CITY UNIVERSITY OF NEW YORK

"'HESITATING BETWEEN TWO WORLDS'": THE CIVIL RIGHTS ODYSSEY OF ROBERT H. JACKSON

by

MARYJANE SHIMSKY

VOLUME I

A dissertation submitted to the Graduate Faculty in History in partial fulfillment of the requirements for the degree of Doctor of Philosophy, The City University of New York

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ABSTRACT

"'HESITATING BETWEEN TWO WORLDS'": THE CIVIL RIGHTS ODYSSEY OF ROBERT H. JACKSON

by

MaryJane Shimsky

Advisor: Professor John P. Diggins

Robert Houghwout Jackson, Supreme Court justice from 1941 to 1954 and chief prosecutor at the first Nuremberg war crimes trial, was a critical voice in the deliberations leading to the 1954 decision in Brown v. Board of Education. Jackson viewed Brown, and other civil rights cases, as raising dilemmas not easily resolved. These dilemmas, and his ultimate resolution of them, arose from his upbringing in rural Upstate New York; his law practice in nearby Jamestown; his years in Washington, DC; his work in the Roosevelt Administration; and his judicial philosophy. The anti-government ideology of his rural youth was tempered somewhat by his experiences with reform administrations in Jamestown and in Washington. But his experience as a New Deal lawyer reinforced the belief he had acquired from his traditionalist legal training, that social reform was not the job of the courts. The ethnic insularity of his rural upbringing, coupled with his firsthand experience in the nation's capital with Southern politicians' intractability on the issue of race relations, made him fear that pressing too hard on civil rights could compromise the Court's authority.

As justice, Jackson's beliefs in judicial restraint and judicial neutrality led him to enforce African Americans' rights under existing law, but made him hesitate when doing so required an extension of legal doctrine. Segregation posed especially difficult problems, as the legislative history of the Fourteenth Amendment gave no clear statement prohibiting segregation, and the Court itself had authorized "separate but equal" in Plessy v. Ferguson (1896). After much trial and error in draft opinions, Jackson neutralized the problems of legislative intent and prior precedent with the argument that changed historical circumstances required Plessy to be overruled. His views influenced Chief Justice Earl Warren's unanimous opinion.

The Robert H. Jackson Collection at the Library of Congress, Jackson's oral history at Columbia University, and his published writings, supplemented by other archival and published sources, permit a rich study of his dilemmas and how he resolved them.

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Of the professors who guided my education at the Graduate Center, special thanks is due to my advisor, John P. Diggins, whose incisive assessment of students' work is second to none; to Thomas Halper of the Political Science Department at Baruch College, whose knowledge of Supreme Court history, dedication to this project and constant encouragement I will never forget; to Martin Burke, K.C. Johnson and Richard G. Powers, for their extremely valuable insights; and to Thomas Kessner, for being an outstanding professor and an even more outstanding human being. Thanks also to my Executive Officers – Professors Stuart Prall, David Nasaw, James Oakes, and Joshua B. Freeman -- for their kindness and patience over the years; and to Betty Einerman, who is the home and hearth of the Graduate Center's History Department. I would also like to

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Edward and Ann Marie Shimsky did everything for me which parents possibly could do for a child; my father instilled in me a strong interest in history, politics and government. My husband, David Agosto, has made countless contributions and sacrifices, big and small, toward this enterprise, well beyond anything we thought he was signing on to when I returned to graduate school. Isaac and Miranda's daily contributions to my life are reflected in every word of this text.

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Since the close of the Civil War, the United States has been "hesitating between two worlds – one dead, the other powerless to be born." Constitutions are easier amended than social customs, and even the North never fully conformed its racial practices to its professions.

-- Robert H. Jackson, March 15, 1954[*]

[*] Robert H. Jackson, March 15, 1954 memorandum, Box 184, Robert H. Jackson Collection, Library of Congress. For a detailed discussion of this quotation, see pp. 467-68.

Introduction

In the early months of 1950, while the Supreme Court was considering whether to require two Southern universities to end the practice of segregating their graduate schools, an extraordinary correspondence was taking place. Robert H. Jackson -- the former chief prosecutor for the international war crimes tribunal after World War II, and one of nine Supreme Court Justices who would soon decide the university desegregation cases, Sweatt v. Painter and McLaurin v. Oklahoma State Regents[1] -- was seeking confidential advice from Charles Fairman, a prominent Fourteenth Amendment scholar and a former aide at Nuremberg. Referring to the Sweatt and McLaurin cases -- which, in the Justice's mind, would determine the issue of segregation in all schools -- Jackson confessed that he was "almost embarrassed to be in doubts about a matter on which nearly everyone here seems, one way or the other, to be fully convinced."[2]

Despite repeated counsel from his secret advisor, the Justice's ambivalence about desegregation continued well past Sweatt and McLaurin. He became, if anything, more tortured about desegregation during the two-plus years that Brown v. Board of Education languished, undecided, before the Court. Eventually, however – and after writing a draft concurring opinion containing a frank discussion of racism and desegregation -- Jackson signed on to Chief Justice Earl Warren's opinion, and provided significant advice to the author even while in the hospital recovering from a heart attack. On May 17, 1954, Brown's decision day, the previously conflicted Justice left the hospital to sit on the bench as Warren read aloud the Court's unanimous opinion. This sign of solidarity, calculated to emphasize the Court's unanimity, was one of Jackson's last major judicial

[1] Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).
[2] Robert H. Jackson to Charles Fairman, March 13, 1950, Box 12, File: General Correspondence – Fairman, Charles, Robert H. Jackson Collection, Library of Congress 1.

acts, for he suffered a second, fatal heart attack less than five months later, just after the Court's long summer recess. Jackson's dramatic presence on the bench that day has become part of the established lore about the Brown case, and about Jackson himself.[3]

But Jackson's internal journey to the Brown decision was even longer than his letter to Fairman suggests. As a farmboy in Northwestern Pennsylvania and Southwestern New York, Jackson absorbed family and local opinion about history, government and race relations. His experiences in the regional urban center of Jamestown, and then in Washington, D.C., led him to question some of the old assumptions with which he grew up, yet his work in the New Deal reinforced a narrow view of the judiciary's role in public policy, and exposed him to the intransigence of

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[3]Earl Warren, The Memoirs of Earl Warren (Garden City, NY: Doubleday & Company, 1977) 3, 286; Richard Kluger, Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality (c.1975. New York: Knopf, 1976. New York: Vintage Books, 1977) 701; Philip Halpern, "Robert H. Jackson, 1892-1954," Stanford Law Review 8 (Dec. 1955) 8; Dorothy McCardle to Irene Jackson, October 13, 1954, Box 7, File: Jackson, Irene G. – Letters of Condolence – Jackson's Death – K-Z, Robert H. Jackson Papers, Library of Congress 3; Eugene C. Gerhart, Supreme Court Justice Jackson: Lawyer's Judge (Albany: Q Corporation, 1961) 20-21; "American Lawyers Mourn The Passing of Mr. Justice Jackson," American Bar Association Journal 40 (November 1954) 971; Max Lerner, "The Mind and Style of Robert H. Jackson," Nine Scorpions in a Bottle: Great Judges and Cases of the Supreme Court, ed. by Richard Cummings (New York: Arcade Publishing, 1994) 167, 171; Ed Cray, Chief Justice: A Biography of Earl Warren (NY: Simon & Schuster, 1997) 286; "Justice Jackson Returns To Bench After Illness," Jamestown (New York) Post-Journal, May 20, 1954 A1; Bernard Schwartz, "Chief Justice Rehnquist, Justice Jackson, and the *Brown* Case," Supreme Court Review 8 (1988) 265; Laura K. Ray, "A Law Clerk and his Justice: What William Rehnquist did not Learn from Robert Jackson," Indiana Law Review 29 (1996) 553; Gregory S. Chernack, "The Clash of Two Worlds: Justice Robert H. Jackson, Institutional Pragmatism, and *Brown*," Temple Law Review 72 (1999) 51.

Warren recalled in his memoirs, written about twenty years after the fact, that Jackson returned that day "to my alarm" (Warren, Memoirs 286), and Richard Kluger wrote that Jackson had returned "well before the normal recuperative period had expired … thinner, older and wan from his ordeal" (Kluger, Simple Justice 1977 ed. 701), but another source suggests that these accounts might have been exaggerated. Jackson's hometown newspaper reported on May 20, 1954, that the Justice had been up and around for three weeks before the decision, and that the doctor had cleared him to go home a week before, but that Jackson elected to stay on at the hospital because of the longer-than-usual stairways at his home. While there he took "regular trips to the solarium where he acquired a healthy coat of tan," and "did considerable court work." The newspaper further reported that upon his return to Court, Jackson's "friends and court associates were delighted with his refreshed appearance when he came back to work." "Justice Jackson Returns to Bench" at A1. Regardless of his condition at the time, however, Jackson chose May 17 to return to work, and he did so to demonstrate his solidarity with the Brown decision. Kluger, Simple Justice (1977 ed.) 701; Warren 3; Elsie Douglas, memorandum appended to Robert H. Jackson's March 15, 1954 memorandum on Brown v. Board of Education, Box 184, File: Cases – October Term 1953 – Segregation Cases – Robert H. Jackson Collection, Library of Congress.

white Southern racial attitudes. When the segregation cases reached the Court, Jackson still harbored reservations about court-ordered desegregation, grounded in his views about the judiciary's role in a democratic government and in his fears that such a ruling could be unenforceable and damage the Court's authority. By the time Jackson made his final decision on the Brown case, he had made his peace with desegregation, with the Supreme Court's role in ending it, and with his own demons.

A half century after his death, Robert Jackson is hardly a household name. Except for a television mini-series on Nuremberg several years ago, and an occasional mention by an op-ed writer, Jackson receives scant media attention.[4] Nor has Jackson received extensive scholarly attention and what has been written, has not focused on his handling of cases litigating civil rights for African Americans. Yet the justice's performance in civil rights[5] cases deserves more study. Described by one prominent

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[4] "Nuremberg," written by David W. Rintels, dir. by Yves Simoneau, starring Alec Baldwin, Brian Cox and Jill Hennessy (2000). See also Thomas Venciguerra, "The Basics: Satisfying the Constitution on Treason," New York Times October 15, 2006 (available at www.nytimes.com); Noah Feldman, "The Way We Live Now," New York Times February 5, 2006 (available at www.nytimes.com) Adam Liptak, "Court in Transition: Legal Context; A Quick Focus on the Powers of a President," New York Times January 11, 2006 (available at www.nytimes.com); Leonard A. Leo, "Thirty Questions for Alito: Finality and Fallibility," New York Times January 9, 2006 (available at www.nytimes.com); Anthony Lewis, "Raising the Stakes," New York Times December 11, 2000 (available at www.nytimes.com).

Jackson is a relative favorite of the Village Voice. See Nat Hentoff, "Putting God in His Place," (www.villagevoice.com January 1, 2007); Hentoff, "Treason: Who Decides?" (www.villagevoice.com October 27, 2006); Hentoff, "God Is Not in the Constitution" (www.villagevoice.com June 28, 2002) 1-2; Hentoff, "The Patriotism Enforcers" (www.villagevoice.com January 2-8, 2002) 2-3; Hentoff, "Getting Back Our Rights" (www.villagevoice.com December 7, 2002) 1; Jason Vest, "Human Shields for Clinton" (www.villagevoice.com June 9-15, 1999) 2; Vest, "Rehnquist's Glass House" (www.villagevoice.com January 13-19, 1999) 2.

[5] "Civil Rights" can most succinctly be defined as all "rights and responsibilities, civil and criminal." Virginia v. Rives, 100 U.S. 313 (1879). According to Thurgood Marshall, who sought to define the term for fellow NAACP members in 1944, "In its broadest sense, the term civil rights includes those rights which are the outgrowth of civilization, the existence and exercise of which necessarily follow from the rights that repose in the subjects of a country exercising self-government." In this country, according to the preeminent civil rights lawyer and future Supreme Court justice, those rights are embodied in the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution and in the Civil Rights Acts of 1866 and 1870. Among them are the ending of slavery (Thirteenth Amendment); the guaranteeing of all privileges and immunities of citizenship, equal protection of the laws, and due process of laws (Fourteenth Amendment); and the right to vote (Fifteenth Amendment). Some of the specific protections included in these broader guarantees were the ending of peonage; the right to enforce contracts; the right to

constitutional law scholar as "one of the most gifted men ever to serve on the Supreme Court," Jackson was widely reputed to have one of the keenest minds on the Court in his time, and be one of the best writers in the institution's history.[6] In his 13-plus years on the bench, Jackson voted on thousands of cases, and wrote 318 published opinions, many on critical cases dealing with the rights of minorities in American society. Before he joined the Court, Jackson had spent seven distinguished years in high-ranking legal posts in the Roosevelt administration, including one year as Attorney General and two as Solicitor General; the great Justice Louis Brandeis, in recognition of Jackson's contributions as the government's chief appeals lawyer, remarked that Jackson should be "Solicitor General for Life."[7] Jackson's role as chief prosecutor for the Nuremberg trial of the Nazi leadership made him "a world figure."[8]

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sue and to be sued; the right to give evidence and serve on juries; the right to equal punishments and taxation for all races; the right to own and convey or dispose of property. Under the civil rights acts, persons who discriminate could be held liable for conspiracies to violate the civil rights of another person. Thurgood Marshall, "The Legal Attack to Secure Civil Rights," Address delivered July 13, 1944 at the NAACP Wartime Conference, published in Negro Protest Thought in the Twentieth Century, ed. by Francis L. Broderick and August Meier (Indianapolis, New York, and Kansas City: Bobbs-Merrill, 1965) 229-31.

This dissertation employs a definition with a similarly expansive scope. See p. 178.

[6] Bernard Schwartz, "Chief Justice Rehnquist, Justice Jackson, and the *Brown* Case," Supreme Court Review 8 (1988) 247-48; Kluger, Simple Justice (1977 ed.) 235, 246; Mark V. Tushnet, Making Civil Rights Law: Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961 (New York: Oxford University Press, 1994; reprint, New York: Oxford University Press, 1996) 69; Gerhart, Lawyer's Judge 103-04; Whitney North Seymour, General Introduction to Four Lectures 2; Jeffrey David Hockett, "Justice Robert H. Jackson and the role of the Supreme Court in American Politics" (Diss., University of VA, 1987) x; "America's Lawyers Mourn The Passing of Mr. Justice Jackson, American Bar Association Journal 40 (November 1954) 971; Glendon Schubert, Dispassionate Justice: A Synthesis of the Judicial Opinions of Robert H. Jackson (Indianapolis: Bobbs-Merrill Co., 1969) 6-8; Henry J. Abraham, Justices and Presidents: A Political History of Appointments to the Supreme Court, Third Edition (New York: Oxford University Press, 1992) 236; Chernack, "The Clash of Two Worlds" 57.

[7] E. Barrett Prettyman, Jr., "Robert H. Jackson: Solicitor General for Life," Journal of Supreme Court History (1992) 75-85; Martin S. Sheffer, "The Attorney General and Presidential Power: Robert H. Jackson, Franklin Roosevelt, and the Prerogative Presidency," Presidential Studies 12 (1992) 54-65; Susan Jane Buck Cox, "Justice Robert Jackson and the Evolution of Administrative law" 3-13., ch. 3; Jeffrey David Hockett, New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, and Robert H. Jackson (Lanham, MD: Rowman and Littlefield, 1996) ch. 8, pp. 289-93; Hockett, "Role of the Supreme Court" 26-43, 49; John Lord O'Brian, Four Lectures 9-10; Desmond, Four Lectures 18; Charles D. Breitel, Four Lectures 31, 48; Gerhart, Lawyer's Judge Ch. 5c; Gerhart, America's Advocate: Robert H. Jackson (Indianapolis: Bobbs-Merill, 1958)24 ff., 306; Glendon Schubert, "Jackson's Judicial

Jackson's distinguished career provides a useful lens through which to study the role of Court and Constitution in securing rights for African Americans during the half generation culminating with the first Brown v. Board of Education decision, in May 1954.[9] He has a complex record in cases involving racial justice. One of his best-known opinions is his dissent in the Japanese internment case of Korematsu v. United States,[10] in which he denounced Fred Korematsu's racially-based detention on the premise that "if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable."[11] Jackson had become a symbol of resistance to bigotry because of his performance at Nuremberg, and was lionized by the American Jewish community for his work there.[12] Jackson hailed from upstate New York, and lacked the type of Southern connections that sometimes influenced racial views of prominent "Northerners."[13] While Jackson was on the bench, the Court decided over 40 cases involving the constitutional rights of African Americans, including Sweatt v. Painter and Sipuel v. Oklahoma State

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Philosophy: An Exploration in Value Analysis," American Political Science Review 59 (1965) 941, 961-62.

[8] Richard Kluger, Simple Justice (1977 ed.) 603; Stephen Breyer, "Crimes Against Humanity: Nuremberg, 1946," New York University Law Review 71 (1996) 1161-64; William H. Rehnquist, Dedication of the Robert H. Jackson Center, Jamestown, NY, May 16, 2003 (available at www.supremecourtus.gov).

[9] Brown v. Board of Education, 347 U.S. 483 (1954). In the May 1954 Brown opinion, the Court found segregation unconstitutional, but ordered reargument to determine procedures and standards for the desegregation process. 347 U.S. at 496. The reargument did not take place until April 1955, six months after Jackson's death. Tushnet, Making Civil Rights Law 217.

[10] Korematsu v. United States, 323 U.S. 214, 242-48 (1944) (Jackson, J., dissenting).

[11] 323 U.S. at 243 (1944) (Jackson, J., dissenting).

[12] Maurice Bisgyer to Robert H. Jackson, July 22, 1947, Box 208, File: Awards, Honors and Tributes, Robert H. Jackson Collection, Library of Congress (B'nai B'rith Gold Medal Award for Jackson's "historic contributions to world justice and to humanity"). See also Anatole Goldstein, "Justice Jackson – Fighter for Humanity," Congress Weekly (date obscured), Box 3, File: Family Papers – Other Papers – Mary (Jackson) Loftus Craighill – General Correspondence 1939-81, Robert H. Jackson Collection, Library of Congress; Abba Eban to Irene Jackson, October 14, 1954, Box 7, File: Family Papers – Jackson, Irene J. – Letters of Concolence – Jackson's Death – K-Z, Robert H. Jackson Collection, Library of Congress.

[13] One of the more apt examples of a transplanted Southerner in Jackson's time was John W. Davis, the prominent New York attorney and Democratic presidential candidate in 1924. A Virginia native who vacationed in South Carolina, Davis spent the last years of his life litigating against desegregation, as counsel to one of the defendant school boards in the Brown cases. William Harbaugh, Lawyer's Lawyer: The Life of John W. Davis (New York: Oxford University Press, 1973).

Regents (desegregation of law schools); McLaurin v. Oklahoma State Regents (desegregating graduate schools); Smith v. Allwright and Terry v. Adams (ending all-white political primaries); and Henderson v. United States (desegregating interstate transportation).[14]

Other justices were on the Court for most or all of these cases; but Jackson's talents, complexity and pivotal role in the resolution of civil rights litigation make his work an unusually rich topic of study. First, Jackson was one of the "make or break" justices on Brown, and his comments and writings indicate that he really struggled with the case.[15] The result of his internal struggle was fraught with consequences for civil rights jurisprudence. If Jackson, a leading intellect on the Court and its most gifted writer; a leading voice against the Nazi regime and the only Korematsu dissenter left on the Court; a Northerner and preeminent legal practitioner, had voted to uphold Jim Crow – or (as was more likely) issued a half-hearted concurring opinion -- the authority of an anti-segregation majority would have been seriously shaken.[16] Other members of the Court struggling with the issue of desegregation, including Stanley Reed and perhaps even Tom Clark, might have been emboldened to do likewise.[17] A divided Court would have been at a grave disadvantage in getting its ruling enforced; as the justices realized at

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[14] Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Oklahoma State Regents, 332 U.S. 631 (1948); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953); Henderson v. United States, 339 U.S. 816 (1950).

[15] See Chapter 9, pp. 444-54, 465-95.

[16] The other Korematsu dissenters had long since left the Court: Owen Roberts retired in 1945, and Frank Murphy died in 1949. Abraham, Justices and Presidents 242, 245.

[17] Reed had actually drafted a dissent and was, according to his own law clerk, the last Justice to sign onto the first Brown decision. Abraham, Justices and Presidents 220; Kluger (1977 ed.) 698; John Q. Barrett, mod., "Supreme Court Law Clerks' Recollections of Brown v. Board of Education," St. John's Law Review 78 (summer 2004) 532-33, 546-48, 557.

the time, unanimity provided the only hope for minimizing resistance, which proved strong enough, even in the face of a unified Court.[18]

Moreover, Jackson's ambivalence – the sum total of childhood influences, his work in the New Deal, his judicial philosophy and his exposure to the horrors of racism in wartime – makes for a rich, complex study of how one person's thinking evolves as he sees the world in a new light. These tensions played a role in Terry v. Adams, in which Jackson voted with the majority that found the Jaybird Democratic primary unconstitutional, but only after a great deal of *angst* over whether the privately-held event satisfied the state action requirement of the Fourteenth Amendment.[19] In Shepherd v. Florida, Jackson (joined in a concurrence by Felix Frankfurter) concluded that reversal was required not because of "the technical question of discrimination in the jury selection," but due to the lynch-mob mentality surrounding the defendants' trial, which he described as "one of the best examples of one of the worst menaces to American justice."[20] As Jackson demonstrated in his dissent in Bob-Lo Excursion Co. v. Michigan, he was adverse to using even moderately innovative constitutional theory to uphold the conviction of a ferry service for violating a Michigan anti-discrimination law.[21] The tension in Jackson's mind between the correctness of civil rights and desegregation as policy/moral decisions and their legal and political fallout weighed on him for years, and reached its resolution in Brown.

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[18] Kluger (1977 ed.) 599, 614, 679, 681, 683, 694, 698, 708-09; Warren 2-3, 281-86; William O. Douglas, The Court Years: 1939-1975: The Autobiography of William O. Douglas (New York: Random House, 1980) 114-15. See also Chapter 9; Justice Harold H. Burton, diary, May 12, 1954 entry, Harold H. Burton Papers, LOC, quoted in S. Sidney Ulmer, "Earl Warren and the Brown Decision," The Journal of Politics 33 (1971) 698-99. Dennis Hutchinson, after expressing some sympathy with 1970s revisionists favoring separate opinions, concluded that the debate was "anachronistic," as at the time "the costs of disunity were too high to accept." Hutchinson, "Unanimity and Desegregation" 44, 87.

[19] See Chapter 7, pp. 346-70.

[20] Shepherd v. Florida, 341 U.S. 550, 555-56 (1951).

[21] Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28, 43 (1948).

Unlike some other justices, Jackson was not bound by a particular ideology, or by doctrinaire views. One could almost always correctly guess how Black and Douglas ruled on a First Amendment case, or how Frankfurter ruled in a case challenging the constitutionality of a federal statute. Jackson, however, was less predictable. This quality partly explains why some scholars have written him off as "erratic."[22] But behind this unpredictability lay a web of deeply-held yet competing principles, and a keen sensitivity to the circumstances and dynamics of a particular case. These qualities isolate him as a key figure for understanding how legal change came about. [23]

The issues implicated in Jackson's attitudes toward civil rights litigation are potentially fraught with significance for our own time. This nation is embarking on a new era of civil rights strategy and tactics: affirmative action is on the wane, and desegregation is giving way to efforts, in and out of the court system, to improve the quality of inner-city schools.[24] The era of court-ordered desegregation that Jackson helped usher in with his vote in Brown, is just about over.[25] The success of desegregation is mixed. Race is still a polarizing issue. And the role of the courts has been fiercely debated, often misleadingly so, with Court decisions on race relations helping to fuel the

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[22] Kluger (1977 ed.) 604; C. Herman Pritchett, The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947 (New York: Mcmillan Co., 1948) 261; Glendon Schubert, "Jackson's Judicial Philosophy" 941; Paul A. Weidner, "Justice Jackson and the Judicial Function," Michigan Law Review 53 (1955) 594.

[23] Schubert, "Jackson's Judicial Philosophy" 941; Gerhart, Lawyer's Judge Ch. 5c; Gerhart, America's Advocate 306; Breitel, Four Lectures 31.

[24] Dirk Johnson, "Busing Revisited; Then, the Color of Classmates. Now, the Color of Money," New York Times September 26, 1999 (available at www.nytimes.com); Winnie Hu, "Judge Approves Settlement In Yonkers Desegregation Suit," New York Times March 27, 2002, B8, col. 5. See also Charles J. Ogletree, Jr., All Deliberate Speed: Reflections on the First Half Century of *Brown v. Board of Education* (New York: Norton, 2004); Derrick Bell, Silent Covenants: *Brown v. Board of Education* and the Unfulfilled Hopes for Racial Reform (New York: Oxford University Press, 2004).

[25] Emily Yellin with David Firestone, "By Court Order, Busing Ends Where it Began," New York Times September 11, 1999 (available at www.nytimes.com). Two years later, the Fourth Circuit Court of Appeals issued a ruling that officially ended court-ordered desegregation in the Charlotte-Mecklenburg, N.C. public schools. "End to Busing Is Ordered," New York Times Sept. 22, 2001, A8, col. 3.

flames. Now, therefore, is a good time for reevaluating the pivotal years of civil rights jurisprudence.

Moreover, as the Court's Hamlet on civil rights, Jackson makes a terrific case study of how one influential person made up his mind about a difficult issue. Seeing how some individuals can reconsider, and even change their minds about, matters of such importance is particularly useful today, when the increased ideological polarization in American politics makes someone with Jackson's doctrinal flexibility and spirit of open-ended inquiry seem almost exotic. It is hard to imagine how a democracy can resolve controversial issues unless people reexamine their views, and consider changing their minds.[26] When it comes to carefully considering and reconsidering positions, Jackson may be one of the better role models ever to sit on the Court.[27]

The Available Materials

Robert Jackson avidly practiced the art of written self-reflection, and much of his self-examination survives. His writings reveal the origins of his conflicted feelings about civil rights law, from both his legal philosophy and his life experience. Over 125 linear feet of those papers, including correspondence, speeches from high school to his last years and draft material for a never-completed autobiography, survive at the Manuscript Division of the Library of Congress. He completed a lengthy oral history -- the typed version is over 1500 pages long -- with Harlan Philips of the Oral History Project at Columbia University. Eugene Gerhart, the author of two books on Jackson's life, quotes

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[26] Keith T. Poole and Howard Rosenthal, "D-NOMINATE after 10 Years: A Comparative Update to *Congress: A Political-Economic History of Roll-Call Voting,*" Legislative Studies Quarterly 26 (Feb. 2001) 5-29.

[27] Felix Frankfurter observed that Jackson's "habit of truth-seeking" manifested itself in the fact that "To confess error for [Jackson] was a show of strength, not of weakness." Felix Frankfurter, "Mr. Justice Jackson," Harvard Law Review 68 (April 1955) 939.

Jackson at great length from his interview notes. Valuable insights are sometimes contained in old family correspondence, letters to or from acquaintances, and even old high school papers and condolence letters to Jackson's widow after the Justice's fatal heart attack.

An examination of Jackson's views on the cases before him must begin with his 318 published opinions, and continue with the draft opinions in his case files at the Library of Congress. Judicial opinions, especially majority opinions, often divulge little about their authors, instead reflecting an attempt to reconcile divergent views on the Court. Even when not, "most justices have conformed to what they conceived to be the appropriate form of an opinion."[28] Jackson, by contrast, was renowned for his "soul-searching opinions,"[29] full of honesty, and often bluntness. Felix Frankfurter, the colleague on the Court who knew him best, once observed that

> To an unusual degree in the history of the Court, Justice Jackson wrote as he felt…. He wrote as he talked, and he talked as he felt…. No man who ever sat on the Supreme Court, it seems to me, mirrored the man in him in his judicial work more completely than did Justice Jackson.[30]

And if the final opinions were revealing, their frankness pales in comparison to that of the drafts, which sometimes contain self-examination he later edited out. Since his opinions in the area of civil rights rarely went beyond the draft stage (but often through many drafts, so that one can trace Jackson's thought process), these files are a treasure trove of introspection. Also in the case files are conference notes and correspondence with other justices.

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[28] Frankfurter, "Mr. Justice Jackson" 938.
[29] Herbert Brownell, Jr., Address delivered at the Annual Meeting of the New York State Bar Association, New York, New York, January 27, 1956; excerpts published in "The Attorney General Reports," New York State Bar Bulletin (1956) 94; "American Lawyers Mourn The Passing of Mr. Justice Jackson," 971.
[30] Frankfurter, "Mr. Justice Jackson" 938-39, quoted in Schubert, Dispassionate Justice 8.

Jackson reflected in writing on his judicial philosophy in numerous speeches and articles, and in three books. The first, The Struggle for Judicial Supremacy, explained the historical basis for President Franklin D. Roosevelt's court-packing plan of 1937, and for Jackson's philosophy of judicial restraint. The other two were published series of lectures. Full Faith and Credit: The Lawyer's Clause in the Constitution, and The Supreme Court in the American System of Government, offer some of Jackson's observations as a sitting Supreme Court justice on the role of that body in a federal government with divided powers.[31]

The Existing Scholarship

No original, book-length biography of Jackson has been published in over 40 years.[32] In 1997, a reviewer of a work focusing in part on Jackson cited the need for "a full-length, scholarly biography of the justice."[33] John Q. Barrett, a professor at St. John's University School of Law in Queens, New York, is currently working on such an account, which may signal renewed interest.

Only a small number of the writings about Jackson make more than the most cursory mention of civil rights for African Americans. Glendon Schubert's Dispassionate

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[31] Robert H. Jackson, The Struggle for Judicial Supremacy: A Study of a Crisis in American Judicial Power (New York: Alfred P. Knopf, 1941); Full Faith and Credit: The Lawyer's Clause in the Constitution (New York: Columbia University Press, 1945); The Supreme Court in the American System of Government (Cambridge, MA: Harvard University Press, 1955).

[32] Eugene Gerhart wrote two books on the justice – a biography, and a second on the Justice's Court tenure. Published in 1958 and in 1961, they were based on published sources, interviews, and Jackson's oral history; Gerhardt was not given unfettered access to Jackson's papers. Gerhart, America's Advocate; Gerhart, Lawyer's Judge. In 2003, they were reprinted in Robert H. Jackson: Country Lawyer, Supreme Court Justice, America's Advocate (Buffalo, NY: W.S. Hein; Jamestown, NY: Robert H. Jackson Center, 2003). There was also a dissertation completed in 1954, the year of the Brown decision and of Jackson's death, which was too early to obtain the manuscripts needed to adequately discuss Jackson's views on desegregation. R.J. Steamer, "The Constitutional Doctrine of Mr. Justice Robert H. Jackson" (diss., Cornell University, 1954).

[33] William Lasser, Review of Jeffrey David Hockett's New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, and Robert H. Jackson, American Political Science Review 91 (1997) 744, 745.

Justice: A Synthesis of the Judicial Opinions of Robert H. Jackson relied solely on published sources, and therefore missed the more revealing contents of Jackson's unpublished papers (which were not yet available).[34] Other writers have studied aspects of Jackson's career, both on and off the bench, but few have focused on the complexity of the jurist's thinking on civil rights.[35]

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[34]Gerhart, America's Advocate Chs. 1, 18-23; Gerhart, Lawyer's Judge 93, 108; Philip J. Kurland , "Robert H. Jackson," Friedman and Israel,eds., The Justices of the Supreme Court, 1789-1969: Their Lives and Opinions, 4 vols. (New York: Chelsea House, 1969) 2543-71; Schubert, Dispassionate Justice 22-23. Nor did Glendon Schubert's statistical analysis of Jackson's voting record deal with cases involving the civil rights of African Americans as a discrete classification. Glendon Schubert, "Jackson's Judicial Philosophy: An Exploration in Value Analysis," American Political Science Review 59 (1965) 940-63; Schubert, Dispassionate Justice 22-23.

[35] In the late 1960s, there was one published series of lectures offering an affectionate view of Jackson's work. Desmond, Charles S., *et al.*, Mr. Justice Jackson: Four Lectures in his Honor by Charles S. Desmond, Paul A. Freund, Potter Stewart, and Lord Shawcross (New York: Columbia University Press, 1969); Glendon Schubert, Dispassionate Justice. Philip B. Kurland produced a biographical sketch in the Friedman and Israel Justices of the Supreme Court series. In the last twenty years, Jeffrey Hockett has written a dissertation on Jackson's jurisprudence; a book comparing Jackson's performance in his first five years on the Court with that of Black and Frankfurter; and articles on Jackson's performance at Nuremberg and his memorandum in Brown. New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, and Robert H. Jackson (Lanham, MD: Rowman and Littlefield, 1996); "Justice Robert H. Jackson, The Supreme Court, and the Nuremberg Trial," Supreme Court Review (1990) 286-98; "Justice Robert H. Jackson and Segregation: A study of the Limitations and Proper Basis of Judicial Action," U.S. Supreme Court Yearbook (1989) 52-67; "Justice Robert H. Jackson and the role of the Supreme Court in American politics," (diss., University of VA, 1987).

One dissertation has analyzed Jackson's administrative law decisions. Susan Jane Buck Cox, "Justice Robert Jackson and the Evolution of Administrative Law" (diss., VA Polytechnic Institute, 1983). A number of other article-length treatments have focused on aspects of Jackson's legal career, such as his tenure as United States Attorney General, his decisions in tax law, his performance at Nuremberg, his writing style, and even a few (covered in notes 46 and 47 and accompanying text) on his unpublished writings in Brown v. Board of Education. Examples include G. Edward White, "Personal versus Impersonal Judging: The Dilemmas of Robert Jackson," The American Judicial Tradition: Profiles of Leading American Judges, expanded edition (New York: Oxford University Press, 1988); Laura K. Ray, "A Law Clerk and His Justice: What William Rehnquist Did Not Learn from Robert Jackson," 29 Indiana Law Review 535 (1996); Max Lerner, "The Mind and Style of Robert H. Jackson," Nine Scorpions in a Bottle: Great Judges and Cases of the Supreme Court, ed. Richard Cummings (NY: Arcade Publishing, 1994) 167-71; Jeffrey D. Hockett, "Justice Robert H. Jackson, the Supreme Court, and the Nuremberg Trial," The Supreme Court Review 8 (1990) 257-99; Dennis Hutchinson, "The Black-Jackson Feud," Supreme Court Review (1988) 203; Walter F. Murphy, "Mr. Justice Jackson, Free Speech, and the Judicial Function," Vanderbilt Law Review 12 (1959): 1019; E. Barrett Prettyman, Jr., "Robert H. Jackson: Solicitor General for Life," Journal of Supreme Court History 17 (1992) 75-85; Glendon Schubert, "Jackson's Judicial Philosophy: An Exploration in Value Analysis," American Poitical Science Review 59 (1965) 940-63; Bernard Schwartz, "Chief Justice Rehnquist, Justice Jackson, and the *Brown* Case," The Supreme Court Review 8 (1988) 245-67; Jeffrey David Hockett, "Justice Robert H. Jackson and Segregation: A Study of the Limitations and Proper Basis of Judicial Action," U.S. Supreme Court Yearbook 1989 52-67; Kirk J. Stark, "The Unfulfilled Tax Legacy of Justice Robert H. Jackson," Tax Law Review 54 (Winter 2001) 171; Stephen R. Alton, "Loyal Lieutenant, Able Advocate: The Role of Robert

Three articles have focused on Jackson's handling of the Brown case: Bernard Schwartz's "Chief Justice Rehnquist, Justice Jackson, and the *Brown* Case"; Jeffrey D. Hockett's "Justice Robert H. Jackson and Segregation: A Study of the Limitations and Proper Basis of Judicial Action"; and Gregory S. Chernack's "The Clash of Two Worlds: Justice Robert H. Jackson, Institutional Pragmatism, and *Brown*."[36] Schwartz's and Hockett's principal focus was Jackson's March 15 draft concurrence in Brown; each recounted much of the opinion's contents and provided valuable analysis. Schwartz also discussed Jackson's contributions to the case's complicated procedural history. But Jackson's resolution of Brown was the culmination of a lifetime's struggle with the issue of race relations, and neither article set forth the Justice's journey. Only one, Schwartz's, attempted any treatment of Jackson's background, and that was incomplete. Neither discussed how Jackson's internal conflicts manifested themselves in other civil rights and desegregation cases. And Schwartz largely focused on the question of whether an earlier memorandum in Jackson's files recommending that Plessy v. Ferguson be upheld represented Jackson's views or those of his then-clerk, the late Chief Justice William Hubbs Rehnquist. Chernack tried to give more consideration to Jackson's childhood, but he primarily relied on interviews with the justice's former clerks, and not on the considerable documentary evidence available; nor did he include Jackson's pre-Brown writings "on the problems facing blacks in this country."[37]

H. Jackson in Franklin D. Roosevelt's Battle with the Supreme Court," William and Mary Bill of Rights Journal 5 (Summer 1997) 527.

[36] Bernard Schwartz, "Chief Justice Rehnquist, Justice Jackson, and the *Brown* Case" 245-67; Jeffrey David Hockett, "Justice Robert H. Jackson and Segregation" 52-67.

[37] Schwartz, "Chief Justice Rehnquist, Justice Jackson, and the *Brown* Case" 247-49. One chapter of Hockett's dissertation dealt mainly with the same issue as the Schwartz article, the origin of the ideas in the infamous Rehnquist memorandum and in Jackson's March 15, 1954 memorandum. Hockett, "Justice Robert H. Jackson and the Role of the Supreme Court in American Politics" ch. 2. Elsewhere in his dissertation, Hockett sought the most appropriate characterizations of Jackson's ideas – pragmatist,

The scholarly literature on civil rights cases is not thoroughly informed by an overall understanding of Jackson's views; nor can the required depth of understanding be expected in more general works, given the state of the literature on Jackson. Works on related topics sometimes analyze key documents rather well (such as the Brown memoranda from Jackson's chambers), but there is still need for understanding these within a broader context of Jackson's life and of his work as a whole.[38]

By contrast, colleagues like Hugo Black, William O. Douglas, Earl Warren and Felix Frankfurter have been studied more extensively. The disparity is not totally surprising. Black's and Douglas's tenures were more than 30 years long.[39] Perhaps more important, Black, Douglas and Warren are known for critical, groundbreaking changes in

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Pragmatist, advocate of judicial self-restraint, Interpretivist, Noninterpretivist. I see different scholarly potential in Jackson's career. Gregory S. Chernack, "The Clash of Two Worlds: Justice Robert H. Jackson, Institutional Pragmatism, and *Brown*," Temple Law Review 72 (Spr. 1999) 54, 85. Chernack's preoccupation with devising a theoretical construct for Jackson's thinking on the issue, while valuable, risked deemphasizing the non-jurisprudential influences on Jackson's thought.

[38] Richard Kluger's thumbnail sketch in Simple Justice lightly dusted over the justice's background, and failed to consider possible sources for his views on civil rights, racial justice and constitutional theory. Kluger, Simple Justice (1977 ed.) 235, 241, 243. And as one might expect from such a comprehensive study of the Brown case, Kluger had little space to devote to the many other civil rights cases decided during Jackson's career on the Court: he summarized the history of African Americans' legal rights in this country, from colonial times to the university segregation cases, in a mere 258 pages. Kluger, Simple Justice (1977 ed.) 27-284. Needless to say, this broad a survey lacked sufficient room for detailed explanation and analysis of individual Supreme Court Justices' *oeuvres*.

Mark Tushnet's Making Civil Rights Law devoted some attention to the cases which led to Brown, and researched some of Jackson's memoranda, draft opinions and correspondence. Tushnet, Making Civil Rights Law 106-12, 129, 141, 143. Yet while Tushnet repeatedly claimed that Jackson's views on racial justice were complicated and ambivalent, he, too, lacked the room in such a comprehensive work for in-depth analysis. Tushnet, Making Civil Rights Law 111, 188, 189-90, 193, 351. And his treatment of two of the more crucial episodes – Jackson's work on Terry v. Adams and his Brown memorandum – focused more sharply on the work generated by Jackson's most famous law clerk, Rehnquist, than on the Justice himself. Tushnet, Making Civil Rights Law 110-12, 189-90, 351.

[39] William O. Douglas, Go East Young Man: The Early Years: The Autobiography of William O. Douglas (New York: Random House, 1974) and The Court Years 1939-1975: The Autobiography of William O. Douglas (New York: Random House, 1980); Earl Warren, The Memoirs of Earl Warren. Black had begun a memoir, but only reached the early 1920s before his death in 1971. His second wife, Elizabeth Seay Black, added her reminiscences of their years together, but she did not enter the picture until after Jackson's death; her essay summarizing the thirty-plus years in between – which included the entire time Black and Jackson knew each other – was only twenty pages long. Mr. Justice and Mrs. Black: The Memoirs of Hugo L. Black and Elizabeth Black (New York: Random House, 1986). The three James S. Carpentier lectures that Black gave at Columbia School of Law in 1968 – neither of which specifically focused on desegregation or racial justice -- laid out many of his guiding Constitutional principles. They were published under the title A Constitutional Faith (New York: Knopf, 1968).

constitutional doctrine, from absolutist views on the First Amendment to the Miranda warnings.[40] As colleagues for over 15 years, usually in the majority, these three justices were indispensable to the revolution in constitutional jurisprudence undertaken by what became known as "the Warren Court." Jackson, on the other hand, was dead less than two years after Warren began his work as Chief Justice. He also tended to be less solicitous of civil liberties than the Warren Court's core membership, and so received a reputation for being "conservative" by comparison: he had become a frequent dissenter, and would have been an unlikely candidate for membership in a Warren-led majority.[41] Jackson was also not reputedly a creative jurist.[42] Add to this the effect on Jackson's reputation of his well-publicized "feud" with the more revered Black – a feud that exploded when Jackson was denied the Chief Justiceship in 1946 – and it seemed to a generation of scholars that Jackson missed the bus on constitutional theory.[43]

Jackson and Felix Frankfurter were both known for their adherence to a school of legal thought known as "judicial restraint," which encouraged deference to decisions made by the elected branches of government. Yet Frankfurter's contributions have been more extensively examined; he developed this doctrine in hundreds of concurring and dissenting opinions during his more than 20 years on the Court, and expertly cultivated a new generation of law clerks, who made numerous contributions to the mountain of

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[40] The published literature on the Warren Court and its major decisions, and on the Court's leading justices, is so extensive as to bar a complete list of citations here. General studies include Lucas A. Powe, Jr., The Warren Court and American Politics (Cambridge, MA: Belknap Press, 2000); Bernard Schwartz, ed., The Warren Court: A Retrospective (New York: Oxford University Press, 1996); Mark Tushnet, ed., The Warren Court in Historical and Political Perspective (Charlottesville: University Press of Virginia, 1993).
[41] Schubert, Dispassionate Justice 2-4, 6.
[42] Warner W. Gardner, "Government Attorney," Columbia Law Review 55 (1955) 438: Schubert, Dispassionate Justice 25 ("Jackson's own conceptualization of the issues before the Court was pristinely conventional.").
[43] Schubert, Dispassionate Justice 22-23; Mark Tushnet, "Earl Warren's Influence," The Warren Court in Historical and Political Perspective 38 and 173-74 n. 1.

scholarship on their former mentor.[44] Jackson -- whose connections to legal academia were relatively slight, whose solitary work habits were legendary, and who saw his role on the Court in terms different from the former Harvard law school professor -- wrote relatively few concurring opinions and developed neither the jurisprudential record nor scholarly following of his colleague and friend.[45] Frankfurter was also more consistent in his views on judicial restraint than his more flexible colleague.[46]

This Study

This work seeks a more thorough understanding of Jackson's views on race relations and the role of the judicial system in advancing the cause of equal rights for African Americans -- the extent to which they flowed from his upbringing, his professional attitudes, his political views and instincts, and his views on federalism and the constitutional role of the judiciary; and their consistency with his approach in other cases. Any effort to understand Jackson's ambivalence on civil rights must begin with the 42 years he spent in Upstate New York. From his upbringing by staunch Democrats in a predominantly Republican area at the dawn of the twentieth century, when many people still heeded the call to "vote the way you fought" in the Civil War, Jackson

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[44] Works on Frankfurter include Sanford V. Levinson, "The Democratic Faith of Felix Frankfurter," Stanford Law Review 25 (Feb. 1973) 430-48; Liva Baker, Felix Frankfurter (Coward, McCann, 1969); H.N. Hirsch, The Enigma of Felix Frankfurter (Basic Books, 1981); Philip B. Kurland, Mr. Justice Frankfurter and the Constitution (Chicago: University of Chicago Press, 1971); C.E. Jacobs, Justice Frankfurter and Civil Liberties (Berkeley: University of California Press, 1961); Michael E. Parrish, Felix Frankfurter and his Times: The Reform Years (New York: Free Press, 1982); Harlan B. Phillips, ed., Felix Frankfurter: Scholar on the Bench (Baltimore: Johns Hopkins University Press, 1960).

[45] Warner W. Gardner, "Government Attorney" 441. Jackson's most famous law clerk, Chief Justice William H. Rehnquist, could seem distant when he reminisced about his former boss (though he did call him "affable," "easygoing" and "pleasant"), and spoke more effusively of Frankfurter. William H. Rehnquist to Irene Jackson, December 8, 1954, Robert H. Jackson Collection, Library of Congress. William H. Rehnquist, The Supreme Court: How It Was, How It Is (New York: William Morrow and Company, 1987) 31, 76-80; William H. Rehnquist, "Robert H. Jackson: A Perspective Twenty-Five Years Later," Albany Law Review 44 (1980) 533-41. Indeed, Frankfurter described his late friend as "gregarious but shy about intimiacies." Frankfurter, "Foreward" 436.

[46] Lerner, Nine Scorpions 66*ff*, 170.

absorbed a view of the Civil War, Reconstruction and race relations relatively sympathetic to the vanquished Confederates.[47] His legal training led him to strive for strict neutrality, a mental posture ill-suited to dealing with what was, at its heart, a moral issue. When the successful Jamestown attorney headed to Washington, his work on behalf of the Roosevelt Administration made him a champion of judicial deference to the legislative and executive branches of government. This embrace of judicial restraint, added to his preexisting views on the proper role of government, made it difficult for him to overturn legislative decisions.

Ultimately, however, Jackson's efforts at neutrality, and his understanding of history, helped him find his way out of the legal and moral morass of Jim Crow. Neutrality is truly neutral only if the arbiter can see the legitimacy of both sides of the argument; the unconstitutionality of African Americans' treatment was too obvious to continue ignoring. Moreover, while Jackson sometimes decried the many changes to American life in the first half of the twentieth century, his participation in that history -- his involvement in the New Deal, his early contributions to the war effort, and his efforts at creating an international system of justice after World War II – helped him understand change as an ever-present, and necessary, part of life. The ability to embrace historical change, and the courage to come to grips with the implications of those changes, helped him resolve his inner dilemmas in a way that permitted him to embrace desegregation and come to terms with the past, both the nation's and his own. It was Jackson's view of

[47] For a discussion of how memories of the Civil War were used to William McKinley's advantage in the presidential election of 1896, see David W. Blight, Race and Reunion: The Civil War in American Memory (Cambridge, MA: Belknap Press, 2001) 345-46.

Brown as new law for a new day that brought him inner peace, and that influenced the crafting of Earl Warren's final opinion.[48]

While Jackson sometimes seemed not to understand the dynamics of race relations, the justice saw the future in ways many fellow Northerners refused to let on. One half century ago, millions fought school desegregation with every fiber of their being, partly out of fear that mixing the races in schools might lead to increased social contact between African American men and white women. Few advocates of desegregation would then admit, at least publicly, that desegregating schools might have fostered interracial sex; while the country was full of light-skinned African Americans, their origins were not topics of public discourse in the early 1950s.[49] Jackson, by contrast, acknowledged the past, present and future of interracial sex in America:

> … we cannot ignore the fact that assimilation today has proceeded much beyond where it was at the earlier periods. Blush or shudder, as many will, mixture of blood has been making inroads on segregation faster than change in law. No clear line of separation between the races has been observed. More and more a large population with as much claim to white as to colored blood baffles any justice in classification for segregation.[50]

Jackson's matter-of-factness about an issue that, as he correctly warned, would make "many" people "blush or shudder" occurred over a dozen years before "Guess Who's Coming to Dinner?" blew the subject of interracial marriage wide open, and before the Supreme Court found state bans on interracial marriages unconstitutional.[51] Jackson's

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[48] Schwartz, "Chief Justice Rehnquist, Justice Jackson, and the *Brown* Case" 261-65; Robert H. Jackson, March 15, 1954 Memorandum, Box 184, Legal File: Supreme Court O.T. 1953 – Cases – Segregation Cases – RHJ Working Papers Not Circulated, Robert H. Jackson Collection, Library of Congress Part IV; Kluger, Simple Justice (1977 ed.) 697.

[49] James T. Patterson, *Brown v. Board of Education*: A Civil Rights Milestone and Its Troubled Legacy (New York: Oxford University Press, 2001) 88.

[50] Robert H. Jackson, March 15, 1954 memorandum 21.

[51] "Guess Who's Coming to Dinner" (1967), dir. by Stanley Kramer, written by William Rose, starring Spencer Tracy, Katharine Hepburn and Sidney Poitier (1967); Loving v. Virginia, 388 U.S. 1 (1967)

concerns with enforcing Court rulings, and maintaining universal respect for the judiciary, have also been borne out by subsequent historical trends: as he predicted at one point, there were in fact two generations of litigation over the racial composition of public schools after Brown, and a conservative backlash against the Warren Court's legacy.[52] Jackson's insistence that all implications of desegregation be vetted, completely and honestly, before he committed himself to that path, reflected the length and intensity of his struggle; and, perhaps, it also anticipated the course race relations would later take.

Chapter Overview

This work will be divided into two parts. Part One, consisting of three chapters about Jackson's pre-Court years, traces the conflicting influences on Jackson's thinking about issues later raised in the civil rights and desegregation cases before him. Chapter One examines how the justice's family life and early schooling forged his early views of social justice and race relations. Chapter Two shows how his legal training and career as a young lawyer in Jamestown contributed to a narrow view of the judiciary, yet also broadened his thinking about politics and government. Chapter Three shows how the New Deal inculcated in him a stronger sense of social justice and an understanding of how institutions must change with the times, but also reinforced his belief that policy change must emanate from the political branches of government, not from the courts. Part Two, six chapters long, recounts how Justice Jackson's views evolved during his Court years. Chapter Four will survey Jackson's, and the Court's, performance on race relations, civil rights and desegregation; and discuss how Jackson and his colleagues

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(antimiscegenation statutes violate both the Equal Protection and Due Process clauses of the Fourteenth Amendment to the U.S. constitution).

[52] See Postscript, pp. 519-22.

related to each other, both in general and on these issues. The remaining chapters will focus on Jackson's performance on specific cases involving the civil rights of African Americans: labor cases (Chapter 5); criminal cases (Chapter 6); voting rights cases (Chapter 7); university and dining car segregation cases (Chapter 8); and Brown (Chapter 9).

Chapter 1: Lessons from Childhood

> I am almost embarrassed to be in doubts about a matter on which nearly everyone here seems, one way or the other, to be fully convinced. Perhaps it is my background.
>
> -- Robert H. Jackson[1]

> … always in Jackson there was a lot of Frewsburg…
>
> -- Charles S. Desmond[2]

Introduction

For understanding Robert Jackson, studying his genealogy and childhood is especially important, because his past and his family's meant so much to him. At a time when genealogy, heredity and scientific racism were key concepts for many educated Americans, Jackson was a particularly avid practitioner of ancestral studies.[3] Proud of his heritage – his ancestors had emigrated from England before the American Revolution, and from the Netherlands in 1660 – he was well-schooled in his family's history and lore. He maintained reams of old family documents and correspondence; he also remembered much of the oral history that older family members had told him. Jackson provided detailed information about his family history and his own childhood in his

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[1] Robert H. Jackson to Charles Fairman, March 13, 1950 1.

[2] Charles S. Desmond, "The Role of the Country Lawyer in the Organized Bar and the Development of the Law," Four Lectures 23.

[3] Jackson's family papers date from as early as 1816, and include correspondence among family members from Great Britain as well as the United States; and four files of genealogical records. Boxes 1-8, File: Family Papers 1816-1983, Robert H. Jackson Collection, Library of Congress. Jackson's interest in genealogy extended beyond the confines of his forebears. In the early 1950s, the busy jurist took time out from his demanding schedule to write "Falstaff's Descendants," a felicitous account of ancestry and real estate title in the rural Pennsylvania county where he had been born six decades earlier. Robert H. Jackson, "Falstaff's Descendants in Pennsylvania Courts," University of Pennsylvania Law Review 101 (1952) 313-32.

For a general understanding of heredity and genealogy in Jackson's early years, see Matthew Pratt Gutterl, The Color of Racism in America, 1900-1940 (Cambridge, MA: Harvard University Press, 2001) 16ff and Nancy Cohen, The Reconstruction of American Liberalism 1965-1914 (Chapel Hill: University of North Carolina Press, 2002) ch. 2.

autobiographical draft from the 1940s,[4] and later to Harlan G. Phillips of Columbia University's Oral History Project[5] and to his biographer, Eugene Gerhart.[6] Some of the material might be classified as unverifiable lore, and perhaps the product of imperfect memory or interpretation.[7] But regardless of their precise truth, Jackson's reminiscences about his family's past and his own paint a revealing portrait of his self-identity and of his values.

Jackson also pondered – in his autobiographical works, in his interviews, and in his professional writings – the broader question of how the rural communities in which he grew up, "their ways and attitudes and their manner of life … deeply and profoundly influences my present outlook and attitude to life …"[8] In a 1944 draft of his never-completed autobiography, he speculated on how his hometown would influence his performance on the Supreme Court:

> I have lived much of my life in a time and an environment that was truly and deeply democratic – democratic in an economic and social as well as in a political sense. That kind of society has largely passed, and I am from the last generation to have had that experience and to have felt the influence of that kind of democracy.[9]

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[4] Robert H. Jackson, Autobiographical draft, Boxes 188-89, Files: Autobiography – Draft, Robert H. Jackson Collection, Library of Congress.

[5] The Reminiscences of Robert H. Jackson (1952-55), with Harlan G. Phillips, in the Oral History Collection of Columbia University, New York, New York. The recollections in the oral history are based on interviews which took place from January of 1952 to February of 1953, and included consultation with the voluminous papers Jackson collected during his lifetime. The sources included family records that Jackson himself had maintained as well as published local histories and records of the New York Genealogical Society.

[6] Gerhart, America's Advocate. Gerhart began interviewing Jackson on October 8, 1947; the last of many interviews took place on March 19, 1954, days before Jackson's first heart attack. Jackson granted Gerhart access to papers "as seemed relevant to the subjects under discussion." Gerhart, America's Advocate Preface.

[7] One example of Jackson family lore with a tall-tale feel was the story of how his great-grandmother successfully fought off an attacking bear by herself. Jackson Reminiscences 2-3.

[8] Jackson Autobiographical draft 4.

[9] Jackson, Autobiographical draft 2, 4.

That "kind of democracy" thrived in a Jeffersonian world of "communities made up of small, self-sufficient, family-operated farms," like the region in which he grew up.[10] Jackson's prediction that his mark on the Court would be a product of his rural background demonstrates how important he thought the early years of his life were in shaping his legal and Constitutional views.

