Justice Hugo Black and the Brown Decision: A Speculative Inquiry

Gerald T. Dunne
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"Yes, the unanimity of the Court in the Segregation decisions rightly gave the widest comfort.... Maybe one of these days the story will be known how it came to pass."1

I. THE AMERICAN DILEMMA

A. The New Chief Justice

"I made straitway for the chambers of Mr. Justice Black . . ." recalled Earl Warren concerning journey's end to the abrupt five-day transition from the governorship of California to the Chief Justiceship of the United States. "He welcomed me to the Court and offered his assistance in every possible way. He then took me to the chambers of the other members of the Court who were also most cordial in their welcome."2 By the time the round of introductions was over, it was almost noon and time for senior Associate Justice Black to administer the constitutional oath to his new chief in the customary private ceremony in the conference room. The members of the Court then filed into the courtroom itself where Warren again was sworn, this time to the judicial oath and once more at Black's hands.

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1. Letter from Felix Frankfurter to C.C. Burlingham, May 28, 1954, in Frankfurter Papers, Library of Congress [hereinafter cited as Frankfurter Papers]. Until that story is definitely told, perhaps in memoirs yet to be published, all accounts of the Brown decision must be in great measure suppositional. Certainly this one is, even though, in the interest of brevity, the indicative mood has been used throughout and qualifiers of caution—"alleged," "indicates," etc.—largely omitted. The author is grateful for the published work and private counsel of Professor S. Sidney Ulmer of the University of Kentucky and other obligations noted in the footnotes. (Reliance was also placed on C. Harbaugh, Lawyer's Lawyer 483-535 (1973).) Any errors, misjudgments and omissions, however, are the author's alone.
The day was October 5, 1953, as good as any to mark the onset of the great judicial revolution, although then little radicalism seemed suggested in the man whose name the revolutionary tribunal was to bear. Yet Warren's very entry onto the judicial scene was portentous: the new Chief Justice took his seat under recess appointment and without Senate confirmation as Dwight Eisenhower did what Franklin Roosevelt had dared only to threaten—forego advanced advice and consent and confront the returning Senate with the fait accompli of a sitting Justice engrossed in the work of the Court. As things were to turn out, Warren's exit would be on an equally unprecedented and provisional note—retirement subject to the appointment and qualification of a successor.

Beneath the seemingly uncomplicated and almost glacial calm exuded by the new Chief Justice lay an extraordinary combination of complexity and will galvanized by an abounding energy. And to this was to be coupled an intense sensitivity to the prestige of his Court and a profound sense of identification with it. Indeed, his initial astonishment at the small staff of the high judicial office—a secretary, a messenger, a brace of law clerks—compared with the two hundred aides who had done his bidding as Governor of California presaged something of that sensitivity and identification.

On October 5, 1953, however, the new Chief Justice's judicial attitudes and philosophy were just another of the unknowns in the towering issue facing the Court he had been called to head—the constitutionality of the "separate-but-equal" doctrine in public education. The preceding December there had been one inconclusive pass at arms before the Court in the first fundamental re-examination of the question in over half a century. A decade before, however, the issue had been both appropriately titled and massively analyzed in An American Dilemma, by Gunnar Myrdal, a member of the Swedish Academy and perhaps the world's foremost social scientist. A decade later a distinguished literary magazine would list the book as the second most important work to appear during its own institutional existence. (First was Lord Keynes's The General Theory of Employment, Interest and Money, and third was Hitler's Mein Kampf.) And in an arresting example of the interplay of the world of ideas and the world of reality, it was, unquestionably Warren's citation of the work in Brown, the landmark opinion of his revolutionary Court, that brought about the commerative acknowledgment in the journal of literary criticism.

The book's title summed up the contradiction between the American ideal and American practice; its theme focused on a critical pressure point of that contradiction—the legal infrastructure in the southern and border states "separating the two groups in schools, on railroad cars and on street cars, in hotels and restaurants, in parks and playgrounds, in theaters and public meeting places . . . with the explicit purpose of diminishing, as

far as was practicable and possible, the social contacts between whites and Negroes. . . ."^4

Remarkably enough, Myrdal had had a personal encounter with the operation of such separate-but-equal legislation; perhaps it underlay in part his observation that "by traveling around the country, in particular in the South, to see things with my own eyes, I was shocked and scared to the bones by all the evils I saw."^6 He was present in Birmingham at the first meeting of the Southern Conference for Human Welfare when Police Commissioner Theophilus Eugene ("Bull") Connor—later world famous for his pronouncement, "We're not going to have white folks and nigras segregating together in this man's town"^6—imposed the local segregation ordinance upon the gathering. Myrdal made no reference to the incident in the book nor did he mention the newly-appointed Justice Black's speech before the conference accepting its first Thomas Jefferson award.^7 He did, however, single out Black as one of the most prominent Southern liberals and noted that it seemed "easier for a Southern liberal to win a seat in Congress than to be really influential at home."^8

B. The Senior Associate

Black's political career strikingly epitomized Myrdal's epigram. Paradoxically, Black could filibuster against an anti-lynching bill as an unconstitutional extension of federal police power and in the very act extol the plenary reach of the commerce clause. ("[E]conomically, in trade and commerce, this Nation is one, indivisible and inseparable . . . ").^9 Alone of all the Senators, he could denounce Herbert Hoover's use of force to oust from Washington the protesting veterans of the Bonus Army, and, at the same time, tell some Vassar-Wellesley protesters against the Scottsboro^10 case to give their sympathies to crime in the northern cities. As Chairman of the Senate Committee on Education and Labor he could extol the great transforming power of education while declining to give the minority school systems any legal assurance of a pro rata share of federal assistance.

And yet a fellow American, in an infinitely better position to perceive and, indeed, to regret the paradox than Gunnar Myrdal ever was, struck the balance on Black and found it good. "[H]e seemed to me," recollected Walter White, then Executive Secretary of the National Association for the Advancement of Colored People, "to be the advance guard of the new

^4 G. MYRDAL, AN AMERICAN DILEMMA 579 (1944) [hereinafter cited as MYRDAL]. Except as indicated in the following footnote, the citation is to the original edition.
^5 G. MYRDAL, AN AMERICAN DILEMMA xxv (Anniversary Ed. 1962).
^6 C. MORGAN, A TIME TO SPEAK 48 (1964).
^7 See T. KRUGER, AND PROMISES TO KEEP 28 (1967); N.Y. Times, Nov. 24, 1938, at 33; Id. Nov. 11, 1938, at 19.
^8 MYRDAL at 469.
South we dreamed of and hoped for . . . ."\textsuperscript{11} The evening of Black's nomination to the Supreme Court saw a remarkable and earnest colloquy, as the head of the nation's then most militant civil rights organization warned the senior Senator from Alabama of "being on the spot" when any issue involving a minority came before the Supreme Court. "He told me frankly and soberly," White wrote a friend, "that he realized this and that he hoped he would be able to measure up to what I and others of his friends expected of him."\textsuperscript{12}

