. Although Clark had used the test only on Negro children, a graduate student of his had given the test to a group of white children. The results of that experiment, however, were not yet available. In the course of explaining his test, Clark admitted that the effects of racial discrimination on personality development had only recently been studied by the use of his test because there were no existing standardized or general tests for such problems.

During a two-day period, just preceding the South Carolina trial, Clark administered the doll test to sixteen Negro children, ages six to nine, and interviewed ten additional children, ages twelve to seventeen. Some of these children were plaintiffs in the case while others were simply chosen at random. The test was given by Clark to

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[6]Interview with Dr. James Loutzenheizer, psychiatrist at the Veterans' Administration Hospital, Kansas City, Missouri on April 14, 1969.

each child individually by showing them a sheet of paper with drawings of the two identical dolls. The children were then asked seven questions in the following order:

1. Show me the doll that you like or that you'd like to play with.
2. Show me the doll that is the "nice" doll.
3. Show me the doll that looks "bad."
4. Give me the doll that looks like a white child.
5. Give me the doll that looks like a colored child.
6. Give me the doll that looks like a Negro child.
7. Give me the doll that looks like you.[7]

The results of this test given to the sixteen children were as follows: 10 chose the white doll as the one they liked best; 10 selected the white doll as the "nice" doll; 11 chose the brown doll as the "bad" one; only one chose the white doll as looking "bad;" 4 refused to make any choice at all; 16 correctly picked the doll that looked white; 16 correctly picked the doll that looked brown; 7 picked the white doll as looking like themselves. These results were interpreted by Clark as meaning that a fundamental effect of segregation is basic confusion in the individuals and in their self concepts.[8] The fact that seven chose the white doll as like themselves illustrated an escape from reality. Clark concluded that these children, subjected to an obviously inferior status in society, were definitely harmed in the development of their personalities and that the signs of instability were so clear that every psychologist would interpret them as such.

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[7]South Carolina transcript, pp. 83-88.

[8]Ibid., p. 89.

Clark was wrong, however, in saying that every psychologist would interpret these results the same way. His former advisor, Dr. Henry E. Garrett, Chairman of the Psychology Department at Columbia University, discounted much of this testimony as will be seen in the discussion of the Virginia trial. Furthermore, in the social science brief Clark himself cautioned about the pioneer aspect of this branch of psychological investigation.[9]

Defense counsel objected to the doll test on the ground that it had never been validated by being given to white children. He also interrogated Clark about the use of these tests elsewhere. Clark testified that it had been administered to a total of about 400 children in Springfield, Massachusetts; Pine Bluff, Little Rock, and Hot Springs, Arkansas; and in New York City. Without going into details, Clark claimed that the accuracy and merit of his doll tests were demonstrated by the use of his test in these other cities.

Was this doll test a valid, scientific test? We can only make some general observations. The test had never been administered to white children or at least the results of one such study had never been assessed by Clark which might have given some basis for estimating its validity. Results of testing 400 other Negro children

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[9]Appendix to Appellants' Brief in the Supreme Court of the United States, October Term, 1952. No. 1, No. 101, No. 191, No. 413. "The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement."

were only mentioned in passing. More important, terms such as "nice," "bad," or "good" were highly subjective so that interpretation was suspect. What did these words mean to the children and what were their referrents for the examiner? What real significance was there in the fact that the children were able to identify the color of the brown and white dolls as well as identify the doll that looked like themselves? Were not these answers predictable for most children six years and older? Also predictable was their dissatisfaction with school revealed in the personal interviews Clark conducted with the older students. Some of these children were plaintiffs in the law suit which was to begin the following day. They undoubtedly knew of the coming trial and were influenced by the conversations they must have heard at home and among their school friends. Furthermore the small size of the sample interviewed, twenty-six students, limited the value of the test. Finally there was the basic problem that school segregation was in no way differentiated from community-wide segregation. Even if one grants that feelings of inferiority were engendered by school segregation, elimination of segregation in the schools alone would still leave wounds from community wide segregation. Testimony by other social scientists, especially in Kansas and Delaware, was extremely impressive and helpful to the Negro cause. Unfortunately, the doll test was neither, as indicated by comments from the Supreme Court during oral argument.

In terms of trial time spent on the social scientists, Kenneth Clark was the major witness in the South Carolina trial. In addition, four other experts testified. James L. Hupp, Dean of Students and Professor of Education and Psychology at Wesleyan College, West Virginia, testified that the development of an "all-around, well developed, integrated personality" was blocked in a segregated school system. Children who were segregated did not get a clear picture of the other race.[10] He also noted that desegregation had proceeded smoothly at West Virginia Wesleyan College, without any of the anticipated emotional tensions. This testimony was offered to meet the objection by the defense that there would be a great deal of emotional tension involved where Negroes and whites were thrown together for the first time in a school system.

Louis Kesselmann, Associate Professor of Political Science at the University of Louisville and author of a book on the social politics of the Fair Employment Practice Commission, testified that school segregation bred suspicion and distrust and prevented students from understanding members of the other race. School segregation ultimately blocked community cooperation in solving joint problems and even interfered with voting. Despite skepticism by Judge Parker as to the relevancy of a political scientist testifying in this case, Kesselman was permitted to speak in an

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[10]South Carolina transcript, p. 99.

attempt to show the relationship between segregation and the development of citizenship for democracy. Parker indicated, however, that this testimony was not responsive to the question about the effect of segregation on the individual, but instead related to community action.[11]

David Krech, Professor of Social Psychology at Harvard University and author of several unidentified books on the effect of racial segregation on education, testified that officially-sanctioned segregation was probably the single most important factor to wreak harmful effects on the emotional, physical, and financial status of the Negro child. Legal segregation gave environmental support for the belief in the racial inferiority of the Negroes and was both cause and effect of racial prejudice, with harmful consequences for the ability to earn a livelihood. Particularly important was the fact that school segregation started at a most crucial age. In response to cross examination he acknowledged that his opinion was based on reading and research, unrelated to any personal experience in Southern states.[12]

Mrs. Helen Trager, Lecturer in Curriculum Problems and Human Relations at Vassar College, testified about her recent three-year study of an integrated public school in Philadelphia. The research team studied the feelings of

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[11] Ibid., p. 101.

[12] Ibid., p. 133.

primary age children by means of classroom observation, anecdotal records, interviews, and projective play techniques. It was apparent to Mrs. Trager that the children were keenly aware of racial differences. Both races viewed the Negro as being at a disadvantage and the white child as part of the preferred group. The Negro children revealed a basic ambiguity when they expressed a desire to be both Negro and white. This inability to accept one's own group set up a disturbing conflict which blocked learning. Mrs. Trager asserted that one of the most common blocks to learning was self-doubt. The tendency of Negro children to expect rejection resulted either in withdrawal or aggressive behavior and caused feelings of inadequacy which the Negro children could not overcome. It was her opinion that misconceptions regarding race could be corrected only in integrated schools.[13]

Robert Redfield, one of the major witnesses for the blacks, was unable to arrive in time for the trial. Therefore, by stipulation, his testimony from the Texas law school case of 1950, Sweatt v. Painter, was inserted into the record. Redfield's credentials included a J. D. and a Ph. D. in anthropology. Currently Professor of Anthropology at the University of Chicago, he had been Dean of Social Sciences for twelve years prior to 1949. The record showed that his opinions were based on over twenty years of research in the field of racial relations.

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[13]Ibid., p. 138-140.

The gist of Redfield's statement was that there was no inherent difference between individual human beings except for skin coloration, no difference in their native ability to learn. Given a similar learning situation, the Negro child would do much the same as the white child. Redfield concluded that segregation prevented inter-group understanding, intensified suspicion and distrust between the races, and accentuated the imagined differences. He felt that immediate end of legal segregation was both desirable and possible.[14]

Although the defense counsel presented no social science witnesses of their own, they challenged the plaintiffs' witnesses on the grounds that none of them, with the exception of Kenneth Clark, were familiar with Southern conditions and traditions. Of the witnesses presented by the plaintiffs, Robert Redfield's transcript from the Sweatt case, David Krech, and Helen Trager gave forthright and logically developed arguments. They were handled with obvious respect by opposing counsel while Kenneth Clark's testimony was subject to sharp cross-examination.

The federal district court was apparently unimpressed by the array of social scientists. Only two brief references were made to the sociological evidence in the majority opinion: (1) if the two school systems were equalized the Court did not feel at liberty to overthrow

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[14] Ibid., pp. 160-162.

strong legal precedents "on the basis of theories advanced by a few educators and sociologists;" and (2) "members of the judiciary have no more right to read their ideas of sociology into the Constitution than their ideas of economics."[15] On the other hand, Judge J. Waties Waring, in his dissenting opinion, called plaintiffs' witnesses among the foremost social scientists in America and endorsed their finding that segregation itself had a deleterious effect upon the children. Waring gave Clark credit for proving the evil effects of segregation on mental processes and showing beyond a doubt that the evils of color prejudice came from early training. Therefore, segregation in education could never produce equality.[16] Despite the support of Waring's dissent, the Negroes had to count the majority opinion as a loss. Their effort to overthrow the "separate but equal" doctrine with social science testimony failed in South Carolina.

Topeka, Kansas was the locale of the next trial on June 25, 1951. Again, as in South Carolina, the school board did not feel compelled to meet the social science evidence of the plaintiffs with experts of their own. The major part of the two-day trial was spent on testimony of plaintiffs' witnesses who were asked the following:

I am going to ask you a hypothetical question which

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[15] Ibid., p. 189.

[16] Ibid., p. 207.

> I would like to have you answer on the basis of your learning. Assume that in the City of Topeka there is maintained a racially segregated school system. Would you say that the Negro child who attends the racially segregated school received the same benefits as he would receive from attending a racial integrated school, if all other factors were equal?17

Predictably, since these were witnesses for the Negroes, they all gave an emphatic "no."

The first witness, Hugh Speer, Dean of the School of Education at Kansas City University, discussed the results of his examination of the physical plant, grounds, curriculum, equipment, library, teacher training, and class loads in the Negro and white schools. Although inevitably there were differences in the ages of the various buildings and in travel distances from home to school, there was a substantial equality of facilities. After extensive testimony and cross-examination, Speer admitted that the prime disparity was the fact of racial segregation itself. According to Speer, gestalt psychology demonstrated that the whole was greater than the sum of the parts and that curricula meant

> the total school experience of the child. In other words education was more than remembering. . . . It is concerned with a child's total development, his personality, his personal and social adjustment. . . . The Topeka curriculum or any school curriculum cannot be equal under segregation.18

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17 Transcript of Record, Supreme Court of the United States, October Term, 1952. No. 8, Brown v. Board of Education of Topeka, hereinafter referred to as the Topeka Transcript, pp. 163-164, 158-169, 175-176, 181.

18 Ibid., p. 135.

Judge Walter Huxman noted that Speer had made it quite clear that racial segregation was the prime and controlling factor in the question of equality and that the physical factors were secondary.

Horace B. English, the next social science witness, was Professor of Psychology at Ohio State University and author of several books on the school age child. His experience included work with the development and use of intelligence tests in the United States Army during World Wars I and II. During the first world war he had been a member of the team that developed the Alpha Test of intelligence. Subsequently English did extensive research in the field of individual and group differences. He had also conducted a lengthy series of experiments with special reference to how children learn in school. The gist of his testimony was that there was no difference in ability to learn based on color alone. Instead, English said, there was a tendency for people to live up to (or down to) social expectancies. Legal segregation depressed Negro expectancies and was prejudicial to learning. Learning, he insisted, was based on individual differences, not on racial characteristics. He found evidence to support these conclusions in his studies during both World Wars in which illiterates, black and white, were taught to read and write. The results showed that the Negro men could learn as well as the white men. English also introduced the

results of a study by Dr. Otto Klineberg, psychologist, who had examined Negro children coming from the deep South to New York City.[19] Marked improvement in I.Q. test scores after the children had been in the city schools for some time indicated to Klineberg and English that their initial low scores were attributable to the generally unfavorable and segregated educational opportunities available to Negroes in the South. On the other hand, the psychologists felt that the improvement was caused by the integrated, as well as improved, learning facilities in New York City. English summed up his testimony by saying that segregation created the very differences upon which it was based.[20]

Wilbur B. Brookover, Professor of Sociology at Michigan State College and author of several books on the sociology of education and minority group relations, was next called to the witness stand. In answer to the hypothetical question about the effects of racial segregation, he gave testimony similar to that of the preceding witnesses. Brookfield felt that the segregated schools perpetuated a "conflict of expectancies" which condemned the Negro child to an ineffective role as a citizen. This conflict developed from the contrast between the model of democratic citizenship presented theoretically to the child and the reality of a segregated educational community. Such a

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[19]No citation was given for this study.

[20]Ibid., pp. 153-162.

conflict created confusion, insecurity, and difficulty for the child who could not internalize a clearly defined and accepted definition of his role.[21]

One of the most eloquent and persuasive witnesses in the four trials was Dr. Louisa Holt, Instructor in Social Psychology at the University of Kansas. Dr. Holt was also part-time instructor at the Menninger Foundation School of Psychiatry in Topeka and author of a report on mental health programs for the Mid-Century White House Conference on Children and Youth. Significantly, both the Kansas federal district court and the United States Supreme Court incorporated some of her exact phrases into their opinions. In discussing the effect of legal segregation she said

> The fact that it is enforced, that it is legal, I think, has more importance than the mere fact of segregation by itself does, because this gives legal and official sanction to a policy which inevitably is interpreted by both white people and by Negroes as denoting the inferiority of the Negro group. . . . A sense of inferiority must always affect one's motivation for learning since it affects the feeling one has of one's self as a person. . . . A sense of ego identity is built up on the basis of attitudes that are expressed toward a person by others who are important. . . . It is other people's reaction to one's self which most basically affects the conception of one's self that one has. . . . If these attitudes that are reflected back and then internalized or projected, are unfavorable ones, then one develops a sense of one's self as an inferior being.22

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[21] Ibid., p. 162-167.

[22] Ibid., pp. 169-170.

Although Dr. Holt agreed that attitudes of inferiority might in some instances lead to achievement as compensation for alleged inferiority, they could also lead to a fatalistic submission, fear of failure, and complete resignation. She testified that segregation was especially deleterious because it was directed not against what people were individually, but against what their parents were; this was a failure to treat people on their merits. Furthermore, segregation in the elementary school was bad, in her opinion, because the "earlier an event occurs in the life of an individual the deeper the trauma will be and the more difficult it is later to eradicate these effects."[23] Attending a segregated school after the preschool years of free play, she felt, was traumatic to the black child. Dr. Holt's answers were positive, unequivocal, persuasive, and cited with well-known authorities. Unquestionably she was a valuable asset to the case for the Negroes.

John J. Kane, Instructor in Sociology at the University of Notre Dame and author of two studies in the field of racial prejudice, was next presented by the plaintiffs. His testimony substantially reinforced the major theme that segregation contributed to feelings of inferiority. He added that most Negro children learned early that certain avenues of vertical mobility were closed

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[23] Ibid., p. 172.

to them. Furthermore segregation erected a barrier to the communication so vital for improved racial relations. Kane made the additional point that when home facilities were inadequate as they so often were in poor Negro families, then the school became increasingly important to the child[24]

The last social science witness for the Negroes was Miss Bettie Belk, on the staff of the Workshop in Human Relations at Kansas City University, who was completing her doctorate in human development at the University of Chicago. She testified briefly that segregated education in the elementary school hindered optimum adjustment for adolescence because the pre-adolescent period was a critical time when children make some of their most important life adjustments. In Miss Belk's opinion, a segregated elementary school made adjustment to a non-segregated junior and senior high school more difficult. On cross-examination the defense queried Miss Belk about whether children carry on the customs and usage in race relations which exist in their community, as for example in Topeka where segregation existed in other areas. Her reply was that adolescents take most of their social patterns from their peers rather than from their parents.[25]

How did the Court respond to this barrage of social science ammunition? It was a technical victory

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[24] Ibid., pp. 176-177.

[25] Ibid., pp. 182-183.

for the school board but real progress for the Negroes. The school board welcomed the Court rulings that the dual school systems were comparable and the "separate but equal" doctrine was still the law. Nevertheless, the blacks had substantial cause for rejoicing when the Court announced that segregation did have a harmful effect on the ability of the black child to learn, ruling that:

> The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro (sic) group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.26

Thus the Negroes lost their legal battle in Topeka but won a significant victory in their use of the behavioral sciences to condemn segregation.

By the time of the Virginia trial, February 25-29, 1952, counsel for the school board decided to fight fire with fire. Here, for the first and only time, social science witnesses appeared for the defense. So too, for the first time, the Court had a choice of conflicting expert opinion. The basic premises in the Negroes' case were: (1) their school system was inferior and (2) segregation in itself had a detrimental effect which resulted in violation of the Fourteenth Amendment. Again the themes

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26 Ibid., p. 246.

of democratic citizenship and respect for the individual were developed.

The school board countered with the proposition that educational policy regarding segregation was a matter for the state legislature and not for the federal judiciary. Community customs and traditions were a reasonable basis for state segregation laws. In addition, the people of Virginia were not prepared for drastic changes and they would not subscribe to large appropriations for integrated schools. Above all, feelings and customs could not be legislated, only gradual evolution could accomplish basic changes.

The first social science witness introduced by the plaintiffs was John J. Brooks, Professor of Education at New York University and director of the privately endowed inter-racial school, New Lincoln School, in New York City. He testified that the purpose of education was to teach citizenship for democracy and a basic respect for personality. Furthermore, the very act of segregation impoverished the discriminated-against group, giving them unequal status in education. Brooks argued that democracy was on trial and that people all over the world were watching.[27] On cross-examination the defense brought up the existence of de facto segregation in New York City which in its own

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[27]Transcript of Record, Supreme Court of the United States, October Term, 1952. No. 191, Davis et al v. County School Board of Prince Edward County, Virginia, et al, pp. 159-163, hereinafter referred to as the Virginia Transcript.

way was as stringent as the legally enforced segregation in the South. The defense also raised the issue of miscegenation which counsel felt would be a logical outcome of desegregated schools.[28]

M. Brewster Smith, Chairman of the Department of Psychology at Vassar College, was the next witness for the plaintiffs. His background included teaching, work with the Research Branch of the Morale Division of the Army for some three years during World War II, and authorship of two books and several articles on race relations. Smith made two major points in his testimony: (1) race or color was not determinative of innate capacity to learn, existing differences resulted from an environmental handicap; and (2) segregation contributed to a definite impairment for the segregated group in intellectual and educational development. Segregation helped perpetuate the stereotypes of the stupid, apathetic, illiterate, and happy-go-lucky Negro, which image directly affected motivation to learn and personality development of the Negroes. Smith said that the fallacy of white supremacy was revealed by analysis of army data on intelligence tests used during World War I. Despite a higher average score for the white soldier, there was a considerable overlap in the range of abilities between the Negro and white groups. The brightest Negroes scored as high as the brightest whites.

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[28]Ibid., p. 177.

This indicated, in his opinion, that individual differences outweighed group differences.[29]

Segregation, according to Smith, perpetuated prejudice, and was a standing insult to the integrity of the individual. "In psychological studies of personality development," he said, "one of the most widely accepted propositions is that self respect, self esteem, being on good terms with one's self, is crucial for effectiveness in personality." He added that we form our pictures of ourselves from the way in which we see others regarding us. This was a recurring theme developed by psychologists in all the trials. It followed that children who grew up knowing that they were despised by the people around them were going to have a conception of themselves as being in some way not worthy. Smith concluded that segregation helped maintain a vicious circle which perpetuated prejudice which in turn re-inforced segregation. Under cross-examination, he insisted that legal segregation was an official insult, harder to take, than de facto segregation. Defense counsel responded by noting the difficulty of legislating mores, as for example the difficulty of enforcing the Prohibition Amendment. Smith replied that there was a vast difference between abstinence from liquor and observance of the American creed of equality.[30]

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[29] Ibid., pp. 180-181.

[30] Ibid., p. 185.

One of the key witnesses for the plaintiffs in terms of trial time was Dr. Isidor Chein. Chein was director of research for the Commission on Community Interrelations of the American Jewish Conference in New York City. The research department had been established to work specifically on problems of inter-group relations. From 1937 to 1950, Chein had also taught psychology at the College of the City of New York, Columbia University, and at New York University. He was the author of numerous articles in various professional journals of psychology.[31] The bulk of Chein's testimony centered on the results of a questionnaire sent to 849 social scientists on the effects of enforced segregation, and published in the Journal of Psychology in 1948.[32] Without regard to geographical groupings, 849 social scientists were polled at random from the memberships of the American Ethnological Society, the Division of the Personality and Social Psychology of the American Psychological Association, and the American Sociological Society. There were 517 returns, 61% of the questionnaires sent out. The social scientists were asked three questions: (1) what was the effect of enforced segregation on the segregated "racial and religous groups," if equal facilities were provided; (2) what was the effect

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[31] Ibid., p. 203.

[32] Isidore Chein and Max Deutscher, "The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion," 26 Journal of Psychology 259, (1948).

on the group which enforced the segregation, and (3) was their answer based on personal research, research they knew about, or on other factors. Space was provided for additional comments.

The results of this study were: 90% of the 517 respondents said there were detrimental effects for the segregated group; 2% said there were no detrimental effects; 4% had no opinion; 4% failed to answer this question; 83% said segregation was harmful to the majority or segregated group; 4% said it was not; the balance were divided equally between those who had no opinion or who simply did not answer; about two-thirds referred to their own experience as a basis for such conclusions; 60% referred additionally to research findings of others; 29% referred to their own research; and 3% said that their statements were based on purely personal opinion; 7% did not answer this question. In addition there were many written comments returned with the questionnaire. From this study Chein concluded that segregated groups developed feelings of inferiority, insecurity, self-doubt, loss of initiative and efficiency, and a diminished sense of personal responsibility, while the segregating group had feelings of guilt and loss of moral values.[33]

Cross-examination brought out the fact that only 32 replies came from Southern states, reputedly an insufficient number to represent Southern scientific opinion.

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[33]Virginia Transcript, p. 209.

Dr. Chein was also interrogated regarding his Jewish background, the source of funds for his research, the degree of support for the new state of Israel, and the extent to which Jews felt discriminated against. Quite obviously some of these questions were immaterial to the testimony being given. The defense pointed out that the questionnaire combined "race and religion" in one question which diffused the question and lessened its impact on the specific issue of racial segregation.

The scientific nature of the questionnaire was legitimately challenged. Certainly the answers could have been predicted from the general phrasing of the questions. On an intellectual level, most social scientists might be expected to have answered as they did. There is the additional objection that the questions did not distinguish between educational and other types of institutional segregation--job, housing, recreational, and so forth. Furthermore the questions indicated a lack of specificity, and a subjective element which increased the difficulty of interpretation. For example "detrimental psychological effects" could include a wide range of behavior, variously interpreted by different social scientists. All of which is not to say that the study lacked any contributory value for the problem of segregation, but that it should not have assumed a posture of "scientific evidence."

Again as in South Carolina, the testimony of Kenneth Clark occupied considerable time. For the

Virginia trial, Clark used private interviews to determine the attitudes of fourteen Negro high school children, ages 13-18. Ten of these students were plaintiffs in the case; the other four were chosen at random. The first question Clark asked was, "Tell me about your school" In every case the response was negative or derrogatory. He said the children reacted as if the "school were a stigma." Specifically mentioned were an inferior auditorium, inadequate heat, "leakage," and the cold in going from one building to another in the winter. The second question was, "What about the white school?" Here, Clark felt that it was significant that there were no negative responses. That is, none of the children thought that the white school could have something wrong with it, an obvious distortion of reality due to the barrier of segregation. The third question was, "Why was the white school better?" One child answered that it was because of the district superintendent; another referred to the inactivity of the Negroes, the others did not know why. The fourth question was, "What can be done about it?" that is, about improving the Negro school. Many simply replied that a new school was needed. Some said that the Negroes should work for it themselves while several stated that the Negroes should work with the NAACP. The fifth question was "What do you think of white people?" The most frequent answers were that "they wanted to keep us [the Negroes] inferior," and "they act as if they are better." One student said that

some whites were good and some bad. Another replied that the whites should know they are treating the Negroes wrong. The final question was, "What do you think of colored people?" Five students said that the colored do not stick together in a fight. Others indicated that the Negroes could be as good as anybody else if they had a chance. One said there are too many "gossips."[34]

Clark concluded from these interviews that the Negroes had an excessive preoccupation with race (ignoring the obvious fact that race was specifically the subject of the interview). He said that everything they perceived was racial. In his opinion, the most detrimental consequence of segregation was the degree to which it obsessed everybody with race, that is, both whites and Negroes, children and adults. Segregation, as a crystallization of prejudice, was interpreted by the Negro children as a badge of inferiority. This in turn led to withdrawal, evasion, avoidance, submission, or aggression. The Negro student became confused in his estimate of his own value.[35]

Cross-examination by T. Justin Moore, defense counsel, bordered on effrontery at times as he questioned Clark about his parentage, his origins in the Panama Canal Zone, the percentage of "white blood" in him, his association with Gunnar Myrdal on the study for the book American

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[34] Ibid., pp. 255-260.

[35] Ibid., p. 261.

Dilemma, and whether the NAACP was not fomenting racial strife. Moore did ask some pertinent questions about the effect of the last year's high school strike in 1951 and the current law suit on the interviews Clark conducted. Clark admitted that the current trial undoubtedly was very much part of the conversations of the students and their parents, although he did not believe it affected their attitudes (a peculiar opinion for a psychologist).[36]

The interview conducted by Clark was as susceptible to criticism as his doll test. Questions were designed in part to elicit anticipated responses; there was nothing really surprising about the results. Students frequently complain about their school Also they reflect attitudes in the home and community. In this instance the whole Negro community of Farmville had been engaged for the past three years in an effort to improve the Negro schools. Finally, the interview questions did not isolate school segregation from community-wide segregation patterns. On the other hand, no sensitive reading of the testimony could fail to impress one with the psychological pain suffered by the segregated group. Its cause and cure might be open to debate but its reality was indisputable.

Three other social scientists testified briefly for the Negroes. One was Horace B. English of Ohio State University, who had previously testified in the Kansas

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[36] Ibid., pp. 274-275.

trial. The substance of his few statements was that segregation imposed a sense of inferiority on segregated children.[37] Mamie Clark, psychologist and co-worker with her husband at the Northside Center for Child Development in New York City, testified that integration could take place as well at the high school level as at the college or graduate school level.[38] The last witness for the Negroes was Alfred McClung Lee, chairman of the Department of Sociology and Anthropology in Brooklyn College. He was also author of eighteen books and numerous articles, including a study of racial tensions. Lee gave his opinion that racial tensions were more likely to be created in a segregated rather than in a non-segregated situation. This was indicated in part, according to Lee, by his study of the 1943 Detroit race riots which showed that persons who took part in rioting were, for the most part, from segregated residential districts rather than from integrated sections of the city.[39]

For the only time during the four federal district trials, the school board presented social science witnesses of their own. Dabney S. Lancaster, President of Longwood College, holding a M.S. degree in Genetics and Heredity from the University of Missouri, testified that he had no evidence that segregation in the schools created warped

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[37] Ibid., p. 580.

[38] Ibid., p. 584.

[39] Ibid., p. 587.

personalities. This answer was based in part on his observation of the Negro children attending Moton High School in Prince Edward County, Virginia, most of whom "appeared happy" to him. No one alluded to the difficulty of interpreting feelings from casual observation of outward appearances.[40]

Dr. Lindley Stiles, Dean of the Department of Education at the University of Virginia, testified that it would be more difficult to integrate children at the high school level, during the early adolescent period, than at the college and graduate levels where "people are mature and they essentially have the same cultural attainments. . . ."[41]

Dr. William H. Kelly, neurologist, psychiatrist, and Director of the Memorial Foundation Clinic of Richmond, Virginia, which treated Negro and white children with behavior problems, testified that a form of segregation occurs by social levels in all cultures. Yet he felt there was a difference at various age levels. The higher the educational scale the less the inter-personal conflict because at the upper level adults could withdraw from social contacts. Kelly also criticized Clark's doll test which he said was not a true projective test. The results of the doll test were controlled by the way the material

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[40] Ibid., p. 492.

[41] Ibid., p. 493.

was presented. He also believed that the color, sex, race, and attitude of the person giving the test would make a difference in the results. Kelly doubted that the doll tests would have any validity as applied to the public school situation in Prince Edward County because it was not standardized adequately, a process which would include its being given by white people to colored children or to other minority groups, or by colored people to white children. He stated that the social sciences lacked the same exactitude that existed in certain of the older sciences. The interviews conducted by Clark in Virginia, for example, were inevitably influenced by the whole experience of the trial. Kelly also gave his opinion that the abrupt termination of segregation would make for some very vicious and subtle forms of discrimination. He felt that the place of greatest difficulty would be at the junior high and senior high level, basing his opinion on his experience with group therapy in his clinic. The adverse effects of racial segregation on personality development would exist whether segregation was enforced or voluntary. Furthermore, elimination of segregation would not per se change the personality defect of the segregated children.[42]

John Nelson Buck, another defense witness, was a retired clinical psychologist from Virginia who, although

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[42] Ibid., pp. 527-529.

he had not completed his formal education, was certified by the Examining Board for Clinical Psychologists in Virginia. His work experience for the most part had been in the Lynchburg State Colony, a state-owned institution for mentally defective or epileptic individuals. Buck had developed several psychological tests including a technique for personality appraisal based on freehand drawings followed by an elaborate post-drawing interrogation. He gave his opinion that problems of integration would be very great at the elementary and secondary levels, because of the tribulations of adolescence even though there was almost no friction at the graduate and professional school levels. He also stated that he did not think that there had been any thoroughly objective and sufficiently large studies about the harm of segregation to the white or Negro children.[43] This witness had admittedly limited educational qualifications. His testimony was based on personal opinion, conversations with white people, and clinical experience with children. Although Buck agreed that racial segregation had an adverse effect on personality development, he argued that elimination of segregation should be done gradually.

The last witness for the defense was undoubtedly the most impressive from the standpoint of credentials and cogency of speech. Henry E. Garrett, Chairman of the

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[43] Ibid., p. 535.

Department of Psychology at Columbia University in New York City, had been the academic advisor for Kenneth and Mamie Clark and Isidor Chein during their graduate training. He was born in Halifax County, Virginia, received a B.A. degree at Richmond College, and an M.A. and Ph.D. at Columbia. Garrett was also past president of the American Psychological Association and a member of numerous other professional organizations in the field of psychology. His evident modesty and clear logical answers gave added weight to his testimony.

The first major point Garrett made was that psychology had not yet reached the stage where it could accurately measure the effect of segregation on personality. He said that psychology was a new science, only about fifty years old. It was his opinion that segregation by itself was not discriminatory, noting that for years not only white and colored but bright and slow learners had been separated. Also school children had long been separated by sex and by religion. Secondly, Dr. Garrett questioned the significance of the questionnaire developed by Isidor Chein and Max Deutscher. Garrett denied that it had any relevance to the Farmville, Virginia, high school children or to personality development. He noted that there were nearly 8,000 members of the American Psychological Association, implying that a sample of 516 was limited indeed. Specifically Garrett criticized Chein's question about the psychological harm of segregation

as being a "shotgun" or "blunderbuss" question. Chein's use of the term "enforced" segregation implied a threat; combining "racial and religious" catagories was a "double-barrelled affair;" and use of "detrimental" was vague. Furthermore Chein had not specified whether he meant legal or de facto segregation or what institutions he referred to--churches, schools, recreational facilities, or public transportation. Considering the phrasing of the question, "whether enforced segregation was detrimental to both the segregated and the segregator," it was surprising that Chein did not get 100% agreement. Garrett believed he could send a questionnaire, selectively phrased, and get almost any answer he wanted. Segregation was a loaded term freighted with emotional overtones. Referring to segregation generally without any relationship to specific circumstances or location was comparable to being opposed to sin. Most people were opposed in principle to any social process which imposes a stigma on other people. Garrett also trained his guns on Kenneth Clark's doll test and his interviews in Virginia. He said inferences from projective tests are always subjective and subject to considerable doubt. Such tests were extremely difficult to administer, requiring a highly skilled person. Garrett's final testimony was that any stigma or sense of inferiority among Negroes would be less in an all Negro school.[44]

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[44] Ibid., pp. 554-561.

How did the federal district court view this torrent of social science testimony? One side cancelled the other apparently, because the court ruled that the plaintiffs' evidence did not overbalance that of the defendants. Moreover segregation imparted "no hurt nor harm to either race." Practical matters were clearly important to the Court when it quoted at some length the testimony of Colgate Darden, Jr., president of the University of Virginia and former governor of the state. Darden had testified that involuntary desegregation would lessen the interest and financial support of the people for the public schools. With the whites comprising more than three-quarters of the entire population of the commonwealth, this was a weighty factor to be considered, said the Court, in determining whether a reasonable basis existed for public school segregation. The Court also noted that segregation resulted in more jobs for Negro teachers, inasmuch as Virginia alone employed as many Negro teachers in her public schools as were employed in all of the thirty-one non-segregated states.[45]

On the subject of the Fourteenth Amendment the Court held that the Amendment merely required that legislative classifications be reasonable. In Virginia, segregation rested neither upon:

prejudice, caprice, nor any other measureless foundation.

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[45] Ibid., pp. 621-622.

> Rather the proof is that it declares one of the ways of life in Virginia. Separation of white and colored "children" in the public schools of Virginia has for generations been a part of the mores of her people. To have separate schools has been their use and want. The school laws chronicle separation as an unbroken usage in Virginia for more than eighty years. . . . The importance of the school separation clause to the people of the State is signalized by the fact that it is the only racial segregation direction contained in the constitution of Virginia.46

Segregation in the public schools was reasonable, concluded the Court, in light of Virginia traditions and customs. Although the Negroes benefited from an order by the court to equalize the schools, they had lost their major goal--the end of official segregation.

The Delaware case on the other hand, heard in March, 1952, represented a signal victory for the Negroes, when the Court ruled that segregation per se resulted in psychological harm for black students. Plaintiffs also won immediate admission to the formerly all-white Delaware schools. There remained only the pronouncement that "separate" was not "equal." This, the Chancery Court said, would have to be decided by the United States Supreme Court itself.

Thirteen social scientists testified for the plaintiffs in the Delaware Chancery Court in March, 1952. None of their testimony was contradicted as to substance nor did the defense counsel offer any social science evidence in rebuttal. Instead, the school board attorneys

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46 Ibid., pp. 620-621.

based their case on the fact that inequalities in school facilities were being corrected and a new building would be completed within a reasonable time.