The mental landscape Jackson constructed from his family history and childhood recollections provides a baseline for tracking his attitudes toward civil rights for African Americans. This preindustrial vision of American democracy and government often conflicted with the dynamics of a more urban – and racially diverse -- America. His later role as counselor to the New Deal notwithstanding, Jackson inherited a belief in minimalist government, which made it difficult for him to sanction new uses of government power, even in the protection of constitutional rights. His beliefs that people should solve their own problems, and that they would avoid trouble if they kept to themselves, hampered his ability to understand those protesting mistreatment and demanding societal integration. The insularity of rural America bred its own brand of bigotry which, combined with that of the broader society, created a particularly racist environment for the young Robert.

Jackson also inherited from his family of partisan Democrats views on the Civil War which were not conducive to the cause of racial equality. In them he found the source of his concern about racial "extremists" he detected on both sides of the segregation issue: "Perhaps it is the tradition of my grandfather who firmly believed the Civil War was an unnecessary conflict precipitated by hot headed slave owner [sic] and hot headed abolitionists whom the moderate and sensible people allowed to run away

[10] Jackson, Autobiographical draft 2.

with the country."[11] His family's views were reinforced, as Jackson's early surviving writings reveal, by what he learned at school. As his later writings demonstrate, Jackson's early-formed attitudes were hard to shake, and some of them made resolving the dilemmas in civil rights cases more difficult for him.

Jackson's Rural Heritage

Jackson spent his childhood "entirely among rural folk and the tradesmen who lived in the small towns dependent on the countryside."[12] Born on February 13, 1892 in Spring Creek, a farming community in Warren County, Pennsylvania, Jackson was welcomed into the world in the same farmhouse as his father and grandfather. Jackson's great-grandfather Elijah, who had moved to western Pennsylvania from Connecticut about a century earlier, established the first European settlement in the area. Members of other branches of his family -- the Houghwouts (his mother's father's family), the Gregorys (his mother's mother's family), and the Eldreds (his father's mother's family) – were rural folk who lived in the region. When Robert was five years old his father, seeking a life off of the farm, moved the immediate family to Frewsburg, a rural community located in Chautauqua County, New York and less than twenty five miles from Spring Creek. Jackson would spend the rest of his youth there, but he frequently visited the Jackson and Houghwout family farms. He graduated from Frewsburg High

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[11] This attitude toward the war was not only family tradition, but reinforced by some leading historians in the first half of the twentieth century, who described the war as a "repressible conflict" brought about by a "blundering generation" of politicians. As Jackson assumed by including this passage in the draft of his letter to Fairman, this view of a critical period in the nation's past was linked to his concerns about the present. Yet for whatever reason – whether he considered the subject of his grandfather's ruminations on the Civil War too far afield, or because it was a part of his past with which he was feeling increasingly uncomfortable -- Jackson crossed out the passage about his grandfather in the draft, and did not include it in the final version he sent to Fairman. Robert H. Jackson to Charles Fairman, undated draft of March 13, 1950 letter, Box 12, File: General Correspondence – Fairman, Charles, Robert H. Jackson Collection, Library of Congress 1. See also Chapter 8, p. 406.

[12] Jackson Autobiographical draft 4.

School in 1909, and completed one year of postgraduate study at Jamestown High School, in the small city that served as Chautauqua's county seat, before he began his legal studies.[13]

The general reliance on pioneer virtues in telling Jackson's story might seem cliched,[14] but it was not misplaced: the New Dealer from Chautauqua County embraced his forefathers' ethic throughout his life. Jackson cherished the closeness he felt with his grandparents and with his great uncle William, who lived with Robert's family during his old age, and the happy times he had spent with them. The justice's detailed recollections about them as individuals confirms that he had spent much quality time with them.[15] This kind of relationship with the older family members helps explain how they so successfully transmitted their values to young Robert: "Most people do not even know what life then was like, but at least the tradition of it has always been strong with me because of my association with those older people who were pioneers."[16]

The ethic that young Robert's ancestors transmitted to him flourished throughout the rural hamlets and farms of the region where he grew up. The mature Jackson speculated that this world view emanated from the regional topography, which created "a sort of eddy to the great currents of westward migration," in which "developed the individuals and individualism of the isolated, while close enough to be in touch with the streams of national life."[17] In this setting thrived rural communities that were "as really

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[13] Gerhart, America's Advocate 32-34; Robert H. Jackson, Address at the Jackson Day Dinner, Commodore Hotel, New York, New York, January 8, 1938, Robert H. Jackson Collection, Library of Congress 1; Robert H. Jackson, Autobiographical draft, June 8, 1944 2-4, 50; Jackson Autobiographical draft, January 10, 1944 2; U.S. Census Bureau, 12th Census, Roll 1013 (1900) and 13th Census, Roll 929 (1910).

[14] Jackson, Autobiographical draft 1.

[34] Jackson, Autobiographical draft 50; Jackson Reminiscences 26-27.

[16] Jackson Reminiscences 31.

[17] Robert H. Jackson, Autobiographical draft 1.

democratic as any society that has ever existed,"[18] comprising "a belt extending from the coasts of New England through New York, Pennsylvania and Ohio and into the northern Mississippi Valley."[19]

Scholarship during Jackson's lifetime suggests that the justice's beliefs were based on more than nostalgia. In a study of rural life in World War II-era Chautauqua County,[20] Lorene K. Fox identified the "chief" value there as "a strong and deeply-rooted individualism," which grew "out of the rugged conditions of settlement and subsequent development" of the area, "together with the great Christian traditions to which her heterogenous people have variously subscribed."[21] This brand of individualism "was not

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[18] Jackson Reminiscences 37.

[19] Jackson Autobiographical draft 2-3.

[20] Lorene K. Fox, The Rural Community and its School (Morningside Heights, New York: King's Crown Press, 1948). Fox, a professor at Fredonia College, now SUNY Fredonia, studied "rural life and education in a period of profound cultural transformation," in an effort to improve rural schools' ability to help their students and communities adjust to the changes wrought by twentieth century urbanization and industrialization. She interviewed numerous farmers in the rural areas of Chautauqua County from 1939 through the mid 1940s. From her research she drew a convincing portrait of traditional culture and values, and how those old ways were being changed by modern life. Fox v, 1-3.

[21] Fox, Rural Community 142-46.

The Jacksons' adherence to organized religion was less pronounced than that of many, although Jackson's estimation of the exact degree varied with the timing of the justice's recollections. In his oral history, produced in the early 1950s, Jackson described his father's family in a more religious light than he had in his 1944 autobiography. But even then, the Presbyterians of his family went unbaptized. This was, he recalled, because there was no church for their denomination nearby, and they did not like the "emotionalism" of frontier religion, and its prohibitions on such activities as dancing and card playing. According to Jackson at that time, in his family

> The Bible was never systematically read, or read as a matter of compulsion in my family. No prayers were said at the table. As children we learned the Lord's Prayer and "Now I Lay Me Down to Sleep" …. individually members of the family read the Bible, read it to me when I wanted to hear stories, and alluded to Scripture in conversation frequently. But there was never any compulsion to religion or to Sunday School or to prayers, or sermons.

Jackson Reminiscences 16. He was baptized an Episcopalian at his wife's church in his early thirties, and later was confirmed at his son's urging. Robert H. Jackson's Baptismal Certificate, Box 243, File: Miscellany, 1822-1983 – Passports and Baptismal Certificate, Robert H. Jackson Collection, Library of Congress; Robert H. Jackson, Autobiographical notes, unnumbered page. But as Jackson confessed in his autobiographical draft, his brand of Episcopalianism was less than devout: "I can not say I have not be [sic] negligent of the ordinances even of that comfortable discipline and have never felt intellectually satisfied by its creed." Jackson, Autobiographical notes. Jackson detected a drop in religious devotion over the years, and noted that it closely approximated the religious feeling within his family: "The older I get the more I tried to lapse into what I think was the attitude of most of my recent forebears." Id.

an exploitative individualism … in the way that the individualism of private capitalism … has often been exploitive." Instead, explained Fox,

> despite … group activities [such as "barn raisings, quilting bees, house-warmings, and the like"] the early farmer was remarkably on his own mettle. Under the self-sufficient patterns of the times, he and his family were largely responsible for and absorbed in what went on within the confines of their own home and farm. His was a sort of dogged, persevering, you-have-your-opinion-and-I'll-have-mine kind of individualism, grown out of the rugged agrarianism of Chautauqua County's past.[22]

This description of life and values in rural Chautauqua County comported with Jackson's recollections of his own family. The Jacksons

> … were self-dependent and did not mix too much with other people. They did not attend the churches much. They went to various social occasions, but I always felt a certain detachment from other people, a certain self-reliance and self-dependence in them that did not care very much what other people thought, or did, or said. They were going their own way. They were sure of their way, and that was that.[23]

In other words, "They looked to their own acres and left everybody to take care of theirs. They were individualists of the strongest kind."[24] His maternal relatives, the Houghwouts similarly lacked "disposition to follow the community in their thinking, their habits, their ways of life. They were self-sufficient and self-reliant…."[25] In his

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The Jackson family's approach to religion predated a more general drop of church membership and attendance in rural areas in the 1940s. James Mickel Williams, The Expansion of Rural Life (New York: F.S. Crofts, 1931), quoted in Fox, Rural Community 124-26.

[22] Fox, Rural Community 142-46.

[23] Jackson Reminiscences 12.

[24] Jackson Reminiscences 23.

[25] Jackson Reminiscences 28-29.

As Jackson began his rise to national prominence, there was a part of him which craved the privacy that came with rural isolation, at least for the family members who stayed behind. Among a folder of his Jamestown correspondence was a crossed-out paragraph of very rough draft scrawled sideways on a sheet of Solicitor General stationery. Writing that he "Would much prefer my mother and sisters be not disturbed with publicity," Jackson went on, apparently addressing someone desiring to contact his family in Chautauqua County: "My indiscretion in getting into pubic life instead of following their excellent example of quiet private life should not be visited on them. Appreciate your enterprize [sic] and good will but rather spare family." Robert H. Jackson, Box 243, File: Miscellany—Miscellaneous Notes, Robert H. Jackson Collection, Library of Congress.

draft autobiography, the justice recounted a bedtime story his mother had often told him, one that he "treasured as a characteristic teaching":

> Once upon a time a family of quails nested in a grain field. One night a little quail said, "Mother, tomorrow we must move, I heard the farmer say he is asking his relatives to come and help cut the grain." But the mother quail calmly said, "No, we are in no danger yet." A few days later the little quail said, "Mother, now we must move. I heard the farmer say today that he is asking some neighbors to come and help cut the grain." But the mother quail replied, "There is no danger yet." Then one night the little quail said, "Mother today the farmer said to his sons that tomorrow they would cut the grain themselves." Said the mother quail, "Now it is time we should move."[26]

According to Jackson, "This homespun philosophy was drawn from life itself. The source of well being on these farms was the labor of the family applied to the soil."[27]

The justice's description of his father as a "salty, sturdy individualist" placed the elder Jackson squarely in the family and community tradition. William Eldred Jackson was "too restless and sociable for settled and solitary farm life," and instead built a career as a businessman in Frewsburg – he bred horses; bought and sold real estate; and at various times ran a livery stable and a hotel (more likely akin to a boarding house).[28] But he belonged to no church, held no office, and kept his distance from community affairs:[29]

> He voted, but always expected to be on the losing side. He never ran for office. He rarely went, for instance, to school meeting. He was interested in the school and wanted to see a good school, but he wasn't going to crusade about it.[30]

The elder Jackson's relationship with the material trappings of modernity were particularly telling: although he "was one of the earliest men in our section to have an automobile … he was very slow about having a telephone," because "[h]e didn't know

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[26] Jackson Autobiographical draft 4-5. Jackson's mother, Angelina Houghwout Jackson, later became known as Angelina Jackson Stickle upon her remarriage after Jackson's father's death.
[27] Jackson Autobiographical draft 5.
[28] Jackson Reminiscences 30; U.S. Census Office, 12th Census (1900) roll 1013; Jackson, Autobiographical draft 46-47.
[29] Gerhart, America's Advocate 29.
[30] Jackson Reminiscences 31; Gerhart, America's Advocate 29.

anybody he wanted to talk to," nor would he grant a right of way to an electric company his son had helped to organize, "because he 'wasn't going to have any damn' wires strung across his property.'"[31] His world view was "you-have-your-opinion-and-I'll-have-mine kind of individualism" writ large.[32]

The younger Jackson's love for rural America ran deep, and went beyond the camping, gardening and horseback riding that remained lifetime interests. He affectionately recalled a rural world with fewer material comforts but tighter social bonds, especially with extended family members.[33] These and other perceived strengths of Jackson's rural upbringing were part and parcel of the local economy. Fox described it as a model of unity, simplicity and belonging, a system that even children could understand and participate in at an early age:

> Life was rigorous, but it was unified and simple. Each experience had meaning and a clear-cut relational quality. Children and adults alike were in on the process of things vastly more than they are today. Products used in home and field were for the most part made or grown in home and field …. The hats and suits and shoes they wore, the food they ate, the chairs or benches they sat upon, the tools they used, were all products of processes which young and old knew well from beginning to end. More often than not the children could boast of their own art in the handiwork.[34]

Even when "settlers tended to cluster," as was already occurring in Jackson's childhood, the simplicity and unity of the rural economy "became true on a neighborhood, village, or town scale." Thus, "Children could watch the cobbler transform their father's leather into shoes, the miller grind into flour the wheat they had helped to harvest, the sawmill

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[31] Jackson Reminiscences 31.
[32] Fox, Rural Community 142-46.
[33] Jackson, "A Tribute to Country Lawyers: A Review," American Bar Association Journal 30 (1944) 136. See also Jackson, Autobiographical draft, January 10, 1944, unnumbered handwritten draft; Jackson, Autobiographical draft 50; Jackson Reminiscences 26-27.
[34] Fox, Rural Community 75-76.

cut the great logs into lumber."[35] Jackson extolled the rural economy, reminiscing how most household products were produced by the households that consumed them, and how each family performed for itself many services provided by professionals in more urban settings[36] -- how doctors' wives (and the spouses *were* wives in those days) borrowed medical equipment to fix sewing machines; how children were born with the aid of "neighborly but untrained women, made wise by experience"; and how the dead were laid out not by licensed morticians but by "loving but unskilled hands."[37] Jackson's nostalgia should not be read as a rejection of professionalism: he also recognized the downside of what he termed the rural "Cult of Incompetence."[38] But his brand of professionalism, at least in his own mind, differed from that of the urbanized twentieth century world: it less specialized and relatively classless, the type of world that was impossible "in a society where work is subdivided among different groups."[39]

Jackson's rural milieu held numerous implications for his views on the constitution, the role of government, and racial and group justice. He recalled that the family farmers in whose midst he had grown up "had a passionate belief in equality," that "every man was as good as he proved himself to be, and no one was better."[40] Political and economic equality were closely related: the "time and environment" of his upbringing "was truly and deeply democratic … in an economic and social as well as in a

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[35] Fox, Rural Community 79.
[36] Jackson Autobiographical draft 9.
[37] Jackson, Review 136. While Powell also reminisced about how families buried their own dead in makeshift ways, he was grateful that, when his own infant son died, he was laid to rest in a satin-lined casket instead of the formerly *de rigeur* pine box. Arthur G. Powell, I Can Go Home Again (Chapel Hill: University of North Carolina Press, 1943) 256.
[38] Jackson Autobiographical draft, January 10, 1944, unnumbered handwritten draft.
[39] See Chapter 2; Jackson Autobiographical draft, January 10, 1944 11.
[40] Jackson, Autobiographical draft, January 10, 1944 13.

political sense."[41] It resulted from an environment in which the tools of self-sufficiency were available to almost everyone. Most people were farmers or small tradespeople, so there was "very little envy of wealth [and] little inherited."[42] There was "no investor class … no management class and practically no laboring class as distinct from those who were owners"; the farmer "was both capitalist and laborer."[43] Jackson believed that the economic structure of these communities distinguished "The economic and social aspects of this type of farm life … from those of plantation life in the South or the single-crop farms of the South."[44]

For that reason, Jackson remembered, there was a work ethic of the type abhorrent to slavery and economic exploitation of others. "Everybody was expected to work" in rural society, and even "working for one's neighbors [was] respectable and much more respected than idleness."[45] In his youth, Jackson's family was comfortable materially, but they still worked for a living.[46] Young Robert helped around the house and in the yard, tended his own garden and cared for the horses.[47] During summers in high school, he worked at a local canning factory.[48] And since "every sanction, economic and social, favored hard work, long hours, and thrift," Jackson believed that "no form of slavery ever has produced such sustained and intelligent effort, and no wage

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[41] Jackson Autobiographical draft 2.
[42] Jackson Reminiscences 37.
[43] Jackson Autobiographical draft 5-6.
Few people were employed by another, and most of them were youths looking forward to the day when they would work their own land. Nor was "there … worker resentment against owners," largely because the owners worked under the same conditions the help did. Jackson Autobiographical draft 6-7; Jackson Autobiographical draft, January 10, 1944, 7, 13; Jackson Autobiographical draft 11.
[44] Jackson Autobiographical draft 2-3.
[45] Jackson Autobiographical draft 11-13; Jackson Reminiscences 37-38.
[46] Gerhart, America's Advocate 29.
[47] Jackson Reminiscences 38-39.
[48] Jackson Reminiscences 41.

system ever has induced human exertion equal to that put into this family farming system."[49]

Yet in the absence of sanctioned exploitation, any exploitation was deemed impossible: there was no such thing as victimization. For example, while "poverty itself was no disgrace," paupers were subject to "both poverty and community disapproval":

> For an unfortunate individual there was utmost kindness, but if one was a pauper that was probably his own fault – he either drank or gambled, or was lazy, or something evil. Poverty, as such, attracted no sympathy and little help.[50]

The notion that being poor was somehow the fault of the individual could have made it difficult for Jackson to understand the plight of poor African Americans, especially in the South. In the last years of his life he staunchly defended the poll tax in private correspondence, arguing that people should not expect to vote unless they are willing to help pay for the community's upkeep.[51] But in the South, the poll tax was used quite successfully for another purpose --as a means for keeping most poor blacks, and poor whites, out of the political system, for they lacked the disposable income with which to pay the tax.[52] Jackson's principles worked well in the relatively homogeneous and abundant world of yeoman farmers in Western New York and Western Pennsylvania, but his lack of exposure to Southern rural poverty and racial hierarchy created a blind spot to the fundamentals of white supremacy.

Yet another implication derives from a striking quality emerging from Jackson's stories about his family and his early life. While Jackson was not the type to shrink from

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[49] Jackson Autobiographical draft 13.
[50] Jackson Reminiscences 37-38.
[51] See p. 380.
[52] Patricia Sullivan, Days of Hope: Race and Democracy in the New Deal Era (Chapel Hill: University of North Carolina Press, 1996) 106-07.

a fight – litigation is a type of combat, after all – there was a side of Jackson which deeply abhorred conflict, to the point of sometimes valuing peace over justice. He engaged "only in hobbies which are non-competitive," and would "decline hobbies in which a score is kept, such as bridge or golf," as "They are too apt to result in watching your score instead of enjoying the game."[53] This abhorrence of competition or conflict could be aimed at those he deemed responsible for instigating a fight, even at those calling for help. In his oral history, he related a telling anecdote from his great uncle. Of whom Jackson recalled, "I cut my teeth on his watch… He was a strong and very early influence, too early for me to estimate its effect." [54] A former California prospector, he told the young Robert how his partner in the gold fields had absconded with their proceeds one night. Instead of attempting to reclaim the stolen gold, the elder Jackson "simply went to work on the claim to replace what he had lost, and eventually pretty much made it up." The former partner, on the other hand, supposedly "spent all that he had stolen and all he had on a wild but short life in San Francisco." From this, Jackson explained, Great Uncle William "always drew two morals… One was to have no partners. The other was that stolen money did not do men any good."[55]

Along with the rejection of victimization flowed hostility toward those who would help the victims. The Jacksons' extreme live-and-let-live-attitude, borne of their milieu, also engendered distaste for reform movements of any kind. As the justice recalled, "Neither the Eldreds nor the Jacksons were given to fanaticism and neither of

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[53] Robert H. Jackson to Louis M. Notkin, January 20, 1939, Box 17, File: General Correspondence – "N," Robert H. Jackson Collection, Library of Congress.
[54] Jackson Reminiscences 12.
[55] Jackson Reminiscences 8. William was also an early opponent of a gun-toting culture, concluding from his prospecting experiences "that being armed was the cause of being shot, instead of a protection against it." Indeed, William "felt safer for being obviously unarmed." Jackson extended this view to international relations: "I have never been sure that he was not right." Jackson Reminiscences 8-9.

them wanted to reform anyone else," at least partly as a result of their lack of experience with industrialized society.[56] And it would surely not engender sympathy for people who used the court system to right social wrongs.[57]

Indeed, the relative physical isolation and independence in rural life must have made it difficult for its denizens to perceive a need for any official regulation of interpersonal relations. Jackson retained a streak of the anti-government sentiment that ran deep in his family and in his rural world. This attitude was reflected in "the widespread notion" that was "built on colonial tradition" and "quite appropriate to the rugged individualism of early Chautauqua settlers and to the conditions which it gave birth," and which persisted in rural Chautauqua County even after young Robert moved to Washington: that "the least government [w]as the best."[58] In his oral history, the former New Dealer explained, somewhat ironically at first blush:

> I am glad [my father] died before there was an income tax because I think he would have told the United States that it was none of their business how much money he made. He didn't want anything to do with the government and didn't want it to have anything to do with him…. He really would have been in trouble today – they all would, as that was their general attitude. In spirit my father, and even I, are much closer to the frontier than most of the people I meet.[59]

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[56] Jackson Reminiscences 23; Jackson, Autobiographical draft, January 10, 1944 13.

[57] For the story of how the Legal Defense Fund, an autonomous arm of the NAACP, embarked on its struggle to end desegregation through the court system, consult Tushnet, Making Civil Rights Law; Genna Rae McNeil, Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights (Philadelphia: University of Pennsylvania Press, 1983).

[58] Fox, Rural Community 135.

[59] Jackson Reminiscences 31. Jackson's ardent defense of the New Deal suggests that he was not as doctrinaire as the *laissez faire* ideologues, nor was he immune to human suffering. He could at least understand that larger economic forces could bring widespread hardship, and that the government should step in to mitigate the effects of economic downturns. But Jackson's ability to see the Great Depression as a special circumstance undoubtedly made it easier for him to be less supportive of New Deal-type economic measures after the crisis had passed. This may help explain the conservative trend in Jackson's voting record on economic issues before the Court. Glendon Schubert, "Jackson's Judicial Philosophy" 9ff.

For a more detailed explanation of how Jackson squared his anti-government views with the New Deal, see Chapter 3.

In a world in which "a rifle, a shot gun, and a dog" was considered a satisfactory alternative to modern policing in an area that was fairly homogeneous ethnically, it is hard to imagine denizens clamoring for government regulation of race relations.[60]

Nor did the rural Chautauquans' democracy embrace ethnic diversity. As Jackson recognized, this "somewhat solitary and elemental life produced … a strong attachment to place – to place of birth, to the place where one lived. Local feeling was strong, and there was suspicion of the stranger until he proved himself.[61] In his own family, he acknowledged a streak of anti-stranger sentiment: "The Jacksons, having been the earliest people in the community, had perhaps a little tendency to regard all of the later arrivals as immigrants." And whether or not the suspicion of immigrants was passed on to him or not, he nonetheless absorbed the arguments in great detail.[62]

According to Fox, anyone perceived as different in the rural Chautauquans' world – and this would include anyone other than "the old families of English and northern European descent" – would "more often than not" be treated as "outsiders." Indeed, "relations between the Chautauquans and the races, nationalities, religions and other groups set apart from their own, have been spotted and varied throughout the county's history."[63] As late as the 1940s, Fox reported resentment against the foreign-born; against Catholics, especially the Poles and the Italians; against newcomers; and against

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[60] Jackson Autobiographical draft 10.
[61] Jackson, Review at 136. See also Jackson, Autobiographical draft, January 10, 1944, unnumbered handwritten draft.
[62] Jackson Reminiscences 12. At an interscholastic debate at Niagara Falls, New York Jackson, then a senior at Jamestown High School, argued in favor of immigration restrictions that would cease to place the nation's "Anglo-Saxon heritage in peril." He lost the debate by a vote of two to one. Robert H. Jackson, debate, Niagara Falls, NY, June 13, 1910, Box 241, File: Miscellany – School Papers – Speeches and Debate Papers, 1907-10, Robert H. Jackson Collection, Library of Congress.
[63] Fox, Rural Community 147.

the poor.[64] In the county seat of Jamestown, even Swedes, despite their Northern European descent, might meet with occasional discrimination in the early twentieth century.[65] Any attempt to fight the local prejudices only made matters worse: "to the extent to which the outsiders differ and to which they attempt to assert themselves in the affairs of the communities in which they are the minority, however large, to that extent they are resented and even looked down upon as inferior."[66]

The infrequency of manifested ill-will toward racial minorities was more a function of demographics than of ideology.[67] Only 148 African Americans lived in Chautauqua County in 1900, comprising fewer than one in five hundred people, and living mostly in Jamestown.[68] When an influx of African Americans seemed likely, there was resistance, as exemplified by the "serious opposition" of neighbors to a proposed "housing project for Negro defense workers" in a nearby community during World War II.[69] Given the minute portion of the African American population in the county, whatever racist feelings people had, had little occasion to be expressed. Thus, the little

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[64] Fox, Rural Community 148. See also The Centennial History of Chautauqua County: A detailed and entertaining Story of One Hundred Years of Development (2 vols. Jamestown, NY: The Chautauqua History Company, 1904) 316-18.
[65] A.J. Lannes, Civic and Industrial Progress of the Swedish People in Jamestown 1848-1914 (Jamestown, NY: Bergwall Printing Co., 1914) 5, 12. In turn, the Swedes were accused of unusually strong anti-Semitism in the first half of the twentieth century. "G.G. Michelson, American Jewish Women of Achievement," transcript of oral history interviews conducted by Rosalind Mayer, William E. Wiener Oral History Library of the American Jewish Committee, August 19 and 31, 1982 (main research library, New York Public Library, New York, NY) 1-6, 8, 20.
[66] Fox, Rural Community 147.
[67] Fox, Rural Community 148.
[68] The Centennial History of Chautauqua County 316-18; John P. Downs, Editor-in-Charge, and Fedwick W. Hedley, Editor-in-Chief, History of Chautauqua County New York and its People (2 vols. Boston: American Historical Society, 1921) 89-90, 168.
[69] Fox, Rural Community 148.

outright hostility toward African Americans was probably due to their small numbers and their marginal place in local society.[70]

Jackson's love of rural life seemed to dovetail with another affinity – one with rural Southerners. In his 1944 review of a Southwest Georgia lawyer's memoir – appropriately entitled "Tribute to Country Lawyers: A Review"[71] -- Jackson claimed that the real rift in twentieth century America was not between North and South, but between urban and rural America. Papering over the fundamental differences between rural North and rural South, which he contemplated in his roughly contemporaneous autobiographical notes, he wrote that "Judge Powell's book reminds us who come from rural backgrounds that our way of life was much the same all over America," and so different from the urban experience that city-dwellers could not understand them as well as they could understand each other:

> … his early life in the heart of Rebel territory and mine in typical Yankee domain were so alike that it stirred a faint nostalgia – such a homesickness as the city-bred will never understand."[72]

Jackson romanticized his past more than did Powell. The memoirist treasured his small Georgia community, he also described its story as one of "progress," a "rise from

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[70] For a contemporary view, see Downs and Hedley, History of Chautauqua County 90: African Americans "still remain distinct from all other classes by reason of a far wider racial difference."

[71] Jackson's review also provides a useful perspective on Jackson's view of lawyering and the legal profession. But, since the memoirist was a Southerner, Jackson's discussion of the book reveals some of the justice's own views about the South, the Civil War and Reconstruction. Jackson's comments indicate that he is a product of then-prevailing attitudes on those subjects, but with a decided twist, stemming from Jackson's ability to see the legitimacy of opposing points of view, and his sympathy, borne of his understanding (forged in childhood) of the Civil War and Reconstruction.

Felix Frankfurter remarked of this review, "no one can read his delicious review of Judge Arthur Gray Powell's 'I Can Go Home Again' without feeling that Mr. Justice Jackson's past left in him not romantic nostalgia but an allegiance to qualities he never ceased to deem essential." Felix Frankfurter, "Foreward" 436. In fact, Frankfurter was only half right; a "romantic nostalgia" about farm life coexisted with the rural qualities Jackson valued throughout his life.

[72] Jackson Review 136.

primitive conditions to a state of prosperity and culture."[73] For Jackson, though, the romance was more one-sided, his idealized reminiscences melding with Powell's descriptions:

> The country doctor, with the lawyer, the teacher, and the preacher, made up the "learned professions," and of these the doctor was the closest to the family hearthstone. He carried his medicines and a pair of forceps to pull aching teeth, if his wife had not borrowed them for some domestic purpose, such as tightening the nuts on the sewing machine….
>
> Our homes were warmed and our food was cooked with wood stoves. There was no plumbing and no sewers, of course, but we managed pretty well without….
>
> The churches were centers of a social life and influence that was distinct from any doctrinal influence…. the Church did hold out an inducement to decent life, and there was nothing that fully took its place.[74]

Jackson also papered over the whole issue of Southern race relations. Saluting Powell for harboring "the good will without which no progress is possible" on the issue, the reviewer overlooked the book's racial stereotyping, its racial epithets, its discussion of the "fealty" African American servants owed their employers' children, its endorsement of white supremacy, its underlying premise that African Americans never would become whites' equals, and its strong support of segregation.[75]

Was Jackson seeing himself in Powell? Or was he trying to put Southern attitudes in the best possible light, even to the point of papering over racial prejudice? Either way, the softpedaling of racial attitudes in the review is simply one manifestation of Jackson's major stated concern with desegregation: the need to maintain the good will of Southern

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[73] Arthur Gray Powell, I Can Go Home Again (Chapel Hill: University of North Carolina Press, 1943) 4, 5.
[74] Jackson Review 136.
[75] Jackson Review 138; Powell, I Can Go Home Again 15, 44, 51-52, 119, 121-23, 172, 178, 212, 213, 214, 217,231, 233-34, 235, 253-54. Similarly, Jackson extolled Powell's handling of the Leo Frank lynching, and blamed the episode on passions whipped up by partisans on both sides; yet Powell paid it relatively little attention and attributed responsibility only to "outside interference" by "various writers, civil rights societies, and Jewish organizations," without whom, he claimed, "Frank probably would have been acquitted." Powell, I Can Go Home Again 287-88.

whites. And Jackson's affinity for ruralism in its varied forms likely influenced his sympathies. But one more influence – a political/historical interpretation of the great conflict a century before – also played a role.

Jackson, His Family and the Civil War

Just as his family's rural ethic was his ethic, the Jacksons' politics was passed down to young Robert. Most branches of his family tree had a strong tradition of voting Democratic. Elijah Jackson, the eighteenth-century patriarch, "was a 'stiff Democrat' … a follower of Jefferson and then of Andrew Jackson, and throughout his life made no compromises apparently."[76] To the best of the Justice's knowledge all Jacksons were Democrats, despite the fact that "The town of Frewsburg [like the rest of Chautauqua County] was overwhelmingly Republican. There were few Democrats in the town except my family."[77] Jackson's grandfather "boasted of having voted for Franklin Pierce and for every Democratic candidate for President from that time down to Woodrow Wilson." He once told his grandson "that he [had] voted against Lincoln twice." Similarly, Robert's Great Uncle William "was a firm Democrat as long as he lived."[78] The Houghouts, like the Jacksons, were also staunch Democrats. Jackson's maternal grandmother's family, the Gregorys, were all Republicans – except for Jackson's grandmother.[79]

The Jacksons' allegiance remained solid even during the Civil War and beyond, when bashing the Democrats and bashing the South went hand-in-hand. The abuse of

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[76] Jackson Reminiscences 5.
[77] Jackson Reminiscences 47; Gerhart, America's Advocate 28; Fox, Rural Community 138.
[78] Jackson Reminiscences 6; Eugene C Gerhart, draft of America's Advocate: Robert H. Jackson, Box 189, File: Biographical File, Robert H. Jackson Collection, Library of Congress. Unlike the staunchly Democratic Jacksons, the Eldreds were Whigs, members of one of the precursor parties to the Republicans. Jackson Reminiscences 19, 24.
[79] Jackson Reminiscences 26-27.

Democrats over the Civil War (a conflict that rural Chautauquans would still call "The War of the Rebellion" decades later[80]) continued into Jackson's adulthood:

> In the early days, up to the second Wilson campaign, the Republicans almost invariably wound up by denouncing the Democrats as traitors and aiders of traitors, and said if you wanted to put the South in the saddle again all you had to do was vote the Democratic ticket.[81]

Yet, the Justice claimed, the Jacksons never suffered for their politics. Even during the Civil War, his great-uncle William was a justice of the peace and "held nearly all of the offices in his town" during his lifetime. So "apparently the family did not suffer the extreme disapprobation of their neighbors that some Democrats did in that era…,"[82] though according to Jackson "many" Northern Democrats did. Jackson intimated that his family's determination not "to convince others" of the rectitude of their views might have facilitated good relations with their Republican neighbors: "the feeling ran very high in some sections and had bitter and lasting effects, but if the Jacksons were determined to think as they pleased, they were never given to proselyting [sic] or crusading to convince others."[83] Thus, if political dissenters did not attempt "to reform anyone else," they would not suffer persecution.[84]

Jackson separated his family's rabid party loyalty from the issues of slavery and secession, maintaining that his family supported the Democrats during the Civil War but opposed slavery. Both positions, he argued, were functions of their peaceable nature: the Jacksons "were not of the war party and deplored the hostilities," but "they were never sympathetic with the South in the sense that they favored slavery, or were in favor of

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[80] Fox, Rural Community 123.
[81] Jackson Reminiscences 47.
[82] Jackson Reminiscences 5.
[83] Jackson Reminiscences 13-14.
[84] Jackson Reminiscences 23.

disunion, or allowing disunion." The justice's reflections on the relative merits of the plantation and the family farm suggest a strongly-held belief in the inherent superiority of free, landowning farmers. As Jackson wrote of the people in his rural world, "these people made slaves of no one except themselves."[85] Yet members of his clan "felt very deeply that the Abolitionists of the North were a hot-headed, lawless lot, and that slave owners constituted another hot-headed and lawless lot, and that the two were getting the country into war." He believed that his ancestors "felt that more moderate measures on both sides would have avoided war and would have accomplished the freeing of the slaves at the same time. They told me that they were even in favor of buying the slaves and then giving them their freedom." But "they were consistently Democrats during the war, that being the least extreme of the parties" in their view.[86] These oral recollections coincide with letters from one branch of Jackson's English relatives; that correspondence expressed roughly the same views: that ending slavery was good, but the war was not.[87] And while such a mix of views was unlikely, it was not impossible. Antislavery sentiment was quite unusual (at least until late in the war, when its military potential became apparent) among Democratic leaders; but antiwar and antislavery views were not entirely mutually exclusive, even among leading Peace Democrats.[88]

Robert's conviction that his ancestors were correct about the origins of the Civil War was reflected in respected historical opinion during his adult life, which held that the Civil War was a "repressible conflict" brought about by abolitionist extremists and a

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[85] Jackson Autobiographical draft, January 10, 1944 9.
[86] Jackson Reminiscences 13.
[87] "The Eldred Family" 2, Box 8, Family Papers, Other Papers, Genealogical Records, Robert H. Jackson Collection, Library of Congress 206, 211-12, 214, 222-23, 230, 246.
[88] Joanna D. Cowden, "Heaven Will Frown on Such a Cause as This": Six Democrats Who Opposed Lincoln's War (Lanham, MD: University Press of America, 2001) 8-10, 13-14, 103, 104-06, 162, 180.

"blundering generation" of politicians."[89] Jackson, as a young adult, denied the centrality of slavery in the great conflict, maintaining that "the freeing of the negro was not the most important issue involved in the war," that Lincoln was correct not "to let the fate of a few million negroes obscure the greater issue of the fate of free government."[90] Whatever Jackson's family, or the young Robert, might have thought about slavery, it seems that it probably was not a central issue in their minds.

The Jackson family's history of military service during wartime further manifests a standoffish attitude toward the Civil War, or toward war in general. His grandfather was drafted but did not serve in the Civil War; Robert believed that he had sent a substitute.[91] Late in life, he recalled that he was "never ashamed of" his grandfather's decision, one that many of his neighbors apparently agreed with.[92] In fact, observed Jackson, "Except for Uri Jackson's service in the Revolution, as to which I have no details, none of the Jacksons down to today ever enlisted, or served in the army, or had

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[89] Jackson's criticism of "extremists" in the slavery debate resembled the works of leading historians during Robert Jackson's adult life. Avery Craven, The Repressible Conflict (Baton Rouge: Louisiana State University Press, 1939) 64; J.G. Randall, "The Blundering Generation," Mississippi Valley Historical Review 27 (June 1940) 4-16.

[90] Robert H. Jackson, Speech to the Grand Army of the Republic, Fentonville, NY, May 31, 1914, Box 31, File: Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 3-4.

[91] Jackson Reminiscences 14.

[92] While estimates of the total number of Chautauquans serving in the war varied from 2000 to 4000, one report claimed that Chautauqua County's draft quota of 908 was filled "nearly all by substitutes from out of towns…" Centennial History of Chautauqua County 562; Andrew W. Young, History of Chautauqua County, New York: From Its First Settlement to the Present Time (Buffalo, NY: Printing House of Matthews & Warren, 1875) 194.

Jackson's attitude toward the Civil War may have been reinforced by his family's collection of literature. According to Jackson, his ancestors had little formal education, but they "all had and read books, which few families in the community did"; they owned "an unusual number" of good books. Jackson Reminiscences 15; Jackson Autobiographical draft 49. Robert had some of the family's collection, which was divided among all of the younger family members. He believed, though, that his portion of the collection was representative of the whole. It included an 1850 biography of Charles C. Calhoun, the proponent of nullification who during the Civil War was considered a prophet of secession. Jackson Reminiscences 16, 19, 22. Jackson's writings as a schoolboy, and later, as a young man, about the Civil War and Reconstruction – writings that express sympathy for Southerners suffering at the hands of Northern "extremists" – suggest that Jackson's sympathies may have been reinforced by such books during his childhood.

any interest in military affairs. They were not pacifists either in national policy, or individually, but they did not believe that wars or fights really settle any problems and they were against warlike policy."[93] Actually, at least two of Jackson's relatives had served in the Union Army during the Civil War: Isaac Houghwout, and William A. McCray, who may have married Jackson's paternal grandfather's sister. But Jackson did not consider either of these distant relations an ancestor. In this way, he maintained the self-image with which he most closely identified – the war-avoiding Jacksons.[94]

The opinions about slavery and the Civil War which Jackson ascribed to his family reflected his discomfort with civil rights advocacy. At the bedrock of Jackson's thinking was the belief that if people left each other alone to solve their problems, instead of trying to change each other's minds, all would work out in the end, and without the cost of war and strife. Trying to change the minds of others was a waste of time, and risked causing more strife. From this attitude, it would be easy to assume that minorities, if they quietly went about their business, had the power to live their lives in peace, without being oppressed by their neighbors; calling attention to oneself would only make matters worse. As Jackson pondered, at the same stage of his life that he offered these reminiscences, the role of the Supreme Court in changing the South's social structure through state action, one can imagine the depth of his reluctance to get the Court involved in what he feared would be a futile and destructive effort at social improvement.

But to what extent did these reminiscences, made when Jackson was already on the Court and after he had lived in the biracial Washington, D.C. area for ten years or

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[93] Jackson Reminiscences 14.

[94] Robert H. Jackson to J. Duane Upton, December 8, 1938 and February 24, 1945, Box 20, File: General Correspondence, 1912-54 – Upton, J. Duane, Robert H. Jackson Collection, Library of Congress.

more, actually represent a baseline of attitudes with which Jackson's elder relatives supplied him, or are they Jackson's attempts to put his family's opinions in the best possible light? Robert's youthful writings suggest that his views of that era in American history, and his view of African Americans, was less than sympathetic to the millions victimized by slavery.

School Days

Jackson completed all but his last year of public education in Frewsburg schools: his neighborhood's one-room schoolhouse and Frewsburg High School, a small operation where Jackson was reportedly one of three graduates in 1909.[95] It is unlikely that the young Jackson encountered African Americans there; the local census listed none in the town of Carroll, where Frewsburg was located, in either 1900 or 1910.[96] He then spent one year as a postgraduate student at Jamestown High School, undoubtedly to take advantage of that school's more comprehensive course offerings and better facilities.[97] It was a year that the young man found intellectually stimulating, and where he received encouragement to become a lawyer.[98]

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[95] "From Spring Creek to Washington," biographical information included in program for a Testimonial Dinner Honoring The Hon. Robert H. Jackson, Attorney-General of the United States, by the Citizens of the City of Jamestown, Hotel Jamestown, Jamestown, New York, May 7, 1940, Box 208, File: Miscellany – Awards, Honors, and Tributes 1938-40, Robert H. Jackson Collection, Library of Congress; Jackson Reminiscences 58-59.

[96] U.S. Census Bureau. 12th Census (1900), Roll 1013; and 13th Census (1910), Roll 929. Unfortunately, the condition of some of the census data sheets are such that a small percentage of entries are illegible, but the legible portions (which comprise easily 95% of the data) were easily readable, and uncovered no evidence of African Americans in the town of Carroll, where Frewsburg is located. This view of Frewsburg as being entirely white was confirmed by a local historian. Telephone conversation with Barbara Cessna, Fenton History Center, Jamestown, New York, August 9, 2002.

[97] Residents of Jamestown prided themselves on the high school's curriculum and facilities. Vernelle A. Hatch, ed. Illustrated History of Jamestown, Chautauqua County, N.Y. Containing Sketches and Illustrations of the Village in the early days of its existence, together with Photographs and Biographies of the Present Time (Jamestown, NY: C.E. Burk, 1900) 65.

[98] Gerhart, America's Advocate, 32-34; Jackson Reminiscences 62-63.

Our knowledge of Jackson and his experiences at this time is limited.[99] Based on the relatively small amount of evidence, it appears that, in these years, he began constructing his attitudes about African Americans and race relations. But the evidence of what those attitudes were is contradictory, and depends on when and where it was generated.

In a March 13, 1950 letter seeking a legal scholar Charles Fairman's advice in the university segregation cases, Jackson recalled a childhood unmarred by racial bigotry: "I was brought up in a community where no serious racial problems or tensions existed, attended public school along with a few Negro pupils and never gave it a thought; I cannot remember that it was ever even discussed." He then claimed that he "first encountered real racial consciousness and antagonism in Washington, D.C." It was, he explained, this "conflict" generated by "extremists on both sides" of the race issue which concerned him when he thought about desegregation.[100]

The professed absence of both segregation and racial tension in Jackson's youth may seem remarkable, especially given the rampant racism of this country at that time and the prevalent *de facto* segregation and persistence of racial tensions in our own. But such recollections are not unusual. Two of Jackson's less ambivalent colleagues at the time of the *Brown* decision, Chief Justice Warren and Justice Douglas, also grew up outside the South, in municipalities with small African American populations and no segregated schools. Like Jackson, they had no memory of racism against African

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His high school class, impressed by young Robert's budding eloquence, wrote in the 1910 Jamestown High School Yearbook, "Mark you! This promising young orator from Frewsburg!" The Red and Green: J.H.S. 1910, Fenton Historical Center, Jamestown, New York 16.

[99] Only ten pages of the Justice's 1500-plus page oral history was devoted to his public education; by comparison, over twice as much text was devoted to his three years of legal study. Jackson Reminiscences 55-64, 65-92.

[100] Jackson to Fairman, March 13, 1950 1.

American students during their school days.[101] But unlike their colleague, they were willing to concede that such reminiscences were perhaps overly charitable.[102] Since both recorded their recollections during the 1970s, after the civil rights movement and a generation after Jackson wrote his, perhaps the timing of their recollections helps to explain why they might have been more conscious of the possibility of racial tensions. But Jackson's positive insistence that race relations were fine until the extremists got a hold of the issue feels more like a Southerner's than a fellow Northerner's.

Reclaiming, as much as possible, the factual background about Jackson's school days, will permit an evaluation of Jackson's assertions to Fairman, and perhaps bring us closer to the source (or sources) of the Justice's dilemma. His claim that there was neither segregation nor racial tension in the schools is, when considering Frewsburg, very likely accurate, because there is no evidence of African Americans there; but the lack of conflict might have been due to a lack of opportunity.

One of the few surviving examples of Jackson's schoolwork is a speech he was to have delivered at Frewsburg High School Hall on Abraham Lincoln's hundredth birthday.[103] The title and subject of the speech, "A. Lincoln from the Point of View of An Enemy," suggests that Jackson did not share all of the views presented therein. Indeed, throughout the approximately 1300-word speech appear instances in which Jackson explicitly ascribed thoughts about Lincoln, and even thoughts about the Civil

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[101] Douglas, Go East, Young Man, 69-70. Douglas recalled that when the number of African Americans in his hometown increased to "nearly a thousand … the feeling of racial discrimination [was] closer to the surface." Warren, The Memoirs of Earl Warren 4.

[102] Douglas, Go East, Young Man 69-70; Warren, The Memoirs of Earl Warren 29-30, 58.

[103] Jackson ended up yielding his time to another speaker, a Reverend Stone, that day. He ultimately delivered the speech to someone identified only by the initials "K.G.L.S." four days later. Robert H. Jackson, "A. Lincoln from the Point of View of An Enemy," Box 244, Miscellany – School Papers -- Speeches and Debate Papers, Robert H. Jackson Collection, Library of Congress.

War, to Southerners.[104] Yet the speech, and the one confirmed source – a published lecture by Southerner and New South proponent Henry W. Grady about "The Race Problem," delivered in Boston in 1900 and also saved in Jackson's papers – indicate at the very least that the young Robert had been exposed to the full run of blatantly anti-African American ideas, and from more than one source.

Much of the material Jackson included did not appear in the Grady pamphlet. Indeed, some passages in the oration were much more hostile than Grady, a "moderate white supremacist" who would doubtless have toned down the more racist aspects of his thinking for a New England audience.[105] For example, the young Jackson explained that the Confederates felt the need to secede because the Union had "determined upon a course of tyrany [sic] and oppression," by "attempting to free the African, who had been the servant of the Aryan race for 6000 years." The claim that African Americans were the natural slaves of Europeans for thousands of years nowhere appears in Grady's pamphlet, which instead conceded that the end of slavery was a good thing, and argued against a biracial polity on the ground of incompatibility and not African inferiority.[106]

Jackson also cited northern hypocrisy to mitigate Southern slavery, by arguing that "The same negro whom the northerners would not tolerate, whom they had enslaved when profitable and when not had sold to the south, were to be taken without compensation and placed upon a basis of absolute equality."[107] By contrast, Grady -- as

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[104] Robert H. Jackson, "A. Lincoln" 1 (emphasis added).
[105] George M. Fredrickson, The Black Image in the White Mind: The Debate on Afro-American Character and Destiny 1817-1914 (New York: Harper & Row, 1971; New York: Harper Torch Books, 1972) 205-06, 216-17, 218-19; Ada Lois Sipuel Fisher, A Matter of Black and White: The Autobiography of Ada Lois Sipuel Fisher (Norman, OK: University of Oklahoma Press: 1996) chs. 2 and 3, pp. 13, 43ff.
[106] Henry W. Grady, The Race Problem: A Lecture (reprint from "Modern Eloquence"; Chicago, George L. Shuman & Co., 1900), Box 243, File: Miscellany – Printed Matter – Robert H. Jackson Collection, Library of Congress 5.
[107] Jackson, "A. Lincoln" 1.

befit a Southerner speaking in Boston in 1900 -- essentially left alone the antebellum issues that had split the sections. Jackson also explained that abolition "was a blessing in disguise" for Southern whites, for "negro slavery … was the bond which held the southern states from the career of progress which has since been theirs"; he added, sounding more like many a Free Soiler of antebellum times than like a conciliatory Southerner of 1900, that "the harm to slavery was to the white and not the ethiopian."[108] He went on to deride the "government, by carpet-baggers and scalawags" – figures to whom Grady referred but did not mention by name – the "negro oligarchy upheld by negro sufferage [sic] while the whites who bore the burden of the taxation were no better than disenfranchised and their property became the plunder of the thieves of both races."[109]

Jackson, like Grady, used statistics about the imprisonment of African Americans, but they each used different ones. And Jackson employed his in a more startlingly racist way than did his Southern counterpart. Grady cited proof that a smaller percentage of African Americans was jailed in the South than in the North, to suggest that Southerners treated African American offenders more leniently than did Northerners; by so doing, he attempted to refute the argument that the criminal justice system in the South railroaded African Americans.[110] Jackson, on the other hand, used African American crime figures to demonstrate the inherent criminality of African Americans:

> The negro, who to-day after 40 years of freedom and education is bared [sic] from all respectable presence, the admitted cause of 2/3 of the crime committed south of Mason & dixons line [sic], who in the streets of even our great northern cities insults our Anglo-Saxon womanhood, and fills the pages of our criminal history

[108] Jackson, "A. Lincoln" 1.
[109] Jackson, "A. Lincoln" 1.
[110] Grady, The Race Problem 8-9.

> with the most brutal attacks upon the young girlhood of America was to be freed without restraint to practice his brutality on the disarmed South.[111]

In this passage the young orator did more than make a point about African Americans' threat to Southerners: most of it cited the perceived African American threat to "*our* great northern cities" and "*our* Anglo-Saxon womanhood."[112] It further defended "barring" African Americans "from all respectable presence" in the North. Thus, when he went on to claim that "the negro has not ceased and never will cease to be a stench in the nostrils of civilization"—a sentiment which ran counter to Grady's position that African Americans had made major strides, both financially and educationally, under segregation – Jackson may well have been expressing his own views as well as those of a generic "enemy" he imagined in his mind.[113] By defending Northern racism in the first person, in a speech that was supposed to reflect the Southern perspective, Jackson further demonstrated that he had absorbed anti-African American vitriol from his own region.

Another question raised by this extraordinary document is the lasting impact the attitudes to which he had been exposed may have had on him. That he retained some of them as personal beliefs seems confirmed by later episodes – a Memorial Day speech delivered in 1915, when he was a young lawyer in Jamestown;[114] his 1934 recollections about an African American janitor at Jamestown High School; and a memorandum in which he urged his fellow Justice Franck Murphy to read Claude Bowers's pro-Southern view of Reconstruction, The Tragic Era.[115] He believed, throughout his life, that Reconstruction was a time of oppression for Southern whites, at the hands of African

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[111] Jackson, "A. Lincoln" 1.
[112] Jackson, "A. Lincoln" 1 (emphasis added).
[113] Jackson, "A. Lincoln" 1; Grady, The Race Problem 7, 8, 9.
[114] See pp. 76-77.
[115] See pp. 55, 310-12.

Americans, carpetbaggers and scalawags. Moreover, as he wrote when he was a young lawyer, the Civil War "did not solve the negro question – he is still there, illiterate, indigent and unmoral, obeying only one commandment of the Scriptures – that to go forth and multiply."[116]

There is evidence that, at Jamestown High School, Jackson had been exposed to small numbers of African Americans – and to racism. According to the 1910 census, approximately 20 African American children (marked as either Black or Mulatto) in Jamestown were reported by the heads of their households to have attended school at some point during the academic year beginning in September 1909, although the census form nowhere indicated whether those schools were public or private.[117] Six of those students were between the ages of fourteen and eighteen, and therefore might have been attending Jamestown High School with Jackson.[118] A search of the photographs in the 1910 yearbook, reveals one student who appears to be African American.[119] Moreover, there is no evidence that the Jamestown public schools were segregated in 1910; indeed, segregation was banned under state law. And even though that law was often violated, a city with as small an African American population as Jamestown would not be a strong candidate for segregated schools, especially separate high schools.[120]

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[116] Robert H. Jackson, Memorial Day speech, Mayville, NY, May 31, 1915, Box 31, File: Speeches and Writings File, Robert H. Jackson Collection, Library of Congress; see also Chapter 2.

[117] A scholar who unearthed information about black schools in New York State found at best ambiguous evidence of any black schools in Jackson's home county at any point in its history. He found "no hard" evidence of such a school's existence. Indeed, it would be difficult to run a school for such a small number of students. Carleton Mabee, Black Education in New York State From Colonial to Modern Times (Syracuse, NY: Syracuse University Press, 1979) 290-91. According to Mabee, Chautauqua was one of 14 counties which were reported in the New York State Superintendent of School's Annual Reports as "having expended funds for black public schools for more than one year" in the nineteenth century, but added that those reports "are not reliable." Id.

[118] U.S. Census Office. 13th Census (1910). Roll 930.

[119] The Red and Green: J.H.S. 1910 22.

[120] Davison M. Douglas, Jim Crow Moves North: The Battle over Northern School Segregation, 1865-1954 (Cambridge: Cambridge University Press, 2005) 7-8, 80, 102ff.,107ff., 144; Mabee, Black Education in

That a small number of African American children may have attended school with whites in Chautauqua County did not mean that race relations were fine, as Jackson claimed in 1950. Uncovering information about the experiences of African American children in white schools before the civil rights movement can be very difficult, if not downright impossible: the only sources may be official in nature, and their reporting methods and standards were not consistent.[121] Reports from Upstate New York sometimes masked or denied ugly truths; even so, other reports admitted mistreatment of African American students, with racist parents, students and teachers sometimes accommodated at their expense.[122] Reports of harassment of African American students in high schools and colleges were legion.[123]

While Jackson has not been tied to any such incident, there is one story about his relationship with the few African Americans at Jamestown High School. In recollections presented as a speech to the Jamestown High School Lyceum in 1934, the successful attorney fondly recalled how he and a "group of us country boys and girls … often encouraged" the school's "colored janitor, Stewart … to orate for us on heavy topics like the tariff, government ownership of railroads and the like," for their amusement, as they believed him to be "the world's greatest genius for using the biggest words in the wrongest places." He offered this man as an object lesson in proper word choice: "he did as much as any teacher to show us the folly of using big words for small ideas"; but it

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New York State 193-212, 227-46, 283, 285. With the influx of Southern blacks after 1900, and more so after World War I, the number of black schools began to rise again in the state, although "most blacks [still] attended school with whites." Mabee, Black Education in New York State 247-61.

[121] For example, see Marian I. Hughes, Refusing Ignorance: The Struggle to Educate Black Children in Albany, New York, 1816-1873 (Albany, New York: Mount Ida Press, 1998) 39.

[122] Mabee 71-72. Hughes cited an 1875 report describing how African American students were "treated in all respects as to the other pupils, and if there was, at first, a reluctance on the part of some of the white children to associate with them, this reluctance seems to have disappeared as the result of familiarity and custom." Hughes, Refusing Ignorance 79.