Black did measure up, although the start was faltering. He disqualified himself in the third Scottsboro\textsuperscript{13} case at about the time his Senate successor involved him in another filibuster against anti-lynching by reading his earlier speech into the Congressional Record. In fact, during that debate, Senator Tom Connally of Texas brandished a copy of the bill and warned his colleagues that there was a man on the Supreme Court who was prepared to hold it unconstitutional. But on Lincoln's birthday of 1940 Black cleared up all doubts as he spoke for a unanimous court in Chambers v. Florida.\textsuperscript{14} striking down a Florida death sentence imposed on four black tenant farmers accused of murder: "Under our constitutional system, courts stand against winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."\textsuperscript{15}

Chambers was a difficult opinion for Black. The case involved going against two principles he held particularly dear. One was overturning a jury verdict; in Chambers the jury had found that confessions produced by nighttime interrogation incommunicado were nonetheless voluntary. Another, strongly underscored in his anti-lynching filibuster, was an antipathy for using the 14th amendment as a vehicle for federal interference with state judicial process. Indeed, Black had voted against taking Chambers

\textsuperscript{11} W. White, A Man Called White 177 (1948). In the only interview given by Black in the interval between the disclosure of his Klan membership and his famous radio address he observed "that the secretary of the National Association for the Advancement of Colored People . . . had commended his appointment." Baltimore Sun, Sept. 16, 1937, at ______. Under intense pressure, White stuck by his guns when swamped by newspapers for counter-comment: "It seemed wisest to answer briefly that my firsthand acquaintance . . . convinced me that Mr. Black would prove to be one of the most valued and able members of the Court." W. White, supra at 179.

\textsuperscript{12} Letter from Walter White to Max Lowenthal, Aug. 20, 1937, Copy in Frankfurter Papers.

\textsuperscript{13} Patterson v. State, 234 Ala. 342, 175 So. 371, cert. denied, 302 U.S. 738 (1937).

\textsuperscript{14} 309 U.S. 227 (1940).

\textsuperscript{15} Id. at 241.
in the first place, and the assignment to write the opinion placed him in the sharpest of dilemmas. "But the evidence of oppression and injustice would not down. The opinion Black wrote, after great internal struggles, was a turning point . . . [foreshadowing] much of what was to become his mature [judicial] philosophy."

C. The Evolving Court

That maturing judicial philosophy placed Black in the forefront of the slow, case-by-case judicial resuscitation of the constitutional rights of the black minority—fair trials, education, suffrage—a process duly noted and commended in An American Dilemma. Myrdal, however, also indicated that these efforts would be peripheral until the court laid the axe to the root by reversing the judicial veto which its Civil Rights decision of 1883 had laid on Congressional legislation in the area of public accommodation. Curiously, however, for all the attention the book gave segregation legislation, it omitted any mention whatsoever of that legislation's constitutional underpinning—the 1896 decision of the Supreme Court in Plessy v. Ferguson. It was there, over the spirited, sole dissent of the first Justice Harlan ("Our Constitution is color blind . . ."). that the Court upheld a Louisiana statute requiring all railroads carrying passengers in that state to provide equal but separate cars for the white and colored races.

The issue of separate-but-equal went back at least to 1849 when Roberts v. City of Boston held that a legal command for equality could be squared with a legal command of enforced separation. Although Roberts had no constitutional force in suggesting the content and meaning of the 14th amendment, its spirit was evident in the amendment's very origin. For the 39th Congress, which had framed the amendment, also had segregated galleries. ("Why is [it] that [you have] separate places for the races even in your own Chambers?" Maryland's Senator Reverdy Johnson asked his colleagues. "Why are they not put together?") But Congress did not put the races together, either in its galleries or in the educational institutions under its direct jurisdiction. Particularly its action in continuing a segregated school system in the District of Columbia seemed decisive to the Court that decided Plessy v. Ferguson; the Court did not so much approve the Louisiana segregation statute, but instead confessed an inability to say

17. Civil Rights Cases, 109 U.S. 3 (1883). They declared the first two sections of the Civil Rights Act of 1875 unconstitutional as applied to the states. The Act had made it unlawful to discriminate based on race or color in public places. The Court ruled Congress did not have the authority to pass such a law.
18. 163 U.S. 537 (1896).
19. Id. at 559.
that enforced segregation on a railroad train was "unreasonable or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia . . . ." 22

Yet, the true constitutional infirmity of separate-but-equal may have been that the 39th Congress had ordained the impossible. Myrdal insisted that segregation could work economically only by systematic deprivation of the weaker group because the duplication required for true equality would be economically ruinous. Certainly the cumulative evidence of the end product bore out his words. "The great difference in the equality of service for the two groups in the segregated set-ups of transportation and education is merely the most obvious example of how segregation is an excuse for discrimination." 23 But this truth had a double edge. The accomplishment of the long-run strategy of bringing down the spirit of Plessy v. Ferguson depended tactically on a Draconic insistence on its letter. In the tactic, as Myrdal noted, lay the reforming group's broadest common ground, most obvious legal appeal, and mode of exposing the inherent contradiction of the formula.

At the beginning of the 1950's a trio of cases involving "the segregated set-ups of transportation and education" afforded a spectacularly triumphant application of both the tactic and the strategy. Tactically, the demand for absolute equality was repeated; strategically, that demand was expanded beyond quantitative to qualitative parity. In McLaurin v. Regents, 24 a black graduate student at the University of Oklahoma was accorded the use of the same classrooms, library, and cafeteria used by white students, but was confined to placarded ("Reserved for Colored") desks and tables. The Supreme Court, holding the separation unconstitutional, found that this was not an equal educational opportunity because it denied some of the intangible benefits of education that derive from association with fellow students. 25 Matching this insistence on the "intangibles" of full parity—an essentially 20th century insight—the Court in Henderson v. United States 26 struck down as an impermissible burden on national commerce (under the Interstate Commerce Act) 27 the designation by the Southern Railroad of a separate, curtained table for Negroes in its dining cars, the unavailability of which had caused the petitioner to go hungry on a trip from Washington to Birmingham. In Sweatt v. Painter 28 disparity was exposed by the mere comparison of a concededly separate and hastily established law school at the black Texas State University with the prestigious white counterpart of the University of Texas. More importantly, in Sweatt the Court's Plessy v. Ferguson measure became calibrated, not only to the measures of faculty,

22. 163 U.S. at 551.
23. MYRDAL at 515.
25. Id. at 641.
degrees, library, and law review, but also by "qualities which are incapable of objective measurement but which make for greatness in a law school . . . reputation of the faculty, experience of the administration, position and influence of the alumni . . . "

Under the field marshallship of Thurgood Marshall and the Howard Law faculty, the petitioners in Sweatt had indicated the ultimate overthrow of the quantitative by the qualitative in suggesting Plessy be re-examined on the basis of the perceptions of contemporary culture. The eventual result of this probe was, of course, obvious—that the psychological effect of segregation on the segregated necessarily flawed the accommodation or service involved and hence prevented equality of use and enjoyment.

Judicial response to these unanswered nuances of the trilogy—particularly, the constitutional consequences of the psychological reaction of the segregated minority and how that reaction might be ascertained—was not so much denied as deferred. The question was unavoidably posed in a quintet of new controversies—from Kansas, South Carolina, Virginia, Delaware and the District of Columbia—moving inexorably up the judicial ladder. Moreover, the challenge was asserted, not to graduate or professional training, but to elementary education itself. It thereby presented the greatest potential in both hazard and hope. On one hand, the public temper which saw no harm in veiling the face of a fellow passenger in a diner (whatever his reaction might be) could hardly be expected to endorse the prolonged, compulsory and intimate association of small children. Yet balanced against this attitude was the American vision that saw education as the most fundamental transformation of all and which, appropriately applied, could sweep away all other discriminations before it.