One of the most prestigious witnesses for the Negroes was the New York psychiatrist, Dr. Frederic Wertham. A specialist in neurology and psychiatry, he was director of several clinics--the La Farge Clinic in Harlam, the Mental Hygiene Clinic of Bellerive Hospital in New York City, and the Mental Hygiene Clinic of Queens. He was also consulting psychiatrist for the City Department of Hospitals, the Juvenile Aid Bureau of the City Police Department, and the Alcoholic Ward of Bellevue Hospital and director of the Psychiatric Clinic of the Court of General Sessions. Wertham had recently been president of the Association for the Advancement of Psychotherapy (1942-1951) and was currently co-editor of the American Journal of Psychotherapy. The subject of his testimony was a study of the effect of segregation on some Delaware school children.[47]

In October, 1951, just five months before the Delaware trial, a research team under Wertham's direction

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[47] Transcript of Record, Supreme Court of the United States, October Term, 1952, No. 448, Gebhart, et al. v. Belton, et al., pp. 79-80, hereinafter referred to as the Delaware transcript. For a published account of this study see Frederic Wertham, "Psychiatric Observations on the Abolition of School Segregation," The Journal of Educational Sociology, Vol. 26, Sept.-May, 1952-53, pp. 333-336.

examinod, on three different occasions, a small group of Negro and white Delaware high school students, ages thirteen to seventeen. They had been selected at random by the Wilmington, Delaware chapter of the NAACP and brought to the La Farge Clinic in New York City where they were given individual interviews, group interviews, and standardized tests. The group consisted of twenty-two students, some of whom had been transferred to integrated schools six months earlier; others had remained in segregated schools. Ten of the Negro children who transferred to an integrated school were examined before and after their transfer. Wertham, one teacher, and two psychologists conducted the actual examinations. In his testimony Wertham presented both some specific findings about the twenty-two students and probably more important, some general conclusions. He noted first of all that all the Negroes who had transferred to integrated schools made distinctly better academic progress. The records proved this and the students admitted it. This improvement was caused, he felt, not only by better facilities and smaller classes, but also by the factor of emotional motivation. That is, the conflicts caused by state-ordained segregation were removed. Wertham conceded that all humans experienced conflicts, but this particular conflict caused by segregation was unnecessary and its relief brought quick and tangible results. It was also obvious, he said, that

children were more democratic than adults. Both the Negro and white students in the integrated school adjusted constructively, in a friendly manner, with an absence of hostility and violence. Although there was some name-calling at first and some embarrassment at the school bus stops, generally there were no disturbing incidents. Wertham summarized his findings by saying that the abolition of segregation removed a handicap that interfered with self-realization and social adjustment. The frequently predicted ill effects of integration had not occurred.

The usual hypothetical question was addressed to Wertham--assuming a system of segregated schools in the state of Delaware, all other factors being equal, did the Negro child suffer because of the fact that he was sent to a segregated school. In cogently argued prose, Wertham delivered what was in effect a lecture on the mental health of school children. Contrary to what had occurred with other witnesses, Wertham was permitted to speak at some length with few interruptions by the court or opposing counsel. Starting out with a discussion of personal, biological, and social factors which have a harmful effect on a child, he proceeded to discuss segregation in Delaware which he said created a public health problem because it was injurious to the mental health of the students. Official segregation created in the mind of the child an unsolvable emotional conflict. One of the most

serious aspects of this was that the children could not discuss this conflict with parents who were emotionally insecure in the same way. The children were unable to find realistic explanations for segregation because adults could make no rational explanation for it. The segregated children felt stigmatized and at the same time were unable to overcome the stigma. Although children sought correct images of human relationships, they met with a distorted image, in a segregated school, which they could not comprehend.

Education was not merely a learning experience but an essential phase of mental health. Segregation created an anxiety-producing emotion, a vague kind of fear, involving conflict with the authority of the State which in turn led to lack of confidence in the state. By sanctioning segregation, the state in effect interfered with the child's defenses and his self-identification. That is, to be happy, healthy, human beings, children needed to identify with some superior authority figures--father, mother, or some official figure such as a teacher. Most of the children he examined interpreted segregation as punishment. Another result of the emotional conflict in segregated children was a noticeable social disorientation. The Negro children testified that "foreigners"--Poles, Catholics, Jews, Dutch, German--were "better" to them, permitted Negro students to attend their schools, than

"plain American" children. Such a situation, Dr. Wertham felt, was fertile soil for a demagogue. This sense of rejection by "plain Americans" interfered with self-realization and led to estrangement of the Negro child from authority figures.[48]

Although Wertham conceded that psychological harm was not caused by school segregation alone, he said the school was of paramount importance. Segregation in the schools was absolutely clearcut, state-imposed, of long duration, continuous, part of daily life, and bound up with the whole educational process. It hit the child at two of the most important moments of his life: that is, at age six when he stepped forward from family life and at adolescence when he must first find a social group for himself. At these crucial times, the state identified itself with its most bigoted citizens. School segregation became a public health problem because the Negro children were indoctrinated with race hatred. White children were also harmed, in that legally sanctioned segregation created illusions of superiority and interfered with their healthy development. Of course, he added, emotional disorders were not necessarily created in every child. There were overlapping factors of home, neighborhood, and individual differences to be considered in addition to the elimination of segregation itself, if emotional disturbances and

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[48]Delaware transcript, pp. 84-87.

frustration were to be eliminated. Wertham concluded that physical differences in the school facilities were not as important as these intangible factors. "If Professor Einstein . . . were to teach physics in marble halls in a segregated school . . . the fact of segregation would still damage, would still be anti-educational."[49]

Unquestionably Wertham made a great impression on the Chancery Court. The Chancellor referred to him as "one of America's foremost psychiatrists" who testified "that State-imposed school segregation produced in Negro children an unsolvable conflict which seriously interferes with the mental health of such children." The Chancellor also agreed that segregation was harmful to the Negro child.[50] During the 1952 hearings before the Supreme Court, Justice Felix Frankfurter had referred to Wertham in similar terms after commenting on what an excellent opinion the Delaware Chancellor had written. Wertham's attack on officially sanctioned school segregation was well reasoned, backed by acknowledged prestige, and difficult to refute.

Dr. Kenneth Clark again appeared as a witness. This time he presented testimony about the results of his examination in September, 1951, of forty-one Delaware students in an all-black high school. In an effort to

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[49] Ibid., pp. 87-88.

[50] Ibid., p. 164.

determine the effect of segregation, Clark tested this group twice, once by administering the doll test and once by personal interview. As before, Clark made grandiose assumptions on the basis of his interpretation of the responses to the doll test. Why he administered a doll test to high school students he omitted to explain. At any rate, Clark testified that it was significant that three out of four students picked the brown doll as the doll likely "to act bad." When 100% of them then identified themselves with the brown doll, this indicated clearly to Clark the serious damage to self-esteem. He added that it was apparent that the brown doll was associated with all the negative stereotypes which were usually ascribed to Negroes in our culture.[51]

Clark was more convincing when he spoke in general terms. In answer to the hypothetical question about the effect of segregation, he gave his opinion that segregation stood as a symbol of institutionalized prejudice and humiliation which impaired the functioning of Negro students. It set up a fundamental conflict which led to self-rejection because of society's rejection. From this came feelings of inadequacy and inferiority. As in the other trials, Clark concluded from his interviews and tests that segregation as perceived by these students impaired their general functioning.

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[51] Ibid., p. 170.

Some of the same objections were made to his testimony in Delaware that had been previously raised, namely that the students (some of whom were plaintiffs in the law suit) were sufficiently knowledgeable and aware of the legal battle to slant their answers in the expected way. There were also objections to the subjective nature of the questions and interpretations. Defense counsel also argued that, "One cannot undo by proclamation or legislation the consequences of behavior which has been built into the individual through long years of training, deliberate or otherwise."[52]

A number of other social scientists presented testimony for the Negroes. Otto Klineberg, Professor of Psychology at Columbia University and author of several books on race problems, testified that there was no scientific evidence that differences in inborn intellectual capacity were determined by skin color or racial origin.[53] Jerome S. Bruner, Associate Professor of Social Psychology at Harvard University, was editor of the Public Opinion Quarterly and the International Journal of Opinion Research as well as author of the Mandate from the People, an analysis of American public opinion prior to 1944. He stated that segregation in the school was especially significant because it influenced the child in his period of

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[52] Ibid., pp. 172-173.

[53] Ibid., p. 122.

greatest plasticity and change. Segregation damaged the child's capacity to learn and to get along with members of the majority community. When persons failed to gain social skills at an appropriate age it became increasingly more difficult to pick these skills up later. Bruner added that one of the highest suicide rates in the United States was among Washington, D. C., Negroes. He related this to their feeling of rejection, apathy, and lowered motivation to learn.[54]

George Kelly, Professor of Psychology at Ohio State University, who had appeared in the Virginia trial, testified that the additional travel time which Negro students spent on the bus in Delaware travelling to segregated schools deprived them of valuable opportunities for free play and for developing initiative and self-control. Dan W. Dodson, Professor of Education at New York University, merely repeated in slightly different words previous testimony that segregated schools were discriminatory because the Negroes were set apart as inferior, thus impairing their motivation to learn.[55]

John K. Morland, a Southerner, who was Assistant Professor of Sociology and Anthropology at the College of Williams and Mary and author of Mill Village Life in a Piedmont Town: A Cultural Analysis of a South Carolina Town,

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[54] Ibid., p. 127.

[55] Ibid., pp. 137-139.

presented his conclusions about segregation based on his mill town study. He said that segregation means in essence that the Negro receives an inferior type of education because he is excluded from the mainstream of American culture. Education was a means of development of the individual and involved give and take in the classroom with the teacher and other students. This separation from the mainstream of American culture meant that the Negro child was not getting the same kind of education that the white child received. Segregation in the mill town which he had studied resulted in differences in dress, general rules of etiquette, ambitions, and desires to get ahead. Therefore it was obvious to him that segregation implied inferiority and impaired growth. This sense of inferiority was in painful contrast with the Democratic ideal of freedom, equality, and opportunity which is preached in the American schools.[56]

George G. Lane, Associate Professor of Psychology at the University of Delaware, co-author of a general textbook on psychology and President of the Delaware Psychological Association, made a very effective witness in terms of well-expressed statements. In his opinion, segregation implied inferiority, causing the Negro child to take on the pattern of behavior others accorded him. From a sense of inferiority came low levels of aspiration.

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[56] Ibid., pp. 147-149.

Conversely the higher the goals the more effectively a person learned. Lane had observed Negroes in his own classroom, products of segregated education, who were afraid to participate in class activities. By reducing causes of hostility, however, one could get startling improvements in actual ability and health.[57]

Frederick B. Parker, Chairman of the Department of Sociology at the University of Delaware, added testimony similar to that of the preceding witnesses to the effect that the self-concept of the segregated child was damaged. He said that the "looking glass self develops attitudes which reflect those of society to him." This sense of inferiority in many Negro students led to frustrations, tensions, aggressions, and hostilities. A recent study at the University of Delaware indicated to Parker that the removal of segregation reduced the damage done to individual Negroes.[58]

The defense attorneys did not deny existing inequalities in the two school systems. Instead they based their case on the fact that steps were being taken to equalize the schools which would be accomplished within a reasonable time. They did claim, however, that the social science testimony offered by the plaintiffs was imprecise and irrelevant because the case was controlled

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[57] Ibid., pp. 150-152.

[58] Ibid., p. 153.

by the precedents of Plessy, Gong Lum, McLaurin, and Sweatt.

Chancellor Collins J. Seitz was obviously impressed with the social science testimony. He commented that although no witnesses were produced by the school boards, experts for the plaintiffs sustained the general proposition that legally enforced segregation in education harmed Negro students. Seitz agreed that segregation created a mental health problem with a resulting impediment to the educational process. Therefore "separate" could not be "equal." Denying the school board's contention that a social problem could not be solved with legal force, Seitz said that constitutional principles overrode "transitory passions"--referring to white segregationist sentiment. A lower court, however, could not reject a doctrine of United States constitutional law adopted by implication by the highest court of the land. Although the rejection of the "separate but equal" doctrine was "in the wind," Seitz felt that its rejection should come from the United States Supreme Court.[59]

There were two major questions about the use of the social science evidence in the trial courts: (1) how valid was this evidence and (2) what was its impact on the trial courts. Before answering the first question one must concede that the social scientists who testified

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[59]Ibid., p. 164.

were well qualified as far as training, educational experience, and familiarity with the field of race relations was concerned. At the same time it was readily apparent that some witnesses made a much greater impact than others. Dr. Frederic Werthem, New York psychiatrist, Dr. Louisa Holt, Topeka psychologist, and Dr. Robert Redfield, University of Chicago anthropologist were clearly among the most effective. On the other hand the tools used by Dr. Kenneth Clark and Dr. Isidor Chein were open to serious question. Clark's interviews, conducted either during or just prior to the trials, were obviously influenced by these events. Moreover his doll test was justifiably critized as being highly subjective and lacking sufficiently wide and varied validation. Chein's questionnaire was also accurately criticized for the "shot-gun" nature of its questions. Admitting that the social sciences were not as precise as the physical sciences, one must still grant that the social sciences in the 1950's contributed important insights in the field of race relations.

The following four basic principles were effectively established by the social scientists during the trials: the concept of race as a social myth; the relationship of segregation to democratic citizenship; the relationship of segregation to learning, and the psychological effects of segregation. First, it was authoritatively argued that race was more of social myth rather than a biological reality insofar as race related to inherent mental

differences. That is anthropologists and psychologists by the 1950's generally agreed that there were no differences in ability to learn based on skin coloration. Second, segregation was an affront to the democratic creed and a block to the development of citizenship for democracy. Third, the learning process was closely associated with the self-concept, self-image, or sense of self-worth. Conversely, feelings of inferiority seriously weakened the motivation to learn. Fourth, (the major conclusion) segregation led to feelings of inferiority, self-doubt, hostility, resentment, aggression, apathy, and low levels of aspiration. This was because people generally see themselves as they are reflected in the eyes of those important to them.

Public school segregation was especially bad because it hit the child at two of his most crucial periods, age six when he first left home, and adolescence, when he was trying to establish his own identity. Furthermore, school segregation was clear cut, state-imposed, of long duration, and continuous which made it much harder on the child than de facto segregation as established by neighborhood residential patterns.

The second major question was what impact did this massive array of testimony have on the trial courts. Clearly the major part of the trial time was spent on this type of evidence, although in Virginia and South Carolina considerable time was devoted by the blacks to

proving the inferiority of their schools. This was also true to a lesser degree in the Kansas and Delaware trials. Nevertheless by far the major time and effort was spent on social science evidence. The only way the impact of the social science evidence on the trial courts can be measured is by a careful reading of the opinions and decisions. Such being the case, it might be called a draw at the end of the four school segregation suits. Both the Kansas and Delaware courts ruled that racial segregation implied a stigma of inferiority, created serious psychological harm, and impaired the ability to learn. The Delaware statement was especially strong in crediting the role of the social scientists. On the other hand the social science evidence seemingly was dismissed by the Virginia and South Carolina courts. In the Virginia case, the court ruled that neither side overbalanced the other--the social scientists on either side apparently cancelled each other. In the South Carolina case, the court merely held that the social science evidence was irrelevant to the question of law.

Impact on the trial courts was one matter. The other equally or perhaps more important question was what impact did this type of evidehce have on the Supreme Court. The following chapter will consider the social science testimony as it was presented to the Supreme Court and as it was handled by the Court in the final opinion.

CHAPTER VI

THE SOCIAL SCIENCE EVIDENCE BEFORE THE SUPREME COURT

How important was the social science evidence in the final decision? Although only the Court knows, a great deal of controversy centered on this aspect of the school segregation cases. Discussion focused on the validity of the evidence and whether the decision was based on it. This chapter will explore the use of the social science testimony in the written briefs, oral arguments, and final opinion, concluding with a look at the vigorous controversy which followed announcement of the 1954 decision.

The written briefs, with their arguments concisely arranged, were designed as time-savers for the Court, nevertheless the sheer number of briefs in the school segregation cases required hours of reading time. Examples of typical arguments in the briefs can be seen by looking at the social science appendix prepared by the National Association for the Advancement of Colored People, the school board brief in the Virginia case, the amicus curiae brief of the United States Department of Justice, and several other amici curiae briefs submitted by friends of the Negroes.

The NAACP, which handled the law suits for the Negro plaintiffs, decided to consolidate its social science arguments in one major effort entitled, The Effects of Segregation and the Consequences of Desegregation: An

Appendix to Appellants' Brief.[1] The attorneys not only used arguments from the trial courts but they secured the signatures of thirty-five social scientists for this statement. Psychologists Kenneth Clark, Stuart Cook, and Isidor Chein prepared the brief based for the most part on the report Clark submitted to the 1950 Mid-Century White House Conference on Children and Youth. In essence Clark's White House report was a survey of the most recent scientific literature about the effects of prejudice, discrimination, and segregation on the personality development of children. More than fifty studies on race relations and segregation were cited in his initial study.

The social science brief concentrated on two major points: (1) segregation harmed both the segregators and the segregated; and (2) desegregation could and would proceed smoothly. Referring to the studies in his White House Conference Report, Clark reiterated the arguments that segregation potentially damaged the personality of all children. Segregation--the external act, was inevitably accompanied by discrimination--the internal attitude. Segregation also led to defeatist attitudes, lowering of personal ambition, and depressed educational goals. Furthermore, he argued that segregation blocked

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[1] Appendix to Appellants' Brief in the Supreme Court of the United States, October Term 1952. No. 1, No. 101, No. 191, No. 413. The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement. Hereinafter referred to as the Social Science Brief.

intergroup communication, led to increased hostility, perpetuated rigid stereotypes, and contributed to a climate conducive to racial tension and violence.

Clark's second major point was that desegregation would proceed smoothly. He pointed to studies of desegregation in the armed service, merchant marines, housing projects, recreational facilities, and industry which showed that the transition was successful despite predictions of violence. He also stressed that consistent and firm enforcement facilitated the process.

In conclusion, Clark stated that the problem of the effects of racial segregation was "admittedly on the frontiers of scientific knowledge," and that inevitably there were differences of opinion concerning the conclusiveness of the evidence and the placement of emphasis. Nevertheless the thirty-two social scientists who signed this statement were in substantial agreement while any differences which existed among them were minor and would not materially influence the preceding conclusions.[2]

No one knows, of course, to what extent if any, this social science statement influenced the Supreme Court. There was no reference to this particular brief in the 1954 Warren opinion. Clark's original report for the Mid-Century White House Conference on Children and Youth was cited, however, in footnote eleven of the Warren

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[2]Kenneth B. Clark, Prejudice and Your Child, (Boston, 1955), p. 211.

decision. The brief did conveniently summarize the major social science findings from the four trial courts. Furthermore, it certified agreement by additional experts on the major findings. Not only the quantity but the quality of this professional support added weight to the Negroes' position.

A totally different view of the social science testimony was given by the school boards. Typical of their position was the brief submitted by the Prince Edward County School Board of Virginia. In the first place the social science data received only minor space and attention. The primary effort was devoted to the legal questions and only incidentally to the psychological effects of segregation. Only obliquely did the brief refer to the effects of segregation when it denied that enforced separation of the races stamped the Negroes with the badge of inferiority. Furthermore, quoting Justice Henry B. Brown in the Plessy decision, the brief asserted that social prejudice could not be overcome by legislation. The compulsory state segregation law had to be viewed in light of Virginia's history where segregation had long been established as basic public policy in order to "prevent violence and reduce resentment."[3]

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[3]Brief for Appellees, Supreme Court of the United States, October Term, 1952, No. 191, Davis v. County School Board of Prince Edward County, Virginia, p. 17. Hereinafter referred to as the Virginia Brief.

The school board, however, did specifically criticize the behavioral science witnesses for the Negroes because they ignored the Virginia background and "discussed segregated education in the air. No definite facts and no particular location affected the vista of the perfect life to come."[4] The brief charged that traditions and customs of the region were disregarded by witnesses who lacked knowledge of the South. As an example, the brief pointed out that Dr. Clark was a native of the Panama Canal Zone and had lived in Virginia only six months while studying at the Hampton Institute. Furthermore, the brief claimed that Clark's exposure to segregation in the District of Columbia while teaching at Howard University so warped his judgment that his entire career was affected.[5] The brief also charged that the witnesses Drs. Brooks, Smith, and Chein, had never lived in Virginia while only Dr. Brook had even been in any part of the South prior to the trial.

The school board attorneys discredited Clark's doll test, quoting Dr. Henry E. Garrett, defense witness, to the effect that the administering psychologist could obtain a "slightly controlled answer."[6] References were also made to the influence of the high school strike and the trial itself on the interviews Clark conducted. In

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[4]Ibid., p. 22.

[5]Ibid., p. 23.

[6]Ibid.

contrast it was claimed that the social science witnesses for the school board were all firmly based in Virginia, were familiar with Southern customs, and had the highest of academic credentials. Finally the Virginia brief argued that since segregation in itself was not discriminatory, both Negro and white students would receive a better education in separate schools.[7] The conclusion, predictably, was that "psychology, a 'new Science,' cannot provide any satisfactory basis for a determination that segregated schooling in the Virginia background is unreasonable. The social traditions of half the nation should not be overthrown on such surmise and speculation."[8] In summary then, the school board met the arguments of the social science witnesses for the Negroes by impeaching their credibility on the grounds that they were unfamiliar with the South in general and Virginia in particular. Furthermore Virginia's social customs and way of life were considered reasonable explanations for racial segregation which should not be denied by a young imprecise "science."

The government brief prepared by the Department of Justice must have brought great joy to those working for the black cause. It was a well argued plea to end racial segregation in the public schools. This was the brief submitted by James P. McGranery, Attorney General of the United States, and written for the most part by Philip

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[7] Ibid., p. 27.

[8] Ibid.

Elman, special assistant to the Attorney General. In line with earlier government briefs submitted in Henderson v. United States, McLauren v. Oklahoma State Regents, and Sweatt v. Painter, the McGranery brief argued that racial segregation imposed by law was per se unconstitutional.[9] Yet there was a curious ambivalence in the suggestion that the Court might not find it necessary to reach the question whether the "separate but equal" doctrine should be reaffirmed or overruled.[10] There was also the interesting suggestion, subsequently accepted, that the Court might not wish to issue a decree at this time in the 1952-1953 term, but rather set the matter aside for further argument at a later date. Despite this note of caution the general import of the government brief was highly supportive of the NAACP position.

Specifically, in reference to the social science issues, the McGranery brief argued that segregation implied a stigma of inferiority, had a "detrimental effect" on colored children, affected their motivation to learn, and tended to retard their educational and mental development.[11] In support of its plea to overthrow racial segregation, the brief appealed to the American creed of equality before

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[9]Brief for the United States as Amicus Curiae, In the Supreme Court of the United States, October Term, 1952. No. 8, No. 101, No. 191, No. 413, No. 448. p. 17. Hereinafter referred to as the McGranery Brief.

[10]Ibid., p. 8.

[11]Ibid., p. 18.

the law, to the American image in the world community, and to the impact of the racial struggle in the United States on the world wide conflict "between freedom and tyranny." The McGranery brief noted that the District of Columbia was "a graphic illustration of a failure of democracy."[12] It was also asserted that the United States was trying to prove to the people of the world that a free democracy was the most civilized and secure form of government devised by man. Against this background it was apparent that racial discrimination "furnished grist for the Communist propaganda mills and it raised doubts even among friendly nations as to the intensity of our devotion to the democratic faith."[13] Racial segregation was clearly to be rejected in the eyes of the government lawyers because it harmed the Negro student, mocked our democratic creed, and damaged our position as leader of the "free world."

Numerous groups sympathetic to the Negroes' cause also submitted briefs. To what extent the Court heeded arguments in amici curiae briefs is not known. Both Justices Black and Douglas acknowledged the pressure of work and a heavy reading load, suggesting that a close perusal may not have been given to all the amici curiae

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[12] Ibid., p. 4.

[13] Ibid., p. 6.

briefs.[14] Justice Harold Burton also indicated that little weight was given the amici briefs. Among the papers of Burton in the Library of Congress was a memorandum about the school segregation cases. The comment was made that the amici briefs filed were not of much help with the exception of the briefs submitted by the United States government. Burton added that there was some useful information about various reactions to the segregation problem, but he felt that time could be better spent reading about the problems of desegregation in the report compiled by the clerks of the Justices.[15]

In the minds of two Yale law professors who studied the use of amici curiae briefs, these briefs were of a time-wasting character, repetitious at best and emotional at worst. By the October term of 1948, amici briefs had become such a problem for the Court that a new rule was formulated, effective November, 1949. The consent of all the parties to a law suit was required in the filing of amici curiae briefs, with the exception of the federal government which could file as a matter of right. Not only was the consent of all parties required, but those wishing to file amici briefs had to submit a preliminary

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[14]Personal interview with Justice Hugo Black on July 15, 1969. Comments by Justice William O. Douglas during a speech before the student political science club at the University of Missouri-Kansas City, April 14, 1970.

[15]Papers of Justice Harold H. Burton, Library of Congress.

statement showing that the brief would discuss matters not presented or inadequately presented by the parties.[16]

Probably the greatest value of the amici curiae briefs was to inform the Court of the identity of groups supporting the parties to a law suit. Although the amici briefs attempted to avoid repetitious arguments, they did in fact often repeat the same lines of reasoning in slightly varied form. In general the 1952 amici curiae briefs, all of which were supportive of the Negroes, argued that segregation was discriminatory, implied inferiority of the Negro race, irreparably damaged the Negro student, and violated the constitutional guarantee of the equal protection of the laws.[17]

A basic premise found in a number of the amici briefs was that there were no innate racial traits or "blood strains" predisposing the Negroes to certain behavior. The brief of the American Civil Liberties Union joined by five companion organizations asserted that scientific research in anthropology, sociology, biology, and education demonstrated the fallaciousness of the

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[16]Fowler Harper and Edwin Etherington, "Lobbyists Before the Court," 101 University of Pennsylvania Law Review, 1172-1177 (1953).

[17]Brief of American Veterans Committee, Inc., Supreme Court of the United States, October Term, 1952, No. 8, Brown v. Board of Education of Topeka). See also Brief on Behalf of the American Civil Liberties Union, October Term, 1952, No. 8, p. 6.

racial concept.[18] Similarly, the brief of the American Jewish Congress denigrated the concept of race, arguing that it was the destiny of Americans to fight every manifestation of racism, and to promote the civil and political equality of all minorities.[19]

Face to face confrontation between Court and counsel was the next step along the route to final decision. Oral arguments, scheduled for December 9-11, 1952, gave the Justices an opportunity to question personally the attorneys, which the written briefs had not. There was much speculation about the questions which the Justices directed to counsel. Justice Frankfurter who was one of the most persistent interrogators during the hearings for the school segregation cases insisted that questions from the bench were solely motivated by "an eager desire for information" and in no way indicated a position on the case or implied an already formulated answer.[20] Because Chapter VII will examine the hearings in detail, only

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[18]Brief on Behalf of the American Civil Liberties Union, American Ethical Union, American Jewish Committee, Anti-Defamation League of B'Nai B'Rith, Japanese American Citizens League, and Unitarian Fellowship for Social Justice as Amici Curiae. In the Supreme Court of the United States, October Term, 1952, No. 8, Brown v. Board of Education of Topeka.

[19]Brief of the American Jewish Congress, In the Supreme Court of the United States, October Term, 1952, No. 1, Brown v. Board of Education of Topeka, p. 1. Similar arguments were made in the Brief of the American Veterans Committee, Inc., Supreme Court of the United States, October Term, 1952, No. 8, Brown v. Board of Education of Topeka.

[20]Leon Friedman, Argument: The Oral Argument Before the Supreme Court in Brown v. Board of Education of Topeka, 1952-55 (New York, 1969), p. 20.

references to the social science data will be pointed out here.

There were three main issues relative to the behavioral sciences which kept reoccurring during the course of the three-day hearings in December, 1952. These were: (1) the meaning and reasonableness of race as a basis for legislative classification; (2) the psychological harm to the Negro as a result of segregation; and (3) the scientific nature of the social sciences generally and the trial court evidence specifically.

According to Thurgood Marshall, chief NAACP counsel, race or color was the key issue.[21] In an exchange between Marshall and Justice Frankfurter, Marshall argued that the only way state segregation laws could be constitutional was to show that Negroes were different from anybody else.[22] He pointed out that no social scientist during any of the four trials had denied that segregation harmed the Negro child. In response, Justice Frankfurter asked if the consequences of how a wrong was remedied would not bear on whether it was a fair classification and also if the Constitution in any place denied race as a basis of classification. Furthermore, Frankfurter stated that the vast "conglomeration of Negroes" in the South was a sociological fact of life which must be considered in arriving at a decision.[23]

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[21] Ibid., p. 62 in the South Carolina Hearings, 1952.

[22] Ibid., p. 63.

[23] Ibid., p. 65.

Repeatedly the plaintiffs drove home the point that race was an invidious, irrelevant, and odious classification. In support of this view, Marshall referred to the testimony of Robert Redfield, the University of Chicago anthropologist, who had testified that there were no recognizable racial differences in children, but that such differences as did exist were caused by differences in education.[24] To justify segregation, counsel for the school boards reminded the Justices of the considerable weight of local customs, traditions, and Southern way of life. Co-existence of different races in the same area had always been a difficult and delicate matter throughout history said the defense counsel during the District of Columbia hearings. The problem was insoluble by force. Only the slow patient processes of community effort would change the situation.[25]

The next most frequently discussed issue during the hearings was the effect of segregation on the Negroes. Counsel for the Virginia school board emphasized that the court in Richmond ruled that neither group of expert witnesses was conclusive on this point. Each side balanced

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[24] Ibid., p. 68.

[25] Brown v. Board of Education of Topeka Argument, In the Supreme Court of the United States, October Term, 1952. No. 2. Briggs v. Elliott, p. 70. A bound volume of the complete 1952 Oral Arguments before the Supreme Court can be found in the University of Missouri-Kansas City law library. Hereinafter referred to as the Brown Argument, 1952.

the other. Therefore the plaintiffs had failed to prove their case.[26] School board counsel also argued that psychological harm was something apart from the components of the school system, something the state did not have within its power to confer or prevent.[27] Wilson touched upon one of the key aspects of the effects of segregation. That was the role of mental attitudes in educational achievement. Although social scientists have not conclusively settled this question, certainly the weight of modern psychological research would support the Negroes' charge that attitudes and learning are inseparable.[28]

Although Frankfurter indicated by his questions that he was concerned with states' rights and the practical implications of deciding the issue of segregation, he did comment favorably on the credentials of the psychiatrist in the Delaware trial, Dr. Frederic Wertheim who appeared for the blacks and also on his high regard for the Delaware Chancellor. Nevertheless Frankfurter rejected the Chancellor's finding that segregation harmed the Negro child, stating that such a finding even if proven had no bearing on the legal question.[29] In sum

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[26] Ibid., Virginia Hearings, pp. 38-40.

[27] Ibid., Kansas Hearings, p. 48.

[28] The authorities in footnote eleven of the 1954 Brown decision support this conclusion.

[29] Ibid., Delaware Hearings, pp. 28, 67.

while questions from the Court indicated skepticism about the relevancy and precision of the social science evidence, there were also expressions of respect for the finding by the Delaware and Kansas courts that segregated schools injured the black student.

Not only the issue of segregation but the credibility of the social sciences themselves was disputed during the hearings. John W. Davis, counsel for the defense in the South Carolina case, probably made the most biting sarcasm regarding the presentation of social science evidence when he called it "fragmentary expertise based on an examined presupposition."[30] Frankfurter also questioned the scientific aspect of the social sciences, stating that

> we are here in a domain which I do not yet regard as science in the sense of mathematical certainty. This is all opinion evidence. . . . It can be a very different thing from, as I say, things that are weighed and measured which are tangible. We are dealing here with very subtle things, very subtle testimony.[31]

The Negroes' own admission that the question of psychological harm was "on the frontiers of scientific knowledge" was repeated by the school board attorneys.[32] John W. Davis also pointed out that none of the social scientists was under any official duty to consider the welfare of the people whose rights were being adjudicated. He stated that much social science evidence was merely

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[30] Ibid., South Carolina Hearings, p. 51.

[31] Ibid., Delaware Hearings, p. 69.

[32] Ibid., Virginia Hearings, p. 50.

an effort on the part of the scientist to "rationalize his own preconceptions."[33] Davis paraphrased a quotation from Justice Oliver Wendell Holmes, Jr., arguing that members of the judiciary have no more right to read their ideas of sociology into the Constitution than their ideas of economics.[34]

It seems reasonable to conclude from the 1952 hearings, that despite sympathy for the claims of the social scientists regarding the adverse effects of segregation, the justices were in no significant way convinced of the relevancy of such evidence. Davis made the telling argument that the crux of the case was not the evidence submitted by the behavioral scientists but the meaning and interpretation of the Fourteenth Amendment. This was indeed prophetic because final decision of the cases was in fact postponed for one year while this very problem was explored.

An interval of almost a year and a half elapsed from the December, 1952 hearings until decision day in June, 1954. During this period there was a second round of written briefs and oral arguments. Very few references were made, however, to social science data during this period. That leaves the 1954 opinion as the remaining source of evidence concerning the social science testimony.

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[33] Ibid., South Carolina Hearings, p. 51.

[34] Ibid., Virginia Hearings, p. 68.

What did Chief Justice Warren say about the social science data in the 1954 opinion? Very little, actually, though what he did say was important. First he noted that the decision could not "turn on merely a comparison of tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education."[35] (emphasis supplied by the writer) This was followed by a discussion of the changes in public education from 1868 to the present. The key question, said Chief Justice Warren, was whether segregation in public schools solely on the basis of race, even though other tangible factors were equal, deprived the children of the minority race of equal educational opportunities. In other words, was race a reasonable basis for a legislative classification? In seeking the answer to this question the Court made its second reference to social science data--"To separate them [Negro children] from others of similar age and qualifications solely because of race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[36] The third reference was a statement that the effect of this separation on their educational opportunities was well stated by a finding in the Kansas case that

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[35] Brown v. Board of Education of Topeka, 347 U.S. 483, 1954.

[36] Ibid.

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the infericrity of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.37

This was the prize for which the Negroes had contended and the gist of the social science testimony in four trials. Unquestionably the Court had accepted the findings of the NAACP witnesses rather than those of the school board. The finding by the Virginia court that neither set of social acientists overbalanced the other was thus firmly rejected.

The final reference in the 1954 opinion was to changes in the theory of the social sciences. The Court said,"whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson in 1896 this finding the detrimental effect of segregation is amply supported by modern authority."[38] What early psychological principles was the Court referring to and in what way did modern authority differ? One of the most respected social scientists of the late nineteenth century was sociologist William Graham Sumner, Yale professor of sociology and prolific writer. Author of over 300 books and articles

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[37] Ibid.

[38] Ibid.

including the well-known Folkways and Science of Society, Sumner contributed some of the basic ideas about race, the nature of man, and inherited instincts widely prevalent at the turn of the century.[39] Building on the foundation laid by Charles Darwin's theory of evolution and Herbert Spencer's social Darwinism, Sumner stressed individualism, free competition, laissez-faire economics, survival of the fittest, and individual inequality within a system of equality under law. He opposed social reform because he equated poverty with ignorance, vice and misfortune, on the premise that poverty was caused by individual rather than social factors. Sumner's philosophy rested on a belief in "racial soundness," governmental paternalism, and the importance of human instincts and heredity which left him fatalistic about upward mobility, reform, or a change in folkways.[40]

These basic assumptions including the premise of inherent racial differences were apparent in the majority opinion of Justice Henry B. Brown in the Plessy case. Brown said that legislation could not overcome social prejudice, eradicate racial instincts, or abolish distinctions based upon physical differences. It was evident, according to Brown, that enforced separation of the races

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[39] Encyclopedia Britanica, Vol. 21, (New York, 1963), p. 6.

[40] Maurice R. Davie, William Graham Sumner (New York, 1963), p. 63.

did not stamp the colored race with a badge of inferiority. If this feeling of inferiority existed, it was solely because the colored race chose to put that construction upon it. Brown also referred to "colored blood" and to some arbitrary percentages of "colored blood" which distinguished a white person from a Negro.[41]

In contrast, the dissenting opinion of Justice John Marshall Harlan in the Plessy case anticipated by some fifty years the social science arguments used in the school segregation cases. Like the social scientists of the 1950's, Harlan argued that segregation stamped the Negroes with the brand of inferiority. He also urged that official discrimination under sanction of law was entirely inconsistent with civil freedom and equality before the law. The ruling by the majority in the Plessy case, however, more accurately reflected the most widely accepted beliefs on race and inherited instincts, during that period.