[123] Mabee, Black Education in New York State 266-67.

employed a racial stereotype seen elsewhere in Jamestown.[124] In the changing intellectual climate of the 1950s, Jackson might not have wanted to bring up these occasions, or he might have forgotten about them. But even as late as 1934, when he was about to begin his career in Washington, they did not seem problematic to him.[125]

There is no telling how strongly Jackson harbored such attitudes. In a town where there were no African Americans, and later, in a city with a handful of them, it is hard to imagine that white supremacy was a core value for him.[126] And given his personal ambitions, and the mind-your-own-business attitude instilled in him throughout childhood, it is plausible that Jackson took a live-and-let–live attitude toward the few African Americans around him, whatever attitudes might have simmered beneath the surface.

* * *

It hardly would be surprising for a white American to harbor some racist attitudes in the early years of the twentieth century, and Jackson's upbringing exposed him to attitudes that could easily lead to hostility toward African Americans and their quest for equal rights. He also appeared to adopt, on some level, assumptions of African American inferiority and overly sympathetic views of Southern whites. But he was not alone, and some leading civil rights stalwarts have been known to overcome traces of anti-African American bias in their backgrounds.[127] During a youth in which racial issues occupied at

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[124] Robert H. Jackson, Speech, Jamestown High School Lyceum, Jamestown, NY, 1934, Box 34, File: Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 5-6; see p. 73.
[125] In a speech to the Lyceum three years later, in the midst of his meteoric rise in Washington, Jackson did not repeat the anecdote. The speech was more formal in tone and more about Washington than Jamestown. Robert H. Jackson, Speech, Jamestown High School Lyceum, Jamestown, NY, December 15, 1937, Box 34, File: Speeches and Writings File, Robert H. Jackson Collection, Library of Congress.
[126] Chernack agrees. Chernack, "The Clash of Two Worlds" 84-85.
[127] Among the stalwarts of civil rights with indications of racism in their past are Hugo Black and Harry Truman. See Roger K. Newman, Hugo Black: A Biography (New York: Pantheon Books, 1994) ch. 6;

most a back burner, he also acquired some of the values and intellectual skills he would later need to overcome initial, possibly superficial, biases. As a young lawyer, he began honing those tools.

William A. Leuchtenberg, The White House Looks South: Franklin D. Roosevelt, Harry S. Truman, Lyndon B. Johnson (Baton Rouge: Louisiana State University Press, 2005) Ch. 5; Michael R. Gardner, Harry Truman and Civil Rights: Moral Courage and Political Risks (Carbondale, IL: Southern Illinois University Press, 2002) chs. 1-2.

Chapter 2: A Professional of his Time

> Robert Houghwout Jackson was an eloquent spokesman for the pattern of beliefs and feelings characteristic of the political ideology of the American lawyer.
>
> -- Glendon Schubert[1]

Introduction

When reminiscing about his youth in his oral history, Justice Jackson could recall nothing he ever wanted to be, except a lawyer.[2] Young Robert wanted to join the bar so badly that he defied his father, who was "dead set against law" as a career for his only son, and borrowed the money for his education from an uncle.[3] From the beginning of his legal education in 1910 until his death over forty years later, Jackson remained employed in the legal profession. The greatest professional praise he received was his work as Solicitor General — the Justice Department's appellate lawyer – and as chief prosecutor at Nuremberg. On the Supreme Court, he was considered a "lawyer's judge," known to consider the ramifications of a ruling for the practicing attorney.[4]

What did being a "lawyer's lawyer" mean for Jackson's view of law and society in general, and of constitutional protections for African Americans in particular? The American legal profession's traditional reputation for restraint and conservatism had a

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[1] Schubert, Dispassionate Justice 1

[2] Jackson Reminiscences 67.

[3] Jackson Reminiscences 65; Gerhart, America's Advocate 33-35. Jackson's mother, on the other hand, "never obstructed" young Robert's choice." Jackson Reminiscences 67.

Eventually Jackson's father came around and gave his blessing to his son's career choice. According to Jackson, his father's resistance stemmed from lawyers he had known who had managed to slide into alcoholism or work themselves into debt. Chief among those was Frank Mott, the debt-ridden attorney who acted as the future Justice's preceptor. As Jackson recalled decades later, "The one lesson that [my father] had instilled in me was that debt was a terrible thing." Jackson Reminiscences 85; John Q. Barrett, "Albany in the Life Trajectory of Robert H. Jackson," Albany Law Review 68 (2005) 518.

[4] William H. Rehnquist to E. Barrett Prettyman, Jr., December 21, 1964, The Papers of E. Barrett Prettyman, Jr., Box 1, Special Collections, University of Virginia Law Library, Charlottesville, VA 2; Sherman Minton to Eugene Gerhart, March 19, 1957, quoted in Eugene Gerhart, Robert H. Jackson: Lawyer's Judge (Albany: Q Corporation, 1961) 102-03; Glendon Schubert, Dispassionate Justice 1.

long and distinguished lineage.[5] And Jackson believed as much,[6] from the start of his legal career. One of his role models was a Jamestown attorney, Benjamin S. Dean who, Jackson recalled, had become "very conservative, largely through his study and devotion to the law."[7] The future justice also understood, with some institutional depth, the law's tendency to act as a conservative force. In 1922, the young Jamestown attorney explained that the Supreme Court "is, always has been and always will be a conservative institution," because its members tend to be older men who came from leadership positions in "a profession which tends to conservatism."[8] The New Deal lawyer similarly explained in The Struggle for Judicial Supremacy, "'the legal profession … is much concerned with precedents, authorities, existing customs, usages, vested rights, and established relationships. Its method of thinking, accepted by no other profession, cultivates a supreme respect for the past, and its order…. No lawyer sufficiently devoted

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[5]De Tocqueville noted in 1835 that American attorneys' "interest in conservation" and preoccupation with precedent, combined with "their natural taste for order," provided the only real "brake" on democratic "passions" in the United States. Over a century later, legal historian James Willard Hurst found a strong conservative streak through the legal profession through most of the nineteenth century and well into the twentieth. And over a decade after Jackson's death, Glendon Schubert observed, "[l]egal ideology looks backward," with its tendencies "to subserve stability … and to promote … political compromises more appropriate to yesteryear." Alexis de Tocqueville, Democracy in America, volume one, part II.8 (1835),ed. J.P. Mayer and Max Lerner, trans. George Lawrence (New York: Harper & Row, 1966) 245, 247; James Willard Hurst, The Growth of American Law: The Law Makers (Boston: Little, Brown 1950) 358, 360, 364, 373; Schubert, Dispassionate Justice 2; see generally Jerold Auerbach, Unequal Justice: Law and Social Change in Modern America (New York: Oxford University Press, 1976) xi, 14.

[6]What does the term "conservative" mean when used to describe Jackson's legal training and outlook toward the law? The two most common variants connote either the preservation of traditional principles and ways of life, or those focused on preserving the interests of those currently in power. These meanings converge at some times, and diverge at others. As a general proposition, the first meaning of conservatism – preserving certain principles and ways of life – tended to be more applicable to Jackson. For more insight into Jackson's relationship with conservative principles, see pp. 108-18 (Jackson and the New Deal), 132-35 (Jackson and federalism), and 169-72 (Jackson and judicial restraint).

Hurst saw lawyers' conservatism manifest in leading attorneys' opposition to such legislation as married women property acts and workers' compensation, but found impulses "that might, in conventional terms, be classed as 'liberal'" in bar associations' support of the Court of International Justice, state versions of pure food and drug laws, and federal regulation of air traffic and public airwaves. Hurst, Growth of American Law 358, 364. Hurst found that "the organized bar was by no means as blindly conservative as the general body of lawyers." Hurst, Growth of American Law 360.

[7] Jackson Reminiscences 69.

[8] Robert H. Jackson, "The Judiciary and the Constitution," Speech to University Club, October 1922, Box 31, Speeches and Writings File, Jackson Collection, Library of Congress 5-6.

to the law to know our existing rules, the history of them, and the justification for them, will depart from them lightly.'" For that reason, he believed, "'The contribution of legal philosophy to the balance of social forces will always be on the conservative side.'"[9] Yet lawyers also reflect the viewpoints of broader society of which they are part.[10] Those opinions include "the prevailing religious, racial and national prejudices of middle-class Americans"; yet as those prejudices wane in the public as a whole, they do likewise in the legal profession. And they subside even more quickly in the "organized bar," the professional elite.[11]

These tendencies dovetail in Jackson's views on African Americans. Early in his career, Jackson the young man apparently maintained his youthful prejudices against African Americans; they were still only peripheral actors in his universe. But the younger Jackson, mindful of an attorney's professional obligation to assist everyone needing counsel, was willing to represent them -- though he never would have dreamed of originating the type of civil rights lawsuit that he would later confront on the bench. These were the attitudes that Robert Jackson brought to Washington, where he confronted the broader issue of racial justice for the first time.

An examination of Jackson's legal training and early career indicate that his involvement in the legal profession reinforced the traditional outlook of his upbringing – but only to a point. His preparation for entering the legal profession -- two years of office study with a practicing attorney, and one year at Albany Law School, a department of

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[9] Jackson, The Struggle for Judicial Supremacy 313-14, quoted in Schubert, Dispassionate Justice 2.
[10] Karl N. Llewellyn, The Bramble Bush: On Our Law and Its Study (New York: 1930; New York: Oceana Publications, 1951) 144-45.
[11] Hurst, Growth of American Law 255. Hurst found that "the organized bar was by no means as blindly conservative as the general body of lawyers." Hurst, Growth of American Law 360.

Union University in Albany, New York, which specialized in preparing students for the bar exam -- was particularly formulaic, and likely provided no model for using the law as an instrument of social and political change.[12] Jackson's training did not open him to legal, or social, innovation; as one former colleague at the Solicitor General's Office put it, "his bent was to plow old pastures in a new way, not to leap fences and attack virgin soil. He was a professional man, and neither a planner nor a dreamer. It was his job to defend, not formulate policies."[13] And his law practice reinforced, in key respects, the Jamestown attorney's rural values, particularly the belief in self-reliance and all of its implications.

Yet Jackson's formative years in the legal profession proved to be, on balance, a somewhat broadening experience. First, although the air of impartiality valued by the legal profession can frustrate social and political activists, legal thinking can sometimes help open minds.[14] Jackson's legal training gave him the intellectual tools to examine new points of view dispassionately. His colleagues, and forays into municipal politics exposed him to new ideas, and led him to question at least some of his old assumptions. From his relationship with Jamestown's reformist mayor Samuel Carlson, to his opposition to World War I and the postwar anti-communist hysteria, to his representation of labor unions and African American criminal defendants, Jackson began to refine the rural creed with which he had grown up. In a more urban setting, he began to see the value of government as the provider of necessary infrastructure, and as the safeguard of individual rights.

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[12]For an appreciation of how innovative the theories and strategies used in the drive toward court-ordered desegregation were, see Tushnet, Making Civil Rights Law and McNeil, Groundwork.
[13] Garner, "Government Attorney" 438, quoted in Schubert, Dispassionate Justice 5.
[14] One scholar who has detected political implications in the lawyerly air of objectivity is Jerold Auerbach. Auerbach, Unequal Justice ix, xi, xiii, 80, 225-28.

Jackson's Legal Training

Today, the typical lawyer enters legal practice with at least one undergraduate and one graduate degree. Even still, this amount of education, though the norm, is not required of all applicants in most states today.[15] In the early twentieth century, on the other hand, only 8% of new lawyers in the United States were college graduates.[16] By 1916, four years after Jackson had completed his studies, only seven law schools nationwide required as many as three years of college for admission[17]; The American Bar Association began recommending two years of college only in 1921.[18] The State of New York, where Jackson spent most of his career as a practicing attorney, did not require even a single year of college until 1928. Jackson's legal *alma mater*, Albany Law School, began requiring one year of college only two years earlier, in 1926.[19] And while two thirds of newly-admitted attorneys were law school graduates by 1910, a requirement

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[15] National Conference of Bar Examiners and American Bar Association Section of Legal Education and Admissions to the Bar, Comprehensive Guide to Bar Admission Requirements, 2002 ed. Twenty seven states (including New York) and the District of Columbia have no prelegal education requirement; fewer than one third of the states require a bachelor's degree or the equivalent. Thirty-two states and the District of Columbia do not require all bar applicants to possess a law degree from an ABA-approved law school. While most of these states make exceptions only for relatively unusual circumstances – for example, for graduates of foreign law schools, or for out-of-state lawyers who graduated from unaccredited schools but are seeking admission after a number of years of practice, or for graduates of unaccredited schools in-state or approved by the state licensing authority -- eight states (including New York) permit law office study to substitute for part or all of a law school education; New Mexico, California and the District of Columbia permit correspondence study. Comprehensive Guide to Bar Admission Requirements 3-4, 10-13.

[16] Jerold Auerbach, "Enmity and Amity: Law Teachers and Practitioners, 1900-1922," Law in American History, ed. Donald Fleming and Bernard Bailyn (Boston: Little, Brown 1971) 574; Auerbach, Unequal Justice 95.

[17] Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s (Chapel Hill and London: University of North Carolina Press, 1983) 36-38; Lawrence M. Friedman, A History of American Law, second ed. (1973; New York: Simon & Schuster, 1985) 612; Stevens, "Two Cheers for 1870: The American Law School," Law in American History 454-455 and n. 43 (citing the Carnegie Foundation Annual Review of Legal Education, 1918 3).

[18] Willard Hurst, The Growth of American Law: The Law Makers (Boston: Little, Brown, 1950) 268; Albert James Harno, Legal Education in the United States (San Francisco: Bancroft-Whitney, 1953) 104.

[19] Alfred Z. Reed, Present-Day Law Schools in the United States and Canada (New York: 522 Fifth Avenue, 1928) 470-71. The issue of pre-legal education remained in flux to the end of Jackson's life. Harno, Legal Education in the United States (San Francisco: Bancroft-Whitney, 1953) 90-94. Looking back forty years later, Jackson mused, "Probably if I had been five years later, I would have thought that I ought to go to college. At the time I didn't." Jackson Reminiscences 84-85.

of three years' study for a law degree was still relatively new, and by no means required by licensing authorities; nor were there agreed-upon standards as to what should be accomplished in those three years.[20] At the time that Jackson commenced his legal studies, prospective lawyers who had not graduated from college, like Jackson, "had to study three years either all in a law office, or all in a law school, or any part of it in either" to be admitted to the bar in New York; college graduates had to study for two years.[21] Albany Law School required only two years of legal coursework for a Bachelor of Laws degree (the precursor to today's Juris Doctor degree) while Jackson was there; the school adopted a three-year program for the 1912-13 academic year, just after Jackson's departure, in response to new state rules.[22]

With a father refusing to finance his education, and with ambitions in a small city where cutting-edge educational standards were unnecessary to professional success, Jackson sought close to the bare minimum of education beyond high school.[23] Thus,

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[20] Auerbach, "Enmity and Amity" 573; Auerbach, Unequal Justice 94; Harno, Legal Education in the United States 95-96, 112-13, 120. The Association of American Law Schools was then an elite institution; as late as 1920, two-thirds of all American law schools were not AALS members. Auerbach, Unequal Justice 112.

[21] Jackson Reminiscences 72; Rules IV and V, "Rules of the Court of Appeals for the Admission of Attorneys and Counsellors-at-Law," as amended 1908, reprinted in Albany Law School Annual Circular of Information 1911 , Albany Law School, Albany, NY 60.

[22] Albany Law School Annual Circular of Information 1911 46; Albany Law School Annual Circular of Information 1912, Albany Law School, Albany, NY 45; Elizabeth K. Allen and Diana S. Waite, Albany Law School 1851-2001: A Tradition of Change (Albany, NY: Mount Ida Press, 2000) 78, 85; Barrett, "Albany in the Life Trajectory of Robert H. Jackson" 522.

[23] Jackson Reminiscences 71; Schubert, Dispassionate Justice 13; John Q. Barrett, "Albany in the Life Trajectory of Robert H. Jackson" 518, 522.

According to Auerbach it was "the country lawyer" – the segment of the profession most closely allied with Jackson -- who "fired the first shot against higher standards" for bar admission, on the ground that more years of education would "'shut out … the sons of farmers and mechanics, occupying that position in society from which come the moral principles and sentiments which preserve our profession.'" Auerbach, "Enmity and Amity" 576; Auerbach, Unequal Justice 97. The dean of Albany Law School while Jackson studied there claimed that its nuts-and-bolts approach to legal education attracted "representatives of what Abraham Lincoln called 'the plain people,' the men from the country and the farm … who" like Jackson, "rely mainly upon their own resources, and … devote themselves solely to the work at hand," the passing of the bar exam. J. Newton Fiero, quoted in Allen and Waite, Albany Law School 67.

after completing his post-graduate year at Jamestown High School in 1910, Jackson planned to go to law school for only one year. He first "read law" for a year in the office of his mother's cousin, Frank H. Mott,[24] and matriculated at Albany Law School for the 1911-12 academic year.[25] Jackson remembered choosing Albany because that was where the leading lawyers in his community had gone, and because the city of Albany was the capital of New York and seat of state government.[26]

When Jackson enrolled at Albany, American legal education was in the midst of an upheaval that spanned more than two generations. In the late nineteenth century, Harvard Law School's dean Christopher Columbus Langdell revolutionized classroom instruction with the case-study approach using the Socratic method. This practice of questioning students to help them divine the reasoning of appellate decisions became the state of the art of legal instruction at the top law schools, and continues to be used in first-year classrooms today.[27] But the Langdellian method distracted students from issues of social policy, instead focusing them on the technicalities of legal procedure. The case method thus shifted "the basis of American legal education from substance to procedure,"

Later, the advocates of urban immigrant groups – including the night schools that provided a relatively inexpensive way for working people to study law -- sounded the alarm against what they viewed as exclusive educational requirements designed to exclude them. See Auerbach, "Enmity and Amity" 577*ff*; Auerbach, Unequal Justice 97-100. On one hand, the desire to make the intellectual quality of the legal profession more consistent in a time of increasing social and legal complexity was certainly a major motivation. Hurst 260-61. On the other, some reformers saw the reform movement as an opportunity to make entry into the legal profession more difficult for recent immigrants and their children. Stevens, Law School 100-11; Auerbach, "Enmity and Amity" 573-79; Auerbach, Unequal Justice *passim*.

[24] Jackson Reminiscences 65, 71; Gerhart, America's Advocate 35.

[25] Schubert, Dispassionate Justice 12-13.

[26] Jackson Reminiscences 69. One of his neighbors who attended Albany Law School was Loy Durand, who appeared in a photograph on a 1910 Christmas postcard with Jackson and a dark-skinned individual named Ralph Robinson. Mary E. Fox, "Frewsburg," Jamestown Evening Journal, Jan. 12, 1909, p. 3, col. 4.

[27] Friedman, A History of American Law 613-20; Stevens, Law School ch. 4; Hurst, The Growth of American Law 264; Harno, Legal Education in the United States 53-70.

and "isolated the study of law from the living context of the society," divorcing the study of law from substantive policy issues and from social attitudes.[28]

An avenue for bringing social policy into legal instruction began to form in the early twentieth century, with the growth of a self-conscious cadre of law professors who saw itself as operating independently of legal practitioners.[29] A movement did not coalesce until years after Jackson's graduation, with the dawn of the Legal Realism movement.[30] Yet even while the legal realists may have had the greatest potential for instilling progressive values in young lawyers, law schools still remained bastions of tradition long after the Legal Realists had passed the torch to the Critical Legal Studies

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[28] Stevens, Law School 56; see also Auerbach, Unequal Justice ix, xi, xiii; Hurst, Growth of American Law 266, 269 *ff*; Jeffrey D. Hockett, New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter and Robert H. Jackson (Lanham, MD: Rowman & Littlefield, 1996) ch. 8.

Another weakness of law school education was a pet peeve of Jackson's: that law schools failed to prepare students to practice law out of law school. Nor was Jackson alone in this evaluation. See Peter Harno, "A Law Center in Illinois," American Bar Association Journal 34 (June 1948) 464. As one legal scholar put it:

> In no respect was the case-method curriculum more narrow than in ignoring the bulk of the lawyer's special skills. A lawyer must draft documents; he must untangle complicated tangles of raw fact (and not merely handle the predigested "facts" stated in reported opinions of courts); he must weigh facts for the formulation of policy in counseling clients, and know how to choose and employ legal tools as positive instruments of policy. But of all these things, the student learned under the case method only as neglected by-products of reading the assigned opinions, or from passing classroom references drawn from his instructor's experience… [the new method imposed] intellectual discipline in place of the lax apprenticeship; but it offered no substitute for other aspects of training that had been a valuable part of the better office education.
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> [Moreover] it taught largely in artificial terms…. Its prime tool was logic, and the limited usefulness of the tool set the limits of study…. There was little to reflect that troubled people did not come to lawyers for acute essays on legal doctrine, but for help in organizing a business, getting credit … planning for the devolution of property to dependents, winding up a broken home … to form a partnership or corporation …

Hurst, Growth of American Law 269-70; Harno, Legal Education in the United States 140-42, 146-53, 175-76. Eventually, the recognition that law school class work was not adequately preparing students for the practice of law led to the adoption of clinical education programs in many law schools. Harno, Growth of American Law 172-75.

[29] Auerbach, "Enmity and Amity" 553*ff*, 570.

[30] Allen and Waite, Albany Law School 42; Stevens, Law School 134 and ch. 9; Stevens, "Two Cheers for 1870," 470; Hurst, Growth of American Law 271; Auerbach, Unequal Justice ch. 6.

movement.[31] The drive to achieve social change through lawyers and the court system did not take off in a major way before the civil rights lawyers that Jackson had become exposed to as a Supreme Court justice began their crusade.[32]

If any law school had been inclined to rock the boat, Albany would not have been the one. Founded in 1851, ALS originally had been comparable to Harvard in such critical areas as the number of faculty, its teaching method (principally lecture and textbooks) and its course offerings; it was an innovator in debating societies and moot courts.[33] With the institution of a uniform bar examination by the Board of State Law Examiners of New York in 1895, however, ALS chose to "provide 'a short and rigorous preparation for examinations for admission to the bar.'"[34] It rejected even the limited Harvard-style system of electives: while Jackson was at Albany, all courses for the full two years were prescribed.[35] The school did what it did very well, enjoying a reputation for having a higher-than-average percentage of its students pass the state bar exam. But its transformation "into a regional law school" made all but certain that the potential for using the law as a tool for social engineering would remain a concept foreign to its students.[36] As the ALS 1912 Annual Circular of Information emphasized, "We aim to give you the law as it is, not as it was or as we think it should be…."[37] And that is just how Jackson recalled it: "The Albany Law School was noted as a practical school, for its courses were designed as equipment for the New York bar rather than for legal

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[31] Jerold Auerbach, Unequal Justice xi.
[32] See generally, Tushnet, Making Civil Rights Law and McNeil, Groundwork.
[33] Elizabeth K. Allen and Diana S. Waite, Albany Law School 21, 25-26, 28, 31; Schubert, Dispassionate Justice 12-13.
[34] Allen and Waite, Albany Law School 65, quoting Albany Law School Announcement, 1895-96, 11.
[35] Albany Law School Announcement 1911-12; Stevens, "Two Cheers for 1870" 434; Hurst, Growth of American Law 263.
[36] Allen and Waite, Albany Law School 66, 74, 79, 89.
[37] Albany Law School Annual Circular of Information 1912 27.

philosophy, jurisprudence and legal theory. There was strict adherence to what was necessary to pass the New York bar examinations and to practice in New York."[38]

When Jackson registered in 1911, Albany offered three different programs. First, successful completion of the full two-year program entitled a student to a bachelor of laws (LLB) degree. Second, "Special Students" were permitted "to take such work … as they desire," but would not be eligible for either "a certificate of attendance or a diploma." Third, students who had already "done work at least the equivalent to that of the [first] year" could matriculate at the law school and take the second year's program. Successful completion of the third option would entitle the student "to a diploma certifying that he is a graduate of the School and is in all respects similar to that received by students completing the entire course except as to the degree."[39] Jackson chose the third option, and was admitted in the fall of 1911.[40] While Jackson recalled years later that he "received a diploma requiring usually two years work at the Albany Law School in one year," the surviving evidence suggests that he did not take a double courseload, as has sometimes been supposed, but he instead took the second year's course work, after having spent his first year clerking with Mott.[41] He received his one-year diploma or "certificate of graduation" in 1912.[42]

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[38] Jackson Reminiscences 71.

[39] Allen and Waite, Albany Law School 70, citing ALS Announcement (1903-04) 22, 33-34; Albany Law School Annual Circular of Information 1911 48-49.

[40] Albany Law School Annual Circular of Information 1912 73-74.

[41] Jackson Reminiscences 71; Gerhart, America's Advocate 34; "Albany Law School Examination and Attendance Report for Mr. Jackson," Feb. 1912, Box 244, File: Miscellany – School Papers – Academic Records 1898-1912, Robert H. Jackson Collection, Library of Congress; "Memorial of Robert Houghwout Jackson, Associate Justice, United States Supreme Court," Federation of Bar Associations of Western New York, Rochester, NY, October 30, 1954, Box 817, File: Jackson Memorial, Papers of Earl Warren, LOC 4-5; Barrett, "Albany in the Life Trajectory of Robert H. Jackson" 523.

In February of 1912, Jackson took five of the six second year, first semester examinations, earning a 93 average (the passing grade was an 80). Jackson recalled that, in his second semester, he had "passed all the examinations and received 100 in the subject of corporations which was taught by Frank White." Jackson Reminiscences 71; Gerhart, America's Advocate 34; "Albany Law School Examination and

Jackson was not impressed by his Albany professors but, as a self-starter, he was able to make the most of his time there, because "What you studied and what progress you made depended pretty much on yourself." He took advantage of the school's location to observe arguments at the New York Court of Appeals "when there was a particularly good argument." Jackson observed that "It was a great court and that opportunity was really one of the most important assets of the school." The experience later helped Jackson because, as he recalled, "I did enjoy appellate work and later came to do a great deal of it." But while Jackson the law student was interested in how "good lawyers" approached appellate advocacy and anticipated doing some appellate work some day, he "didn't expect a very large appellate practice" when he returned to

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Attendance Report for Mr. Jackson"; Barrett, "Albany in the Life Trajectory of Robert H. Jackson" 523. While Jackson's first semester transcript remains on file at the Library of Congress, that from the second semester does not. Nor is this information available from ALS, which discarded all of its student records from before 1920, most likely during a series of moves from downtown Albany to its current location in the years 1928-30. Email from Robert Emery, archivist, Albany Law School, to author, September 23, 2002.

[42] Jackson Reminiscences 72; Gerhart, America's Advocate 34; "A Hard Man to Pigeonhole," Time, October 18, 1954, copy in Box 2, E. Barrett, Prettyman, Jr. papers, Special Collections, University of Virginia School of Law; John Q. Barrett, "Albany in the Life Trajectory of Robert H. Jackson" 523.

Jackson recalled that he had been ineligible for a degree because he had not yet reached his twenty-first birthday when he finished his year at the school. Jackson Reminiscences 72; Gerhart, America's Advocate 34. Jackson's age may have caused some delay in the bar admission process – bar applicants had to be 21 years of age, according to the rules in place when Jackson was attending ALS – and would have presented a bar to his receipt of an LLB degree, had he chosen that route. Rule VI, "Rules of the Court of Appeals for the Admission of Attorneys and Counsellors-at-Law," reprinted in Albany Law School Annual Circular of Information 1911 60; Allen and Waite, Albany Law School 70, citing ALS Announcement (1903-04) 22, 33-34; Albany Law School Annual Circular of Information 1911 48-49; John Q. Barrett, "Albany in the Life Trajectory of Robert H. Jackson" 528-29.

Over time, the lack of a law degree created a certain amount of confusion: for example, it was apparent, even as an adult, that Jackson's son William was unaware that his father lacked a law degree. Albany Law School eventually decided to remedy this deficiency in the credentials of its most illustrious alumnus, using the "as of" dodge often used by lawyers late with their filings: on May 5, 1941, it awarded Attorney General Jackson a Bachelor of Laws Degree "as of the Class of 1912." Robert H. Jackson, "Justice Jackson's Story," Manuscript of Tape Recording Taken by Dr. Harlan B. Phillips, Oral History Research Office, Columbia University (1952-55) 190; Robert H. Jackson, Autobiographical draft 53; John Q. Barrett, "Albany in the Life Trajectory of Robert H. Jackson" 535.

Jamestown; since "there was not much appellate work from our city…. The trial work was the thing that was important."[43]

After leaving Albany, Jackson spent a "required third year" reading in Mott's law office in Jamestown "as an apprentice." He received very practice-oriented instruction from Mott, who "turned many small things over to" his student when he returned from Albany, allowing him to meet with clients and even "try[] cases almost as though [he had been] admitted to the bar" during his third year of study. This is the kind of education available to second and third year law students today, in clinical law classes, and the kind of instruction that Jackson would not have received in a second year at Albany. He took the bar exam in October 1913, and was sworn in in November.[44]

Just how important was Jackson's legal education to his future consideration of desegregation cases? One must be careful not to make too much of where Jackson had spent the nineteenth, twentieth or twenty-first year of his life. Yet his legal training undoubtedly had some impact on his views of the law and the Constitution. From all appearances, the impact was mixed. On one hand, it was not conducive to acquiring what many would consider a social conscience. On the other, it did reinforce a belief in regularity of procedure, which would have consequences down the road for a Justice choosing between what he perceived to be restraint and activism. His training also imparted the ideal of the even-handed application of the law to all. While the legal ideal of objectivity and balance might not be apolitical, as it would preserve existing

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[43] Jackson Reminiscences 71-72.
[44] Jackson Reminiscences 72; Gerhart, America's Advocate 34-35; "Memorial of Robert Houghwout Jackson, Associate Justice, United States Supreme Court" Federation of Bar Associations of Western New York 5; John Q. Barrett, "Albany in the Life Trajectory of Robert H. Jackson" 529.

imbalances in the status quo,[45] it also fostered equal treatment within the existing political-legal framework. For those who were so mistreated that they could not expect even that much from the legal system, equal treatment was progress. Equal treatment is one lesson that Jackson learned well in law school, and learned with a vengeance. Jackson's legal and judicial career is replete of instances in which his patina of evenhandedness worked to the detriment of those subject to discrimination.[46] Yet the values reinforced in his law school education also enabled Jackson to rise above common prejudices and protect individuals from violations of their rights.[47]

The Young Lawyer in Jamestown

In 1910, when Jackson first established himself in Jamestown, it was a small but densely industrialized city, one that shared to a large degree the combination of technological advancement, demographic growth and social problems then characteristic of America's urban centers. Some of its problems appeared on a much smaller scale than those of big cities, and much of its history would seem quaint compared to those of New York and Chicago. But Jamestown was cosmopolitan enough to broaden young Jackson's horizons in the almost quarter century he spent there, while sufficiently small and insular to reinforce some elements of his rural world view.

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[45] Auerbach, Unequal Justice ix, xi.

[46] For a discussion of Jackson's view of objectivity in the legal profession, and how it contrasted with the legal philosophy of some of his colleagues on the Court, especially Justices Black, Douglas, and Murphy, see Chapter 4.

[47] One context in which Jackson's evenhandedness created apparently inconsistent results was his treatment of Japanese American victims of discrimination during World War II. While on the one hand, he was one of three Supreme Court Justices to vote against the government's internment of persons of Japanese ancestry during World War II, he voted to uphold the State of California's restrictions on the economic rights of Japanese citizens who resided in the state. Korematsu v. United States, 323 U.S. 214 (1944); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948).

Early Twentieth-Century Jamestown

About sixty miles south of Buffalo, Jamestown lay on the southeast shore of Lake Chautauqua. The city boasted about 35,000 residents out of Chautauqua County's approximately 88,000 in 1900,[48] and 42,000 out of 123,000 in 1940.[49] Economically, early twentieth century Jamestown was "an industrial city in a county which [was] chiefly agricultural," home to over two hundred factories producing a wide variety of products, with an emphasis on furniture and textiles.[50] Also located there were summer resorts and cottages, entertainment and amusements along Lake Chautauqua, where the renowned summer institute attracted much outside interest.[51]

The area's first European settlers were, like the Jacksons, of British stock, generally from New England. The waves of immigrants in the early nineteenth century consisted primarily of Irish, English, Canadians, and Germans. Immigrants from Sweden first arrived in the late 1840s, and represented the largest immigrant community in 1900; by then, Poles and Italians also were arriving in large numbers.[52] The number of foreign born had already peaked in the county, but fully 40% of its residents still were either of foreign birth, or had two parents from other countries.[53] Leading citizens were

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[48] Downs and Hedley, History of Chautauqua County 89, reprinted from The Centennial History of Chautauqua County 316-18.
[49] Fox, Rural Community 3; Downs and Hedley, History of Chautauqua County 115.
[50] Jamestown New York Historical and Industrial Review: Presenting an Accurate Portrayal of the Development of Jamestown's Representative Financial, Industrial and Commercial Interests, with an Introductory Article Descriptive of the City's Natural Resources and Advantages (Municipal Publishing Company; received by New York Public Library in 1912) 3, 5; Hatch, ed., Illustrated History of Jamestown 124-224; A.J. Lannes, Civic and Industrial Progress of the Swedish People in Jamestown, 1848-1914 (Jamestown, NY: Bergwall Printing Co., 1914) 85, 91.
[51] A General Administrative Survey of the City of Jamestown, New York: A Study of the Methods in use in the various Departments of the City together with recommendations for improvement based upon long study and wide experience, prepared for the Jamestown Board of Commerce by the New York Bureau of Municipal Research, F.A. Cleveland, dir. (September 1916-February 1917) 276-92; Industrial Review 10.
[52] Hatch, Illustrated History of Jamestown 10, 27; Downs and Hedley, History of Chautauqua County 89; Centennial History of Chautauqua County 312-14.
[53] Downs and Hedley, History of Chautauqua County 89-90.

sometimes quick to sing the praises of Chautauqua's immigrants, but not far under the celebratory surface ran currents of ethnic tensions. The prejudice against those not from Northern Europe was evident, and even the Swedes suffered ethnic prejudice from native-born Americans of British stock into the 1920s and 1930s.[54]

The first African Americans in the area included slaves brought by some white settlers in the early 1800s. According to accounts by whites, those early slaves "were regarded and possessed more as servants than as slaves and were soon given their freedom." Evidence exists that slaves were legally freed as early as 1814, and that significant numbers of free blacks populated pockets of the county, most notably the Jamestown neighborhood known as Africa. The whites in the county were bitterly divided about slavery, and the anti-abolitionists made themselves felt with the 1837 mobbing of an anti-slavery speaker.[55] Yet the anti-slavery movement surged locally in the 1840s and 1850s, especially after the Free Soil Party held its 1848 convention in nearby Buffalo.[56]

As Jackson was approaching adulthood, Civil War veterans and their memories of that conflict were disappearing. Yet their reunions were still common enough, and memories sufficiently fresh, that in 1909 the Jamestown Evening Journal called

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[54] Centennial History of Chautauqua County 316-18; Industrial Review 8; Lannes, Civic and Industrial Progress of the Swedish People in Jamestown 12, 42; M. Lorimer Moe, ed. and principal author, Saga from the Hills: A History of the Swedes of Jamestown New York (Jamestown, New York: Fenton Historical Society, 1983) 113-17, 147.

Ethnic bias was too pervasive to be merely a nativist affair, according to one former Jamestown resident who recalled that Jamestown was relatively anti-Semitic, and that the Swedes tended to be more so than members of other ethnic groups. "Ms. G.G. Michelson, American Jewish Women of Achievement" 1-6, 8, 20.

[55] Arthur Wellington Anderson, The Conquest of Chautauqua: Jamestown and Vicinity in the Pioneer and Later Periods As Told by Pioneer Newspapers and Persons (Jamestown, NY: Journal Press, 1932) 323-36; Helen G. McMahon, Chautauqua County: A History (Buffalo: Henry Stewart, 1958) 143-46.

[56] McMahon, Chautauqua County 143-46; The Centennial History of Chautauqua County 171, 194-97.

Memorial Day "The Sabbath of a Nation."[57] National reconciliation was a major theme, with Lee and Calhoun idealized alongside Lincoln and John Brown. The big exception was the group of Radical Republicans who advocated freedmen's rights – it was believed that Lincoln would have "controlled" them had he not been assassinated. Prominent figures in the fights for African Americans' rights, such as the abolitionist Theodore Parker and the Freedman's Bureau head Oliver O. Howard, were instead remembered for other accomplishments.[58]

In 1900, 148 African Americans resided in Chautauqua County, mostly in Jamestown -- a modest increase from the 140 reportedly living in the county fifty years earlier.[59] As the white population around them increased more quickly, African Americans became an ever-smaller percentage of the local population – less than one in every 500 residents by the turn of the twentieth century. The available evidence indicates that they were probably spared the worst of the blatant and brutal discrimination found in many parts of the country, but they belonged to an impoverished, stereotyped and marginalized part of the community. Prominent African Americans were generally held in high esteem, but pursued relatively menial service occupations outside the

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[57] "Are Passing Away," Jamestown Evening Journal July 16, 1910, p. 4, col. 1; "Veterans of 112th," Jamestown Evening Journal June 10, 1909, p. 4, col. 4; "Reunion of Veterans," Jamestown Evening Journal June 14, 1909, p. 7, col. 4; "Jamestown in 1910," Jamestown Evening Journal June 18, 1909, p. 3, col. 2; "The Sabbath of a Nation," Jamestown Evening Journal May 31, 1909, p. 4, cols. 1-2.

Estimates of the number of Chautauqua County residents serving in the Union army during the Civil War range from 2300 to about 4,000. But the area provided only 108 conscripts out of its draft quota of 908, and filled the shortfall with out-of-town substitutes. Young, History of Chautauqua County 194; Centennial History of Chautauqua County 562-63.

[58] "Bearer of Historic Name on Trial Today," Jamestown Evening Journal Jan. 12, 1909, p. 2, col. 5; "Robert E. Lee Memorial,"[check] Jamestown Evening Journal Jan. 19, 1909, p. 4, col. 1; "Is Lincoln Idealized?" Jamestown Evening Journal Feb. 2, 1909, p. 4, col. 1; "Roosevelt at Osawotomie," Jamestown Evening Journal Aug. 31, 1910, p. 4, col. 1; "Theodore Parker," Jamestown Evening Journal Aug. 24, 1910, p. 4, col. 2; "General O.O. Howard Dead," Jamestown Evening Journal Oct. 27, 1910, p. 2, col. 4; "Gen. Oliver O. Howard," Jamestown Evening Journal Oct. 27, 1910, p. 4, col. 2.

[59] Downs and Hedley, History of Chautauqua County 90.

expanding industrial base. Census data indicates that the most common occupation for African Americans in Chautauqua County in the early 1900s was barber/hairdresser, with substantial numbers of servants and tradespeople. Those with intellectual aspirations, such as the auction drummer who displayed "the fondness of his race for using large words on small occasions," might gently be put down, much in the tradition of which the radio show *Amos 'n' Andy* later became a part; and much the way young Robert and his friends treated the janitor at Jamestown High School.[60]

Racial stereotypes persisted in newspapers: much, if not most, of the news concerning African Americans in the Republican Jamestown Evening News during Jackson's first year in the city were police blotter-type items about African American crime, little of it local. But the GOP daily provided regular, and positive, coverage of the major African American institution in the city, the AME Zion Church; and its editorials condemned lynching and out-of-state efforts to disenfranchise African Americans.[61] The newspaper also advocated economic self-help and education in African American communities nationwide, much in the manner of Booker T. Washington.[62] Yet whites in Jamestown were in no hurry to amalgamate with their African neighbors: a 1921

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[60] Anderson 328-37; U.S. Census Bureau, 12th Census, Roll 1013 (1900) and 13th Census, Roll 930 (1910); Barbara Dianne Savage, Broadcasting Freedom: Radio, War, and the Politics of Race, 1938-1948 (part of the John Hope Franklin Series in African American History & Culture) (Chapel Hill: University of North Carolina Press, 1999) 6-8. For more about Jackson's year at Jamestown High School, see Chapter 1.

[61] For example, "Honoring His Memory," Jamestown Evening Journal, Feb. 12, 1909, p. 4, col. 5; "Local Meetings," Jamestown Evening Journal, Apr. 2, 1909, p. 11, col. 5; "The Debt Should be Paid," editorial, Jamestown Evening Journal, May 17, 1910, p. 4, col. 2. "Hope for the Colored Race," editorial, Jamestown Evening Journal, May 25, 1910, p. 4, col. 3; "Methodist Ladies," Jamestown Evening Journal, June 3, 1910, p.54, col. 4; "The Fruits of Tuskeegee," editorial, Jamestown Evening Journal, June 23, 1910, p. 4, col. 1; "America's Shame," editorial, Jamestown Evening Journal, Dec. 18, 1909, p. 4, col. 1.

[62] "Hope for the Colored Race," editorial, Jamestown Evening Journal, May 25, 1910, p. 4, col. 3; "Methodist Ladies," Jamestown Evening Journal, June 3, 1910, p.54, col. 4; "The Fruits of Tuskeegee," editorial, Jamestown Evening Journal, June 23, 1910, p. 4, col. 1.

compendium reported that "The colored people of African descent … still remain distinct from all other classes by reason of a far wider racial difference."[63]

Politically, the area was predominantly Republican from the GOP's first presidential campaign in 1856 until long after Jackson's departure for Washington in 1934. It was not unusual for Republican presidential candidates to defeat their Democratic opponents by a two to one margin (or more) in Chautauqua County.[64] Franklin Roosevelt and the New Deal nearly broke the city's monolithic Republicanism (with the GOP narrowly winning Jamestown in 1932 and losing it in 1936 by 150 votes), but it was not until 1971 that the city became Democratic.[65] Local politics aspired to the good-government model, although the main actors were generally Republicans.[66] Ethnic politics survived to a substantial degree in Jamestown until the 1930s, but the Industrial Review, proud of both the city's government and its Northern European Protestant stock, boasted, "There are no party bosses in Jamestown."[67]

Jamestown Attorney

Upon his return from Albany, Jackson quickly immersed himself into Mott's legal practice. Much like a law student in a legal clinic today, the apprentice handled "many small things … and was soon trying cases almost as though I was admitted to the bar, so far as justice court and city court were concerned. I was consulting with clients, serving

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[63] Downs and Hedley, History of Chautauqua County 90. For a general treatment of the links between African American self-help, segregation and racial hierarchy, see Lee D. Baker, From Savage to Negro: Anthropology and the Construction of Race, 1896-1954 (Berkeley, California: University of California Press, 1998) 87.

[64] When former Republican president Theodore Roosevelt challenged incumbent Republican president William Howard Taft in the 1912 presidential election, Democrat Woodrow Wilson finished in third place in Chautauqua County, lagging well behind the county's second place finisher, Roosevelt. Downs and Hedley, History of Chautauqua County 378, 381; Centennial History of Chautauqua County 204, 207, 327.

[65] Moe, Saga from the Hills 148.

[66] Hatch, Illustrated History of Jamestown 34.

[67] Moe, Saga from the Hills 148; Industrial Review 11.

papers, and earning some money in the office."[68] He took over the practice when Mott left for a government job in Albany and specialized in litigation, prosecuting and defending against lawsuits over a wide range of subject matter.[69]

While much in his life had changed, Jackson still retained much of his rural ethic. But for several months with a Buffalo law firm, Jackson stayed close to home in Jamestown, until he left for Washington in 1934. He found his experience defending a railroad in the larger city good training, but the individualist from Frewsburg preferred to keep his independence rather than associate with a larger firm.[70] That is not to say that he remained a solo practitioner: he had no partners from Mott's departure until 1919 (except for the stint in Buffalo), but maintained several paid lawyers, probably the forerunners of today's associates. He then became junior member of a three-partner firm until 1923, when he organized a three-partner firm, with himself as lead partner; and he established a four-partner effort, again as lead attorney, in 1927.[71] Jackson's type of law practice was the norm in small cities at the time, or perhaps a little more specialized than that: a solo practitioner, or a practitioner loosely associated with a small group of lawyers, was quite common in a small city at the time. While specialization and aggregation were on the rise, "the average lawyer" still "practiced alone" as late as 1940.[72]

If Jackson's work habits in a much larger office – that of Solicitor General – were any indication, the manner in which he did his work probably mirrored that of a solo practitioner.[73] An anecdote from Jackson biographer Eugene Gerhart is illustrative of

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[68] Jackson Reminiscences 72.
[69] Gerhart, America's Advocate 35-36; Jackson Reminiscences 72-73.
[70] Jackson Reminiscences 136; Gerhart, America's Advocate 36-37, 58.
[71] "Memorial of Robert Houghwout Jackson, Associate Justice, United States Supreme Court," Federation of Bar Associations of Western New York 5; Gerhart, America's Advocate 36-37.
[72] Hurst, Growth of American Law 297, 307, 309.
[73] See p. 123.

Jackson's efforts to retain the isolation and independence of his rural upbringing in his later work habits:

> All his life he treasured a picture Frank Mott had taken out of the old humor magazine, *Life*. It portrays a lone man seated at his desk studying. There are books strewn about him, an old-fashioned oil lamp is on the desk, a globe stands in one corner of the room. Over the head of the young man a phantom hand holds a laurel wreath. The caption beneath the picture is a line from Kipling's poem "The Winners" – "He travels fastest who travels alone." Jackson kept that picture near his desk, even while on the Supreme Court, as a symbol.[74]

Jackson also resisted a more modern model of interdependence by opposing the trend toward increased specialization in the legal profession, believing that an attorney had to be prepared to represent any and all potential clients.[75] He was not self-consciously a "country lawyer" at the time, as he was in Washington, where he took a sobriquet "not meant as a compliment" and made it his own.[76] Yet he was far from the emerging law firm ethic of big cities.

Nor had the young attorney's attitudes toward African Americans much changed from his days in Frewsburg, at least in his early years at the bar. In a 1915 Memorial Day speech, he referred to the freed slaves as "a black hoard, illiterate and untaught … released from all restraint," and clung to the Negro-as-savage stereotype so prominent at the time. While the Civil War "rid the nation of the curse of slavery and freed the south from a wrong labor system that ate at its vitals like a cancer," argued Jackson, the "negro question" remained: "he is still there, illiterate, indigent and unmoral, obeying only one commandment of the Scriptures – that to go forth and multiply." The war was necessary

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[74] Gerhart, America's Advocate 37, 48, quoted in Schubert, Dispassionate Justice 3.
[75] Gerhart, America's Advocate 49; Hockett, New Deal Justice ch 8; Jackson Review 136-40.
[76] Robert H. Jackson, undated draft, Box 53, File: Speeches and Outlines Undated, Robert H. Jackson Collection, Library of Congress. The sobriquet's original source was a famous trial lawyer who, in 1935, was Jackson's adversary in the Mellon tax fraud case, which first gave Jackson national exposure. Jackson Reminiscences 328.

to free the African American, claimed Jackson, because "until he was free, no solution of his problem was possible, and of late sensible efforts are being made to save him from himself and save others from being involved in his ruin."[77] These comments reflect the "naturalized racial hierarchy," with Europeans on top and Africans on the bottom, pervading American thought in the early twentieth century.[78]

He also wrote African Americans out of their most central moment in American history. On Memorial Day 1914, for example, he observed that "the freeing of the negro was not the most important issue involved in the [Civil] war"; he praised Lincoln because he "refused to let the fate of a few million negroes [sic] obscure the greater issue of the fate of free government." Less than a year later, in an address commemorating the fiftieth anniversary of Lee's surrender to Grant at Appomattox, he referred to the occasion as "the birthday of fifty years of undisturbed concord among the people of the United States." These efforts to write African Americans out of Civil War history reflected his contemporaries' interpretation of the Civil War as a whites-only affair, a healed breach between Northern and Southern whites.[79]

Yet some of the ideas the young lawyer had received in his youth were amenable to reinterpretation in his new urban environment. One of his first trials, one that helped garner him a reputation as one of the best advocates in town, separated him from the anti-organized labor ideology of his rural background: during the street railway strike of 1913,

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[77] Jackson, Memorial Day Speech, Mayville, New York, May 31, 1915, Box 31, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 2, 4-5.
[78] Baker, From Savage to Negro p. 87, ch. 3.
[79] Blight, Race and Reunion; Jackson, Memorial Day 1914 Speech 3-4; Robert H. Jackson, Appomattox Day Speech, Eagle Temple, Jamestown, NY, April 9, 1915, Box 31, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 1.

he represented the union against its employer.[80] According to Jackson, "Of course there was a feeling in employer circles in the town against a lawyer who took a labor case in those days," and his defense of the strikers, while not exactly a cause for him, resulted in his being pegged as a radical by more conservative elements in town.[81] As he explained forty years later, "I always favored labor's right to organize. In my practice I never, though was often requested to do so, sought a labor injunction" breaking up a strike.[82] He reconciled his pro-organized labor views with his upbringing by reasoning that "the union was battling against what appeared to be a much more dominating threat to individualists," that of big business and organized employers.[83] Indeed, "the independence of working people was pretty much at stake in their ability to organize."[84] Yet Jackson's sympathy for the union cause had its limits. He and other Jamestown residents, with great relief, considered themselves separate from the big steel towns and their labor-management problems.[85] He disapproved of some of organized labor's tactics, such as picketing.[86] And he believed in balanced treatment of both labor and management: in a 1931 speech, he stressed the need for "the utmost tolerance without

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[80] The city appeared to suffer relatively little class warfare or labor strife. Strikes, though there were a few of long duration, were rare, and organized labor was late in developing. The city was not immune from labor strife: in 1919, a big strike year nationwide, "56 factories were closed and 3,600 workers idled." Yet except for skilled tradesmen like printers, barbers and builders, organized labor "played a very minor role in the local economy" until the New Deal. Hatch, Illustrated History of Jamestown 34, 124; McMahon, Chautauqua County: A History 198; Moe, Saga from the Hills 395.

[81] Jackson Reminiscences 92; Hockett, New Deal Justice 225. But, according to Jackson, "In the smaller communities a lawyer doesn't sacrifice his business if he takes an unpopular cause as he may in a larger city because, as I say, the community judges the lawyer" differently. Jackson Reminiscences 185-86. In Jackson's case, he never lost business or standing for taking on controversial cases, including labor cases. Jackson Reminiscences 186-88.

[82] Jackson Reminiscences 93.

[83] Jackson Reminiscences 93.

[84] Jackson Reminiscences 93-97; Robert H. Jackson, "Justice Jackson's Story," Manuscript of Tape Recording taken by Dr. Harlan B. Phillips, Oral History Research Office, Columbia University, 1952-55, Box 190, File: Autobiographical File – "Justice Jackson's Story," Robert H. Jackson Collection, Library of Congress 76.

[85] Jackson Reminiscences 93-97; "Justice Jackson's Story" 154; see sources cited in note 80.

[86] Jackson Reminiscences 105.

resort to harshness on either side" of the labor disputes arising out of the Great Depression's hard times.[87] As he once explained, he "had … no conviction that the underdog is always right…."[88]

Jackson's neutrality in the struggle between dominant groups and underdogs further demonstrates that his viewpoint differed from that of attorneys who used the legal system to advance the interests of society's underdogs: "I don't think I ever had any bitterness toward the group that was always on top … I was never a crusader."[89] While according to one Jamestown associate, the young attorney was "always available to the underdog and the unfortunate," he was also there for the rich and powerful.[90] His client base in Jamestown included "all of the utilities in this end of the state," businesses large and small, and individuals.[91] Jackson's willingness to represent anyone who needed his professional assistance, might make him appear to be a champion of the underdog compared to many in a conservative profession. But appearances are sometimes deceiving.

Jackson explained his practice of representing those in all social strata as a professional imperative that stemmed from the traditional ethic of the country lawyer, and from the importance of the rule of law to a society. His "nostalgia for country law practice"[92] reached its most fulsome expression in the 1944 review of I Can Go Home Again. In it Jackson extolled the virtues of "the county seat lawyer," his beau ideal of the

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[87] Gerhart, America's Advocate 58.
[88] Gerhart, America's Advocate 36.
[89] Gerhart, America's Advocate 36, based on October 8, 1948 interview.
[90] Gerhart, America's Advocate 40, based on Wright's Feb. 17, 1950 memorandum to the author.
[91] Jackson Reminiscences 151, 155, 157; Jeffrey D. Hockett, New Deal Justice 222.
[92] Robert H. Jackson Review 136; Gerhart, America's Advocate p. 46, ch. 2. According to Gerhart, Jackson was "impatient with government restraint and … red tape"; he romanticized the justice of the peace, who had "no use for the exhaustive legal research and footnoted learning in which modern law schools and their progeny delight … their decisions represented the community's collective idea of the decent thing."

legal profession: "counsellor to railroads and to Negroes, to bankers and to poor whites, who always gave the best there was in him – and was willing to admit that his best was good."[93] It was the lawyer's professional obligation to represent anyone who came to him for help: "He did not specialize, nor did he pick and choose clients. He rarely declined service to worthy ones because of inability to pay"[94]:

> The law to him was like a religion, and its practice was more than a means of support: it was a mission. He was not always popular in his community, but he was respected. Unpopular minorities and individuals often found in him their only mediator and advocate. He was too independent to court the populace – he thought of himself as a leader and lawgiver, not as a mouthpiece. He 'lived well, worked hard and died poor.'[95]

Outside of the fact that Jackson became a quite comfortable financially from his labors, Jackson appeared to live the country lawyer's creed he so ardently espoused.[96] A former Supreme Court clerk recalled that even then the justice "completely believed it when he commented, 'There are no unimportant cases.'"[97] Most vital to Jackson was preserving the rule of law, by operating in the service of everyone equally and not in the service of a

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[93] Jackson Review 136; Gerhart, America's Advocate 46, ch. 3.
Jackson noted that in his community "Some lawyers were too busy to be bothered with representing unpopular causes," and "There were others who probably would have had no sympathy with them." On the other hand, "There were other lawyers who would take the case of anybody, however unpopular." Jackson Reminiscences 185.

[94] Jackson Review 139.

[95] Jackson Review 139.

[96] One counterexample is John W. Davis, founding partner of one of New York City's largest law firms, and Democratic candidate for president in 1924. His position as a wealthy corporate lawyer was a repudiation of the past in a way that Jackson's career as a government attorney and Supreme Court Justice was not. Like Jackson, he harkened back to his days as a country lawyer in Clarksburg, Virginia, as he reached the pinnacle of his profession; but much of it seemed hollow. For example, "The wealthier [Davis] became, the greater was his fondness for quoting the aphorism that a lawyer 'works hard, lives well, and dies poor.'" Jackson, by contrast, remained what he always was, defined by Auerbach as "the nineteenth-century liberal in the twentieth century," motivated by "the animus of Wall Street displaced professionally by Wall Street." Auerbach, Unequal Justice 136-37, 174-76. Davis went on to represent the South Carolina school district on the block in Brown v. Board of Education, and believed he had won Jackson's support; Davis, of course, was wrong. See Chapter 9.

[97] James M. Marsh, "The Genial Justice: Robert H. Jackson," American Bar Association Journal (March 1974) 308-09.

particular group – neither to serve the rich and powerful who could afford to pay the best lawyers, nor to right the balance of the oppressed.[98]

The review's insistence on the lawyer's obligation to represent "Negroes" and other "unpopular minorities" was not mere puffery. One of Jackson's rare criminal clients was an African American accused of pitchforking a white man. The defendant was a friend of the window cleaner at Jackson's office; Jackson won the man an acquittal. Jackson's relationship with the window cleaner comported with his later reputation as a Supreme Court Justice for cultivating friendships with clerks, elevator operators and other nonprofessional staff; this habit flowed naturally from his rural idealization of America as a classless society.[99] Taking a rare criminal case to defend an African American accused of a heinous crime showed how two ideals – the rural disregard for class and the lawyer's duty to defend anyone who needed it, regardless of race – melded together in Jackson's mind. He thus could disregard race in the service of both his traditional and professional ideals.