D. The Hazards of History

The Supreme Court had not been immune from the burning national issue. It had been cropping up in the Court's own institutional life in one way or another over the past decade and a half. In 1939, because of segregated seating arrangements, what was to have been a private recital of Marian Anderson in Constitution Hall became a public concert at Lincoln Memorial wherein invitations to the Supreme Court produced one

29. Id. at 634.
acceptance. In 1947, a household controversy—whether the black Supreme Court messengers should attend the law clerks' and secretaries' Christmas party—took almost an hour's debate at the weekly judicial conference before being settled by an affirmative 6-2 vote.\textsuperscript{35} In 1950, the stark constitutional issue was presented without any pretense of \textit{Plessy v. Ferguson} trappings when Glen Taylor, the Progressive vice-presidential candidate, unsuccessfully sought review of his Birmingham conviction for using the colored instead of the white door to enter a church\textsuperscript{36} ("There's not enough room in town for Bull and the Commies.")\textsuperscript{37} The Supreme Court denied certiorari.

The Anderson concert, the Christmas party controversy, and the \textit{Taylor} case had all occurred prior to Warren's accession to the Court, and accordingly shed no light on where he might stand on the basic issue. Indeed, the very speculation as to where he might stand underscored the haphazardness of the constitutional process. A number of other men had been mentioned for appointment as Chief Justice following the death of Fred Vinson—John Foster Dulles, John J. McCloy, Robert A. Taft—any of whose views might have entailed a different sequence of events. And certainly that sequence of events might have been decidedly different, for example, had James F. Byrnes not broken with Harry Truman, but instead sought and obtained the Chief Justiceship on the death of Harlan Stone in 1946.\textsuperscript{28}

Earl Warren's record as governor of California—innovative, activist, progressive—had already been written. Yet there was also a thread running through that record that afforded food for thought. Foremost was his vigorous advocacy of the Nisei relocations before the fact and his vigorous defense of that action afterward. More recently, there had been his firm

\textsuperscript{35} See Ulmer, Bricolage and Assorted Thoughts on Working in the Papers of Supreme Court Justices, 35 J. OF POL. 286, 307 nn.53 & 54 (1973). The demand to include the black messengers had been made by the law clerks, and the secretaries withdrew from the planning. Possibly the incident represents one of the first instances of "Ombudsmen from the elite law schools [joining] forces with the Negro and white lower classes ..." Riesman, In Memory of Harold W. Solomon: Comments on Southern California's Flyer in Legal Education, 41 S. Cal. L. Rev. 506, 512 n.6 (1968). It is interesting, in view of the comment of one of the justices at the conference ("[i]f . . . we are going to be fair about this business we know damn well that our hostesses, our wives don't have our servants, and our messengers, as guests at parties.") Ulmer, supra at 308 n.54), that Justice Black's black messenger and cook were honored guests at the White House reception honoring the thirtieth anniversary of his appointment to the Court. LADY BIRD JOHNSON, WHITE HOUSE DIARY 513 (1967).

\textsuperscript{36} Taylor v. Birmingham, 35 Ala. App. 183, 45 So. 2d 53, cert. denied, 253 Ala. 369, 45 So. 2d 60, cert. denied, 340 U.S. 832 (1950).


\textsuperscript{38} Byrnes's attitude in 1953 was still relevant to the great issue at hand. As incumbent governor of South Carolina he was desperately striving to make his school system equal as well as separate. But he was threatening to abolish it entirely if the separation could not be maintained. However, there are indications that Byrnes's attitude might have been different in the absence of political necessity.
stand for loyalty oaths for the University of California faculty, a matter which reportedly had been decisive in President Eisenhower’s choice. In fact, just some months before appointment and while Warren was still being mentioned as a possible Republican nominee for the Presidency, an article in the *The New Republic* looked at the record with considerable apprehension. In addition to the Nisei relocations and the loyalty oaths, the author found other disquieting items—opposition to both a parole for Tom Mooney and a California court appointment for Max Radin, an asserted advocacy of migrant farm worker disenfranchisement but of agricultural super-representation otherwise, and less-than-successful efforts to secure fair employment legislation. The interrogative caption of the article summed it all up: “How Liberal Is Warren?”

**E. The Limits of Politics**

Relevant as that question was in a political context, it took on a special significance in a judicial one. In grappling with its foremost dilemma the American political process seemed to have reached the limit of its effectiveness. Notwithstanding the triumphalist prose of *The New Republic* hailing the 1950 trilogy of *Sweatt-McLaurin-Henderson* as “Jim Crow in Handcuffs,” the more obvious fact seemed to be that the swart bird had but lost some tailfeathers. To be sure an occasional black passenger might dine in dignity; nonetheless, the appropriate counterpart of *Henderson* might be glimpsed in the Freedom Train episodes of just a short time before. Here the issue was not dining but something more fundamental, and the recurrent controversies over whether segregation would be imposed on lines of citizens waiting to view the organic documents of American liberty provoked a bitter poem:

**Can a coal-black man drive the Freedom Train?**

**Or am I just a porter on the Freedom Train?**

The political process had not failed for want of effort. As early as 1946 Truman had taken a firm stand for equal employment opportunity. But despite an upset electoral victory two years later on a platform that included a strong civil rights plank, despite an eloquent and landmark remonstrance against “imposing a caste system on a minority group” by a prestigious

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39. Mooney was a labor organizer who had been sentenced to death for the murder of ten persons killed by a bomb in a parade in San Francisco in 1916. Warren was California’s Attorney General at the time. Mooney’s sentence was subsequently commuted to life. L. Huston, *Pathway to Judgment: A Study of Earl Warren* 62-63 (1966).

40. Radin was a professor at the University of California Law School and was appointed to the California Supreme Court in 1940. Said to be a distinguished liberal and a man with a passion for justice, his confirmation was opposed by Warren, and his name was subsequently withdrawn. L. Katcher, *Earl Warren: A Political Biography* 155-56 (1967).

41. *The New Republic*, June 23, 1952, at 1; *See* article id. at 11.

42. *Id.*, June 12, 1950, at 5.

43. A memory from earlier days.

presidential commission, despite majorities in both houses of Congress, Harry Truman's Fair Deal proposals all came to naught. Superficially, of course, there were any number of things to be blamed, and those ranged from congressional structure—seniority, the committee system, the Senate filibuster—to the Truman administration's effort to restore party harmony after the bitter 1948 campaign. Deep down, perhaps, there was another reason.