By mid-twentieth century many of those underlying ideas on race, heredity, and the role of environment had changed drastically--at least in the academic community. The importance of environment vis-a-vis heredity was increasingly stressed by anthropologists Ruth Benedict and Robert Redfield. For example, Redfield, one of the witnesses in the school segregation cases, denied that there were any inherent differences between the races in

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[41]Plessy v. Ferguson, 163 U.S. 537 (1896).

intellect or ability. Modern authority referred to by the Brown decision was cited in footnote eleven of the opinion. Eight social scientists were listed here whom the Court credited for the proposition that segregation was psychologically harmful. These authorities included Kenneth Clark, Max Deutscher, Ruth Kotinsky, Franklin Frazier, Theodore Brameld, and Gunnar Myrdal.[42]

Kenneth Clark's study on the "Effect of Prejudice and Discrimination," submitted for the mid-century White House Conference on Children and Youth, was the first reference cited in footnote eleven of the Brown opinion. As discussed earlier in this chapter, Clark referred to the research of over fifty social scientists, to establish the proposition that segregation was psychologically harmful. Scientists listed in Clark's study included the nationally known psychiatrist and author, Erich Fromm; University of Chicago psychologists Bruno Bettelheim and Maurice Janowetz; Columbia University psychiatrists Lionel Cvesey and Abram Kardiner; psychologist Otto Klineberg, as well as Clark himself and his wife, Mamie Clark. At the same time, Clark issued a caveat to the extent that "there was little in scientific literature on the precise effects of prejudice and discrimination on the health of personality." He also acknowledged that other factors such as emotional balance, good sense of the parents, character of the physical and intellectual make-up,

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[42]Brown v. Board of Education of Topeka, 347 U.S. 483, 1954, footnote eleven.

neighborhood environment, and regional differences determined the manner and extent to which prejudice and discrimination affected an individual, seemingly a major retrenchment. Clark said that the effects of prejudice were less where there were strong supportive cultural, ethnic or family traditions. One admission by Clark was especially damaging; this was that "completely satisfactory research in this field [of Negro personality] will have to wait until psychologists have devised more adequate measures for the study of personality."[43] While Clark insisted that a relationship existed between personality damage and prejudice, he admitted that this relationship could not be stated in simple causal or specific terms. Despite the considerable number of studies Clark based his report on, he admitted that there was little scientific research on the effects of prejudice and discrimination, that the problem needed to be more clearly defined, that further research awaited developments in personality testing, and that the whole problem was infinitely complex.[44]

The Helen Witmer and Ruth Kotinsky book, Personality in the Making, was the second source cited in footnote eleven. In this book the editors assembled studies

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[43]Helen Leland Witmer and Ruth Kotinsky, editors, Personality in the Making: The Fact-Finding Report of the Mid-century White House Conference on Children and Youth (New York, 1952), p. 136-152.

[44]Ibid., pp. 151-152.

from the Mid-century White House Conference which had surveyed the latest findings on personality development. These studies in the main reinforced the testimony of the social science witnesses for the Negroes in the school segregation cases. Of concern here was the emphasis on the relationship of emotions to learning, of feelings of inferiority to segregation, and therefore of segregation to learning. The point was made repeatedly that feelings were fundamental in the learning process, that motivation was directly linked to feelings which in turn were related to the basic drives for affection and competence. The total school experience either enhanced or undermined the child's basic sense of trust, independence, initiative, and self confidence. Therefore invidious distinctions (such as implied by segregation) were exceedingly destructive. A major corollary of these findings was that racial and ethnic discrimination handicapped children, aroused feelings of inferiority, insecurity, and resentment, and was contrary to the basic democratic tenet of respect for the individual.[45]

Chief Justice Warren's reference in the 1954 Brown opinion to changes in psychological knowledge may well have referred to the discussion in Witmer and Kotinsky on the "new" dynamic psychology which interpreted behavior in the context of the whole environment. In this interpretation, the individual and the environment interacted

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[45] Ibid., p. 140.

upon and changed each other. There are obvious traces here of the influence of John Dewey's views on education, learning, and intelligence which had become influential by the 1930's. Healthy integration of personality was seen to depend ultimately upon relationships with other people who either supported the developing ego or undermined it. Clinical evidence showed how motivation and intellectual endeavors changed with changing physical and emotional conditions. The conclusion clearly stated that feelings were fundamental in the learning process. Here was the latest findings of psychologists supporting the position of the plaintiffs in the school segregation cases. This mental hygiene approach to learning had been increasingly emphasized among scholars since the 1930's, according to Witmer and Kotinsky.[46]

The two editors did not claim, however, that there was any precise evidence on personality development, conceding that "much of the knowledge is still tentative though it is the best available at the moment." There were still "great chasms of ignorance" about the roots of character and the type of home and school experiences "most desirable as preparation for the good life." Because of these gaps in knowledge, social science practitioners must often improvise, relying on evidence that is empirical rather than scientific, and must frequently

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[46] Ibid., p. 252.

depend solely upon reasonable assumption. The editors admitted candidly that much more research was needed both generally and specifically on the effects of prejudice upon personality. They also acknowledged that little was known about the effects of poverty or economic inequality on personality development.[47] Although the reports by social scientists for the Mid-century White House Conference on Youth were, in the main, supportive of the testimony for the Negroes, there were noticeable reservations, as just related.

The next citation in footnote eleven of the Brown opinion referred to the study by Max Deutscher and Isidor Chein, witnesses for the NAACP in Virginia, based on the returns from the questionnaire sent to 849 social psychologists. Since this study was already discussed in connection with the Virginia trial it is merely necessary to note that the Supreme Court felt it worthy of mention in the footnote. The consensus of opinion in the questionnaire, 83% of the responses, indicated that the social scientists contacted believed that enforced segregation was harmful to both the segregators and the segregated.[48] Although criticized in the trial court for the "shot gun" effect of

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[47] Ibid., p. 437.

[48] Max Deutscher and Isidor Chein, "The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion," Journal of Psychology XXVI (1948), p. 259.

the questions and the predictable nature of the responses, the Deutscher and Chein study did add a quantitative note to the opinion evidence on state-imposed segregation.

A history of the Negroes in the United States, by sociologist E. Franklin Frazier, was the next citation. Frazier's study of American Negro history focused on problems of race and intergroup contact. His basic assuption was that there was no innate racial inferiority but rather so-called racial traits developed because of social and economic factors. Frazier's main emphasis was on the social and economic forces which shaped the course of Negro history in the United States, that is, urbanization, industrialization, and the Southern agricultural system. He also emphasized the social and economic bases of prejudice. Although he thought prejudice could be modified by education, propaganda, and literature, Frazier believed that public discrimination (official segregation) should be directly attacked by legislative and judicial means, the approach used by the NAACP. Frazier ended with a most poignant complaint that what the Negro feels most keenly of all, more than any other type of discrimination, was the "moral isolation which counts him out."[49] This complaint is encountered repeatedly in Negro literature,

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[49] E. Franklin Frazier, The Negro in the United States (New York, 1949), p. 683.

especially in the works of James Baldwin, Richard Wright, Ralph Ellison, and Langston Hughes.[50]

The final citation in footnote eleven was "see generally Myrdal, An American Dilemma."[51] It is extremely doubtful that any of the busy Justices read Gunnar Myrdal's monumental two-volume, 1483-page study. What is more likely is that some capable law clerks summarized several key chapters as well as the basic assumptions of this work. Gunnar Myrdal, social economist, professor, Senator in the Swedish Senate, and advisor to the Swedish government was selected in the late 1930's by the Carnegie Corporation to supervise a fact-finding investigation of the American Negro. Although studies for this investigation were performed by corps of American social scientists, Myrdal edited and wrote the final report.

The basic assumptions on which the study was founded were: (1) the American dilemma consisted of the discrepancy between the American ideal of equality and the American reality of discrimination. This dilemma created a battle or conflict primarily in the heart and mind of the white American--the focus of racial tension; and (2) the moral and rational strain in American thought

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[50]James Baldwin, The Fire Next Time (New York, 1963); Richard Wright, Native Son (New York, 1940); Ralph Ellison, Invisible Man (New York, 1947); Langston Hughes, Shakespeare in Harlem (New York, 1945).

[51]Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (New York, 1944).

optimistically believed that institutions and human nature could be improved through social engineering. That is, society could be reconstructed through political decisions and public resposibility. Today in America, Myrdal said, there is in the social sciences a greater trust in the improvability of man and society than there has ever been since the Enlightenment. He added that the world sadly needed the youthful moralistic optimism of America. Myrdal also contrasted this new optimistic climate of mid-twentieth century America, with the stalwart individualistic laissez-faire philosophy of the late nineteenth and early twentieth century, as characterized by William Graham Sumner.[52]

Myrdal's statements on race were very much in line with the testimony produced by the NAACP in the school segregation cases. He stated that race was a social not biological or scientific concept. No physical differences had yet been measured quantitatively by rigid research standards. For example, hereditory susceptibility to diseases varied with environment and medical care. Myrdal further maintained that psychological differences were also caused by environmental factors. Tests of intelligence measured performance rather than anything called innate ability. In a word, the term "race" was incorrect in a scientific inquiry as it carried false

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[52]Ibid., p. 1024.

biological and genetic connotations.[53]

The gist of Myrdal's findings was that segregation implied inferiority and was based on a heritage of magic and primitive religion. He said segregation resulted in a vicious circle wherein a belief in Negro inferiority kept the Negro in slums and in a condition of poverty which in turn reinforced the inferiority. Myrdal also spelled out the causes of racial prejudice which he found in economic competition, fears for social status, sexual drives, jealousies, and inhibitions. Like many of the social scientists in the four trial courts, Myrdal found that feelings of inferiority, resentment, hopelessness, and suppressed rage were common in the Negro personality as a result of his inferior caste position. Although Myrdal referred to community wide segregation rather than just school segregation, his conclusions were supportive of the NAACP position in the school segregation cases.[54]

Not surprisingly Myrdal gave social scientists enthusiastic although not unqualified praise. He felt that the social sciences had much to contribute to social planning. Optimistically he stated that the social engineering of the coming epoch would rest on the teachings of the social scientists that human nature was changeable and that human deficiencies were to a large degree preventable. Essentially all people want to be rational and just.

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[53] Ibid., p. 667.

[54] Ibid., p. 66.

At the same time he cautioned that social scientific facts were a "construction abstracted out of a complex and interwoven reality by means of arbitrary definitions and classifications." Myrdal conceded that the social scientist never succeeded in freeing himself entirely from the dominant perceptions and biases of his environment. He admitted that social science research was based on preconceived theories involving value premises. In order to avoid these limitations in his report, Myrdal explicitly stated the value premises inherent in each separate study. For example, in analyszing reports and statistics on integration, the underlying value premise was the assumption that white culture was superior to Negro culture. No effort was made to "prove" this; it was merely stated as an underlying assumption accepted by most whites, Negroes, and even by many of the research teams. By facing, not evading, such evaluations Myrdal felt that we could make our thinking more rational.[55]

There were significant implications in Myrdal's study, however, for the school board's position. For example, Myrdal emphasized that the Negro could never in a short-time power bargain attain more than the most benevolent white groups were prepared to give.[56] In a bow to Southern customs and traditions the Supreme Court seemed to agree when in 1955 it ordered the school boards to proceed "with all deliberate speed."

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[55] Ibid., pp. 1023-1035. [56] Ibid., p. 740.

In sum, although the Warren opinion expressly found that segregation was psychologically harmful to the Negro student, only the Court knew whether this was the real basis of the decision. The authorities cited in footnote eleven candidly admitted the tentative nature of social science knowledge at that point in time. Furthermore, although Gunnar Myrdal and E. Franklin Frazier were professionally recognized by the early 1950's, none of the others had any such pre-eminence.[57] Why the Supreme Court accepted these social scientists as representative of modern authority is not known. The Court apparently disregarded opposing conclusions by two social science experts in the Virginia trial--Dr. Henry Garrett, Chairman of the Department of Psychology at Columbia University, and Dr. William Kelly, Richmond, Virginia, psychiatrist. Significantly the social science appendix to the NAACP brief was not mentioned. This still leaves unanswered the question of why the Court adopted certain scientists as authoritative. It is possible that with the exception of the Virginia officials the failure of the school boards to meet the social science witnesses with experts of their own, was decisive on this question. At any rate, acknowledgment that the Court did adopt the major social science

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[57]Oscar Handlin, Arthur M. Schlesinger, Samuel E. Morison, Frederick Merk, Arthur M. Schlesinger, Jr., and Paul H. Buck, Harvard Guide to American History (New York, 1954, 1967), p. 215.

finding on behalf of the Negroes is not tantamount to saying that the decision in toto was based on social science evidence. That the words of the oracle are not always crystal clear is as true of current Supreme Court decisions as of Delphic pronouncements.

The ensuing controversy over what the decision really meant only underscored the ambiguities inherent in the Warren opinion. Among the first salvos of criticism fired were those by irrate Southern politicians. A speech by Senator James Eastland on May 26, 1955, illustrated the temper and mood of the extreme white racist position. Eastland was determined not only to discredit the "modern authorities on psychology cited by the court" but the Court itself. The decision, according to Eastland, was an attack on the reserved powers of the states to regulate public schools. The major point of his speech was that Myrdal and the social scientists associated with him were Communists or belonged to Communist-front organizations, dedicated to the overthrow of the United States government. Eastland selected four of the experts cited in footnote eleven--Clark, Brameld, Frazier, and Myrdal--as his principal targets. Clark was denounced as a paid employee of the NAACP, and therefore not credible as an authority for the plaintiffs. Brameld and Frazier were in the files of the House Committee on Un-American Activities as members of Communist or Communist-front organizations. Various details were given by Eastland such as the fact that

Frazier's book, The Negro in the United States was praised by the Daily Worker, Communist newspaper. Frazier had also publicly supported "the brazen Negro Communist Paul Robeson" as well as the Spanish Refugee Appeal of the Joint Anti-Facist Refugee Committee. Brameld was condemned for supporting the Boycott Japanese Goods Conference of the American League for Peace and Democracy, the Refugee Scholarship and Peace Campaign, and the Committee for Free Political Advocacy defending twelve Communist leaders.[58]

Eastland's major target for criticism, however, was Gunnar Myrdal whom he said the Court relied on as its "leading authority on modern psychology." One by one Eastland described Myrdal's associates in his study of race in America. By innuendo, distortion, misrepresentation, and half truths, Eastland identified association with any liberal, pacific, or foreign-born groups as Communistic. Eastland's tactics mirrored forcefully the McCarthy style of innuendo and accusation prevalent during the Communist witch hunting era of the early 1950's. The similarities were more than superficial, inasmuch as Eastland used the files of the House Committee on Un-American Activities as his major source of information. An example of outright falsehood was Eastland's charge that Myrdal had utter contempt for the principles on which the United States was

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[58] Speech of Hon. James O. Eastland of Mississippi in the Senate of the United States, Thursday, May 26, 1955. United States Government Printing Office, Washington, 1955. (not printed at Government expense.)

founded. Even a cursory reading of Myrdal's two volume work reveals countless references to American idealism and to the fact that the world needed America's youthful moralism. It was indeed because of Myrdal's admiration for the American creed of equality and liberty that he believed that progress toward improved race relations would be made first in America despite the difficulty of the task.

The debate over the role of the social scientists in the segregation cases was not confined to politicians. Academia entered the fray, resulting in a voluminous literature, only a brief part of which can be noted here. Psychologists, lawyers, political scientists, educators, and historians had something to say on this subject. The following section will examine first, the arguments of those who believed that the decision rested on social science evidence and second, the arguments of those who denied any such importance to the social science data.

Hugh Speer, Dean of the School of Education at Kansas City University in 1952, and witness for the plaintiffs in the Topeka trial, stressed the role of the social scientists in his study, Case of the Century.[59] In order to appraise the scientific nature of the social science evidence he mailed questionnaires to a group of

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[59]Hugh W. Speer, The Case of the Century: A Historical and Social Perspective on Brown v. Board of Education of Topeka with Present and Future Implications, 1963, unpublished manuscript in UMKC law school library, pp. 217-243; actual questionnaire on p. 220.

social scientists. These included twenty of the witnesses in the four state trials, twenty-five of the social scientists who had endorsed the social science statement appendix to the NAACP brief, and a number of others selected at random. The questionnaire sought answers to whether the social scientists would still endorse the testimony they had given or the statement they had signed in the brief, and whether they believed the courts were a promising avenue for social change. Not surprisingly the response was overwhelmingly in favor of the decision and the stand they had taken some fifteen years earlier. Although the returns on the questionnaire indicated a high degree of consistency in attitudes over the years, the responses by no means proved that the social sciences played a decisive role. Even though Speer stressed that the social science evidence was given more time in the trial courts than all the other evidence combined, sheer quantity of evidence is by no means conclusive of its importance. Speer was also persuaded by Thurgood Marshall that the important new element in the Brown case was the behavioral science argument that segregation was psychologically bad.[60]

Historian I. A. Newby added his voice to those who

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[60]Hugh Speer tape-recorded an interview with Thurgood Marshall in Washington, D. C. on April 3, 1964, a copy of which he made available to this writer.

stressed the role of the social scientists. In his book, Challenge to the Court: Social Scientists and the Defense of Segregation, he praised the witnesses for the Negroes as "equalitarians and environmentalists" in contrast to opposing social scientists whom he charged as being "racists and hereditarians."[61] These latter, he said, falsely ascribed intelligence and emotional make-up to heredity. Newby's criticism was directed more to disagreement over rival value systems than to substantive differences. Nevertheless, Newby emphasized the role of the social sciences.

Others agreed with that position although some were less than enthusiastic about it. Robert J. McCloskey, Professor of Government at Harvard University, stated that the decision did in fact lean too heavily on modern sociological and psychological literature, and because of the lack of legal case work on it, was not the persuasive document it could have been. McCloskey's criticism was also leveled at the selection of social scientists in footnote eleven which he described as uninspired. He argued that the question of segregation in the public schools remained very much alive for legal scholars, behavioral scientists, and the public at large.[62] According to historian Numan

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[61] I. A. Newby, Challenge to the Court: Social Scientists and the Defense of Segregation, 1954-1966 (Baton Rouge, Louisiana, 1967), p. 61.

[62] Robert G. McCloskey, The American Supreme Court (Chicago, 1960), p. 216.

V. Bartley, Chief Justice Warren had largely ignored the legal precedents of the previous two decades and relied instead on historical, psychological, and sociological arguments.[63] Alfred H. Kelly and Winfred A. Harbison, constitutional historians at Wayne State University, also regretted the reliance on social science data. They characterized the Brown decision as a "simple sociological argument on the impact of segregation on the status of the Negro," adding that the Court had disregarded long-standing precedents which implied constitutional validity for school segregation.[64]

Typical of those in the legal profession who felt that the Court erred in relying on social science testimony were Attorney General Eugene Cookof Georgia and Missouri attorney William Potter. Writing for the April, 1956, issue of the American Bar Association Journal, they expressed their disapproval of the decision because the

> social sciences were too young, too imprecise, too changeable to be used as a basis for a constitutional decision on fundamental rights. . . . Should our fundamental rights rise, fall, or change along with the latest fashions of psychological literature? How are we to know that in the future social scientists may not present us with a collection of notions

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[63]Numan V. Bartley, The Rise of Massive Resistance: Race and Politics in the South During the 1950's (Baton Rouge, Louisiana, 1969), p. 56.

[64]Alfred H. Kelly and Winfred A. Harbison, The American Constitution (New York, 1963), p. 934.

> similar to those of Adolph Hitler and label them as modern science?[65]

These lawyers argued that a court may not consider treatises in a field other than law, unless the treatises themselves were the subject of inquiry. Judicial notice of what they considered extraneous materials extended only to those things of common knowledge that lie without the realm of science. Not surprisingly, one was a Southern attorney and the other from the border state of Missouri. However, as will be shown shortly, criticism of the decision or the basis for it was by no means regional.

One Associate Justice of the Supreme Court, in a confidential interview, also disapproved of the role of the social scientists in the case. This Justice felt that the Court should not have relied on the "sociologists" particularly Gunnar Myrdal. (Myrdal actually was an economist.) Although the Justice stated that he approved of the decision, he thought the Court should have simply ignored the social science evidence and relied on legal reasons. He added that "it was a good decision but a bad opinion because it failed to establish bridges to the past."[66]

It is interesting to note that one of the attorneys

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[65]Eugene Cook and William I. Potter, "The School Segregation Cases: Opposing the Opinion of the Supreme Court," American Bar Association Journal XIII (April, 1956), 313-317.

[66]Confidential interview with an Associate Justice of the Supreme Court on April 26, 1967.

who argued the Brown case in Topeka also believed that the social science evidence was conclusive. In an interview on October 16, 1970, with Charles Scott, attorney for the Negroes, he said that the social science testimony was the "new" evidence necessary to justify a change from prior precedents. He felt that use of conventional evidence, citation of the recent decisions (e.g. Sweatt and McLauren decisions), would not "do the job," but instead the attorneys needed a "new body of evidence." As support for this belief, Scott pointed to the finding by Judge Walter Huxman in the Topeka case that segregation did create psychological harm and implied inferiority. He also noted that Chief Justice Warren in his 1954 opinion used Huxman's phrase verbatim in reference to the harm of segregation. Scott was emphatic that the social sciences had played a key role.[67]

In contrast to the aforementioned, others downgraded the role of the social scientists. One of the most prominent was a member of the Warren Court itself. Justice Hugo Black, in a personal interview, commented that the social science evidence "didn't amount to a row of pins." He said that he "hadn't read it and didn't know half of it was there." It was simply irrelevant to the real issue in the case which according to Black was the constitutionality of race as a legislative classification. That is,

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[67]Personal interview with Charles Scott in Topeka, Kansas, on October 16, 1970.

to segregate on the basis of race was a denial of the equal protection of the laws. It was not the equality of Negroes that was the key issue, according to Black, but their equal rights under the law.[68] Former Justice Tom C. Clark agreed essentially with Justice Black. In an interview with the writer he stated that the social science evidence was not that important in the determination of the case. Clark said he had wanted the Chief Justice to take out footnote eleven. What was determinative according to Clark was the fact that race was an unreasonable classification.[69] In line with these views, Justice William O. Douglas, indicated that he had little time to read the voluminous literature, including the social science references connected with the school segregation cases. Instead, he quickly scanned the briefs for key phrases supportive of or contradictory to the legal question.[70]

A number of lawyers agreed with the Justices that the social sciences were relatively unimportant as evidence in the school segregation cases. A New York University law professor, Edmund Cohn, who was also a close personal friend of Justice Black, conjectured that the

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[68]Personal interview with Justice Hugo Black in Washington, D.C. on July 15, 1969.

[69]Personal interview with Justice Tom C. Clark in Kansas City, Missouri on January 28, 1971.

[70]Comments by Justice William O. Douglas to a group of students in a political science club meeting at the University of Missouri at Kansas City, April 14, 1970.

social science testimony was of little influence on the decision. Although Cohn approved of the decision and hoped for racial integration, he vigorously criticized the social science evidence as an insufficient basis for the opinion. Cohn wrote, "I would not have the constitutional rights of Negroes--or other Americans--rest on such a flimsy foundation as some of the scientific demonstrations" in the Brown case, adding that the behavioral sciences were "young, imprecise, and changeful." Cohn pointed out that it was one thing to use current scientific findings to ascertain if the legislature acted reasonably as in the Brandeis Brief, where there was a presumption of legislative validity, but it was another matter "to have our fundamental rights rise, fall, or change along with the latest fashions of psychological literature." Today, Cohn commented, "social psychology is liberal and egalitarian. Perhaps tomorrow it will be racist." Cohn noted that Chief Justice Warren did not mention either the testimony of the expert witnesses or the social science statement of the thirty-two scientists in the appendix to the appellants' (NAACP) brief. Actually, according to Cohn, the social science brief contained little information beyond what was already known in "literary psychology," that is, in the observations and insights of poets, novelists, essayists, and journalists. Merely translating a proposition of "literary psychology" into technical jargon could scarcely make it a scientific finding. Cohn was

especially critical of Kenneth Clark's doll test. "No one," he wrote, "can state positively what these children were thinking at the time." Furthermore he felt that the doll test was not analyzed in suitable detail on cross-examination, probably because the "lawyers too realized that segregation does injure and degrade Negro school children." Cohn specifically criticized the social scientists for a lack of agreement on substantive premises and for use of empirical means for checking and verifying inferred results.[71]

Charles L. Black, Jr., Professor of Law at Yale University, also dismissed the social science testimony and the authorities cited in footnote eleven as of no influence upon the decision. Although he endorsed the decision itself and supported the principle of desegregation, Black believed that the social science evidence was too weak to be a satisfactory basis for so important a decision. A sturdier base in legal and constitutional principles was needed.[72]

Two other law professors, Albert P. Blaustein and Clarence Ferguson, Jr., from Rutgers University argued that the social science testimony was of little importance in the final decision. In their book, Desegregation and the

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[71]Edmond Cohn, "Jurisprudence," 30 New York University Law Review 167 (January, 1955).

[72]Charles L. Black, Jr., "The Lawfulness of the Segregation Decision," 69 Yale Law Journal 421 (January, 1960).

Law, they wrote that the facts of segregation were so well-known that they were recognized and applied by the Court under the doctrine of "judicial notice" without the help of the social scientists. In other words the experts were merely testifying to the obvious fact that for over twenty years hardly any cultivated person had questioned that segregation was cruel to the Negro school children. The authors observed that recent school segregation cases, Ex rel Gaines v. Canada, Sweatt v. Painter, McLaurin v. Oklahoma State Regents, had been decided without recourse to social science data. In Sweatt for example, the Court ignored voluminous data compiled by sociologists and based its decision on the personal knowledge and experience of the justices with legal education. Blaustein and Ferguson also commented that they would regret to see judges embrace some "fashionable psychological theory," pointing out that while the Kansas and Delaware courts incorporated some of the behavioral science data, the Virginia and South Carolina courts rejected it as irrelevant. In their opinion the social scientists had done no more than argue that segregation was harmful. They could not give factual evidence that there were no rational bases for the Southern segregation laws, because there most definitely existed a body of legal opinion upon which such state actions were based.[73] As Justice Willis Van Devanter explained, "when

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[73]Albert P. Blaustein and Clarence C. Ferguson, Jr., Desegregation and the Law (New Jersey, 1957), pp. 132-136.

the classification of a law is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts must be assumed."[74] Therefore, to sustain the racial segregation statutes, it needed only to be shown that some rational bases existed for the classification scheme. Parties opposing the legislation had to prove that the statute was completely arbitrary. This they could not do, with or without the help of the social scientists. Blaustein and Ferguson were saying that although the Court utilized the behavioral sciences the decision did not rest on this evidence

Jack Greenberg, NAACP counsel in the Kansas and Delaware cases stressed the legal foundation of the decision, the irrationality of racial classifications. Although, he felt that the social science testimony was helpful in providing useful information to the Court, the decision was based on legal tradition.[75]

Somewhat surprisingly the sufficiency of the social science evidence was also attacked by social scientists. Psychology Professors Ernest van den Haag and Ralph Ross of the University of Chicago wrote that

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[74] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

[75] Jack Greenberg, "Social Scientists Take the Stand: A Review and Appraisal of Their Testimony in the Litigation," 54 Michigan Law Review 953, 1956. See also Herbert Hill and Jack Greenberg, Citizen's Guide to Desegregation (Boston, 1955), pp. 142-143.

science could not assess personality damage associated with social stigma. They argued that "whether humiliation leaves deep and lasting traces or whether it increases the incidence of personality disorders among Negroes, we do not know nor do we know whether congregation [integration] would alleviate them." They added that it was fortunate that the United States Supreme Court did not depend on the attempt of the social scientists to detect and prove psychological injuries by "scientific" tests because the evidence presented was "so flimsy as to discredit the conclusion." The authors did believe that some weight was given to Kenneth Clark's doll test which they criticized for the small size of the test group and the fact that the test was not validated by use in non-segregated schools. They concluded that "the 'scientific' evidence for the injury [the psychological harm of segregation] is no more 'scientific' than the evidence presented in favor of racial prejudice. . . . We need not try 'scientifically' to prove that prejudice is clinically injurious. This is fortunate, for we cannot."[76]

Henry E. Garrett, Chairman of the Psychology Department at Columbia University and witness for the board of education in the Virginia trial, wrote that the Brown decision rested on false social science. He said it was

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[76]Ralph Ross and Ernest van den Haag, The Fabric of Society (New York, 1957), chapter 14 "Prejudice About Prejudice."

the absence of valid constitutional precedents which led the Court to turn to social science, adding that "the Justices, however, knew even less about psychology and sociology than they did about law and allowed themselves to be deceived by equalitarian witnesses." Equalitarian dogma was the "scientific hoax of the century." None of the scientists cited in footnote eleven had a national reputation, in his opinion. Perhaps Garrett's real concern was with ideology as indicated by his observation that one scientist had eighteen citations of membership in communist front organizations and another had ten citations against him. Furthermore, two of the authorities in footnote eleven (Kenneth B. Clark and E. Franklin Frazier) were Negroes which, according to Garrett, eliminated them as authorities on racial matters because of obvious grounds for bias. Apparently Garrett did not believe that a white social scientist would have any bias. Garrett's statements must be weighed in light of his background as a Virginian, born and educated in the South.[77]

Political scientists also jumped into the debate. One of the most prolific writers on the Supreme Court and the judicial process was Glendon A. Schubert, Professor of Political Science at Michigan State University. In his book, Constitutional Politics, Schubert said that it was unlikely that the Justices would have accepted the views

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[77]I. A. Newby, pp. 92-93.

of the social scientists as authoritative

> were it not for the critical circumstance that such views corresponded closely to the personal experiences of the Justices, learned in the field of education that they knew best. Such nonprofessional psychological conclusions, reflecting the Justices' own estimation of the importance of 'intangible factors' in legal education, played a key role in Vinson's opinion in the Sweatt and McLaurin cases, which in turn provided the precedents upon which the Court places principle relevance in the [Brown] opinion and decision below.78

In other words, it was the personal experiences of the Justices instead of any authoritative social scientists upon which they relied.

Joseph Tanenhaus, Professor of Political Science at New York University, argued that the social sciences generally carried little weight for fact finding in trial courts because of the inordinately strict practices in admissibility of evidence, relative imprecision of many social science techniques, failure of the scientists to use more adequate tools already in hand, and drawing of unwarrented conclusions from their data. He endorsed the observation of John Davis, counsel in the South Carolina school segregation case, that "social science is fragmentary expertise based on examined presuppositions." Tanenhaus believed, furthermore, that social scientists should be neutral in regard to civil rights. They should leave advocacy to the lawyers. Social science evidence, in his opinion, was too often hearsay and lacking in legal

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78Glendon A. Schubert, Constitutional Politics (New York, 1960), p. 494.

relevancy. On the one hand the constitutionality of a statute carried with it the presumption of validity until it was proven beyond all reasonable doubt that it violated the constitution. On the other hand, the sociological data in the school segregation cases was without any "measurable base on reliable studies."[79]

What conclusion can we reach about the role of the social science evidence in the school segregation cases? The most convincing authority and logic suggest that this data was not the basis of the decision although unquestionably it was part of the consideration, at least in the mind of Chief Justice Warren, the writer of the opinion. Social science did affirm the obvious--that discrimination was psychologically harmful to the Negro student. This evidence did not, however, "prove" that there was no rational basis for racial classification in the public schools. Furthermore, all the social scientists involved, including Kenneth Clark, major witness for the NAACP, and the authorities cited in footnote eleven of the Brown opinion, conceded the tentative nature of social science research on the subject of racial segregation.

In addition, neither the written briefs nor the oral arguments would support the view that the social science data was determinative. The briefs were merely a

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[79]Joseph Tanenhaus, "The Uses and Limitations of Social Science Methods in Analyzing Judicial Behavior," (American Political Science Association Annual Meeting, September, 1956) mimeographed, pp. 1-22.

continuation of the adversary position of the parties to the cases, while the oral arguments were far more concerned with legal history and the rationality of race as a legislative classification than with discussion of the social science evidence. The 1954 opinion offers the most problems in analysis, because while it stated that the primary question was the use of race as the basis of a legislative classification, the reasoning did not really address itself to legal history on this point. Instead Warren offered three reasons for the decision: the importance of education in the 1950's, the consideration of intangible factors in the Sweatt and McLaurin decisions, and the harm of segregation as supported by "modern authority." Furthermore, as demonstrated, the credentials of this "modern authority," with the exception of Gunnar Myrdal and E. Franklin Frazier, were open to debate.

The most logical and convincing scholarly analyses following the decision played down the role of the social scientists. Lawyers Charles Black, Jr., Albert Blaustein, Clarence Ferguson, and NAACP counsel Jack Greenberg, social scientists Henry Garrett, Ernest Van den Haag, and Ralph Ross, and political scientists Glendon Schubert and Joseph Tanenhaus all subscribed to the belief that this evidence was not determinative. Finally the most authoritative of all were the statements by Justices Black, Clark, Douglas, and Frankfurter (the latter during oral

argument) that the social science evidence was not controlling.

A desire for certainty cannot be satisfied in a quest such as this but then that limitation is true for most studies of human affairs. Given that, the above conclusions must be considered persuasive.

CHAPTER VII

ORAL ARGUMENTS--1952-1953

How decisive are oral arguments in the decision-making process of the Supreme Court? Justice John M. Harlan II insisted that, "A good argument may in many cases make the difference between winning or losing, no matter how good the briefs are."[1] The hearings do enable both sides to confront each other directly, permitting the Justices to question and not infrequently engage in debate with the attorneys. Oral argument is considered so helpful that when a member of the Court is ill and must be absent during the hearings in a particular case, he generally refrains from voting on the final outcome even though he may be thoroughly familiar with the issues and briefs.[2] Jack Pope, Associate Justice of the Supreme Court of Texas, cautioned, however, that it would be difficult to prove or disprove the statement that cases on appeal are won by argument, since argument is only one of the ingredients. He did not believe that most judges at the argument stage were ready to make a final decision. Judgment

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[1]Anthony Lewis, Gideon's Trumpet (New York, 1964), p. 262.

[2]Daniel M. Berman, It Is So Ordered: The Supreme Court Rules on School Segregation (New York, 1966), p. 63.

at that time is and probably ought to be reserved. Facts need to be checked and cases need to be read.[3]

Despite this caveat the available evidence indicates that oral arguments do play an important role. Justice Black stated that he gives extremely close attention to oral arguments.[4] One of his law clerks related that not infrequently at the end of the hearings Black would pencil the notation "affirmed" or "denied" on the briefs of the case.[5] There are several reasons why oral argument is important. Judges have different work habits. Some judges listen better than they read and are consequently more receptive to the spoken than the written word. Judges quite obviously have developed skills in listening. Judge Pope observed that in conference and study, justices often recall the points, theories, and facts referred to during argument more than arguments developed in written briefs.[6] Although Pope had reservations about the conclusive role of oral argument, he pointed out that these arguments assure that the lawyer's work at least reaches the ear of the whole court, if not the eyes, because the lawyer can never be sure that the brief is completely read.

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[3]Jack Pope, "Argument on Appeal," The Practical Lawyer, Vol. 14 (1968), No. 8, p. 36.