Jackson believed that, because of his vision of society, the country lawyer had a greater appreciation for his own importance in maintaining both social order and individual rights. But his concept of individual rights was based more on social mores than on individual will:

> Paper "rights" are worth, when they are threatened, just what some lawyer makes them worth. Civil liberties are those which some lawyer, respected by his neighbors, will stand up to defend. Any legal doctrine which fails to enlist the support of well regarded lawyers will have no real sway in this country.

Country lawyers were better at this than urban lawyers who, despite living in a more diverse place, had a more parochial view of society:

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[98] See Chapter 4.
[99] Jackson Reminiscences 43; Gerhart, America's Advocate 43-44; Marsh, "The Genial Justice" 308.

> Lawyers in large cities do not know their cities; they know their circles, and urban circles are apt to be made up of those with a kindred outlook on life; but the circle of the man from the small city or town is the whole community and embraces persons of every outlook. He sees how this society lives and works under the law and adjusts its conflicts by its procedures.[100]

Another clue to Jackson's relationship with civil liberties in the Jamestown years is provided by his recollections about the Sacco and Venzetti case. Though the case had become a national cause celebre, Jackson noted, somewhat surprisingly for a case that has achieved such historical prominence, "The bar in the main was indifferent to the Sacco-Vanzetti case," as "It was a Massachusetts affair." Yet those "who read the New Republic and similar publications were concerned and uneasy about it …. A later generation has grown up who feel indignant. At that stage I don't think that it was indignation. It was more a period of confusion and questioning."[101]

Thus, while Jackson did not stray far from the beliefs of his youth, he was willing to reevaluate them in the context of his new urban environment. This questioning must have been further advanced by a leading Jamestown politician. Mayor Samuel Carlson's tenure as the city's chief executive began in 1908 and extended for 26 of the next 30 years.[102] A Republican by registration but a foe of what he considered blind partisanship, Carlson was "a truly free-wheeling political maverick" who ran as a Progressive (Bull Moose) Party candidate for Congress in 1912, and who was accused of apostasy for supporting Franklin Roosevelt in 1932 and 1936.[103] He worked for nonpartisan

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[100] Jackson Review 138.
[101] Jackson Reminiscences 185.
[102] Moe, Saga from the Hills 124.
[103] Moe, Saga from the Hills 122.

municipal elections, paved streets, playgrounds and other municipal improvements.[104] As a "champion of municipal ownership at a time when many considered it dangerously socialistic," Carlson advocated, on financial and public health grounds, city-operated "light, water, market, hospital and sanitary service, paving and sewer construction," and municipal milk distribution.[105] Municipal power and water companies, and a city hospital, were formed; milk and gas suppliers remained private.[106] Carlson's support for municipal ownership of public utilities was motivated more by the Social Gospel than by Socialism. A supporter of the "equitable distribution of the products of toil," the longtime mayor believed that "if Christ were here on earth today … he would regard the plutocrat who seeks to grasp all as just as bad as the radical who seeks to divide all..."[107]

Both Carlson and Jackson belonged to the Saturday Night Club, which met at the local Eagle Temple. The members gave speeches on issues of public importance; some speeches written by Jackson for this assemblage survive in his Library of Congress files. Members included Jackson and Carlson, Jackson mentor and friend Benjamin Dean, and Ernest Cawcroft, Corporation Counsel of Jamestown and close Jackson friend. Carlson appointed Jackson to the Municipal Civil Service Commission in 1917, and made him acting corporation counsel of Jamestown for a short time starting in September 1918. The position, according to the former officeholder, "was not regarded as a political job. It was simply a professional job." Jackson was only one Democrat who had held it under Carlson. Carlson's, recalled Jackson, "was a very advanced administration and very

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[104] Moe, Saga from the Hills 122-23; Samuel A. Carlson, Autobiography by Samuel A. Carlson, Mayor Emeritus, and Comments on His Fifty Years of Public Service (Jamestown, NY: Liberty Printing Company, 1943) 4-14, 50.
[105] Downs and Hedley 382; Samuel A. Carlson, The Saga of a City and A New Concept of Government, Arthur Wellington Anderson, collaborator (Cleveland: E. George Lindstrom Linotype, 1935) ii, 43, CHs. 1, 5,6.
[106] Moe, Saga from the Hills 121, 123.
[107] Samuel A. Carlson, Autobiography 48.

clean…. there was no graft.…"[108] After Jackson left that position, he served on various municipal committees and commissions.[109]

In a speech given at the 1938 testimonial to Carlson, then Mayor Emeritus, Assistant Attorney General Jackson reminisced about the man who had given him his first government appointments. It was clear from Jackson's 1938 recollections and his oral history at Columbia University, that he thought extremely highly of Carlson. According to one author, Jackson sounded "like a proud son" when he "paid tribute to his one-time mentor's steadfast stewardship of municipal affairs" at the 1938 testimonial to the former mayor. Jackson's wistfulness about nonpartisanship was apparent in his remarks:

> For more than a third of a century …the political organizations had other candidates and the newspapers often had other candidates. Every election it seemed that nobody wanted Sam except the voters … He has had no prejudice against any political party. He would take any old nomination from any of them … But the interesting thing about it is that he was usually able to win with any nomination or without any nomination. And he has had no prejudice against any race, class or nationality …
>
> … Mayor Carlson has never been a chattel of any political party – he has never been the property of any organization and he has never been the tool of any group …
>
> My tribute to Sam Carlson is that his public life has been good for the soul of this city. For 30 years he has shown us how to take victory without arrogance, and how to take defeat without hatefulness. He has taught us how to follow the ways of peace – peace for the nations of the world and peace for the groups within the city.[110]

How did the Frewsburg individualist square his beliefs with Carlson's? At the height of the New Deal, Jackson deemphasized the socialistic specifics of Carlson's administration, while sticking to a more pragmatic interpretation. While "the bridges, the pavement, the

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[108] Jackson Reminiscences 117.
[109] Jackson Reminiscences 117-20.
[110] Moe 128.

light plant and the water system" were "all worthy in their way," more important was Carlson's "striving for a good life for this city, for an abundant life – if you will, for a wholesome life, and for [a] life where men and women might develop without political or economic or social suppression or oppression."[111]

Just how far the young attorney had come is illustrated by his recollection in his oral history that the Saturday Night Club "had studied the German system somewhat" and found good as well as bad in it. In fact, the positive aspects that Jackson recalled having unearthed might have shocked a Frewsburg denizen:

> Their system of pensions, industrial insurance and so forth were discussed. We thought that while the German government was militaristic and possessed some very medieval features, it was also, in other ways, a very progressive government. The fact that something was German didn't condemn it in the eyes of a great many of us.[112]

Jackson's ability to view imperial Germany's social insurance system as a positive thing showed his ability to reevaluate his inherited attitudes. And while his recollections, some from the New Deal era and others from the early 1950s, might explain more about how far Jackson had come since his departure from Jamestown, his long term admiration for Carlson tends to confirm that the seeds of the New Dealer had been planted two decades earlier, in a progressive city led by an innovative mayor.

As his nostalgia about nonpartisanship might suggest, Jackson also began questioning his loyalty to the Democratic Party. It is not all that unusual for ambitious young professionals to change party affiliation to better "fit in" with their clients, or to

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[111] Carlson Autobiography 26.

[112] Jackson Reminiscences 114; Robert H. Jackson, Memorial Day Speech, Mayville, NY, May 31, 1915 12. Jackson belonged to the Saturday Night Club, a discussion group focusing mostly on issues of the day, for most of his time in Jamestown. He especially enjoyed a long intellectual association with Ernest Cawcroft, with numerous meaty letters on history and politics exchanged between them during Jackson's years in Washington. Correspondence File: Ernest Cawcroft, Box 10, File: General Correspondence, -- Cawcroft, Ernest, Robert H.Jackson Collection, Library of Congress.

keep open the option of running for public office.[113] Yet Jackson, for the most part, maintained his family's Democratic faith. He had helped the party's county chair handle patronage requests from 1912 until 1914 (he left that post because he was not an organization kind of person, and felt that it took too much time from his law practice).[114] He also continued attending party conventions and making speeches,[115] and stayed true to presidential candidates William Jennings Bryan and Woodrow Wilson.[116] During the presidential election of 1912, in which former President Theodore Roosevelt ran as the Progressive (Bull Moose) Party candidate against incumbent Republican William Howard Taft and Democratic challenger Wilson, Jackson backed Wilson and his Brandeisian policies because "I didn't like business getting too damn big."[117]

But Jackson's inherited Democratic partisanship – and his obvious respect for Wilson -- were sorely tested during the First World War. In 1914, "all shades of opinion" existed in Jamestown.[118] Jackson's inherited views on warfare – reinforced by many around him -- remained unchanged. He recalled, "We doubted that war would solve any European and certainly no American problems. In our view war wasn't necessary. We didn't want to get into it or have any part of it. I was as strong in that view as anybody."[119] (That "we" apparently included Mayor Carlson, whose "moral courage to oppose our entry into the world war" Jackson saluted years later.[120]) The young lawyer

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[113] Justice Black's membership in the Ku Klux Klan is often explained in similar terms. See, for example, Daniel M. Berman, "The Racial Issue and Mr. Justice Black," American University Law Review 16 (1967) 389; Roger K. Newman, Hugo Black: A Biography (New York: Pantheon Books, 1994) 92-100.
[114] Jackson Reminiscences 110, 113.
[115] Jackson Reminiscences 36 113.
[116] Jackson Reminiscences 61-62.
[117] Jackson Reminiscences 98-99.
[118] Jackson Reminiscences 114, 117-27.
[119] Jackson Reminiscences 114; Robert H. Jackson, Memorial Day Speech, Mayville, NY, May 31, 1915 12.
[120] Carlson Autobiography 22, 25

campaigned for President Wilson, again the Democratic nominee, in "almost every town in our county" during the 1916 presidential election, largely on the theme, "'He kept us out of war.'"[121] He continued to oppose the war even after Wilson had made the fateful decision to enter it.[122] Jackson could support aid for the allies, but drew the line at sending land troops: "Naval aid was one thing, money or material assistance was another thing, but to send an expeditionary force was to put America on the wrong path."[123] He also opposed a draft, because it was "medieval and militaristic."[124]

Once the die was cast, however, Jackson recalled backing the war effort. He professed discomfort with wartime restrictions of civil liberties, though he signed on with the American Protective League, a "quasi-vigilante organization" attempting to stifle dissent by means legal, extralegal and illegal: "They organized the American Protective League to weed out pro-Germans. Some of us laughed and said we joined it in self-defense."[125] He recalled that his investigative work for the organization made him less enthusiastic about its aims, and more concerned about civil liberties:

> I remember that I was assigned to investigate a complaint that a man was getting "pro-German literature." He was a farmer up in the country. What we found he was actually getting was the Literary Digest, which had cartoons, and the complainers thought these were ridiculing the United States. Some of his neighbors with whom he had some feud, I suppose, had complained of him. There was another case of an Austrian chef in the hotel who seemed to have been acquainted with a young woman waitress not wisely, but too well. She went to annoying him when their relations became less friendly. On one such occasion she waved an American flag in his face. While he was an Austrian citizen, he was completely loyal as far as we discovered. However his reply to her was not complimentary to the flag which she waved in his face. She then went and complained of him as being seditious. We had a lot of silly stuff like that.[126]

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[121] Jackson Reminiscences 114-15.
[122] Jackson Reminiscences 115.
[123] Jackson Reminiscences 115.
[124] Jackson Reminiscences 115.
[125] Jackson Reminiscences 116; David M. Kennedy, Over Here: The First World War and American Society (New York: Oxford University Press, 1980) 81-82.
[126] Jackson Reminiscences 116-17.

Until his last years, Jackson decried what he believed to be the folly of World War I: he believed that, without World War I, World War II and the Cold War would not have happened.[127]

After World War I, the United States, overcome by a fear of radicalism, especially the Bolshevism of the new Union of Soviet Socialist Republics, endured the Red Scare: the unearthing of bombing plots against political leaders led to government repression of Communists and Socialists.[128] Jackson opposed the Palmer raids, an "outrageous" roundup of some four to six thousand alleged radicals.[129] After a brief stint, he declined further service on committees set up by Mayor Carlson to censor socialist speeches, and publicly denounced the efforts.[130] Unalterably opposed to socialism, as antithetical to his "extreme individualism," the young lawyer nonetheless believed that suppressing socialistic ideas was wrong, and ultimately beneficial to the socialists.[131] Free speech, Jackson argued, was a vital "safety valve" that prevented social unrest; he argued that "Socialism … like the force of steam, passes off harmlessly if unsuppressed; confined,

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[127] Gerhart, America's Advocate 54-55, based on Jan. 19, 1950 letter from Robert H. Jackson to Eugene Gerhart.

[128] See generally Robert K. Murray, Red Scare: A Study in National Hysteria, 1919-1920 (New York: McGraw-Hill, 1964); Francis Russell, A City in Terror: 1919, The Boston Police Strike (New York: Viking Press, 1975); William M. Tuttle, Race Riot: Chicago in the Red Summer of 1919 (New York: Atheneum, 1972).

[129] Christopher Capozzola, "The Only Badge Needed Is Your Patriotic Fervor: Vigilance, Coercion, and the Law in World War I America," Journal of American History (March 2002) 374-77; Lawrence M. Friedman, American Law in the 20th Century (New Haven and London: Yale University Press, 2002) 141, 144; Richard Gid Powers, Secrecy and Power: The Life of J. Edgar Hoover (New York: The Free Press, 1987) 104-05.

[130] Yet Carlson also established a commission to protect civil liberties in Jamestown, and earned Jackson's respect because he had "stood up against the wave of intolerance" sweeping the nation. Carlson Autobiography 25.

[131] Robert H. Jackson, Address to Socialists, Jamestown, NY, March 16, 1916, Box 31, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 2; "'Mexico Today' Torn by Strife," Jamestown Post, January 12, 1920, copy found in Box 209, File: Miscellany, Clippings, 1919-35, Robert H. Jackson Collection, Library of Congress.

like steam, it explodes and is revolution."[132] He believed in engaging Socialists – as he did in a 1913 speech before a socialist assembly – and in openly disputing their assertions in the free marketplace of ideas. He also opposed the New York State Assembly's decision in 1920 not to seat five duly elected assemblymen because they were Socialists, because "If the people wanted to elect Socialists, that was their business."[133]

At about this time, Jackson and two of his friends from the Saturday Night Club, Benjamin Dean and Ernest Cawcroft, ran afoul of the American Legion. This episode began when the Club announced plans for a Symposium on Free Speech, inspired by allegations that the Legion planned to break up meetings they saw as sympathetic to the socialist cause. In an open letter to the Jamestown Post, Legion officials upbraided Jackson, Dean and Cawcroft for their "criticisms," "slurs" and "sneers," and invited them to a Legion meeting to justify their criticisms. The letter contained thinly veiled criticisms of the men's failure to support the war effort, and of an anti-veteran attitude that would lead to "the Bolshevising of our nation." In response, Jackson and his associates were careful to deny criticizing the Legion itself, or the bulk of its membership; Jackson's rejoinder accused some in the local Legion post of anti-Carlson motives and alluded to personal ambitions on the part of the post's temporary head, under whose watch the imbroglio occurred. After the Legion rebuffed the accuseds' demand

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[132] "Free Speech Safety Valve," Jamestown Post, March 19, 1919, Box 209, File: Miscellany -- Clippings, 1919-35, Robert H. Jackson Collection, Library of Congress; "Mexico Today," Jamestown Post; "Robert H. Jackson Discusses Action of New York State Assembly in Denying Membership in that Body to Socialist Assemblymen-elect," Jamestown Evening Journal, January 12, 1920, Box 209, File: Miscellany -- Clippings, 1919-35, Robert H. Jackson Collection, Library of Congress. Jackson was less indulging of Fascists' and Communists' free speech rights after World War II, whether out of fear of their possible success, or because of the violence surrounding some of their activities. See Terminiello v. City of Chicago, 337 U.S. 1 (1949); Dennis v. United States, 339 U.S. 162 (1950); and Chapters 4 and 6.

[133] Jackson Reminiscences 123; "Robert H. Jackson Discusses Action of New York State Assembly in Denying Membership in that Body to Socialist Assemblymen-elect," Jamestown Evening Journal.

for a public forum, the Post membership unanimously passed a resolution approving their leaders' handling of the situation.[134] The affair left the young lawyer disillusioned.[135]

Jackson was so disillusioned with World War I that he temporarily abandoned the Democratic Party: he admitted in a 1928 letter to a relative that he had voted for Warren G. Harding in 1920. This apostasy was apparently due to the Democrats' failed foreign policy. As Jackson explained in a Wilson Day speech in 1927, "Woodrow Wilson is a personality that I have at times worshipped with an almost oriental idolatry, and again denounced with the rancour of deepest disappointment," because of the war's tragic end. Harding, Jackson admitted, had been a false god: as Jackson quipped, "Warren Harding, May his soul rest in peace – and his record in oblivion!" But while the young lawyer's single experiment with political freethinking on the national level was less than satisfying – as he acknowledged in his 1928 letter, "After once voting for Harding I have gotten back to the faith of my Fathers and will never wander again" – the episode demonstrated that, while Jackson found it difficult to stray from his belief system, he would do so when circumstances seemed to require it.[136]

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[134] "American Legion's Open Letter to Dean, Cawcroft and Jackson," Jamestown Post, January 15, 1920, Box 209, File: Miscellany -- Clippings, 1919-35, Robert H. Jackson Collection, Library of Congress; "Cawcroft Says He Will Reply," Jamestown Evening Journal, January 15, 1920, Box 209, File: Miscellany -- Clippings, 1919-35, Robert H. Jackson Collection, Library of Congress; "Cawcroft, Jackson and Dean Demand Meeting be Public," Jamestown Evening Journal, January 16, 1920, Box 209, File: Miscellany -- Clippings, 1919-35, Robert H. Jackson Collection, Library of Congress; "More on Legion Matter," Jamestown Evening Journal, January 15, 1920, Box 209, File: Miscellany -- Clippings, 1919-35, Robert H. Jackson Collection, Library of Congress; "Legion Men Unanimously Sustain Action of Staff," Jamestown Post, January 17, 1920, Box 209, File: Miscellany -- Clippings, 1919-35, Robert H. Jackson Collection, Library of Congress.

The Legion had a reputation for having "frequently attempted to impose their vision of Americanism and social order through extralegal means." Capozzola, "The Only Badge Needed" at 1378.

[135] Jackson Reminiscences 123-25. Jackson believed that World War I was preventable, while World War II was not. Jackson Reminiscences 126-27.

[136] Robert H. Jackson to V.W. Houghwout, October 24, 1928, Box 1, File: Family Papers – Family Correspondence, Robert H. Jackson Collection, Library of Congress; Robert H, Jackson, "Woodrow Wilson," Wilson Day Address, Feb. 3, 1927, no location indicated on original, Box 31, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 1.

Perhaps not surprising for an ambitious young man in an area dominated by the political opposition, Jackson expressed distaste for partisan politics, and even the Democratic Party, at other times in the 1910s and early 1920s. In a 1915 speech, he criticized the "party spirit," which "must diminish or disaster will follow."[137] In a 1922 address to the local branch of the Norden Club (a Scandinavian organization), he urged the restructuring of the two-party system, with each party realigned ideologically and "an intelligent and independent electorate" in the middle choosing between them, thus avoiding the "intellectual dishonesty" that was "the greatest evil accompanying party government."[138] In a 1922 compendium of 48 leading citizens of Jamestown, Jackson's party affiliation was described as "Independent Democrat"; the vast majority were Republicans, with at least one Independent Republican, a handful of Independents, and a handful listing no party affiliation. The addition of "Independent" to "Democrat" made clear that Jackson would not blindly toe the party line. It also mirrored what Carlson called himself – an "Independent Republican."[139]

In his Jamestown years, Jackson's political ideal was not tied to any one program. Some of his rhetoric sounded like the future president to whom he would hitch his star twenty years later. Not long out of law school, the young attorney advocated a middle

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Jackson supported Al Smith for president, despite the fact that the New York governor "was not generally strong or popular in our section" of the state: "In the first place he was a Tammany man, and Tammany stood for all the evils that political life is heir to. Al Smith was a wet. Our community was predominately dry in theory. Al Smith was a Catholic. Our community was predominately Protestant. Al Smith was the "brown derby." Our idea of the statesman was a more sedate old Yankee. It was a complete revelation to our community that Al Smith could be governor." "Of course," added the Democrat and New Dealer, "there were many of us that were for him, but we were regarded as queer anyway because we had always been Democrats." Jackson Reminiscences 184.

[137] Robert H. Jackson, Memorial Day Speech, Mayville, NY, May 31, 1915 15.

[138] Robert H. Jackson, "Government by Political Parties," speech before the Norden Club, Jamestown, NY, October 23, 1922, Box 31, Speeches and Writings file, Robert H. Jackson Collection, Library of Congress 7-8.

[139] Moe, Saga from the Hills 122.

way in which abuses of the status quo would be stopped without violence.[140] Citing the social problems plaguing the country, especially labor unrest and the assimilation of multitudes of recent immigrants, he identified the need to "forestall violent revolution by conservative and rational reform"[141] At the same time, however, he maintained distrust of social reform. In a 1916 speech to the Saturday Night Club, he voiced opposition to both the "intrenched [sic] and privileged classes, fearful of every change lest it go far enough to be a real reform"; and to the reformers themselves. He found legal reform the most dangerous of all, especially the abandonment of precedent as a basis for deciding cases.[142] Thus, he had adopted the mainstream legal ethic, an ethic he easily reconciled with his rural roots.

The pattern of tweaking established orthodoxy while not abandoning it, was also apparent in Jackson's bar organization activities He worked with others to create a bar federation organization to rival the established – and quite conservative – American Bar Association. As he recalled years later, "We enjoyed the battle. We enjoyed prodding these Brahmins."[143] Accusing the existing organization of being little more than an excuse for elite lawyers to take a vacation, Jackson "wanted it more representative" of the legal profession.[144] But while critical of bar association elitism, and instrumental in the

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[140] Robert H. Jackson, Speech at Ellington (NY) Town Picnic, Aug. 8, 1913, Box 31, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress.
[141] Robert H. Jackson, Memorial Day 1914 Speech 6.
[142] Robert H. Jackson, Speech to the Saturday Night Club, June 1916, Box 31, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 1, 2, 3, 8.
[143] Jackson Reminiscences 196. 4. Jackson's use of the term "Brahmin" provides an interesting counterpoint to Richard Kluger, who characterized him as a "patroon" and a "patrician." Kluger, Simple Justice (1977 ed.) 235, 241.
[144] At least in the beginning (starting in the late nineteenth century), the established bar organizations tended to be selective (meaning, according to one source, "primarily well-to-do business lawyers, predominantly of old-American stock") in its membership practices. The American Bar Association, the largest nationwide organization, had been much more selective before Jackson's admission to the bar, but even after expanding its membership it still claimed only a small minority of lawyers. And while no precise information on its membership was released, it did appear that membership, and especially

founding of regional bar association federations, Jackson maintained good relations with the ABA.[145] He joined, and rose to leadership positions in, numerous professional organizations. The "undisputed leader of the Chatauqua County bar," Jackson served as president of the Jamestown Bar Association and the Federation of Bar Associations of Western New York, an organization that lobbied the State Bar Association to meet the needs of Upstate lawyers; in 1933, he chaired the National Conference of [American] Bar Association Delegates; he also became Vice President of the New York State Bar Association. He served as a member of the New York State Commission on the Administration of Justice, a five-member panel organized under the administration of then-Governor Franklin Roosevelt.[146] Jackson, who had first met the future president as a young state committeeman in the early 1910s, campaigned heavily for the Roosevelt ticket in 1932.[147]

* * *

Jackson's values as a legal professional, and basic tenets from his rural upbringing, comprised his basic belief system. At its core was the rural individualism he learned in Frewburg[148]; he also inherited an allegiance to the Democratic Party, as well as opposition to social reform and expanded government. And then there were the flashes

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leadership, represented an elite "clique." Nor did the ABA make any attempt to exert strong leadership by integrating other lawyers and bar associations under its leadership, which would have made it a forceful and truly representative voice for the profession, until 1933. The ABA also excluded African Americans until the middle of the twentieth century; fought against the confirmation of progressive Justice Louis Brandeis, the first Jew on the Supreme Court; and sought to exclude immigrants from the bar. Jackson Reminiscences 197; Friedman, History of American Law 648, 651; Hurst, Growth of American Law 288-91; Auerbach, Unequal Justice 4, 65-73.

[145] Jackson Reminiscences 199.

[146] "From Spring Creek to Washington" 2; Gerhart, America's Advocate 45, 56-57; Simon B. Sobeloff, "Proceedings in the Supreme Court of the United States In Memory of Mr. Justice Jackson," 349 U.S. xxvii, xxxii (1955).

[147] Schubert, Dispassionate Justice 13; Gerhart, America's Advocate 58-59; Barrett, "Albany in the Life Trajectory of Robert H. Jackson" 530.

[148] Schubert, Dispassionate Justice 2.

of rhetoric hostile to African Americans, in his references to the Civil War. His experiences as a law student and lawyer, in the small city environments of Albany and Jamestown, softened his partisan edges; allowed him to acquiesce in a somewhat expanded role for government in an urban industrial society; and made him a believer in the need for the legal system to operate in the service of all people, regardless of race. His broadening life experiences -- his legal practice, his opposition to World War I and his long association with Mayor Carlson -- did not result in a new ideology or world view; rather, they helped him refine his core values. It was in the service of those beliefs that Jackson's views on public policy evolved, first in Jamestown, and later in Washington. And it was these core beliefs, further tempered by new experiences, with which Jackson ultimately would have to come to terms with court-ordered desegregation.

Chapter 3: New Deal Lawyer

> The trouble with this work is that it is bound to make one either a radical or a cynic.
>
> --Robert H. Jackson[1]

> The best talent of the bar will always muster to keep the Ins in and to man the barricades against the Outs.
>
> --Karl N. Llewellyn [2]

Introduction

When the successful Jamestown attorney first arrived in Washington in 1934, to serve as assistant general counsel to the Bureau of Internal Revenue, he envisioned his new job as a temporary and part-time appointment, one that would allow him to maintain his Jamestown practice for his eventual return home.[3] Yet Jackson's career would soon take a new direction, as his talents for law, writing and speechmaking, and his sterling personality, secured him promotion after promotion: to Assistant Attorney General, at first in charge of the Tax Division and later, its Antitrust Division; to Solicitor General; and then to Attorney General. His rise through the administration and his obvious ability made him a perennial prospect for the highest offices, including the presidency.[4]

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[1] Robert H. Jackson to Warren Tubbs, December 14, 1934, Box 20, File: General Correspondence -- Tubbs, Warren, Robert H. Jackson Collection, Library of Congress 1.

[2] Karl N. Llewellyn, The Bramble Bush 144-45.

[3] Jackson saw himself as a temporary resident throughout his seven years in the Roosevelt administration, not even buying a home in the metropolitan area until his Supreme Court appointment in 1941. Jackson Reminiscences 487; Robert H. Jackson, Unpublished Notes, p. 185, quoted in Gerhart, America's Advocate; Draft 2, Box 188, Biographical File, Robert H. Jackson Collection, Library of Congress 40; Gerhart, America's Advocate, Chapters from Early Draft 1, Box 188, Biographical File, Robert H. Jackson Collection, Library of Congress 10; Robert H. Jackson, Autobiographical draft 49, 125-26.

[4] Jackson Reminiscences 295 (his job with the BIR was supposed to last six months); Gerhart, America's Advocate Early Draft 1, 42ff., 49ff. (possible candidacy for New York governorship in 1938), 199-200 (possible candidate for president in 1940), 132 (possible candidate for governor of New York in 1938); Cordell Hull, The Memoirs of Cordell Hull, vol. I (New York: Macmillan, 1948) 209; "Proceedings in the Supreme Court of the United States In Memory of Mr. Justice Jackson," 349 U.S. xxvii, xxxiii (1955); Hockett, New Deal Justice 6; Time xxvi, no. 6 (August 5, 1940) 10; Schubert, Dispassionate Justice 13 n. 43 and 44, and authorities cited therein; Robert H. Jackson, Autobiographical draft 4; Robert H. Jackson, Autobiographical draft 140-42; Philip B. Kurland, "Robert H. Jackson" 2555-56; W.M. Kiplinger, Washington is *Like* That (New York: Harper & Brothers, 1942) 335; Jackson Reminiscences 263, 295 (how Jackson's interpersonal skills won him professional contacts).

What kind of New Deal lawyer was Jackson, and how did his time in the Roosevelt administration affect his views on race relations and the Constitution? No liberal firebrand or social scientist, Jackson was a professional who did his job very well, and who with his skill and charm gained the confidence of senior members of the administration, including the President himself. Yet it would be a mistake to think of Jackson as nothing more than a legal technician or a political opportunist, as his private as well as public declarations demonstrate his agreement with the New Deal's aims and most of its policies.

Jackson's exposure to the Washington racial and political milieus provided him not with a new point of view, but with new layers of complexity. On the one hand, the New Deal exposed him to the concept of the Constitution as a living document: one that could be interpreted flexibly, as the times or circumstances might require. Yet his participation in the administration's battle with the Supreme Court over the New Deal's legality made him ever more skeptical of making the courts final arbiters of social policy. As one of the nation's leading African American centers and a city more Southern than Northern in its racial mores, the nation's capital provided Jackson his first opportunity to face institutionalized racial bigotry and the struggle against it. At the same time, his friendships with Southern political leaders made him keenly aware of the intractability of white Southerners' opposition to equal rights for African Americans.

There are methodological complexities to keep in mind when trying to glean Jackson's own mindset from his professional actions. In representing their clients,

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Years later, Jackson insisted that he had not been "consciously shaping my course" for elective office, or he would have been more careful in his public pronouncements, many of which were shocking to some in their bluntness. Nonetheless, Roosevelt urged him to consider running for governor of New York – a possible stepping-stone to the presidency – in 1938. Jackson Reminiscences 614-15, 592 ff.; Jackson, Autobiographical draft 125 ff., 140-42.

lawyers often advance points of view with which they personally disagree;[5] members of an administration cannot disagree too much with their boss. And there is the question of how clientele affects policy stances. As Jackson himself once said of lawyers:

> …our sincerity is always under a cloud. People believe that a profession whose voice and hand are for sale may have a price on its heart also. Exceptional lawyers do have convictions of their own. But there is a cruel realism about the underworld which calls any lawyer, even its own, a "mouthpiece." Even the upper world notes that a lawyer's retainers and his convictions seldom conflict. The correspondence is too frequent to be a coincidence. People wonder whether it is convictions that get retainers, or retainers that beget convictions.[6]

The sincerity of Jackson's convictions were not always apparent to observers: one attributed his rise in power to "sheer hard work, ability, and a capacity for knowing which way the wind blows."[7] An awareness of the sincerity issue is critical in studying any Supreme Court justice, since the judicial independence that comes from life tenure allows a jurist to abandon earlier positions taken out of personal ambition or political expediency. Yet here, regardless of his ambitions (and he undoubtedly had them, despite his attempts to minimize them in writings and interviews), what Jackson said while in the executive branch, and what he recalled about that time years later, give some indication of his evolving views on civil rights and the constitution.

Jackson, the Roosevelt Administration, and Race Relations

The administration's tack on race relations seems less than progressive to twenty-first century eyes. Such attitudes, however, were common among "the great majority of" whites at the time. Race relations were not a cause of immediate concern for Northern whites (even elites), who generally considered the issue a Southern concern. Their

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[5] Jackson Reminiscences 642 ff.
[6] "Lawyer to Lawyers: U.S. Attorney Scores Bar For Emphasis On Precedent Which Invites Confusion In Government," Washington Post February 1, 1937, clipping in Box 210, File: Miscellany -- Clippings – Jan. 1919-Mar. 1937 -- Robert H. Jackson Collection, Library of Congress.
[7] Kiplinger, Washington is *Like* That 335.

personal stakes seemed much lower than those for white Southerners, whose resulting political will allowed them to control the racial agenda.[8] That so many African Americans so admired Franklin Roosevelt, in spite of his less than Herculean efforts on their behalf, attests to how shabbily the federal government had treated African Americans in the decades between Reconstruction and New Deal. Modest tangible gains profoundly mattered to a group historically shunned at best.[9]

While expressing sympathy for African Americans' plight, FDR claimed that his hands were tied, as he believed that African Americans' political support could not compensate for the loss of solidly Democratic, and virulently racist, Southern whites. That region's strident and nearly monolithic white supremacy reinforced the Administration's reluctance to get involved with racial issues.[10] Even the

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[8] Walter A. Jackson, Gunnar Myrdal and America's Conscience: Social Engineering and Radical Liberalism, 1938-1987 (Chapel Hill: University of North Carolina Press, 1990) xvii, 1, 13; Everette Swinney, "Enforcing the Fifteenth Amendment, 1870-1877," Journal of Southern History 28 (May 1962) 218.

[9] Donald W. Jackson and James W. Riddlesperger, Jr., "Federalism, the Roosevelt Coalition, and Civil Rights: FDR's Political Leadership," Stephen K. Shaw, William D. Pederson and Frank J. Williams, eds., Franklin D. Roosevelt and the Transformation of the Supreme Court (Armonk, NY: M.E. Sharpe, 2004) 165, 170, 186.

Sources on the New Deal and African Americans include Kevin J. McMahon, Reconsidering Roosevelt on Race: How the Presidency Paved the Road to *Brown* (Chicago: University of Chicago Press, 2004); Harvard Sitkoff, "The Impact of the New Deal on Black Southerners," The New Deal and the South, ed. by James C. Cobb and Michael V. Namorato (Jackson: University Press of Mississippi, 1984) 118-34 and A New Deal for Blacks: The Emergence of Civil Rights as a National Issue, Volume I: The Depression Decade (New York: Oxford University Press, 1978); John B. Kirby, Black Americans in the Roosevelt Era: Liberalism and Race (Knoxville: University of Tennessee Press, 1980).

[10] For views on Roosevelt's record on racial justice and race relations, see Harvard Sitkoff, "The Impact of the New Deal on Black Southerners," The New Deal and the South 118 ("Roosevelt had little alternative to seeking the support of, and capitulating to the racism of, the white southerners who controlled Congress"); Sitkoff, A New Deal for Blacks ix ("The New Deal years are a turning point in race relation trends," but that "does not mean that blacks received their proper due from … the New Deal [nor] that Franklin D. Roosevelt and the New Deal were the sole or primary determinants of the emergence of civil rights as a national issue"), 329 ("In moral terms the horror of racism makes a mockery of lauding anyone as a humanitarian who compromised with its existence, as Roosevelt did repeatedly," yet "Historical judgment … requires attention to the nuances of context and to an awareness of limits"); David E. Bernstein, Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal (Durham: Duke University Press, 2001) ("Broad-based New Deal labor legislation … typically did not have discriminatory intent but had harsh, foreseeable, discriminatory effects…. The federal minimum-wage laws passed during the 1930s … were applied selectively so that African American

Administration's level of accommodation failed to prevent Roosevelt from being pilloried by Southern politicians, who understood that even the smallest change could destabilize the political system they controlled.[11] And even white Southerners who claimed to be "liberals" on race often maintained "that any attempt to promote fundamental change would have catastrophic results."[12] Roosevelt's failed attempt to purge anti-New Dealers, mostly Southerners, from the Democratic Party in 1938 put him in an even weaker position vis-a-vis the white Southern power structure, especially given the need for national unity in the face of impending war.[13]

Moreover, in spite of tensions between the Administration and the region's political elite, Roosevelt liked the South and sought to maintain good relations with it.[14] A former governor, the president viewed as the patron of big government was sympathetic to Southern whites' claims of states' rights. He enjoyed the region and its people, enjoying his retreat near Warm Springs, Georgia, and fishing off the Florida coast. He "absorbed almost all of [the progressive Southern] ideology" – which included the rejection of political rights for African Americans -- from his tenure as assistant secretary of the navy in the Wilson administration.[15] As William Leuchtenberg recently

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workers who generally did not compete with whites, such as domestics, were not covered at all"); William E. Leuchtenburg, The White House Looks South 55 (no major civil rights campaign in office, but his Administration "initiated changes that shook established racial patterns, stirred up a resistance to the old order that would reverberate for decades to come and, by listening to, and sometimes heeding, demands for greater equality, deeply angered the guardians of white supremacy").

[11] Leuchtenburg, The White House Looks South 58-59; Brinkley, "The New Deal and Southern Politics" 97-99, 115. The Southern politicians were probably right about the New Deal's long-term effects on the South and on the Democratic Party, which eventually became the new party of Lincoln thanks to later politicians' efforts to garner support from African Americans voting in major Northern cities. Brinkley, "The New Deal and Southern Politics" 112-13, 115.

[12] Brinkley, "The New Deal and Southern Politics" 104-09.

[13] Freidel, "The South and the New Deal," in Cobb and Namorato, eds., The New Deal and the South 33-34; Leuchtenburg, The White House Looks South 85ff.

[14] Freidel, "The South and the New Deal" 23, 24, 34, 35.

[15] Freidel, "The South and the New Deal" 23-24. Of Roosevelt's personal views on race, Freidel wrote, "As for blacks, it never occurred to him to question white supremacy, but being humane, he favored better

observed, "Franklin Roosevelt not only came to think of himself as southern, but was frequently so perceived," even by the white Southern politicians who thought of him as the only "liberal, big-city Democrat" who was one of them – until his fits and starts on racial equality and other types of political progressivism damaged their relationship beyond repair.[16]

Jackson learned the political price to be paid for backing civil rights. As he wrote later in life: "the issue of civil rights divided the North and South. The South, while President Roosevelt had made no radical civil rights proposals, resented his attitude on the Negro question."[17] He explained the dilemma (one that the party resolved only decades later, and by ceding white supremacists to the former Party of Lincoln):

> … the Democratic party is a split personality…. A party that in the North is a liberal party and in the South represents the vested interest of the white man and his business interests, is fundamentally at conflict with itself.[18]

Oddly, his understanding of the situation denied the centrality of race, instead viewing the main conflict as a more generic insider/outsider struggle, of which race was only one aspect:

> When you became Democrats in the South, you lined up with the leading businessmen and leading political influences of your community…. You were on the right side of the railroad tracks by being a Democrat. It was just the opposite in the North, we were against the business community. We were outcasts politically…. What did we do to get somebody with us? If we made any campaign at all, we had to go out to the discontented. We had to go out to the

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education and an improved livelihood for them as well as whites." Id. at 24. Others have shaded the nuances somewhat differently. For example, Jackson and Riddlesperger observed, "While it seems evidence that Roosevelt personally had little zeal for racial issues, he was not opposed to the rights that 'Negro' leaders sought," and "was able to respond with steps forward that represented – relative to what had gone before – a national change of direction." Donald W. Jackson and James W. Riddlesperger, Jr., "Federalism, the Roosevelt Coalition, and Civil Rights" 186.

[16] Leuchtenburg, The White House Looks South p. 29, chs. 1, 3, 4.

[17] Jackson Reminiscences 837; Time, vol. xxxvi, no. 6, August 5, 1940 at 13, clipping in Box 208, File: Miscellany -- Articles about Jackson 1935-40, Robert H. Jackson Collection, Library of Congress 13.

[18] Jackson Reminiscences 458.

> minority. We had to go to the Negro, the unemployed, the laborer…. The result was that our party in the North, aside from a core of old-line Democrats, came to be made up of immigrants, minority groups, labor groups, feeling that they hadn't had a fair deal from the powers that be.[19]

Even more remarkable, Jackson seemed not to take into account the lack of a two-party system in most of the South at the time. He demonstrated a greater command of the socioeconomic struggle underlying the New Deal than of race relations.

Jackson believed that pursuing a civil rights agenda was a matter of political survival for Southern as well as Northern Democrats, since Northern Democrats needed votes from African Americans to hold their seats in Congress and maintain Democratic majorities.[20] If Southern Democrats "defeat the promises that [Northern Democrats] made," Southern Democrats will "go[] back on the minority side" of Congress, because their Northern colleagues will lose elections.[21] Southern Congressmen did not see it that way. One threw the dilemma at Jackson:

> How can we ever get along with you Northern Democrats? You know the position we take on Negro rights and civil rights. We know the position you take on that, and on labor and so forth. I want to put it to you how we can work together permanently.[22]

While Jackson recalled that the specific Congressman who engaged him in this disputation became "a friend of mine ever after," Jackson maintained that the rift posed a perennial problem, and would always compromise Democratic reforms:

> That split is in the Democratic party clear to the roots. It can never be a really cohesive instrument of government. It can stand together only while it's being battered from the outside for the purpose of getting into office. But the moment it

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[19] Jackson Reminiscences 460.
[20] Jackson Reminiscences 460. As Harvard Sitkoff observed of Roosevelt's Supreme Court appointees in general, they "well understood the political importance of the Negro vote to the Democrats. They … realized the pragmatic necessity of the alliance between blacks and the national Democratic party." Sitkoff, A New Deal for Blacks 229.
[21] Jackson Reminiscences 460-61.
[22] Jackson Reminiscences 459.

> is in office that cleavage, to my mind, is so deep as probably to be insoluble in our time.[23]

Jackson's pessimism about his party's prospect for effective governance demonstrates how deeply the tensions between New Dealers and Southern Democrats had affected him.[24]

Yet Jackson understood these attitudes as part of a larger matrix of Southern prejudices, including "opposition to the alien … a feeling of anti-semitism, of anti-Catholicism, of general hostility to the stranger …"[25] And since African Americans were no strangers to Southerners or their culture (given the plethora of African American servants and laborers in the region, Jim Crow did not separate the races, just barred their interaction as equals), Jackson again betrayed his lack of understanding of Southern race relations. Yet he understood that, whatever the problem was, it would stymie civil rights reformers, and give little hope for federal reform.

Jackson was schooled in the need to accommodate white Southerners early in his government career. Huey Long -- senator, governor, and political boss of Louisiana -- advised Jackson to find a Southern trial lawyer to handle a major tax fraud case in that state, as a Northerner would not prevail with a local jury. Jackson took the advice, and the case was successfully prosecuted by a former Texas governor.[26] And Roosevelt himself, rejecting the possibility of annexing Caribbean islands, went beyond "the

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[23] Jackson Reminiscences 461. In fact, events over the last two generations have shown how right Jackson was: many Southern Democrats ultimately resolved the dilemma not by facilitating any healing in their own party, but by jumping ship and joining the Republicans. Kari A. Frederickson, The Dixiecrat Revolt and the End of the Solid South, 1932-1968 (Chapel Hill: University of North Carolina Press, 2001) 218-33.

[24] In his oral history, he even discounted the Court fight as a polarizing force, in the face of this more fundamental rift between North and South, over "the Roosevelt program." Jackson Reminiscences 461-62.

[25] Jackson Reminiscences 1015.

[26] Jackson Reminiscences 387.

difficulty we had in the Canal Zone between white and colored laborers" as an explanation:

> He pointed out, as I knew from visits to the islands and as we had discussed before when we had been fishing in southern waters, the differences in race relations in those islands and the race relations in the United States. In those islands there was no discrimination. There was intermarriage. There was a large measure of social, and complete political, equality between the races. He pointed out that if we undertook the government of those islands, we would run into that problem with the Southern representatives in the Senate and the House of Representatives. If we attempted to alter the pattern and impose upon the islands the conditions that prevailed in the Untied States, we would have the bitterest kind of resentment in the islands. On the other hand, if we attempted to conduct race relations in the islands as they had been, we would be setting up a pattern that would cause the bitterest resentment in the Southern part of the United States.[27]

Roosevelt's Jamestown protégé believed that he had established better relations with conservative Southerners than his mentor had. He had forged a good relationship with Georgia Senator Walter George, and was disappointed in the President's decision to attack the lawmaker, whom Jackson trusted enough to show confidential Justice Department files.[28] He was friendly with Judge John Parker of the Fourth Circuit Court of Appeals,[29] whose nomination for a Supreme Court seat was derailed by a 1920 newspaper quote, "The participation of the Negro in politics is a source of evil and danger to both races and is not desired by the wise men in either race…." According to longtime NAACP chief Walter White, Parker's "decisions on both Negro and labor cases … have been above reproach" after the confirmation defeat.[30] Yet despite his "relatively

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[27] Jackson Reminiscences 896; Robert H. Jackson, That Man: An Insider's Portrait of Franklin D. Roosevelt, ed. and intro. by John Q. Barrett (Oxford: Oxford University Press, 2003) 100.
[28] Jackson Reminiscences 816-17, 462-65.
[29] Box 18, File: Personal Correspondence -- Parker, John J., Robert H. Jackson Collection, Library of Congress.
[30] Walter White, A Man Called White: The Autobiography of Walter White (New York: Viking Press, 1948) 104-05, 114; Kluger, Simple Justice (1977 ed.) 141-44, 216 (Parker voted to equalize salaries for black and white teachers), 289 (presided over court that voted to desegregate University of North Carolina law school), 300 (wrote opinion affirming invalidation of all-white primary in South Carolina).

liberal" leanings, Parker upheld the constitutionality of a discriminatory public school system in Briggs, one of the companion cases to Brown.[31]

Jackson's sympathy toward white Southerners was probably rooted, to a significant extent, in his affinity for their rural orientation. In his 1944 review of a Southern lawyer's memoirs for the American Bar Association Journal, Jackson laid bare his nostalgia for the premodern rural existence of his childhood, while overlooking racial tensions.[32] It also might have stemmed from his complex feelings about race relations. Although he made public statements like "religious and racial bigotry have always been repugnant to American ideals,"[33] he was not immune to the type of stereotyping against African Americans which continued in the 1930s and 1940s.[34] His reminiscences about the African American janitor at Jamestown High School dated from the year he began working in Washington.[35]

Race Relations in the Nation's Capital

None but the hardiest of optimists would have become sanguine about the future of race relations, from observing them in the nation's capital in the 1930s. Washington, the major American city with the highest percentage of African Americans, was

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[31] Kluger, Simple Justice (1977 ed.) 344-67.

[32] Jackson Review 136. For a related discussion on how Jackson's review revealed tenets of his own ruralism, see Chapter 1, pp. 17-18.

[33] Robert H. Jackson, Message to Committee of Catholics for Human Rights, as excerpted in The Voice for Human Rights (November 1940), Box 55, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress.

[34] For examples of "minstrelesque descriptions" of African Americans during the 1930s and 1940s, see Lauren Rebecca Sklaroff, "Constructing G.I. Joe Louis: Cultural Solutions to the 'Negro Problem' during World War II," Journal of American History 89 (December 2002) 958, 971; Barbara Dianne Savage, Broadcasting Freedom: Radio, War, and the Politics of Race, 1938-1948 (Chapel Hill: University of North Carolina Press, 1999) 6-9.

[35] Robert H. Jackson, speech, Wagner meeting, Jamestown , NY, October 24 or 29, 1936, Box 33, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 1; Jackson, speech, State Armory, Jamestown, NY, October 31, 1936, Box 33, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 1; Robert H. Jackson, Speech, Jamestown High School Lyceum, Jamestown, NY, 1934, Box 34, File: Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 5-6.

For more on this episode, see p. 55.

Southern: a slave territory before the Civil War, the nation's capital continued to be "in the thrall of southern senators and congressmen" thereafter; and was thoroughly segregated in the first two decades of the twentieth century.[36] By the 1930s, African Americans in Washington were better educated than their counterparts elsewhere, with a 96% literacy rate; with "most … [having] been through high school";[37] and with the leading African American educational institutions in the country, Dunbar High School and Howard University.[38] Yet they experienced "plenty of poverty," and their "middle class" was comprised largely of servants and tradesmen, with few professionals or businessmen.[39] Whites' refusal to patronize African American businesses stunted critical economic development, and Congress would not fund programs to help, as key appropriations posts were controlled by Southerners.[40] Living conditions reflected economic privations. Newsweek named Washington the "Murder Capital of the U.S." in 1941; its infant mortality rate, according to 1934 statistics, was second only to New Orleans's.[41]

The capital's African Americans, like those elsewhere, suffered disproportionately in the Great Depression.[42] Even when the unemployment situation began to improve, pervasive discrimination (and, in government, influential Southern

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[36] Harry S. Jaffe and Tom Sherwood, Dream City: Race, Power, and the Decline of Washington, D.C. (New York: Simon & Schuster, 1994) 25-26; Powers, Secrecy and Power 10. See also p. 166.
[37] Kiplinger, Washington is *Like* That 147, 158.
[38] Jacqueline M. Moore, Leading the Race: The Transformation of the Black Elite in the Nation's Capital, 1880-1920 (Charlottesville: University Press of Virginia, 1999) 70, 111 and Ch. 8.
[39] Kiplinger, Washington is *Like* That 156-57; Lorenzo K. Greene and Myra Colson Callis, The Employment of Negroes in the District of Columbia (Washington, D.C.: The Association for the Study of Negro Life and History, undated) 67-68.
[40] Jaffe and Sherwood, Dream City 27; Moore, Leading the Race 2-4, 8, 70, 111 and ch. 8. As an example of white hostility to the African American community, white Masons unsuccessfully sued African Americans who formed their own lodge, in an attempt to deny them the "Mason" name. Mason at 181 ff.
[41] Jaffe and Sherwood, Dream City 26.
[42] Constance McLaughlin Green, The Secret City: A History of Race Relations in the Nation's Capital (Princeton, NJ: Princeton University Press, 1967) 218-19.

Congressmen) had most African Americans relegated to bottom-rung positions.[43] As African Americans, whose population was growing faster than that of whites, were displaced from neighborhoods -- to make room for new government buildings and housing for new, white, government employees -- the burgeoning housing crisis was ignored by many in government. The chair of the Alley Dwelling Authority dismissed complaints as an attempt to desegregate housing and impose "full racial equality."[44]

In the federal government, African Americans comprised 9.85% of employees working in Washington in 1938, up ever so slightly from 9.79% in 1933, when Roosevelt first took office; yet they comprised about 28% of the population. Their average pay was about 40% less than the overall average. Fully 90% were in custodial jobs (versus 3% for the government's Washington workforce as a whole) and only 9.5% in clerical positions (versus 83%). Even in custodial positions, whites held the top-paying posts.[45] In the Justice Department (where Jackson spent most of his career in the executive branch), African Americans comprised only 3.14% of the District of Columbia staff in 1938, ranking it 8 out of 10 executive departments in its percentage of African American employees. The vast majority was low-level staff, such as laborers and messengers.

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[43] Green, The Secret City 200, 251-53; Greene and Callis, The Employment of Negroes in the District of Columbia 65-67.

[44] Howard Gilette, Between Justice and Beauty: Race, Planning, and the Failure of Urban Policy in Washington, DC (Baltimore: Johns Hopkins University Press, 1995) 136-37, 142-44; Green, The Secret City 200.

The housing shortage for African Americans would only get worse during with more government workers than ever to house in the nation's capital. Gilette, Between Justice and Beauty 145-47. It was in the immediate postwar years that litigation to end racially restrictive real estate covenants wound its way through the courts. See p. 377, n. 19; Tushnet, Making Civil Rights Law 86-91.

[45] Laurence J.W. Hayes, The Negro Federal Government Worker: A Study of His Classification Status in the District of Columbia, 1883-1938 (Washington, DC: Graduate School, Howard University, 1941) 153, 73, Green, The Secret City 231; Kiplinger, Washington is *Like* That 155; Greene and Callis, The Employment of Negroes in the District of Columbia 59 ff.

Only one was an attorney (a political appointee), one a law clerk, and one – the chief file secretary – was replaced upon his death in 1938 with a white.[46]

By 1940 or so, a few public facilities had desegregated, yet "in almost everything … Negroes are reminded daily that Washington is south of the Mason and Dixon's line." Only lighter-skinned African Americans could "slip into" restaurants, theaters and hotels.[47] The founding of the Community Chest in 1928, with its integrated banquets, was considered a milestone, but improvements in the 1930s were fitful and "followed by half a step backward."[48] And despite increased interracial contacts, racial mixing "usually stopped at the office threshold"[49]:

> Inevitably in a city where two generations of white people had thought of Negroes primarily as servants, or at least as human beings of a distinctly lower order, the new contacts made through charity board sessions and university classrooms were generally formal, often marred by white condescension, and usually lacking in personal warmth.[50]

Faced with this reality, "Knowledgeable Negroes in early 1939 were still skeptical about any Nascent conversion among whites to the doctrine, let alone the practice, of racial equality."[51]

There were harbingers of fundamental change. African American graduate students were admitted to American and Catholic Universities with "no stir," which "in itself suggests that racial toleration was growing without political forcing." The administration's more tolerant attitude encouraged dignified treatment of African

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[46] Hayes, The Negro Federal Government Worker 81-82, 136, 154.
Despite the passage of an executive order seeking to remedy such widespread discrimination in June of 1938, racial prejudice, combined with the perennial "disabilities which afflict an unorganized minority group" would make it impossible, even with the best of intentions, to change the job status of the masses of African American workers (or the resulting perceptions of those workers) overnight. Id.
[47] Green, The Secret City 201-02; Kiplinger, Washington is *Like* That 158-59.
[48] Green, The Secret City 215-16, 218; Kiplinger, Washington is *Like* That 159.
[49] Green, The Secret City 258-61.
[50] Green, The Secret City 243.
[51] Green, The Secret City 246-48.

Americans. Outrage over the treatment of renowned contralto Marian Anderson by the Daughters of the American Revolution (who would not let her perform in Constitution Hall on Easter 1939) and the District of Columbia school system (the superintendent offered a white high school auditorium as an alternative venue only if the occasion were treated as an "exception, not a precedent") was in itself "a turning point." Moreover, "observing the applications of race doctrines in Nazi Germany" provided "stimulus to a reexamination of second-class citizenship."[52] Yet there was still a long way to go before African Americans would be equal citizens in their own capital.

New Dealer or Hired Gun?