This reason, the most subtle corrosive of all, said Myrdal, was the vague and optimistic assumption that in time things would somehow work themselves out. But all the evidence suggested that things were not working themselves out, particularly in the area of congressional action, which Myrdal saw as the indispensable element of change. The very abortiveness of legislative proceedings only underscored how legislative developments increasingly lagged judicial ones. The mere reporting from a House committee to the floor of a doomed anti-lynching bill—the very type Calvin Coolidge had recommended at the beginning of Hugo Black's first Senate term—was accounted a signal victory. Mere House passage of an anti-poll tax and fair employment measure, both defeated by Senate filibuster, was accounted an even greater triumph. By the time Harry Truman's second term was over, Professor Edmund Cahn summed up reformist sentiment with the bleak observation that the "legislative process that had appeared so promising in the middle forties seemed to have come to a definite and protracted halt."45

If anything, this observation understated the case. By the time of Dwight Eisenhower's inauguration the process would have been better described in terms of total cessation. Nor could much hope be seen in the modest promises of the new President to do what he could to end segregation in the District of Columbia and throughout the federal government. These promises contrasted strikingly with the soaring but unaccomplished proposals of his predecessor, not only in their distrust of centralized power but in their unambitious estimate of what might be done.

Within a few months of his inauguration the new President received assistance in redeeming his pledge from a quarter which no one, not even Gunnar Myrdal, had suggested as an apparatus of political and social change. On the very day the Supreme Court decided to set Linda Brown's case down for reargument it also ended forthwith theatre and restaurant segregation in the nation's capitol.46 The mode was resuscitation of an 1873 District of Columbia statute that most parties in interest thought had been repealed long before. The swift and summary nature of the change—in the sharpest contrast to congressional donothingism—and the prompt public acquiescence suggested that Congress, not the Court, was out of touch with the the dominant public mood.

A further indication of the merits of decisive action and the supportive popular response was suggested by the progress of military desegregation, initiated under a Truman executive order. Hence, even though the first

session of the new 83rd Congress came and went without substantial legislative action on America's foremost problem, and even though the Republicans in power seemed doubly disposed to emulate the inaction of the Democrats, as the Supreme Court approached the 1953-54 Term and its new Chief Justice other signs of the times could be seen as justifying an editorial headline in *The New Republic*: "Exit Softly, Jim Crow."  

II. *Brown v. Board: The Record and Beyond*  

A. *Brown I*

Present and set down for argument at that term was Linda Brown's case out of Topeka, Kansas. It had been there since June 7, 1952, when the Court agreed to hear it in a deceptively colorless per curiam. Some of that deception fell away the following October when the first advance sheets for the new term suggested the national dimensions of the issue and consolidation with counterpart South Carolina, Delaware, Virginia, and District of Columbia litigation was ordered. First argument was accordingly scheduled for December, and the Court's temper with respect to it was suggested by another entry in the reports shortly before Thanksgiving—a tart judicial inquiry of November 24, 1952, which observed that the Kansas Attorney General had neither appealed nor filed a brief and asked if such inaction was meant as a concession of the unconstitutionality of the state segregation statute. Another element was added shortly after the election in the belated appearance of the Department of Justice on behalf of the petitioners.

At last came the display of advocacy on December 9, 10, and 11, 1952, wherein the highspot was the confrontation pitting the great John W. Davis, still at the mastery of his powers at 79, and 44-year-old Thurgood Marshall of the NAACP. But, although the encounter provided great advocacy, it afforded little argument for the antagonists never seemed to be at issue. The two lines of address resembled nothing quite so much as the 19th and 20th centuries passing each other on parallel but never-meeting planes. Davis pleaded eloquently against moving the landmark which the fathers had set. ("Somewhere, sometime to every principle comes a moment of repose where it has been so long often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance.") Marshall, however, was not to be outdone in either eloquence or pragmatism. ("[E]ven if [segregation] was necessary in 1895, it is not necessary now because people have grown up and understand each other.")

52. *Id.* at 3072.

The Court fired question after question at Marshall. Justice Frankfurter, in particular, challenged his sociology. . . . Is it "irrelevant" to recognize that some states have "a vast congregation of Negro popula-
Much the same void was exhibited in briefs. Here, as in oral argument, a second thrust of the petitioners' case lay in an exhibit evaluating, in the light of modern knowledge, the consequences of racial segregation signed by 32 sociologists, anthropologists, psychologists and psychiatrists.

The 1952-53 Term closed without an answer to either thesis. Instead, the cases were set down for reargument on a remarkable sequence of four interlacing questions largely turning on cause rather than consequence: (1) whether the 14th amendment had actually abolished segregation of its own force, (2) whether the "intentions of the framers" contemplated some future Court or Congress doing so, (3) whether such abolition was within the ambit of the federal judicial power, and (4) if the latter development were to be the case, whether such power might be best exercised (a) by admitting petitioners forthwith to schools of their choices, (b) by reorganization of school districts, (c) by the appointment of special masters to oversee the cases, or (d) by returning the cases to "courts of first instance."²⁵³

The convoluted questions suggested a few answers. One was that the issue might be around for a long time, and that the current opinion of the Court was merely Brown I. More substantive was the implication that the Court was willing to strip away almost a century of encrusted overlay and re-examine the original understanding of the 14th amendment. Beyond this was the real thrust. Justice Frankfurter, in a somewhat malaprop metaphorical reference to the array of questions, cautioned the Court not to "tip the mitt"²⁵⁴ by looking in the opposite directions. The mitt had indeed been tipped, however, as Thurgood Marshall's comment indicated: "A nothin'-to-nothin' score . . . means we win the ball game."²⁵⁵

Obviously, things were not quite that simple, for the historical quest for the meaning of the 14th amendment might not produce a standoff score, or as Marshall later put the hazard, the "golden gate" might well turn out to be a "booby trap with a bomb in it."²⁵⁶ The difficulty was the questionable capability of the Supreme Court of the 1950's, far more remote from the 39th Congress than the Plessy Court, to nonetheless more clearly perceive that body's intention. Nevertheless, Marshall plunged into the terra incognita, and where a year earlier he had brigaded the views of social scientists, he now called upon historians. In fact, he held a veritable seminar on the subject in New York in September, 1953 ("the smartest move I ever made in

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²⁵³ W. Harbaugh, Lawyer's Lawyer 505 (1973).
²⁵⁷ 56. Id. at 260.
my life”), wherein the muse of history became the queen of law. His new “historical” brief ran to 235 pages. The South Carolina reply covered 90 with 145 more of appendix. The Department of Justice brief covered 188 with twice that amount in its appendix.

B. Brown II

As had happened a year earlier, the Brown arguments were once more postponed from October to December. The reason was not procedural consolidation, however, but the need for the new Chief of Justice to acquaint himself with the massive and formidable briefs. Hence, it was almost a year to the day when the encounter was resumed, and from 1:05 p.m. on December 7 to 2:42 p.m. on December 9 a magistral burst of advocacy—again featuring a Davis-Marshall exchange—reviewed the intentions of the 39th Congress. This time another element constantly intruded: apprehension and concern with public response, acquiescence, and obedience.

The dominance of the latter issue, and the subordination of the former was apparent when the new Chief Justice read the opinion of a unanimous Court at 12:52 p.m. on May 17, 1954. If the intricately filigreed questions of Brown I suggested Justice Frankfurter, Brown II—lumbering, bearlike, and overpowering—bore the stamp of Earl Warren. All the subtle argument and scholarly research as to what the 39th Congress had on its mind was dismissed with one word—“inconclusive”—and Thurgood Marshall had his zero-to-zero ballgame with a scorer’s note in the observation that the Court could not “turn the clock back to 1868 when the 14th amendment was adopted or even to 1896 when Plessy v. Ferguson was written.”