[4]Personal interview with Justice Black on July 15, 1969.

[5]John P. Frank, Marble Palace: The Supreme Court in American Life (New York, 1966), p. 100.

[6]Pope, p. 35.

In fact Pope estimated that in all probability at least one or more judges have not examined the briefs at the time of the hearings. This point was substantiated by a question from Justice Frankfurter during the 1953 hearings revealing that he had not read a major finding in the Delaware brief of the school board.[7]

In an address before the Judicial Conference of the Fourth Circuit, Asheville, North Carolina, June 24, 1955, Justice John M. Harlan stated that the first impressions that a judge gets of a case were very tenacious, frequently persisting into the conference room. These impressions, he added, are actually gained from the oral argument, if the arguments were effective.[8] Harlan confessed that while he was on the Court of Appeals, he had kept an informal scoreboard of the cases in which he sat, so as to match his initial reactions after the close of the oral argument with his final reactions when it came time to vote at the conference table. Harlan related that he was astonished to find that more times than not his initial views jibed with his final views.[9]

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[7]Leon Friedman, ed., Argument: The Oral Argument Before the Supreme Court in Brown v. Board of Education of Topeka, 1952-55 (New York, 1969), p. 152.

[8]John M. Harlan, "The Role of Oral Argument," The Supreme Court: Views From Inside, ed. Alan F. Westin (New York, 1961), p. 57.

[9]Ibid., p. 58.

There are other reasons why oral argument is important. The arguments are more personal than the written record, thoughts are often better crystallized and more tersely stated, bringing the case into sharper focus. The oral argument gives an opportunity for interchange between court and counsel which the briefs do not. According to Justice Harlan, there is no substitute for the Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies.[10] At the same time, counsel often infer more from questions from the Court than they should. Even when a question strongly suggests the judge's view, it is often testing in nature. Most probably it is only a tentative position. Usually questions are prompted by a sincere interest in settling a problem legally, although some justices, particularly Frankfurter, appeared to engage in debate with the lawyers as if they were quizzing students in a classroom.

Granting that oral arguments are indeed important in the decision-making process, what characteristics make for effective advocacy? John W. Davis, one of the nation's foremost advocates, stated that a good argument came from the three C's--chronology, clarity, and candor.[11] Justice Harlan added to those qualifications--selectivity, simplicity, and resiliency. First of all, Harlan said, the

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[10] Ibid.

[11] John W. Davis, "The Argument of An Appeal," 26 American Bar Journal 895 (1940).

lawyer should make a thoughtful selection of issues to be argued, limiting the argument only to the controlling issues. Simplicity depended upon thorough preparation plus artful expression. Resiliency referred to the response of the lawyer to questions by the Court. The lawyer instead of shunning questions should welcome them, answering as directly as possible, at the time they were asked, without evasion.[12]

Before examining the issues brought out by the hearings, it is of interest to look at the attorneys representing each side and the organization which played such a key role from the very beginning--the National Association for the Advancement of Colored People. Historian John Garraty called the NAACP the "cutting edge" of all the complex social and political forces at work to produce a desegregated America.[13] Certainly by the 1950's the legal branch of the NAACP had developed effective legal techniques and an over-all strategy in its attack upon segregation in various sectors of American life. Just a few days before the Supreme Court hearings in the school segregation cases, for example, the NAACP lawyers set up a moot court at Howard University Law School. Attorneys from the District of Columbia were

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[12]Harlan, pp. 58-61.

[13]John Garraty, Quarrels That Have Shaped the Constitution (New York, 1962), p. 249.

invited to attend and criticize their arguments.[14]

The Supreme Court was of course aware of the large organization and vast numbers of people represented by the NAACP. By the 1950's, the Association had a long and successful history in the area of legal persuasion. Its origins dated to a 1908 meeting of white sympathizers, called together by Oswald Garrison Villard, the grandson of the abolitionist leader, William Lloyd Garrison. Following a Springfield, Illinois race riot in 1908, fifty-three people, including John Dewey, Jane Addams, William Dean Howells, and Lincoln Steffens, participated in forming the NAACP.[15]

The goal of the NAACP in its formative years was to achieve full citizenship and equal rights for the Negro through a militant but nonviolent course of action. The tactics pursued were protest, agitation, and direct legal action. To assist in this pursuit, the NAACP maintained a biracial organization. W. E. B. DuBois, a Harvard graduate, who directed publicity and edited the Crisis,

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[14]Hugh Speer, Case of the Century: A Historical and Social Perspective on Brown v. Board of Education of Topeka with Present and Future Implications, 1968 (unpublished manuscript in the Library of Congress and the law library of the University of Missouri at Kansas City), p. 153.

[15]Charles Flint Kellogg, NAACP, Vol. I, 1909-1920 (Baltimore, 1967), pp. 9-30. See also Clement E. Vose, Caucasians Only: The Supreme Court, the NAACP, and Restrictive Covenants (Berkely, 1959), pp. 30-49.

the official monthly NAACP organ, was the organization's first Negro leader. Moorfield Storey, a conservative white Boston lawyer who had been secretary to Charles Sumner in the immediate post Civil War period, became the first president of the Association. Storey was president until his death in 1929 when he was succeeded by Joel Elias Spingarn, a professor of comparative literature at Columbia and prominent literary critic and poet. Upon Joel Spingarn's death in 1940, his brother, Arthur B. Spingarn, a prominent attorney, assumed the presidency of the NAACP until his death in 1965. These three presidents, Storey and the two Spingarns, all reflected the original interest of white civic leadership in Negro betterment. However over the years the titular leadership of the NAACP shifted from whites to the Negroes, although the active leadership, in the position of the secretary, had always been occupied by Negroes. By 1949, the national office of the Association had a paid staff of seventy-two, only four of whom were white.[16]

Membership in the NAACP grew at the local level throughout the country. Local chapters were established in all major cities and many smaller ones, in both the North and South. As money-raisers and as the basis of political support for black leaders, these groups were invaluable. In Topeka for instance, contributions for

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[16]Kellogg, p. 291 and Vose, p. 33.

fighting the school segregation battle came from countless meetings held two to three years before the court battle ever took place.[17] By 1945, the Association had 300,000 members and 1,600 branches and youth councils. The general pattern of action by the NAACP according to Roy Wilkins was "petition and protest, legal redress, lobbying, legislative activity, education, and persuasion. And, implicit and explicit in all activities, has been the theme of equality."[18]

NAACP entry into national politics was marked by its successful campaign, along with the American Federation of Labor, against the 1930 Senate confirmation for the Supreme Court of Judge John J. Parker of the United States Circuit Court of Appeals. One wonders what possible effect this had on Judge Parker's opinion in the South Carolina school segregation decision of 1952. The NAACP had no doubt of the importance of the background of each judge, noting in its 1930 Annual Report that "in view of the many 5-to-4 decisions rendered in the early decades of the twentieth century that the character, social background, and general education of each justice played an important part" in the decision-making process.[19]

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[17]Personal interview on October 16, 1970, with Charles Scott, Topeka lawyer who appeared for the plaintiffs in Brown v. Board of Education of Topeka.

[18]Roy Wilkins, "The Negro Wants Full Equality," What The Negro Wants (Chapel Hill, North Carolina, 1944), p. 118, in footnote 18 on p. 34 of Vose. See also Kellogg, p. 291.

[19]NAACP, Annual Report, 1930, p. 12, from Vose, p. 34.

Important to the NAACP's legal strategy in the school segregation cases was its marked lack of success in lobbying Congress over the years. The size and character of the Southern congressional delegation, the committee system, seniority, and the rule of cloture in the Senate doomed Negro efforts. In the 1920's blacks had failed in their efforts to secure legislation making lynching a federal crime. Bills to prohibit the poll-tax had failed. Limited success did come from forming alliances with labor and liberal interest groups in support of measures favoring workers and low-income groups. The Association advocated rent and price controls, public housing, federal aid to education, and stronger social-security laws. Trade-union support for Negro objectives grew after NAACP denounced the Taft-Hartley Act. As shown by the amici curiae briefs in the Brown case, the American Civil Liberties Union, the American Jewish Congress, and the NAACP assumed that the problems of civil rights and Negro rights were indivisible.

Negro influence on presidential policies developed in a limited fashion following a number of significant changes. Economic betterment and higher educational attainments for the Negroes followed their migration north and to the cities. The growth of the black population in the North and their interest in national policies contributed to political organization and moderate gains. After 1940, the Negroes began to see a political advantage

in their strategic diffusion in the marginal states whose electoral votes were generally considered vital to the winning candidate.[20] There were twenty-eight states in which a shift of five per cent or less of the popular vote would have reversed the electoral vote cast by these states. In twelve of these, the potential Negro vote exceeded the number required to shift the states from one candidate to another.[21] There was no doubt that black influence brought about some favorable presidential policies. From World War I on, the Negroes worked against segregation in the armed forces and eventually realized this goal when President Truman ended the practice. They also realized some success when President Franklin D. Roosevelt established a temporary Fair Employment Practice Commission during World War II to end discrimination in defense contracts and in job training programs.[22]

Although Negroes were improving their economic position and breaching the barriers in many types of private institutions, hospitals, colleges, and restaurants after World War II, much of their greatest success came via the courts. Beginning as early as 1915 the NAACP

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[20] Ibid., p. 38.

[21] Henry Lee Moon, Balance of Power: The Negro Vote (Garden City, New York, 1948), p. 198.

[22] Donald R. McCoy and Richard T. Ruetten, "The Civil Rights Movement, 1940-1945," Midwest Quarterly, XI, No. 1 (October, 1969), p. 14. See also John Hope Franklin From Slavery to Freedom (New York, 1967) pp. 576-607.

was active in nearly every Supreme Court case concerning the constitutional rights of Negroes. From the very first cases it had the assistance of outstanding counsel. Moorefield Storey for the NAACP successfully argued the case in the Supreme Court against the constitutionality of a Louisville racial zoning ordinance (Buchanan v. Warley, 245 U.S. 60, 1917). In 1923 the Association realized another victory when the Court overturned the death sentences of twelve Negroes convicted in an Arkansas court dominated by a mob (Moore v. Dempsey, 261 U.S. 86, 1923). By 1929, the NAACP had won a series of impressive constitutional victories. Furthermore, Arthur B. Spingarn had organized a National Legal Committee whose members included Clarence Darrow, Felix Frankfurter, Frank Murphy, Arthur Garfield Hays, and Morris L. Ernst to advise the Association. These men and their successors on the committee contributed important help, but volunteers could not give to the cause of Negro rights the broad continuity needed to present a large procession of cases to the Supreme Court. Justice Brandeis commented that during the 1920's, Negro rights had suffered because their cases, especially in the trial courts, were not always well prepared.[23]

In the late 1920's and 1930's a foundation grant allowed the NAACP to make a broad survey of legal problems. A young millionaire, Charles Garland, who had established

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[23]Vose, p. 41.

the American Fund for Public Service, offered his financial support. The Board of the American Fund recommended in 1929, that substantial help be given to protect the civil rights of Negroes. The report stated that

> We believe that the largest single contribution which this fund could make to the release of the creative energies of the producing class in America would be to finance a large-scale, wide-spread, dramatic campaign to give the Southern Negro his constitutional rights, his political and civil equality, and therewith a self-consciousness and self-respect which would inevitably tend to effect a revolution in the economic life of the country. . . Specifically, we recommend a dramatic, large-scale campaign to give the Negroes equal rights in the public schools, in the voting booths, on the railroads, and on juries in every state where they are at present denied them, and the right to own and occupy real property. . . These rights are the necesssary basis of any real economic independence; . . . the campaign which we propose is a continuing battle because each time the Negro establishes a legal right, an effort is made to circumvent it by another restrictive law.[24]

Eventually $100,000 was allocated by the American Fund to the NAACP for a coordinated legal program, although because of the depression and dwindling resources, only $20,700 was actually contributed. The program planned by the NAACP constituted a full-scale attack on racial segregation in education, transportation, and housing. Charles H. Houston, Vice Dean of the Howard University Law School, one of the most brilliant students at Harvard University according to Felix Frankfurter, became special counsel for the Association in 1935. Houston stressed that the legal campaign against inequality was "a carefully planned one

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[24] Ibid., pp. 41-42.

to secure decisions, rulings, and public opinion on the broad principle, instead of being devoted to merely miscellaneous cases."[25] Although Houston left the NAACP in 1938 to return to private practice and the Howard Law School, he continued to assist the black civil rights effort. Another Negro who played an extremely important role in the NAACP was Thurgood Marshall, Howard Law School graduate, who joined the staff of the NAACP in 1935.

The primary group, within the NAACP, fighting the legal battles was the Legal Defense and Educational Fund, incorporated in 1939, to provide a full-time staff to work on civil-rights litigation. Certain tax advantages accrued to subscribers of this Fund because the legal and educational effort of the NAACP was thus technically separated from the main body, considered primarily a propaganda organization by the Bureau of Internal Revenue. The avowed purpose of the Legal Defense Fund was to establish racial equality before the law. Its limited resources, however, prevented it from participating in all cases involving the rights of Negroes. To have the proper issues raised at the required point, the NAACP attorneys preferred to work with local counsel on select cases only.[26]

The success of the legal effort depended in no small measure on the cooperation, competence, compatability, and dedication of Negro lawyers across the country. Howard

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[25] Ibid., p. 43.

[26] Ibid., p. 44.

University School of Law in the District of Columbia was the single most important training place for Negro attorneys interested in civil rights. A study of black lawyers made in 1951 showed that there were 2,000 Negroes in active legal practice. Approximately one-third were concentrated in three cities--Chicago, New York, and Washington. Negro attorneys, like their white colleagues, have professional contact with each other across the country, in their own association, the National Bar Association. Many of the most active members in the Negro Bar were graduates of Howard Law School who had served on the National Legal Committee of the NAACP. The interlocking nature of these organizations has been an important factor in the cooperation of Negro attorneys in their effort to achieve equal treatment.[27]

The organization that has most antagonized the NAACP has been the Communist party which makes even more ironic the charges in 1954 by Senator Eastland and others of his persuasion that those involved in the effort to desegregate the schools--the social scientists, the lawyers, and even the Supreme Court itself--were invested with the virus of Communism. The Communists had earlier actually fought to take over important NAACP cases, as for example the Scottsboro cases (1931-1935) in Alabama, involving nine Negroes charged with rape. Although the Alabama cases were controlled by the NAACP until 1935,

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[27] Ibid. pp. 46-47.

the Communists moved in at that time and exploited the Scottsboro boys for Communist purposes.[28] Moreover in their appeals to the Supreme Court, the Communists' methods endangered rather than helped the efforts of the NAACP to win advances for Negroes. In 1951, for example, the Communists picketed the Court and deluged the justices with telegrams in connection with the case of Willie McGee, a Negro, convicted of rape in Mississippi and later electrocuted. Justice Black, in giving a press conference, severely criticized these tactics and stated that the Supreme Court could not be influenced by such pressures.[29] Tactics such as these were widely condemned by lawyers in the United States. Numerous bills to restrict the picketing of courts were introduced in Congress. In contrast to Communist practices, the NAACP adhered to established traditions of the American Bar in sponsoring cases.[30]

The NAACP considered judicial battle not only an avenue to desegregation but equally important, an educational forum for the nation. In a 1945 Chicago conference of the Association, Charles Houston, one of the most respected lawyers at the meeting, argued that the philosophy

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[28]Wilson Record, Race and Radicalism: The NAACP and the Communist Party in Conflict (Ithica, N. Y., 1904), p. 62. See also Don T. Carter, Scottsboro: A Tragedy of the American South (Baton Rouge, 1969), p. 53.

[29]Carter, p. 52 and Vose, p. 48.

[30]Vose, p. 60.

of segregation should be questioned as frequently as possible in the courts.[31] A successful test in the Supreme Court of the United States was what everyone was hoping for. The decision on what case to carry up for this important test was the subject of much disagreement among the lawyers. Although the NAACP had been sponsoring cases in education, transportation, and other areas, the Association decided to make an all-out effort in the field of restrictive covenants in housing. The restrictive covenant cases became a crucial trial run for the Negro attorneys in their ultimate attack on segregated education.[32]

In the restrictive covenant cases, in contrast to the later school segregation cases, the NAACP planned their test cases with meticulous care. They hoped to select a case from a state which, on the face of it, had at least some outward expression against racial discrimination. The NAACP leaders reminded its lawyers that litigation as public relations was critical. The courts were important as an educational forum for molding national opinion and the opinion of the rank and file of the NAACP itself. Illustrative of the publicity drive was a flyer by the Chicago branch of the NAACP in the spring of 1945 urging people to "join the NAACP $50,000 campaign to

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[31] Ibid., pp. vii, ix.

[32] Ibid., p. 63.

break racial restrictive covenants. . . . NAACP is leading the fight."[33]

The restrictive covenant cases which finally reached the Supreme Court in 1948 and 1953, ended judicial support for discriminatory housing contracts in Northern cities. The high court held in these cases that judicial enforcement of racial restrictions in real estate deeds was not a private matter but actually amounted to "state action," forbidden by the Fourteenth Amendment. Vose believed that the significance of the restrictive covenant cases lay in what went into their preparation rather than in what came out, the decision. In these cases the NAACP perfected techniques which they had been in the process of developing in the twenty-five cases from 1909 to 1947, the date when the Supreme Court agreed to hear the first of the four covenant cases.[34] No earlier litigation was comparable in scope to the Association's task of working to eliminate judicial enforcement of racial restrictions in housing. Relying on the constitutional theory of "state action" with the aid of the latest social and economic facts about discrimination, the NAACP made a smashing legal victory. In actual practice, unfortunately, racial segregation in the residential areas of America's largest

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[33] Ibid., p. 71.

[34] Ibid., pp. viii, ix. Shelly v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948); Barrows v. Jackson, 346 U.S. 249 (1953).

cities has not been substantially altered--which only suggests the limited powers of court victories. Nevertheless the housing cases stood as a symbol of power and a portent of the future. The NAACP victory in the covenant cases is attributable to the efficient organization by the Negro lawyers which made them better able to do battle through the courts. Without this money, and talent, the NAACP would not have succeeded. These factors and this experience undoubtedly played a major role in the Brown victory of 1954. The NAACP during the covenant cases also engaged in extensive consultation with academic experts in economics, sociology, housing, and public administration which experience was of great value in fighting school segregation.[35] Of undoubted help to the NAACP also was the Association's promotion of the publication of numerous sympathetic articles in legal and scholarly journals propounding the NAACP point of view toward restrictive covenants.[36]

The actual NAACP attack on segregated schools began in the mid-1930's with only meager results at first. For a time Charles Houston, chief counsel, and Walter White, executive secretary of the NAACP, toyed with the idea of flooding Southern states with a massive series of taxpayers' suits against elementary and secondary

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[35]Garraty, p. 252.

[36]Ibid.

schools. They hoped this action might force Southern states to abandon the dual school system. This approach was soon abandoned for a direct attack on graduate and professional schools. The reasons for this change in tactics were: (1) most Southern states did not even attempt a facade of equality for Negroes on the professional or graduate school level; (2) equality at this level was too expensive and in fact impossible to achieve; (3) Houston knew that the South regarded racial mixing in graduate and professional education as less invidious than in the primary, secondary, or even collegiate level; in a word, Houston believed correctly that the South would resist integration on the graduate school level with less emotional intensity than at any other level.[37]

If the NAACP was the major organization backing the Negroes' legal fight, certain individual Negroes were the guiding spirits. Thurgood Marshall, chief counsel for the NAACP, coordinated the legal effort in the school cases. Marshall first joined the NAACP legal staff in 1935 after private practice in Baltimore.[38] In 1939, he became general counsel for the newly created Legal Defense and

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[37] Ibid., p. 253.

[38] Ibid., p. 251.

Education Fund of the NAACP. By the early 1950's Marshall through the legal defense fund was directing the expenditure of $150,000 annually in the prosecution of various desegregation cases throughout the country with such success that he became known as "Mr. Civil Rights."[39] During the prosecution of these suits Marshall conducted a series of regional and national lawyers' planning conferences in which his New York office became a kind of general staff headquarters, coordinating policy and strategy, while local attorneys handled the actual trials.

Marshall's skill and pre-eminence were recognized, following the school segregation cases, by subsequent appointments as United States Circuit Judge for the Second Circuit Court of Appeals from 1961-1965; Solicitor General of the United States from 1965-1967; and Associate Justice of the United States Supreme Court in 1967. In naming Marshall as an Associate Justice in June, 1967, President Johnson pointed out that few if any men ever had such an impressive batting average in arguing cases before the Supreme Court prior to their appointment. Marshall had won fourty-four out of fifty-two cases in which he appeared. Nineteen were argued for the government as Solicitor General and thirty-three for the NAACP or in private practice.[40]

A reading of Marshall's oral argument during the

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[39] Ibid.

[40] Speer, p. 206.

1952 and 1953 hearings reveals occasional lapses in logic and rhetoric. Nevertheless his presentation, frequently couched in humorous coloquialisms, had an undeniable emotional appeal. According to Hugh Speer, one of the witnesses in the Kansas case who interviewed Marshall on April 3, 1964, Marshall comes on stronger, with more force and a better impression in oral argument than a written transcript of the hearings would indicate. Marshall's charm, humanitarianism, and wisdom, are apparently more evident in a personal confrontation than the printed word could possibly reveal.[41]

Among the other attorneys for the Negroes was Spottswood Robinson III, representing the Virginia plaintiffs, who was South East Regional Counsel for the NAACP Legal Defense and Educational Fund, Inc., 1951-1960, Dean of Howard University Law School 1961-1966, and United States Circuit Judge for the District of Columbia after 1966. George E. C. Hayes, counsel for the plaintiffs in the District of Columbia, was in private practice in Washington, D. C. and also on the NAACP Legal Defense staff. James Nabrit, also representing the plaintiffs in the District of Columbia case, was a law professor at Howard University from 1936-1956, and later Dean and President of the university. Louis L. Redding, representing

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[41]Personal interview with Hugh Speer on March 21, 1969. Speer not only gave me his personal impressions of Marshall but a typed report of the interview which he had tape-recorded.

the Delaware plaintiffs, was in private practice in Wilmington. His co-counsel, Jack Greenberg, was assistant counsel for the NAACP legal defense staff from 1949-1961, and thereafter Director-Counsel of the legal division. Robert L. Carter, who argued in the Kansas case, was assistant counsel of the NAACP Legal Defense and Education Fund and subsequently general counsel for the NAACP.

In contrast to the NAACP lawyers there was no formal alliance of attorneys arguing for the school boards. Although several of them gave well-reasoned, effective presentations, John W. Davis, counsel for the South Carolina school board, made an outstanding impression. The press acknowledged his pre-eminence as one of the chief lawyers pleading for the states. Davis, eighty years old at the time of the 1952 hearings and one of America's leading trial lawyers, had an illustrious career behind him. He had been a member of the House of Representatives, Solicitor General of the United States, Governor of West Virginia, Ambassador to Great Britain, Democratic candidate for President in 1924, President of the American Bar Association, and member of a prominent New York law firm for over thirty years preceding the hearings. Interestingly enough he had declined nomination to the United States Supreme Court in 1922.[42] In June, 1952, only six months prior to the December hearings, Davis had been in the news

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[42]Friedman, p. 6 and Who's Who in America, Vol. 28 (Chicago, 1954) pp. 645-646.

for having bested President Truman before the Supreme Court in the case regarding the presidential seizure of the steel mills. Davis's opposite number in the South Carolina trial was Thurgood Marshall. As some observers delightedly reported it, this was to be a battle of two giants.[43]

A reading of Davis's arguments during the Supreme Court hearings reveals masterly logic, superb rhetoric, graceful allusions to the classics, superior organization, and delightful humor. In contrast to the treatment of Marshall, there were relatively few interruptions from the Court while Davis spoke. However when questions did arise, Davis was always directly responsive, never equivocal. It was interesting to hear the rumor circulating during the hearings that Davis had entered the case at the bequest of his personal friend, Governor James Byrnes of South Carolina, and donated his services without charge. Allegedly at a later date, the legislature of South Carolina voted a silver tea service to Davis as an expression of thanks.[44]

Other able counsel represented the school boards.

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[43]Lucius J. Barker and Tiley W. Barker, Jr., Freedoms, Courts, Politics: Studies in Civil Liberties. (Englewood Cliffs, N. J., 1965), p. 167.

[44]Personal interview on May 12, 1970 with Paul Wilson, Assistant Attorney General from the state of Kansas who argued for the state before the Supreme Court in December, 1952.

Paul E. Wilson, Assistant Attorney General for the State of Kansas, made a well argued plea for the constitutionality of the state segregation laws. H. Albert Young, Attorney General from the State of Delaware, J. Lindsay Almond, Attorney General from the State of Virginia and subsequently governor of the state, Milton Korman, Counsel from the District of Columbia, and Robert McFigg, Jr., counsel from South Carolina, also made effective appearances. T. Justin Moore, counsel for the Prince Edward County Virginia school system was the one notable exception, who engaged in biting sarcasm with racial overtones. A number of attorneys general from the states of Texas, Arkansas, Oklahoma, Maryland, North Carolina, and Florida also appeared as counsel for amici curiae in 1953. In addition, J. Lee Rankin, Assistant Attorney General from the Department of Justice, made a very effective oral argument in 1953.

Hearings before the Supreme Court were held in December, 1952, December, 1953, and April, 1955. Only the first two will be discussed here as they are the hearings relating to the primary decision of May 17, 1954. The third set of hearings in April, 1955, concerned implementation of the primary decision. Testimony during oral argument ran into hundreds of pages of fascinating reading. What will be done here, however, is to restrict discussion to the issues covered and the general arguments advanced by each side. A few observations will also be

made on questions from the justices.

The issues which emerged during the 1952 oral argument were essentially those raised during the trials. Was race a reasonable basis for legislative classification within the purview of the "equal protection" clause of the Fourteenth Amendment? How was the Fourteenth Amendment to be interpreted in relation to public school segregation? Or stated another way, was a non-segregated public school education a basic constitutional right? What was the intent of the framers and the ratifiers on this question? This led to the problem of constitutional interpretation--was the constitution to be interpreted narrowly or broadly? What about a "living constitution" in relation to the changing times? Was segregation a political or judicial question--a matter for the legislature or the judiciary? Was segregation a matter for state government in its control of educational policy or the concern of the national government in its protection of certain basic individual rights? The role of the social scientists and the validity of their testimony, as discussed in the previous chapter, were also argued. Implicit in many of these questions was the age-old judicial problem of balancing the public interest against private rights. Furthermore, if the court merely ruled that schools must be equal would not resegregation occur when facilities were equalized? Finally, there was the important question of

consequences of any decree granting desegregation--the anticipated disruption of the Southern way of life.

The 1952 oral arguments were heard over a period of three days, from December 9 through 11, 1952. Attorneys for the Kansas case argued first, followed by counsel for the South Carolina, Virginia, District of Columbia, and Delaware plaintiffs. In the Kansas hearings Robert Carter, for the Negroes, pointed out that this was a case of first impression in the Supreme Court, the first time that the issue of segregation per se in public school education was ever presented to the Court.[45] Carter commenced his argument with the obvious assertion that racial classifications were involved. Secondly, he pleaded that the Plessy doctrine of "separate but equal" be overruled, though he admitted at the same time that the Court did not necessarily have to meet that issue. On the question of racial classifications, Justice Frankfurter interrogated Carter at some length about the problem of reasonableness, asking if there was not anything in life to which this segregation legislation responded, obviously referring to the customs and tradition in Southern society. Frankfurter also pointed out that this was not just one example of a racial classification in public schools but part of a body of legislative enactments in twenty states in Southern and border areas, where race was one of the facts of life.

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[45]Friedman, Argument, p. 21.

Frankfurter, in a word, was suggesting that racial classification in schools had a reasonable relation to the facts, whereas Carter had called such classification a "whim."

In arguing the issue of reasonable classification, Carter stated that any legislative classification must fall with an even hand on all persons similarly situated. He also pointed to the fact that the Plessy case had nothing to do with grade school education. Granting this, Justice Frankfurter asked under what circumstances should the Supreme Court now upset a long course of decisions, written into the public law and adjudications of courts.[46] Justice Douglas pointed out that the Court had only judged segregation cases in street cars, railway cars, and restaurants, but that education was different.[47] Frankfurter then went into a discussion of the reasonableness of race as a classification. He asked counsel if the basis for such a classification was not long established policy.

Paul Wilson, for the State of Kansas, argued that the decision in an early Kansas case, Reynolds v. Board of Education (66 Kansas 672, 1903), was sufficient basis for the validity of the Kansas segregation law. Wilson conceded, however, that the consequences of desegregation would probably not be serious in Kansas inasmuch as the Negro population there was small. In fact there had been

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[46] Ibid., p. 20.

[47] Ibid., p. 22.

no finding that any of the plaintiffs in Topeka were personally harmed by segregation or that they interpreted segregation as denoting the inferiority of the Negro group. Nor was evidence presented that white children were favored over colored in the Topeka schools. Wilson stated that he was not arguing for segregation as such but only that policy determinations were within the exclusive province of the state legislature. He said he was not pleading that separate schools were economically expedient, sociologically desirable, or consistent with sound ethical or religious theory, but only that the Kansas statute did not violate the Fourteenth Amendment.

Thurgood Marshall in arguing the case for the South Carolina school children urged the need to uphold federalism, that is, the maintenance of federal rights. The "Union becomes a mere rope of sand," he said, when states are permitted to destroy federal rights.[48] In contrast, counsel for the school boards argued that Negroes were denying the right of the states to regulate public education. Marshall added that the Negroes wanted an equality of laws and not merely an equality of facilities. He pointed out that the Supreme Court had many times rejected distinctions on a racial basis as odious, citing the Japanese exclusion cases during WorldWar II, and a

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[48] Ibid., p. 40.

Texas primary election case.[49] Marshall also pointed out that under the Gaines doctrine constitutional rights were "personal and present." That is, they adhered to the particular plaintiffs who were entitled to immediate relief. Relief postponed was relief denied. The immediacy and urgency of these constitutional rights, that is, the right to equality before the law, made them superior to the "sociological facts of life" urged by the school boards. Marshall commented that South Carolina had not even defended her school segregation statutes as reasonable. He made a three-pronged attack on segregation, namely that: (1) equality was impossible within a segregated system because of the intangibles in education, as noted in the Sweatt and McClaurin decisions; (2) legislative classification based on race was invalid, unconstitutional, because it had no relation to the purpose of the legislation--that is to public school education; and (3) racial distinctions in and of themselves were invidious.[50] Marshall pointed out that nowhere had any witnesses for the school boards denied that harm did indeed result from segregation. However significantly Marshall also pointed out that he was not seeking affirmative relief--integration --when he conceded

that desegregation would not put anybody in any school.

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[49] Ibid., p. 42.

[50] Ibid., p. 45.

> The only thing that we ask for is that the state-imposed racial segregation be taken off, and to leave the county school board, the county people, the district people, to work out their own solution of the problem to assign children on any reasonable basis they want to assign them on.[51]

By this, Marshall explained, he meant that the school board could find some method other than race of distributing the children, such as drawing district lines.[52] At this point Justice Frankfurter mentioned the likelihood of gerrymandering to achieve racial segregation in the districts. Frankfurter felt that nothing would be worse than for the Court to make an abstract declaration that segregation was bad and then have it evaded by tricks.[53] Marshall replied that if it could be shown that district lines were drawn on the basis of race or color, then they too would violate the court injunction. Anticipating the bussing problem which emerged by the late 1960's, Frankfurter asked what would occur if children in Negro ghettoes would request admission to schools outside their district. In a word, residential segregation was basic to the whole problem. Marshall replied the important thing was to establish the principle--no state-imposed segregation--because it was the "state-imposed" part that affected the individual children.[54]

An interesting digression was made at this point by Justice Jackson who wanted to know what effect the end

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[51] Ibid., p. 47.

[52] Ibid.

[53] Ibid., p. 48.

[54] Ibid., p. 49.

of racial segregation would have on Indian policy. Marshall replied that Indians had neither the judgment nor the wherewithal to bring lawsuits (perhaps meaning a lack of wisdom or experience, as well as money, however Marshall made no further explanation or comment). John W. Davis responded to this question by stating that if the plaintiffs prevailed in their construction of the Fourteenth Amendment, the State would have no grounds to segregate its pupils on any ground--sex, age, mental capacity, or race, including the Indians.

Davis argued that: (1) the State had proceeded forthwith to furnish the Negro pupils with equal educational facilities, equipment, curricula, and opportunities; (2) legislative classification on the basis of race, sex, age, or mental capacity was not affected by the Fourteenth Amendment; and (3) social science evidence relied on by the plaintiffs was insufficient. The social science evidence, in his opinion, had no relation to constitutional rights, carried little weight, and conflicted with the opinion of "other and better informed sources."[55] Davis pointed out that the South Carolina legislature had approved an act for the issuance of $75,000,000 in bonds for school purposes, that is a maximum at any one time, not an ultimate sum. Furthermore, the State had: directed that Clarendon County, the seat of the current suit, be

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[55] Ibid., p. 51.

redistricted into three consolidated districts, instead of the existing thirty-four; provided for the building of a new Negro high school in the future and the repair of the existing secondary school by September of 1952; and voted appropriations of $21,000 for immediate additional equipment.

The crux of the case however in Davis's opinion was the meaning and interpretation of the Fourteenth Amendment. He argued that the Constitution was to be read "in a sense most obvious to the common understanding at the time of adoption."[56] His argument anticipated the five questions propounded by the Court for reargument the following year. In answer to a question by Justice Burton about how to interpret the Fourteenth Amendment in light of changed conditions such as the changed relations between the races, Davis answered that changed conditions might affect policy but could not broaden the terminology of the Constitution.

Obviously one of the main lines of defense by the school boards was that the whole problem of racial classification was a question for legislative policy and not for judicial determination. Both the federal and state relationship as well as the legislative and judicial balance were at stake here. Davis argued that, "equal protection in the minds of the [39th] Congress of the United

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[56] Ibid., p. 55.

States did not contemplate mixed schools as a necessity."[57] He found it inconceivable that the Congress which supported segregated schools in the District of Columbia would have forbidden the states to employ a similar system.

Davis made three additional points. First, Congressional support of segregation in the District of Columbia was a legislative interpretation that the Court could not ignore. Second, the social science evidence offered by the Negro plaintiffs in the trial court was not a sufficient basis for a legal determination. The experts lacked any official duty to those for whom they were "legislating." Only one had the slightest knowledge of conditions within the states where separate schools were maintained. Third, members of the judiciary had no more right to read their ideas of sociology into the Constitution than their ideas of economics. Thousands of men, sworn to uphold the Constitution and charged with official duty in legislative and judicial branches of the government have declared that segregation per se was not unlawful. If conditions have changed so that segregation was no longer wise, it was a matter for the legislature and not for the courts.[58]

Marshall made his own claims. First, the State of South Carolina failed to produce one social witness in refutation of the claims of psychological harm by witnesses

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[57] Ibid., p. 56.

[58] Ibid., pp. 59-60.

for the Negroes. Second, race could not be used as a basis of classification. Third, the issue was one of weighing the constitutionally protected rights of an individual against what was considered to be the public policy of the State of South Carolina; since that policy ran afoul of the Fourteenth Amendment, the individual rights had to be affirmed. Fourth, the courts were the only testing ground for individual rights because state laws must be tested for reasonableness in light of the Fourteenth Amendment and not in light of what the state meant.