The middle-aged Jamestown lawyer was not a perfect fit with the mostly young, Ivy League-educated New Dealers. Jackson recalled in his oral history, "I was pretty much outside of all" administration cliques, "yet friendly with many of the members of all of them. So I wasn't easily classified."[53] His path to the administration differed from the typical New Dealer's, having been brought on board because of his legal skills and political connections in New York State, not out of demonstrated academic brilliance.[54] The counsel position he was asked to fill was a "technical" one, of litigating tax cases for the government. As he reminisced years later: "I don't think you could say that the revenue bureau was, or ought to be, New Deal or Old Deal…. You either had a tax due or you didn't. The social policy of the tax law didn't concern our staff very much."[55]

Jackson, a prominent Democrat in upstate New York for nearly a generation, had already absorbed key concepts that would find their expression in the New Deal. As

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[52] Green, The Secret City 248.
[53] Jackson Reminiscences 411.
[54] Jackson Reminiscences 110; Schubert, Dispassionate Justice 13 Jackson, Autobiographical draft, p. 5.
[55] Jackson Reminiscences 301, quoted in Kurland, "Robert H. Jackson" 2547.

early as 1914, he called for "a Patriotism of Peace [to] forestall violent revolution by conservative and rational reform" – the type of third way that Roosevelt later would seek. He saw the need for change as his idealized world of independent farmers gave way to industrialization, fearing that a "nomadic" and "dependent" polity of industrial workers could turn to violence and anarchy, putting democratic institutions at risk. The Main Street nostalgia was there, yet so, too, was the call for "adjusting old laws to new conditions."[56] He echoed these and related themes, such as improving the workers' lot and aid to the unemployed, in the years following World War I.[57]

Yet, even as the Depression worsened, he was still ambivalent about government action. In early 1932, he had written a relatively long address, "An Economic Plan for America." He agreed that aid to the unemployed was necessary: as he asked rhetorically, "When hundreds of thousands have neither capital nor income, shall they perish?" He nonetheless criticized relief, even work relief, as beginning a dangerous trend toward a government-run economy, redistribution of wealth, and enabling big business's encouragement of consumption over savings.[58] Jackson recognized his own attempts at devising solutions as paltry. He concluded that "We are too far committed to government responsibility for employment, for old age support, for regulation of business to ever withdraw…. And I am not enough learned in socialism to make a plan agreeable to its tenets."[59]

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[56] Jackson, Speech to Grand Army of the Republic, Fentonville, NY, Memorial Day 1914 6-7.
[57] See, for example, Robert H. Jackson, "Review of the Interchurch World Movement Report on the Steel Strike of 1919," undated speech before the Saturday Night Club, Jamestown New York, Box 53, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress.
[58] Robert H. Jackson, "An Economic Plan for America," 1932 Speech delivered in Bemis Point, NY, Box 32, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 5-15.
[59] Jackson, "An Economic Plan for America" 10, 15-20.

He eschewed all misgivings in the 1932 presidential campaign. As the election approached, Jackson decried maldistribution of wealth and sought a solution for the cycle of economic crises which brought ruin to so many:

> It is plain that no political party and no class group yet have the system for avoiding these cycles of depression…. Notwithstanding this fact, it is obvious that the contrast between our great collective wealth and individual want indicates a bad distribution of the advantages of industrialism and when part of our population is poor because it produces more than is needed and another part is poor because it can't get what it needs, men cannot be blamed for making bitter criticisms of the system even if they can't propose an offhand solution.[60]

Jackson proposed two remedial approaches later tried by the Roosevelt Administration: "restrictions upon competitive production and sales," and providing jobs for the unemployed.[61] In a speech to the local Norden Club – a Republican bastion where he felt at home, except perhaps at election time – he warned that the consequences could be damaging, if not fatal, to the existing social and political order: "such an experience breeds great bitterness against those in power, debtor vengeance is aroused against creditor classes, restlessness borders upon violence, and radicalism threatens established order…."[62] While not completely satisfied with "meeting each day's problem with that day's plan," he opted for theoretical drift and practical action as the better alternative to hunger and violent upheaval.[63]

Nor was he afraid to attack conservative interests. He chided Norden Club businessmen for asking laborers and farmers to vote for "a business president."[64]

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[60] Robert H. Jackson, Speech delivered before The Labor Council of Jamestown, NY, October 21, 1931, Box 32, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 6.
[61] Jackson, Speech delivered before The Labor Council of Jamestown, NY, October 21, 1931 7-8.
[62] Robert H. Jackson, Address, Democratic Presidential Campaign, The Norden Club, Jamestown, NY, 1932, Box 32, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 1-2.
[63] Jackson, "An Economic Plan for America" 20.
[64] Jackson, "An Economic Plan for America" 20.

Shortly before he left for Washington, he told the local Daughters of the American Revolution chapter that "I am myself an individualist of the school of Emerson," yet … this creed of self reliance has been in the past century perverted and misused. It has become a credd [sic] of exaggerated selfishness and exploitation." He concluded, "That is not individualism, that is itself destruction of individualism."[65]

Having cast his lot with the New Deal, Jackson became one of its leading lawyers and spokesmen soon after his arrival in Washington.[66] He helped devise the Administration's "'soak the rich' tax program" of 1935 and worked to secure its passage, which he described years later as "one of the most constructive pieces of work that I had a hand in after coming to Washington."[67] In late 1937, he made a series of speeches defending Roosevelt against his opponents,[68] thereby becoming "closely associated in the press with what was regarded as the 'left wing' of the New Deal."[69] He continued his speaking and writing engagements until he joined the Court.[70]

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[65] Robert H. Jackson, Speech to the Daughters of the American Revolution, Jamestown, NY, February 22, 1934, Box 32, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 6.

[66] Jackson's popularity as a speaker is revealed by the contents of his speeches and writings file at the Library of Congress. A local speaker of note back in Jamestown, Jackson left in his speeches and writings file 81 speeches for the 24-year span from 1912 to 1935. For the next six years, which roughly coincided with his time in the Justice Department, he left 154. Boxes 31-41, File: Speeches and Writings File, Robert H. Jackson Collection, Library of Congress.

[67] Robert H. Jackson, Autobiographical draft 36-40; Jackson Reminiscences 356, quoted in Kurland, "Robert H. Jackson" 2548-49; William E. Leuchtenburg, Franklin B. Roosevelt and the New Deal 1932-1940 (New York: Harper & Row, 1963; New York: Harper Torchbooks, 1963) 150-52; Robert H. Jackson, "The Rich Get Richer," The New Republic (August 28, 1935) 68-72, copy in Box 54, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress; Jackson, "The Big Corporations Rule," The New Republic (September 4, 1935) 99-101, copy in Box 54, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress.

[68] Robert H. Jackson, Autobiographical draft 136-37; see, for example, Robert H. Jackson, "The Menace to Free Enterprise," Address to the American Political Science Association, Philadelphia, PA, December 23, 1937, Box 34, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress; Robert H. Jackson, "Labor's New Rights and Responsibilities," Address of Welcome to the New York State Federation of Labor Convention, Jamestown, NY, August 24, 1937, Box 33, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress.

[69] Kurland, "Robert H. Jackson" 2555.

[70] See notes 65-67; Robert H. Jackson, "Why Roosevelt Will Win," Look, October 22, 1940, copy in Box 55, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress; Robert H. Jackson,

It has been suggested, then and now, that Jackson's New Deal days were a somewhat liberal interlude sandwiched between a conservative youth and conservative-trending judicial career.[71] Jackson justified FDR's policies in numerous speeches and articles, sometimes in ways apparently inconsistent with his ideological moorings. This was especially true with his defense of the National Recovery Administration (NRA), an effort at government micromanagement and business cartelization at odds with his strongly anti-monopoly views.[72]

Address to the Jackson Day Dinner, Commodore Hotel, New York, NY, January 8, 1938, Box 35, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress.

[71] Adolf Berle, upon resigning as Assistant Secretary of State in the summer of 1938, charged that the then-chief of the Antitrust Division advocated "the progressive thesis of the [eighteen] nineties, which was old in the time of McKinley." Leuchtenberg, Franklin D. Roosevelt and the New Deal 265. One historian has maintained that Jackson agreed with his New Deal colleagues that corporate excesses were the problem, but that "they fired at the same target for different reasons. Theirs was the cry of contemporary politics; his was the voice of nostalgic betrayal," fueled by "the animus of Wall Street displaced professionally by Wall Street." Jerold S. Auerbach, Unequal Justice 175.

[72] Leuchtenburg, Franklin D. Roosevelt and the New Deal 67, 69-70; Gerhart, America's Advocate ch. 4. Historians have conflicted on whether Jackson supported or opposed the NRA. Compare Hockett, New Deal Justice ch. 8 (Jackson against NRA) with Gerhart, America's Advocate 61 (Jackson an NRA supporter). In his oral history, Jackson recalled having had a nuanced view: "As a temporary revival measure, it had, in my judgment, served a very important and useful purpose," but "As a permanent, or long-continued policy, it seemed heading in the wrong direction" of "monopoly" and "concentration of power." Jackson Reminiscences 429.

Jackson had been an adherent of the Wilsonian, anti-monopoly view of economics through his adult life. See p. 83; Robert H. Jackson, Autobiographical draft 1, June 6, 1944, Box 189, Biographical File, Robert H. Jackson Collection, Library of Congress 85. But in the 1932 presidential campaign, he began voicing concerns about how inefficiencies of competition might have been causing the economic crisis. Jackson, Autobiographical draft 1 85-86. Once Roosevelt was elected and his Administration's drive to sign businesses up with the NRA regulatory scheme began, he began making pro-NRA speeches to his fellow Jamestonians. Robert H. Jackson, NRA Speech, Jamestown, NY, 1933, Box 32, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress; Robert H. Jackson, Speech Delivered Under Auspices of the NRA Committee of Jamestown, NY, 1933, Box 32, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress. One wonders what combination of political loyalty, political ambition, and alarm at the length of the Depression motivated the believer in Wilson's New Freedom to say: "The conservative opposition is from … idealists, who still advocate individualism, competition and all that the old system stood for. I do not blame men of another generation for cherishing that dream. It was a beautiful dream but in their dreams they are living in a world which in fact, has passed away." Robert H. Jackson, Speech Delivered Under Auspices of the NRA Committee of Jamestown, NY, 1933 7.

With the Supreme Court's invalidation of the NRA, and corporate collusion "exceed[ing] anything authorized by NRA," Jackson reverted to his original instincts, and counseled Roosevelt to attack monopoly instead of competition. Robert H. Jackson, Autobiographical draft 1, June 6, 1944 86, 130-35. As chief of the Antitrust Division, he employed his post to further the antimonopoly cause. Kurland, "Robert H. Jackson" 2550-52; Robert H. Jackson, Autobiographical draft 7, Box 189, Biographical File, Robert H. Jackson Collection, Library of Congress 83; Robert H. Jackson, "The Antitrust Division," Box

Yet perhaps the best way to understand how Jackson felt about the New Deal as a whole is to read private correspondence from his early years in Washington. His pre-Washington political values seemed intact, but they were admixed with a pointed hostility toward large corporate interests. He conceded in a December 1934 letter to an old friend and Buffalo attorney that they were both "naturally individualists and, I think, fundamentally conservative." Yet he went on to explain, "The trouble with this work is that it is bound to make one either a radical or a cynic":

> When I see what has been done and what some of them are still trying to do in the Government, I realize that individualism as you and I knew it in our youth can be endangered not only by the Government, but can be pretty much destroyed by groups sufficiently powerful outside of the Government and that there have been some strange goings-on under the name of individualism.[73]

Observing that "the country is much farther to the left than the Administration," he wrote "that the real struggle of this Administration is to reform the existing system enough to save it."[74] Some months later, when Jackson's correspondent criticized him for his "unqualified endorsement" of Roosevelt's "soak the rich" tax plan,[75] the New Dealer replied with a mini-manifesto against the concentration of corporate ownership, again emphasizing the need for reform to save the capitalist system:

> I think the whole matter simmers down to whether one believes that this concentration, which we must admit is proceeding at an unprecedented rate, is a good thing or a bad thing. I do not know. I feel, however, that it is not a good

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189, File: Autobiographical Draft – Antitrust Division, Robert H. Jackson Collection, Library of Congress 85 ff; Robert H. Jackson, Address before the Trade and Commerce Bar Association and Trade Association Executives, Hotel Astor, New York, NY, September 17, 1937, Box 34, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress; Robert H. Jackson, "The Menace to Free Enterprise," Address to the American Political Science Association, Philadelphia, PA, December 29, 1937, Box 34, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress.

[73] Jackson to Tubbs, December 14, 1934 1.

[74] Jackson to Tubbs, December 14, 1934 1.

[75] Warren Tubbs to Robert H. Jackson, August 9, 1935, Box 20, Correspondence File: Tubbs, Warren, Robert H. Jackson Collection, Library of Congress. For the full text of the June 19 presidential message Tubbs referenced in his letter, see The Public Papers and Addresses of Franklin D. Roosevelt, 13 vols. (New York: Random House and Harper and Brothers, 1938-50) 1935 vol., pp. 270-76.

> thing and that the evil of it will be suffered more by people of property than by those without it.
>
> I suppose that to the man who has no accumulated wealth, it makes very little difference whether eighty-five per cent of the corporate wealth of the country is owned by five per cent of the corporations, as we now find it to be, or whether the eighty-five per cent is owned by eighty-five per cent of the corporations. That individual wouldn't have any of it anyway.
>
> I do think that for the institution conveniently called capitalism it makes some difference, for the greater the concentration the fewer are the number who have an interest in standing up for the system. When I was a youngster there were local merchants and small businessmen in my little town who defended every assault against conservative things. Today they are all gone and there are only clerks in their places, who have no influence and no interest in defending the economic order.
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> * * *
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> I am inclined to think that the ultimate end of too great a concentration will be an overwhelming degree of Government regulations, if not of Government ownership, and that big business in destroying small units is destroying the outposts on which it depends for political and social defense.[76]

He could have been thinking about this exchange when he confided to a colleague several years later, "I sometimes find it very difficult to be tolerant of my business friends who profess to see in every reform the destruction of our system."[77] Moreover, the excesses of the wealthy sickened Jackson, whose bitterness showed through in a 1935 letter to his son, William, then an undergraduate at Yale. Complaining that "Everybody is weeping over poor Edsel Ford who only got about $300,000 free of tax, and they are afraid that he is now going to be taxed so he won't get along," Jackson shared with William the same historical perspective he often employed on the speechmaking circuit[78]:

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[76] Robert H. Jackson to Warren Tubbs, August 12, 1935, Box 20, Correspondence File: Tubbs, Warren, Robert H. Jackson Collection, Library of Congress 1-2.

[77] Robert H. Jackson to Herbert C. Pell, October 25, 1938, Box 10, File: Jackson, Robert H., Herbert C. Pell Papers, Franklin D. Roosevelt Library, Hyde Park, NY.

[78] In a 1938 Jackson Day address, Jackson tied his political leanings to his family history by discussing how the frontier settlers of his own family "found in Andrew Jackson their champion." Robert H. Jackson, Address to the Jackson Day Dinner, Commodore Hotel, New York, NY, January 8, 1938 1. Later that year,

> It is the old fight of those who have things well in control against those who want the benefits of civilization a little more widely distributed. Thomas Jefferson, Andrew Jackson, Woodrow Wilson and Franklin Roosevelt have fought in their generations, and it will be on still when you are of fighting age.[79]

These private reflections are consistent with much of his speechmaking. Jackson publicly distinguished self-reliance – a value many anti-New Dealers felt was compromised by economic regulation and aid to the unemployed -- from the "creed of exaggerated selfishness and exploitation" which he attributed to many Roosevelt opponents. Detecting an intimate connection between inherited economic power and inherited political power, Jackson believed that breaking up inherited wealth was needed to maintain democratic institutions and free enterprise.[80] Believing that change was inevitable, and "orderly" change necessary, to protect the democratic and free enterprise systems, he concluded that such change "can be accomplished neither by reactionaries nor by revolutionists."[81]

Critical to Jackson was the capitalist system's meritocratic benefits – that the most talented have the opportunity to rise, regardless of their circumstances of birth.[82] He

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he linked the "political liberalism" that "as an attitude has dominated the constructive administration of Washington and Jefferson, of Jackson and of Lincoln, of Wilson, and of Franklin D. Roosevelt." Robert H. Jackson, "The Meaning of Liberalism," Address to the Liberal Voters League of Montgomery County, MD, Rockville, MD, November 22, 1938, Box 37, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 1-7.

[79] Robert H. Jackson to William Eldred Jackson, August 4, 1935, Box 2, Family Papers -- Family Correspondence -- Letters to William 1932-54, Robert H. Jackson Collection, Library of Congress.

[80] Gerhart, America's Advocate 62; Jackson Reminiscences 356, 358-59; Robert H. Jackson, "The Menace to Free Enterprise," Address to the American Political Science Association, Philadelphia, PA, December 29, 1937, Box 34, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 1, 6; Robert H. Jackson, Speech to the Daughters of the American Revolution, Jamestown, NY, February 22, 1934 6.

[81] Robert H. Jackson, Address at the Annual Memorial Service in Honor of Robert LaFollette, Madison, WI, June 23, 1940 14-15; Robert H. Jackson, "The Party and the Nation 1940," Jackson Day Dinner, Hotel Statler, Cleveland, Ohio, January 8, 1940, Box 40, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 9.

[82] Robert H. Jackson, "The Menace to Free Enterprise," Address to the American Political Science Association, Philadelphia, PA, December 29, 1937 6; see also Robert H. Jackson, Commencement Address, Randolph-Macon College, Ashland, VA, June 13, 1938, Box 36, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 9-10.

reconciled the New Deal with the anti-government liberalism of his youth by characterizing the ideology as something other than a "fixed code of principles," but rather "a continuing attitude toward problems of government" which "is always defending the same goal": that is, "the support of democracy, not as a mere form of government, but as an underlying philosophy with deep spiritual meaning." He invoked Jefferson and Andrew Jackson as protectors of rights "necessary to the individual's sense of personality," including many in the Bill of Rights; Old Hickory advocated expanded voting rights and direct homestead grants; and later Democratic administrations sought to protect workers' rights as an industrialized economy overtook the frontier.[83] In the time of the New Deal, "The chief abuses which liberals have to fight … are economic, related to property and the ways by which property is acquired." A liberal could defend private property, and fight the abuses of concentrated economic power at the same time, simply by insisting "that the interests of men and of society come first."[84] He admired Sweden's welfare state, and asserted before the National Conference of Catholic Charities that the "general welfare" clause of the Constitution required social justice, in "the democratic tradition of human rights over property rights."[85] Nor did Jackson's free-market views disallow government management of the economy, especially in time of

[83] Robert H. Jackson, "The Meaning of Liberalism," Address to the Liberal Voters League of Montgomery County, MD, Rockville, MD, November 22, 1938, Box 37, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 1-7.
[84] Robert H. Jackson, "The Meaning of Liberalism," Address to the Liberal Voters League of Montgomery County, MD, Rockville, MD 9-10.
[85] Jackson Reminiscences 377; Robert H. Jackson, "Social Justice Under Our Constitution," Address at the National Conference of Catholic Charities, John Marshall Hotel, Richmond, VA, October 11, 1938, Box 36, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 9.

national emergency, for "government, if it is to be effective, must be bigger than any of the governed."[86]

Yet like so much of Jackson's belief system, his liberalism was far from unqualified. He was willing, years later, to admit his disagreement with at least some Administration policy. For example, though he testified before Congress in support of the Fair Labor Standards Act, Jackson felt that absolute requirements for wages and hours were a mistake, as employers needed flexibility.[87] And while the former defender of Jamestown's streetcar employees opposed the conservative judiciary's practice of breaking strikes through the use of injunctions as being "vicious and uncalled for and … injuring the prestige of the courts,"[88] he objected to a labor union "exerting its power to defeat the law for its own ends, just as the corporations had done."[89] Unlike many in the administration, Jackson did not want labor to receive a free hand with regard to antitrust enforcement.[90] And while Jackson believed in the need for the growth of state power during the New Deal, he was nonetheless uneasy about it: "there were unfortunate aspects of that [yet] I think that was more or less inevitable given the economic conditions" caused by the Great Depression.[91]

There is no question that Jackson's liberalism had its personal advantages. And certainly, his support for the NRA was probably motivated more by political loyalty than by a belief that it was good public policy. Yet the New Deal was more than a path to

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[86] Robert H. Jackson, "The Undeveloped Strength of American Democracy," Address at the Institute of Public Affairs, Charlottesville, VA, June 14, 1940 5. See generally Herbert David Croly, The Promise of American Life (New York: Macmillan, 1909; Boston: Northeastern University Press, 1989).
[87] Jackson Reminiscences 466-68.
[88] Robert H. Jackson, "The Judiciary and the Constitution," Paper presented before the University Club, Jamestown, NY, October 1922, Box 31, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 11.
[89] Jackson Reminiscences 422.
[90] Jackson Reminiscences 538.
[91] Jackson Reminiscences 650.

power for Robert Jackson. In his speech at Franklin Roosevelt's memorial service in 1945, the then-Justice said of his former boss that

> Power to the President ... was never an end, but a means to a better world where men might live their chosen lives, rear their families in decency and security, safely think and speak their thoughts….[92]

Having agreed with Roosevelt that social and political systems can survive only if they foster these goals, Jackson put aside his ideological misgivings to support the New Deal. His stellar efforts on its behalf earned him a well-deserved reputation as "an ardent new Deal liberal."[93]

Jackson's Record on Civil Rights at the Justice Department: His Limits as a Policymaker

Jackson's initial posts in the Roosevelt Administration focused on taxation and antitrust policy. This changed in March 1938, with his appointment as Solicitor General, the federal government's chief appeals lawyer. Jackson's recollection of how that promotion came about skimmed over the office politics at work. Late in 1937, he set up an appointment with Roosevelt, at which he informed him that he wished to resign from government service by the first of the upcoming January. His motive, he claimed, was that he "wanted to get back to my law practice. I was becoming more deeply involved in politics and in legislative matters and in matters of policy and was getting away from strictly legal work, for which – justly or unjustly – I felt better qualified." Roosevelt, claiming that he could not afford to lose someone of Jackson's caliber, started musing about having Jackson run for governor of New York. Jackson recalled telling the President that "I did not think my capacities lay in the direction of political office; that I

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[92] Francis Biddle, In Brief Authority (Garden City, NY: Doubleday and Company, 1962) 361-62.
[93] Kevin J. McMahon, Reconsidering Roosevelt on Race 137.

had been fairly successful as a lawyer and preferred to stick to the law." In response, Roosevelt "suggested that there might be changes in the Department of Justice and that at least I should withhold any action for the time being." Then, with a brief period of testing the waters for a possible gubernatorial bid – a candidacy that never materialized -- coming to a close, he was appointed Solicitor General.[94]

In truth, Jackson had had his eye on the Solicitor Generalship for some time. When he first went to Washington, he recalled in his draft autobiography, his longtime friend, New York Court of Appeals Judge Sears, told Jackson "that he wanted to see me become Solicitor General." Jackson added that he and his mentor "did not differ in that hope, but he thought it a possibility and I did not." The Solicitor Generalship "had seemed so far out of reach of a country lawyer with no political organization for support that I never entertained the thought seriously of occupying the place." Referring to himself as a "country lawyer" suggests that Jackson was posturing: despite his grounding in rural America, he did not think of himself as such, until after journalists in Washington had started using it.[95] His distance from the "coveted" post had shortened with his promotion to head of the Antitrust Division. Upon learning of rumors that Attorney General Homer Cummings was about to resign, Jackson met with then-Solicitor General, Stanley Reed; Reed and Jackson were rumored to be the two likely candidates for Cummings's job. Jackson promised Reed that he would use his influence to get Reed promoted to Attorney General, "and added that while it was no condition of the offer I hoped that he might see fit to recommend me for Solicitor General."[96] As it happened, Cummings did not resign, and Reed was appointed to the Supreme Court before he had

[94] Robert H. Jackson, Autobiographical draft 124-28, 140-42; Gerhart, America's Advocate 132-35.
[95] Jackson, Autobiographical draft 143-44.
[96] Jackson, Autobiographical draft 143-44.

ever had a chance to serve as Attorney General.[97] But with Reed leaving the Solicitor Generalship, the post became open, and it went to Jackson.[98]

As Solicitor General, and later as Attorney General, Jackson was charged with ultimate responsibility for, *inter alia*, civil rights litigation. By the time he became Solicitor General, the drive toward protecting the rights of African Americans in the courts had already begun. The Court's shift on civil rights was in its infancy: as one historian wrote, "one must remember that as late as 1935 a Court that included [such respected civil libertarians as Charles Evans Hughes, Louis Brandeis, Benjamin Cardozo and Harlan Fiske Stone] upheld the white primary unanimously."[99] Yet the law was on the move. The Supreme Court announced decisions safeguarding rights of African American criminal defendants in Powell v. Alabama, Norris v. Alabama and Brown v. Mississippi. The National Association for the Advancement of Colored People (NAACP) was making crucial strides in formulating and executing the litigation strategy that eventually led to the Brown decision. The high court had decided the first case on the long road to ending segregation in education, Missouri ex rel. Gaines v. Canada, requiring states to provide African American students with in-state graduate facilities, when such facilities were available to white students.[100]

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[97] Jackson, Autobiographical draft 145.
[98] Jackson, Autobiographical draft 145-48.
[99] Leuchtenberg, Supreme Court Reborn 231. The all-white primary was one means for devaluing African Americans' right to vote in many southern jurisdictions. Claiming that constitutional protection of the right to vote extended only to general elections, as political parties were private organizations, political parties would deny African Americans the right to vote in primary elections. Since the South was solidly Democratic at the time, the denial to vote in a primary election was tantamount to not having the right to vote at all, as the primary election was the only election in which a meaningful choice of candidates was presented to the voters. For more on all-white primaries, see Chapter 7.
[100] Powell v. Alabama, 287 U.S. 45 (1932); Brown v. Mississippi, 297 U.S. 278 (1936); Norris v. Alabama, 294 U.S. 587 (1935); William H. Hastie, "A Look at the NAACP," The Crisis 46 (September 1939) 236-64, 274, republished in Broderick and Meier, eds., Negro Protest Thought in the Twentieth Century 189-96); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); John T. Elliff, The United States Department of Justice and Individual Rights 1937-1962 (New York and London: Garland Publishing, 1987) 87, 89, 92;

Jackson's overall performance as Solicitor General was stellar.[101] His excellence on the job was noted by no less an authority than Supreme Court Justice Louis Brandeis, whose vast talent and length of service on the Court made him as qualified as anyone to evaluate government attorneys, when he remarked that "Jackson should be solicitor general for life."[102] The Solicitor Generalship combined several aspects of lawyering Jackson loved the most. One was the job's principal function, "the act of advocacy" – writing briefs and arguing in Court. Jackson described his time at the post as being

> … like coming home after being out in a bad storm. I was delighted with the work. I cut off other types of things as fast as I could and settled down to the legal work of the Department of Justice in the Supreme Court and other appellate courts. I entered upon the most enjoyable period of my whole official life.[103]

Also important to Jackson was the end to most administrative duties, which Jackson abhorred and from which Cummings excused Solicitor Generals. When Cummings's successor Frank Murphy tried to impose more such responsibilities, Jackson "flatly

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Tushnet, Making Civil Rights Law 10-22, 70, 95, 121-22, 123, 129-30. See generally Leon Higginbotham, Jr., and William C. Smith, "The Hughes Court and the Beginning of the End of the 'Separate but Equal' Doctrine," expanded version of the William B. Lockhart Lecture, University of Minnesota Law School, November 28, 1990, Minnesota Law Review 76 (May 1992) 1099

[101] Jackson Reminiscences 656; Jackson, Autobiographical draft at 148.

[102] Ray, "A Law Clerk and His Justice" 538; William H. Rehnquist, The Supreme Court: How It Was, How It Is (1987) 84; Lincoln Caplan, The Tenth Justice 171. The Government's winning percentage when Jackson was Solicitor General was quite good: the government won 64% of the cases before the Court in which it was a party in the October 1938 Term and 84% in the October 1939 Term, for an overall winning percentage of 76%. Caplan writes that "As annual reports of the Justice Department indicate, under Jackson the government's record in the Court was better than at any time in the previous decade." Caplan, Tenth Justice 104, 300-01 n. 90. But Jackson did not argue all of those cases himself – he was generous in letting his legal staff argue cases they had briefed. And, as Caplan pointed out, "by the time Jackson assumed the office, in March of 1938, the Court had already swung in favor of the New Deal." So Jackson's record did not necessarily reflect only his gifts as an appellate advocate. His predecessor, Reed, under whom "the government did lose the lion's share of the cases," had to face a more hostile Court. Caplan, Tenth Justice 104.

Jackson was one of four Solicitors General to become a Supreme Court justice: the other three were William Howard Taft; Jackson's colleague on the Court, Stanley Reed; and Thurgood Marshall who, as an NAACP attorney, had frequently argued before Jackson and Reed. While Solicitor General, Jackson maintained "very cordial" relations with the Court, lacking a positive bond only with McReynolds, the cantankerous and bigoted justice whom he ultimately replaced. Caplan, Tenth Justice 12, 104; Jackson, Autobiographical Draft, Box 189, file 2, June 8, 1944 at 151.

[103] Ray, "A Law Clerk and His Justice" 538. See also Warner W. Gardner, "Government Attorney" 441; Eugene Gerhart, America's Advocate 132.

declined to accept them or to attend conferences … on the administrative problems of the Department."[104] Jackson also responded to the job's "semijudicial" function.[105] As his successor Francis Biddle wrote, back then the Solicitor General

> … determines what cases to appeal, and the client has no say in the matter … for the client is but an abstraction. He is responsible neither to the man who appointed him nor to his immediate superior in the hierarchy of administration. The total responsibility is his, and his guide is only the ethic of his own profession framed in the ambience of his experience and judgment.[106]

Jackson relished being in a "more independent position than a private practitioner," ever mindful of "his obligation to deal candidly and honorably with the Supreme Court, which traditionally looked to the Solicitor General for an evenhanded assessment of the law."[107]

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[104]Jackson, Autobiographical draft at 151-52. Jackson reminisced that his political duties ended while Solicitor General, but in truth they were not over. See, for example, Robert H. Jackson, Draft Guest Column; Robert H. Jackson, "Back to the American Way," Address at The Commonwealth Club of California, San Francisco, CA, July 14, 1939, Box 38, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress; Robert H. Jackson, Address at the District of Columbia Province Dinner of Pi Gamma Mu, Catholic University, Washington, D.C., May 8, 1938, published in Journal of the District of Columbia Bar Association 5 (July 1938) 292-99; Robert H. Jackson, Speech at Northwestern University Dinner for Dean Leon Green, Palmer House, Chicago, IL., June 6, 1939, esp. 9-10; Robert H. Jackson, "Social Justice Under Our Constitution," Address at the National Conference of Catholic Charities, John Marshall Hotel, Richmond, VA, October 11, 1938; Robert H. Jackson, "The Party and the Nation 1940," Jackson Day Dinner, Hotel Statler, Cleveland, Ohio, January 8, 1940, Box 40, Speeches and Writings File, Robert H. Jackson Collection, LOC 9; Robert H. Jackson, "The Meaning of Liberalism," Address to the Liberal Voters League of Montgomery County, MD, Rockville, MD 1-7.

Jackson also professed to be pleased by the fact that "the office was removed from political activity by tradition." Yet he remained in demand for political speechmaking, as he continued his speaking engagements throughout his tenure as Solicitor General. Jackson, Autobiographical draft, June 8, 1944 at 148.

[105] Jackson Reminiscences 653; Caplan, Tenth Justice 1. See also John T. Elliff, The United States Department of Justice and Individual Rights 1937-1962 (New York and London: Garland Publishing, 1987) 45-48.

[106] Francis Biddle, In Brief Authority 97-98.

[107] Jackson Reminiscences 638; Ray, Laura K. Ray, "A Law Clerk and His Justice" 538-39. Jackson insisted on maintaining his independence when Murphy (who would become a Supreme Court Justice and one of Jackson's nemeses on the bench) took over as Attorney General. Though "enjoying" the Solicitor Generalship, Jackson was clearly miffed by Murphy's selection. While Roosevelt promised Jackson the run of the department, as he considered Murphy a temporary appointment, Jackson "half suspected the arrangement never would work out," but recalled that "The only thing I insisted upon was being left strictly alone in the Solicitor General's Office." Jackson recalled never attending Justice Department staff meetings on administrative matters, as "I kept my department as separate from his department as I could." Jackson Reminiscences 720.

The Solicitor Generalship also allowed Jackson to shape his practice more like that of a solo practitioner. His First Assistant explained that "The administrative responsibilities of the Solicitor General's office are negligible, and, if the Solicitor General is content to sign briefs written by others, his paper work is slight." Jackson, he recalled, "took full advantage of the unusual perquisites of his office … He delegated to his staff as much responsibility in the preparation of briefs and in the preparation of briefs and in the routine conduct of the office as they wanted, entering into such matters only upon the invitation of his subordinates."[108] He thus "was free to give concentrated personal attention to his own work," including Supreme Court arguments.[109]

Gardner perceived Jackson's limitations as a policymaker: his boss was "a professional man, and neither a planner nor a dreamer. It was his job to defend, not to formulate policies." Thus, while "Jackson could not touch any problem without bringing to it … an insight and a power of original generalization which was unique and illuminating," at the same time "his bent was to plow old pastures in a new way, not to leap the fences and attack virgin soil."[110] Indeed, Jackson himself recalled appreciating the opportunity to avoid "troublesome" issues of policy formation.[111] His discomfort with policymaking explained why he was happier as Solicitor General than as chief of the Antitrust Division or as Attorney General.[112]

Yet he had to shape legal positions that would affect government policy, especially on Constitutional questions. And shape them he did.[113] The relationship

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[108] Gardner, "Government Attorney" 441.
[109] Gardner, "Government Attorney" 441.
[110] Gardner, "Government Attorney" 438.
[111] Jackson Reminiscences 510, 683.
[112] Jackson Reminiscences 510.
[113] Jackson Reminiscences 659.

between Jackson and the Solicitor Generalship provided hints of how he viewed the Court's role – and his personal involvement -- in social and economic policy. As Solicitor General, Jackson reshaped the government's legal positions on federal powers, to further social and economic policies "essential to the well-being of a modern industrial society" and "to remedy some of the ills that had proved to be beyond state capacity." Governing his positions was "a concept of the judicial office which was guided by the historic intentions of the Constitution and not the judge's own political or social philosophy."[114] He also focused on the importance of federalism to his judicial philosophy, views that were not easily compatible with an active role in civil rights issues. Jackson felt it essential that, as certain federal powers increased, the states retain power in areas within their purview.[115] He believed that the balance was best struck by "draw[ing] a line between the necessity for central regulation of commerce, in the sense of finance and trade," including unemployment and social security benefits, "and the necessity for a diffused control of such things as affect civil liberties."[116] He did allow that "While the federal government occasionally may make a great advance in the direction of civil liberties that the state governments would not make – at least in some states," he warned that national authorities "can also make a very disastrous reversal and do more harm to civil liberties in one administration than a state government could do in a generation."[117] So his general view of Constitutional matters would disincline him toward interfering in state decisions concerning personal rights.

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[114] Jackson Reminiscences 646.
[115] Jackson Reminiscences 646-48.
[116] Jackson Reminiscences 648-49.
[117] Jackson Reminiscences 649-50.

His promotion to Attorney General in 1940 "was the next natural step in his progress to the Supreme Court," but he found it a move to a "less congenial position," one he described as being "but a managing clerk."[118] The job entailed more administrative responsibilities (personnel matters, political appointments, pardons and commutations of sentences) than legal work. Worse, "more and more I was managing activities that I didn't welcome," including immigration and counterespionage surveillance.[119] Moreover, "The fight in the courts for the establishment of the constitutional principles in which I believe had been won" by the time he had left the Solicitor Generalship.[120] Policy was not going the way he had favored, either – "the anti-trust policies, taxation, civil liberties, all were moving in a direction that I didn't like."[121] Some of Jackson's chief subordinates noted that his preference for lawyering over administration showed in his performance as Attorney General, with "no major reforms of procedure or organization" and a lack of determined leadership."[122]

Jackson's record on civil rights while Attorney General was characterized, on one hand, by a reluctance to bring the full weight of governmental power on individual citizens – hence his decisions to dismiss prosecutions against Americans who recruited soldiers to fight with the Loyalists in the Spanish Civil War, his curtailment of his predecessor Murphy's "campaign against 'subversives,'" and his relative restraint on wiretapping.[123] Yet the new Attorney General, true to his discomfort with using the law

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[118] Jackson Reminiscences 640.
[119] The duty Jackson found by far the most troublesome was heading the Bureau of Immigration and Naturalization, which had come under the Justice Department's purview while Jackson was Attorney General. Jackson Reminiscences 1078-80; Robert H. Jackson, Autobiographical draft at 235.
[120] Jackson Reminiscences 1080-81.
[121] Jackson Reminiscences 1081.
[122] Gardner, "Government Attorney" 443-44; Biddle, In Brief Authority 99.
[123] Jackson Reminiscences 794, 963-84; Elliff, The United States Department of Justice 98; Biddle, In Brief Authority 108-09; Powers, Secrecy and Power 235-37. According to Biddle, his predecessor's desire

as a vehicle for social change, "was less sympathetic with the Civil Liberties Unit's own 'campaigns' during 1940. Jackson did not believe law enforcement was the place for campaigns, whatever their purpose."[124]

Jackson headed the department when its involvement in civil rights litigation to protect the rights of African Americans was in its infancy. It was only in 1939 that Murphy had formed the Civil Liberties Unit within the Department's Criminal Division. (The unit was renamed the Civil Rights Section in 1941, and became a full-fledged division in 1957). The CLU was the product of, primarily, unions' concerns about attempts to intimidate labor organizers; the NAACP pressure on the Administration for anti-lynching measures was a significant, but a secondary, factor. Jackson, like Murphy, moved slowly to consolidate the unit's position. Only five prosecutions were authorized in 1939-40, "those which raised clear issues for judicial test." Partly motivating this restraint was the desire to keep central control over the selection and building of test cases; the FBI was also concerned about its caseload.[125] According to Jackson, Murphy had been planning to empanel "a grand jury to investigate racial hatred and matters of the kind" when he left the Department, yet Jackson made no mention of following through on Murphy's intention.[126]

It was not long before the issue of civil rights was called to the Attorney General's attention. In a congratulatory letter to the new cabinet member, Norman Thomas urged that more could be done in cleaning up certain cases which fall under

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to protect resident aliens from wartime oppression stemmed from "his experience in the last war," when "he learned to hate the German baiting, which he saw run through the little town he lived in." For corroboration of Biddle's view, see pp. 86-90.

[124] Elliff, The United States Department of Justice 98.

[125] Elliff, The United States Department of Justice 99; John T. Elliff, "Aspects of Federal Civil Rights Enforcement: The Justice Department and the FBI, 1939-1964," Law in American History, ed. by Donald Fleming and Bernard Bailyn (Boston: Little, Brown 1971) 605-08.

[126] Robert H. Jackson, Autobiographical draft at 231.

Federal as well as State law," particularly "the recent Klu [sic] Klux Klan outrages in South Carolina in which I hope investigation will lead to action – unless State action makes Federal action superfluous."[127] Along with standard explanations about not yet having had time "to get into the details of the cases you mention" and inviting Thomas's continued input, the new AG observed, less than hopefully, "The matter of adequate protection of civil rights is a long way from solution."[128]

The Unit's "most enduring accomplishment" was a May 1940 memorandum to United States Attorneys nationwide, in which the Department set forth its interpretation of laws authorizing criminal prosecutions for conspiracies to violate Constitutional rights.[129] While somewhat conservative in its legal theories,[130] the circular formulated a vehicle permitting, among other things, the prosecution of lynchings under existing federal law without the anti-lynching legislation perpetually stalled by Southerners in Congress:

> The failure of state officers to protect persons "against a lynching mob …" and even the refusal of a state's attorney "to prosecute persons who have committed acts of violence upon Negroes…" could be regarded as State violations of the due process and equal protection clauses [of the Constitution].

The entire lynch mob could be prosecuted – not just the government officials – "where a state official willfully cooperated with the mob."[131] The memorandum urged restraint, in

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[127] Norman Thomas to Robert H. Jackson, January 20, 1940, Box 20, File: General Correspondence -- T, Robert H. Jackson Collection, Library of Congress.
[128] Robert H. Jackson to Norman Thomas, January 30, 1940, Box 20, File: General Correspondence -- T, Robert H. Jackson Collection, Library of Congress.
[129] Elliff, The United States Department of Justice 99; Elliff, "Aspects of Federal Civil Rights Enforcement" 607-09.
[130] For Jackson's view on restricting use of the civil rights statutes in prosecutions of racially-motivated civil rights violations, see discussion of Screws v. United States, pp. 307-17.
[131] Elliff, The United States Department of Justice 101, quoting "Federal Criminal Jurisdiction Over Violations of Civil Liberties," Memo accompanying Circular No. 3356 (Supplement No. 1), O. John Rogge, Assistant Attorney General, To All United States Attorneys, May 21, 1940.

part "since such prosecution may arouse antagonism on States' rights grounds,"[132] yet it was significant for placing "the Justice Department on record as supporting the application of the civil rights statutes to contemporary civil liberties issues, including lynching and mob violence."[133]

Jackson probably played little, if any, role in the 1940 memorandum, "since he left direction of most Departmental policies to" his assistant, Matthew McGuire, who was apparently the lead official involved.[134] This is consistent with his occasional willingness to give free rein to subordinates who were assertive on civil rights matters. Jackson was also Attorney General when Biddle chose – in a major break with custom – to oppose another federal agency, the Interstate Commerce Commission, when it defended a railroad decision to eject an African American Congressman, Arthur W. Mitchell, from a Pullman car on a Jim Crow train. Authorizing the ICC to submit its own brief, Biddle filed a friend of the court (*amicus curiae*) brief in support of Mitchell's position that the denial of Pullman services to African Americans was a violation of the "separate but equal" doctrine.[135] When Jackson left the Justice Department to take his seat on the high court, he successfully recommended to Roosevelt that his Solicitor General, Francis

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[132] Elliff, The United States Department of Justice 101.
[133] Elliff, The United States Department of Justice 103.
[134] Elliff, The United States Department of Justice 102-03. Yet Jackson sometimes intervened in civil rights and civil liberties cases. For example, Attorney General Jackson, through his Solicitor General, Francis Biddle, requested "an immediate investigation … of the outrages" perpetrated against Jehovah's Witnesses in 1940. Elliff, The United States Department of Justice 112.
[135] Elliff, The United States Department of Justice 136; Biddle, In Brief Authority 152-53; Higginbotham and Smith, "The Hughes Court and the Beginning of the End of the 'Separate but Equal' Doctrine" 1102; Catherine A. Barnes, Journey from Jim Crow: The Desegregation of Southern Transit (New York: Columbia University Press, 1983) ch. 2.

Biddle succeed him. Also pleased by Biddle's promotion were some African Americans, who called him "'a friend of the colored people of America.'"[136]

Jackson also, understandably, responded to direction from the top. While Attorney General, his Department successfully prosecuted United States v. Classic. Classic involved election fraud unrelated to racial issues, but permitted the federal government involvement in primary elections which made possible Smith v. Allwright, the decision outlawing the white primary, after Jackson's appointment to the Supreme Court.[137] The full story behind Classic will probably never be known. The case was opportunistic, resulting from a broader investigation into the Louisiana political faction the Classic defendants opposed; and from Justice Department employees to Roosevelt himself, the situation was rife with the potential for mixed motives and interpersonal conflict.

Justice Department officials, including Criminal Division Chief O. John Rogge, who was to clash with Jackson about the "sincerity" of Southern states' commitment to protect civil liberties, had begun investigating the dominant Long faction in Louisiana for reprisals against uncooperative officials in 1939. Early in 1940, Senator Allen Ellender, a Longite loyalist and ardent white supremacist even by contemporary Southern standards, complained to Jackson and directly to Roosevelt "that federal activities in Louisiana are

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[136] Biddle, In Brief Authority 164-66; Elliff, The United States Department of Justice 135-36. But one must be careful not to read too much into Jackson's approval of Biddle; undoubtedly despite his civil rights record, and not because of it, a number of Southern Congressmen also backed Biddle. Biddle, In Brief Authority 166-67.

Biddle's record in civil rights far surpassed that of his predecessor, with "an even broader interpretation" of key civil rights statutes mentioned in the 1940 circular and "an expansion of the CRS program … progress … in part considered possible because of Attorney General Robert Jackson's ascent," as "Biddle has been decidedly more eager than had Jackson to promote the work of the CRS." Kevin J. McMahon, Reconsidering Roosevelt on Race 161.

[137] Elliff, The United States Department of Justice 120-24; Francis Biddle, In Brief Authority 159-60; Robert K. Carr, Federal Protection of Civil Rights—Quest for a Sword (Ithaca, NY: Cornell University Press, 1947) 88.

designed to influence primary election rather than to enforce federal law." Ellender appears to have opposed federal investigations into voting irregularities not quite so much because he feared being implicated in a crime himself – he apparently tended to business in Washington while members of a rival Longite faction ran things back home – but because, as he claimed, "'If you people don't watch out, in 10 or 15 years the federal government will be in charge of all elections and the darkies will be voting.'"[138]

Not wanting to hamstring his subordinates but insisting on keeping the trip's focus on the original objective (and undoubtedly also interested in not alienating Ellender, who had his boss's ear), Jackson informed Rogge that he was "unable to determine whether complaint has merit from limited knowledge of situation," yet he "can only reiterate my view that the enforcement of federal law should proceed as if there were no primary being held, neither delaying nor expediting, neither taking nor omitting to take action to help either side." He expressed in rather strong language his desire that the department avoid creating any question about its neutrality: "I am depending on your judgment not only to keep the department out of local politics but as far as possible to keep it out of the appearance of playing local politics as well."[139]

While the investigations into the Long faction were proceeding, the attorneys discovered election fraud on behalf of an insurgent faction backing T. Hale Boggs for

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[138] Thomas A. Becnel, Senator Allen Ellender of Louisiana: A Biography (Baton Rouge: Louisiana State University Press, 1995) 40-42, 61, 63-65, 79, 95-100; Steven F. Lawson, Black Ballots: Voting Rights in the South, 1944-1969 (New York: Columbia University Press, 1976) 38; David M. Kennedy, Freedom from Fear: The American People in Depression and War, 1929-1945 (New York: Oxford University Press, 1999) 343. Ellender continued to make inquiries of the White House about the case. Franklin Roosevelt, "Memorandum to the Attorney General," April 18, 1940, Box 94, File: Attorney General – White House – Miscellaneous Memoranda, Robert H. Jackson Collection, Library of Congress.

[139] Robert H. Jackson to O. John Rogge, February 15, 1940, Box 88, File: Attorney General – Criminal Division Matters, Robert H. Jackson Collection, Library of Congress. Rogge assured Jackson, "We have subpoenaed only a few election commissioners in New Orleans and have carefully avoided interference with their official duties." O. John Rogge to Robert H. Jackson, February 16, 1940, Box 88, File: Attorney General – Criminal Division Matters, Robert H. Jackson Collection, Library of Congress.

Congress.[140] The Classic indictment was brought shortly after the September 10 primary. After a brief period of indecision, Jackson had given the prosecution the go-ahead, "apparently believing that the case might be used to reverse the troublesome *Newberry* ruling" upholding the white primary by denying federal power over party activities.[141] The Oval Office (lobbied by Ellender, who apparently felt differently about federal intervention when it was aimed at the local opposition) continued to provide the impetus when, after some delay from Jackson, Roosevelt "ordered" Jackson to "send some men" South after the indictment had been dismissed.[142] Jackson continued to resist sending the additional investigators Ellender wanted, on the ground that, with the trial court having ruled that the federal government had no jurisdiction in the case, "We are thus in the position of having the Court hold that our investigation would be unlawful." He assured the President that "we are testing the matter in the Supreme Court… but meanwhile until we can reverse the Newberry case, we are at a stand-still on primary elections."[143] Ellender continued to press Roosevelt directly for five F.B.I. agents so that a prosecution for the less jurisdictionally questionable offense of mail fraud could move forward before the November election. Jackson, apparently at Roosevelt's direction, drafted a response pleading that "the F. B. I. is tremendously overworked with national defense problems," and that in any event any attempt on their part "to seize the ballot boxes would be promptly restrained under the decision of Judge Borah and it would be represented, no doubt, that the Federal government was unlawfully interfering with election

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[140] Steven F. Lawson, Black Ballots 39.
[141] Carr, Federal Protection of Civil Rights 86-87 (based on 1945 interviews with Justice Department officials Hugh A. Fisher and O. John Rogge).
[142] Kevin J. McMahon, Reconsidering Roosevelt on Race 151, quoting Pa Watson, "Memorandum for the Attorney General," October 10, 1940, Box 94, File: Attorney General – White House – Miscellaneous Memoranda, Robert H. Jackson Collection, Library of Congress.
[143] Robert H. Jackson, Memorandum for the President, October 15, 1940, Box 94, File: Attorney General – White House – Miscellaneous Memoranda, Robert H. Jackson Collection, Library of Congress.

machinery."[144] What Jackson understood about the case's larger significance, and how his understanding affected his performance, are not clear. Yet his insistence on keeping the department narrowly focused and neutral in appearance as well as in fact, is consistent with his attitude toward federal interference in what traditionally were state matters, and his desire not to ruffle Southern feathers.

Partly as a result of this and other civil rights cases,[145] tensions existed between the Justice Department – especially the Civil Liberties Unit – and Southern states.[146] Jackson, always solicitous of maintaining federal-state relations and trying not to irritate white Southerners, believed in approaching civil rights with great restraint. When Jackson "convened a conference of federal and state officials on law enforcement problems of national defense" in 1940, "Southern state representatives called for recognition of the states' responsibilities for protecting civil liberties."[147] The skepticism of some Justice Department officials, including the chiefs of the Civil Liberties Unit and

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[144] Allen Ellender to Franklin D. Roosevelt, October 18, 1940, Box 94, File: Attorney General – White House – Miscellaneous Memoranda, Robert H. Jackson Collection, Library of Congress 1-2; Franklin D. Roosevelt to Robert H. Jackson, October 18, 1940, Box 94, File: Attorney General – White House – Miscellaneous Memoranda, Robert H. Jackson Collection, Library of Congress; Robert H. Jackson, Proper Letter for the President's Signature, Box 94, File: Attorney General – White House – Miscellaneous Memoranda, Robert H. Jackson Collection, Library of Congress.

[145] The Justice Department began prosecuting a particularly sadistic Atlanta policeman in United States v. Sutherland in 1940, under a theory announced in the 1940 circular. The case created tensions between the Civil Rights Unit and Criminal Division on one side, and the FBI and local law enforcement on the other, over the proper scope of federal investigations of local law enforcement agencies. The prosecution commenced on Jackson's watch, but his deputy, McGuire, barred investigating the police department's and Sutherland's past practices with regard to the treatment of prisoners. Biddle, possibly in response to recent successes in Classic and Mitchell, and to a widely publicized Missouri lynching that had caught the attention of Axis propagandists, permitted more extensive inquiries after the first (and then second) prosecutions ended in mistrials. John T. Elliff, "Aspects of Federal Civil Rights Enforcement" 606 ff.; United States v. Sutherland, 37 F. Supp. 344 (N.D.Ga. 1940).

[146] Many Southern politicians harbored a deep distrust of, and distaste for, the New Deal in general. As one contemporary account described the predominant attitude in the "'Solid' South'": "They don't like the New Deal's catering to the Negro vote in Pennsylvania, in New York and other Northern states." Time xxvi, no. 6 (August 5, 1940) 10, copy in Box 208, File: Articles about Jackson 1935-40, Robert H. Jackson Collection, Library of Congress. For a more detailed history of Southern politicians' attitudes toward the New Deal and Roosevelt, see Leuchtenberg, The White House Looks South chs. 2-3.

[147] Elliff, The United States Department of Justice 115.

of the Criminal Division, about states' "sincerity" in protecting civil liberties, elicited "immediate and 'red-hot'" responses from Southern representatives.[148]

An "upset" Jackson was not pleased with his subordinates, especially Criminal Division chief O. John Rogge, because his behavior constituted, in Jackson's view, "a disruption of the conference and a distortion of its aims – to secure state cooperation, not hostility." Believing "'that the protection of civil liberties and the prevention of … violence is primarily the responsibility of state and local governments,'" he "preferred to secure cooperation in the national defense emergency and avoid reactions by Southern states."[149] Jackson's belief that civil rights enforcement was primarily the job of the states weakened the Unit, whose "aim was precisely to extend federal power over local conduct that had previously been outside the federal sphere."[150] Yet perhaps in part because of the Attorney General's conciliatory approach, the conference (despite the internal difference of opinion) succeeded in reassuring states that they could safely "defer to federal authority, especially to the FBI under J. Edgar Hoover."[151]

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[148] Elliff, The United States Department of Justice 115-16 (quoting Civil Liberties unit chief Albert E. Arent).

[149] Elliff, The United States Department of Justice 116 (quoting Federal-State Conference on Law Enforcement Problems of National Defense, Proceedings [1940]), 119. Rogge, who had disagreed with Jackson and other officials in the department on other policy matters – including the establishment of field offices for reporting civil rights violations to the federal government -- resigned later that year. Id. at 116. This policy "forced" the Civil Rights Section "to follow a policy of waiting for complaints to come into its office before taking any action." Carr, Federal Protection of Civil Rights 124. Jackson's skepticism about federal intervention in civil rights matters over the states continued to be manifested during his career on the Court, especially in the *Screws* case. Carr, Federal Protection of Civil Rights 200; pp. 307-17.

[150] Elliff, "Aspects of Federal Civil Rights Enforcement" 612.

[151] Elliff, The United States Department of Justice 201. Hoover's presence may have made it possible for the Department to make strides forward on civil rights enforcement when Jackson was on the side of states' rights. When puzzling over how "Henry Schweinhaut secured executive consent for the policy circular to U.S. Attorneys earlier in 1940 if Attorney General Jackson disagreed with its assertion of federal responsibility," Elliff suggested as "one plausible explanation" unit chief Schweinhaut's support for the FBI's conduct in its arrest of Detroit Communists involved in the recruitment of troops for the Loyalists in the Spanish Civil War. Perhaps his "support for the FBI muted objections to his policy circular," which was approved soon thereafter. Elliff, "Aspects of Federal Civil Rights Enforcement" 612-13.

To the second Annual Conference of United States Attorneys in 1940, Jackson explained his reluctance to expand federal prosecutions. He urged the prosecutors to employ their "immense power to strike at citizens … with all the force of government itself" with care and restraint.[152] While it was the job of the Justice Department in Washington to provide "some degree of centralized administration," Jackson explained to the gathering that their discretion, based on "knowledge of local sentiment and opinion," should not be subsumed "by a centralized department of justice."[153] For those reasons, "there should be … no use of federal prosecutions to exert an indirect influence that would be unlawful if exerted directly."[154]

Jackson did not specifically address prosecutions for violating African Americans' rights. Yet he seemed to have in mind his concerns about federal involvement in such matters when he said:

> The federal government could not enforce one kind of law in one place and another kind elsewhere. It could hardly adopt strict standards for loose states or loose standards for strict states without doing violence to local sentiment. In spite of the temptation to divert our power to local conditions where they have become offensive to our sense of decency, the only long-term policy that will save federal justice from being discredited by entanglements with local politics is that it confine itself to strict and impartial enforcement of federal law, letting the chips in the community fall where they may.[155]

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[152] Robert H. Jackson, "The Federal Prosecutor," Address delivered by Robert H. Jackson at the Second Annual Conference of United States Attorneys, Department of Justice Building, Washington, DC, April 1, 1940, republished in Journal of the American Judicature Society 24 (June 1940) 18. To see how Jackson's beliefs about prosecutorial self-restraint affected his performance as justice, see Chapter 6.
[153] Jackson, "The Federal Prosecutor" 18.
[154] Jackson, "The Federal Prosecutor" 20.
[155] Jackson, "The Federal Prosecutor" 20.