The discard of the past provided the key to the present. After a discussion of the growing place of education in American life and government as well as its impact on the democratic process, and, perhaps most critical, of the traumatic psychological impact of segregation on the segregated minority, the Chief Justice came to the key sentence in which he distinguished (but did not overrule) Plessy from the current controversy: “We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”

Given the categorically absolute tone of the decision (“We have now announced that such segregation is a violation of equal protection of the laws.”), the real surprise was that it did not admit a single child to a single

57. Id.
58. See D. Berman, It Is So Ordered: The Supreme Court Rules on School Segregation 83 n.8 (1966).
60. Id. at 489.
61. Id. at 492.
62. Id. at 495.
63. Id. at 495.

The sentence was the most famous of Brown II. There were some others. Almost as celebrated was Footnote 11 (Id. at 494) which dealt with the psychological consequences of segregation, which began by citing Dr. Kenneth Clark’s Effect of Prejudice and Discrimination on Personality Development and closed with “see generally Myrdal, An American Dilemma (1944).”
school. Brown II called for a Brown III argument on the fourth of the arabesqued questions, that concerning remedy, where enlightenment had been requested the preceding year.

A separate companion opinion was necessary to dispose of the District of Columbia issue involving as it did national rather than state power. It also involved the difficulty that the 5th amendment, on which the Washington petitioner's appeal was pitched, unlike the 14th, contains no reference to "equal protection of the laws". This meant that if relief were to be forthcoming at all it was to be secured under the nebulous bonds of "due process."

The difficulty did not detain the Chief Justice for a minute. Citing among other authorities United States v. Korematsu, which had validated the relocation camp incarceration of almost one hundred thousand American citizens and their relatives solely on the basis of race, the companion opinion reached its conclusion on a manifest and common sense proposition: that if the Constitution outlawed segregation in education by the states, it was "unthinkable" that it imposed a lesser duty on the federal government. The logic had an irony transcending Korematsu. A century earlier in Dred Scott v. Sandford another Chief Justice had used the same judicial reasoning—the logic of unthinkable ("No one . . . would think a moment . . .") to use the selfsame words of the fifth amendment as a mode of extending slavery throughout the American territories.

C. Brown III

The issue of remedy came on almost a year later and almost as an anticlimax. Once more scheduled argument had to be deferred, this time in consequence of the death of Justice Jackson in early October of 1954 and the subsequent Senate delay—in a sense, the first fruits of resistance to Brown—until the following March in confirming the second Justice Harlan as his successor. But on May 31, 1955, Chief Justice Warren once more spoke for a unanimous bench in Brown III and sent the cases back to the lower courts with a phrase that would be long remembered: that racial segregation in the public schools must be ended, not necessarily overnight, but "with all deliberate speed."

The phrase itself became almost as much the subject for debate and reflection as the key decision, for notwithstanding the Chief Justice's brave rhetoric that "constitutional principles cannot be allowed to yield simply because of disagreement," the plain fact was that constitutional principles

65. 323 U.S. 214 (1944).
68. Id. at 40.
70. Id. at 301.
71. Id. at 300.
were being allowed to yield precisely because of that reason. At the time, however, the abstract outlawry of educational segregation provoked the larger commentary, or perhaps noncommentary, of which President Eisenhower's was the most conspicuous.

Other response was neither covert nor restrained and Warren's efforts and particularly footnote 11 of Brown II drew a variety of fire. Professor Edmond Cahn wrathfully denounced the citation of sociological data. ("I would not have the constitutional rights of the Negroes—or of other Americans—rest on any such flimsy foundations as some of the scientific demonstrations in these records.")72 The Chief Justice of Florida was likewise scandalized, albeit from an opposite point of view by the citation of "the Scandinavian sociologist," Gunnar Myrdal. ("What he knew about constitutional law we are not told nor have we been able to learn.")73

Nevertheless, the spring of 1954, the spring of Brown II, was a springtime of hope with a euphoria almost impossible to remember in the light of subsequent events. Down in Atlanta at the NAACP convention, Channing Tobias greeted the decision, not in the accents of victory, but of moderation, and promised his organization would work for its mandate in a spirit of "give and take."74 In Washington, Senator Allen Ellender of Louisiana asserted that white Southerners were "law-abiding citizens and the Supreme Court's decision is the law of our land."75 Felix Frankfurter captured something of the spirit of the spring of 1954 when he was able to write an old friend:

Yes, the unanimity of the Court in the Segregation decisions rightly gave the widest comfort. Particularly heartening is the predominantly moderate tone of the southern press and with a few conspicuous exceptions, even the southern public men are more sober than I should have expected them to be. Maybe one of these days the story will be known how it came to pass.76

D. Beyond the Record

Frankfurter made another observation in his letter, and it touched the very heart of what had transpired in Brown: "One does not have to be a soothsayer to know that the new Chief Justice is one person and his predecessor another."77 The passage cryptically summarized the sequence of events which brought a divided Court to the unanimous opinion of May 17, 1954.78

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73. Id. at 614.
75. Id. at 81.
76. Letter from Felix Frankfurter to C.C. Burlingham, supra note 1.
77. Id.
78. To repeat: This article, and particularly the part which follows, is written as a factual account. It is considerably less than that, but considerations of syntactical economy have prompted me to substitute the foregoing caveat for an
Just two short years earlier, on June 9, 1952, the Justices by a seven to one margin voted to hear the case.\textsuperscript{79} Justice Jackson cast the negative vote; Chief Justice Vinson's vote was not recorded. The real divisions, however, appeared at the conference of December 13, 1952, following the first round of argument. Here a remarkably diverse quartet favoring reversal of \textit{Plessy}—Black, Douglas, Minton, and Burton—confronted a doubtful Chief Justice Vinson and the varyingly doubtful Reed, Frankfurter, Jackson, and Clark. As significant as the fact of division was its character.

This doubt was epitomized by the Chief Justice's perplexity as to the action of the 39th Congress in dealing with the public schools under its jurisdiction. But Vinson also indicated that the Court might have to act if Congress did not, and the just concluded election of the 83rd Congress in the first Eisenhower landslide obviously heightened the chances of the latter contingency coming to pass. At the moment he seemed to favor continuing the euthanasia approach of the past wherein the Court hastened the demise of \textit{Plessy} by affirming its letter and denying its spirit.\textsuperscript{80}

But there seemed another element present: an obviously increasing concern over judicial legislation in the area of civil rights. The Chief Justice's questioning of petitioner's counsel during oral argument had been seen as less than sympathetic. More suggestive was his forthcoming dissent from \textit{Barrows v. Jackson},\textsuperscript{81} the last official word on civil rights. There he was to break what had been the Court's long unanimity and disagree with the veto which \textit{Barrows} placed on state court enforcement of suits by whites against whites for sales of real estate to blacks in violation of racially restrictive covenants.