Various comments by the justices indicated their concerns. Frankfurter returned to the matter of consequences of a court decision. He stated that the consequences of how one remedies a conceded wrong bear on the question of whether it was a fair classification. Frankfurter said if the constitutionally protected right (the right not to be segregated in schools) was written into the Constitution then he did not care about the evidence. All the evidence introduced by the Negroes was beside the point. If it is in the Constitution, "I do not care about what they say. But the question is, is it in the Constitution?"[59] Frankfurter conceded that this was the first time that the question of whether segregation per se violated the Constitution had come before the Court.

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[59]Ibid., p. 65.

Frankfurter, along with several other justices, also wanted to know what kind of decree should ensue if the Supreme Court should decide to reverse and remand the cases to the federal district courts. In other words, the judges were very concerned at this point with the means of effecting the decision.

Justice Reed showed his interest in the idea of the reasonableness of race as a classification. He asked Thurgood Marshall if the school segregation laws of South Carolina were not passed for the express purpose of avoiding racial friction. He wondered if the state legislature did not have to weigh the disadvantage of the segregated group against the advantage of maintenance of law and order. In a word, Reed asked, was not this question a matter for the state legislature rather than the judiciary.[60]

Counsel T. Justin Moore for the Virginia school board also discussed the question of legislative classifications. He said that the basic standard of equal protection of the laws did not mean that all men at all times must receive the same treatment. Rather the requirement was that the state must act reasonably in making classifications. He pointed out that the federal district court in Virginia made a specific finding that no harm resulted to students from segregation.[61] Moore argued that the

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[60] Ibid., p. 67.

[61] Ibid., p. 70.

state law requiring segregation was reasonable because the doctrine of "equal but separate" was based on the "southern way of life." Statistics showed that the black population in Virginia was 20.5% of the whole population, whereas Negroes averaged 4.6% of the population in all other states.[62] He also said that the Negro population had increased 225% in Prince Edward County (the seat of the original law suit) within the preceding ten years. Moore turned to the practical aspect, insisting that the people of Virginia would not support desegregation through their taxes. There were also 5,243 black teachers in Virginia, more than in all of the thirty-one states of the Union where there was no legally required segregation. These teachers would not be employed to teach white children in Virginia's tax-supported system.[63]

Moore also derogated the social science witnesses produced by the NAACP. On the other hand, he pointed out that Virginia was the one state which introduced social science experts to counter those of the Negroes. These were men, he said, who were familiar with Virginia conditions as well as being experts in their own fields.

In sum Moore's case rested on two major points: (1) segregation was a policy matter for the state legislature and not for the courts; (2) there was a rational basis

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[62] Ibid., p. 85.

[63] Ibid., p. 99.

for racial segregation (the classification was reasonable) resting on the history, customs, and way of life in Virginia.[64] This latter point was a recurring theme hammered home by the plaintiffs throughout the four-year duration of the cases.

Attorney Spottswood Robinson for the Negro plaintiffs denied the importance of precedent and the Virginia way of life. He pointed out that the Supreme Court never hesitated to change the course or trend of its decisions when error was demonstrated.[65] He also argued that an equalization decree by the Court was impossible. That is, the Court's machinery was not suitable to ordering a school board to equalize facilities.[66] Robinson reasoned that: (1) educational facilities in Virginia were unequal; and (2) separate facilities could never be equal. He also urged that, in line with the Gaines doctrine, these rights were "personal and present" requiring immediate redress for the plaintiffs in the suit.

Frankfurter revealed his interest in a narrow decision when he suggested that the case should be decided on the sole issue of equality. He said the courts had faced that problem in several cases and decided that where there is inequality, the decision would issue on that basis and "we shall not borrow trouble in 1953, or 1954 or

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[64] Ibid., p. 86.

[65] Ibid., p. 72.

[66] Ibid., p. 79.

whenever it is." He said the decree should be issued according to Gaines, that is, facilities should be equalized.[67] This obviously was strong support for a narrow decision in line with the arguments of the school boards. Quite obviously, however, he was unable to persuade his brethren on the Court, nor did he hold out with a dissenting opinion, in May of 1954.

During the Virginia hearings, Justice Jackson brought up the same point. He asked if the question of segregation was not a matter for Congress under section five of the Fourteenth Amendment. Section five gave Congress the power to "enforce, by appropriate legislation, the provisions of this article." Why, he asked, could not Congress enact a statute that segregation was contrary to national policy and welfare.[68] Jackson answered his own question later when he commented that probably the reason the case was before the Court was that Congress had failed to outlaw segregation.[69]

George C. Hayes, counsel for the District of Columbia Negroes, argued that congressional legislation pertaining to buildings and funds for the District schools, was neither mandatory nor permissive, but merely silent in regard to segregation of the races. This contention was responsive to the fact that throughout the years,

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[67] Ibid., p. 74.

[68] Ibid., p. 93.

[69] Ibid., p. 244.

ever since the Civil War, Congress had appropriated money for separate Negro and white schools in the District. Counsel also argued that segregation on the basis of color violated the due process clause of the Fifth Amendment, the Civil Rights Act of 1866, and the public policy of the United States government as announced in the charter of the United Nations.[70] Section C of Article 55 of the United Nations Charter stated that the United Nations should promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language, or religion."

The unreasonableness of race as a legislative classification was again brought up by Hayes. He called attention to the language in Hirabayashi v. United States (320 U.S. 81, 1943) where the Supreme Court had said that legislation based on race was suspect. When Chief Justice Vinson asked Hayes if the Fourteenth Amendment invalidated all relationships based on race, Hayes replied

> If your Honor please, I say again--and this is said on something that I hope is not based on obsession because of the fact that I am a Negro--I said to you that I believe that any of the facts--the Fourteenth Amendment, which had in it the question of the equal protection clause--the equal protection clause, as I conceive it, was put into the Fourteenth Amendment not because of the fact that there was any attempt at segregation for Negroes, not of administering it. It was a question of getting it, and I think that the Fourteenth Amendment, when it provided for citizenship, mindful of the situation, and saying that they should have full citizenship, I think that they could not

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[70] Ibid., p. 111.

> consistently have had that in mind and passed that and, at the same time, had in mind the question of that we shall segregate in schools.[71]

Obviously the question of race was never far from the argument, either intellectually or emotionally. This excerpt also indicates the sometimes confused rhetoric which emerged during the oral argument, particularly in response to questions from the bench, but also during prepared statements. Translated, Hays was probably saying that full citizenship was incompatible with segregation in the schools.

At this point Frankfurter, repeating Vinson's question in slightly different form, asked Hayes if all legislation which drew any line with reference to race was automatically outlawed by the Fifth and Fourteenth Amendment--that is all laws prohibiting intermarriage of the races--because there was a good deal of legislation in this country drawing such lines.[72] Frankfurter added that the statement in the Hirabayashi case simply meant that legislation based on race can be valid. It was not an absolute prohibition, rather good cause or great cause must be shown for such legislation. This really was the gravemen of the action. For in truth, the Fourteenth Amendment did not mention schools and a considerable body of laws based on race did exist. The reasonableness of

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[71] Ibid., p. 115.

[72] Ibid., pp. 116-117.

such laws was always the condition precedent for their legality. The essential basis of the case for the school boards was that an established way of life for over eighty years made segregation laws reasonable. The Negroes on the other hand argued that there was no basis in science or reason for separation of the races. On a purely intellectual and legal level, the Southerners had by far the stronger case. The interesting aspect of the Brown decision, however, was that it was not based on precedent, intellectual arguments, or even the desires of almost 50% of the states (seventeen Southern and three border states). It was of course for these very reasons that the decision was so vulnerable to criticism.

Never in the history of this country, Hayes pointed out, were individual liberties of the citizen entrusted to legislators. The Bill of Rights was passed to prevent that very thing. Hayes also noted that this was the very first time that the Supreme Court had the opportunity to say whether the District of Columbia statute permitting segregation was unconstitutional.

Milton Korman, counsel for the District of Columbia school board, denied that the congressional legislation was punitive, depriving Negroes of their rights. Rather, he said, the Negroes had never enjoyed anything which had been taken away from them. The laws setting up the dual schools in the District gave something to them and did not take away. The main thrust of his argument, however, was

that any change in laws should come in the "proper" way, through Congress. The judiciary was not the forum to decide on a change which should emerge from grass roots--from the people.[73] Korman cited the language in the 1950 District of Columbia case (Carr v. Corning, 182 F. 2d 14--D. C. Circuit Court) wherein the Court upheld the validity of the District's segregated school system, saying that

> Since the beginning of human history, no circumstance has given rise to more difficult and delicate problems than has the coexistence of different races in the same area. Centuries of bitter experience in all parts of the world have proved that the problem is insoluble by force of any sort. The same history shows that it is soluble by the patient processes of community experience. Such problems lie naturally in the field of legislation, a method susceptible of experimentation, of development, of adjustment to the current necessities in a variety of community circumstances.[74]

Korman also argued for a strict construction of the Constitution. He said that changes in public opinion in regard to the Negroes should not induce the Court to give to the words of the Constitution a more liberal construction than they were intended to bear when the instrument was framed. Any other rule of construction would abrogate the judicial character of the Court and make it a mere reflex of the popular opinion or passions of the day.[75]

Justice Burton asked about the impact of changed conditions on constitutional interpretation. Korman

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[73] Ibid., p. 140.

[74] Ibid., p. 141.

[75] Ibid., p. 135.

replied that there was nothing new in 1952 that was not known in 1938 when the Supreme Court refused to invalidate the segregated Missouri law school in the Gaines case.[76]

In rebuttal, an emotional appeal was made by counsel for the Negroes. Hayes said that one cannot have a quantum of liberty:

> When liberty is interfered with by the state, it has to be justified, and you cannot justify it by saying that we only took a little liberty. You justify it by the reasonableness of the taking. This case, in the heart of the nation's capital, in the capital of democracy, in the capital of the free world, there is no place for a segregated school system. This country cannot afford it, and Constitution does not permit it, and the statutes of Congress do not authorize it.77

Attorneys representing the Delaware clients were the last to appear. Essentially they presented the same arguments. Counsel for the Negroes argued that race was an unreasonable classification. He also pointed out that merely affirming the desegregation decree of the Delaware court was not enough. Once school facilities in Delaware were equalized there was a strong possibility of resegregation. What counsel urged was that the Supreme Court would outlaw segregation per se.[78] He also stressed the finding by the Chancellor in the Delaware Court that segregation in itself harmed the Negro child.

As other school board attorneys had done, counsel for the Delaware school board pointed out that the roots of

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[76] Ibid.

[77] Ibid., p. 142.

[78] Ibid., p. 104.

social segregation were deep in Delaware history and tradition. Practical difficulties in adjusting to a non-segregated system could not be ignored. Also counsel urged that the decree of desegregation by the courts in Delaware failed to take into account the "public interest."

Frankfurter again during this argument asked about the consequences of a decree ordering desegregation. He said the Court must balance public interest against the immediate relief of individuals. Frankfurter also commented that mere numbers, concentration of Negroes, made a lot of difference. Furthermore he indicated his skepticism about the social sciences generally. Frankfurter also doubted whether immediate desegregation was required, as the Delaware Chancery Court had ordered. "Equity can and does balance," said Frankfurter, " and the Supreme Court, as a court of equity, should always strike a balance between the needs of plaintiff and the consequences of giving the desired relief."[79]

Justice Black reminded the school board counsel that there was still the finding in Delaware that even if facilities were equalized, segregation resulted in inferior education for the Negroes.[80] This was welcome support for the case of the Negro school children.

A reading of the 1952 hearings left the impression

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[79] Ibid., p. 151.

[80] Ibid., p. 152.

that the essential elements were feelings and attitudes rather than facts and legal precedents. Often an argument amounted merely to an assertion by one side--that segregation resulted in no harm--met by a flat denial on the other--that segregation harms the Negro child. Emotion, not reason, seemed to rule the day.

In reviewing the questions of the justices, certain attitudes were strikingly apparent. Frankfurter repeatedly revealed his concern for states' rights, for the practical consequences of a desegregation decree, and for a strict construction of the Constitution. He was generally impatient with and frequently interrupted counsel for the Negroes. At one point he lectured Thurgood Marshall, pointing out that the Fourteenth Amendment did not destroy history and substitute mechanical departments of law. He said, "you have to face the fact that this is not a question to be decided by an abstract starting point of natural law, that you cannot have segregation. If we start with that, of course, we will end with that."[81] He thought it reasonable that a state legislature should address itself to those "facts of life" where there were vast congregations of Negroes, in contrast to states where there were not. Questions by Justice Reed seemed to be put him in either a neutral position or pro-states' rights. Justice Burton on the other hand made comments supportive of the Negroes' claims. Justice Jackson repeatedly

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[81] Ibid., p. 44.

suggested that he believed Congress had the power to outlaw segregation. Chief Justice Vinson asked counsel for the Virginia plaintiffs why, if he were willing to allow reasonable time for a desegregation decree, he would not allow time for Virginia to equalize. Vinson reminded counsel that in equity one must consider the rights of other people which would be involved in any major dislocation.[82] Questions by the Chief Justice generally seemed to indicate concern for the position of the Southern states.

If repetition gets results, both sides scored. The ears and eyes of the Court were assailed with essentially the same arguments throughout the written briefs and oral hearings, with occassional fillips of eloquence and a quantum of facts. What the Court did with all this rhetoric is another question.

Six months of silence followed the 1952 hearings. Then, on June 8, 1953, the Court issued an intermediate order requesting more information on the meaning of the Fourteenth Amendment. Specifically the Court asked: (1) Whether the framers or ratifiers of the Amendment intended that public school segregation should be abolished? (2) Whether Congress or the courts might abolish segregation in the future? (3) Could the Supreme Court abolish segregation regardless of the meaning of the Fourteenth

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[82] Ibid., p. 105.

Amendment or the intent of the framers? (4) If the Court so decided, should desegregation be "forthwith" (immediate) or gradual? (5) How should such a decree be implemented--that is which court should be responsible, should a master in chancery handle the matter and what general directions or guidelines should the Supreme Court give? The parties and the Attorney General of the United States were invited to submit written briefs on these questions and appear for reargument during the fall term of 1953.

Once again from December 7 through 9, 1953, oral argument was heard before the Supreme Court. In order of appearance were counsel for the Virginia, South Carolina, Kansas, District of Columbia, and Delaware cases. Inasmuch as the 1953 hearings merely retraced and enlarged the arguments in the written briefs on the Fourteenth Amendment which were examined in detail in Chapter III, only the highlights will be looked at here. The basic position of each side on the five questions, comments by the Court, and a few general observations will be presented.

Question number 1: What evidence was there that the Congress which submitted and the state legislatures 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?

The Negroes claimed that both the Congress which framed the Amendment and the ratifying states intended

that public school segregation would be abolished by the Amendment. There were two basic contentions. First, Spottswood Robinson, counsel for the Negroes, argued that the historical evidence--the debates in Congress and in the state conventions--showed that the purpose of the Amendment was to provide for the complete legal equality of all men, irrespective of race, and to broadly proscribe all caste and class legislation based on race or color. Secondly, segregation in the public schools was a form of class legislation prohibited by the Amendment. As in the written briefs, Robinson related the Amendment to the Black Codes which were imposed to keep the Negroes in an inferior position. He pointed to language from the congressional debates, e.g. "abolishing class legislation," "assuring all civil and political rights," "equality before the law," "fundamental rights and privileges," "the same shield as protects the white man," as "proving" that Congress intended to eliminate school segregation.[83] Robinson did concede, however, that there was only one specific reference to school segregation during the debates on the Fourteenth Amendment. This was by Democratic Representative Andrew J. Rogers of New Jersey who opposed the proposed amendment as destroying all state legislation on race, mentioning specifically the right to segregate the races in the public schools.

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[83] Ibid., pp. 183-186.

Robinson thought it highly significant that during these debates no one denied that the Amendment had the scope that Representative Rogers stated it had. At that point, Justice Frankfurter asked what weight the Court should give to uncontradicted individual statements by Congressmen. Should silence by other members of Congress be construed as acquiesence.[84] "The Fourteenth Amendment speaks in general language and makes no effort to enumerate the rights it designs to protect," said Robinson, quoting the Supreme Court in Strauder v. West Virginia (100 U.S. 303 1886).

Attorneys for the school boards read the Congressional debates, reaching diametrically opposite conclusions. John Davis, arguing for the South Carolina defendants, claimed that the "overwhelming preponderance of the evidence demonstrates that the Congress which submitted, and the state legislatures which ratified, the Fourteenth Amendment did not contemplate and did not understand that it would abolish segregation in public schools."[85] As proof, he said that the plaintiffs based their case on several erroneous assumptions: that the anti-slavery, pre-Civil war crusade, the abolitionist crusade, was directed not only against slavery but against segregation in schools; that the radical Republicans controlled the action

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[84] Ibid., p. 189.

[85] Ibid., p. 207.

of the 39th Congress which passed the Fourteenth Amendment; and that Congressmen in favor of racial equality in the 39th Congress were opposed to segregated schools. Davis then proceeded to discuss individuals in the 39th Congress whose statements and actions backed his case. He stressed that the question was not whether Negroes should enjoy equal protection of the laws but whether segregation in schools was a denial of equality where the segregation runs against both races and where the facilities were equal. Davis then referred to the bog of "congressional intent."

> Now, Your Honors, then are presented with this: We say there is no warrent for the assertion that the Fourteenth Amendment dealt with the school question. The appellants say that from the debates in Congress it is perfectly evident that the Congress wanted to deal with the school question, and the Attorney General, as a friend of the Court, says he does not know which is correct. So Your Honors are afforded the reasonable field for selection. (Laughter)[86]

Question number 2: If Congress did not intend to abolish segregation in the public schools at that time, was it the Congressional understanding that future Congresses might abolish it or was it within the judicial power to abolish it in light of future conditions? The Negro position was that both Congress and the Courts could eliminate segregation in public education.[87] According to this interpretation Congress's power to act, stemmed from Section 5 of the Amendment giving Congress

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[86] Ibid., p. 209.

[87] Ibid., p. 192.

the authority to legislate in this area if it so desired. Robinson also argued that Section 5 empowered the courts to determine acts of a state in contravention of the Fourteenth Amendment.

Legal precedents were brought in to support this position. Thurgood Marshall argued that the court's power rested firmly on a group of cases construing the Fourteenth Amendment during the period immediately following ratification. These cases, particularly, Strauder v. West Virginia and the Slaughter-House Cases, made it clear that the Fourteenth Amendment was adopted for the express purpose of correcting discriminatory laws against the Negroes.[88] He said that the Strauder v. West Virginia case ruled that the Fourteenth Amendment established principles in broad language and not narrow rules of conduct. Marshall also asserted that the Congressional debates indicated that the Amendment was adopted for the express purpose of depriving the states of any authority to enforce the existing Black Codes. Since the present school segregation laws were of the same cloth as the Black Codes, inevitably they could be challenged by Congress or the Courts.[89] Frankfurter thought the question was not whether the Supreme Court lost its power in this matter, but whether the states lost their powers. As Frankfurter's questions indicated, he was much concerned with states' rights. Marshall replied

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[88] Ibid., pp. 197-198.

[89] Ibid., p. 198.

that the states most certainly lost their power in the matter of segregation. Marshall explained that the test in this case was whether the public policy, customs, and mores of the states or constitutional rights of individuals should prevail.[90] This, of course, was pure advocacy and not an "objective" statement inasmuch as the point of the law suit was to determine specifically whether a non-segregated public school education was in fact a "constitutional right."

The position of the school boards was that neither Congress nor the courts had the power to abolish segregation in the public schools--that section 5 merely provided for more effective remedies via Congress than through the normal judicial process. John Davis for the South Carolina defendants argued that since Congress never intended the Fourteenth Amendment to deal with segregated schools, obviously Congress never contemplated that Section 5 of the Amendment would give that body more power than the Amendment had originally embraced. At this point Justice Jackson inquired whether the "necessary and proper" clause of the Constitution would not apply to the Fourteenth Amendment also--that is would not Congress be able to pass any laws necessary and proper to carry out the purpose of the Amendment. Davis answered that Congress did not have power to enforce a provision not within the

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[90] Ibid., p. 199.

scope of the Amendment itself, nor could the courts construe the Amendment adversely to the understanding of its framers. Furthermore, according to Davis, controlling precedents precluded a construction which would abolish segregation in the public schools. He noted that the Court had seven times pronounced in favor of "separate but equal" so that, "somewhere, sometime to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judical discretion and disturbances."[91] This of course was mere rhetoric, inasmuch as precedents are quite obviously not irrevocable. Quoting Judge Parker in the South Carolina opinion, Davis stated that since segregation had been acceptable under the Fourteenth Amendment for over three-quarters of a century, "it was late indeed in the day to disturb it on any theoretical or sociological basis."[92]

Question number 3: On the assumption that the answers to questions 2 (a) and (b) do not dispose of the issue (that is could Congress or the courts abolish segregation in the future), was it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

Thurgood Marshall stated that it clearly was within the power of the Court to construe the Fourteenth Amendment

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[91] Ibid., p. 215.

as abolishing segregation in public schools. In support of this position, he again pointed to Strauder v. West Virginia where the Court made clear that Congress did not intend to enumerate these rights--that the Amendment set broad principles in broad language and not merely specific rules.[93] Both the Strauder and the Slaughter House Cases indicated, to Marshall, that the Fourteenth Amendment was intended to strike down all types of class and caste legislation.

Davis contended on the other hand it was not within the judicial power to construe the Fourteenth Amendment adversely to the intent of the framers. Stare decisis applied so that controlling precedents precluded any other interpretation. Davis argued that the states rightly relied on the fact the appellate courts in some sixteen or more states passed on the validity of the "separate but equal" doctrine. Also relevant was the fact that Congress had continually since 1862 segregated its schools in the District of Columbia. The Court was not the forum wherein laws should be attacked because a change was wanted. It was a legislative matter for Congress.[94]

Question number 4: Assuming it was decided that segregation in public schools violated the Fourteenth Amendment, would a decree necessarily follow that the

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[93] Ibid., p. 198.

[94] Ibid., p. 213.

Negro children should forthwith be admitted to schools of their choice, or might the Court permit an effective gradual adjustment to a system not based on color distinctions?

According to Marshall, the position of the Negroes was that the states should be given a sufficient time to meet administrative problems. However, he could conceive of nothing administrative-wise that would take longer than a year. If the school boards did not have sufficient staff to do these things, then the states should hire more people to do the job. A longer period of time would only get the lower court into the legislative field.[95]

Quite emphatically the school boards recommended that if the Court were to abolish segregation in the schools, then by all means it should permit a gradual adjustment. Davis said that the right of the Supreme Court as a court of equity, to postpone the remedy was unquestioned. Counsel for the District of Columbia school board suggested that no positive future date be set, but that the matter be left to the District Courts, because he did not think that anyone could now determine what lengths of time would be required to get Congress to act.[96]

Question number 5: Assuming that the Court would rule that public school segregation violated the Fourteenth

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[95] Ibid., p. 234.

[96] Ibid., pp. 218, 292.

Amendment, should the Supreme Court formulate a detailed decree? And if so what specific issues should it reach? Should the Court appoint a master to handle the question? Or should the Court remand to the court of first instance with directions to frame decrees and if so what general directions should the decrees include?

Both sides agreed that the Supreme Court should not enter any detailed decree but should remand to the district courts. Milton Korman, counsel for the District of Columbia school board, for example, suggested that if segregation were found unconstitutional, the Supreme Court should remand with instructions directing immediate commencement of desegregation with periodic check-up by the district court. He stated that the District Board of Education would take immediate steps to try to work out desegregation as quickly as possible. However some preparation and indoctrination of the teachers to handle integration was a prime prerequisite.[97] John Davis stated that the Supreme Court should remand either to a lower court or to a master in chancery, where local conditions could be considered with the broadest possible discretion.[98] Thurgood Marshall suggested that the responsibility of the federal courts ended with telling the state what it could not do. The Supreme Court should merely instruct the

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[97] Ibid., p. 292.

[98] Ibid., p. 218.

lower court to take administrative problems into consideration. Marshall added that he did not believe anybody recommended that the Supreme Court take over the administrative job.[99]

It is instructive to note the arguments of J. Lee Rankin, Assistant Attorney General for the Department of Justice, who appeared as amicus curiae. Not only was the Attorney General's office specifically invited to appear at the 1953 hearings by the Supreme Court, but the close working relationship between the Court and the Justice Department gave importance to the position of the government.

In regard to the primary question, Rankin said that the history of the Fourteenth Amendment was inconclusive on the matter of segregation in the public schools. The Supreme Court had established the standard in Maxwell v. Dow (176 U.S. 581, 1900) that it would not pick out an isolated remark, part of the debates, something of the opponents or the proponents, in connection with a certain piece of legislation to ascertain intent. In line with this standard, Rankin said that one could not rely on statements during the debates on the Fourteenth Amendment as showing that Congress decided this particular question--public school segregation. The Department of Justice in its lengthy study of the Amendment had concluded that the evidence did not sustain either the plaintiffs or

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[99] Ibid., p. 234.

defendants.[100] In regard to the segregated schools of the District of Columbia, Rankin said that Congress in 1866 simply did not consider the matter. It merely decided to give three lots for the use of colored schools in the District and to allocate a given amount of money. As far as ratification by the seceding states was concerned, there was no evidence of intent that the Fourteenth Amendment dealt with mixed schools. The South had just been occupied, the Negroes were entirely illiterate, and there were few public schools for anyone in the South. The public schools that did exist in the South were largely for the poor. In the North, according to Rankin, everybody was involved in the problem of educating the Negro, yet the question of segregation in the public schools was just not discussed. In a word, there was no assumption from state legislative acts at that time that anyone understood that the Fourteenth Amendment would permit segregation of the Negro in the public schools.[101]

At this juncture, Justice Jackson asked how to account for the decisions in the last decade and a half of the nineteenth century of a number of New York state courts which held that the Amendment had no bearing on the question of public school segregation.[102] Rankin's answer was that apparently there had been no detailed study of

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[100] Ibid., p. 241.

[101] Ibid., p. 246.

[102] Ibid., p. 247.

the history and background of the Fourteenth Amendment in connection with the New York decisions. Furthermore after 1896, the courts relied on the "separate but equal" doctrine of Plessy v. Ferguson. The history as related in the Slaughter-House Cases and in Strauder v. West Virginia by a Court which had recently lived through the debates on the Fourteenth Amendment was the true version of the meaning of the Amendment, according to Rankin. This version indicated that the pervading purpose of the Fourteenth Amendment was to establish that all men were equal--equal before the law--and that no distinction could ever be made upon the basis of race or color. Rankin claimed that if there was anything that the Fourteenth Amendment tried to do for this country, it was to make clear that no discrimination could ever be made, based upon race or color. The position of the Department of Justice therefore was that the Fourteenth Amendment did not permit segregation in the public schools based upon race.[103]

It followed from the above argument, that the Department of Justice believed the Court had the power to rule whether the Fourteenth Amendment permitted a state determination of public school segregation.[104] Rankin insisted that both Congress and the Court had concurrent jurisdiction in enforcement of the Fourteenth Amendment.

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[103] Ibid., p. 249.

[104] Ibid., p. 248.

Yet the Court need not wait for Congress to act under Section 5 of the Amendment. Justice Jackson observed that realistically, he supposed the reason these school segregation cases were before the Court was that action could not be obtained from Congress. He said that certainly the case for the Negroes would be much stronger if Congress had acted.[105] This was of course the basis of the NAACP strategy--advance via the courts.

On the problem of implementation, the position of the United States Government was that the burden fell on the school boards to satisfy the lower courts as to the time necessary to make the transition to a desegregated school system. Rankin suggested that the lower court could take into consideration problems on the local level. He thought that a year might be a reasonable time for the presentation of a reorganization plan with the idea that the parties should proceed "with deliberate speed."[106] Significantly, this was the very phrase used in the final implementation decision of the Court in 1955.

In regard to guidelines, Rankin urged that the Supreme Court merely establish the broad general principle that the Fourteenth Amendment meant equality in schools--that there be no distinction because of race. Justice Jackson interrupted to say that he foresaw a generation of litigation if the Court sent the cases back (to the lower

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[105] Ibid., p. 244.

[106] Ibid., p. 253.

courts) with no standards, and each case had to come to the Supreme Court for a determination, standard by standard.[107] This question along with others by Justices Frankfurter and Reed indicated concern with implementation of a desegregation decree. Rankin replied that it was reasonable to remand the matter to the lower court which could take local problems into consideration and enter a decree accordingly. Transportation to school, adequacy of building facilities, and overcrowding were examples of problems which Rankin indicated should be dealt with by the local school districts. The school districts then would have the obligation to bring in a plan to accomplish desegregation as rapidly as possible. The details should not be a problem of the lower court unless it found that the plan was unreasonable or a deliberate attempt to evade the order of the Court.[108] Justice Frankfurter asked Rankin if it were a correct assumption that the Government's suggestions were made on the basis that these cases would settle a widespread problem involving the relationship of ten million Negroes in seventeen states--that it was in reality a question of making a readjustment of an existing system throughout the states where the practice of mandatory or permissive public school segregation existed.[109] Rankin agreed that was indeed true. Obviously readjustment of an entire social system was at stake.

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[107] Ibid., p. 255.

[108] Ibid., p. 257.

[109] Ibid., p. 258.

The bedrock question during the 1953 reargument was whether race was a reasonable classification for legislation.[110] Thurgood Marshall argued that the "Fourteenth Amendment was intended to strike the word "white" out of all those statutes."[111] The real question according to Marshall was whether the states had the power to use race and race alone for the basis of segregation. Marshall urged that :

> this Court makes it clear to all the states that in administering their governmental functions . . . that little pet feelings of race, little pet feelings of custom--I got the feeling on hearing the discussion yesterday that when you put a white child in a school with a whole lot of colored children, the child would fall apart or something. Everybody knows that is not true. Those same kids in Virginia and South Carolina--and I have seen them do it--they play in the streets together, they play on their farms together, they go down the road together, they separate to go to school, they come out of school and play ball together. They have to be separated in school.[112]

In his homely colloquialisms, Marshall was eloquent if not always grammatical. He argued that the only reason the states had the right to make a classification based on race was that for some reason Negroes were inferior to all other human beings. He asked why segregate Negroes out of all the multitudinous groups of people in this country and give them separate treatment.

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

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[110] Ibid., pp. 239, 279.

[111] Ibid., p. 323.

[112] Ibid., p. 239.

> thing can be is an inherent determination that the people who were formerly in slavery, regardless of anything else shall be kept as near that stage as is possible, and now is the time, we submit, that this Court should make it clear that that is not what our Constitution stands for.113

Race as a basis for classification was also discussed by counsel for the District of Columbia Negroes. He stated that the basic inquiry was whether under our Constitution, the federal government was authorized to classify Negroes in the District of Columbia as untouchable for the purpose of educating them for living in a democracy. He added that the Court cannot say to "a waiting world that we sanction segregation in the District of Columbia for no other reason than because of the fact that the skin of the person is dark."[114]

Counsel for the school boards argued that, on the contrary, race was a reasonable classification in light of history, customs, and the Southern way of life. Furthermore the question of school segregation, was a legislative one and not a judicial one. T. Justin Moore, counsel for the Virginia school board, pointed to the heavy concentration of Negroes in certain sections of the South. In Prince Edward County, the site of the Virginia case, the Negro school children outnumbered the white children, two to one.[115] John W. Davis also pointed to the number of Negro children in Clarendon School District

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[113] Ibid., pp. 239-240.

[114] Ibid., pp. 279-280.

[115] Ibid., p. 218.

S.C., where there were 2,799 registered Negro children (as of a year and a half previous to the hearings), and only 295 white children.[116] He urged that the doctrine of reasonable classification would protect state segregation laws. Quoting Disraeli that race was the key to history, Davis argued that it was "not necessary to enter any comparison of faculties or possibilities. You recognize differences which racism plants in the human animal."[117] After asserting that South Carolina was confident of its good faith and intention to produce equality for all of its children, he concluded that "here is equal education, not prophesied, but present. Shall it be thrown away on some fancied question of racial prestige?" The following day Marshall replied, saying that "as Mr. Davis said yesterday the only thing the Negroes are trying to get is prestige. Exactly correct. Ever since the Emancipation Proclamation the Negro has been trying to get what was recognized in Strauder v. West Virginia which is the same status as anybody else regardless of race."[118]

In few other Supreme Court cases has there been more emotional intensity. The oral argument especially, even more than the written briefs, revealed the depth of emotional involvement. Although neither side neglected the legal and historical arguments, it was impossible to

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[116] Ibid., p. 215.

[117] Ibid., p. 216.

[118] Ibid., p. 236.

ignore the frequent appeals on the emotional level. Ghosts of the Civil War appeared as when John Davis insisted that the State of South Carolina "does not come here as Thad Stevens would have wished in sack cloth and ashes."[119] Scalawags, carpetbaggers, and Radical Republicans haunted the Supreme Court in 1953. Fear of intermarriage was implicitly and explicitly expressed. Counsel for the Delaware school board tried to deny that emotion was playing a substantial role, urging that

> an emotional approach to this question is a poor substitute for a rational discussion of the problem at hand, which is to be judged by the application of well-settled principles governing the effect of the Fourteenth Amendment on the police power of the state . . . . This Court is not in a position to judge to what extent the prejudices and tensions which gave rise to the segregation laws and the Congressional decision to leave those matters to the states, have abated in any particular state or district. . .120

Nevertheless emotional overtones were very obvious.

Marshall was superb in evoking emotion. At one point he claimed that "throughout the argument, they [counsel for the school boards] not only recognize that there is a race problem involved, but they empasize that that is the whole problem. . . . their only justification for this being a reasonable classification is, one, that they got together and decided that it is best for the races to be separated, and two, that it has existed for over a century."[121] The Negroes also called the District of

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[119] Ibid., p. 216.

[120] Ibid., p. 319.

[121] Ibid., p. 234.

Columbia the "window of the Republic" through which the waiting world watched to see how the United States handled its racial problems, a most effective emotional appeal.[122]

It could not be assumed that questions by the Court during the 1953 hearings indicated any final positions. Nevertheless these questions were carefully observed and occasionally a lawyer on the following day would address himself to a question previously asked by one of the Justices. Justice Frankfurter without a doubt was the most frequent interrogator, especially of Thurgood Marshall who frequently had to change tactics midstream because of questions from the Bench. Justices Jackson and Reed also asked numerous questions. Chief Justice Warren along with Justices Black and Douglas had very little to say while Justices Clark, Burton, and Minton asked no questions at all during the 1953 hearings.

Justices Jackson and Frankfurter indicated their well known concern for states' rights and judicial restraint. Both repeatedly questioned whether the Fourteenth Amendment specifically rejected school segregation, inasmuch as the history of the Amendment was inconclusive.[123] Frankfurter had trouble accepting the interpretation of Congressional intent on the Fourteenth Amendment advanced by the Negroes. He expressed his doubt that an uncontradicted individual statement by a Congressman in 1866 or silence by the rest

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[122] Ibid., p. 279.

[123] Ibid., pp. 188-192, 195.

of the Congress could be the basis for deciding intent.[124] Jackson said that even if the Supreme Court declared that state segregation statutes were unconstitutional, local custom would still perpetuate it in most districts of the states that really wanted segregation, especially since "separate but equal" had prevailed for over seventy-five years.[125] It was apparent that Jackson thought that Congress had the power to enforce the Fourteenth Amendment yet he acknowledged that the cases were before the Court because Congress had not acted. Frankfurter too expressed his doubts about the power of the Court to interfere in any area within the police power of the states. Justice Reed pointedly asked about state legislatures which passed segregation laws. He noted that the justices sitting on the Plessy case were familiar with the history of the Fourteenth Amendment, most of them having lived through it. Reed seemed to imply support for the "separate but equal" doctrine.[126]

The Court was also very concerned about implementation of any desegregation decree, especially Justices Frankfurter, Jackson, and Reed. Frankfurter directed a whole series of questions to the problem of who would administer a desegregation decree and how administrative,

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[124] Ibid., pp. 188-192.