The proper functioning of the federal system of government was, to the Attorney General (and later, the Supreme Court justice), a greater good that had to trump the "decent" thing.[156]

Though reluctant to create new legal rights or expand federal responsibilities, Jackson stood committed to making sure that African Americans enjoyed all of the rights entitled to them under the existing "separate but equal" law, when he had the authority. Huber I. Brown, an African American attorney practicing in the District of Columbia, sued the local bar association over its refusal to open its law library, which was then housed in the District Court Building, to African American attorneys.[157] Amid suggestions that Jackson, who as Attorney General was legally responsible for the building, be substituted as the defendant, the Justice Department "attempted to negotiate the matter out with the bar association."[158]

Talks fell apart. In a letter dated February 12, 1941 (a date Jackson claimed years later just "chanced to be Lincoln's birthday"), he informed the Bar Association president of his refusal to defend the suit "because technical defenses to Mr. Brown's complaint, whether good in law or not, do not justify me in perpetuating a denial of equal privileges in a Federal Court Building on grounds of race, of color, of religion, or of sex." Mediation "between your association and those who felt the sting of discrimination" forged an agreement giving African Americans access to the books in a separate room. A

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[156] Particularly instructive are Jackson's views on the Francis and Screws cases, pp. 289-97 and 307-17.
[157] Jackson Reminiscences 1070, 1072; Robert H. Jackson to Francis Hill, February 12, 1941, Box 88, File: Justice Department – District of Columbia Bar Association, Black Lawyers, Robert H. Jackson Collection, Library of Congress 1. Segregation in the District of Columbia bar was a product of the end of the nineteenth century, when African Americans originally accepted by white organizations were subjected to increasing prejudice. In 1899, the National Bar Association was formed by African American attorneys who "no longer expected acceptance in the white professional organizations." Moore, Leading the Race 176-77.
[157] Jackson Reminiscences 1070; Jackson to Hill, February 12, 1941 1.

bar association committee and its board of directors approved it; moreover, "The program was also satisfactory to the complainants and was, therefore, acceptable to me." (In his reminiscences in the early 1950s, Jackson explained that he "felt that the colored people were not unreasonable about the situation").[159] Yet the bar association's members rejected the proposal.[160] Jackson thus ordered (effective on April 1) that "if any space in the Federal Court Building be occupied by any member of the bar or by any association of the bar, the space and its facilities shall be made available to all members of the bar in good standing without discrimination on account of race, color, religion, or sex." It was then the bar association's choice whether "to get out of the building with its library, or to open it to Negroes without discrimination," though segregated. The organization chose to vacate their space in the courthouse rather than open their facility to African Americans.[161]

Jackson's handling of the suit provided several early indications of how he would approach civil rights cases as a justice. He saw African Americans' legal rights as generic "minority rights," not as rights of a unique group with a unique history; as a firm believer in equality for all, he would not single out African Americans. By postdating the order for over a month and a half, he gave the Association an opportunity to appeal or move, and thereby avoid opening the library to African Americans, thus allowing those who discriminated to prevail in the end. The proposed settlement's approval by the

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[159] Jackson Reminiscences 1070; Jackson to Hill, February 12, 1941 1-2.
[160] Jackson Reminiscences 1070-71; Jackson to Hill, February 12, 1941 2. As an aside, Jackson recalled in his oral history that the leader of this opposition was Catholic, which he considered "rather strange," because in his experience, "usually the minority groups tend to stand together." Id.
[161] Jackson Reminiscences 1072; Jackson to Hill, February 12, 1941 2. In his oral history, Jackson recalled that the bar association had threatened to move out, but since the library was too useful to the judges in the building to be moved, "the matter has now been adjusted to that there's no longer any difficulty about it"; he remained unaware of "the terms of adjustment." Other sources, however, reported that the library had been moved. Gilbert Ware, William Hastie: Grace Under Pressure (New York and Oxford: Oxford University Press, 1984) 147.

leadership but rejection by the rank and file provided Jackson with one more example of white Southern intransigence. And Jackson's clarity on this issue -- his insistence on strict compliance with existing law, that African Americans be given equal access, though separately, but that the bar association be accorded a full opportunity to comply with the law and discriminate by moving out of a government building – sets forth Jackson's later dilemma: he would enforce all existing rights of African Americans, but doubted the propriety of judicial expansion of those rights, and would not give them priority.

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After Biddle succeeded Jackson as Attorney General, the Civil Liberties Unit (renamed the Civil Rights Section) received a boost from geopolitical considerations, yet was limited in accomplishments. On one hand, "Since the United States was fighting against a German regime that tyrannized racial and religious minorities, protection of the rights of minorities at home became part of the war effort." With "the Justice Department intensif[ying] its efforts at prosecution and persuasion in civil rights," it became more aggressive in protecting African Americans under Biddle's leadership.[162] Yet even then, progress was slow. Efforts to help secure African Americans' voting rights – from considering filing a brief on behalf of the plaintiffs in the white primary case Smith v. Allwright, to the initiation of its own lawsuits and prosecutions – "forced Attorney General Biddle to consider the Southern political reaction to federal intervention." He ultimately chose not to participate in Smith v. Allwright when

[162] Elliff, The United States Department of Justice 134-35 and Ch. 3; Kevin J. McMahon, Reconsidering Roosevelt on Race 161.

"advisors warned of a 'terrifying conflagration'" should he challenge political manifestations of white supremacy.[163]

Jackson, the Constitution and the Supreme Court – judicial restraint, historical change and their implications for African Americans

Jackson's view on the role of the courts in formulating social policy greatly informed his ambivalence about desegregation. His votes and written opinions did not invariably follow a particular judicial philosophy,[164] yet he long had an approach to constitutional issues. The New Deal was instrumental in refining his understanding of the need for protecting "the balanced power structure of our Republic," by further exposing him to two major legal currents.[165] The most obvious, and the one most recognized by scholars, was judicial restraint, the reluctance of courts to overturn policy decisions by the elected branches of government.[166] The leading early source of this theory was Harvard Law School Professor James Bradley Thayer's 1893 article "The Origin and Scope of the American Doctrine of Constitutional Law," which set forth the doctrine that judges can find legislative acts unconstitutional only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one, -

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[163] Elliff, The United States Department of Justice 199-201. For the government's track record on civil liberties in the midst of World War II, see Cushman, "Civil Liberties," American Political Science Review 37 (1943) 49.

[164] Pritchett, The Roosevelt Court 253ff.

[165] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (Jackson, J., concurring).

[166] Kluger, Simple Justice 241-42, 245; Tushnet, Making Civil Rights Law 69; Vincent M. Barnett, Jr., "Mr. Justice Jackson and the Supreme Court," Western Political Quarterly 1 (1948) 227; Ray, "A Law Clerk and His Justice" 536, 540-41; Arthur M. Schlesinger, Jr., A Life in the Twentieth Century: Innocent Beginnings, 1917-1950 (Boston: Houghton Mifflin Company, 2000) 421; Felix Frankfurter, "Foreward," Columbia Law Review 55 (1955) 437; Dorothy B. James, "Role Theory and the Supreme Court," Journal of Politics 30 (1968) 177-81; Walter F. Murphy, "Mr. Justice Jackson, Free Speech, and the Judicial Function," Vanderbilt Law Review 12 (1959) 1042-46; Glendon Schubert, "Jackson's Judicial Philosophy" 949, 951-52; Potter Stewart, "Robert H. Jackson's Influence on Federal-State Relationships," in Charles D. Desmond, *et al.*, Four Lectures 83-86; Paul A. Weidner, "Justice Jackson and the Judicial Function," Michigan Law Review 53 (1955) 568-79, 592-93; Eugene C. Gerhart, "A Decade of Mr. Justice Jackson," New York University Law Review 28 (1953) 970; James A. Nielson, "Robert H. Jackson: The Middle Ground," Louisiana Law Review 6 (1945) 384-89, 403; Arthur M. Schlesinger, Jr., "The Supreme Court: 1947," Fortune 35 (January 1947) 201-04; Robert J. Steamer, "Mr. Justice Jackson and the First Amendment," University of Pittsburgh Law Review 15 (1954) 194.

- so clear that it is not open to rational question." The concept was passed to the Supreme Court, in its most pure from, through the decisions of John Harlan and Oliver Wendell Holmes who, in their dissenting opinions in Lochner v. New York, denied any role for judges in fashioning social or economic policy.[167]

The other influence, a belief that legal analysis should adapt itself to changing times, bore more in common with Legal Realism, the school of legal thought which grew out of the assumptions that legal decisions were influenced more by external factors than by the blind application of legal rules.[168] With its admixture of social science and legal criticism, Legal Realism is based on a more instrumentalist view of the law and on a belief in the need for social reform, which sounds more like William O. Douglas or Hugo Black.[169] But Jackson's historical view of the Constitution as a facilitator of Congress and his belief that the law should evolve with the changing historical context suggest that he – whose practical, fact-based bent was already in evidence at this point in his career -- was also susceptible to its influence.

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[167] Lincoln Caplan, The Tenth Justice 71; James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," Harvard Law Review 7 (1893) 143-44; Lochner v. New York, 198 U.S. 45, 67 (1905) (Harlan, White and Day, JJ., dissenting), 75-76 (Holmes, J., dissenting).

[168] Sources on Legal Realism include Brian Leiter, "American Legal Realism," in The Blackwell Guide to the Philosophy of Law and Legal Theory, ed. Martin P. Golding and William A. Edmundson (Malden, MA: Blackwell Publishing, 2005) 49-61; Karl Llewellyn, "A Realistic Jurisprudence – The Next Step," Columbia Law Review 30 (1930) 431-65; Llewellyn, The Bramble Bush; Wilfrid E. Rumble, American Legal Realism: Skepticism, Reform, and the Judicial Process (Ithaca, NY: Cornell University Press, 1968); William Twining, Karl Llewellyn and the Realist Movement (London: Weidenfeld and Nicolson, 1973); Jerome Frank, Law and the Modern Mind (Gloucester, MA: Peter Smith, 1970); Jeffrey David Hockett, "Justice Robert H. Jackson and the role of the Supreme Court in American politics," (diss., University of Virginia, 1987) 35.

According to one author, Legal Realism "emphasized human limitations (such as irrationality and bias) on judges, assumed that judges made law, encouraged the judiciary to acknowledge candidly those 'realities,' and implicitly conveyed a skepticism about the permanency of values or truths, in law or elsewhere." White, "Personal Versus Impersonal Judging" 230. Thus, "The Constitution was treated by a new breed of legal thinkers as nothing more than an 'experimental text,' and established constitutional doctrines that stood in the way of change had to be reinterpreted or sometimes even avoided." Ronen Shamir, Managing Legal Uncertainty: Elite Lawyers in the New Deal (Durham, NC: Duke University Press, 1995) 131.

[169] For a brief explanation of legal realism's relationship to social reform, see Robert Stevens, Law School 156 ff.

That Jackson and Frankfurter were to become leading judicial adherents of judicial restraint is no accident. If the law was to be independent of substantive policy considerations, yet bend with changed policies for changing times, the necessary adjustment would have to originate outside the judiciary, in the elected branches of government. One byproduct of judicial deference to legislative judgments, was the potential for making more difficult a judicial decision to dismantle Jim Crow, a system of state laws written by state legislatures.[170]

The key event for understanding Jackson's jurisprudence was the "court fight," when Roosevelt tried to check the Supreme Court's repeated invalidations of his policies with a proposal to pack the Supreme Court with his loyalists. His efforts on behalf of the Administration, and his subsequent book *The Struggle for Judicial Supremacy*, provided him occasion to refine his views on the subject of judicial power. Yet he long was skeptical of using the courts to shape social and economic policy. As a trial lawyer in state and local courts, the young Jamestown attorney defended judicial review but opposed judicial overreaching. In a June 1916 speech before the Saturday Night Club, he warned that judges "must be held to their original province, declaring the law that is and applying it to the case at bar." In other words, "The courts must not legislate. They must

[170] Yet the role of judicial restraint in a body of decisions in general, or in particular decisions, varies with each justice. Frankfurter, who is reputed to apply the principle of judicial restraint more consistently for Jackson, was reputedly faster to come to the decision to invalidate discriminatory laws. Kluger, Simple Justice (1977 ed.) 564, 596-602; Hockett, "Justice Robert H. Jackson and the role of the Supreme Court in American politics" 4-6 and n. 14, 26-27, 35. As Hockett explained, however, Jackson's reluctance to use an active judiciary to achieve social justice is distinct theoretically from much of his disagreement with Frankfurter – for example, Jackson found fault, to a degree, at least, with Frankfurter's willingness to use procedural rules as tools to avoid reaching issues. Jackson believed that courts should overrule legislatures in cases of "clear mistake" on the merits of an issue. Hockett, "Justice Robert H. Jackson and the role of the Supreme Court in American politics" 37-38 and notes 117-118; Jackson, The Struggle for Judicial Supremacy 34 n.8 and 323.

follow the precedent and leave the alteration of law to men elected for that purpose."[171] Far from believing in any diminution in the judiciary's constitutional powers Jackson, in an October 1922 speech before Jamestown's University Club, used language jarringly inconsistent with his New Deal pronouncements, in defense of judicial review against a proposed constitutional amendment ending courts' power to find legislation unconstitutional[172]: he emphasized protecting property rights, to the point of defending the Court's use of "the contract, and the due process clauses," which were to be used in the anti-New Deal decisions he later fought against.[173] Yet the young attorney also envisioned the courts as an ideologically neutral check on the majority,[174] which should hold "personal rights," as well as those of property, "inviolate."[175] And he presaged the court packing plan, suggesting that a mandatory retirement age for judges could moderate their conservative tendencies and foster "a somewhat more vigorous and less academic court."[176]

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[171] Robert H. Jackson, Speech Before the Saturday Night Club, June 1916, Box 31, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 2.

Yet the young lawyer conceived the separation of powers in unambiguous terms, a theoretical construct that might not always hold up when the complexities of real life enter the picture. For example, the point at which judicial review ends and judicial lawmaking begins is not always clear, as Justice Jackson later found when he considered the proper scope of judicial action in the segregation cases. See Chapter 9.

[172] Robert H. Jackson, "The Judiciary and the Constitution" 3. He chastised the leaders of "radical political complexion," including "Patrick Henry, Thomas Jefferson, and [Robert] LaFollette," who "appealed for support to prejudice against property and against strong government" by, among other things, advocating for an end to judicial review. Id.

[173] Robert H. Jackson, "The Judiciary and the Constitution" 5-7. In citing the "contract, and the due process clauses" of the Constitution, Jackson belied his lack of systematic study in constitutional law. One of the arguments he later used to dispute Court decisions striking down pro-labor legislation on the ground that such laws violated a laborer's "freedom of contract" (in other words, the liberty to negotiate terms of his employment with his employer) was that "freedom of contract" was not a "clause" in the Constitution, but was, in fact, a judicial "gloss" nowhere mentioned in the document. Id.; U.S. Const.; G. Edward White, The Constitution and the New Deal (Cambridge, MA: Harvard University Press, 2000) 242.

[174] Jackson, "The Judiciary and the Constitution" 10-11.

[175] Jackson, "The Judiciary and the Constitution" 7, 12.

[176] Jackson, "The Judiciary and the Constitution" 5-6.

With the notion of a strong judiciary that should not impede legislative progress, Jackson moved to Washington, where he came to see the balance of constitutional power skewed in favor of the judiciary. In a speech given less than six months after he had joined the Administration, he decried courts' delay in deciding challenges to New Deal programs:

> Not even the most ardent champion of judicial supremacy would claim that the administration could halt its policies dealing with the banking emergency, unemployment relief, gold as the basis of our currency, or many other problems, while the judicial view was slowly made available through the tedious and often devious process of private litigation. … Having, because of the self-imposed restrictions of our present legalism, withheld its views when they were most needed to be constructive and corrective, can the judicial department now intervene except as a force for the mischief or confusion?[177]

He urged legal practitioners to "review … our entire philosophy, to find its place in this modern era," and adapt its procedures to a new historical epoch.[178] Jackson also had had occasion to reflect on the constitution as a flexible document changing with the times. He kept extensive notes about a 1935 report to the House of Commons by the Special Committee on the British North America Act, including an explanation of how constitutions evolve over time:

> … constitutions are changed by progressive judicial interpretation. In written federal constitutions, at least in English speaking countries, where certain powers are definitely assigned to the central and local authorities respectively, it is considered essential to have some impartial and competent body to determine, in doubtful cases, where the line is to be drawn. That duty is assigned to our courts. Theoretically the courts merely decide what the law is and do not make law. But inevitably, at the end of a long period of time it is found that the constitution is different from what it was at the beginning: the unconscious influence of changes

[177] Robert H. Jackson, "The Lawyer: Leader or Mouthpiece?" Address before Joint Dinner of the Conference of Bar Association Delegates and the American Judicature Society, August 27, 1934, Box 32, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 12-13.
[178] Robert H. Jackson, "The Lawyer: Leader or Mouthpiece?" 14.

> in current public opinion, personal prepossessions, and logical refinements and extensions of earlier decisions, lead [sic] step by step to new interpretations.[179]

He insisted that the judiciary observe the line between judicial interpretation and legislation, a line that he had come to believe the courts had crossed.[180]

Jackson's belief in judicial restraint fully developed with the "court fight."[181] New Dealers' frustration with the Court reached its apex in the nine-month span from May 1935 to January 1936, when the high tribunal invalidated the two anchors of Roosevelt's economic recovery plan, the National Industrial Recovery Act and the Agricultural Adjustment Act, as well as other major legislation dealing with the economic crisis. Monetary devaluation, seen as a prerequisite for economic recovery, "escaped" the Court's wrath, "but just barely," surviving by a 5-4 vote. Challenges were mounting to the Tennessee Valley Authority, the Securities and Exchange Commission, and state minimum wage laws. High Court decisions on the validity of 1935 legislation, including Social Security, the National Labor Relations Act and the Public Utility Holding Company Act, were but a matter of time.[182]

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[179] Notebook Entry, Session of 1935 House of Commons Special Committee on British North America Act, "Just Vagrant Thoughts" Notebook, Box 57, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 4.

[180] "Jackson Warns Bar 'Government of Litigation' Aids Dictatorship Trend," Albany Knickerbocker Press, January 30, 1937, clipping in Box 209, File: Miscellany – Clippings – 1937, Jan. 2-Feb. 28, Robert H. Jackson Collection, Library of Congress.

[181] Sources on the court crisis and Roosevelt's court plan, include William E. Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt (New York: Oxford University Press, 1995); Alfred Haines Cope, Franklin Delano Roosevelt and the Supreme Court (Boston: Heath, 1952 and 1969); Marian McKenna, Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937 (New York: Fordham University Press, 2002); Merlo J. Pusey, The Supreme Court Crisis (New York: Macmillan, 1937; New York: Da Capo Press, 1973); Stephen K. Shaw, William D. Pederson and Franklin J. Williams, eds. Franklin D. Roosevelt and the Transformation of the Supreme Court; Wesley McCune, The Nine Young Men (1947. New York: Greenwood Press, 1969) ch. 3; Michael Comiskey, "Can a President Pack – or Draft – The Supreme Court? FDR and the Court in the Great Depression and World War II," Albany Law Review 57 (1994) 1045; Michael Nelson, "The President and the Court: Reinterpreting the Court-Packing Episode of 1937," Political Science Quarterly 103 (1988) 267.

[182] Eugene C. Gerhart, America's Advocate 99-105; Jackson, The Struggle for Judicial Supremacy 86-114, 125-39; Alton, "Loyal Lieutenant, Able Advocate" 531, 573; Leuchtenberg, The Supreme Court Reborn chs. 2-4.

Justices Pierce Butler, Willis Van Devanter, George Sutherland and James McReynolds, known as "The Four Horsemen," remained on the Court despite their advancing age. With one more vote, usually that of either Justice Owen Roberts or Chief Justice Charles Evans Hughes, they frequently blocked New Deal programs. Only three justices – Benjamin Cardozo, Louis Brandeis and future Chief Justice Harlan Fisk Stone – regularly voted to sustain reforms.[183] Widespread opposition to the Court's decisions led to calls for stemming judicial power through constitutional amendment.[184]

With his landslide victory against Kansas governor Alf Landon in November 1936, FDR felt he received a popular mandate to confront a Court forming "the only obstacle … in our way."[185] So the Administration proposed a plan to, *inter alia*, add a new justice (up to six) to the nine-member Court whenever a sitting justice reached the age of seventy and refused to retire.[186] The scheme was hatched in relative secrecy by FDR and a small number of subordinates. When FDR unveiled it on February 5, 1937, it met with "stunned silence" from cabinet members and congressional leaders.[187]

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[183] Jackson, The Struggle for Judicial Supremacy 75-85, 187. Yet this wall of support sometimes caved. For example, the decision invalidating the NRA, Schechter Poultry Corporation v. United States, 295 U.S. 495 (1935) was unanimous. David M. Kennedy, Freedom from Fear 328-29.

[184] S.J. Resolutions 80, 98 (75th Cong., 1st Sess.), reprinted in Jackson, The Struggle for Judicial Supremacy 352-53; Jackson, The Struggle for Judicial Supremacy 179-80; Alton, "Loyal Lieutenant, Able Advocate" 611-16.

[185] Franklin D. Roosevelt, The Public Papers and Addresses of Franklin D. Roosevelt 6 (Samuel I. Rosenman ed., 1941) lviii, quoted in Alton, "Loyal Lieutenant, Able Advocate" 527, 536.

[186] Alton, , "Loyal Lieutenant, Able Advocate" 539-41, 571; Jackson, The Struggle for Judicial Supremacy 176-85; S.J. Resolutions 80, 98 (75th Cong., 1st Session), reprinted in Jackson, The Struggle for Judicial Supremacy 352-53; Robert H. Jackson to William E. Jackson, April 1, 1949, Box 2, File: Family Papers -- Family Correspondence -- RHJ Letters to William, Robert H. Jackson Collection, Library of Congress; Leuchtenburg, Supreme Court Reborn 108-12.

[187] Alton, "Loyal Lieutenant, Able Advocate" 550. Authors differ on the precise officials involved in hatching the scheme, though there is agreement on the central role of Homer Cummings, then Attorney General. According to William Leuchtenberg, the involved officials included Cummings; Solicitor General (and future Justice) Stanley Reed, who was decidedly uncomfortable about the plan; Reed subordinate Warner W. Gardner, who claimed to have written the first draft of the plan; Donald Richberg and Samuel Rosenman, longtime New Dealers who helped fine-tune it; and Corwin. Leuchtenberg, Supreme Court Reborn 114-26. Jackson wrote to his son years later that the plan "was fornulated, kept closely secret and sprung on Congress and the rest of the world by Attorney General Cummings and two or three advisors."

Opponents of presidential tampering with the judiciary received some big assists from the Court itself. Decisions more congenial to legislative reforms were issued on March 29 and May 24, making the Court expansion seem no longer necessary. The resignation of one of the Four Horsemen, Van Devanter, and a letter to the Senate Judiciary Committee from the highly respected Chief Justice Hughes, to the effect that the Court was not backlogged (thus refuting the Administration's initial justification for expanding the Court) also took their toll.[188] Meanwhile, Congressional committees issued unfavorable reports, and the plan's floor leader in the Senate, Majority Leader Joe Robinson of Georgia, suffered a fatal heart attack.[189] Ultimately, Congress passed a few minor reforms affecting the lower courts, and Roosevelt claimed victory when the Court ignored earlier rulings and upheld key legislation, and when he filled vacancies with his own nominees. Yet the plan – and the precipitous way it was sprung – damaged FDR politically for his remaining years in office.[190]

In his later reflections, Jackson voiced a belief that the lack of public support for the court-packing plan was partly attributable to "a deep feeling in some minorities that

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Robert H. Jackson to William Eldred Jackson, April 1, 1949, Box 2, File: Family Papers – Family Correspondence – RHJ Letters to William, Robert H. Jackson Collection, Library of Congress 1.

[188]The Court upheld the State of Washington's Minimum Wage Act in West Coast Hotel Co. v. Parrish. The court-packing plan did not affect the result, though the election may have. The Court vote sustaining the legislation, including the Roberts about-face on the underlying legal issue which later became known as the "switch in time that saved nine," had taken place at a Court conference after the election but before Roosevelt's court-reform proposal was released. William Leuchtenberg, Supreme Court Reborn 142-43, 173-75, 177, 219. Leuchtenberg, however, allowed that the court packing episode "may well have affected Roberts's vote in later cases." Id. at 142-43. See also Charles A. Leonard, A Search for a Judicial Philosophy: Mr. Justice Roberts and the Constitutional Revolution of 1937 (Port Washington, NY: Kennikat Press, 1971) 155-57 (noted Roberts's denial of succumbing to pressure by Roosevelt, but doubted that a complete understanding of the Justice's motivations would ever be possible).

Jackson believed that the 1936 election, and not fear of Roosevelt, influenced the Court. Jackson Reminiscences 485.

[189] Alton, "Loyal Lieutenant, Able Advocate" 550-55; Gerhart, America's Advocate 115-18.

[190] Leuchtenberg, Supreme Court Reborn ch. 5; Gerhart, America's Advocate 108, 119-20, 121-22; Alton, "Loyal Lieutentant, Able Advocate" 597-611. For the reflections of a contemporary Washington observer, see Kiplinger, Washington is *Like* That 241.

the court was the only protection they had against arbitrary majorities." Among those minorities were "Negroes [who] felt that it was their only real protection against the white tyranny":[191]

> There was a deep feeling in some minorities that the Court was the only protection they had against arbitrary majorities. Property holders felt that it was the only protection against the propertyless class. Negroes felt that it was their only real protection against the white tyranny. Catholics felt that the Court had protected the parochial schools. Minorities felt a certain security in the Court that they didn't think would exist if the Court were too much under the control of the executive or legislative branches. So when it came to a real test of the sentiment of the country, the country was much stronger for the Court than I think the administration realized at the time this bill was proposed.[192]

Yet back in 1937, Assistant Attorney General Jackson, then chief of the antitrust division, had only "a vague notion that something was generating along the line of dealing with the judiciary." He "had been in on none of the conferences, knew nothing about the proposal and was as surprised as anybody at its nature" when he read about it in an out-of-town newspaper.[193] Brought in after the fact to defend the plan, Jackson

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[191] Jackson Reminiscences 452-53.

[192] Jackson Reminiscences 452-53, quoted in Kurland, "Robert H. Jackson" 2554.

[193] Jackson Reminiscences 433; Gerhart, America's Advocate 105 (based on the author's January 14, 1949 interview with Jackson); Robert H. Jackson to William E. Jackson, April 1, 1949, Box 2, File: Family Papers -- Family Correspondence – RHJ letters to William, Robert H. Jackson Collection, Library of Congress 1; Leuchtenberg, Supreme Court Reborn 83. According to both Alton and Leuchtenberg, Jackson had no prior knowledge of the plan before its surprise unveiling on February 5, 1937. Alton, "Loyal Lieutenant, Able Advocate" 540-41, 543-44, 550; Leuchtenberg, Supreme Court Reborn 83; Jackson, Autobiographical draft 113-14.

Some contemporaries believed that Jackson had been in on the plan, and it was apparent to many that he had much to gain from it; he was rumored to be a likely nominee for one of the new Court seats. Further fueling suspicions was Jackson's pre-plan attacks on the court. In an article entitled "Is Landon Constitutional?", published during the 1936 presidential election, Jackson pointed out instances in which the Kansas Supreme Court had found unconstitutional state legislation produced during the tenure of Roosevelt's opponent, Governor Alf Landon. Alton, "Loyal Lieutenant, Able Advocate" 537. In a speech before the New York Bar Association on January 29, 1937, about one week before the plan became public, he criticized the Supreme Court majority "for its reflexive adherence to outmoded precedents and its strict construction of the Constitution," both of which "stymied ... Congress and President in their efforts to deal effectively with the nation's severe social and economic problems." He condemned what he termed "'government by litigation'" for "immobilizing the implementation of public policy," expressed displeasure with the legal profession's "philosophy" on the New Deal, and noted in passing that the presence of

became one of its principal advocates.[194] He also directly advised the President on political strategy.[195] Jackson's Senate testimony and later speeches were premised on an interpretation of the Constitution as a "flexible framework … accord[ing] the government wide latitude in fashioning responses to changing economic and social conditions." The "judicial veto" of legislation was disturbing the delicate balances between state and federal governments, and the three branches of the federal government. By changing the Court's composition through changing its size – a not unprecedented occurrence -- the executive and Congress could right the balance.[196]

The Assistant Attorney General's sterling advocacy belied the fact that his "initial impressions of the plan were not particularly good." Nor was his opinion of White House

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lawyers on the High Court was due only to "'public sufferance and tradition.'" Jackson Reminiscences 433; Alton, "Loyal Lieutenant, Able Advocate" 545-47.

While the January 29 speech "reasonably might have led an observer to believe that Jackson was hinting at the administration's upcoming court reorganization proposal," Alton, "Loyal Lieutenant, Able Advocate" 547, in this case the similarity of Jackson's pre-plan attacks to points made in his later defenses of the plan, actually refutes charges of Jackson's prior knowledge: the Administration initially used a different rationale to justify expanding the Court, claiming that reform was needed to prevent Court backlogs caused by the declining vigor of aging Justices. Alton, "Loyal Lieutenant, Able Advocate" 557, 563. Jackson also insisted that, far from being "in anticipation of the President's plan," the January 29 speech "was not even cleared with the White House," much less "connected in any way with the court plan," of which Jackson had yet to learn anything. Jackson Reminiscences 433.

[194] Alton, "Loyal Lieutenant, Able Advocate" 527, 556-94; Gerhart, America's Advocate 108-11, 114.

[195] Alton, "Loyal Lieutenant, Able Advocate" 563. Some, including Jackson biographer Eugene Gerhart, have argued that Jackson, along with Roosevelt advisors Ben Cohen and Tom Corcoran (both of whom were Jackson allies) formed part of a strategy group advising the Administration on its battle for the plan, but "considerable evidence indicates that Jackson was not a member – or at least not a regular member." Alton, "Loyal Lieutenant, Able Advocate" 557-62; Gerhart, America's Advocate 107 (based on January 14, 1949 interview with Jackson).

For a discussion on Roosevelt's public addresses in support of the plan, see Alton, "Loyal Lieutenant, Able Advocate" 564-66. Jackson garnered a great deal of respect, even from plan opponents, for his candor about the reason for the plan – to pack the court with justices who would reject constitutionally dubious attempts to scuttle the New Deal. By contrast, Jackson's boss, Attorney General Homer Cummings, stuck by the Administration's discredited official line, and paid the price at questioning time in the Senate. Alton, "Loyal Lieutenant, Able Advocate" 568-70.

But Jackson's relatively positive reception also may have had something to do with how well he presented himself as a "capable advocate … acting much as any skillful lawyer would act on behalf of a client." Alton, "Loyal Lieutenant, Able Advocate" 580.

[196] Alton, "Loyal Lieutenant, Able Advocate" 593-94.

political strategy. On February 22, 1937, Jackson reported to the President that the initial rationale was not working:

> … in my opinion, support is not increasing for your court reform but rather decreasing. This, I think, is distinctly due to the terms in which the problem is approached.
>
> We cannot expect the general public to understand the significance of "certiorari denied." … They do not understand calendar congestion and nobody ever yet went into a fight over a set of statistics…. Instead of talking about cases the Court did not take, let us talk about the cases they did take …
>
> The people are unquestionably ready to support you to the finish if they understand that this is a fight to make the court a contemporary and nonpartisan institution. I am utterly unable to get any response to the statistical approach and I do not see that anyone else has.[197]

So why did Jackson "publicly and outspokenly sw[i]m against the tide" and serve as the plan's most effective advocate? Was his role the product of "loyalty … a sense of political duty, or … political ambition"; or was there "more to it than that," as scholar Stephen Alton suggested?[198]

If an act of careerism, defending the Administration was effective: Jackson was promoted to Solicitor General in less than a year. "Political loyalty," and quite possibly

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[197] Robert H. Jackson to Franklin D. Roosevelt, February 22, 1937, Box 79, Legal File: Assistant Attorney General, Antitrust Division, Reorganization of Federal Judiciary, Robert H. Jackson Collection, Library of Congress; Alton, "Loyal Lieutenant, Able Advocate" 563; Jackson Reminiscences 434-36; Gerhart, America's Advocate 107.

Jackson acknowledged in Struggle the Administration's strategic blunder of not justifying the plan with the genuine reason for it – the High Court's dubious rulings. Citing backlogs allegedly caused by the old age of the Justices (an argument that infuriated Brandeis, the oldest justice and the man whom Jackson called "the original New Dealer") was a mistake. Jackson, Struggle for Judicial Supremacy 188-90; "Recommendation to Reorganize Judicial Branch," Message from the President of the United States to The House of Representatives (75th Cong., 1st Session, Feb. 5, 1937), reprinted in appendix, Jackson, Struggle for Judicial Supremacy 328-37; Attorney General Homer Cummings to President Franklin D. Roosevelt, Feb. 2, 1937, reprinted in appendix, Jackson, Struggle for Judicial Supremacy 337-40; "Address of the President, Broadcast from the White House," March 9, 1937, reprinted in appendix, Jackson, Struggle for Judicial Supremacy 340-51.

[198] Alton, "Loyal Lieutenant, Able Advocate" 617

the benefits it could confer, surely had something to do with Jackson's advocacy.[199] But his self-interest in lobbying for the court plan should not be overemphasized. For one thing, Jackson was still thinking of his Washington career as a temporary interlude. Moreover, he seemed genuinely frustrated by "an increasingly conservative and activist United States Supreme Court," as his pre-court plan speeches indicated. For example, in a January 1937 address before the New York State Bar Association – a speech best known for the startling suggestion that a country hamstrung by conservative courts might react by staffing the judiciary with non-lawyers -- Jackson derided legal doctrine that "'requires us to consider modern labor relations in the terms of precedents made by slave owners and social security in the light of decisions by men, who if they heard the term would have thought it meant the return of fugitive slaves.'"[200]

The concept of the Court allowing for new policies to meet new social circumstances put into action the Legal Realists' concept that the law should change to fit the times. Indeed, "even prior to *Schechter*," the Court decision that most raised FDR's ire,

> Reform-minded jurists emphasized the flexible nature of the Constitution and the uncertainty inherent in judicial decisionmaking. According to this view, which had a profound influence on government lawyers, the Constitution had to be treated as a kind of a working hypothesis, as a text of truth to be constructed and

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[199] Alton, "Loyal Lieutenant, Able Advocate" 594-95, 617-18. As Eugene Gerhart, a great admirer of Jackson's, observed, "Jackson, friend and political ally of the President, had committed himself to become a leading spokesman for a plan he did not formulate, for a scheme he did not personally admire as a lawyer. Such are the demands of political loyalty." Gerhart, America's Advocate 108. Gerhart concluded, based in part on his own negative conclusions about the plan, that Jackson's support of the court-packing scheme was "not a bright spot on his legal escutcheon." Gerhart, America's Advocate 121-22.

[200] Alton, "Loyal Lieutenant, Able Advocate" 580, 616-18; "Jackson Warns Bar 'Government of Litigation' Aids Dictatorship Trend," Albany Knickerbocker Press, January 30, 1937, clipping in Box 209, File: Miscellany – Clippings – 1937, Jan. 2-Feb. 28, Jackson Collection, Library of Congress; "Lawyer to Lawyers," Washington Post Feb. 1, 1937, clipping in Box 209, File: Miscellany – Clippings – 1937, Jan. 2-Feb. 28, Jackson Collection, Library of Congress.

Alton's suggestion that Jackson's exposure to the Legal Realists was necessary to influence him in a position more sympathetic to the Administration ignores how Jackson, from his days as a young practitioner, was troubled by judicial interference with social policy.

> as a source for future creative interpretations in the service of desired social ends. In line with these ideas of legal construction, therefore, New Dealers spoke against "maintaining the deadly letter of the law" and in favor of its "life-giving spirit."[201]

Seen in this light, the court-packing scheme would provide sustenance to a Constitution in need of ideological replenishment. And Jackson, who already felt comfortable with the concept of a constitution changing with the times, possessed the necessary intellectual building blocks to view it as such.[202]

Jackson set forth at length his understanding of judicial restraint in The Struggle for Judicial Supremacy.[203] He drafted his longest published work while Solicitor General, and completed the preface early in his brief tenure as Attorney General. The book was prompted by Roosevelt, who suggested that it be written "to set the Roosevelt Court proposal and the Court's own steps to reform in their historical and constitutional perspective…." The author used the operative term in the title in a January 1937 speech before the New York State Bar Association, in which he said: "Lawyer prestige rests on judicial supremacy in government."[204] The argument that the judiciary had, since the Dred Scott decision, arrogated power to itself as a superlegislature had been made before, perhaps most authoritatively in a scholarly treatment tracing the history of "government

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[201] Shamir, Managing Legal Uncertainty 77.

[202] As Jackson himself said on the eve of the court reform plan's unveiling, "Our constitution is a general outline of great powers and institutions. It is not a legal document." "Lawyer to Lawyers," Washington Post Feb. 1, 1937.

[203] Alton detected in Justice Jackson a tendency "to distance himself somewhat from the court packing plan" of his earlier days: "With the benefit of more than a decade of hindsight, and with the rather lofty view from the bench, Associate Justice Robert H. Jackson would attempt to distance himself somewhat from the court packing plan, but Assistant Attorney General Jackson was, by no means, as cool to the notion." Alton, "Loyal Lieutenant, Able Advocate" 617.

[204] Jackson, Struggle for Judicial Supremacy xvi, xix-xx; Robert H. Jackson to Samuel I. Rosenman, December 10, 1940, Box 2, File: Jackson, Robert, Samuel I. Rosenman Collection, Franklin D. Roosevelt Library, Hyde Park, NY; "Lawyer to Lawyers," Washington Post Feb. 1, 1937.

by judiciary," or the "supremacy of the judicial power."[205] Jackson's historical treatment was more streamlined, and set the stage for a New Deal-friendly approach to judicial power, one which provided a benchmark for the author's attitudes on the Supreme Court's role in public policy as he was about to become a Justice.

The author traced an 80-year trend of ascendant judicial power, in which the doctrine of judicial supremacy – which he defined as the judicial arrogation of power to define terms in the Constitution and to make "judge-made law in accordance with" prior court decisions – had come to fruition. The Court used the due process clause of the Constitution, bolstered by a belief in the primacy of property rights, to block legislative efforts to deal with the changing economic and social conditions of the post-Civil War era:[206] it invalidated federal income taxes, state wages and hours regulations, and a federal ban on child labor; and weakened the power of new agencies designed to regulate big business, and sanctioning the expanded use of injunctions to break labor unions.[207] Such rulings accelerated in the first years of the Roosevelt administration, as one New Deal program after another fell to the "destructive and relentless opposition from a majority on the Court."[208]

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[205] Louis B. Boudin, Government by Judiciary, vol. 2 (New York: Godwin, 1932); Edwin Borchard, "The Supreme Court and Private Rights," Yale Law Journal 47 (1938), esp. 1064 ff. For earlier treatments more sympathetic toward the Court, see also Charles Warren, "The New 'Liberty' Under the Fourteenth Amendment," Harvard Law Review 39 (1925-26) 431; Edward S. Corwin, "The Supreme Court and the Fourteenth Amendment," Michigan Law Review 7 (1908-09) 643.

[206] Jackson, Struggle for Judicial Supremacy xiii, 38-41, 175.

Jackson cited a dramatic rise in the number of Congressional laws being declared unconstitutional by the Supreme Court in the late nineteenth and early twentieth centuries (from two in the court's first seventy years -- 1790 and 1860 – to 58 in the next 70, with 19 alone in the decade from 1920 to 1930; and with 12 in the 3 years starting with October of 1933), which coincided with legislative efforts to cope with new social and economic demands in an industrializing society. These rulings invalidated or greatly weakened such reforms as the federal income tax, antitrust regulation and child labor laws. Jackson, Struggle for Judicial Supremacy ch. 2; Alton, "Loyal Lieutenant, Able Advocate" 572.

[207] Jackson, Struggle for Judicial Supremacy 46; 96-104; 182; 211; Alton, "Loyal Lieutenant, Able Advocate" 573. Conversely, major laws, such as the income tax, were often overturned by 5-4 votes.

[208] Jackson, Struggle for Judicial Supremacy 75-85; Chernack, "The Clash of Two Worlds" 60.

By declaring so many laws unconstitutional on the basis of social and economic philosophy, the Court had abused its power by overruling the types of policy judgments that the elected branches of government are supposed to make. Worse, Jackson warned, activist courts could endanger the country by preventing the kind of moderate reform needed in times of national crisis. The judiciary was tilted toward conservatism -- a function of the legal profession's inbred tendencies, combined with the effects of life tenure, a cloistered existence and relatively advanced age. As "a check of the preceding generation" on the young, and a check on the electoral process,[209] the Court could not work successfully with the elected branches if it were on a mission to block all change; it had to allow the government to tackle problems and not let them fester through inaction. "Nullifications of democracy," like the Court's use of "freedom of contract" theory could force a desperate society to embrace extremism.[210]

Even though the immediate crisis was obviated by a Court more congenial to New Deal reforms, the author maintained that national policy should never depend on personnel changes on the Court, or on other twists of fate.[211] He suggested no structural reforms, but instead called for "a court which is governed by a sense of self-restraint," a form of deference to the other branches of government in matters of substantive policy, as they craft solutions to new problems.[212] The concept is grounded in the principle that the court system, designed for resolving specific "cases and controversies" between individual parties, is an inappropriate policymaking forum.[213]

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[209] Jackson, Struggle for Judicial Supremacy 313-15; Alton, "Loyal Lieutenant, Able Advocate" 591-93.
[210] Jackson, Struggle for Judicial Supremacy 319-24; Alton, "Loyal Lieutenant, Able Advocate" 589-93.
[211] Jackson, Struggle for Judicial Supremacy 191-96, chs. VII-VIII.
[212] Jackson, Struggle for Judicial Supremacy 285.
[213] Specifically, Jackson claimed that the Court lacked the machinery for publicly vetting its policy assumptions and a procedure for adequately expanding lawsuits to examine policy considerations; its perspective was limited by lawyers' training, experience and understanding; it was bound by the

Although Jackson's ire was focused on social and economic policy,[214] he argued that "government by lawsuit" was of limited value in the field of civil liberties as well. He suggested that the Court was more protective of rights derived from "the older liberalism of the eighteenth century, which was embodied in the Bill of Rights," than of the "social reform and to economic control [of] twentieth-century liberalism," to which the Court was decidedly "cold."[215] As examples, Jackson listed two decisions guaranteeing African Americans' right to a fair trial in the racially-charged South -- Powell v. Alabama (one of the Scottsboro Boys cases) and Moore v. Dempsey (which overturned the convictions of a railroaded group of African-Americans in Arkansas) -- and a third affirming African Americans' right to vote in a primary election, Nixon v. Herndon (outlawing Texas' white primary). He described these cases in racially neutral terms, defining them by the rights to "fair trial" and "franchise."[216]

The author conceded that the Court's record on enforcing the rights of African Americans left something to be desired, but in understated terms: "[t]here is room for controversy as to whether the Supreme Court has always adequately and consistently

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"paralyzing influence of precedent," which is capable of preempting novel solutions to non-legal problems; it could not gather enough information to assess policies; and the nature of the trial and appellate system resulted in "delay, doubt and confusion," and in wrong timing. Finally, argued Jackson, "the Constitution should not depend on" the possibly flawed judgment of an adversary's counsel. Jackson, Struggle for Judicial Supremacy 289-305; Chernack, "The Clash of Two Worlds" 53-54, 59, 62.

[214] Jackson, Struggle for Judicial Supremacy 285.

[215] Jackson, Struggle for Judicial Supremacy 71. The cases Jackson cited were Powell v. Alabama, 287 U.S. 45 (1932) (the first Scottsboro boys case -- right to fair trial in Alabama court); Moore v. Dempsey, 261 U.S. 86 (1923) (right to fair trial in racially charged Arkansas case); Nixon v. Herndon, 273 U.S. 536 (1927) (right to vote in Texas election).

Jackson also argued that a "presumption of validity" should not attach to legislative attempts to curb fundamental political rights of free expression and free assembly, because unlike economic legislation, political repression cannot be cured at the ballot box: "when the channels of opinion and peaceful persuasion are corrupted or clogged, these political correctives can no longer be relied on, and the democratic system is threatened at is most vital point." Jackson, Struggle for Judicial Supremacy 285.

[216] Jackson, Struggle for Judicial Supremacy 23-24, 71. Only in his description of one twentieth-century case did the author of Struggle consider the race of the litigant worthy of mention: he noted that Herndon v. Lowry, 301 U.S. 242 (1937), found unconstitutional a Georgia statute used to convict "a Negro Communist" for fomenting insurrection. Jackson, Struggle for Judicial Supremacy 219.

enforced all of these rights in the cases coming before it."[217] Given the state of precedent at that time, Jackson's language seems oddly tentative, especially when compared with how freely he criticized the Court in economic cases. Yet by intimating that the Court might have done more to insure the rights of those it had been charged to protect under the Fourteenth Amendment, he at least suggested that he had an open mind on the subject.

His skepticism about the judiciary's role in preserving constitutional rights went beyond questioning its competence in matters of social and economic policy:

> I am far from suggesting that our civil liberties can be adequately assured by the courts. Some of the most subtle and pervasive forms of intolerance are not technically violations of the Constitution or laws, and cannot be dealt with in the courts. And at best the courts can intervene only sporadically, as isolated cases are brought by persons with sufficient resources and fortitude to gird for litigation.[218]

This belief in limits on the Court's power grew out of a fundamental skepticism about the Court's power to accomplish social reform, but it went beyond that point: the Court, simply put, cannot vanquish bigotry.

The New Dealer on the Civil War and Reconstruction

Jackson's occasional references to the Civil War and Reconstruction in the late 1930s intimate his awareness of a new way of looking at race relations.[219] During this period he began to refer to the Democrats' pro-slavery stance before the war as a dreadful mistake with far-reaching consequences, including the party's relegation to second-tier

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[217] Jackson, Struggle for Judicial Supremacy 23.

[218] Jackson, Struggle for Judicial Supremacy 285; Chernack, "The Clash of Two Worlds" 85. Justice Brown's majority opinion in Plessy also made the point that the law could not eradicate racial prejudice. 163 U.S. 537 (1896).

[219] Jackson recognized such historical allusions as having value in analyzing present events. He thought of history as precedent for the future. As he quipped in one of the many historical arguments he made in Struggle: "I yield to the lawyer's impulse to prove my point by citing a precedent." Jackson, Struggle for Judicial Supremacy 324, xvi.

status. He personalized the concept for the 1939 Illinois Governor's Day Ceremonies: "because their leaders in the fifties and sixties tragically miscalculated the moral forces of their time, those loyal Democrats of my grandfather's generation spent most of their lives a pathetically weak and helpless minority party." Not wanting "us in our time [to] repeat that blunder," he cast Roosevelt as "our New Lincoln."[220] He acknowledged the moral dimension of the slavery issue, a far cry from the rantings of his youth.

Roger Taney, Chief Justice for the Dred Scott case and through most of the Civil War, served as the focus of Jackson's historical reevaluation. In Struggle, he considered Taney a great Justice despite his "reckless and disastrous" opinion holding, first, that Scott remained a slave despite years in free territory and, second, denying all African Americans, slave or free, the right to seek relief in federal courts, because they were not citizens under the Constitution.[221] Jackson interpreted Dred Scott as part of a wrongheaded attempt to save the institution of slavery:

> Slave interests saw that institution endangered by the sentiment of the nation but cherished by the sentiment of their own states. Able lawyers and judges under that influence began the work of protecting slavery by cramping constructions of the only power that threatened it – that of the Federal Government. They overplayed their hands and the most extreme decisions were reversed on the battle fields of the Civil War.[222]

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[220] Robert H. Jackson, Address at Governor's Day Ceremonies, Springfield, IL, August 17, 1939, Box 39, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 1, 9.

[221] Jackson, Struggle for Judicial Supremacy 24, 27, 36. Not everyone in Jackson's time agreed with his overall evaluation of Taney. One correspondent wrote to Jackson that Taney, who had used a writ of habeas corpus to order the freeing of Confederate cavalryman John Merryman in a Supreme Court decision later ignored by Lincoln, "was no hero. He was a plain, unvarnished Fifth-Columnist, and should have been hung." "John M. Henry to Robert H. Jackson, April 2, 1941, Box OV 20, Robert H. Jackson Collection, Library of Congress.

[222] Robert H. Jackson, "Back to the Democratic Way," address to the Commonwealth Club of California, San Francisco, CA, July 14, 1939, Box 208, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 10-11; Chernack, "The Clash of Two Worlds" 61.

This view of Dred Scott and related opinions differed in emphasis from Jackson's 1922 pronouncement that the case "was undoubtedly legally right."[223]

The decision's consequences reached far beyond the Civil War; it had also set in place judicial philosophy and legal doctrine that courts would later use to invalidate social and economic legislation, for "many of their incidental decisions cutting down Federal power remain as precedents for later judges to follow."[224] Jackson recognized, as had scholars before him, Taney's "deliberate attempt to destroy or neutralize Congressional power to deal with the single most important issue of the moment" as the first salvo in the struggle for judicial supremacy:[225] the Chief Justice had used, among other doctrines, the same substantive Due Process theory used by the twentieth century Court to invalidate progressive and New Deal reforms.[226] Jackson further objected to Taney's use of an exaggerated notion of states' rights, a pattern he detected in New Deal-era opinions that condemned reform legislation for infringing on states' rights.[227] Thus, the long-term damage from Dred Scott examplified what could happen if the Court left a grievance to fester by invalidating political solutions: "the bitterness which comes of

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[223] Yet Jackson had conceded in 1922 that the ruling "so offended the sentiment of its day, and was so valuable to the slave power and so timely in its announcement in connection with the policies of the Buchanan administration that it aroused intense animosity, not only to the decision but to the Court itself." Jackson, "The Judiciary and the Constitution" 2.

[224] Jackson, Struggle for Judicial Supremacy 24, 327.

[225] Jackson, Struggle for Judicial Supremacy 24, 27, 36; Boudin, Government by Judiciary, vol. 2; Borchard, "The Supreme Court and Private Rights" 3. See also Robert H. Jackson, "Back to the Democratic Way," Address to the Commonwealth Club of California, San Francisco, California, July 14, 1939, Box 38, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 10-11.

[226] Struggle for Judicial Supremacy 36. See also Robert H. Jackson, Speech at Northwestern University Dinner for Dean Leon Green, Palmer House, Chicago, IL, June 6, 1939, Box 38, Speeches and Writings File, Robert H. Jackson Coll., Library of Congress 7 ("… when the slave-holding power desired to strengthen slavery by weakening government which might interfere with it … the doctrine of *laissez faire* was introduced" in Supreme Court jurisprudence, "and it reached the maximum application within the last decade"); see also Robert H. Jackson, "Back to the Democratic Way" 11.

[227] Jackson, Struggle for Judicial Supremacy 160, 227-28; see also Alton, "Loyal Lieutenant, Able Advocate" 572.

long-endured injustices" would as "the separation becomes wide or deep … get[] beyond the capacity of elective processes to compose."[228]

Despite Jackson's criticism of Dred Scott, he still defended Taney's overall career. That case made him a less attractive historical role model, however, so Jackson engaged in some literary hand-wringing when the late justice's name surfaced. As he explained in a letter praising Tennessee Valley Authority's David Lilienthal's remarks on Taney, "It is a shame that [Taney's] great liberal record was so overshadowed by the Dred Scott episode and his slavery views. On other economic issues he performed nobly."[229] In the same vein, he wrote to liberal commentator Max Lerner,

> I think you are the only man in the world who would have the courage to suggest Taney's record as a mark to shoot at…. He was a great Attorney General and he did more to release the country from economic serfdom than any other Justice of the Court ever did. What a shame he had to put it all under a cloud.[230]

These views on the Civil War and Reconstruction were an eclectic mix of prevalent views in circulation at the time -- somewhat moderated from some of the extreme views of Jackson's youth, yet still sympathetic to white Southerners. Jackson observed, as had Nationalist school historians while he had been young, that it was the "Separation … over slavery" that went "beyond the capacity of elective processes to compose" and led to war.[231] He labeled the chief executive who had presided over the Kansas-Nebraska Act, Franklin Pierce (the same Franklin Pierce for whom Jackson's

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[228] Jackson, Struggle for Judicial Supremacy 316, 318, 327; Alton, "Loyal Lieutenant, Able Advocate" 589-93.
[229] Robert H. Jackson to David M. Lilienthal, February 18, 1938, Box 15, File: General Correspondence -- "l" Miscellaneous, Robert H. Jackson Collection, Library of Congress.
[230] Robert H. Jackson to Max Lerner, January 13, 1940, Box 15, File: General Correspondence – Lerner, Max, Robert H. Jackson Collection, Library of Congress.
[231] Jackson, Struggle for Judicial Supremacy 316-18. This section includes a comparison between Irish Home Rule and slavery – each fueled passions that led to violence. See also James Ford Rhodes, History of the United States from the Compromise of 1850 to the Final Restoration of Home Rule in the South in 1877, 7 vols. (New York: Harper & Brothers, 1893-1906).

grandfather had proudly cast his ballot) a "pro-slave politician," and used the epithet used by Northern partisans, "slave power," to describe pro-slavery combinations.[232] His view of the Civil War as a conflict in which "Northern industrialists and financiers joined forces with the small farmer and free labor" to "destroy[] the slave power" was touched by the economic determinism present in Charles and Mary Beard's The Rise of American Civilization, published in 1927, while Jackson was practicing law in Jamestown.[233]

Historians of the "Blundering Generation" school argued in the 1930s that a more responsive government – including a less partisan Supreme Court – might have averted the conflict.[234] This, the dominant school of the time, failed to provide Jackson with an understanding of how intractable Southern whites had been on the slavery issue. Similarly, Jackson's understanding of Reconstruction comported with the dominant pro-Confederate interpretation all too common in the era of "Gone With the Wind," when white historians were only beginning to challenge its historical assumptions.[235] Influenced by this mélange of beliefs, it is understandable how Jackson could rationalize that white Southerners would have been reasonable on race issues had they not been oppressed during Reconstruction – a view that not only acknowledged their intransigence, but also partly justified it.

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[232] Jackson, Struggle for Judicial Supremacy 39, 228.
[233] Jackson, Struggle for Judicial Supremacy 39; Charles A. and Mary R. Beard, The Rise of American Civilization, 2 vols. (New York: Macmillan, 1927), 2:53-54.
[234] Craven, The Repressible Conflict 64; Avery Craven, The Coming of the Civil War (New York: Charles Scribner's Sons, 1942) 2; J.G. Randall, "The Blundering Generation," Mississippi Valley Historical Review 27 (June 1940) 4-16. It has been observed that the "Blundering Generation" historians were motivated by a "basic assumption … that wars in general and the Civil War in particular were evil," a view with which Jackson, whose own associations with the first world war were less than positive, must have felt sympathetic. See Chapter 2; Gerald N. Grob and George Athan Billias, Interpretations of American History: Patterns and Perspectives, vol. 1: to 1877 (6th ed.) (New York: The Free Press, 1992) 384-86.
[235] Jackson, Struggle for Judicial Supremacy 19 (emphasis added); see Carl Bowers, The Tragic Era: The Revolution After Lincoln (Cambridge, MA: Harvard University Press, 1929) v-vi; Grob and Billias, Interpretations of American History, vol. 1, 6th ed., 415-18.