\textbf{E. The Duel Rejoined}

Something of the same apprehension beset Felix Frankfurter. The historical intentions and the original understandings of the 39th Congress as expressed in the 14th amendment had been on his mind a long, long time. "For nearly 20 years," he wrote a colleague back in 1947, "I was at work on what was to be as complete and as scholarly a book on the 14th Amendment as I could make it."\textsuperscript{82} From that study he had concluded that the states were under no constitutional ban insofar as legally imposed segregation was concerned. The Federal government and the District of Columbia, however, were another thing again. Here he saw the far more obscure and latitudinous due process clause of the 5th amendment as a readily available source of judicial power.

\begin{footnotes}
\footnotetext{79}{Brown \textit{v.} Board of Educ., 72 S. Ct. 1070 (1952).}
\footnotetext{80}{See text accompanying notes 22-26 supra.}
\footnotetext{81}{346 U.S. 249 (1953).}
\footnotetext{82}{Memorandum to Hugo Black, Nov. 13, 1943, Frankfurter Papers.}
\end{footnotes}
Almost predictably, Hugo Black disagreed. Black's antipathy toward judicial resort to due process as a super-legislative veto authority had been established as far back as his first Senate term. But that was not at issue; what was in dispute was the meaning and content of the 14th amendment vis-a-vis state power. Here Black had made his own independent study, best exemplified in the lengthy appendix attached to his dissent in Adamson v. California, 83 but manifested also in one of the dissents at the beginning of his judicial service. 84 That study had been undertaken in the context of Black's long-standing duel with Felix Frankfurter over whether the 14th amendment incorporated the Bill of Rights. It posed special complications for the issue in Brown. The very Congressman Bingham whom Black had hailed in his Adamson appendix as "the James Madison of the 14th Amendment" 85 had insisted that the Civil Rights Act of 1866 be amended to eliminate prohibition of state segregation laws. To be sure, the inference was as long as it was broad, for the evidence also suggested that Bingham felt this result should be effected by amendment rather than statute.

Black preferred to take his stand with the first Justice Harlan that segregation as a constitutional issue was ruled essentially by the 13th, 14th and 15th amendments ensemble, rather than by the legislative history of any one. The consequence was simple: that slavery with all its incidents, consequences, and secondary pathology—including separation by reason of color—lay under the continuing ban of the organic law.

The specific letter of the 14th amendment was also available to support his view and what was perhaps his line of argument at the December conference, reconstructed from subsequent expression. Thirteen years after Brown II, Justice Douglas gave one view of what that case decided—that "notions of what constitutes equal treatment for the purposes of the equal protection clause do change." 86 It drew a bristling dissent from his longtime coadjutor: "I do not vote to hold segregation in the public schools unconstitutional on any such theory. I thought when Brown was written and I think now, that Mr. Justice Harlan was correct in 1896 when he dissented from Plessy v. Ferguson. 87 And still two years later in a television program Black elaborated his defense of an unchanging equal protection clause:

My view was, we had a simple question: does that give the colored people of the nation equal protection of the law.... Well, I lived in the South, practically until I came up here.... I didn't need any philosophy about changing times to convince me that there was a denial of equal protection of the laws. 88

83. 382 U.S. 46, 92 (1947).
85. 382 U.S. at 74 (1947).
87. Id. at 677 n.7.
88. Television Transcript, CBS Telecast, Mr. Justice Black and the Bill of Rights, 12 (1968).
Frankfurter, however, had no desire to take a stand with the first Justice Harlan, and what Frankfurter had to say earlier in Adamson v. California,89 on the incorporation of the Bill of Rights in the 14th amendment, was not without relevance to the decision he faced in Brown:

Between the incorporation of the Fourteenth Amendment and the beginning of the present membership of the Court—a period of 70 years—the scope of that Amendment was passed upon by forty-three judges. Of all those judges, only one, who may respectfully be called an eccentric exception, ever indicated the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions on the powers of the States. Among those judges were not only those who would have to be included among the greatest in the history of the Court, but—it is especially relevant to note—they included those whose services in the cause of human rights and the spirit of freedom are the most conspicuous in our history . . . Miller, Davis, Bradley, Waite, Matthews, Gray, Fuller, Holmes, Brandeis, Stone, and Cardozo . . . 90

He might have added, vis-a-vis the current issue, Hughes, Stone, Murphy and Rutledge. Still, by early 1953 Frankfurter had made the break with the past, although the agony of his choice was suggested by a work of superogation—having "one of the most dependable law clerks he ever had" read "every word"91 in the old Congressional Globe relating to the formulation of the 14th amendment.

In any event, with the advent of 1953 his thoughts turned from right to remedy, and his writing skills appeared in the ceaseless drafting and re-drafting of a memorandum to his fellow Justices concerning what form the Court's forthcoming decree should take. This overt change of position, together with that of Justice Tom Clark—who insisted that whatever be done be done with a gentling hand but whose ultimate judicial position had been forecast by his stand against residential segregation as Attorney General—reduced the previous five-man majority reluctant to overrule Plessy to an unconvincing trio of Vinson, Reed, and Jackson.

Along this line, the arabesqued questions that came out of Brown I were largely drawn from Frankfurter's views on the direction in which the Court should proceed and his recommendation that the Court should conceal that direction by looking in opposite directions. Concealment went only so far, however, for Frankfurter had a characteristically tart response to suggestions that the Court indicate that the questions had been framed at the request of the Department of Justice:

1. We ought to assume full responsibility for the questions we put

89. 332 U.S. 46, 59 (1947) (concurring opinion).
90. Id. at 62. See also Frankfurter's rolcall of his deceased predecessors in Green v. United States, 356 U.S. 165, 192 (1958).
to counsel, and what is perhaps more important.
2. The objections which both parties will naturally have... John Davis, et al., because they do not want any intimation that the merits will go against them, and Thurgood Marshall because he wants a decree on the merits unqualified—ought not to be allowed to be resolved into resentment against the Government for bringing up this matter in the first place...

F. The Changing Cast

The second Brown conference was held December 12th, a year to the day less one since the first meeting of the Court on the merits of the case. The meeting mixed the old and the new. One new element was the position of Justice Frankfurter, who four days earlier had circulated among the Justices a memorandum which compressed the tour de force of his historical research on the origins of the 14th amendment into a brief phrase—"in a word, inconclusive." It was to give the Chief Justice a key term of his Brown II effort.

Also completely new were the words and attitudes of the Chief Justice of the United States, and these differed strikingly from those of his predecessor. The historical difficulties that had beset Vinson moved Warren not at all. Instead, almost at the opening, he tersely restated the Harlan-Black concept that it did not take research but only a knowledge of the plain meaning of plain words to know that segregation violated the 14th amendment and the 13th and 15th as well. Insisting that the practice was based on a presumption of racial inferiority and had no place today, whatever its past may have been, Warren proposed that the only duty of the Supreme Court was "to abolish [it] in a tolerant way." The statement also indicated that the Warren style which had been developed in 11 years in state government was to continue in the Chief Justiceship—innovative, policymaking, advocative, persuasive.