[125] Ibid., p. 253.

[126] Ibid., pp. 247-249.

financial, and districting problems would be handled. Jackson wanted to be sure that the Court made sufficiently clear guide lines to prevent needless future litigation. Frankfurter and Reed stressed that the school segregation cases were the direct antithesis of the law and graduate school cases of the 1950's. These earlier cases were based squarely on the doctrine of "separate but equal." That is, segregated facilities were legal if facilities were equal. Now for the very first time, Frankfurter said, this doctrine was being challenged.[127]

By December 10, 1953, the arguments were concluded. It remained for the Court to make its final decision. Although there is little tangible evidence of what occurred behind the scenes during the next six months, one major area remains to give some clues regarding the coming decision. This was the Supreme Court itself, the composition and background of the men on the Bench. The next chapter will explore relevant biographical data about the individual justices.

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[127] Ibid., p. 204.

CHAPTER VIII

THE JUSTICES

"Tell me who the members of the Court are and I'll tell you the decision," said Justice William O. Douglas.[1] Or as he had previously expressed it, "We all come here with our bags fully packed, but even we aren't sure what's in them."[2] Political scientist Robert K. Carr wrote that it was entirely possible that a careful examination of the personalities and economic and social background of the nine men on the Supreme Court was as valuable and realistic an approach to the American Constitution as the more usual law school approach which emphasized case study, the rule of stare decisis, and fixed legal principles.[3] All of which points to the importance of each individual Justice on the Bench. In an effort to understand the reason for a unanimous decision by such a diverse group as sat on the High Court in 1954, an extensive biographical survey was made of each man. Such

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[1]Speech by William O. Douglas to a group of students at the University of Missouri at Kansas City, April 14, 1970.

[2]Leo Katcher, Earl Warren: A Political Biography (New York, 1967), p. 311.

[3]Robert K. Carr, The Supreme Court and Judicial Review (New York, 1942), p. 235. See also Robert Scagliano The Courts: A Reader in the Judicial Process (Boston, 1962) and Herman C. Pritchett, The Roosevelt Court: A Study in Judicial Politics and Values (New York, 1940); both writers stressed extra-legal factors such as the judge's personality and views on public policy in the decision-making process.

factors as family background, legal education, prior court experience, and judicial philosophy were examined for clues as to why they voted as they did in May, 1954.[4]

The following study will note certain general conclusions about major background factors and then briefly discuss the judicial philosophy of each Justice, in approximate order of their appointment, treating the two Chief Justices last. First of all, the degree of affluence or poverty in early childhood seemed to have no direct bearing on the constitutional position of the Justices. The four men who endured the most economic hardships in their early years were William O. Douglas, Fred M. Vinson, Felix Frankfurter, and Earl Warren. By no means did these four share similar viewpoints. Likewise Harold H. Burton, Sherman Minton, Hugo Black, Stanley F. Reed, and Robert H. Jackson came from various levels of the middle class; yet they too were on opposite points of the philosophical spectrum.

Nor did the type of legal education relate to any given philosophy. Burton and Frankfurter from Harvard

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[4]A number of biographies and compilations of opinions were consulted for this study. However only Black, Frankfurter, Jackson, and Warren have been treated in full-length biographies to date. Some of the judicial opinions of Douglas, Black, and Reed have been analyzed and published in book form. Douglas, Frankfurter, Black, and Jackson have published books in their own right, expressing their constitutional viewpoints. There is nothing, however, published at this time on Vinson, Clark, Burton, or Minton except in reference-type books, such as Current Biography and others and in journal articles.

University, Douglas and Minton from Yale University, and Reed from Yale and the University of Virginia represented graduates from the Ivy League schools; yet this in no way led to close judicial viewpoints. Warren, Clark, and Black similarly were graduates of state university law schools, while Vinson and Jackson came from small private schools; yet this gave them no basic bond.

The major factor common to all members of the Court was extensive political experience prior to their appointment on the Bench, either in an elective, appointive, or advisory capacity. Black served as Birmingham police judge for eighteen months, prosecuting attorney and county solicitor for two and one-half years, and finally as United States Senator from Alabama for over ten years just prior to appointment on the Court.[5] Douglas' prior political experience was connected with a study which he directed for the Securities and Exchange Commission and his subsequent service on the Commission, ultimately as chairman.[6] Reed's public service included four years as representative in the Kentucky State Legislature, Counsel for the Federal Farm Board in Washington, member of the Reconstruction Finance Corporation, and Solicitor General under President Roosevelt.[7]

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[5]"Hugo Lafayette Black," Current Biography, 1964.

[6]Vern Countryman, Douglas of the Supreme Court (Garden City, N. Y., 1959), p. 10.

[7]F. William O'Brien, S. J., Justice Reed and the First Amendment (Washington, 1958), p. 205 and "Stanley Reed," Current Biography, 1964.

The one Justice who had no elective or appointive office, nevertheless served as unofficial advisor to two presidents. In 1917, Frankfurter served on a commission investigating threatened strikes and labor unrest on the West Coast for President Woodrow Wilson. During President Franklin D. Roosevelt's presidency Frankfurter helped write the Securities Act of 1933, the Securities and Exchange Act of 1934, and some railroad and labor legislation. By World War II, Roosevelt turned to him so frequently for counsel that for a time Frankfurter was commuting weekly from Cambridge where he taught at Harvard University to Washington, D. C. In addition Frankfurter's political connections were such that government department heads turned to him repeatedly for recommendations of bright young law graduates for government service.[8]

Jackson was appointed general counsel for the Bureau of Internal Revenue by President Roosevelt. Later he served as special counsel for the Securities and Exchange Commission, Assistant Attorney General in the Anti-Trust Division of the Department of Justice, Solicitor General, and finally Attorney General of the United States.[9] Burton had an active twenty-year political career before coming to the Bench. Starting out as an unpaid research

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[8]Liva Baker, Felix Frankfurter (New York, 1969), pp. 106-108.

[9]Eugene Gerhart, America's Advocate: Robert H. Jackson (Indianapolis, 1958), p. 107.

director of the citizen's counsel promoting regional government for Cleveland, Ohio, Burton was elected to the Ohio House of Representatives in 1929. He also served as director of law for the city of Cleveland, mayor of the city for three terms, and United States Senator for one term just prior to his Court appointment.[10] Minton worked closely with Paul McNutt in his campaign for governor of Indiana, served as public counselor for the state Public Service Commission, United States Senator for one term, and United States Circuit Judge for eight years before going on the Bench.[11]

Clark, active in Texas politics, was a protege of Senator Tom Connally and Representative Sam Rayburn. In his pre-Court career, he became county district attorney, special assistant to the Attorney General of the United States, and finally Attorney General under President Truman.[12] Chief Justice Vinson was very active politically before coming to the Supreme Court. He served as Congressman from Kentucky for almost sixteen years, Judge of the District of Columbia Court of Appeals for four years, Chief Justice of the Emergency Court of Appeals for price control cases, Director of Economic Stabilization under President Roosevelt, and Secretary of the Treasury under President Truman.[13] Warren certainly had one of the most

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[10]"Harold H. Burton," Current Biography, 1964.

[11]"Sherman Minton," Current Biography, 1964.

[12]"Tom C. Clark," Current Biography, 1964.

[13]"Fred M. Vinson," Current Biography, 1964.

successful political careers of any of the Justices. He worked for the Judiciary Committee of the California Assembly, and served as a district attorney and Republican national committeeman for California. He was also attorney general in California and governor of the state for three terms, receiving both the Democratic and Republican nomination for governor in 1946.[14]

Clearly all the Justices on the Bench in 1954 were extremely knowledgeable about either state or national politics. Interestingly enough only Minton and Vinson had any prior judicial experience. Only three had academic teaching backgrounds--Frankfurter at Harvard, Douglas at Yale, and Burton at Western Reserve University.

One might expect appointment by the same president to furnish close philosophical ties among the Justices. This was not necessarily the case however, as shown by the fact that Black, Douglas, Frankfurter, Reed, and Jackson were all appointed by President Roosevelt, yet these five men by no means shared similar viewpoints. On the other hand Minton, Burton, Vinson, and Clark, all appointed by President Truman, were often characterized as "center justices" and more actively reflected the pressures of the cold war period when security of the state usually took precedence over the rights of the individual.[15]

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[14]"Earl Warren," Current Biography, 1964.

[15]I. F. Stone, The Haunted Fifties (New York, 1963, p. 55.

Certainly the factor most relevant to the Brown decision was the attitude of the Justices toward the basic constitutional issues appearing in the school segregation cases. These issues concerned the struggle between state and national governments, the conflict between the judiciary and the legislature, the balance between the rights of the majority and claims of individuals or minorities, and finally the various approaches to constitutional interpretation. Although not all the Justices expressed themselves on all these issues, it was instructive to observe those who did so, attempt to resolve some of the built-in conflicts inherent in our governmental system.

Looking first at Justice Black we find something of an apparent contradiction as he insisted both that judges should leave policy-making to the legislatures and yet when constitutional issues and the public interest were involved that judges were derelict in their duty if they avoided such adjudications.[16] The cornerstone of his constitutional faith, he said, was his trust in the people and their representatives. The Constitution was designed to avoid putting too much power in the hands of any public official, including judges. Judges, he indicated, were like other people; they wanted power and the more power they got the more they wanted.[17] Black observed that he

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[16]Hugo L. Black, A Constitutional Faith (New York, 1968), p. 155.

[17]Personal interview with Justice Black on July 15, 1969.

could be called either a judicial activist or a believer in judicial restraint, although he rejected these labels as being mere substitutes for careful thinking. For example, he argued that the Court should make decisions based on the Constitution and not according to the judges' ideas of economics, sociology, fairness, justice, or reasonableness (the idea of judicial restraint).[18] At the same time he rejected the concept of judicial restraint which resulted in avoiding constitutional questions, leaving them up in the air, if the judges could possibly decide the case on any other grounds. Although judges should be restrained by the Constitution, they were responsible for deciding whether a statute was in accord with the Constitution. Nevertheless Black rejected an activism based on a judge's personal belief. As an example, for many years he rejected the idea of substantive due process, which during the first two and a half decades of the twentieth century had been used by the Court to determine the reasonableness of state or federal laws; in effect to declare unconstitutional, laws the Court did not like.[19]

Black, however, was without doubt sensitive to the changing times. In a 1937 Senate speech, Black noted that the people of the United States had chosen the program of

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[18]Black, A Constitutional Faith, p. 25.

[19]Ibid., p. 27.

the New Deal. Therefore the time had arrived when those who favored fitting laws to modern needs in order to correct and cure social and industrial injustices, must face these problems squarely. The remedy, said Black, was "new ideas on the bench." While this was undoubtedly a blend of idealism and politics, it was an attitude carried over in his judicial work.[20] According to John P. Frank, law professor and former law clerk to Black, the Justice realized there were large areas where the law's answer to particular questions was very uncertain. In these cases, to an undefined degree, judges would necessarily decide the cases and determine the law in the light of the economic, social, and philosophical predilections they took with them to the Bench. At the same time Black was committed absolutely to the proposition that it was never the business of judges to pass upon the reasonableness of legislation.[21]

Despite Black's view that judges should not avoid constitutional questions where there was a strong public interest involved, he also believed that the First Amendment "absolutes" denied to judges the privilege of weighing competing values. That is, his view of the preferred position of First Amendment Rights--freedom of speech, press, religion, assembly, and petition--stemmed from his idea of the danger of unlimited government power.

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[20]John P. Frank, Mr. Justice Black (New York, 1949), p. 34.

[21]Ibid., pp. 306-307.

Clearly there was a contradiction between Black's twin concepts of a limited judicial power to weigh competing values and the need for a flexible constitution in a changing dynamic society. Although he denied that judges had the power to weigh values in order to arrive at a contemporary understanding, the very problem of finding a contemporary meaning for the Constitution involves a weighing process.[22] Black acknowledged this contradiction by saying that the balance to be achieved was established by the Constitution. The scales were those of the framers of the Constitution, not of the judges. The absolutes in the Constitution rested on a balance between the individual and the state. This basic structure required a higher plane of generality than a mere balancing formula by individual judges on an ad hoc basis, reflecting merely current needs and views.[23]

It could be said that his basic premise was that the meaning and objectives of the Constitution must be applied to constantly changing conditions. This of course inevitably requires judicial interpretation and this is in fact exactly what the Court did in the Brown opinion. The determination that race was an unreasonable basis for legislative classifications most certainly involved

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[22]Hugo Black and the Supreme Court: A Symposium, ed. Stephen P. Strickland (Indianapolis, 1967), p. 143.

[23]Ibid., p. 150.

weighing a policy on the basis of the Court's view of current social facts. Still it was the unavoidable duty of judges to maintain the grand constitutional design--a lasting balance between the individual and the community.

Justice William O. Douglas was not only next in line of seniority on the Court, but closely allied with Black in his voting record and in his general philosophy. Arthur Schlesinger, Sr., attributed to both Douglas and Black a belief that "the Supreme Court can play an affirmative role in promoting social welfare" and a tendency "to settle the particular case in what they regard as the spirit of the American democratic tradition" rather than on legal merits.[24] While this was an oversimplification of the very complex views of two keen constitutional scholars, there could well be a modicum of truth in the observation.

Inasmuch as the Brown decision reversed established precedent, Douglas' position on stare decisis is of some interest. In a 1954 collection of essays, Douglas maintained that in the field of constitutional law, judges should not feel bound by rulings of their predecessors, as age alone did not give sanctity to decisions. It was the constitution judges swore to support and defend, not the gloss which an earlier Court put on it. Douglas' views on stare decisis are related to his basic philosophy

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[24]"William O. Douglas," Current Biography, 1964.

that security can only be achieved through constant change--that the search for a static security, in the law or elsewhere, is misguided. Only through the wise discarding of old ideas that have outlived their usefulness, and through the adapting of others to current facts, can a real security be found. This re-examination of precedent in constitutional law, he felt, was a personal matter for each judge. The alternative was to let the Constitution freeze in the pattern which one generation gave it.[25]

Since Douglas felt that most social, political, and economic problems should remain in the legislative field, he stated that the problem of the judge was to keep personal predilections from dictating the choice and to be faithful as possible to the "architectural scheme." At the same time he stressed that "it was better that we make our own history than be governed by the dead."[26]

The same inherent contradiction between judicial restraint and judicial activism or between legislative policy-making and adjudication that appeared in the writings of Black were also apparent in Douglas' written philosophy. On the one hand he urged judicial restraint, in leaving policy-making decisions to the legislatures. On the other hand Douglas' support of the Brown decision

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[25]William O. Douglas, Almanac of Liberty (New York, 1954), p. 48.

[26]Wesley McCune, The Nine Young Men (New York, 1947), p. 126.

was tantamount to judicial assumption of policy-making. The goal of adjudication was to keep the power of government unrestrained by the social or economic theories that one set of judges may entertain. At the same time Douglas realized that construction of statutes necessarily involved a species of law-making. Considering the massive historical legal research effort to interpret the meaning of the Fourteenth Amendment in the school segregation cases, it is interesting to note that Douglas thought it futile to canvass Congress for legislative purpose. He said that the full implication of what Congress did, may never have been appreciated at the time. The words of a statute were the mere beginning, not the end, of the search. Most American judges looked beyond the words to ascertain what evil the law was designed to eradicate.[27] How this differed from a search for legislative purpose or intent, Douglas did not explain.

Douglas' concern for the individual and minority groups was apparent in numerous writings. Especially in Almanac for Liberty and A Living Bill of Rights he revealed his dedication to the idea of equality of all men, his abhorrence of racial discrimination, and his devotion to economic justice, fair play, and the rule of law. Douglas was particularly sensitive to the rights of the individual

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[27]William O. Douglas, "Judges and Legislators," in Allan F. Westin, ed., The Supreme Court: Views From Inside (New York, 1961), p. 68.

vis-a-vis claims of the government involving national security, morals, or loyalty oaths.[28] Writing in 1954, Douglas indicated that he was encouraged that the thrust of the principle in the Brown decision was being extended in numerous ways. He said that equality among men of all creeds, nationalities, and color was the great curative of social ills. The new aristocracy should be one of talent and virtue, not family or wealth.[29]

Judicial restraint and the principle of federalism were the bedrock of Justice Reed's constitutional philosophy. On February 16, 1950, in a speech before the Juristic Society in Philadelphia, Reed said that the Supreme Court was a creature of the Constitution, and that "it has its authority only from the four corners of that instrument. . . . There is a danger that the Court or some of its members will permit their attitudes to issues to sway their conclusions as to constitutionality."[30] In his opinion, it was necessary for the judiciary to restrain their inclination to achieve results agreeable to the judges' conception of proper economic or social arrangements. F. William O'Brien, who made a detailed analysis of Reed's opinions in the First Amendment cases, concluded that Reed

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[28]William O. Douglas, A Living Bill of Rights (New York, 1961), passim.

[29]Douglas, Almanac of Liberty, p. 172.

[30]O'Brien, p. 232.

was especially reluctant to use the Court's powers where the legitimate authority of the state or national government might be impaired.[31]

Reed's defense of states' rights was indicated in the Jehovah Witnesses' cases. Writing for the majority view in the Gobitis case he upheld the local ordinance requiring a flag salute against the religious sect.[32] Again in the Barnette case, this time writing the dissenting opinion, Reed again upheld the flag salute ordinance against Jehovah Witness members.[33] Similarly in his majority opinion for In re Summers Reed showed a decided reluctance to oppose the legislative will of one of the states.[34]

O'Brien concluded after his investigation of Reed's opinions that Reed was also zealous in guarding the constitutional separation of powers among the different branches of government. Furthermore, according to O'Brien, Reed was benevolent to group interests--the rights of the majority--and hostile to an extreme laissez-faire philosophy which he thought was often disguised as zeal for civil rights. Reed's ideal was that of an ordered community

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[31] Ibid., p. 241.

[32] Minersville School District v. Gobitis, 310 U. S. 586 (1940).

[33] West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943).

[34] In re Summers, 325 U. S. 561 (1945).

working out its temporal salvation in group rather than individual activities.[35]

Reed has been characterized as the most reactionary of any of the Roosevelt justices, particularly in the civil liberties cases of the 1940's.[36] However, O'Brien said that the Justice displayed an over-all liberal tendency in extending the protection of the judiciary to black people.[37] Nevertheless Reed's strong views upholding states' rights and judicial restraint must have caused serious problems for him when it came to deciding the school segregation cases.

Felix Frankfurter, well-known as a sympathizer of the "underdog," undoubtedly felt a clash between his sympathies and his outspoken belief in judicial restraint. During his years at Harvard, for example, Frankfurter served as counsel without fee for the NAACP, for the defendents in the Scopes trial, and for the silk strikers of Passaic, New Jersey in 1926.[38] In addition Frankfurter was an ardent New Deal supporter and writer of much of its legislation. At the same time he freely admitted his debt to the constitutional philosophies of Justices Holmes,

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[35] O'Brien, P. 241.

[36] Fred Rodell, Nine Men: A Political History of the Supreme Court from 1790 to 1953 (New York, 1955), p. 201.

[37] O'Brien, p. 197.

[38] Baker, p. 43.

Brandeis, and Cardoza. In discussing statutory construction, he gave credit to their views that a judge must not rewrite a statute, either to enlarge or contract it. Frankfurter also acknowledged the negative influence upon his thinking of the Taft and early Hughes Courts whose invalidation of much state legislation had given rise to many of the famous dissents of Holmes, Brandeis, and Cardoza.[39]

In a series of three lectures given in 1936, later incorporated into his book, The Commerce Clause Under Marshall, Taney, and Waite, Frankfurter clearly spelled out his basic constitutional philosophy which rested on the three tenets of judicial restraint, federal balance, and a proper balance in the problems of the individual versus society. Frankfurter's praise for Chief Justices Taney and Waite was based on their devotion to the limitations of the judiciary vis-a-vis the legislature, plus their concern for state and local solutions to problems as opposed to federal solutions. In analyzing key cases coming before these Chief Justices, Frankfurter was quick to point out how so many of the problems involved social, economic, and political issues of fact which could best be investigated and solved by a legislative body. Policy, he said repeatedly, should be determined by the representatives of the people. On the other hand, the Supreme Court was never designed to be responsive to the people,

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[39]Felix Frankfurter, "Reflections on Reading Statutes," The Supreme Court: Views From Inside, pp. 77-79.

but rather was conceived as a check on the dangers of popular rule.[40]

Frankfurter was especially concerned with the danger to the democratic system when judges translated their own economic or political convictions into their decisions. Impartial justice was the goal--through decisive, courageous action in the bench, but rendered in restrained, austere opinions limited to the facts of the case, and avoiding possible erroneous guideposts for the future. He wrote that judicial self-restraint might be the most significant aspect of judicial action in the American constitutional scheme or in other words, the duty of the Court not to decide.[41] The Court was not a maker of policy but was concerned with questions of ultimate power. Therefore the Court should defer to legislative judgments of constitutionality and determinations of policy.[42]

In Frankfurter's concept of federalism, responsibility for policy-making lay with Congress, in some cases, with state legislatures, and in other cases with the executive branch. Redistribution of their respective powers would destroy the tenuous balance of the governmental structure. At the same time, Frankfurter realized that controversy was inherent in the structure of federalism,

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[40]Felix Frankfurter, The Commerce Clause: Under Marshall, Taney and Waite (Chicago, 1937), pp. 1-10.

[41]Ibid., p. 95.

[42]Ibid., pp. 80-81.

built into the constitution by the deliberate generalities of the language. Frankfurter said his trust, however, was not in the judiciary, but in the people; otherwise the system would be "government by judges."[43] His starting point was a faith that insisted on the right of a democracy to make mistakes and correct its errors by the organs that reflect the popular will. Even where a law was socially undesirable, invalidation of the law by a court weakened popular democratic government.

It is easy to see the dilemma facing Frankfurter which was posed by the school segregation cases. As Frankfurter's questions from the Bench showed throughout oral argument, he was intensely concerned with the right of state legislatures to correct any socially unjust laws. Even though he was committed to racial tolerance and opposed to official discrimination, he thought racial problems, which were the most complex problems facing mankind, should be solved in other ways.[44] At any rate NAACP leaders generally attributed the phrase "with all deliberate speed," incorporated into the 1955 decision, to Frankfurter because of his concern for implementation of any court-ordered desegregation decree.[45] A memorandum circulated

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[43] Ibid., p. 34.

[44] Baker, p. 232.

[45] Hugh W. Speer, The Case of the Century: A Historical and Social Perspective on Brown v. Board of Education of Topeka with Present and Future Implications, unpublished study, a copy of which is in the University of Missouri library in Kansas City, p. 210.

to the Justices by Frankfurter nearly five months before the May, 1954, decision, revealed his concern for the "how" of the decision, that is how to inflict the least amount of damage.[46]

The Justice most closely associated with Frankfurter in his approach to the Constitution was Robert Jackson, another Roosevelt appointee. Like Frankfurter, he had great respect for precedent. Jackson felt that "the mere fact that a path is a beaten one is a persuasive reason for following it."[47] Yet he also believed that interpretations changed from one generation to another as precedents were overruled and innovations made, no doubt in part as the Court responded to changes in public opinion.[48] The ultimate function of the Supreme Court, however, in his opinion, was to arbitrate between fundamental and ever-present rival forces or trends in society. It was the responsibility of the Court to hold all social movements within the express bounds of the Constitution.[49] Yet in no way should judges feel that they must correct the result of public indifference to issues of liberty.

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[46]Baker, pp. 310-311.

[47]Robert H. Jackson, Full Faith and Credit (New York, 1945), p. 45.

[48]Robert H. Jackson, The Supreme Court in the American System of Government (New York, 1955), pp. 1-26.

[49]Robert H. Jackson, The Struggle for Judicial Supremacy (New York, 1941), p. 319.

A court should not seize the initiative in shaping policy whether by constitutional or statutory interpretation.[50]

Like Frankfurter, Jackson rejected resort to broad constitutional clauses to implement judicial activism. To do this was to set up the judiciary as a check on elections, a nullification of the process of government by consent of the governed. It left the grievances of a frustrated majority to grow, and more extreme remedies to commend themselves.[51] At the same time, Jackson was strongly aware of the Supreme Court as a political institution. He related the various cycles of interpretation through which the Court had gone, to political and economic conditions at different periods in the country's history. Nevertheless he repeatedly warned against leaving the protection of liberty wholly to the judiciary because of the various limitations on the Court--limited jurisdiction, narrow processes, small capacity for handling mass litigation, and inability to coerce obedience.[52]

The major function of the Court in Jackson's opinion was to maintain that system of balances upon which the American system was founded--the balance between the Executive and Congress, between the central government and the states, between state and state, and between the

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[50]Jackson, Supreme Court, p. 79.

[51]Jackson, Struggle for Judicial Supremacy, p. 319.

[52]Jackson, Supreme Court, p. 24.

freedom of the individual and the authority of government. Jackson expressed his concern that protection of individual or minority rights often impinged on majority rule. In the case of civil rights, for example, the question simmered down to one of the extent to which majority rule should be set aside. Actually Jackson rejected the idea that civil liberties could be adequately assured by the courts. He argued that "some of the most subtle and pervasive forms of intolerance are not technically violations of the Constitution or law and cannot be dealt with in the courts."[53] On the other hand unrestricted majority rule left the individual or the minority unprotected. In this dilemma the Constitution-makers made their choice in favor of a limited majority rule, which obviously Jackson favored.

Jackson did not believe that the courts could save a whole people from great currents of intolerance, passion, or tyranny. Instead, it was the attitude of society and its organized political forces, rather than its legal machinery, which controlled the development of free institutions.[54] Nevertheless Jackson was sensitive to the role of the Court. He believed that the philosophy of every single justice on the Supreme Court had an important impact on America and its future, that in fact "a really great judge, by his sensitivity to the national tradition and to

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[53]Jackson, Struggle for Judicial Supremacy, p. 285.

[54]Jackson, Supreme Court, p. 82.

the soul of the law as well as to the statutory framework, may point out our destiny to us."[55]

There has been little written by or about the constitutional philosophy of Harold H. Burton, Tom C. Clark, or Sherman Minton.[56] Indeed two Rutgers University law professors, Albert P. Blaustein and Clarence C. Ferguson, considered Burton and Minton "the great enigmas . . . . There is a complete absence of any legal literature which would warrant the conclusion that they were either pro- or anti- Negro or pro- or anti-civil rights."[57] Yet, according to David Atkinson, University of Missouri political science professor, this was not entirely true of Minton. In a personal interview with Warren, the Chief Justice stated to Atkinson that there never was any doubt about the way "Shay" Minton would vote--that he was strongly in favor of desegregation.[58]

At the time of his appointment to the Supreme Court, Burton commented that "my position is center. I hold to the belief that if folks get around a table and talk things through they usually can come to the right and

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[55] Gerhart, p. 289.

[56] Albert P. Blaustein and Clarence Ferguson, Jr., Desegregation and the Law (New Brunswick, N. J., 1957), p. 34.

[57] Ibid.

[58] Personal Interview between David Atkinson and Chief Justice Warren in Washington, D. C., January 12, 1968, as related to the writer by David Atkinson on April 7, 1969. Atkinson is the author of an unpublished biography of Minton.

fair answer."[59] What is "right" and "fair" in constitutional interpretation is of course debatable. Moreover Burton was also apparently loathe to expound his constitutional philosophy via judicial opinions.[60] Although there has been no intensive analysis or compilation of Burton's opinions to date, Fred McCune observed that Burton's first term opinions put him in the group of Justices who construed statutes conservatively. In fact most often Burton agreed with Frankfurter during his first year on the Bench.[61] In a study of Burton's votes during the 1949-52 period, political scientist Glendon Schubert characterized Burton as extremely conservative. This ranking was based on Schubert's construction of his civil liberties scale--that is his listing of votes in civil liberties cases where there were dissenting opinions, with all unanimous decisions excluded.[62]

A year and a half before he was appointed to the Court, Minton told the press, "As a judge you are responsible for the law in each case, with no leaning over fences. I have decided cases against labor and against corporations, according to the law. . . . The law must be

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[59]McCune, p. 234.

[60]Blaustein and Ferguson, p. 35.

[61]McCune, p. 231.

[62]Glendon Schubert, The Judicial Mind (Evanston, 1965), p. 101.

nonpolitical."[63] While waiting for confirmation of his appointment to the Court, he stated, "If my appointment is confirmed, I should attempt never to be a strict rule-book Justice. . . . On the Supreme Court I would have a tendency to give leeway to Congress and yet work fiercely for the enforcement of the Bill of Rights."[64] Although willing to deal in generalities, Minton, like Burton, was loathe to discuss legal philosophy in any detail off the Bench.[65]

There were few clues to Clark's views on the great issues before the Court. Not only was he little inclined to reveal his constitutional philosophy, but there have been no in-depth analyses of his opinions. The fact that he was denounced as anti-Negro during Senate hearings on his appointment to the Supreme Court can not be given too much weight. Actually he had demanded the admission of Negro lawyers to the Federal Bar Association during his term as president of that association.[66] Closer to the point is the fact that in 1948, while Attorney General, he entered the restrictive covenant cases as amicus curiae with strong support for ending judicial enforcement of the

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[63]"Sherman Minton," Current Biography, 1964.

[64]Ibid.

[65]Personal interview with David Atkinson on April 7, 1969.

[66]"Tom C. Clark," Current Biography, 1964.

racially discriminatory private real estate contracts.[67]

Clark expressed his view of the decision-making task with considerable humility. He reported that

> What is essential in judging is . . . first and foremost, humility and an understanding of the range of the problems and [one's] own inadequacy in dealing with them; disinterestedness, allegiance to nothing except the search, amid tangled words, amid limited insights; loyalty and allegiance to nothing except the effort to find that path through precedent, through policy, through history, through [one's] own gifts of insight to the best judgment that a poor fallible creature can arrive at in that most difficult of all tasks, the adjudication between man and man, between man and state, through reason called law.[68]

Glendon Schubert reported, after studying the opinions Clark wrote in four court-martial cases during the 1959 term, that Clark revealed a perfectly clear and unambiguous reliance upon the time-honored common-law principle of stare decisis.[69]

Fred M. Vinson, who was Chief Justice until his death in October, 1953, did not of course, have an opportunity to vote on the major Brown decision of May, 1954; however an appraisal by Blaustein and Ferguson gave him credit for his role in the school segregation cases. They

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[67]Clement E. Vose, Caucasians Only: The Supreme Court, the NAACP and Restrictive Covenants (Berkely, 1959), p. 173.

[68]Tom C. Clark, "The Supreme Court Conference," address before the section on Judicial Administration, American Bar Association, Dallas, Texas, August 27, 1956, as reprinted in Westin, The Supreme Court: Views from Inside, p. 50.

[69]Schubert, p. 7. The cases were: Reid v. Covert and Kinsella v. Krueger, 351 U.S. 470 (1956) and Reid v. Covert and Kinsella v. Krueger, 345 U.S. 1 (1957).

felt that it was unlikely that unanimity could have been achieved without the device of breaking the segregation issue into separate questions--whether, how, and when. They gave Vinson credit for this "compromise," stating that the five questions directed to counsel in June, 1953, which helped to solve the question of how to remedy segregation, bore all the imprints of Chief Justice Vinson's border-state experience and wisdom. Vinson was well known as a good team man and capable of bringing harmony to a divided Court.[70]

A contrasting view of Vinson's Supreme Court career was given in an analysis by Yale University law professor, John P. Frank, who stated that Vinson supported the state more frequently than the individual. Although Vinson often used the expression "weighing individual freedom against the public interest," he was convinced the needs of the state should come first. Frank wrote that Vinson almost never decided a difficult civil liberties case in favor of the individual.[71] Even though Vinson usually voted with the majority of the Court, he most consistently agreed with Burton, Clark, Minton, and Reed, forming a five-judge bloc that was markedly less sensitive to claims of civil liberties than Black, Douglas, or even Frankfurter and

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[70]Blaustein and Ferguson, p. 29.

[71]John P. Frank, "Fred Vinson and the Chief Justiceship, a seven-year appraisal," 21 University of Chicago Law Review 225, 1953-1954.

Jackson.[72]

Earl Warren, appointed Chief Justice after Vinson's death, was the subject of much speculation at the time of his appointment. Frank reported with enthusiasm Warren's own statement that he conceived of the Court as the "balance wheel of this government. Its function is to keep us from swinging too violently to one extreme or another."[73] Two days after Warren was sworn in as Chief Justice, he characterized himself as a "conservative liberal--one who will confine his liberalism to practical conservative thinking."[74] This, of course, was a perfect example of a man walking a middle-of-the-road tightrope, careful to avoid offending anyone. Prior to his appointment, Warren had committed himself on none of the major issues beyond the point of no return. Many Southern segregationists felt that he might stand on the "separate but equal" doctrine of the Plessy v. Ferguson case due to his role in the evacuation of the Japanese from the West Coast during World War II. On the other hand anti-segregationists took heart from Warren's defense of Japanese returnees against bigots and racists.

In the past, Warren had successfully straddled the

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[72]Walter F. Murphy, Congress and the Court (Chicago, 1962), p. 74.

[73]John P. Frank, "Affirmative Opinion on Justice Warren," New York Times Magazine, October 3, 1954.

[74]Katcher, p. 311.

issue of federal-state power relations. Under Democratic presidents he had called for decentralization and return of responsibility to the states. Yet he had also said that "if our states are to survive as strong governmental units, they must take more and more of their responsibilities and discharge them . . . . What are called Federal encroachments often result from the failure of states to solve problems that should be solved by state government."[75] He had also expressed his strong belief that it was the "joint responsibility of the state and community to provide adequate education for all our children. . . . Education will never be sound until this principle of equalization is recognized and practiced, both in the states and nationally."[76]

The Chief Justice was always extremely reticent about the workings of the Court, except in the most general terms. In an interview shortly after his appointment, Warren said that his new job exhilarated him because "as a judge you see the whole gamut of human nature. Even if the case being argued involves only a little fellow and $50, it involves justice. That's what's important."[77] In the matter of the school segregation cases, however, it was

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[75] Ibid., p. 313.

[76] Earl Warren, The Public Papers of Chief Justice Earl Warren, ed. by Henry M. Christman (New York, 1959), pp. 11-13. These remarks were made in a speech at the National Convention of the National Education Association, July 2, 1951.

[77] Katcher, p. 315.

not only a question of justice, but also a question of law. A friend quoted Warren as saying, during the period between argument and decision in the Brown case, "You know how I feel about segregation. It isn't a question of what I'd like to say, but what the Constitution will permit me to say."[78] A member of the 1953 Court who asked to remain anonymous said that of course there was no member on the Court who believed in segregation but there was a definite division about the question of law in the minds of some of the members.[79]

Warren's role, in addition to writing the preliminary and final opinion, was to try to bring harmony and unanimity to the Court. The spirit of "collegiality" was lacking in that the Justices functioned more as individuals than as colleagues. Warren's job from the first was to bring personalities together, not beliefs.[80] Payson Wolff, a Los Angeles attorney who had been one of Chief Justice Warren's clerks, said that after Warren's arrival, Court attendants commented upon a notable coherence, formerly lacking.[81] During the weeks that the preliminary opinion in the school segregation cases circulated, Warren exerted all his ability as a politician--knowing full well, as did all others on the Court, that the effect of this decision

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[78] Ibid., p. 321.