Jackson, historical change and the eve of World War II

Jackson's belief in the flexibility of constitutional interpretation provided a critical conceptual underpinning for his narrative in Struggle. As he explained the court fight after a decade on the bench:

> … laymen have a vague notion that the same words mean the same thing at all ages and times. The due process clause, for example, is in its essence, as it has been applied, an admonition to be reasonable in legislation. What is reasonable depends on the environment, the occasion.[236]
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> The difficulty was that this group of judges … thought they were applying the Constitution, but they really were misapplying it, in our view, because what is reasonable also has to depend on the environment and the circumstances. They were not open to conviction that conditions had changed. They were striking down a good deal of legislation on the basis of what conditions were when they were brought up on the frontier.[237]

At the end of the constitutional crisis, Jackson observed that the current generation would have to make more than its share of change in the law, because much needed reform had been blocked for so long. While he allowed that errors would be made, he commented, "each generation has the right to make blunders of its own rather than merely to copy those of his predecessors."[238] The idea of each generation making its own jurisprudence is reminiscent of Jeffersonian theory, in which each generation is entitled to have its own revolution. He expanded upon the notion of each generation controlling its destiny in a 1939 speech before his son's classmates at Yale University:

> Someone recently had the intellectual arrogance to propose as a topic for discussion "Will Youth Follow the American Way." They seem not to understand that whatever way American youth goes will be the American way, and that your generation has just as much right to create an American way for its

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[236] Jackson Reminiscences 446.
[237] Jackson Reminiscences 448.
[238] Robert H. Jackson, "Progress in Federal Judicial Administration," Address before the American Judicature Society, Hotel Mayflower, Washington, DC, May 10, 1939, Box 38, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 7.

> time as my generation has had to create an American way for my time, or my grandfather's generation for his time.[239]

Soon, a new situation would give this idea even more currency.

As Jackson wrote The Struggle for Judicial Supremacy, much of Europe was falling to Hitler. The United States did not officially enter the war until December of 1941, after Jackson had become an Associate Justice. Yet his temporary involvement in what, even before the bombs began falling on Pearl Harbor, had been evolving into a war administration, reinforced the concept of law adapting to historical change.[240] Comments about the relationship between the Constitution and the demands of a changing world repeatedly found their way into Jackson's speeches.[241] As he argued in his memorial to Robert LaFollette, democracy

> is not a device for perpetuating a *status quo*. We are living in a moving world and we must move with the traffic or be run over. We must constantly infuse new principles into our constitutional fabric such as social security and the greater measures of economic justice which have been won in the past seven years. Much remains to be done.[242]

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[239]Robert H. Jackson, Speech, *Yale News* Annual Banquet, New Haven, CT, May 3, 1939, Box 38, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 1.

[240] Among Attorney General Jackson's wartime duties was the authorization of a land-for-destroyers deal, by which Great Britain received naval aid in exchange for United States bases in Bermuda; and the implementation of policies that balanced the civil rights of resident aliens against heightened concerns for national security. Jackson Reminiscences 882-913, 1012-15, 1052-54.

[241] He broadcast remarks like "I do not think it is a bad thing that constitutional law should change and keep abreast of the times. I think it is a good thing" and, "Our democracy, if it is to live, cannot be static. It must move forward to meet the challenge of the times." Robert H. Jackson, "A Square Deal for the Court," Boston College Law School, Boston, Massachusetts, address broadcast on CBS April 9, 1940, Box 40, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 3; Robert H. Jackson, Address on the "I'm an American Day" Program Broadcast over the Mutual Broadcasting System, under the auspices of the Citizenship Educational Service, May 18, 1941, Main Research Library, New York Public Library, New York, NY 3.

[242] Robert H. Jackson, Address at the annual Memorial Service in Honor of Robert LaFollette, Madison, WI, June 23, 1940 8.

In his 1941 commencement address at his *alma mater*, Albany Law School – an address within two months of his elevation to the high court -- Jackson observed that the Constitution itself epitomized the need to tailor government to historical circumstances:

> … the states recognized that their organization could not be a mere freezing of a *status quo*, it must yield to events take account of changing times and within the constitutional limitation respond to popular control. It insured a continuity of institutions with the opportunity freely to make orderly revolutions in personnel.[243]

He recognized that the Constitution's limits are absolute; but the limits of constitutional limitations are not clear cut. And ultimately, Jackson would have to decide how far the Court could go in civil rights cases.

Conclusion

Jackson's tenure in the Roosevelt Administration added layers of complexity to his understanding of race relations, of the Constitution, and of the courts' role in mediating between the two. He saw firsthand how white Southerners' political conservatism, including their intransigence on race, could hamper a chief executive, even one as powerful as Franklin Roosevelt. His understanding of the law's limits in such matters could only make him despair over what, as a practical matter, a court could do against such intractable opposition. Furthermore, his sympathy for Southern whites – as manifested in Roger Taney's mixed public record and the supposed mistreatment of white Southerners during Reconstruction; Jackson's affinity for Southern ruralism; his good relations with his white Southern contemporaries; and the vestiges of the racism of his youthful environment -- gave further reason to avoid confrontation. His exposure to race relations in Washington could not have engendered much hope for change, as

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[243] Robert H. Jackson, Address at Commencement Exercises, Albany Law School, Albany, NY, June 5, 1941, Main Research Library, New York Public Library, New York, NY 10.

progress in the District of Columbia's civil rights record was retarded by African American underemployment, segregation, and white Southern hostility.

The court fight profoundly influenced Jackson's views of the Constitution, especially on the issue of court-ordered desegregation.[244] His participation in the New Deal reinforced his initial beliefs about the need for both judicial flexibility and judicial restraint. It might appear that Jackson's embrace of these two strains of thinking evidenced a "dialectical" style of thinking (a style that emerged in his career on the bench), because he embraced "contradictory jurisprudential impulses."[245] But in the 1930s, the contradiction between judicial restraint and judicial realism was not as glaring as in later decades. The accommodation of judicial power to the political branches of government and to the forces of history did not appear contradictory during the New Deal: in that environment, Jackson could feel confident that judicial restraint and judicial flexibility went hand in hand, each helping the Roosevelt Administration implement the New Deal and prosecute the Second World War. Yet by the time Justice Jackson was grappling with school desegregation, these once complimentary strains were pulling him in opposite directions – judicial activism, not restraint, would be needed to take the next historic step in the road to racial equality. It was then that Jackson faced a dialectic needing resolution.

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[244] For evidence of this influence, see pp. 408, 438, 446-49, 462, 477-81. The court fight's influence on Jackson has been recognized by other scholars. Chernack, "The Clash of Two Worlds" 52, 58, 71-72; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1880; Kurland, "Robert H. Jackson" 2552.

[245] White, "Personal Versus Impersonal Judging" 231; Ray, "A Law Clerk and his Justice" 590-91.

On the eve of his elevation to the Supreme Court, Jackson remarked, in an address on Independence Day 1941, that the United States must continually strive for equal rights and equal opportunity for all of its citizens. Of the Declaration of Independence, Jackson observed:

> It has been the inspiration for every later recognition of broadened human rights and for the extension of justice and security to all men. We do not claim to have reached a perfect fulfillment of its high principles. But we have achieved the nearest approach among all the nations to a classless society, to equality of rights, and to a fair distribution of opportunity and prosperity. Whenever we reproach our own imperfections, as we ought often to do, we must not forget that our shortcomings are visible only when measured against our ideals, never when put beside the practical living conditions of the rest of the world. We have by Constitution, by legislation, and by judicial decision translated the Declaration out of the language of abstract philosophy into the idiom of everyday living.[246]

The repeated *mea culpas* here do not specifically mention racial discrimination. Yet they suggest Jackson was cognizant of the goal of making the ideals of the Declaration of Independence – ideals that have come to include equality for all citizens, regardless of race – a reality for everyone.[247] Jackson's role in making the American system of government more nearly conform to these ideals would become more significant, and more direct, than he might have imagined at that moment.

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[246] Robert H. Jackson, Address at the Independence Day Celebration, on the grounds of the Washington Monument, Washington, D.C., July 4, 1941, broadcast over the Mutual Broadcasting System, Main Research Library, New York Public Library, New York, NY 2-3. See also Robert H. Jackson, Address at Commencement Exercises, Albany Law School, Albany, NY, June 5, 1941, Main Research Library, New York Public Library, New York, NY 3. In that speech, Jackson again referred to the United States' progress "in spite of many deficiencies … toward a greater measure of economic security and social justice," though, again, Jackson's emphasis was on economic justice and individual justice.

[247] Garry Wills, Lincoln at Gettysburg: The Words that Remade America (New York: Simon & Schuster, 1992).

Chapter 4: Jackson on the Supreme Court

Jackson's thirteen-year tenure as Associate Justice began with his country's reluctant entry into war against history's most virulently racist regime, and ended with the constitutional demise of racial segregation.[1] During that period, the Court decided numerous cases challenging all means of inferior treatment of African Americans: their exclusion from elections and labor unions; unfair judicial process; and segregation. The journey was singular, both for the country and for the Court. The gulf between Brown's desegregated vision and the legal state of the art in 1941, when courts had barely begun to enforce the "equal" part of "separate but equal," was a wide one. Yet the legal chasm was nowhere near as yawning as that between Brown's ideals and the reality of race relations in 1941 America.[2]

Meanwhile, Jackson was embarking on a remarkable jurisprudential journey of his own. This chapter provides and overview of the Justice's handling of African American civil rights cases and related issues during his judicial career.

Jackson, the Roosevelt Court and the Vinson Court

After the defeat of its 1937 Court plan, the Roosevelt Administration took advantage of more traditional opportunities to remake the Supreme Court. Seven of nine justices left the bench through death or retirement in the years 1937-1941, including all of the Court's *laissez-faire* ideologues, the Four Horsemen.[3] Roosevelt's replacements --

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[1] Jackson was sworn in as Associate Justice in July 1941, and died in October 1954.

[2] For a brief but comprehensive survey of the Supreme Court's record on African American rights in the period from Reconstruction to the mid-1930s, see John Braeman, Before the Civil Rights Revolution: The Old Court and Individual Rights (New York: Greenwood Press, 1988) ch. 3.

[3] Sources on the Court crisis include Leuchtenburg, The Supreme Court Reborn; Cope, Franklin Delano Roosevelt and the Supreme Court; McKenna, Franklin Roosevelt and the Great Constitutional War; Pusey, The Supreme Court Crisis; Shaw, Pederson and Williams, eds. Franklin D. Roosevelt and the Transformation of the Supreme Court; McCune, Nine Young Men ch. 3; Comiskey, "Can a President Pack

eight in all[4] -- formed the backbone of the Roosevelt Court, and continued to shape its jurisprudence for many years after FDR's demise.[5] For much of that period, especially during the twelve years between Chief Justice Charles Evans Hughes's retirement in 1941 and the appointment of Earl Warren in 1953, the Court underwent a painful "transition" as it moved by fits and starts toward a more expansive view of personal freedoms under Chief Justices Harlan Fiske Stone and Fred Vinson.[6] This fractious transitional era overlapped with almost all of Jackson's judicial career: he was appointed upon Stone's elevation; and outlasted Vinson, who had suffered a fatal heart attack while the Brown case lingered, undecided, on the Court docket, for little more than a year.[7]

The standard interpretation of the Roosevelt Court -- that it practiced self-restraint in reviewing economic legislation while acting more aggressively in protecting civil liberties -- is generally accurate.[8] It is also fair to say that FDR's appointees were

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– or Draft – The Supreme Court?"; Michael Nelson, "The President and the Court: Reinterpreting the Court-packing Episode of 1937" 267. Jackson's most thorough discussion of his own role in this episode appears in his Reminiscences; The Struggle for Judicial Supremacy is probably the best account, from the Administration's perspective, of the doctrinal dispute that led to the Court crisis.

[4] One of the seven slots was filled a second time, when Roosevelt appointee James Byrnes left the Court to assist the president in the war effort. He was replaced in 1943 by Wiley Rutledge, a former law school dean and appeals court judge who became, with Francis Murphy, one of the leading civil libertarians on the Court. Byrnes, for his part, "wrote only one major opinion … and fifteen other minor rulings, with no dissents or concurrences," and "left no mark on the Court." Abraham, Justices and Presidents 231-32; Melvin I. Urofsky, Division and Discord: The Supreme Court Under Stone and Vinson, 1941-1953 (Columbia: University of South Carolina Press, 1997) 28. His biggest role in the civil rights arena was as the segregationist governor of South Carolina in the mid-1950s. See Kluger, Simple Justice (1977 ed.) 715; Tushnet, Making Civil Rights Law 232.

[5] Sources on the Roosevelt Court include Pritchett, The Roosevelt Court; McCune, Nine Young Men; Fred Rodell, Nine Men: A Political History of the Supreme Court of the United States from 1790 to 1955 (1955. New York: Vintage Books, 1964) ch. 8; Leuchtenburg, The Supreme Court Reborn chs. 6-8; Russell W. Galloway, Jr., "The Roosevelt Court: The Liberals Conquer (1937-1941) and Divide (1941-1946)," Santa Clara Law Review 23 (1983) 491-542.

[6] Urofsky, Division and Discord 7; Pritchett, Civil Liberties and the Vinson Court (Chicago: University of Chicago Press, 1954) ch. 13.

[7] For the story of Brown's extraordinarily lengthy stay on the Court's docket, see Chapter 9.

[8] Galloway, "The Roosevelt Court" 526ff.; Glendon Schubert, The Constitutional Polity (Boston: Boston University Press, 1968) 48-57; Alpheus Thomas Mason, Harlan Fiske Stone: Pillar of the Law (New York: Viking Press, 1955) 512; Leuchtenburg, The Supreme Court Reborn pp. 208-10 and ch. 8. Brief reiterations of this argument include Lawrence W. Friedman, American Law in the 20th Century (New Haven: Yale University Press, 2002) 158-62; Rodell, Nine Men 290ff.; Urofsky, Division and Discord chs. 3-4, 6-8.

relatively united on giving the elected branches of government leeway in fashioning economic regulation and reform, while diverging more frequently on personal rights. This trend was noticeable by 1941, when the last of the Four Horsemen retired and new factions replaced the old ones.[9] In this period, as one prominent historian put it, "the very terms 'conservative' and 'liberal' as applied to judges changed…": before the Roosevelt Court, the advocates of judicial restraint were the liberals, as they tried to stop the Four Horsemen from blocking economic reforms based on their *laissez faire* and Social Darwinist ideologies; as the Court began lifting government restrictions on civil rights and civil liberties, the camps switched, with conservatives advocating restraint and liberals disregarding it in cases involving individual rights.[10]

The two leading advocates of judicial restraint were Jackson and his best friend and closest professional associate on the Court, Felix Frankfurter. The former Harvard Law School professor and unofficial New Deal personnel director was widely considered the most doctrinaire adherent of restraint. His dogged defense of both civil liberties and the New Deal before his arrival on the bench raised liberals' expectations for his judicial career. The disappointment they felt with Frankfurter's often handwringing opinions refusing to interfere with legislative and executive restraints on personal liberties bitterly

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Jackson wrote the majority opinion in Wickard v. Filburn, 317 U.S. 111 (1942), one of the key cases establishing that the Court has "nothing to do" with "the wisdom, workability, or fairness" of a regulatory scheme enacted by Congress under the Commerce Clause. 317 U.S. at 129. See also White, "Personal Versus Impersonal Judging" 241-42; Buck Cox, "Justice Robert Jackson and the Evolution of Administrative Law" *passim*. For a view assuming that Jackson's willingness to strike down state regulation of interstate commerce was inconsistent with judicial restraint, see Chernack, "The Clash of Two Worlds" 63-72.

[9] Pritchett, The Roosevelt Court p. 168 and ch. 10; Galloway, "The Roosevelt Court" 507, 510, 522, 525, 526, 531; Schubert, The Constitutional Polity 100; Alpheus Thomas Mason, Harlan Fiske Stone ch. 31. For an interpretation suggesting a far more splintered Court on all issues beyond the "clean-up job on constitutional errors of past Courts" (most of which involved economic regulation and policy), see Rodell, Nine Men 256-62, 286-96.

[10] Urofsky, Division and Discord 7.

disappointed many of his previous champions.[11] Jackson, who intensely lobbied Roosevelt to appoint the Harvard professor to the bench, belonged in the "judicial restraint" camp, though he was not considered as doctrinaire, and more sensitive to cases' particular facts.[12] Viewed, for the most part, as a moderate until his return from Nuremberg in late 1946, after which some scholars have detected a conservative trend in his decisions, Jackson's reputation can be attributed to his refusal to intervene in many civil liberties cases.[13] The Justices most in favor of judicial expansion of individual rights – with whom Jackson and Frankfurter were frequently at loggerheads -- were Hugo Black, William O. Douglas, Frank Murphy, and Wiley Rutledge.[14]

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[11] Galloway, "The Roosevelt Court" 500, 510-18, 525-26; Frances Howell Rudko, Truman's Court: A Study in Judicial Restraint (New York: Greenwood Press, 1988) 11; Rodell, Nine Men 269-73; McCune, Nine Young Men ch. 8; Joseph P. Lash, ed., From the Diaries of Felix Frankfurter (New York: W.W. Norton, 1975) 64; Hockett, "Justice Robert H. Jackson and the Role of the Supreme Court in American Politics" ch. 5; Abraham, Justices and Presidents 220-25; Urofsky, Division and Discord 19-21; Theodore M. Vestal, The Eisenhower Court and Civil Liberties (Westport, CT: Praeger, 2002) 237-38.

Frankfurter biographies include Liva Baker, Felix Frankfurter (NewYork: Coward-McCann, 1969) and H.N. Hirsch, The Enigma of Felix Frankfurter (New York: Basic Books, 1981).

Two sources that illuminate the nature of the conflict between the two major Court factions, from the perspective of the chief protagonists, are Mark Silverstein, Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making (Ithaca: Cornell University Press, 1984) and James F. Simon, The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America (New York: Simon & Schuster, 1989).

[12] Kurland, "Robert H. Jackson" 2554-55 (Jackson expressed the need for some court intervention in cases involving individual rights, because "in waves of hysteria the majority would override everything"). The classic example of Jackson breaking with Frankfurter on matters of individual rights occurred in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), in which Jackson voted to overturn the school expulsion of a Jehovah's Witness who refused to recite the Pledge of Allegiance; Frankfurter dissented. See also White, "Personal Versus Impersonal Judging" 247.

[13] Paul A. Freund, "Individual and Commonwealth in the Thought of Mr. Justice Jackson," Stanford Law Review 8 (1955) 12-13; William Jackson to Felix Frankfurter, April 8, 1964, Box *2*, File: Family Papers – Family Correspondence – Jackson, William E., Robert H. Jackson Collection, Library of Congress; Hockett, New Deal Justice 208 ff.; Hockett, "Justice Robert H. Jackson and the role of the Supreme Court in American politics" 197 ff., 229-32; Chernack, "The Clash of Two Worlds" 79.

[14] Galloway, "The Roosevelt Court" 510-18, 521, 525; Schubert, The Constitutional Polity 76-78; Hockett, "Justice Robert H. Jackson and the role of the Supreme Court" ch. 5; Abraham, Justices and Presidents 213-19, 225-29, 237-39; Urofsky, Division and Discord 17ff.

The literature on Black is voluminous, with that on Douglas only slightly less so. Studies by or of Black include Wesley McCune, Nine Young Men ch. 4; Hugo L. Black, A Constitutional Faith (New York: Alfred A. Knopf, 1968); Hugo L. Black and Elizabeth Black, Mr. Justice and Mrs. Black: The Memoirs of Hugo L. and Elizabeth Black (New York: Random House, 1986); Roger K. Newman, Hugo Black: A Biography (New York: Pantheon Books, 1994).

The more interventionist approach to individual rights is often traced to a footnote in a relatively obscure 1938 opinion by then-Associate Justice Harlan Fiske Stone in United States v. Carolene Products Co., in which the future Chief Justice suggested that government action that might compromise personal rights and civil liberties, including the rights of "'discrete and insular minorities' … who could not rely on 'political processes' for their protection … may well call for a correspondingly more searching judicial inquiry." [15] Giving priority to individual rights over the property rights emphasized by the Four Horsemen, fit in well with the literalist and populistic readings of the Constitution provided by Black, and the civil libertarian stances of Douglas, Murphy and Rutledge; the Court, they believed, should challenge unfairness against society's underdogs.[16] Tentatively worded as it was, and as small a role as Stone was to play in its

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Works on Douglas include his two massive volumes of memoirs (given the books' sometimes tenuous relationship with reality, the term "Autobiography" in the titles is a misnomer), Go East, Young Man and The Court Years 1939-1975: The Autobiography of William O. Douglas (New York: Random House, 1980). See also Bruce Allen Murphy, Wild Bill: The Legend and Life of William O. Douglas (New York: Random House, 2003); James Simon, Independent Journey; Melvin I. Urofsky, Introduction, The Douglas Letters: Selections from the Private Papers of William O. Douglas (Adler & Adler, 1987); McCune, Nine Yong Men ch. 10.

Biographies of Murphy include Sidney Fine, Frank Murphy (2 vols. Ann Arbor: University of Michigan Press, 1975 and 1984) and J. Woodford Howard, Jr., Mr. Justice Murphy: A Political Biography (Princeton, NJ: Princeton University Press, 1968). See also McCune, Nine Young Men ch. 12.

Sources on Rutledge include McCune, Nine Young Men ch. 16; Fowler W. Harper, Justice Rutledge and the Bright Constellation (Indianapolis and New York: Bobbs-Merrill, 1965); and John M. Ferren, Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge (Chapel Hill: University of North Carolina Press, 2004).

[15] Friedman, American Law in the 20th Century 158-62, quoting United States v. Carolene Products Co., 304 U.S. 144 (1938); Mason, Harlan Fiske Stone 53ff. (also quoting Carolene Products); Urofsky, Division and Discord 8. Perhaps the dividing of the Roosevelt justices into ideological camps is best exemplified where honored in the breach. For all of Fred Rodell's protestations that the Roosevelt appointees splintered justice to justice and issue to issue, his thumbnail sketches of the justices in Nine Men showed his admiration for the Black-Douglas-Jackson-Rutledge quartet, and his disappointment (or even downright hostility) toward some of the others, especially Jackson, whom he called "the New Deal Court's most obvious turncoat-to-conservatism." Rodell, Nine Men 264-84. It should be noted that Rodell was the former student and close friend of Douglas, whose lack of warmth toward Jackson was painfully apparent in Douglas's relatively cold treatment of him in his memoirs years later. Simon, Independent Journey 29, 104, 116, 277 ff.; Douglas, The Court Years 1939-1975 28-32, 37-39, 44, 177, 182-83, 252-53, 279-80; Douglas, Go East, Young Man 173-74, 450.

[16] Rodell, Nine Men 264-66, 275-79, 283-84; McCune, Nine Young Men 45, 83, 94, 97-98, 120-21, 137-54, 206 ; Harper, Justice Rutledge and the Bright Constellation ch. 9; Hockett, "Justice Robert H. Jackson

application, Stone's Carolene Products suggestions presaged the path the Court chose, as it ended segregation and expanded individual rights through the Warren Court.[17]

On the other hand, under the doctrine of judicial restraint, "the scope of proper judicial review does not expand or contract depending on what party invokes it," or on the issue raised.[18] Among the influences on Jackson's brand of judicial restraint was the concept of majoritarianism – that policy matters in a republic should be decided by the people's elected representatives, and not by "the least democratic of any of our branches of government."[19] Also vital were the values of judicial neutrality, objectivity, detachment – a judge should tend to the procedural machinery and enforced the rules, but show no preference for one litigant (or class of litigants) over another;[20] and the notion, grounded in Jackson's long-held skepticism of judicial involvement in policy issues and reinforced by his New Deal fight against judicial activism, that courts lack the fact-

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and the Role of the Supreme Court in American Politics" 275 ff.; Abraham, Justices and Presidents ch. 9; Urofsky, Division and Discord 17-18, 21, 29.

[17] Urofsky, Division and Discord 8, 11-12.

[18] Interstate Commerce Commission v. Jersey City, 322 U.S. 503, 523 (1944); Pritchett, Roosevelt Court 27; McCune, Nine Young Men 89-98; Rodell, Nine Men 271-72.

For background on the history of judicial restraint, see p. 136.

The considerations of restraint and neutrality grew into a process-based jurisprudence by the 1950s. Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," Harvard Law Review 73 (1959) 1; Auerbach, Unequal Justice 259ff; Caplan, The Tenth Justice 74-75.

Not all contemporaries saw Jackson's approach to constitutional jurisprudence as doctrinally legitimate: Rodell, a former student and close friend of Jackson's arch-nemesis Douglas found him a personally bitter "gentleman of property" who, as he saw both the presidency and chief justiceship slip through his fingers, voted, consonant with his station in life, in an increasingly conservative direction. Rodell, Nine Men 279-82

[19] Kurland, "Robert H. Jackson" 2554.

[20] For a more elaborate treatment, complete with metaphors, see Ray, "A Law Clerk and His Justice" 583; Wallace Mendelson, "Mr. Justice Frankfurter – Law and Choice," Vanderbilt Law Review 10 (1957) 333-50. See also Caplan, The Tenth Justice 70-74. For an impassioned defense of maintaining judicial integrity against a results-oriented jurisprudence (whether from the right or from the left) by a former Frankfurter clerk, see Alexander Bickel, "Justice Frankfurter at Seventy-Five," The New Republic 137 (Nov. 18, 1957) 7-9.

finding competence to resolve policy disputes.[21] All of these considerations were intertwined with Jackson's belief in limited federal power (a belief that was apparently strengthened from his Nuremberg experience) and his sense that the judiciary, without any enforcement mechanism of its own, had less power and was more likely to lose credibility over unpopular decisions than other branches of government.[22]

Jackson's belief that the Court should not interfere in public policy held fairly consistent throughout his legal career. His Godkin Lectures for Harvard Law School, published posthumously as The Supreme Court in the American System of Government, formed his valedictory on the issue. Jackson complained of a "cult of libertarian judicial activists," which "now assails the Court almost as bitterly for renouncing power as the earlier 'liberals' once did for assuming too much power"; he found the doctrine "wholly incompatible with faith in democracy, and in so far as it encourages a belief that the judge 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."[23] His

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[21] See discussion of The Struggle for Judicial Supremacy, pp. 140-54. For a discussion of Jackson's views on the subject, in the context of a different type of policy issue, see Kirk J. Stark, "The Unfulfilled Tax Legacy of Justice Robert H. Jackson," 54 Tax Law Review (Winter 2001) 171-259.

[22] Kurland, "Robert H. Jackson" 2555; White, "Personal Versus Impersonal Judging" 243-45; Robert H. Jackson, "Chapter I Introduction," Autobiographical draft 1 (Supreme Court "a position, not so much of power as one of influence," as it "has neither purse nor sword" and "turns its judgments over to the executive department for enforcement"). Jackson's view of the Court's authority closely tracks that of Alexander Hamilton in Federalist No. 78, which deemed the judiciary "the least dangerous branch" for those reasons. Alexander Hamilton, Federalist No. 78 (McLean's Edition, New York – available at www.FoundingFathers.info).

[23] Jackson Reminiscences 1130-31; Jackson, The Supreme Court in the American System of Government 57-58, 77; Hockett, "Justice Robert H. Jackson and the Role of the Supreme Court in American Politics" 127-28, 192, 265 ff.; Jackson, Manuscript of introduction to Our Constitution: Tool or Testament?, by Beryl Harold Levy, Box 54, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 4; Galloway, "The Roosevelt Court" 510-18; Pritchett, Civil Liberties and the Vinson Court 18; Rodell, Nine Men 269-73, 282; Newman, Hugo Black: A Biography 368; Alpheus Thomas Mason, The Supreme Court from Taft to Warren (Baton Rouge: Louisiana State University Press, 1958; revised and enlarged ed., Baton Rouge: Louisiana State University Press, 1968) 197-98; Galloway, "The Roosevelt Court" 500, 510-18, 525-26; Rudko, Truman's Court 11; McCune, Nine Young Men ch. 8; Joseph P. Lash, ed., From the Diaries of Felix Frankfurter (New York: W.W. Norton, 1975) 64; Jeffrey D. Hockett, New Deal Justice introduction, chs. 8-9; Schubert, Dispassionate Justice 18, 24, 27 ("activism and restraint had

criticism of judicial arrogation of power is not necessarily inconsistent with the "democratic tradition of human rights above property rights" he extolled in his New Deal days; while the latter addressed substantive policy, the former set forth process, leaving policy to the democratic branches and not the judiciary.[24]

Restraint motivated the Court's liberals in the 1920s and 1930s, especially Oliver Wendell Holmes and Stone, both of whom emphasized that their own views on legislation were irrelevant to their determination of whether those laws were constitutional.[25] Stone and Owen Roberts, the two remaining appointees from the pre-New Deal years, had been at the Court's ideological fulcrum during the mid-1930s, when judicial restraint was still considered progressive. But by Stone's elevation to Chief Justice in the 1941, Roberts had come to be thought of as the most conservative justice. To some, Stone also appeared to drift right, but his biographer – and Jackson -- saw him as consistently applying restraint, while the Court became more interventionist.[26] Jackson "agreed with Chief Justice Stone that activism was no more appropriate on the part of the judiciary in favor of reforms than it was in knocking them down."[27]

The Roosevelt Court roster was rounded out by Stanley Reed, Jackson's predecessor as Solicitor General, who tended to rest in the middle of competing factions,

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no definite substantive content for him"); Schubert, "Jackson's Judicial Philosophy" 962-63; Abraham, Justices and Presidents 236; Urofsky, Division and Discord 27.

[24] Jackson, "Social Justice Under Our Constitution," Address before the National Conference of Catholic Charities, Richmond, Virginia, October 11, 1938 9.

[25] Mason, Harlan Fiske Stone 332-33, 560,ch. 26; Rudko, Truman's Court 11-12; Leuchtenburg, The Supreme Court Reborn 18; McCune, Nine Young Men 83; Jackson Reminiscences 1130.

[26] Galloway, "The Roosevelt Court" 492, 495, 499, 502, 505, 507, 508, 511-17; Schubert, The Constitutional Polity 94ff.; Mason, Harlan Fiske Stone 305, 318, 322, 348, 481, 511-18, 560, 576; Mason, The Supreme Court from Taft to Warren 132-45, 163; McCune, Nine Young Men 246-48; Urofsky, Division and Discord 10-15; Jackson Reminiscences 1130-31. For an in-depth discussion of Justice Roberts who, legend had it, made the "switch in time that saved nine" – that is, reversed his position on social legislation and thus prevented the Court from falling prey to Roosevelt's reorganization scheme -- see Michael Ariens, "A Thrice-Told Tale, or Felix the Cat," Harvard Law Review 107 (Jan. 1994) 629ff; Leonard, A Search for a Judicial Philosophy.

[27] Jackson Reminiscences 1130.

and often represented the decisive fifth vote. He began moving away from the more liberal justices in 1941.[28]

With cases involving personal rights proliferating as the middle of the twentieth century approached, it was probably inevitable that basic disagreements on constitutional jurisprudence would result in Court factions. But still more factors worked to split the justices. Even before the 1941 retirement of Chief Justice Hughes, an unquestionably strong leader,[29] fissures had been developing between Black, Douglas and Murphy on one side, and Frankfurter on the other. Then Stone, for all of his virtues, proved not to be as strong as his predecessor; in any event it is doubtful that anyone could have tamed his colleagues, to whom he often referred as his "wild horses." Between doctrinal and personal tensions, escalating factional warfare created an atmosphere less than conducive to unity and deliberative decisionmaking.[30]

Jackson had little regard for the legal acumen of Murphy, his predecessor as Attorney General, and for most of his tenure seemed on even worse terms with the irascible Douglas than were his colleagues. Yet there seemed to be an extra edge to Jackson's rancor toward Black, with whom he felt he had little in common.[31] The author of The Struggle for Judicial Supremacy perceived a fundamental incompatibility between political and judicial: a good politician might on occasion "be zealous and … help whip

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[28] Galloway, "The Roosevelt Court" 497, 508, 510-11; 513-18; Rodell, Nine Men 266-68; McCune, Nine Young Men ch. 5; Abraham, Justices and Presidents 219-20; Urofsky, Division and Discord 19.

[29] The definitive work on Hughes is Merlo Pusey, Charles Evans Hughes (2 vols. New York: Macmillan, 1951). See also Urofsky, Division and Discord 31 ff.

[30] Galloway, "The Roosevelt Court" 513-15, 517; Pritchett, Civil Liberties and the Vinson Court 1; McCune, Nine Young Men 249; Urofsky, Division and Discord 32, 35, 37, 148; James F. Simon, Independent Journey 11. For a sense of Stone's view on the role of the Chief Justice, see Mason, Harlan Fiske Stone chs. 35, 46; Mason, The Supreme Court from Taft to Warren 169ff.; Roger K. Newman, Hugo Black: A Biography 320; Urofsky, Division and Discord 8, 30; Simon, Independent Journey chs. 16-17; Jackson Reminiscences 1092.

[31] Gerhart, America's Advocate 239-40; Simon, The Antagonists 19, 129, 158. Jackson took on the Nuremberg prosecution in part to escape the Court's "interminable fractiousness." Simon, The Antagonists 158-59; Jackson Reminiscences 1577-80.

up some feeling," but that behavior would never do in a judge. He was rankled by what he perceived as his colleague's "hopelessly inappropriate judicial behavior" and "result-oriented" approach to judicial decisionmaking, and disapproved of the ex-Senator's use of legislative tactics to build majorities for his positions, stratagems that the former Solicitor General believed factionalized and overly politicized the Court.[32] On at least one occasion, Jackson felt that Black was attempting to intimidate him into changing his vote, and claimed that even Murphy, a staunch Black ally with whom he had had his share of disagreements, had similarly complained.[33]

Yet it was probably Black's apparent lack of objectivity which most rankled Jackson. For example Black, a successful personal injury lawyer in his native Alabama, considered it a badge of honor – and part of what he considered the judicial function of righting the scales of justice -- that he never voted against an injured worker in nearly 200 cases.[34] Jackson, on the other hand, believed that "the validity of a doctrine does not depend on whose ox it gores."[35] He viewed his colleague's acceptance of an award from the Southern Conference for Human Welfare as "grossly improper." In the "old days," fumed Jackson, had a "big business association" honored one of the Four Horsemen,

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[32] Jackson Reminiscences 107-08; Gerhart, America's Advocate 242 ff.; Harvey G. Hudspeth, "The Roosevelt Court and the Changing Nature of American Liberalism: An Uncertain Legacy," Franklin D. Roosevelt and the Transformation of the Supreme Court 228, quoting Kurland, "Robert H. Jackson" 2564; Simon, The Antagonists 60; Felix Frankfurter, January 30, 1943 diary entry, From the Diaries of Felix Frankfurter 173-74. The "result-oriented" description applied with equal force to Murphy and Douglas (one of whose biographers used the term to describe him). Simon, Independent Journey 312, 357. Actually, the two had a substantial amount in common. They came from rural backgrounds that were better than average yet not exactly privileged; they were the last two Supreme Court Justices not to have graduated from college or law school; and they were both staunch New Dealers.

[33] Felix Frankfurter, June 9, 1945 diary entry, From the Diaries of Felix Frankfurter 265; Urofsky, Division and Discord 18; Jackson Reminiscences 1582-83.

[34] Newman, Hugo Black: A Biography 473.

[35] Interstate Commerce Commission v. Jersey City, 322 U.S. 503, 523 (1944); Wells v. Simonds Abrasive Co., 345 U.S. 514, 525 (1953) (Jackson, J., dissenting).

"every liberal in the country would have screamed his head off over it."[36] Jackson sought to lend legitimacy to his views by invoking the procedural fairness and strict neutrality of former Chief Justice Hughes, one of his role models.[37] This view of jurisprudence seems rooted in Jackson's "dialectical mind," that perceived his role on the Court as the "accommodation" of legitimate yet competing interests, of "principles in collision."[38] It would be impossible to imagine Black (or Douglas or Murphy, for that matter) saying, as did Jackson, of the Court's work that "almost nothing that comes here is easy … [or] one-sided," that "It's hard to make up your mind."[39]

Perhaps the fullest expression of Jackson's frustration with what he saw as judicial favoritism may be found in his dissent in Hunt v. Crumboch, a case in which the majority exempted a labor union from prosecution under antitrust laws for actions unlawful if committed by an employer:

> With this decision, the labor movement has come full circle. The working man has struggled long, the fight has been filled with hatred, and the conflict has been dangerous, but now workers may not be deprived of their livelihood merely because their employers oppose and they favor unions. Labor has won other

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[36]Rudko, Truman's Court 26 ff. Hudspeth, "The Roosevelt Court and the Changing Nature of American Liberalism" 224; Harper, Justice Rutledge and the Bright Constellation 316 ff.; Urofsky, Division and Discord 45-46; Newman, Hugo Black: A Biography 333. Newman reported that the results on the dinner read like so many case results: Black, Douglas, Murphy, Rutledge and Reed attended, while Jackson, Frankfurter, Stone and Roberts did not.

Jackson turned down at least two honors bestowed on him. One was from the Anti-Defamation League, saluting his work at Nuremberg (his letter expressed the fear that accepting it would have compromised his neutrality on Court cases concerning anti-Semitism). Robert H. Jackson to Meier Steinbrink, March 28, 1950, Box 209, File: Awards, Honors and Tributes – Miscellaneous, Robert H. Jackson Collection, Library of Congress. The second saluted his participation in the Brown decision. See pp. 505-06.

[37] Pusey, Charles Evans Hughes 352-53, 691; Marsh, "The Genial Justice: Robert H. Jackson" 309; Robert H. Jackson, "Autobiography: outlines, notes and source material," Box 189, Biographical File, Robert H. Jackson Collection, Library of Congress 3-5; Robert H. Jackson to Dr. Jacob Billikopf, March 16, 1948, Box 9, Correspondence Files: Bi-Bl, Robert H. Jackson Collection, Library of Congress.

[38] Freund, "Mr. Justice Jackson and Individual Rights," Four Lectures 36; Ray, "A Law Clerk and his Justice" 590; Chernack, "The Clash of Two Worlds" 52-53; White, "Personal Versus Impersonal Judging" 231. Schlesinger relates Black and Douglas's views on judicial decisionmaking with legal realism. Arthur M. Schlesinger, Jr., A Life in the Twentieth Century: Innocent Beginnings, 1917-1950 (Boston and New York: Houghton Mifflin, 2000) 421.

[39] Jackson Reminiscences 1102.

> rights as well, unemployment compensation, old-age benefits and, what is most important and the basis of all its gains, the recognition that the opportunity to earn his support is not alone the concern of the individual but is the problem which all organized societies must contend with and conquer if they are to survive. This Court now sustains the claim of a union to the right to deny participation in the economic world to an employer simply because the union dislikes him. This Court permits to employees the same arbitrary dominance over the economic sphere which they control that labor so long, so bitterly and so rightly asserted should belong to no man.[40]

Quoting from a Brandeis opinion asserting that "the right to carry on business – be it called liberty or property – has value," and "To interfere with this right without just cause is unlawful," Jackson separated himself from what he saw as judicial partisanship.[41]

The mutual hostility got so bad, that it impaired the Court's ability to perform even the simplest of functions. For example, the Court failed to send the traditional letter of regret to Justice Roberts when he retired in 1945, because of an impasse over its contents: Black's opinion of Robert's performance on the bench would not permit him to approve complimentary language, while Frankfurter and Jackson concluded that a letter phrased neutrally enough for Black's taste was not worth sending. Another involved Black's decision not to remove himself from a case argued at the Court by a former law partner (who, according to a recent Black biographer, harbored some potentially damaging secrets about the Alabamian's association with the Ku Klux Klan). Jackson believed that Black's participation created an appearance of judicial bias.[42]

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[40] Hunt v. Crumboch, 325 U.S. 821, 830-31 (1945) (Jackson, J., dissenting). Frankfurter and Stone joined in Jackson's opinion.

[41] 325 U.S. at 831. This opinion was issued on the same day as Jackson's extraordinary and controversial published opinion in the Jewell Ridge case. See note 42 and accompanying text.

[42] Jewell Ridge Coal Corporation v. Local 6167, United Mine Workers of America, 325 U.S. 897 (1945) (Jackson, J., concurring). See Gerhart, America's Advocate 245ff.; Newman, Hugo Black: A Biography ch. 22; Hockett, "Justice Robert H. Jackson and the Role of the Supreme Court in American Politics" 269 ff.; Urofsky, Division and Discord 137ff.; Simon, Independent Journey 245; Jackson Reminiscences 1583-89.

When Stone unexpectedly died in 1946, Jackson hoped that he would be appointed Chief Justice, an appointment Roosevelt had suggested was Jackson's upon Stone's retirement, and one recommended to Roosevelt's successor, Truman, by former Chief Justice Hughes.[43] But Truman learned about the problems on the Court (probably from Roberts), and hesitated.[44] When rumors reached Jackson, who was then prosecuting Nazis at Nuremberg, that Black and Douglas had threatened to resign if Jackson were elevated, Jackson sent to President Truman, the House and Senate Judiciary Committees and the press a blunt tirade about Black and the tensions on the Court. The episode became known as the "Black-Jackson feud," with partisans on both sides. Jackson's performance, however, amounted to a self-inflicted wound that never completely healed.[45]

Given the poisoned atmosphere, Truman reasonably decided it was best not to promote a Chief Justice from inside the Court. He instead tapped Fred Vinson, an ardent New Dealer and poker buddy, who had had extensive government experience as a

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[43] Pritchett, Civil Liberties and the Vinson Court 2; Jackson Reminiscences 1086, 1903-94; Gerhart, America's Advocate chs. 14 and 16; Pusey, Charles Evans Hughes 801-02 and n. 12; James E. St. Clair and Linda C. Gugin, Chief Justice Fred M. Vinson of Kentucky: A Political Biography (Lexington, KY: University Press of Kentucky, 2002) 161. Truman disputed Hughes' recollection of their meeting about whom to appoint as Stone's successor, claiming that Hughes ultimately gave his blessing to Vinson. Pusey, Charles Evans Hughes 802 n.12.

[44] Newman, Hugo Black: A Biography 343.

[45] Rodell, Nine Men 297-98; McCune, Nine Young Men 164ff.; Newman, Hugo Black: A Biography ch. 23; Harper, Justice Rutledge and the Bright Constellation 310 ff.; Gerhart, America's Advocate ch. 15; Hockett, "Justice Robert H. Jackson" 269 ff.; Abraham, Justices and Presidents 236-37; Urofsky, Division and Discord 143-45; Simon, Independent Journey 12, 246; Rudko, Truman's Court 28-30, 67; Pritchett, Civil Liberties and the Vinson Court chs. 1, 12, 13; Rodell, Nine Men 299, 304-05; McCune, The Nine Young Men 260, 265, 267-68; Newman, Hugo Black: A Biography 344, 366; Fowler Harper, Justice Rutledge and the Bright Constellation 331; Abraham, Justices and Presidents 243-45; St. Clair and Gugin, Chief Justice Fred M. Vinson of Kentucky chs. 1-7 and pp. 156-62, 173-74., 283-84; Urofsky, Division and Discord 148, 151; Harry S. Truman, Memoirs vol. 2: Years of Trial and Hope (Garden City: Doubleday and Company, 1954) 489. According to Jackson, his relationship with Black actually improved after the episode. His full recollections are found in Jackson Reminiscences 1591-99.

According to St. Clair and Gugin, Truman warned Jackson to keep the matter private, but the Justice refused, adding that clearing the air at that point would keep the situation from tarring Vinson. St. Clair and Gugin, Chief Justice Fred M. Vinson of Kentucky 158.

Congressman, Secretary of the Treasury, and federal appeals court judge. The president hoped that his choice would act as a "peacemaker," but the kindhearted Kentuckian's inability to harness his brilliant but fractious colleagues was complicated by their sense that he was not up to the job intellectually.[46]

Vinson's tenure was marked by a more pro-government tilt and less sympathy toward individual rights, thanks to his performance and that of three other Truman appointees: Harold Burton (to replace Roberts) in 1945, and Tom Clark and Sherman Minton in 1949, when civil libertarians Murphy and Rutledge died suddenly within weeks of each other.[47] The Truman appointees were nowhere near as gifted intellectually as the Roosevelt holdovers, though Burton was extolled for his fairness and Clark grew in

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[47] Kluger, Simple Justice 245-46. James Jerome Bolner, in "Mr. Chief Justice Vinson: His Politics and His Constitutional Law" (diss., UVA, 1962), argued that Vinson, while unable to bridge the doctrinal divides, "succeeded admirably in ameliorating the sharp personality struggles which had injured the Supreme Court's prestige as an institution." Bolner, "Mr. Chief Justice Vinson" 1, 3, 347, 360-61. Given the kindness of Justice William O. Douglas to Vinson in his own memoirs, despite his lack of respect for Vinson's judicial ability and his own misanthropy, there may be something to Bolner's argument. Douglas, The Court Years 1939-1975 225-27; Simon, Independent Journey 246, 252.

For a relatively recent, book-length profile of Vinson, see James E. St. Clair and Linda Gugin's Chief Justice Fred M. Vinson of Kentucky. See also, Richard Kirkendall, "Fred M. Vinson," in Friedman and Israel, The Justices of the Supreme Court, 1789-1969 4:26; Francis A. Allen, "Chief Justice Vinson and the Theory of Constitutional Government: A Tentative Appraisal," Northwestern Law Review 49 (1954) 3; John P. Frank, "Fred Vinson and the Chief Justiceship," University of Chicago Law Review 21 (1954) 212. Bolner completed his dissertation before Vinson's papers became available to scholars, but did a rather admirable job with published sources and personal interviews, and his work contains insights still useful today.

[47] Schubert, The Constitutional Polity 108; Rudko, Truman's Court ch. 2 and pp. 56, 65, 91, 94-95, 113, 115, 130; Pritchett, Civil Liberties and the Vinson Court 19; Mary Frances Berry, Stability, Security, and Continuity: Mr. Justice Burton and his Decisionmaking in the Supreme Court 1945-1958 (Westport: Greenwood Press, 1978) 9, 11, 87; Rodell, Nine Men ch. 9, pp. 231; McCune, Nine Young Men 259; Newman, Hugo Black: A Biography 397-01; Harper, Justice Rutledge and the Bright Constellation 305 ff., p. 339; Abraham, Justices and Presidents 242-43, 245-50; St. Clair and Gugin, Chief Justice Fred M. Vinson 232, 287; Bolner, "Mr. Chief Justice Vinson" 343. Bolner suggested that Vinson's record on individual constitutional rights was better in cases involving "purely domestic situations" than those raising Cold War-related issues. Bolner, "Mr. Chief Justice Vinson" 345.

Sources on Minton include David M. Atkinson, "From New Deal Liberal to Supreme Court Conservative," Washington University Law Quarterly (1975) 361; Harry Wallace, "Mr. Justice Minton – Hoosier Justice on the Supreme Court," Indiana Law Journal 34 (1959) 145, 377.

stature over the course of his judicial career.[48] The divisiveness continued unabated, and indeed worsened, with unanimous decisions reaching an "unprecedented" low of 19%.[49]

Jackson, his Colleagues and Civil Rights: Supreme Court Voting Records

A Supreme Court voting record is an important, though incomplete, source of information about a justice's views. The following tables display the voting records of Jackson and each of his fourteen Court colleagues on civil rights cases during his judicial career. A decision was classified as involving civil rights if the published opinion indicated that a party to the case made a claim of discrimination against African Americans; if one or more justices felt that a party's identity as an African American was worthy of mention in his opinion on a case concerning the criminal justice system; or if a published order in a case without full opinion contained direct citations to other civil rights cases. Table 1 lists voting records for Jackson and each of his colleagues in a total of forty four civil rights decisions during the 1941-1953 terms. Tables 2 and 3 are limited to thirty six in which Jackson actually voted. Table 2 reflects seventeen votes on cases in which African Americans brought lawsuits alleging racial discrimination, while Table 3 lists nineteen implicating the rights of African Americans in criminal cases (in most, one or more African Americans had been accused of crimes; in others, African Americans were crime victims). Table 4 displays voting records in eight relevant cases in which Jackson did not participate.[50]

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[48] Abraham, Justices and Presidents 241-42, 245-49; Urofsky, Division and Discord 30, 151ff. Sources on Clark include Evan A. Young, Lone Star Justice: A Biography of Justice Tom C. Clark (Dallas, TX: Hendrick-Long, 1998).

[49] Dickson, ed., The Supreme Court in Conference 105; Pritchett, Civil Liberties and the Vinson Court 20-21.

[50] Unlike Pritchett, the eminent scholar of the Roosevelt and Vinson Courts, I have included unanimous as well as nonunanimous decisions. While Pritchett's methodology is excellent for isolating differences among Justices, a reliance on nonunamimous cases alone fails to demonstrate the magnitude of

1. Voting Records in Cases litigating the civil rights of African Americans, during Jackson's tenure on the Supreme Court[51]

(*=Justices are statistically tied)

Justice	***Rulings Favorable to African American Party***	***Rulings Unfavorable to African American Party***	***Did Not Participate***	**Voting Record**
Murphy*	25	0	0	*100%*
Byrnes*	3	0	0	*100%*
Warren*	2	0	0	*100%*
Rutledge	17 ½	1 ½	3	*92.1%*
Douglas	36 ½	5 ½	2	*86.9%*
Stone	9 ½	1 ½	0	*86.4%*
Black	37 ½	6 ½	0	*85.2%*
Frankfurter	34 2/3	9 1/3	0	*78.8%*
COURT	34 ½	9 ½	0	*78.4%*
Clark	14	4	1	*77.8%*
Burton	24	9	0	*72.7%*
Minton	12	6	1	*66.7%*
Reed	26 ½	13 ½	4	*66.3%*
Vinson	20	11	0	*64.5%*
Jackson	22	14	8	*61.1%*
Roberts	6	4	0	60%

disagreement – whether, for example, the Justices disagreed in 6 out of 7 cases, or 6 out of 70. Nor do nonunamimous cases alone necessarily reveal overall trends, if the Court has decided a large number of cases unanimously for or against a class of litigants. A major part of the story about the Court's civil rights decisions is contained in unanimous decisions, which are included in the charts.

[51] The cases included in this Table are listed in footnotes 52-54.

2. Voting Records in Civil Rights Lawsuits brought by African Americans, in which Jackson Participated[52]

(*= Justices are statistically tied)

Justice	***Ruling Favorable to Plaintiff***	***Ruling Unfavorable to Plaintiff***	***Did Not Participate***	***Voting Record***
Stone*	4	0	0	100%
Murphy*	6	0	0	100%
Rutledge*	6	0	0	100%
Warren*	2	0	0	100%
Black	15	2	0	88.2%
Douglas	14	2	1	87.5%
COURT*	14	3	0	82.4%
Frankfurter*	14	3	0	82.4%
Jackson*	14	3	0	82.4%
Clark	8	2	1	80%
Burton	10	3	0	76.9%
Reed	13	4	0	76.5%
Roberts	3	1	0	75%
Vinson	9	4	0	69.2%
Minton	6	4	1	60%

(Justice James Byrnes is not included in this chart, as he participated in none of the decisions recorded in it)

[52] The cases included in Table 2 are Smith v. Allwright, 321 U.S. 649 (1944); Steele v. Louisville & NR Co., 323 U.S. 192 (1944); Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, Ocean Lodge No. 76, 323 U.S. 210 (1944); Railway Mail Association v. Corsi, 326 U.S. 88 (1945); Sipuel v. Board of Regents of University of Oklahoma, 332 U.S. 631 (1948); Fisher v. Hurst, 333 U.S. 147 (1948); Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232 (1949); Henderson v. United States, 339 U.S. 816 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950); Board of Supervisors of Louisiana State University and Agricultural and Mechanical College v. Wilson, 340 U.S. 909 (1951); Briggs v. Elliott, 342 U.S. 350 (1952); Gray v. Board of Trustees of University of Tennessee, 342 U.S. 517 (1952); Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952); Terry v. Adams, 345 U.S. 461 (1953); Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483 (1954); and Bolling v. Sharpe, 346 U.S. 497 (1954).

3. Voting Records in Cases litigating rights of African Americans in the criminal justice system (including criminal defendants; convicts seeking federal habeas corpus relief; and African American victims of criminal civil rights violations), in which Jackson participated[53]

(* or # =Justices are statistically tied)
(Warren is not included in this chart, as he participated in none of the decisions recorded in it)

Justice	***Ruling Favorable to African American Defendant or Victim***	***Ruling Unfavorable to African American Defendant or Victim***	***Did Not Participate***	***Voting Record***
Murphy*	14	0	0	100%
Byrnes*	3	0	0	100%
Rutledge	9 ½**	1 ½	0	86.4%
Douglas	15 ½	2 ½	1	86.1%
Black	15 ½	3 ½	0	81.6%
Stone	5 ½	1 ½	0	78.6%
COURT	13 ½	5 ½	0	71.1%
Frankfurter*	12 2/3***	6 1/3	0	66.7%
Burton*	8	4	0	66.7%
Clark##	3	2	0	60%
Minton##	3	2	0	60%
Reed	10 ½	8 ½	0	55.3%
Roberts*	3	3	1	50%
Vinson*	6	6	0	50%
Jackson	8	11	0	42.1%

**The scores ending in halves reflect votes for three different results in Screws v. United States, 325 US 91, 65 SCt 1031 (1945). This chart credits Justice Murphy, who cast the lone vote in favor of affirming the criminal convictions for civil rights violations in that case, with one whole ruling favorable to the African American victim; Stone, Black, Reed, Douglas, and Rutledge, who each voted to overturn the conviction but remand for a new trial, with ½ ruling in favor of each side; and Roberts, Frankfurter and Jackson, who voted to dismiss the indictment, with one whole ruling adverse to the victim.

[53] The cases included in Table 3 are Taylor v. Georgia, 315 U.S. 25 (1942); Ward v. Texas, 316 U.S. 547 (1942); Hill v. Texas, 316 U.S. 400 (1942); Pollock v. Williams, 322 U.S. 4 (1944); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Akins v. Texas, 325 U.S. 398 (1945); Screws v. United States, 325 U.S. 91 (1945); State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); Patton v. Mississippi, 332 U.S. 463 (1948); Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948); Lee v. Mississippi, 332 U.S. 742 (1948); Brunson v. North Carolina, 333 U.S. 851 (1948); Haley v. Ohio, 332 U.S. 596 (1948); Moore v. New York, 333 U.S. 565 (1948); Cassell v. Texas, 339 U.S. 282 (1950); Shepherd v. Florida, 341 U.S. 50 (1951); Beauharnais v. Illinois, 343 U.S. 250 (1952); Sweeney v. Woodall, 344 U.S. 86 (1952); Brown v. Allen, 344 U.S. 443 (1953).

***The scores ending in thirds reflect Justice Frankfurter's split decision in Brown v. Allen, 344 US 443 (1953). Since Frankfurter voted to reverse the convictions under two of the three docket numbers consolidated in Brown, Justice Frankfurter has been credited with 2/3 ruling favorable to the African American defendants and 1/3 ruling unfavorable to the African American defendants.

4. Voting Records in Civil Rights Cases (civil and criminal) during Jackson's tenure, in which Jackson did not participate[54]

(* or #= Justices are statistically tied)

(Stone, Warren, Justices Roberts and Byrnes are not included in this chart, as they participated in none of the decisions recorded in it.)