Only two of the Justices present seemed disposed to dispute their new Chief. Stanley Reed, conceding that the Constitution of Plessy and 1896 might not be the Constitution of today, denied Warren's assumption that segregation necessarily rested on an assumption of racial inferiority and suggested the arrangement might be justified as an application of the police power of the state. A far harder opposition seemed to lie with Robert Jackson, whose files contained a bristling memorandum ("A Random Thought on the Segregation Cases") and whose disclosure some years later would itself trigger a separate and independent controversy. At the time,
however, its thrust illuminated some of the argument among members of the Court:

I realize that it is an unpopular and unhumanitarian position for which I have been excoriated by my 'liberal' colleagues, but I think Plessy v. Ferguson was right and should be affirmed. If the 14th Amendment did not enact Spencer's Social Statics it just as surely did not enact Myrdal's American Dilemma. 96

Yet, Jackson did not take this line of address at the conference. He did much the same thing, however, in softer words, suggesting that he knew no judicial way to reverse Plessy but that he was prepared to join—if so labeled—a frankly political decision reaching this end. All through argument before the Court his comments had indicated the issue was essentially one for political resolution. ("I suppose that realistically the reason this case is here is that action couldn't be obtained from Congress.") 97 His complete response to that impasse was such that a quarter-century later a former law clerk would say that "[t]o this day . . . I am not exactly sure what Justice Jackson's views were . . . ." 98

The winning over of the minority became the Chief Justice's key strategy, and he approached it with the same bland but hydraulic and pervasive manner which had worked his will time and time again with a recalcitrant legislature. Five days after the conference Justice Burton was recording the Chief's tactic—"to try [and] direct discussion of segregation cases toward the decree—as probably was the best chance of unanimity in that phase." 99 Here Burton put his finger on the critical element of any reversal of Plessy: the indispensability of organic unity and the necessity that the Court speak with a single voice.

III. DRAMATIS PERSONNAE

A. The Orchestral Conductor

In a later commentary—written in the subsequent fallout of Brown and therefore applicable a fortiori to the germinal litigation—Frankfurter suggested the double necessity for judicial unanimity. One was negative—to foreclose "any possible misunderstanding, especially by those fired with a zeal to pervert, that there was any qualification to the responsibility for every member of the Court for the Court's decision . . . ." 100 The other was positive—to make "the transcending issue" not segregation but "respect for

100. Letter from Felix Frankfurter to C.C. Burlingham, Nov. 12, 1958, Frankfurter Papers. Mr. Frankfurter was commenting on the Little Rock school case (Cooper v. Aaron, 358 U.S. 1 (1958)) but the statement is equally, if not more, applicable to the Brown decisions.
law as determined so impressively by a unanimous Court in construing the Constitution of the United States.101

The means of securing the impressive and unanimous determination took the form of a double envelopment. The first fold was to align the plurality who already agreed to Plessy's reversal on the mechanics of reversal and hold them together. Concessions obviously had to come from this revisionist quartet whose initial disposition was to effect the overthrow out of hand. The second was to coax the others into the group. Here also Frankfurter came to the fore. Well before the second conference of December 12, 1953, he was helping shape the tactic of remedy via the phrase, "with all deliberate speed." It was an ancient chancery line, one which Holmes had used half a century before,102 which Frankfurter himself had used repeatedly and without attribution103 and which he incorporated in a secret memorandum to the Court ("[T]he typing was done under conditions of strict security.").104 This was the phrase that was much criticized and long regretted; at the time, however, it yielded two enormous advantages, distinct but related. Primarily, it fitted the vague mood of hope that the problems of race in America would somehow and in some way work themselves out. Tactically, it later gave the Chief Justice the resource of flexibility. It was a remedy of compromise, and in the short run, massed the Court on a common front regarding the fundamental Constitutional issue.

In many ways, massing the Court involved the same delicate game of feint, charm, and persuasion that Warren had played a thousand times in Sacramento. On the Court, as in the legislature, each side held some trump cards; in Brown, however, the potential dissenters had a bargaining position out of all proportion to their numbers. Yet the Chief Justice was not without some bargaining leverage of his own on this proposition, where the key issue (as Frankfurter suggested) was the institutional character of the Court itself and where the consequences of a divided decision could be equally chilling when turned either way.

In any event, a unanimous opinion is the product of all participants, and the role of the Chief Justice was essentially that of orchestral intermediary. Perhaps some members of the Court were more open to his advocacy than others, as for example, Justice Reed, whose concession on a changing Constitution had stipulated away half the intellectual opposition and whose heart had already demonstrated it was in the right place. Notwithstanding a rural Kentucky background, it was Reed who wrote the landmark opinions ending the color bar in party primaries105 and integrating

104. Memorandum to the Court, Jan. 15, 1954.
common passenger carriers in interstate commerce.\footnote{108} Throughout the spring of 1954 the Chief Justice backed and filled with the issue of remedy as his major ploy, and by May 8, 1954, Associate Justice Burton's praise of the draft effort to date ("a magnificent job that may win a unanimous court")\footnote{107} suggested the end of the trail was in sight. On May 12 the close was even nearer at hand ("It looks like a unanimous opinion").\footnote{108} The entry at the conference of May 15 recorded the draft being "finally approved" and therewith Warren's triumph.

But he had help.

B. The Last Federalist

"[W]hen the inner history of [the Brown] case is known," Professor Bickel noted, "we may find that [Justice Frankfurter] was a moving force in its decision."\footnote{109} Frankfurter's contributions lay at several levels. One may have been a role as devil's advocate, masking the strong feelings he obviously had ("As one who, for years before coming on the Court, was a member of the legal committee of the NAACP")\footnote{110} and testing the arguments put forward.\footnote{111} But most conspicuous and, in retrospect, most ironic, was the suggestion of "with all deliberate speed." At the time it seemed the tactic of consensus when consensus was indispensible. Years later, Justice Black looked back with regret:

[I]t seems to me that it probably delayed the process of outlawing segregation. It seems to me, probably, with all deference to the opinion and my brethren, all of them, that it would have been better—maybe—I don't say positively—not to have had that sentence.\footnote{112} Ironically enough, Felix Frankfurter also agreed, ambiguously asserting some years later that the sentence "was used without credit [against my protest] in the segregation opinion."\footnote{113}

In truth, Frankfurter's contribution in the area of phrasemaking did not lie in the increasingly controverted sentence concerning speed but in the single word "inconclusive" with which he summed up the legislative history of the 14th amendment and which was incorporated in a key sentence in the Brown II opinion. His private opinion of that history was even less complimentary. ("[H]ow anyone could have gone through the debates in Congress on the subject of the 14th amendment and have respect for the intellectual clarity of hardly anyone in that debate beats me.")\footnote{114} But the

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  \item 107. Ulmer, supra note 94, at 698.
  \item 108. Id. at 698.
  \item 109. A. Bickel, supra note 97, at 33.
  \item 110. Letter from Felix Frankfurter to Walter Lippmann, Aug. 8, 1957, Frankfurter Papers.
  \item 111. I am indebted for this and other insights to Mr. Richard Kluger.
  \item 112. Black TV Transcript, supra note 88, at 14.
  \item 113. Letter from Felix Frankfurter to Mark DeWolfe Howe, May 5, 1958, Frankfurter Papers.
  \item 114. Letter from Felix Frankfurter to Charles Fairman, Aug. 31, 1954, Frankfurter Papers.
\end{itemize}
important thing was that he had laid his towering reputation for integrity ("I feel about accuracy the way Queen Victoria felt about chastity.")¹¹⁵ on the line in attesting that the legislative history was indeed inconclusive.