[79] Ibid.

[80] Ibid., p. 312.

[81] Ibid., p. 314.

would be highly political. It was also obvious that unanimity on the Court would ease enforcement as well as acceptance.

What unique aspects of these Justices help explain the Brown decision? Although obviously personal background factors molded each judge, there was no way to relate any given factor to a particular judicial attitude. Neither economic level, type of education, section of country nor pre-court experience served as a guide to basic philosophy. What this study did reveal was varying constitutional viewpoints. One limitation was the paucity of materials either by or about some members of the Court. However even the more articulate Justices did not necessarily reveal their basic attitudes on all of the key issues in the Brown case. Nevertheless certain attitudes and groupings became apparent. On the issue of federalism, Justices Frankfurter, Jackson, Vinson, and Reed were extremely zealous of maintaining states' rights. However even Douglas and Black affirmed their belief that certain functions, e.g., education and running school boards, were within the province of the states.[82] Although all the Justices gave lip service to maintaining a balance between legislative and judicial powers, Frankfurter, Jackson, Vinson, and Reed stressed repeatedly that most social, economic, and

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[82]Personal interview with Justice Black on July 15, 1969.

political issues fell within the province of legislatures. During oral argument Frankfurter and Jackson interrogated NAACP counsel again and again on this point. At the same time, even though Black spoke of the need to limit judicial powers, nevertheless both he and Douglas argued that it was the duty of the Court to decide on constitutional questions when a great public interest was involved, thus conceding that some judicial policy-making was inevitable.

Douglas and Black had long acknowledged concern for the rights of minorities, although Frankfurter in his pre-court career and in a private capacity was also active in advancing minority rights. On the other hand Reed, Jackson, and Vinson all expressed concern that the rights of the majority should not suffer while protecting the rights of individuals or minorities.

In the matter of constitutional interpretation, Frankfurter and Jackson were outspoken in their respect for the "beaten track" or the rule of precedence. In contrast, Douglas declared that particularly in constitutional questions, the Court should be less bound by stare decisis, that age alone did not give sanctity. Jackson and Frankfurter also preferred restrained, austere opinions, "avoiding possible erroneous guideposts for the future." Nevertheless these two Justices, along with Douglas and Black, argued for a flexible interpretation of the Constitution by acknowledging the influence of the times

and the necessity for developing a "living constitution."

Regardless of their professed attitudes, what the Justices actually agreed to in the Brown decision was an assertion of judicial versus legislative policy-making and national vis-a-vis state power. With a vigorous nod to changing times, precedence was overthrown in following a broad construction of the Fourteenth Amendment in order to uphold minority rights against claims of a sizable majority of the population. In light of the serious reservations about the issues and points of law in the minds of several members of the Court, it becomes even more surprising that unanimity was reached in the Brown decision. Such being the case, there is one remaining major influence on the decisional process worthy of exploration. That is the often-mentioned climate of the times. What relevance if any this factor played in the school segregation cases will be examined in the following chapter.

CHAPTER IX

INFLUENCES ON THE COURT

The prime question of my study of the Court is how the judicial mind is informed--what kind of contacts exist between society and the courtroom. If the Court is to interpret a "living constitution," if it is to remain sensitive to the currents of public opinion, if it is to acknowledge changing life patterns and advances in various fields of knowledge, there must be channels of information. This is so because above and beyond legal precedents, there is the intangible yet powerful influence of the times through which the Court must move. Many justices have acknowledged this. Justice Robert Jackson observed that the Court could never escape the climate in which it lived, noting that judicial interpretations changed from one generation to the next as the Court responded to changes in public opinion.[1] Felix Frankfurter called the Court "a good mirror, an excellent mirror . . . of the struggles of dominant forces outside the Court."[2] Hugo Black observed that the constitution could only maintain its integrity

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[1]Robert H. Jackson, The Supreme Court in the American System of Government (New York, 1955), p. 112.

[2]Felix Frankfurter, "The Supreme Court in the Mirror of Justice," 105 University of Pennsylvania Law Review, 785, 1956-1957.

by moving in the same direction and at the same rate as the rest of society.[3] Oliver W. Holmes, Jr., noted that judicial decisions were affected by the "felt necessities of the times, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men."[4] Plainly there is considerable agreement that the courts do respond to the mood of the times.

This raises two key questions. First, what was the "temper of the times" in the early 1950's and second, by what means could the Court have informed itself of the public mood. Unquestionably, interpretations of the public mood varied. That it is multi-faceted, shifting, and difficult to ascertain no one doubts. That politics focuses on guessing and guiding this mood is also certain. For the purposes of this study the dominant mood of the times in relation to racial segregation was identified in certain recurring themes appearing in various media. The Cold War, the struggle between Communist and democratic countries, the American image as a democratic leader in the eyes of non-white peoples of the world, the American tradition of equality, the politics of race with the emerging Negro vote, and the Southern life-style and

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[3]Charles A. Reish, "Living Constitution and the Court's Role," Hugo Black and the Supreme Court (New York, 1967), p. 37.

[4]Oliver W. Holmes, Law and the Court: Speeches of O. W. Holmes (Boston, 1918), p. 98.

traditions were essential concerns of the public at that period of American history. Changing ideas of the very concept of race itself were also in the news.

In order to answer the second question as to how the Court informed itself, certain more readily available sources were examined such as Presidential speeches and actions, the Congressional Record, the press, magazine articles, and legal journals. Clearly the Court has other means of informing itself such as professional and personal friendships, intra-Court relations, and the entertainment world of movies, stage, and television, as well as events occurring in the District of Columbia, the immediate environment of the Court. Limitations of time and resources, however, limited this study to select examples of the first-named sources.

Looking at the world scene first, certain well-known facts form the background for the American mood in the 1950's. Nazi storm troops had demonstrated the implications of racialism in terms few could ignore. The free world, in theory at least, revolted against the principle that a man might be harassed for his ancestry.[5] Hope for universal brotherhood was explicitly spelled out in the United Nations Charter which requested "Universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex,

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[5]Wallace Mendelson, Justices Black and Frankfurter: Conflict in the Court (Chicago, 1961), p. 75.

language, or religion."[6] Granted that this was the ideal and not the reality, nevertheless the formation of the United Nations organization itself was an expression of widespread hope for a world ruled by reason and justice rather than greed and brute force.

Race was the principle subject of discussion by the Economic and Social Council of the United Nations in a Paris conference during December, 1949. There a group of world-eminent anthropologists declared that the term "race" should be replaced by ethnic, religious, national, linguistic, geographic, or cultural terms. According to this group, intelligence tests did not in themselves enable us to differentiate safely between what is due to innate capacity and what is the result of environmental influences, training, and education. The anthropologists found no evidence of inborn differences in intelligence or temperament. Cultural experiences were considered to be the major factor in explaining differences between groups. They thought race not so much a biological phenomenon as a social myth.[7] This is not to claim that press releases of such news changed peoples' opinions overnight, nevertheless such viewpoints became part of the public picture.

Looking at the domestic scene, the struggle for

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[6] United Nations Charter, Article 55, Section C.

[7] "UNESCO Statement on Race," Race and Science (New York, 1961).

Negro rights had strong roots in the events of the 1930's and 1940's. Under the New Deal, for the first time, attempts were made to give Negroes their share of government assistance. More blacks entered government service than ever before. Thanks to the lobbying efforts of A. Philip Randolph and a threatened march of 50,000 Negroes on Washington in January, 1941, President Franklin D. Roosevelt issued an executive order aimed at abolishing employment discrimination in defense contracts, civil service, and job training programs.[8] Furthermore the New Deal had worked to the Negroes' political advantage by incorporating the colored voter as an essential element in the Roosevelt political machine.[9] As part of this trend the Department of Justice established a Civil Rights Division in 1939, under Attorney General Frank Murphy. In the Soldiers' Vote Act of 1942, Congress abolished the poll tax as a prerequisite for voting by members of the armed services. All these measures added up to an improvement in the ideological climate in the country. Furthermore four of the Roosevelt appointees to the Court were practical politicians (Justices Black, Jackson, Murphy, and Rutledge) whom the exigencies of the New Deal had made intensely aware

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[8]Donald R. McCoy and Richard T. Ruetten, "The Civil Rights Movement: 1940-1954," The Midwest Quarterly, XI, No. 1 (1969), pp. 9-14.

[9]John A. Garraty, Quarrels That Have Shaped The Constitution (New York, 1962), p. 248.

of the political power shift implied in the Negroes' new party role.[10]

Progress toward desegregation of the armed forces, especially during the Truman administration, was one of the quietest revolutions in racial matters the United States had experienced. By the end of 1954, segregation and discrimination were virtually eliminated from the internal organization of the active military forces. Integration and equality of treatment was the official policy in such on-base facilities as swimming pools, chapels, barbershops, post exchanges, movie theaters, and dependent's housing as well as in the more direct military areas of assignment and promotion. Despite this achievement, however, there remained areas where military life touched the surrounding off-post civilian communities and where discrimination and segregation remained the rule, especially, in civilian housing and in schools surrounding military bases.[11]

Campaign oratory during the 1948 and 1952 presidential elections also dramatized the issue of race and civil rights. Indeed the prospect of a revolt in the South by Dixiecrats made the Northern Negro vote crucial in 1948 in states with large electoral votes. During the 1952 presidential campaign, statements by Dwight Eisenhower

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[10] Ibid.

[11] Richard M. Dalfiume, Desegregation of the United States Armed Forces (Columbia, Missouri, 1969), p. 220.

supporting desegregation in the District of Columbia were duly noted and publicized by members of the National Association for the Advancement of Colored People.[12]

Pressure group activity also increased in volume and intensity. Fifty-three national organizations in 1949, joined the NAACP for a civil rights mobilization, representing the church, labor, fraternal, and minority organizations. From this group 4,000 delegates assembled in Washington, D. C. during February, 1950, to press for Congressional action under the leadership of Roy Wilkins, acting secretary of the NAACP. A variety of methods were used by these organizations to educate and persuade the American public to make government guarantee equality and freedom. There were appearances before the Senate and House committees, articles in journals, a campaign in the press, radio, and television, as well as united demands for civil rights before the platform committee of the Democratic and Republican parties in 1948 and 1952.[13]

The segregationists were also working for their vision of America. While the majority proceeded quietly, more rabid types of white racism did exist. One extremely vocal group which sent out a stream of literature reaching even the Supreme Court was the Chicago group called the White Circle League of America founded by Joseph

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[12]Walter White, How Far the Promised Land (New York, 1955), p. 110.

[13]Ibid.

Beauharnais. Recommending total segregation, Beauharnais suggested reserving Africa for the blacks, Asia for the yellow man, and Europe and America for the whites. The formal platform, combining religious, anti-Communist, states'-rights, and anti-integration appeals, urged white Americans to:

1. Oust the Reds from America
2. Preserve white neighborhoods for white people, and to bring about complete separation of the black and white races
3. Adhere to Constitutional Government as established by our pioneer forefathers
4. Oppose F.E.P.C.(Fair Employment Practice Committee)
5. Oppose One World Government
6. Preserve States' Rights[14]

Although the language of such openly racist organizations was extremely inflamatory and the size of their following doubtful, nevertheless the fears of some Americans were undoubtedly expressed in their platform.

One gauge of the times was the public opinion poll. An Elmer Roper poll in 1950, was encouraging to Walter White, NAACP director. He noted that in response to a questionnaire on integration, 43.5% from the Far West and 57% from the North West favored total integration. White commented that it was doubtful whether even half that number would have so expressed themselves in 1940.[15] On

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[14]Burton Papers, Library of Congress. One letter, dated December 4, 1953, was addressed to Justice Hugo Black urging him to respect the "impassable" dividing line between civil rights and social rights.

[15]White, p. 45.

September 1, 1953, a Gallup poll investigated the pressing worries in the nation. According to the replies, major concerns were civil rights in the South, the high cost of living in the East, and the farm problem in the Middle West. Another Gallup poll conducted on July 11, 14, and 16, 1954, indicated a three-to-one response in the South against the Brown decision, in contrast to the East, the region most in favor of the decision. On the question of whether educational integration was acceptable, the most highly educated groups in the population were most in favor of it. Nevertheless among Northern whites 45% objected to school integration, 49% did not object, and 6% expressed no opinion.[16]

An intensive study of white, moderate attitudes in the South was published in 1954 by Henry Ashmore, executive editor of the Little Rock Arkansas Gazette. Ashmore conducted a field study of progress and gaps in Southern public education with the help of forty-five scholars. According to the report, integration in a meaningful sense could not be forced by the mere physical presence of the two races in a single classroom, because no public school was isolated from the community which supported it. Instead, the initiative for desegregation must come from the

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[16]Betrinia Bowker, "The Effect of Press Sponsorship on Gallup Candidate Polls," unpublished Masters' Thesis, June, 1970, Department of History, University of Missouri at Kansas City. pp. 112-113.

local level where new patterns had to be hammered out across tables in thousands of scattered school districts, to accommodate not only the needs but the prejudices of whites and blacks to whom "these problems were not abstractions but the essence of their daily lives."[17]

Ashmore emphasized that the black-white ratio was the most powerful single determinant of racial attitudes and that the practical results of desegregation depended on it. The larger the concentration of Negroes, the greater degree of discrimination. Although the end of legal segregation was in sight, he foresaw the continuation of de facto segregation in both the South and non-South, resulting from segregated residential patterns. This was so because "the great social and economic forces that have worked on behalf of segregation will keep on working regardless of judicial determination." Ironically while the South spent a higher proportion of her total personal income for education than the rest of the nation, 3.3% in the South to 2.7% for the non-South, Southern schools lagged behind national standards. Part of the problem was that cities had born the heaviest tax burden while rural areas had the greatest need. However the expense of maintaining a dual school system was undoubtedly a major factor. In sum the report gave the impression that the white moderate Southerner was saying, "go slow,"

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[17]Henry Ashmore, The Negro and the Schools (Chapel Hill, 1954), p. 126.

give us time, we have an economic problem in the South for white as well as for black schools, and eventually we will desegregate.[18]

Presidential actions were another indicator of public mood. As both leader and reflector of current opinion, the president plays a special role. While recognizing that a president rarely has all segments of the country behind him, his actions nevertheless have great importance in reading the climate of the times. For the purposes of this study, a few select examples of presidential actions in reference to racial discrimination from the Truman and Eisenhower administrations will further illuminate the mood of the early 1950's.

Probably one of the most publicized developments of the Truman administration was the appointment of the Committee on Civil Rights in 1946. Many believed that a decisive factor in the movement toward greater civil rights for the Negroes began with Truman's Committee, whom he told, "we are making progress, but we are not making progress fast enough."[19] In its report, To Secure These Rights, issued in 1947, the Committee unequivocally recommended the elimination of segregation based on race, color, creed, or national origin and the end of the "separate but equal" doctrine. The effect of segregation was to brand

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[18]Ibid., pp. 114, 134.

[19]John P. Roche, The Quest for the Dream (New York, 1963), p. 238.

the Negro with the mark of inferiority, implying that he was not fit to associate with white people. The Committee argued that reason, history, and recent experiences in military desegregation supported an end to official segregation. Segregation in the nation's capital was also noted as a particularly graphic illustration of the failure of democracy. The Committee specifically recommended that the civil rights section of the Department of Justice be reorganized to effectuate desegregation policies; an anti-lynching law be enacted by Congress; state and federal action be taken to end the poll tax; and Congress require an immediate end to discriminatory and segregation practices in all branches of the armed services.[20]

The report was widely discussed in newspaper editorials, by ministers from the pulpit, in labor union meetings, in all levels of educational institutions, and by numerous civic and fraternal associations. According to Walter White, the Committee's statement was a positive help in creating sentiment in support of future court decisions.[21] Various segments of the public were represented by business, educational, labor, religious, and professional leaders who were called to serve on the Committee. Some of the more prominent individuals included Charles E.

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[20] To Secure These Rights, The Report of the President's Committee on Civil Rights, Washington: United States Government Printing Office, 1947, p. 79.

[21] White, p. 76.

Wilson, Chairman of General Motors, James B. Carey, Secretary-Treasurer of the C.I.O., Congressman Franklin D. Roosevelt, Jr., President John S. Dickey of Dartmouth College, President Frank P. Graham of the University of North Carolina, and Jewish, Catholic, and Protestant clergymen.[22]

It is significant that President Truman did not bury the Committee's report but instead on February 2, 1948, asked Congress to implement it with the necessary civil rights legislation. To show further that he meant business following the report, President Truman issued two Executive Orders, Nos. 9980 and 9981. The first established a Fair Employment Board to deal with discrimination in government employment and the second set up the President's Committee on Equality of Treatment and Opportunity in the Armed Services.[23] Although President Truman was unsuccessful in obtaining Congressional endorsement for his views on civil rights, the great moral and political force of the presidency was now forthrightly behind equality of treatment.[24]

The President's Committee on Equality of Treatment and Opportunity in the Armed Services issued its final

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[22] To Secure These Rights, p. 24.

[23] McCoy and Ruetten, p. 24.

[24] Dalfiume, p. 200.

report, Freedom to Serve on May 22, 1950. Significantly the army moved from an official policy of segregation in 1948 to an official policy of integration in 1950, although in fact, as previously mentioned, the practice of segregation continued. The Committee's report was, however, an impetus to the Air Force to move more rapidly toward integration and led the Navy to take further steps in that direction. Despite official policy many military officers believed in gradual integration and continued their resistance to integration. Although the Korean War pushed the Army to complete integration much sooner than would have been the case without it, nevertheless the Committee's work laid a firm foundation for this development.[25]

Other actions by President Truman included the formation of his Commission on Higher Education in 1948 which pressed for an end to racial discrimination in colleges. Truman also made some appointments of Negroes to public office. One of the most prominent was that of William Hastie as a Court of Appeals judge in 1949. There also was increasing pressure by blacks within and without government agencies for fair employment and promotion standards. Although Truman resisted pressure for a Fair Employment Practice Act, after the onset of the Korean War he announced a National Manpower Mobilization Policy based on voluntary responses to civilian manpower needs. Under

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[25]Ibid.

this policy the government assisted employers in the maximum use of minority workers. Partly as a result, employment of blacks rose, although not proportionately to their numbers. Some months later, in December, 1951, Truman issued another Executive Order, No. 10308, creating a Committee on Government Contract Compliance charged with investigating compliance with anti-discrimination clauses in government contracts. The Committee's work did strengthen enforcement of nondiscriminatory provisions in government contracts and contributed to the rise in median income of non-white families from $1,671 in 1950 to $2,357 in 1953.[26]

Supplementing the efforts of the government was a very active Negro leadership which included Walter White, Roy Wilkins, and Thurgood Marshall of the NAACP, Lester Granger of the Urban League, Congressman Adam Clayton Powell, and Judge William Hastie. Authors, athletes, and artists of the black race also publicized the needs and potential of Negroes. Furthermore the black press reached out into the black community as an opinion-molding instrument.[27]

The Eisenhower style and viewpoint on racial segregation differed markedly from that of President Truman's. Eisenhower revealed his personal views when as Army Chief

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[26] Ibid., p. 167.

[27] McCoy and Ruetten, p. 26.

of Staff, he once told the Senate Committee on Armed Services, "I do believe that if we attempt merely by passing a lot of laws to force someone to like someone else, we are just going to get into trouble."[28] Sherman Adams, principal assistant to Eisenhower, reported that the President had done nothing to encourage acceptance of school desegregation and was planning to do nothing until Governor Orval Faubus and the mob at Little Rock forced the federal government's hand. Eisenhower was convinced in his own mind that progress toward school integration had to be made with considerable deliberation. Probably his statement that "I don't believe you can change the hearts of men with laws or decisions" best summed up his attitude.[29]

Despite the President's well known viewpoint, the NAACP Report of 1952 noted some encouragement from Eisenhower for the fight to end segregation in schools. In a conference with a NAACP delegation in November, 1952, the President-elect said he could not conscientiously see federal funds appropriated to establish or maintain segregated schools. At the same time he told several Southerners that he would not dictate how they should run their schools, even though he opposed federal aid to dual systems

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[28]Leo Katcher, Earl Warren: A Political Biography (New York, 1967), p. 325.

[29]Ibid.

of public education.[30] School desegregation as Eisenhower viewed it, was not so much a part of a sweeping social revolution as it was a question of individual emotions. In his opinion the problem was basically emotional rather than rational and therefore he wanted to ensure that change would be sufficiently gradual to prevent law from advancing too far beyond emotional readiness. The adjustment had to come internally from within a sufficient number of white Southerners. Furthermore federal pressure would not only be an intrusion into areas that were properly state responsibilities, but would deepen emotionalism and compound the problem.[31]

Congress was another indicator of the times as speeches by Senators and Representatives gave a kaleidiscopic picture of the mood of America on the question of racial discrimination. Samples of Congressional rhetoric from 1950 to 1954 as proximate to the Brown decision will be briefly discussed here. No effort will be made, however, to trace the numerous bills introduced on the subject during this period. That would have to be the subject of another inquiry. Suffice it to say that despite the myriad of bills and resolutions offered, there was no major civil

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[30] NAACP Report, 1952, p. 43.

[31] Numan V. Bartley, The Rise of Massive Resistance: Race and Politics in the South During the 1950's (Baton Rouge, 1969), p. 62.

rights legislation passed by Congress until the Civil Rights Act of 1957.

A swelling tide of rhetoric flowed from Congress during the years 1950 to 1954 on the subject of racial discrimination, resulting no doubt from all the previous mentioned national and international factors as well as from the recent Supreme Court cases on restrictive covenants and segregated graduate and professional schools. Predictably a wide diversity of opinion was revealed as Southerners and non-Southerners, liberals and conservatives, pro-segregationists and anti-segregationists battled it out. Pro-segregationists repeated the familiar themes heard elsewhere: the Southern way of life, the importance of deep-seated feelings, the fact that the problem existed in the hearts and minds of Southerners, their opposition to federal aid for education, their belief that the whole problem was aggravated by radical agitators and Northern carpetbaggers, their conviction that the Court was engaging in judicial legislation, their belief that Negroes did not really want to end segregation in the South, the claim that the Fourteenth Amendment did not proscribe segregated education, their opposition to any permanent federal F.E.P.C., the Communist ogre behind the civil rights movement, the probable loss of teaching jobs for Negroes under desegregation, and the complaint that the South was the whipping-boy for the racial problems of the nation. Nativist sentiment, fears of mixed marriages,

dislike of sociological theory, and the plea for racial purity were also heard.

Congressmen favoring racial desegregation spoke about the Democratic tradition, the world image of the United States in regard to race relations, the financial cost of race bias, the myth of race, and progress in desegregation in the armed forces and in the District of Columbia.

Typical segregationist rhetoric was that by Senator James O. Eastland of Mississippi on June 22, 1950, alleging that the Supreme Court's recent Sweatt and McLaurin decisions were attempting to tear down the dual school system of the South. Racial segregation was in the minds and hearts of Southerners and was not about to crumble because of radical agitators. The very foundations of American democracy would be destroyed if federal bureaucrats seized control of the public school system, therefore he opposed federal aid for education.[32] In like vein, Representative James C. Davis of Georgia on November 30, 1950, compared the desegregationists whom he classified as radical agitators with the carpetbaggers of Reconstruction Days who at bayonet point tried to force radical doctrine on a "helpless and defeated section." In 1950, it was a question of judicial legislation by a left-wing Court aided by the executive branch of the federal government, that was being

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[32]Congressional Record, 81st Congress, 1st Session, p. 9043.

forced upon an unwilling people. Furthermore he claimed that decent, law-abiding, hard-working Negroes did not want segregation abolished. The Court's action was a blow in favor of the mongrelization of America.[33] Nowhere, Davis argued a year later, did the Fourteenth Amendment state that separation of the races was a denial of equal protection of the laws. Georgia was determined to resist destruction of her laws and institutions. Efforts to force mixed schools would fail, and in fact there could be no public schools without public school funds.[34] In similar fashion, Representative John Wheeler of Georgia complained that 10% of the population (the Negroes) should not be allowed to dictate to 90% of the people. He felt that the District of Columbia restaurant case (District of Columbia v. John R. Thompson Co.) was an obvious prelude to the decision expected later that year regarding segregation in the public schools.[35]

On the other hand, from more moderate Southerners came speeches favoring laws abolishing lynching, encouraging equal opportunity to work, and approving desegregation in the armed forces. For example, during the first eight months of 1953, not only Northern but some Southern Congressmen as well were among the sponsors of nineteen bills

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[33] Ibid., Cong. Rec., 81st Cong., 2nd Sess., p. 16005.

[34] Ibid., 82nd Cong., 1st Sess., p. 12554.

[35] Ibid., 83rd Cong., 1st Sess., p. 6431.

whose major purpose was to prohibit racial discrimination in various areas of national life.[36]

Congressmen pleading for racial desegregation were also vocal. In September, 1950, Senator Hubert H. Humphrey introduced the United Nations' report on race relations which presented, he said, the most authoritative scientific facts about the problem of race by the world's outstanding anthropologists and sociologists. For all practical social purposes, the report stated that race was not so much a biological phenomenon as a social myth which had done enormous human and social damage by preventing the normal development of millions of human beings. No proof existed that groups of mankind differed in innate mental characteristics--in intelligence or temperament.[37] A few days earlier Humphrey had discussed the cost of race bias and, referring to an article by a member of the President's Committee on the Equality of Treatment and Opportunity in the Armed Services, said that national self-interest demanded that all our human resources be made available without delay or inhibitions.[38]

From time to time congressional recognition was given to achievements of outstanding Negroes. The career of Charles Spaulding, President of the North Carolina Mutual Life Insurance Company, of Durham, North Carolina

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[36] Ibid., Index, 83rd Congress, 1st Sess., p. 497.

[37] Ibid., 81st Cong., 2nd Sess., p. A14379.

[38] Ibid., p. A6457.

was one so mentioned.[39] The theme of totalitarian propaganda discrediting the United States over the issue of civil rights and racial strife was repeatedly heard in one variation or another. Consequently, according to Representative Franklin D. Roosevelt, Jr., America must show that democracy worked for all.[40] Senator Paul Douglas of Illinois pleaded for better understanding among the races when he deplored the 1950 race riots in Cicero, Illinois. A Negro family was prevented from moving into an all-white neighborhood by a mob of 6,000. Ironically the Chicago Grand Jury indicted not the activists in the mob, but the woman who rented her building to the Negro family. Douglas said this was a denial of every principle of American democracy and justice under the law.[41] A wave of vandalism in Miami against racial and religious groups and the bombings of Negro apartments and a Jewish synagogue in the fall of 1951 was bitterly condemned by Representative Louis Heller of New York.[42]

Representative Adam Clayton Powell of New York City was especially active in bringing up problems of discrimination. He spoke out for a Fair Employment Practices Commission, desegregation in naval shore establishments, open

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[39] Ibid., p. A1560.

[40] Ibid., p. A4396.

[41] Ibid., p. 12554.

[42] Ibid., p. A1755.

housing, and ending segregation in the State Department. Powell characterized Washington as a "moral cesspool" permitting segregation in the "hub of world liberty, in the capital of democracy." This was in connection with his bill to assure all persons within the District of Columbia full and equal privileges in places of public education, accomodation, resort, entertainment, and amusement.[43]

Other speakers pointed to progress being made in race relations such as President Eisenhower's backing for desegregation in the capital, Attorney General Herbert Brownell's recommendation for ending segregation in public schools, the appointment of a number of Negroes to high government positions, and for desegregation in Veteran's hospitals.[44]

The divisions in American society over the issue of racial segregation were painfully clear in the statements of Congressmen during this period. Not only did Congress attempt to interpret the mood of its constituents but Congressional actions in turn were reported by the press. Clearly there was a two-way street running from the American citizen to Capitol Hill and back again. The Supreme Court could not help being aware of what its fellow servants were doing across the street. The nine justices were thus subject to a barrage of arguments from the public

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[43] Ibid., 83rd Cong., 1st Sess., p. 7114.

[44] Ibid., 83rd Cong., 2nd Sess., p. 12876.

via Congress as well as from the White House for an extended period prior to Brown, exposing them to all the major themes appearing in the school segregation cases.

The newspapers are, of course, a valuable source of information about the climate of the times. As might be expected they reinforced the themes and attitudes about racial problems already revealed. To probe this source, the New York Times was examined from the years 1950 to 1955. Although the Times is by no means representative of other papers, the Times does enjoy a reputation for relatively objective reporting and its news service acts as a pipeline to local papers throughout the country. The American democratic tradition, the United States image abroad, the politics of race, and the usual pro- and anti-segregationist thought appeared repeatedly. A few examples will suffice.

Harold Stassen, Director for Mutual Security, appealed to the NAACP on June 29, 1953, to help publicize the positive aspects of the Negroes' progress, in particular the spectacular improvement in literacy from 1863 to the present. He pointed out that while 95% of the Negroes were illiterate in 1863, only 6% were so in 1953.[45] Walter White, NAACP leader, protested the nomination in 1953 of Governor James Byrnes of South Carolina as a delegate to the United Nations Assembly. White said that this

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[45]New York Times, June 29, 1953.

assignment contributed to Soviet propaganda about American racism. Byrnes' assignment would be widely interpreted, according to White, as an abandonment by the United States of its championing of human rights.[46] Along this line, a press release by former Assistant Secretary of State A. A. Berle stated, "It is no exaggeration, I think to say that the habit of race discrimination practiced in certain parts of the United States is the greatest single danger to the foreign relations of the United States."[47]

Politics and race were repeatedly in the news. Statements by President Eisenhower appeared regularly noting his support for the principle of equality. Credit was given him for the large number of appointments of Negroes to government jobs, the establishment of a government contracts committee, and executive orders to end segregation in the nation's capital, in schools on military reservations, and in veteran's hospitals.[48] Walter White announced in April, 1954, that the mounting voting strength of the Negro would be a big gun in his battle for equality in the South. By 1956, he estimated that over 3,000,000 Negroes would be eligible to vote in the South, compared with 200,000 in 1944.[49]

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[46] Ibid., July 10, 1953.

[47] Ibid., February 7, 1954.

[48] Ibid. May 18, 1954.

[49] Ibid., April 5, 1954.

Statements from various public leaders supported the Negroes' cause. A Committee of 100, made up of leaders in education, church, law, arts, and civil life was formed to aid the NAACP in its fight against segregation. A November 25, 1952 new release requested contributions from all who believed in this cause. It was pointed out that a single case carried to the Supreme Court in 1952 involved expenses of more than $20,000.[50] The C.I.O. announced its financial support for the NAACP fight when it offered a contribution of $2,500 to help finance the legal attack on segregation of Negro children in public schools.[51] Senator Hubert H. Humphrey was also in the news for his protest against school segregation on army posts.[52]

Various personalities working for the Negro cause made the news. Judge J. Waties Waring was honored on April 17, 1952, at a Civil Liberties luncheon in New York City for his fight against racial bias in the South.[53] Judge William H. Hastie, ranking Negro jurist at that time was reported as saying that housing segregation "was one of the most sinister breeders of bigotry" which more than anything else made Negroes strangers in their own home community.[54] Of special interest to citizens of the

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[50] Ibid., November 25, 1952.

[51] Ibid., September 3, 1953.

[52] Ibid., January 15, 1953.

[53] Ibid., April 17, 1952.

[54] Ibid., November 23, 1953.

District of Columbia was the announcement that the famous singer Marion Anderson was going to make her first commercial appearance in Constitution Hall on March 14, 1953, fourteen years after she was barred from singing there by the Daughters of the American Revolution.[55]

Indications of segregationist sentiment were apparent in the announcement of the central board of the National Council of Churches in the United States of America, representing twenty-nine Protestant and Orthodox bodies with a membership of 31,000,000. Because of a division of opinion, the board postponed action on a strong denunciation of racial segregation. A member of the Presbyterian Church, USA (northern branch) observed that "in certain communities some things can be done that can't be done in other places."[56] The strong opposition in South Carolina to public school desegregation was publicized by the announcement that a state constitutional amendment had been passed paving the way for a private school system in the event that segregation was declared unconstitutional.[57] The widely varied patterns of segregation in the South was the subject of a Sunday feature article in the New York Times on June 14, 1953. Although segregation was practiced in schools, in the use of drinking fountains, dining

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[55] Ibid., March 4, 1953.

[56] Ibid., March 22, 1952.

[57] Ibid., November 6, 1952.

and sleeping accomodations, and local transportation, more people in the South were beginning to believe that the use of the ballot would turn the tide.[58]

Other segregationist sentiment was evidenced in reports that the Klu Klux Klan rode again in Cairo, Illinois, in January, 1952, when crosses were burned on the eve of the scheduled admission of Negroes into Cairo's hitherto all-white schools. Despite Illinois laws forbidding racial segregation in the public schools, Negro children were turned away when they arrived at school.[59] In Kansas City the Swope Park municipal pool segregated for many years, was closed after announcement of a recent desegregation policy.[60] Occasionally a lone incident involving only a few people revealed the heartbreak and pathos beneath the surface of segregation practices. One such story was that of the seven-year old Mobile, Alabama boy who was denied admission to an all-white school because the Alabama Supreme Court held that "Creole" meant "part Negro." His father claimed that he had attended white churches and associated with white persons all his life but that his son had been dismissed from school because of protests by other parents.[61]

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[58] Ibid., June 14, 1953.

[59] Ibid., January 29, 1952.

[60] Ibid., May 30, 1952.

[61] Ibid., March 28, 1953.

Public attitudes were also revealed in the magazines of the period. Time and Newsweek from 1952 to 1954 rarely appeared without at least one item dealing with the race issue. Look, Reader's Digest, Colliers, American Magazine, Redbook, and Ladies' Home Journal supplied many factual articles, fiction, photographs which, with few exceptions, presented Negroes and other minorities fairly objectively.[62] A few articles about racial segregation prior to the May, 1954, decision indicate how this media handled the problem.

The position of the moderate South was explained by Virginius Dabney, a 1948 Pulitzer Prize editorial winner and editor of the Richmond Times Dispatch. He observed in the Saturday Evening Post in 1952 that public school segregation was a form of racial segregation which the majority of the South considered more important than any other. In his opinion the future of race relations in the South depended on the manner in which the Court disposed of this question. He feared that the Court might inadvertently inject new life into the dying and discredited Klu Klux Klan. He also doubted whether a majority of Southern Negroes wanted desegregation, citing a 1950 Elmer Roper poll that only 17.1% of the white and colored population questioned wished to see the end of segregation. Conceding that segregation could not be maintained forever, he felt

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[62]White, pp. 209-210.

that a sudden liquidation would be extremely dangerous. Progress would be more rapid if extremists on both sides could be kept quiet. In his opinion, the problem of numbers was decisive. When the proportion of colored children rose to 30, 40, or even 75%, as in many Southern communities, it became a decidedly different problem. On the other hand, where there were only a few Negroes, desegregation might occur without difficulty. He wrote that the coming Supreme Court decision would be as crucial in its impact upon the position of Negroes in American society as was the historic Dred Scott decision handed down nearly a century ago.[63]

The U.S. News and World Report published a summary of extensive research on the problem of segregation in 1952. The major point was that the fight over racial barriers was much deeper than the question of separate schools. It was a matter of custom, precedent, social patterns, in a large part of the United States. Thirty-one million pupils between 5 and 17 years of age were involved in the present legal battle, 27.1 million of whom were white and 3.9 million were Negro. Three-fourths of the Negro youth, about 2.7 million, were in the 21 states or the District of Columbia where there were either mandatory or permissive

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[63]Virginius Dabney, "Southern Crisis: The Segregation Decision," Saturday Evening Post, CCXXV (Nov. 8, 1952), p. 40.

segregation laws. The report predicted great social changes if the attack on segregation succeeded. Some Southern states were preparing to abandon their public school system and move toward private schools. The segregationists were concerned that all other requirements for separate living would fall if youngsters worked and played together in schools. Although the tone of the article was reportorial and factual rather than editorial, nevertheless the position of the Southern whites was given the most emphasis.[64]

Reports of segregation practices in the District of Columbia were also evident. It was noted in U.S. News and World Report in 1952 that this problem was loaded with political dynamite and that while Congress talked a good deal about civil rights, it tended to shy away from this "backyard" issue. In fact Congress passed the buck to appointed officials who lacked power to decide basic issues, while President Truman held aloof. As the Negro population increased in the District, the white population became noticeably less enthusiastic for home rule. Washington was indeed the "test-tube" for the civil rights struggle. Moreover it was felt that the November, 1952, election results would not change the problem because "the writing

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[64]Segregation Issue: What It's All About," U.S. News and World Report, XXXIII (December 26, 1952), pp. 55-57.

is on the doorsteps for the winner."[65]

The extremist Southern position was reported by Time magazine in December, 1952. Governors Herman Talmadge of Georgia and James Byrnes of South Carolina announced that desegregation would be fought to the bitter end. It was also noted that "to many a powerful conservative Southerner, school segregation symbolized the last major barrier before the final day when Negroes and whites will intermingle socially--perhaps even marry." As an instance of last ditch efforts, the Georgia legislature provided that any school district which did not provide separate schools would automatically lose its state funds. At the same time more than one-half of the Southern states permitted Negro college enrollment. In fact for the year 1952 the percentage of United States Negroes attending college (.5%) was higher than the percentage of the entire British population attending college (.2%).[66]

The Nation ran numerous articles supportive of the Negroes' position. One writer noted that many Negro leaders believed that the position of the Supreme Court would be determined by the increasing political significance of Negroes nationally and internationally. It was felt that the Negro vote might be decisive in northern

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65"Civil Rights on Capitol's Doorstep: Race Problems Increasing in Washington," U.S. News and World Report, XXXIII (June 27, 1952), pp. 26-29.

66"The Supreme Court--the Segregation Case," Time LX (December 22, 1952), p. 13.

urban centers and was politically a factor in some areas of the South. The Negro was compelled to recognize that he could place less reliance on the good-will of a few justices than on his strength in the political area. Blacks were also urged to join the broader civil rights struggle for repeal of the Smith Act, the McCarren Act, and the Taft-Hartley Act. Only when there was created an atmosphere of political liberalism in which men could not be imprisoned for their political views would the overthrow of the Plessy doctrine become inevitable.[67]

Devoting an entire issue to civil liberties in June, 1952, the liberal Nation outlined a plan for action which included a federal F.E.P.C., an anti-lynching act, a federal civil rights bill outlawing the poll tax and all forms of segregation, repeal of the Taft-Hartley, the Smith, and McCarran Acts, and defeat of the McCarran-Walter Omnibus Immigration Bill.[68]

More scholarly journals were also concerned with problems of racial discrimination. The Journal of Political Science, Journal of Social Psychology, Journal of Negro Education, Phylon, and Journal of Abnormal Psychology carried articles on school segregation, the equal

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[67]Earl B. Dickerson, "Negro Rights and the Supreme Court," Nation CLXXV (July 12, 1952), pp. 26-28.

[68]"How Free is Free," Nation, CLXXIV (June 28, 1952), p. 615.

protection of the laws, the meaning of prejudice, and experiments in racial attitude analysis. As an example of this type of article, a Southern writer for the Journal of Politics argued that the Court would and should most probably favor "operational equality" in attempting to effectuate the "separate but equal" doctrine. Such an approach would require cooperation on multi-levels--nationally, state-wide, and locally.[69]

Interesting enough the Journal of Negro Education published an article in 1952 recommending the gradual approach to school segregation. The point was made that the schools could not be disassociated from other public agencies and institutions. Bias and intolerance in the public mind were bars to integration. Furthermore it was felt that Court action could be successful only when a majority of people supported the rulings and only as the Courts interpreted the will of the majority. The education of the public was needed if gains were to be deep seated and lasting. Stressing that local problems could not be solved by legislation or court injunction, persuasion and argumentation were recommended. Public schools reflected social policies and public attitudes and therefore had to conform to established community practices.[70] Obviously

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[69]E. H. Hobbs, "Negro Education and the Protection of the Laws," Journal of Politics, XIV (August, 1952), pp. 488-511.

[70]Ward I. Miller, "Anticipated Problems in Integration and some Suggested Approaches," Journal of Negro Education, XXI (Spring, 1952), pp. 285-292.

what this sample of periodical literature revealed was a diverse but sustained public interest in the subject of racial discrimination and school segregation.

The final source of current thinking on the subject of racial segregation for this study was the law journal . It may not be the election returns so much as the bar reviews which the Supreme Court follows.[71] According to Chief Justice Charles E. Hughes, it was "not too much to say that, confronting any serious problem, a wide-awake and careful judge will at once look to see if the subject has been discussed, or the authorities collated and analyzed in a good law periodical."[72] Because of the intense discipline of law schools and the selection of review editors from the best students, there has been an increasing regard for law journal articles by the Court. Not only student contributors, of course, but eminent legal experts offer the results of their research in these journals. By 1954 there were 180 law schools and 55 law journals giving direction to professional thought.[73]

Numerous lawyers observed this resort to law journals and scholarly works by the Court. In the area of

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[71]Jack W. Peltason, Federal Courts in the Political Process (New York, 1955), p. 43.

[72]Charles E. Hughes in the foreward to 50 Yale Law Journal 737, March, 1941.

[73]Chester A. Newland, "Legal Periodicals and the United States Supreme Court," Midwest Journal of Political Science, III (1959), pp. 58-74.

restrictive covenants alone, one writer counted over thirty books and articles between 1946 and 1948 urging reversal of the 1926 Supreme Court decision upholding the covenants.[74] This process could be seen in the footnotes of decisions giving references drawn from scholarly monographs.[75] An additional reason that the Supreme Court has relied on law journal articles is that academia has taken the place of an intimate, well-informed, specialized, resident Supreme Court Bar. Few lawyers today, except in the office of the Solicitor General of the United States, appear regularly before the Supreme Court and regularly scrutinize its work. Though the law teachers are spread over fifty states, what they lack in continual attendance at the Court, they make up through the law reviews. Their influence is also felt through recent honor graduates who become law clerks for the justices.[76]

A study by political scientist Chester A. Newland indicated that beginning in 1939 there was a sharp increase in citations of law journals by the Supreme Court over those of previous three decades. Indeed from 1949 to 1953 legal periodicals were cited in 26% of the decisions. Although over 100 legal journals were cited, a few reviews

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[74]Peltason, p. 52.

[75]Charles E. Wyzinski, A Trial Judge's Freedom and Responsibilities (New York, 1952), p. 18.

[76]Alexander Bickel, Politics and the Warren Court (New York, 1965), p. 143.

were clearly most influential. The Harvard Law Review was the most frequently cited periodical, referred to twice as often as the Yale Law Journal, the second most frequently listed. The others in the top five frequently cited were: Columbia Law Review, Michigan Law Review, and Northwestern University Law Review. Since this was a quantitative summary, Newland admitted that only a detailed qualitative analysis would reveal the actual influence of the journals on court decisions.[77]

It is of special interest to note the position of the American Bar Association on the school segregation cases. The ties between Court and A.B.A. are numerous--through friendships and professional associations. Interestingly enough the A.B.A. had little to say on the subject of segregation. In the opinion of Dean Charles M. Thompson of Howard University Law School and Law Professor Harry Kalven, Jr., of the University of Chicago Law School, the American Bar Association was noticeably silent on the issue of school segregation.[78] Since there is little "hard" evidence to explain this, one can only speculate that the Association, as a group, refrained from this issue because of its extremely potent political implications.

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[77]Newland, pp. 58-74.

[78]Hugh W. Speer, The Case of the Century: A Historical and Social Perspective on Brown v. Board of Education of Topeka with Present and Future Implications 1966, unpublished manuscript, in the University of Missouri at Kansas City law school library, p. 152.

School segregation was, however, the subject of numerous law journal articles during the years 1950-1955, the period surveyed for this study. The history of the Fourteenth Amendment, the requirement of equality, the specific meaning of the equal protection clause, the relevance of modern social science studies to legal problems, related state court decisions, and the effect of the Sweatt and McLaurin decisions on the school segregation cases were common themes. The following examples will indicate the type of thinking prevalent in those years.

In seeking an interpretation of the Fourteenth Amendment, one writer stressed its anti-slavery background. He asserted that the Amendment was the culmination of an ethical, moral, religious, and legal attack on slavery starting in the 1830's in which missionaries, temperance groups, and women's rights movements joined. The whole anti-slavery movement was essentially a quest for legal protection of certain rights later impliedly incorporated in section one of the Fourteenth Amendment. These rights claimed in the 1830's were freedom of migration, education, and residence and liberty to pursue common callings, acquire homes, and receive the protection of the courts. The Civil Rights Act of 1866 had specifically mentioned some of these rights and it was widely understood that the Fourteenth Amendment had incorporated the same rights. Therefore according to this writer, these basic rights

should still be considered under the umbrella of the equal protection clause.[79]

Others declared that there was no intimation regarding segregation in the language of the Fourteenth Amendment. Segregation was not even discussed in Congressional debates on the Amendment except for one equivocal reference. This was because it was widely understood that the Amendment simply incorporated analagous provisions of the Civil Rights Act of 1866 which opponents repeatedly argued would abolish separate schools. In support of this view it was pointed out that there was widespread press comment in 1866 that the civil rights bill would prohibit segregation.[80]

Other writers emphasized that the Amendment did not prohibit segregation. They pointed out that there was little litigation in the North or South after 1868 challenging public school segregation on federal grounds. If the belief had been current that the Amendment prohibited segregation without implementing legislation, it was highly probable that Negroes would have brought suit and would have prevailed in the post-Civil War ardor for equality. Certainly at least one case would have reached the Supreme

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[79]Howard J. Graham, "The Early Anti-slavery Backgrounds of the Fourteenth Amendment," 53 Wisconsin Law Review 479, 1950.

[80]"Is Racial Segregation Consistent with Equal Protection of the Laws? Plessy v. Ferguson Re-examined," 49 Columbia Law Review 629, (May, 1949).

Court. The evidence suggests that Charles Sumner and others thought that they could do away with separate schools for Negroes by means of legislation which is the way they tried to do it. Nevertheless although there was no litigation over federal law, segregated schools were successfully attacked as violating state laws in a handful of cases--in Illinois, Iowa, Kansas, Michigan, New Jersey, and Ohio within twenty years after the adoption of the Fourteenth Amendment.[81]

The heart of the debate over the legality of school segregation was the meaning of "equal protection." One view was that regardless of racism in public schools in 1866, the meaning of the phrase must be found in evolving concepts which take into account contemporary social facts not even in existence in the post Civil War years. This was the argument over the "living constitution," wherein if the Supreme Court felt that the nation was socially and politically ready to abolish public school segregation, the "equal protection clause" afforded conceptual support.[82]

Legally the prime question was did the requirement of equality mean an identity of experience. One argument held that an identity of experience was not required because any such conception would be at war with the

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[81]Robert A. Lefler and Wylie H. Davis, "Segregation in the Public Schools," 67 Harvard Law Review 377 (January, 1954).

[82]Ibid., p. 386.

flexibility needed for legislation designed to meet particular problems.[83] Supporting this view were a number of state court decisions which ruled that "equal protection" merely guaranteed equality. "Equal protection" did require, however, that differential legislation be based on reasonable and relevant distinctions. In other words there must be real differences pertinent to the object of legislation. The classification must be material to valid public purpose, even though there was some inequality in the very process of classification itself. Furthermore there was always the presumption of constitutionality inasmuch as legislators are the primary policy makers.[84] Traditionally the three main reasons for racial classifications were: (1) differing intellectual capacities--discredited by the social sciences in the 1950's, (2) safeguarding the public peace--which might be better secured by ending segregation, and (3) the intent of whites to discriminate, to impose a badge of inferiority on Negroes--clearly difficult to justify. If segregation was valid,

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[83]Joseph S. Ransmeier, "The Fourteenth Amendment and the 'Separate but Equal' Doctrine," 50 Michigan Law Review 203 (1952).

[84]Katherine E. Driscoll, "Equal Protection and Segregated Education," 3 Boston University Law Review 565 (November, 1950). These state court decisions were: Lehew v. Brummell, 103 Missouri 546 (1890); Williams v. Board of Education, 79 Kansas 202 (1908); Maddox v. Neal, 45 Arkansas 121 (1885); Bluford v. Canada, 32 F. Supp. 707 (1940).

the proper test should be "separate but not discriminatorily unequal."[85]

The other side of the argument was that "equal protection" implied identity by prohibiting segregation. One particularly prestigious statement of this position was the amicus curiae brief in the Sweatt case submitted by over 200 attorneys from the Committee of Law Teachers Opposing Segregation in Legal Education. As a background for this argument, the brief explored the origin of the phrase "equality before the law" which they ascribed to Charles Sumner who had adopted it from French philosophical thought. While the lawyers could not "prove" their contention, they rested their case on the fact that there was no ruling or even carefully considered dicta by the Supreme Court that segregation might be enforced in education.[86] Unfortunately for their case these lawyers were attempting to establish a positive--that the "equal protection" clause prohibited segregation--by proving a negative--that the Supreme Court had never ruled that educational segregation was allowable under the "equal protection" clause.

Social science arguments were also used to bolster the contention that "equal protection" prohibited segregation. These arguments held that since students were

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[85]Thomas I. Emerson, John P. Frank, and others, "Segregation and the Equal Protection Clause," 34 Minnesota Law Review 289 (March, 1950).

[86]"Segregation in Legal Education," 64 Harvard Law Review 129, (1950-1951).

profoundly affected by discrimination this resulted in a denial of equality. Moreover sociologists in the 1950's rejected William Graham Sumner's concept that law must come from the mores and could not go beyond them. Modern authorities argued that it was now generally accepted that legal action within limits, could influence ways of living.[87] At the same time other legal writers rejected all sociological data in constitutional determinations. They felt that constitutional language commanded precedence over the "eternal verities as revealed by Gunnar Myrdal."[88]

Attention also focused on a number of state court decisions dealing with racial segregation. In Mendez v. Westminister (64 F. Supp. 544, S.D. Cal., 1946) for example, a California appellate court opposed arbitrary assignment of Mexican children to separate schools. The federal constitutional issue was avoided, however, when the lower court relied solely on a California statute restricting segregation. Even though the Mexican school had admittedly equal facilities, the Court ruled that "a paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage."[89] In a

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[87] J. D. Human, "Segregation and the Fourteenth Amendment," 4 Vanderbilt Law Review 555 (1950-1951).

[88] Ralph T. Cotterall, "Judicial Self Restraint: The Obligation of the Judiciary," 42 American Bar Association Journal 829 (September, 1956).

[89] "Segregation in Public Schools--A Violation of 'Equal Protection of the Laws'," 56 Yale Law Journal 1060 (1947).

Florida state court case, a Miami ordinance was held constitutional which permitted Negroes to use the municipal golf course only one day per week in line with the proportion of Negroes to whites. The Supreme Court reversed the holding, however, in a per curiam decision and remanded the case in accordance with the Sweatt and McLaurin decisions. A Louisiana law school case was also decided in line with the Sweatt opinion when the Supreme Court affirmed a federal district court ruling that a Negro should be admitted to a white law school.[90] The writers discussing the above cases were urging that "equal protection" did indeed prohibit segregation.

Interpretations of the Sweatt and McLaurin decisions were similar to viewing a glass as half-full versus half-empty. Some writers stressed that the decisions marked the beginning of the end of "separate but equal." Others emphasized that the Court had pointedly refused to overrule the Plessy case. One writer contended that although those decisions would probably apply to state colleges, they would hardly apply to public school systems if there were bona fide efforts to equalize them.[91] The social repercussions from outlawing segregated public

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[90]Rice v. Arnold, 340 U.S. 848, 1950 and Board of Supervisors of Louisiana State University v. Wilson, 340 U. S. 909 (1950) as discussed by John P. Roche, "Education, Segregation, and the Supreme Court--A Political Analysis," 99 University of Pennsylvania Law Review 949 (1951).

[91]J. Carleton Ivey, "Equal Protection as Applied to Segregation in Graduate and Professional Schools," 2 Mercer Law Review 272 (Fall, 1950).

schools should justify sustaining a "substantially equal" doctrine according to another commentator. She conceded, however, that for the first time the Court had measured feelings and other intangible factors.[92] Yet there was doubt that these intangible factors applied at lower educational levels.[93] The fact that Sweatt and McLaurin were unanimous at a time when unanimous decisions were rare was also mentioned. This observer ventured a guess that advocates of outlawing segregation per se could not muster a majority and settled for a unanimous decision on the lowest common denominator. Optimistically it was noted that by 1950 nearly 100 Negroes were attending all-white colleges whereas ten years previous not a single Negro could be found in an all-white Southern college. In fact, six months prior to the Sweatt and McLaurin decisions, there were fewer than 25 Negroes in such colleges.[94]

Public policy implications of the school segregation cases were of great concern. One writer believed that the refusal of the Court to overrule Plessy in Sweatt and McLaurin stemmed from the Court's interpretation of public policy. The Court apparently believed in 1950 that substantial improvement of the racial problem could be

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[92]Nadine N. Reed, "Implications of Recent Cases on Education of Minority Racial Groups," 3 University of Florida Law Review 358 (1950).

[93]64 Harvard Law Review 129 (1950-1951).

[94]Roche, p. 959.

achieved by stern insistence on equality while continued availability of "separate but equal" was a safeguard against over-rapid social change in areas where separation of the races was firmly established. In a word, the Court was sensitive to the relative intensity of discriminatory feeling. If this were true, the "equal protection of the laws" clause was limited by the force of local opinion.[95] This was the concept of the "living constitution" which, according to Justice Oliver Wendell Holmes, Jr., must recognize conflicting interests.[96] In line with this, it was the obligation of the Court to judge what the "social will" really was and whether the legislature had enacted legislation counter to the social compact. Therefore the Court in the school segregation cases should be influenced primarily by what the Fourteenth Amendment had come to mean currently, rather than by what the Court might have done with the question in 1868.[97]

By the fall of 1953, legal writers were speculating on possible decisions. The Court could: avoid passing on the segregation issue on the grounds of refusing to anticipate questions of constitutional law in advance of the necessity for doing so; proclaim "separate but equal"

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[95] Ransmeier, p. 259.

[96] Oliver W. Holmes, Jr., in Gompers v. United States, 233 U.S. 604 (1914) as reported in Ransmeier, p. 257.

[97] Lefler and Davis, p. 386.

still the law and accept the lower court finding of substantial equality in Kansas while ordering equalization in the other states; hold "separate but equal" still the law and require immediate admission of Negroes to the white schools on grounds of inferior Negro schools; intimate that "separate but equal" was diminshing in validity but conclude that the Court was not ready to condemn the doctrine as invalid because "presumably the Court looked forward to years of peeling layers off the onion and at last arriving at the place where nothing remains;" rule that segregation was allowable in some but not in all phases of education as for example in extracurricular activities; decide that whether segregation in a given case was constitutional was a question of fact for the trial courts; declare "separate but equal" invalid either permitting gradual correction, or giving detailed orders or ending segregation immediately. Interestingly enough these writers believed that whatever the Court's decision, it would almost surely seem to laymen more far-reaching than it really was, since the ensuing orders would be directly applicable only in the cases and to the parties actually before the Court.[98]

An exceptionally well-reasoned analysis of the racial segregation problem was made by Professor John P. Frank of the Yale School of Law. He wrote that the

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[98] Ibid., pp. 387-392.

Fourteenth Amendment was imprecise and unclear on segregation, in part because there had been no segregation in the South under slavery. Regardless of this ambiguity in the language of the Amendment, the Supreme Court portrayed shifting concepts of public policy which reflected the dominant social, moral, and political spirit of the times. Indeed, the Court had a way of accomodating the Constitution to what the country would tolerate. At the same time the Justices also made the symbols by which the country lived. Since 1925 there had been an increasing moral opposition to racial discrimination in the United States and the courts had gone along with it.

Frank believed that the judiciary was the least effective of the three branches of government in changing American life. Limitations on court action in the area of racial segregation were: fear of engendering violence against the Negro, which fear he felt was exaggerated; fear of precipitating unfortunate political consequences, e.g., delay by the Court during the 1952 elections; restraints of practicability, e.g., a Negro could be admitted to white law schools but could not be equipped with the requisite background; and theprobability of ending de jure but not de facto segregation. An example of the latter limitation was the fact that abolition of restrictive covenants in Indianapolis had almost no practical consequences. Judicial decisions were implemented only if there was continued pressure. The principal lesson of the school

segregation cases in his opinion was that progress was made extremely slowly.

Frank also had some practical suggestions for future legal strategy. First, a forthright attack on segregation, noting that judicial victories could not be won without asking for them. Second, the grade school cases should not be pushed until after the November, 1952, elections. Third, one aim of the attack on segregation should be to atomize it, to reduce it to its component parts and to secure decisions on each element. For example, he recommended separate and distinct master plans for transportation, recreation, and the school cases. Litigation was only one phase of the attack and by no means the most important one. By far the most important was the encouragement of a public attitude receptive to victory in these law suits. In the race relations field, law suits were won more by public acceptance of results than by actual judicial decree.[99]

What effect if any did this legal barrage have on the Court? In essence the Court was given a full dress rehearsal of the major arguments that ultimately appeared in the written briefs and hearings of the school segregation cases. These arguments covered the historical background of the Fourteenth Amendment, the attitudes of various sections of the country, fine points of the "equal

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[99]John P. Frank, "Can the Courts Erase the Color Line," 2 Buffalo Law Review 28 (Winter, 1952).

protection clause" and the requirements of equality. Certainly by decision time, the Court had been given an opportunity to reflect on all phases of the problem. One specific observation should be made. While the preponderance of legal opinion held that segregation would and should not continue, it also acknowledged that the "separate but equal" doctrine still stood prior to 1954, a small but formidable barrier.

These samples of the press, periodicals, Congressional Record, law journals, and statements by the President highlight the public opinion and human relations developments of the early 1950's. Clearly racism was becoming one of the prime sensitive areas of the American mood. There were strong forces working to eradicate discrimination and segregation. Equally true there were strong pockets of resistance to change. The contrast between the ideal and the real was only too painfully apparent to the Court, no less than to other branches of government.

CHAPTER X

CONCLUSION

This examination of the Brown decision provided an instructive view of the complexities of judicial decision-making. Primarily it pointed to the political nature of the Supreme Court and its sensitivity to the broad political and social currents of the times. To arrive at this conclusion it was necessary to search through a tangled thicket of legal, political, social, and historical factors, brushing aside some initially considered important. The search started logically in the four trial courts. The factual data presented there would certainly have supported an equalization decree by the Supreme Court. Glaring inequalities of the Negro schools in Virginia, South Carolina, and Delaware afforded the Court this opportunity, in line with the federal district court rulings in Virginia and South Carolina. On the other hand in Kansas, where the Negro and white school systems were substantially equal, the Supreme Court was directly faced with the issue of segregation per se.

Turning to the Fourteenth Amendment, the constitutional basis for the Negroes' suits, the Court correctly decided after examining an enormous amount of data that the evidence relating to the original purpose of the Amendment was inconclusive. That is, there was nothing to suggest

that the intent of the Amendment was to prohibit racial segregation in the public schools. Subsequont scholarly investigations supported this conclusion.

The legal history of racial discrimination cases revealed two important facts. First, there was undoubtedly a decisional trend beginning in 1937 when the Court began to reject racial segregation in a series of decisions involving transportation, housing contracts, jury duty, and employment. Furthermore, overcoming the voting barriers in a series of cases in the 1940's was one of the most significant steps forward for the Negroes. This may have contributed as much to the success of the blacks in the school segregation cases as anything else. Second, the key graduate and law school cases of 1948 and 1950, despite the decisional trend, proved as much of a hindrance as a help in discarding the "separate but equal" doctrine. Although the blacks relied heavily on the Sweatt and McLaurin decisions, Justices Frankfurter, Jackson, and Reed pointed out during oral argument that the Court had expressly refused to rule on segregation in those cases but had instead relied on the grounds of unequal educational facilities for the Negroes. It was apparent therefore to all concerned that there were several options open to the Court in 1954.

Other factors such as effectively written briefs or highly competent counsel, although important, were in no sense determinative of the final decision. Certainly the

outstanding trial lawyer appearing before the Supreme Court was John W. Davis, whose eloquence, learning, and wit nevertheless did not rule the day. What oral arguments did reveal, in addition to a re-emphasis of the legal points, were fundamental reservations on the part of Frankfurter, Jackson, and Reed about the basic constitutional questions involved in the cases. Although these Justices were personally committed to racial equality, they showed their deep concern over federal intrusion in the sphere of state policy-making for public education. Frankfurter pointedly asked where in the Constitution could be found a prohibition against racially segregated schools. Oral argument also graphically underscored the high emotional content of the cases. Despite their emphasis on law and facts, the emotional involvement of counsel was clearly evident, a factor impossible to ignore.

The uproar over the social science evidence on the other hand both during and subsequent to the cases was out of all proportion to its importance in the final decision. Even though social science experts were the major witnesses in all the lower trial courts, the relevance of this evidence was debatable. Understandably the blacks used every means at their disposal to convince the courts that segregation should go. Certainly most sensitive people were aware of the psychological pain inflicted by segregation. Various witnesses effectively testified to the relationship of segregation and learning. Among the most telling

testimony was that by the anthropologists which affirmed that there were no inherent differences in learning ability based on race. Admitting all this, however, is not tantamount to saying that the decision was based on social science data. Logic and the most persuasive authorities pointed to legal reasons as the basis of the decision--the unreasonableness of race as the basis of a legislative classification. Still this did not explain why the Court finally decided at this time that school segregation laws were no longer reasonable.

Investigation of the Justices also drew a blank. Although their personal background factors were undoubtedly important, there was no way these could be related to judicial philosophy. More important, their previously expressed constitutional views about the basic issues in the school segregation cases did not relate to the decision. Frankfurter, Jackson, Reed, and Vinson had at one time or another announced a strong commitment to the rules of precedent, judicial restraint, federal balance, and majority rights. Even Douglas and Black despite their liberal stand supported the view that most social, political, and economic policies were matters to be decided by the states. Nevertheless disregarding these previously announced positions, the Court in the Brown opinion rejected precedent and favored judicial power over legislative, national power over state authority, and minority rights over claims of a majority.

Since the above factors were not controlling, it became increasingly clear that the Court had respondod to its reading of the pressures of the period. This of course is not a new observation. The sensitivity of the Court to the spirit of the times had long been acknowledged by members of the Court itself. Furthermore, by the 1950's political scientists began to investigate the relationship of judicial attitudes to the major issues of the day. The difficulty however in "reading the times" was that the script was confused. The Court was confronted with conflicting values and options. Democratic ideals and reality collided. There was not only a widespread reaction to racism and a growing awareness of the non-white peoples in the underdeveloped countries, but there still existed in the United States a large segment of the population who clung to segregationist traditions. As in all constitutional questions the Court was forced to choose among competing principles. In the end it was the sensitivity of the Court to these underlying social forces rather than any one constitutional principle which explains the decision.

The irony of the choice was that even for those who most enthusiastically applauded the end of legally sanctioned school segregation, the fact that the judicial branch of the government was the one to make such policy detracted from the highly desirable objective. The slow pace of desegregation in the decades following the school segregation

cases, suggests that a major social revolution such as was attempted by the Brown decision might better have been effected by political and economic pressures rather than by the Supreme Court. Yet there was no gainsaying that the publicity surrounding the cases served to focus the national spotlight on one of the major social problems of the day. Perhaps the overwhelming need for moral leadership in the United States at this juncture in history more than any legal or constitutional argument justified overreaching the constitutional balance.

Brown et al. v. Board of Education
of Topeka et al.
347 U. S. 483
(Final decision on the merits)

Mr. Chief Justice Warren delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.[1]

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[1] In the Kansas case, Brown v. Board of Education, the plaintiffs are Negro children of elementary school age residing in Topeka. They brought this action in the United States District Court for the District of Kansas to enjoin enforcement of a Kansas statute which permits, but does not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students. Kan. Gen. Stat. § 72-1724 (1949). Pursuant to that authority, the Topeka Board of Education elected to establish segregated elementary schools. Other public schools in the community, however, are operated on a nonsegregated basis. The three-judge District Court, convened under 28 U.S.C.§§ 2281 and 2284, found that segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. 98 F. Supp. 797. The case is here on direct appeal under 28 U.S.C.§ 1253.

In the South Carolina case, Briggs v. Elliott, the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. They brought this action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. S.C. Const., Art. XI§7; S.C. Code§ 5377(1942). The three-judge District Court, convened under 28 U.S.C.§§ 2281 and 2284, denied the requested relief. The court found that the Negro schools were inferior to the white schools

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the

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and ordered the defendants to begin immediately to equalize the facilities. But the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 98 F. Supp. 529. This Court vacated the District Court's judgment and remanded the case for the purpose of obtaining the court's views on a report filed by the defendants concerning the progress made in the equalization program. 342 U.S. 350. On remand, the District Court found that substantial equality had been achieved except for buildings and that the defendants were proceeding to rectify this inequality as well. 103 F. Supp. 920. The case is again here on direct appeal under 28 U.S.C.§1253.

In the Virginia case, Davis v. County School Board, the plaintiffs are Negro children of high school age residing in Prince Edward County. They brought this action in the United States District Court for the Eastern District of Virginia to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Va. Const., §140; Va. Code §22-221 (1950). The three-judge District Court, convened under 28 U.S.C.§2281 and 2284, denied the requested relief. The court found the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forthwith to provide substantially equal curricula and transportation and to "proceed with all reasonable diligence and dispatch to remove" the inequality in physical plant. But, as in the South Carolina case, the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 103 F.Supp. 337. The case is here on direct appeal under 28 U.S.C.§1253.

In the Delaware case, Gebhart v. Belton, the plaintiffs are Negro children of both elementary and high school age residing in New Castle County. They brought this action in the Delaware Court of Chancery to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Del. Const., Art. X, § 2; Del. Rev. Code §2631 (1935). The Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children, on the ground that the Negro schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance involved in travel. 87 A. 2d 862. The Chancellor also found that segregation itself results in an inferior education for Negro children (see note 10, infra), but did not rest his decision on that

courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in Plessy v. Ferguson 163 U.S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities even though these facilities be separate. In the Delaware case, the Supreme court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws.

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ground. Id., at 865. The Chancellor's decree was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished. 91 A. 2d 137, 152. The defendants, contending only that the Delaware courts had erred in ordering the immediate admission of the Negro plaintiffs to the white schools, applied to this Court for certiorari. The writ was granted, 344 U.S. 891. The plaintiffs, who were successful below, did not submit a cross-petition.

Because of the obvious importance of the question presented, the Court took jurisdiction.[2] Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.[3]

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools,

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[2] 344 U.S. 1, 141, 891.

[3] 345 U.S. 972. The Attorney General of the United States participated both Terms as amicus curiae.

is the status of public education at that time.[4] In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term

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[4]For a general study of the development of public education prior to the Amendment, see Butts and Cremin, A History of Education in American Culture (1953), Pts. I, II; Cubberley, Public Education in the United States (1934ed.), cc. II-XII. School practices current at the time of the adoption of the Fourteenth Amendment are described in Butts and Cremin, supra, at 269-275. Cubberley, supra, at 288-339, 408-431; Knight, Public Education in the South (1922), cc. VIII, IX. See also H. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871). Although the demand for free public schools followed substantially the same pattern in both the North and the South the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South (e.g., the rural character of the South and the different regional attitudes toward state assistance) are well explained in Cubberley, supra, at 408-423. In the country as a whole, but particularly in the South, the War virtually stopped all progress in public education. Id., at 427-428. The low status of Negro education in all sections of the country, both before and immediately after the War, is described in Beale, A History of Freedom of Teaching in American Schools (1941), 112-132, 175-195. Compulsory school attendance laws were not generally adopted until after the

was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race.[5] The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of Plessy v. Ferguson, supra,

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ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. Cubberley, supra, at 563-565.

[5] Slaughter-House Cases, 16 Wall. 36, 67-72 (1873); Strauder v. West Virginia, 100 U.S. 303, 307-308 (1880): "It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is that but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by the law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,--the right to exemption from unfriendly legislation against them distinctively as colored, --exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."
See also Virginia v. Rives, 100 U.S. 313 318 (1880); Ex parte Virginia, 100 U.S. 339, 344-345 (1880).

involving not education but transportation.[6] American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education.[7] In Cumming v. County Board of Education, 175 U.S. 528, and Gong Lum v. Rice, 275 U.S. 78, the validity of the doctrine itself was not challenged.[8] In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. Missouri ex rel. Gaines v. Canada, 305 U.S. 337; Sipuel v. Oklahoma, 332 U.S. 631; Sweatt v. Painter, 339 U.S. 629; McLaurin v. Oklahoma State Regents, 339 U.S. 637. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in Sweatt v. Painter, supra, the Court expressly reserved decision on the question whether Plessy v. Ferguson should be held inapplicable to public education.

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[6]The doctrine apparently originated in Roberts v. City of Boston, 59 Mass. 198, 206 (1850), upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. Mass. Acts. 1855, c. 256. But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

[7]See also Berea College v. Kentucky, 211 U.S. 45 (1908).

[8]In the Cumming case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for Negro children. Similarly, in the Gong Lum case, the plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with Negro

In the instant cases, that question is directly presented. Here, unlike Sweatt v. Painter, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors.[9] Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function

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children and requiring him to attend a Negro school.

[9]In the Kansas case, the court below found substantial equality as to all such factors. 98 F. Supp. 797, 798. In the South Carolina case, the court below found that the defendants were proceeding "promptly and in good faith to comply with the court's decree." 103 F. Supp. 920,921. In the Virginia case, the court below noted that the equalization program was already "afoot and progressing" (103 F. Supp. 337,341); since then, we have been advised, in the Virginia Attorney General's brief on reargument, that the program has now been completed. In the Delaware case, the court below similarly noted that the state's equalization program was well under way. 91 A. 2d 137, 149.

of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In Sweatt v. Painter, supra, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In McLaurin v. Oklahoma State Regents, supra, the Court,

in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations; ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."10

Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is

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[10]A similar finding was made in the Delaware case: "I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated." 87 A. 2d 862,865.

amply supported by modern authority.[11] Any language in Plessy v. Ferguson, contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal has no place. Separate educational facilties are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.[12]

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was

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[11] K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44-48; Frazier, The Negro in the United States (1949), 674-681. And see generally Mydral, An American Dilemma (1944).

[12] See Bolling v. Sharpe, post, p. 497, concerning the Due Process Clause of the Fifth Amendment.

necessarily subordinated to the primary question-- the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term.[13] The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.[14]

It is so ordered.

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[13] "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 color distinctions?

"5. On the assumption on which questions 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?"

[14] See Rule 42, Revised Rules of this Court (effective July 1, 1954).

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