Even after Frankfurter had settled the question of legislative intent the conclusion did not come easy to him. He was indeed the last Federalist, scrupulously concerned with keeping the ancient balance the Fathers had set between central power and local authority, and beyond that, with keeping the judicial power within its appointed limits.

My starting point is . . . the democratic faith . . . the right of a democracy to make mistakes and correct its errors by the organs that reflect the popular will—which regards the Court as a qualifica-
tion of the democratic principle and desires to restrict the play of this undemocratic feature to its narrowest limits.¹¹⁶

Yet, despite this starting point he did come over. Why? Perhaps it was the passage from Holmes he was so fond of quoting:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.¹¹⁷

Frankfurter may have made one other contribution to the unanimity of Brown in the evolving position of Justice Jackson.

C. The Final Participant

On March 30, 1954, Justice Robert Jackson suffered a heart attack and from that day until the reading of the Brown II opinion on May 17th was confined to the hospital. For that reading he came directly to the bench from his hospital bed to add his physical presence to the display of institutional solidarity. Five months later he was dead. The following year his Godkin Lectures were published posthumously by the Harvard University Press.¹¹⁸ If the controverted memorandum¹¹⁹ were in fact an index of Jackson's views during the pendency of Brown, then a remarkable passage in the lecture could have been framed, in vitro at least, as a dissenting opinion in Brown II:

A cult of libertarian judicial activists . . . appears to believe that the Court can find in a 4,000-word eighteenth-century document or its nineteenth-century Amendments, or can plausibly supply, some clear bulwark against all dangers and evils that today beset us

¹¹⁶. Memorandum to Hugo Black, Nov. 18, 1943, Frankfurter Papers.
¹¹⁹. See text accompanying note 96 supra.
internally. This assumes that the Court will be the dominant factor in shaping the constitutional practice of the future and can and will maintain, not only equality with the elective branches, but a large measure of supremacy and control over them . . . . But it seems to me a doctrine wholly incompatible with faith in democracy, and in so far as it encourages a belief that the judges may be left to correct the result of public indifference to issues of liberty in choosing Presidents, Senators, and Representatives, it is a vicious teaching.¹²⁰

What aborted the dissent, if dissent it was, and won Jackson over? Surely not the friendly persuasion of the Chief Justice who occupied the office for which Jackson had been twice passed over. Jackson did have one close friend on the bench in Frankfurter—the only one, if a book so scurrilous that Frankfurter wanted to sue for libel is to be believed.¹²¹ But Jackson was always his own man, whatever the counsel of friends, and his final decision was very much of his own making. Perhaps in those months in the hospital, overshadowed with the intimidations of mortality, another and wholly different consideration was both critical and decisive—the memories of Nuremberg where he had served as a prosecutor of the Nazi war criminals and had seen, as few men have, the ultimate pathology of race and the Caliban state.

D. The Senior Associate

Despite—or perhaps because of—the fact he was the only member of the Court from the deep South, Black was in the forefront of the revisionist bloc. He had acquired some credentials much earlier when he was the only member of the Supreme Court to accept Secretary Ickes's invitation and attend the Marian Anderson concert at Lincoln Memorial. ("Only ten Senators attended," diaried Ickes, "and only one Justice of the Supreme Court—Black—who was a former member of the Ku Klux Klan.")¹²² More recently, he and Douglas had been the only members of the Court willing to hear the head-on and unadorned confrontation to segregation presented by the Taylor¹²³ case of 1950.

A reference to the latter episode and a measure of the progress of ideas came when the Southern Conference for Human Welfare honored Black a second time. The second event, some six years after the first, occurred a week before the death of Franklin Roosevelt in 1945. This time there was no imposition of segregation laws but instead a glittering and fully integrated

¹²⁰ R. Jackson, supra note 118, at 57, 58.
gathering at Washington's new Statler Hotel. At the meeting, Charles Houston, general counsel of the NAACP, recalled the Anderson event: "After the concert, Negroes sought Mr. Justice Black's autograph more than any other person except Miss Anderson herself. People have an uncanny instinct for recognizing their friends." \(^\text{124}\)

Black was hailed that night by the future Chief Justice Vinson as "an unmistakably Southern but genuinely national stateman," \(^\text{125}\) and a passage in Black's reply forecast both his Brown concurrence and the consequent tension between the two loyalties ("The conditions which created fascism abroad must not be allowed to exist here—the placing of some groups in a preferred class of citizenship at the expense of other groups.") \(^\text{126}\) Perhaps the oblique phrase was especially applicable to Houston, whose Supreme Court appearances involved a lunch at Union Station—the only nearby place he could eat—and to whom the dining facilities in Washington, from the drug store lunch counters to the Statler itself, remained as closed after the festive evening as they were before.

In any event, it was precisely Black's Alabama origins that give his concurrence in Brown, and through it the decision itself, an ultimate credibility. "How wonderful the unanimity of the Court," wrote the venerable C.C. Burlingham, dean of the American bar. "Black's concurrence is marvelous. He is as good a Southern Democrat as any of the Governors and Senators." \(^\text{127}\)

But goodness as a Southern Democrat did not carry with it freedom from the price exacted, and some years later Chief Justice Warren suggested what that price was when he declined praise for the decision and insisted, instead, that it go to the Southern Justices—Reed of Kentucky, Clark of Texas, and Black, who had to go home thereafter. In Black's case there was a degree of rhetorical license, for Black did not go home, at least for a long time to come. Ironically, his southward trip which caused him to miss the historic December, 1953, conference on Brown II was the last public journey he was to take to his native state for over a decade. He did not need critical senatorial oratory to know that there would be "a more or less hostile attitude on the part of many people, partially because of a feeling that I have participated in opinions which many people thought were bad for Alabama and the South." \(^\text{128}\)

The price was exacted vicariously, however, and it was that much harder to suffer. "Hugo, Jr., and Graham are at Birmingham, no children yet," the Justice had written a few years before Brown II. "Hugo is doing

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\(^{124}\) J. Frank, Mr. Justice Black: The Man and His Opinions 138 (1949).
\(^{125}\) Birmingham News, Apr. 4, 1945 at ———.
\(^{126}\) Id.
\(^{127}\) Id.
\(^{128}\) Letter from C.C. Burlingham to Felix Frankfurter, May 18, 1954, Frankfurter Papers.
well in the practice and loves it.”\textsuperscript{129} The son and namesake, educated in Alabama and practicing law in his parent’s home town, obviously had the most promising of political futures in a state where the Bankhead dynasty was proof that family names would be taken seriously. All that passed with the \textit{Brown} decision. 

It all had been forecast some two decades before when Walter White, Executive Director of the National Association for the Advancement of Colored People, wrote of the assurances (“\textit{[H]e hoped that he would be able to measure up to what I and others of his friends expected of him.”})\textsuperscript{130} just tendered by the senior Senator from Alabama who was about to become the junior Associate Justice of the Supreme Court: “Somehow or other, I feel quite confident that he is going to do so. I do hope we won’t be fooled by him.”\textsuperscript{131}

Nor were they.

\textsuperscript{130} See note 12 supra.
\textsuperscript{131} Id.