Justice	***Ruling Favorable to African American Party or Victim***	***Ruling Unfavorable to African American Party or Victim***	***Did Not Participate***	***Voting Record***
Frankfurter*	8	0	0	100%
Murphy*	5	0	0	100%
Rutledge*	2	0	3	100%
Clark*	3	0	0	100%
Minton*	3	0	0	100%
Black#	7	1	0	87.5%
Douglas#	7	1	0	87.5%
COURT#	7	1	0	87.5%
Vinson	5	1	0	83.3%
Reed*	3	1	4	75%
Burton*	6	2	0	75%

As a whole, the voting records of the Court and of individual Justices tended to be favorable to African Americans' rights. The Court record (the way the Court actually decided the cases) in the seventeen antidiscrimination and antisegregation lawsuits listed

[54] The cases included in Table 4 are Morgan v. Virginia, 328 U.S. 373 (1946); Fisher v. United States, 328 U.S. 463 (1946); Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948); Trustees of the Monroe Avenue Church of Christ v. Perkins, 334 U.S. 813 (1948); Avery v. Georgia, 345 U.S. 559 (1953); District of Columbia v. John R. Thompson Co., Inc., 346 U.S. 100 (1953); Barrows v. Jackson, 346 U.S. 249 (1953). I excluded from this chart Yin Kim v. Superior Court, 334 U.S. 813 (1948), because the petitioner in this case was apparently Asian American, and not African American.

in Table 2 was fourteen to three, or a score of 82.4%, in favor of African Americans; only two justices fell below 75%, and no justice, below 60%. The Court record in cases in which Jackson did not participate (Table 4) was seven to one, or 87.5%, in favor of African American parties. African Americans tended to fare somewhat more poorly overall in criminal cases.[55] Nonetheless, the Court sided with them thirteen and a half out of nineteen times, or 71.1%. Pritchett noted that "the liberal record of the Vinson Court on racial discrimination cases stands out in sharp contrast to the generally antilibertarian trend of its decisions in other fields."[56]

Jackson's record was singularly mixed. At a scant 42.1%, his score in criminal cases was little more than half of his score in civil rights lawsuits, and was the only score below 50%, by any justice on any table. On Table 2, he matched the Court mean (and Frankfurter) of fourteen to three, or 82.4%. It was Jackson's record in criminal cases which pulled down his overall record to 61.1%, or second to last. By contrast, the other justices tend to have similar records on all tables on which they appear.[57] The wide

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[55]Although *habeas corpus* proceedings are technically civil, or non-criminal, in nature, their subject matter generally involves the constitutionality of a criminal prosecution. I have therefore included them in my discussion of criminal cases.

[56] Pritchett, Civil Liberties and the Vinson Court 145.

[57] Frank Murphy consistently scored at 100% on all four charts; his closest partner, Wiley Rutledge, attained either perfect scores or is ranked just below those who did. Not far behind (and generally immediately behind) were the other two justices in of the liberal vanguard, Hugo Black and William O. Douglas. Chief Justice Stone consistently scored above the Court record; Justices Roberts, Reed, Burton and Vinson consistently scored below. Justice Frankfurter, on all charts, either tied with the Court record, or was just one decision above or below it.

Other than Jackson's record, the only anomalies among Justices who appear in at least three tables are Justices Clark and Minton's perfect record in Table 4 (they appear below the Court record in the other 3), but their record in Table 4 (8-0) is only one decision above the Court record (7-1). Moreover, with only 8 total decisions, Table 4 is more likely to produce anomalies than the others, which have 44, 19 and 17 apiece.

Excluded from this discussion are Chief Justice Warren and Justice Byrnes, who appear in only two of the four charts, and whose small number of decisions (two for Warren, three for Byrnes) in unanimous cases indicate little about the careers of the most civil libertarian Chief Justice in American history and the future segregationist governor of South Carolina.

disparity in Jackson's record in criminal and non-criminal cases is by far the most significant anomaly in these charts.

It is possible that Jackson's record reflects a larger reality on the Court, for more disagreement on civil rights issues occurred in criminal cases. The fact that voting percentages were high in absolute terms for all justices in the civil rights lawsuits in Table 2 suggests the existence of many lopsided results -- unanimous decisions and lone or two-justice dissents. That is in fact what happened. Twelve of the seventeen decisions in Table 2 were unanimous; eleven of those twelve favored the African American plaintiff. Of the five nonunanimous decisions, three had lone dissenters, one had two, and one, three. Considering that thirteen of these seventeen cases were decided during the particularly fractious Vinson years, one might presume a fair amount of agreement among members of the Court on the general direction that civil rights law should take. By contrast, in criminal justice cases, only seven unanimous decisions emerged out of nineteen cases, with three six to three decisions; four five to four results; and one four, four, and one.[58]

The rankings of individual justices in these charts are, for the most part, consistent with other tabulations of their voting patterns in individual rights cases. Pritchett's tables show Murphy, Rutledge, Black, and Douglas consistently above the Court average (and usually in that order) in nonunanimous civil liberties cases, criminal cases and personal liberties cases, during the Roosevelt Court years. They are generally followed by Stone; then Frankfurter, Jackson, Reed and Roberts, in different orders in each category; and Burton and Vinson at the bottom. Frankfurter and Jackson straddled the Court voting

[58] In Screws v. United States, 325 US 91 (1945), four justices voted to reverse the conviction and remand the case for a new trial; four voted to dismiss the indictment; and one voted to affirm the conviction.

record in civil liberties cases during the Vinson Court years, with Frankfurter just above and Jackson just below. Above them were Murphy, Rutledge, Douglas and Black, while the four Truman appointees (Clark, Burton, and Minton/Vinson, in that order) followed, and Reed brought up the rear.[59]

A quantitative analysis of Supreme Court decisions is limited in what it can reveal about a Justice and his/her decisionmaking process. For one thing, each case is not of equal importance legally or otherwise. Moreover, as Pritchett pointed out, "votes were cast not in their personal but in their judicial capacity," and therefore may not reflect personal ambivalence about the law's direction. Furthermore, each vote was not necessarily a simple thumbs-up-or-thumbs-down decision on civil rights, but instead "represented their resolution of situations where many legitimate values may have been competing for attention."[60] Frequently, a judge's vote represented the resolution of a battle of values, and often, a very agonizing one. In such a situation, the final "box score" (to borrow Pritchett's phrase) obscures the competition's existence as well as its course. In Jackson's case, the voting record is only the tip of the iceberg.

Jackson, the Court and Racial Attitudes in Perspective

Despite the relative isolation inherent in their line of work, Supreme Court justices are real people who live in the real world, and therefore cannot help but mirror attitudes of the broader society.[61] One example of the interaction between the justices and popular culture on the issue of race appeared in a quick note Jackson sent to Chief Justice Stone in 1943. Trying to make light of a slight embarrassment – the Jacksons had to wiggle out of a social commitment to the Chief and his wife – the junior Associate

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[59] Pritchett, The Roosevelt Court 131, 141, 162, 254; Pritchett, Civil Liberties and the Vinson Court 190.
[60] Pritchett, Civil Liberties and the Vinson Court 191.
[61] In his oral history, Jackson called the position "isolated." Jackson Reminiscences 1097.

Justice prefaced the news with an allusion to the radio show "Amos 'n' Andy."[62] Over half of national radio listeners regularly tuned in at the height of its popularity. With its "genuinely witty dialogue" and success at "exploiting the comic possibilities inherent in the transition from rural to urban life," the series seems tailor-made for Jackson. Yet its lack of authenticity, and the stereotyping present in the radio version Jackson and his Chief would have enjoyed in the mid 1940s, combined with the "strong folk prejudices" and Southern "propaganda" also in the mainstream of American ideas, to reflect and reinforce racial bias.[63] Racial stereotyping in the media generates outrage among African Americans and many whites today, and it also raised some ire then; a national petition drive against "Amos 'n' Andy" in 1931 garnered close to three quarters of a million signatures, and complaints about its successor television series led to its cancellation in 1953, the year before the Brown decision.[64]

It is probably impossible to know the precise effect of the racial attitudes underlying "Amos 'n' Andy," or "Birth of a Nation" or "Gone with the Wind," on their audiences. But we do know that their worldview was part of a full gamut of racial attitudes swirling around Jackson, at close range as well as from afar. His sister, for example, used the term "darkie" in correspondence.[65] His associates included

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[62] Robert H. Jackson to Harlan Fiske Stone, March 19, 1943, Box 20, File: General Correspondence – Stone, Harlan Fiske, Robert H. Jackson Collection, Library of Congress.

[63] Joseph Boskin, Sambo: The Rise and Demise of an American Jester (New York: Oxford University Press, 1986) 202; Joseph Boskin, Rebellious Laughter: America's Humor in American Culture (Syracuse, NY: Syracuse University Press, 1997) 40; Drake and Cayton, Black Metropolis 266ff, 275; Barbara Dianne Savage, Broadcasting Freedom: Radio, War, and the Politics of Race, 1938-1948 (part of the John Hope Franklin series in African American History and Culture. Chapel Hill: University of North Carolina Press, 1999) 6-8; Kevern Verney, African Americans and US Popular Culture (London: Routledge, 2003) ch. 2 and p. 32.

[64] Verney, African Americans and US Popular Culture ch. 2; Savage, Broadcasting Freedom ch. 6; Joseph Boskin, Sambo: The Rise and Demise of an American Jester (New York: Oxford University Press, 1986) 204.

[65] Helen Adams to Robert Jackson, October 25, 1938, Box 1, Family Papers, Family Correspondence: Helen Adams, 1937-60, Robert H. Jackson Collection, Library of Congress 1.

Southerners like Judge John Parker, who as a federal appeals court judge would vote to maintain segregated schools in South Carolina; and Justice Byrnes, the future segregationist governor of South Carolina, whose "common sense viewpoint and … practical outlook" Jackson said he would miss, when Byrnes resigned from the Court.[66] The law clerks from his first decade on the Court produced a program for their dinner honoring his service, in which they described themselves as Jackson's "Slaves" and "Ex-Slaves."[67] Frank Murphy jousted with Jackson over Reconstruction historiography (with Murphy's interpretation being a generation ahead of its time); and Jackson's daughter-in-law described for him her "near apoplexy" at the segregation that was part of Southern social norms.[68]

Some of Jackson's thoughts relating to the concept of race in general – a subject which was not of primary interest to him -- were becoming outdated. By the 1940s, previous Americans' world view, in which ethnic groupings were classified as separate races, and with even many European nationalities considered alien and inferior, was becoming obsolete, with race seen by more people as a dichotomy of color, either white

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[66]Box 18, File: Personal Correspondence -- Parker, John J., Robert H. Jackson Collection, Library of Congress; John J. Parker to Robert H. Jackson, April 17, 1954, Box 236, File: Miscellaneous – Illnesses – 1954 Heart Attack – Get Well Messages and Replies, Robert H. Jackson Collection, Library of Congress; Robert H. Jackson to James F. Byrnes, October 5, 1942, Box 10, Personal Correspondence -- File: Byrnes, James F., Robert H. Jackson Collection, Library of Congress. Jackson's letter to Byrnes was more fulsome than one might expect of a letter of this type, unless the sender and receiver were on very good terms.

[67] "Our Boss," program, October 6, 1951 dinner commemorating the tenth anniversary of Jackson's appointment as an Associate Justice, Box 243, File: Miscellany – Programs and Souvenirs 1938-54, Robert H. Jackson Collection, Library of Congress.

[68] Robert H. Jackson to Francis Murphy, and Francis Murphy to Robert H. Jackson, undated notes, Box 17, General Correspondence, File: Frank Murphy, Robert H. Jackson Collection, Library of Congress; Nancy Roosevelt Jackson to Robert H. Jackson, August 15, 1947, Box 1, File: Family Papers/ Family Correspondence -- Nancy Roosevelt Jackson, 1947-48, Robert H. Jackson Collection, Library of Congress 2. Roosevelt Jackson's letter also recalled Jackson's characterization of Liberia as "the first nation that occurred to [him] that was founded to ease a troubled national conscience." Id.

and black, or white and non-white.[69] Yet Jackson still referred to French and German "races" in correspondence. His continuing interest in genealogy was evidenced by his habit of noting a person's ethnicity, and using it as a key to understanding that individual. Thus, to Jackson, his mother possessed the "placidity of [the] Dutch," and Earl Warren's "disposition to be friendly, without intimacy or invitation to intrusion, is thoroughly characteristic of his Scandinavian background."[70] Justice Jackson did not believe that ethnicity was destiny, at least as a legal matter; but in the early 1940s, events in Europe were making seemingly innocuous ethnic preoccupations like Jackson's less palatable.[71]

In the wider culture, racial tolerance became more prevalent as the 1940s unfolded and world affairs, along with domestic activism and new scholarship, set the scene for further change in race relations.[72] During wartime, the salutary effect of some "de facto integration" in the military complemented the anger and shame many white Americans felt at mistreatment of African American troops, in the war effort.[73] Gunnar

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[69]Matthew Frye Jacobson, Whiteness of a Different Color: European Immigrants and the Alchemy of Race (Cambridge, MA: Harvard University Press, 1998) chs. 3 and 8, pp. 258 ff.

[70] Robert H. Jackson, raw notes, Box 189, File: Autobiography Outline, notes and source material, Robert H. Jackson Collection, Library of Congress; Robert H. Jackson to Valentine Brookes, October 8, 1953, Box 31, File: Warren, Earl -- Appointment as Chief Justice, Robert H. Jackson Papers, Library of Congress; Robert H. Jackson to William Jackson, .July 30, 1939, Box 2, File: Family Papers – Family Correspondence – Jackson, William E., Robert H. Jackson Papers, Library of Congress 2.

[71] Edwards v. California, 314 U.S. 160, 185 (1941) (Jackson, J., concurring) (indigence "constitutionally an irrelevance, like race, creed, or color"); Korematsu v. United States, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting); Harrop A. Friedman, "Genesis, Exodus, and Leviticus: Genealogy, Evacuation, and Law," Cornell Law Quarterly 28 (1942-43) 414 and n.1.

[72] Gunnar Myrdal, An American Dilemma: The Negro Problem and American Democracy (1944; 50th Anniversary ed., New Brunswick, NJ: Transaction Publishers, 1996) 53, 117; Jacobson, Whiteness of a Different Color chs. 3 and 8, pp. 258 ff.; Guterl, The Color of Race in America 188-89.

[73] Thomas Borstelmann, The Cold War and the Color Line: American Race Relations in the Global Arena (Cambridge, MA: Harvard University Press, 2001) 4, 31 ff.; Mary L. Dudziak, Cold War Civil Rights: Race and the Image of American Democracy (Princeton: Princeton University Press, 2000) ch. 1; Lucille B. Milner, "Jim Crow in the Army," The New Republic March 13, 1944, reprinted in Reporting Civil Rights Part One: American Journalism 1941-1963 (New York: The Library of America. 2003) 52-60; David W. Southern, Gunnar Myrdal and Black-White Relations: The Use and Abuse of *An American Dilemma*, 1944-1969 (Baton Rouge: Louisiana State University Press, 1987) 51-52. According to John Hope Franklin and Alfred A. Moss, Jr., there was still "much discrimination in" the military in the Second World War (including an execution rate in the European theater more than 40 times that of whites), but the

Myrdal's An American Dilemma "helped to create a new racial liberalism that influenced political leaders, judges, civil rights activists, and thousands of educated white Americans"[74]: its portrayal of the "race problem" as "a moral lag in the development of the nation" left white Americans struggling with the hypocrisy of not living up to the American Creed when it came to millions of their fellow citizens.[75] Many of the book's ideas "filtered down to ordinary people through influential persons, agencies, and institutions."[76] During the Cold War, racial discrimination became a global embarrassment, as the United States competed with the Soviet Union for allies among peoples in Africa and Asia. By the late 1940s, bad press abroad and activism at home

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African American soldier was treated better than in previous wars. Franklin and Moss, From Slavery to Freedom (1994 ed.) 439-41, 445 ff (treatment of African American soldiers bad in the South); Walter A. Jackson, Gunnar Myrdal and America's Conscience: Social Engineering and Racial Liberalism, 1938-1987 (Chapel Hill: University of North Carolina Press, 1990) 240; Howard W. Odum, Race and Rumors of Race: The American South in the Early Forties (Chapel Hill: University of North Carolina Press, 1943; Baltimore: Johns Hopkins University Press, 1997) 177-78.

[74] Alan Brinkley, The End of Reform: New Deal Liberalism in Recession and War (New York: Alfred A. Knopf, 1995) 167-68; Jackson, Gunnar Myrdal and America's Conscience xi, ch. 7, 234-36, 319; "Call to Negro America 'To March on Washington for Jobs and Equal Participation in National Defense,'" The Black Worker May 1941, reprinted in Reporting Civil Rights Part One 1-4.

[75] Jackson, Gunnar Myrdal and America's Conscience ch. 5 (textual analysis), esp. pp. 186-91, and ch. 6 (public reaction); David W. Southern, Gunnar Myrdal and Black-White Relations 39, 55-56.

[76] David W. Southern, Gunnar Myrdal and Black-White Relations 101-09.

Redefining race relations was the goal of African Americans increasingly impatient with the racial status quo. Discrimination in defense industries and in the military was met by increasing numbers of Northern African Americans who had less to fear from challenging the racial status quo outside the brutal Jim Crow South. They voted; joined labor unions and voluntary organizations like the NAACP and the new Congress of Racial Equality; and supported the "Double V Campaign" against racism at home and abroad. William H. Harris, The Harder We Run: Black Workers Since the Civil War (New York: Oxford University Press, 1982) chs. 4 and 5; Franklin and Moss, From Slavery to Freedom (1994 ed.) 454-55; Gilbert Ware, William Hastie: Grace Under Pressure (New York: Oxford University Press, 1984) 106. According to a leading African American newspaper, "Where there was once tolerance and acceptance of a position believed to be gradually changing for the better, now the Negro is showing a 'democratic upsurge of rebellion,' bordering on open hostility." Roi Ottley, "Negro Morale," The New Republic (November 10, 1941), reprinted in Reporting Civil Rights Part One 5-6. See also Charles H. Loeb, "Our G.I.'s in S. Pacific Fiercely Resent 'Uncle Tom' Roles," New York Amsterdam News September 1, 1945, reprinted in Reporting Civil Rights Part One 71-72; Brinkley, The End of Reform 167-68; Jackson, Gunnar Myrdal and America's Conscience 234-36; "Call to Negro America 'To March on Washington for Jobs and Equal Participation in National Defense,'" 1-4; Roi Ottley, "Negro Morale," 7, 10.; Southern, Gunnar Myrdal and Black-White Relations 50-51; Franklin and Moss, From Slavery to Freedom 454-55.

convinced more American policymakers that defeating Jim Crow was the only way to defeat Soviet propaganda.[77]

One prominent agent of this policy shift provides a case study of how changing times change minds. A Missourian with slaveowning grandparents and a mother whose memories of Northern "'occupiers'" during the Civil War sparked a hatred of Northerners, the Union and Abraham Lincoln, Harry S. Truman was raised in an area "pervadingly southern" in its racial mores. He retained a habit, well documented by witnesses and surviving letters alike, of using racial epithets. Yet Truman the statesman and politician understood that discrimination was both morally wrong and politically unwise. His President's Committee on Civil Rights issued To Secure These Rights, a report calling for a permanent Fair Employment Practices Commission, anti-lynching legislation, and an end to the poll tax; the Fahy Commission recommended an end to segregation in the armed forces. Few of Truman's initiatives came to fruition during his administration (according to some, because of his failure to push for them assertively), but his policies "did bend patterns of thought and behavior and did confer tangible benefits."[78]

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[77] Borstelmann, The Cold War and the Color Line 75; Dudziak, Cold War Civil Rights pp. 6, 12, 28-47 and ch. 3; Donald R. McCoy and Richard T. Ruetten, Quest and Response: Minority Rights and the Truman Administration (Lawrence, KS: University Press of Kansas, 1973) 106, 113 Peter J. Kellogg, "Northern Liberals and Black America: A History of White Attitudes 1936-1952" (diss., Northwestern University, 1971) 119; Brenda Gayle Plummer, Introduction, Window on Freedom: Race, Civil Rights, and Foreign Affairs, 1945-1998 (Chapel Hill: University of North Carolina Press, 2003) 3; Paul Gordon Lauren, "Seen From the Outside: The International Perspective on America's Dilemma," Window on Freedom 21-43; Gerald Horne, "Race from Power: US Foreign Policy and the General Crisis of White Supremacy," Window on Freedom 54 ff.; Jackson, Gunnar Myrdal and America's Conscience 232.

[78] Leuchtenburg, The White House Looks South chs. 5-7; Jackson, Gunnar Myrdal and America's Conscience 113 ff., 275-76; McCoy and Ruetten, Quest and Response pp. vii, 18, 43-48, 86 ff., 198,313 and chs. 11, 12; David McCullough, Truman (New York: Simon & Schuster, 1992) 53-54, 586-90; Gardner, Harry Truman and Civil Rights chs. 1, 2, 4, 10; Robert H. Ferrell, Harry S. Truman: A Life (Columbia, MO: University of Missouri Press, 1994) 292-99. For a slightly less sympathetic view of Truman's civil rights record, see Alonzo L. Hamby, Beyond the New Deal: Harry S. Truman and American Liberalism (New York: Columbia University Press, 1973) 61-65, 188-90, 232-33, 243-44, 247, 313, 342-

Jackson evidenced at least a superficial understanding that racial discrimination violated the democratic values he regularly invoked throughout his career; as he put it in one opinion, race was "constitutionally an irrelevance."[79] Yet he also understood the fear and distrust many felt toward those who were different from themselves. The "other," the outsider, had always been looked at with skepticism, if not hostility, in insular farming communities like the one where Jackson was raised and whose values he internalized.[80] A poem written out in Jackson's hand expresses the power of this impulse:

> The Stranger within my gate
> He may be true and kind
> But he does not talk my talk --
> I cannot feel his mind.
> I see the face and the eye and the mouth
> But not the soul behind
>
> The man of my own stock
> They may do ill or well,
> But they tell the lies I am wonted to,
> They are used to the lies I tell;
> And we do not need interpretation
> When we go to buy and sell.
>
> The men of my own stock
> Bitter bad they may be,
> But at least they hear the things I hear
> And see the things I see;
> And whatever I think of these and their likes

46, 445-46; Robert A. Garson, The Democratic Party and the Politics of Sectionalism, 1941-1948 (Baton Rouge: Louisiana State University Press, 1974) pp. 136-37 and chs. 5-6.

[79] 314 U.S. at 185; 323 U.S. at 243; Robert H. Jackson, "The Judicial Career of Chief Justice Hughes," American Bar Association Journal 27 (July 1941) 409 (praised the former Chief Justice for, *inter alia*, his role as "a persistent opponent of various types of race discrimination"). Jackson's acerbic wit also touched this subject in private correspondence; see, for example, Robert H. Jackson to Philip Wickser, September 19, 1944, Box 21, File: Personal Correspondence -- Wickser, Philip J., Robert H. Jackson Collection, Library of Congress 1 (Black "was recently quoted in the American Mercury as saying that the organization that he regretted joining was not the Ku Klux Klan, but the American Bar Association.").

[80] See pp. 35-36.

They think of the likes of me.[81]

Jackson professed a belief in education as an antidote to insularity. In a letter to schoolchildren who had asked his counsel on how to foster international understanding, he observed that "Someone has said that it is hard to hate people whom we know. So," he advised, "I think it is really helpful to the peace of the world that you get to know all nationalities, races, and creeds, to understand their histories and backgrounds, and to understand their viewpoints."[82] Thus Jackson had internalized another basic tenet of Myrdal's – the power of education – but his life experience had taught him that a distrust of diversity could trump it.

Though the forces of racial equality were gaining strength as Jackson's Supreme Court career progressed, they were still no match for American racism. The National Opinion Research Center at the University of Denver found in 1944 – the year of An American Dilemma's publication -- that 52% of whites believed that whites should get a chance at any job before an African American (6% were undecided); only 46% believed that "'some restaurants in this town should serve both Negro and white people'"; 65% of Northern and Western whites, and 85% of white Southerners, "'would object to Negroes as neighbors.'" Sixty-five percent of whites agreed that "'If Negroes could get more kinds of jobs than they can now … they would want to go more places white people go'"; only one out of three thought that that was okay.[83] While a 1946 poll showed 50% of

[81] Untitled and undated poem, Box 57, Speeches and Writings File: Writings -- Poems, Robert H. Jackson Collection, Library of Congress.
[82] Robert H. Jackson to Youth of All Nations, April 27, 1944, Box, 21, File: General Correspondence -- Y-Z, Robert H. Jackson Collection, Library of Congress.
[83] Lawrence H. Fuchs, The American Kaleidoscope: Race, Ethnicity, and the Civic Culture (Hanover, NH: University Press of New England for Wesleyan University Press, 1990) 154, citing "Whites Look at Negroes and Negro Problems," Confidential Report, Copy No. 81 of the National Opinion Research Center, University of Denver, December 1944.

whites believing that blacks were just as intelligent as they were, only 7% of Southern whites and 19% of Northern whites believed that African Americans should have equal job opportunities.[84] North as well as South, "the overwhelming majority of people … were racists and thought little about black rights."[85]

For most Northerners, who encountered very few or no African Americans in their daily lives, the race question was distant and exotic. In the South, however, it was an everyday consideration. And there, the forces of tribalism were winning in the 1940s. Early in that decade, the attitudes of Southern whites toward race relations had experienced a "relative retrogression."[86] A young Arthur M. Schlesinger, Jr., traveling through the region as a government factfinder, noted the defense of lynching by those, he believed, "would have condemned it ten years before."[87] Even liberal white Southerners retreated behind their more traditionalist instincts,[88] blaming outsiders for stoking African American impatience with the rate of progress on race relations[89]; and, evoking the "'lessons of Reconstruction,'" insisting that the federal government not interfere with racial matters.[90] As one African American confirmed, "Some of these southern liberals

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[84] Southern, Gunnar Myrdal and Black-White Relations 102-03.
[85] Southern, Gunnar Myrdal and Black-White Relations 53.
[86] Howard W. Odum, Race and Rumors of Race: Challenge to American Crisis (Chapel Hill: Univeristy of North Carolina Press, 1943; Baltimore, MD: Johns Hopkins University Press, 1997) vii (introduction by Bryant Simon), 53-164; Frederickson, The Dixiecrat Revolt 30, 34-35; Kellogg, "Northern Liberals and Black America" 169ff., 175-76.
[87] Arthur M. Schlesinger, Jr., A Life in the Twentieth Century 272-74. See also Odum, Race and Rumors of Race (1997 ed.) 31 ("If it were not for the sex-caste foundation it might have been possible to make adjustments" in Southern race relations). Opinion polling suggested that even most Southerners favored anti-lynching legislation in the 1930s. Kellogg, "Northern Liberals and Black America" 48.
[88] Myrdal noticed an unmistakable pattern of white liberal accommodation to conservative southern norms during his travels. Gunnar Myrdal, An American Dilemma: The Negro Problem and American Democracy (50th anniv. ed. New Brunswick, NJ: Transaction Publishers, 1996) 470-71, quoted in Jackson, Gunnar Myrdal and America's Conscience 213-14, 218; Joel Williamson, The Crucible of Race: Black-White Relations in the American South Since Emancipation (New York: Oxford University Press, 1984) 485 ff.
[89] Odum, Race and Rumors of Race (1997 ed.) xxxiii-iv, 14-15, 32-33.
[90] Southern, Gunnar Myrdal and Black-White Relations 77-78. See also Morton Sosna, In Search of the Silent South: Southern Liberals and the Race Issue (New York: Columbia University Press, 1977) 198-211; Frederickson, The Dixiecrat Revolt 104.

used to want to accelerate Negro progress. Now it seems that all they want to do is put on the brakes."[91]

While Southern discrimination was legally sanctioned,[92] and was often more brutal, than other varieties, "'caste' existed in 'watered down form'" North and West as well.[93] Although white opinion leaders began seeing the need for "democratic rights" for African Americans, while many saw racial inclusion in their economic interest, or at least harbored "no strong feelings one way or the other,"[94] the gap between platitudes and action nationwide could be enormous.[95] According to a 1949 American Mercury article:

> The Negro is still pretty much a second-class citizen all over the country, and the whole concept of civil rights continues to be largely a dream to men and women who are colored. Much progress has been made in the past twenty-five years – and this progress has by no means been confined to the North. Nevertheless, conditions in the North are still … very far from ideal.[96]

Even Northern liberals, such as the New Dealers with whom Jackson associated (including Roosevelt himself), were slow to embrace civil rights. Part of this reluctance

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[91] Sterling A. Brown, "Out of Their Mouths," Survey Graphic November 1942, reprinted in Reporting Civil Rights Part One 27-28. Fears of disorder prompted one newspaper editor to "blame[] a 'small group of Negro agitators and another small group of white rabble-rousers' for creating a situation that might easily lead to race riots." Virginius Dabney, "Nearer and Nearer the Precipice," Atlantic Monthly (January 1943) 94-100, quoted in Jackson, Gunnar Myrdal and America's Conscience 239; see also Southern, Gunnar Myrdal and Black-White Relations 77-78ff.

As narrow as their reform agenda was, Southern liberals still were isolated and unorganized, and vulnerable to racist backlash. Williamson, The Crucible of Race 485ff; Hamby, Beyond the New Deal 291.

[92] Odum, Race and Rumors of Race (1996 ed.)39-40.

[93] Fuchs, American Kaleidoscope 101; Drake and Cayton, Black Metropolis ch. 3 and pp. 105-09, 111-12, 117.

[94] Drake and Cayton, Black Metropolis 263.

[95] Drake and Cayton, Black Metropolis 266.

[96] Specifics include a poll in which two-fifths of African Americans surveyed in New York -- its "civil-rights laws … cosmopolitanism [and] reputation for being liberal" notwithstanding --reported having suffered from job discrimination. African Americans found their children tracked into vocational programs at school; found themselves relegated to lower-paying, low-prestige jobs; and were frequently excluded from civic organizations, public accommodations and amusements. Most of the states with laws banning interracial marriage – 16 out of 29 – were outside the South. African Americans could not even vacation at most resorts in New England, the birthplace of abolitionism. George S. Schuyler, "Jim Crow in the North," The American Mercury, June 1949, reprinted in Reporting Civil Rights Part One 112, 120; Williamson, The Crucible of Race 483; Fuchs, The American Kaleidoscope 100, 102-09; Drake and Cayton, Black Metropolis chs. 6-7.

might be attributed to the socioeconomic determinism fashionable at the time, and which carried over into Jackson's thinking from his New Deal days.[97] Moreover, white liberals' "atrocity orientation" led them to concentrate on, for example, lynchings, and avoid more systemic problems like white supremacy, discrimination and poverty.[98]

Yet the most significant aspect of northern racial discrimination may have been its "accommodation with the South on the race question," a late nineteenth century concession that, even in the 1940s, "still included the myth of letting the 'best whites' of the South take care of blacks." Hence, even as African Americans became part of the Democratic Party's electoral base, Jackson's beloved former boss, FDR, "chose primarily white southerners … for his racial advisers"; the New York Times selected two white Southerners to review An American Dilemma; and The New Republic and The Nation summoned white Southern liberals to discuss racial issues.[99] As World War II brought home the realization that racism had to be confronted, many Northern liberals called for educating whites and for patience on the part of African Americans.[100] It was not until late in the war that liberal journals began favoring an end to segregation, and not consistently until after war's end. Even then they were still lacking in focus, in a

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[97] For Jackson's New Deal writings, see Chapter 3, pp. 16-24. One indication of how these views carried over into Jackson's Supreme Court career, is his review of Georgia lawyer Arthur Gray Powell's memoir I Can Go Home Again. Some of its comments on Southern society seem based on the assumption that economic class took precedence over race. Jackson emphasized the memoirist's focus on "a middle-class South, little known to literature," as opposed to "the rare and spacious and elegant plantation life," and "the penniless and squalid life of the poor black and the equally necessitous poor white." Jackson Review 136. Yet even if poor blacks and poor whites were "equally necessitous," it would be the rare Southerner who would not take strong exception to Jackson's suggestion that poor Southerners of both races were equals. For a general discussion of how race divided the Southern working class and poor, see C. Vann Woodward, Origins of the New South 1877-1913 (Baton Rouge: Louisiana State University Press, 1951; Baton Rouge: Louisiana State University Press and Littlefield Fund for Southern History, University of Texas, 1971) chs. 10-14; W.J. Cash, The Mind of the South (New York: Alfred A. Knopf, 1941).

[98] Southern, Gunnar Myrdal and Black-White Relations 77; Kellogg, "Northern Liberals and Black America" vi-vii, ch. 1, 109ff., 120, 122.

[99] Southern, Gunnar Myrdal and Black-White Relations 77; Williamson, The Crucible of Race 339-40; Kellogg, "Northern Liberals and Black America" 12, 101 ff.

[100] Kellogg, "Northern Liberals and Black America" 124-29, 143-48.

comprehensive view of the problems faced by African Americans, and in confidence that real solutions were possible.[101]

Jackson himself reflected this sense of well-meaning Northern disengagement from Southern racial problems in his 1944 review of the Georgia lawyer's memoir: the Justice saluted the author for possessing the kind of white Southern "good will without which no progress is possible,"[102] but the memoir more powerfully demonstrated how little white Southern goodwill there was. [103] It seems surprising today that Jackson missed the import of the memoirist's comments on race. A blind spot might be attributable to several factors. First, he may simply not have much noticed the book's racial dynamics in the glow of its rural nostalgia, which rekindled powerful memories of his own childhood. The strength of Jackson's preoccupation with his own past is palpable in the text of his review, as well as in the autobiography he was drafting at the same time.[104] Also influential was his acceptance of the prevailing views of post-

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[101] Kellogg, "Northern Liberals and Black America" 204-14, 343 ff.

[102] Jackson Review 138.

[103] Evidence of white Southern goodwill was very thin, and confined to a small number of anecdotes. Powell, I Can Go Home Again 41, 45. Yet the typical racial epithets and stereotypes abounded, as did the feudalistic view of master-servant relations. Powell, I Can Go Home Again 15, 44, 51-52, 119, 172, 178, 212-14. Powell justified police murder of African American criminal suspects, Powell, I Can Go Home Again 234, 253-54; refused to stand for African American "insolence," Powell, I Can Go Home Again 231; and intimated that African Americans were a separate, subhuman species, with descriptions reminiscent of minstrel show stereotypes. Powell, I Can Go Home Again 233-34. For a discussion of minstrel show stereotypes, see Robert C. Toll, Blacking Up: The Minstrel Show in Nineteenth-Century America (New York: Oxford University Press, 1974) 134-274.

Powell argued that there was no "'Negro problem'" in Southwest Georgia, only "a form of affection" that "involves an inborn spirit of noblesse oblige on the part of the whites and the frank acceptance of the status on the part of the blacks. In many respects the mind and conduct of the ordinary negro are the mind and conduct of a child. He needs and expects from the white man understanding and protection, especially against himself." Powell, I Can Go Home Again 233. While Powell conceded that "The Southern Negro has made much advancement in intelligence, in orals, in education, and in culture," and that "No right-minded Southerner begrudges this progress," he warned that "equalities" would come in the future, "as he merits them"; and that "social segregation is a very different matter." Powell, I Can Go Home Again 231, 235.

[104] Jackson's nostalgia clearly outstripped the memoirist's. Powell described his tale as one of "progress," a chronicle of the town's "rise from primitive conditions to a state of prosperity and culture." Powell, I Can Go Home Again 4, 5, 61, 121, 256. By contrast, Jackson lovingly catalogued in his 4-page review his

Reconstruction sectional reunion still current in the "Gone with the Wind"-era popular culture.[105] The post-Civil War generations, according to Jackson, witnessed a victimized South "slowly rising to its feet after the devastations of war and the corruptions of a peace of which no Northerner is now proud."[106] Jackson's sense of economic determinism made him focus more on poverty than on race. And, as Jackson's discussion of the Leo Frank case demonstrated, his wariness of social activists – including, and perhaps especially, those who sought to change the South's balance of racial power -- remained as strong as ever.[107] Much of Jackson's standoffishness also undoubtedly lay in his acquiescence in Powell's insistence that Southerners be left alone to "work out our situation satisfactorily to all of us."[108]

Jackson would not have been alone in his misperceptions. With the accommodationist mindset in place, even firsthand experience could confound Northern liberals. Schlesinger, for example, attributed "the passionate conviction on the part of many [white] southerners that terrorism and repression are the only policies open to them" to "growing black defiance" of the old system. His bleak conclusion about the prospect for improved race relations in the South (which, he admitted years later, "contained statements I would soon renounce"), evidenced the influence of Southern whites' prejudice on their Northern counterparts:

> The tragedy of the situation is that no improvement would be made by giving more power to the Negro. The southern Negro would abuse power even more than the reactionary southern white. The northerner is excluded… The only hope in the situation lies in activity by the southern liberals, and this hope is scant. It is

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reminiscences of everyday life in early twentieth-century rural America. To confirm the triumph of nostalgia over experience, Jackson's trip down memory lane included at least one stop of little importance in his less-than-devout family: the church's central role in moral and social life. Jackson Review 136.

[105] Blight, Race and Reunion 2ff, 397.

[106] Jackson Review 138.

[107] Jackson Review 137-38.

[108] Arthur G. Powell, I Can Go Home Again 235.

> very difficult in the war situation to see any steps which might be taken without antagonizing either the conservative whites or the radical Negroes. The situation just looks bad.[109]

Years later, the historian recalled that he "would soon renounce" some of these thoughts; even when he wrote them, he confided to his father that African Americans "could not be worse treated by Hitler than they are by Southerners today."[110] Yet this Northern liberal's dim view of Southern African Americans, his belief that only white Southerners could rescue them, his dismay at the antagonism between "conservative whites" and "radical Negroes," and the seeming hopelessness of the situation – all of which are similar to ideas expressed by Jackson in his 1944 review and in other writings about civil rights – demonstrate how widespread these beliefs were in the 1940s. Like Schlesinger's letter home, Jackson's review acknowledged African American mistreatment at the hands of white Southerners; insisted that both sides shared the blame for the state of race relations there; sensed that the race issue would be difficult to resolve; and held that the solution would require "the good will" of whites.

The "enthusiastic welcome" that non-Southerners gave to To Secure These Rights was just one indication that "the idea of racial equality came of age in the 1940s."[111] So were the increasing number of professional organizations barring racial discrimination.[112] Yet progress on one front could lead to regression on another. Growing sympathy with the civil rights agenda alienated Northern liberals and white Southerners, especially conservatives,[113] while in the South conservatives balked and liberals retrenched.[114] And

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[109] Arthur M. Schlesinger, Jr., A Life in the Twentieth Century 274.
[110] Schlesinger, A Life in the Twentieth Century 274.
[111] Southern, Gunnar Myrdal and Black-White Relations 113 ff, 124.
[112] McCoy and Ruetten, Quest and Response 162 ff.
[113] Kellogg, "Northern Liberals and Black America" 94, 221, 231, 246, 249.
[114] Kellogg, "Northern Liberals and Black America" 252, 262ff, 278-79, ch. V.

the seeming intractability of the problem could drive those who tried to accommodate both sides, like Jackson, to mental paralysis.[115]

Jackson and World War II

Jackson's legacy to the field of racial justice was most prominent in two episodes arising out of World War II: his dissent in the Japanese internment case Korematsu v. United States, and his prosecution of the Nazi leadership at Nuremberg. Both involved ethnic minorities other than African Americans, but each implicated themes and conflicts he confronted – and drew upon -- in deciding civil rights cases.

Japanese Internment

The American government's most drastic act of domestic racism in the twentieth century was directed at persons of Japanese ancestry living on the West Coast in 1942. Fear of a West Coast invasion after the surprise Japanese attack on Pearl Harbor, added to decades of racial animosity and economic rivalry, motivated the military to imprison over 110,000 persons of Japanese ancestry – including some 70,000 United States citizens – in isolated internment camps for over two years. The imprisonment of loyal Americans because of their ethnic background – something to which very few German Americans and Italian Americans were subjected -- cast a pall on American claims of moral superiority to the Axis powers, and demonstrated that white supremacy was not a Southern idiosyncrasy.[116] Some contemporary observers linked racism against Japanese Americans with that against other groups, including African Americans.[117]

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[115] For a more complete picture of Jackson's indecision, see Chapters 8 and 9. See also Jackson Reminiscences 1103 ("almost nothing that comes [to the Court] is one-sided. It's hard to make up your mind which is right.").

[116] Standard works covering the World War II internment of Japanese Americans and the generations of racist policies culminating in that sorry episode include Milton R. Konvitz, The Alien and the Asiatic in American Law (Ithaca, NY: Cornell University Press, 1946); Morton Grodzins, Americans Betrayed: Politics and the Japanese Exclusion (Chicago: University of Chicago Press, 1949); Jacobus ten Broek,

The Supreme Court heard four legal challenges to the government's World War II policies on Japanese Americans. In the first two, decided in June 1943, the Court unanimously upheld criminal convictions for violating the nighttime curfew imposed on all persons of Japanese ancestry living on the West Coast.[118] The latter two were decided in December 1944. The Court upheld Fred Korematsu's conviction for remaining in California, despite an evacuation order, by a 6-3 decision; Jackson, Roberts and Murphy dissented in separate opinions. In the other, a unanimous Court ordered Mitsuye Endo freed, in light of the government's admission that it had uncovered no proof that she had been disloyal.[119]

Edward N. Barnhart and Floyd W. Matson, Prejudice, War and the Constitution (1954; Berkeley: University of California Press, 1968), esp. pp. 274, 291-92, 325-34; Roger Daniels, The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion (Berkeley: University of California Press, 1962; New York: Atheneum, 1970); Roger Daniels, Concentration Camps, USA: Japanese Americans and World War II (New York: Holt, Rinehart and Winston, 1971; Malabar, FL: Krieger, 1993), esp. pp. vi-vii; Michi Weglyn, Years of Infamy: The Untold Story of America's Concentration Camps (New York: William Morrow, 1976); Personal Justice Denied, Report of the Commission on Wartime Relocation and Internment of Civilians (Washington, DC: U.S. Government Printing Office, 1982), esp. pp. 2-16, 86-92, 236-39; Peter Irons, Justice at War (New York: Oxford University Press, 1983); Greg Robinson, By Order of the President: FDR and the Internment of Japanese Americans (Cambridge, MA: Harvard University Press, 2001). Law review articles on the subject are legion. Leading articles from the 1940s tended to be more supportive of the military decision in the war's early years than toward war's end. Charles Fairman, "The Law of Martial Rule and the National Emergency," Harvard Law Review 55 (June 1942) 1253-1302; Joel F. Watson, "The Japanese Evacuation and Litigation Arising Therefrom," Oregon Law Review 22 (1942) 46-59; Maurice Alexandre, "The Nisei – A Casualty of World War II," Cornell Law Quarterly 28 (June 1943) 385-413; Freeman, "Genesis, Exodus, and Leviticus," 414-58; W.A. Graham, "Martial Law in California," California Law Review 31 (1942-43) 6-15; Richard F. Wolfson, "Legal Doctrine, War Power, and Japanese Evacuation," Kentucky Law Journal 32 (May 1944) 328-342; Nanette Dembitz, "Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions," Columbia Law Review 45 (1945) 175-239; Eugene V. Rostow, "The Japanese American Cases – A Disaster," Yale Law Journal 54 (June 1945) 489-533; Sidney Fine, "Mr. Justice Murphy and the Hirabayashi Case," Pacific Historical Review 33 (1964) 195-209.

[117] Grodzins, Americans Betrayed 162-64 and ch. 3; Carey McWilliams, Prejudice; Japanese-Americans: Symbol of Racial Intolerance (Boston: Little, Brown 1944) 12-13.

[118] Yasui v. United States, 320 U.S. 115 (1943); Hirabayashi v. United States, 320 U.S. 81 (1943). Yasui's case was sent back to the district court for resentencing, based on the Court's finding that the trial court improperly gave Yasui the maximum sentence, on the erroneous ground that his course of conduct in fighting the curfew amounted to a renunciation of his American citizenship. 320 U.S. at 117. In a July 14, 1943 decision, the trial judge ordered stricken his earlier finding and promised to reduce the sentence because, in light of the improved strategic position of the United States by that time, "the offense appears minor in character." United States v. Yasui, 51 F. Supp. 234, 235 (D. Oregon 1943).

[119] Korematsu v. United States, 323 U.S. 214 (1944); Ex Parte Endo, 323 U.S. 283 (1944).

Jackson wrote more extensively in these cases than his Korematsu dissent indicates; in addition to all of the Korematsu drafts, he prepared numerous versions of a Hirabayashi opinion – first a dissent, and then a concurrence -- and started to write a concurring opinion for Endo, though he ultimately filed no opinion in either case.[120] The cases disturbed him deeply; his observations on the clash between national security and racial justice, and military and judicial power, were complex.

The justice consistently characterized ancestry as an accident of birth which should not diminish legal rights. As he wrote in Hirabayashi, "To classify citizens according to their ancestry for frankly unequal standing before the law" was "difficult to reconcile with either our constitutional traditions or our professions."[121] And in Korematsu, he observed:

> if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. … But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should enact such a criminal law, I should suppose this Court would refuse to enforce it.[122]

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[120] For a comprehensive discussion of Jackson's writings in the Japanese internment cases, see Dennis J. Hutchinson, "'The Achilles Heel' of the Constitution: Justice Jackson and the Japanese Exclusion Cases," Supreme Court Review (2002) 455.

[121] Robert H. Jackson, draft concurring opinion, May 22, 1943, Box 128 – File: Supreme Court -- October Term 1942 – Cases -- No. 870, Hirabayashi v. United States, Robert H. Jackson Collection, Library of Congress 1-2; Robert H. Jackson, draft concurring opinion, June 3, 1943, Box 128 – File: Supreme Court -- October Term 1942 – Cases -- No. 870, Hirabayashi v. United States, Robert H. Jackson Collection, Library of Congress 1-2; Robert H. Jackson, draft concurring opinion, June 4, 1943, Box 128 – File: Supreme Court -- October Term 1942 – Cases -- No. 870, Hirabayashi v. United States, Robert H. Jackson Collection, Library of Congress 1; Robert H. Jackson, draft dissenting opinion, November 13, 1944, Box 132 – File: Supreme Court -- October Term 1944 – Cases -- No. 22, Korematsu v. United States, Robert H. Jackson Collection, Library of Congress 1-3.

[122] Jackson, draft dissenting opinion, November 13, 1944, Korematsu v. United States 3-4; Robert H. Jackson, draft dissenting opinion, November 30, 1944, Box 132 – File: Supreme Court -- October Term 1944 – Cases -- No. 22, Korematsu v. United States, Robert H. Jackson Collection, Library of Congress 4; Korematsu v. United States, 323 U.S. 214, 243-44 (1944).

He was particularly disturbed by the fact that a citizen "convicted of treason but out on parole" would himself not be subject to the mistreatment afforded to innocent Japanese Americans.[123] These concerns comported with Jackson's lifelong belief in individual agency.[124] Directing discrimination at only one of the enemy nationalities made the curfew particularly troubling: "The same conduct at the same time and place would not be criminal if their parents were of any other national origin – even German or Italian."[125] He even seemed to sense plasticity in the concept of ethnicity when he recognized that that the country's diversity made it impossible to identify particular backgrounds with being American. Hence, he observed that "The same conduct would not be criminal if their parents were 'American – whatever that is ….'"[126]

Yet in the face of total war and possible invasion, Jackson felt uncomfortable testing his beliefs. While Hirabayashi and Yasui were pending, he indicated agreement with the conventional wisdom that "Regardless of the attachment of many Japanese individuals to this country, it would fly in the face of common sense to doubt that this group as a whole contained a greater proportion of enemy sympathizers than other racial groups." He feared that, for some Japanese Americans at least, consanguinity (of family if not ethnicity) would inevitably trump national identification or citizenship in determining loyalty "in a war to which Japan has tried to give the aspect of a racial

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[123] 323 U.S. at 243.
[124] Ray, "A Law Clerk and His Justice" 545, quoting Gerhart, America's Advocate 62 and fn; see also Frankfurter, "Forward" 436; Kurland, "Robert H. Jackson" 2543 (Jackson "an individualist in a collectivist world").
[125] Robert H. Jackson, draft concurring opinion, May 21, 1943, Box 128 – File: Supreme Court -- October Term 1942 – Cases -- No. 870, Hirabayashi v. United States, Robert H. Jackson Collection, Library of Congress 2; Jackson, draft concurring opinion, May 22, 1943, Hirabayashi v. United States 1.
[126] Jackson, draft concurring opinion, May 21, 1943, Hirabayashi v. United States 2; Jackson, draft concurring opinion, May 22, 1943, Hirabayashi v. United States, 1.

war."[127] His skepticism that traitors could be rooted out with individual hearings went well beyond the practicality of affording hearings to all persons subject to curfew,[128] for such a hearing "really was a prophecy."[129] Using Yasui as an example, Jackson wrote:

> Before us is an American-born Japanese, of blameless record, a conventionally respectable Boy Scout and Methodist, a lawyer and college man. His friends testify to every confidence in him. He worked for the Japanese consulate until the day of Pearl Harbor, he immediately resigned and gave out statements of loyalty and readiness to serve this country. Here is either the ideal citizen or an ideal enemy agent, there is not a way in the world to know which until events give the answer.[130]

In 1942, for all of his protestations, Jackson was not ready to dismiss the implications of ethnic background potentially determining loyalty: "However inadequate may be the mere fact that petitioner is of one blood and stock with the enemy, we cannot say that a defense measure based on it was unsupported by reason."[131]

By the time of Korematsu and Endo, however, Jackson began to ask, "How do we know that these orders have a reasonable basis in necessity instead of race prejudice?"[132] He acknowledged "widespread" disapproval of internment and approvingly discussed an amicus brief by the Japanese American Citizens League that "points out omissions and

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[127] Jackson, draft concurring opinion, May 21, 1943, Hirabayashi v. United States, 5; Jackson, draft concurring opinion, May 22, 1943, Hirabayashi v. United States 6. In later drafts, Jackson omitted some of the specifics regarding consanguinity, but restated a larger point – that consanguinity between Japanese Americans and the enemy "was an imponderable influence toward disloyalty." Jackson, draft concurring opinion, June 1, 1943, Hirabayashi v. United States 10-11.

[128] 320 U.S. at 105-09.

[129] Jackson, draft concurring opinion, May 21, 1943, Hirabayashi v. United States 6; Jackson, draft concurring opinion, May 22, 1943, Hirabayashi v. United States 6-7; Jackson, draft concurring opinion, June 1, 1943, Hirabayashi v. United States 11-12.

[130] Jackson, draft concurring opinion, May 21, 1943, Hirabayashi v. United States 6-7; Jackson, draft concurring opinion, May 22, 1943, Hirabayashi v. United States 7. This specific barb was omitted from later drafts, though the general point – "They may be ideal citizens; they would be ideal enemy agents" – remained. Jackson, draft concurring opinion, June 1, 1943, Hirabayashi v. United States 12.

[131] Jackson, draft concurring opinion, May 21, 1943, Hirabayashi v. United States 7; Jackson, draft concurring opinion, May 22, 1943, Hirabayashi v. United States 7-8.

[132] Jackson, draft dissenting opinion, November 13, 1944, Korematsu v. United States 9. He deleted the reference to "race prejudice" in the next draft. Id. (marked-up copy); Jackson, draft dissenting opinion, November 30, 1944, Korematsu v. United States 9.

defects in the DeWitt report which if credited leave it far from a convincing document." He discounted General's defense of his decision, as the commanding officer in charge of the West Coast, to intern Japanese Americans as "unsworn, self-serving [and] untested by any cross-examination," by "one interested in vindicating his own fairness."[133]

Yet in both Hirabayashi and Korematsu, the Justice doubted the Court's power to review military orders. The underlying justifications for judicial self-restraint seemed to be most applicable to military decisions – an area in which the Court has the least competence, and in which the country might face the direst consequences if the Court unduly restricted the government:

> In the very nature of things military decisions are not susceptible of intelligent judicial appraisal. Of course, necessity always will be asserted to be the basis for any such order. A court can give that claim either no examination or a sham examination. Courts can hardly ask military commanders and staffs to leave the conduct of the war to testify. But if they could be summoned, their decisions are peculiarly executive in character. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Even if in rare cases the whole story could be had, judges rarely have the technical background to weigh the reasonableness of a military judgment. Hence courts have no real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint. That is just what the Court is doing here.[134]

Aside from the impossibility of adequate review, "It would be impracticable idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality":

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[133] Jackson, draft dissenting opinion, November 13, 1944, Korematsu v. United States 9; Jackson, draft dissenting opinion, November 30, 1944, Korematsu v. United States 9-10; 323 U.S. at 245.

[134] Jackson, draft dissenting opinion, November 13, 1944, 8-9; Jackson, draft dissenting opinion, November 30, 1944, Korematsu v. United States 9; Jackson, draft concurring opinion, May 21, 1943, Hirabayashi v. United States 3; Jackson, draft concurring opinion, May 22, 1943, Hirabayashi v. United States 3; 323 U.S. at 245.

> When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a whole society, not merely our Constitution. If our society is not overrun, the people can take care of the Constitution. If it be overrun, all is lost.

Reflecting on historical precedent, most prominently Lincoln's disregard of Chief Justice Taney grant of *habeas corpus* relief during the Civil War, Jackson concluded that wartime leaders needed wide leverage to wage war, even when their decisions might – temporarily -- impede the normal observance of constitutional rights.[135]

He feared misuse of the war power, but concluded that, in wartime, the only checks on it were "a Commander in Chief devoted to a political system in which authority is controlled by law, and whose ultimate aim was to preserve free institutions," and the military's responsiveness "to the political judgements of their contemporaries and to the moral judgments of history."[136] The Japanese internment cases provided perhaps the most extreme statement of Jackson's belief that individual freedom could be saved only in the political process.[137]

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[135] Jackson, draft dissenting opinion, November 13, 1944, Korematsu v. United States 6-7; Jackson, draft dissenting opinion, November 30, 1944, Korematsu v. United States 6-7. See also Jackson, draft concurring opinion, May 22, 1943, Hirabayashi v. United States 4-5.

[136] Jackson, draft dissenting opinion, November 13, 1944, Korematsu v. United States 14; 323 U.S. at 248. For a similar formulation, see Jackson, draft concurring opinion, May 21, 1943, Hirabayashi v. United States 9; Jackson, draft concurring opinion, May 22, 1943, Hirabayashi v. United States 9; Jackson, draft concurring opinion, June 3, 1943, Hirabayashi v. United States 9.

That is not to say that Jackson believed that the Court had no power to question the application of the war power "when it is shown to be invoked in clear bad faith, or as a pretext for effecting internal policies, or resort to it upon judgment so wild as to lack all rational foundation." He instead took issue with reviewing "specific orders made in its exercise" when it was "properly invoked in dealing with foreign wars." Jackson, draft concurring opinion, June 4, 1943, Hirabayashi v. United States 3.

[137] As he wrote in the Steel Seizure Cases: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations." Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579, 655 (Jackson, J., concurring), cited in Hutchinson, "The 'Achilles Heel' of the Constitution" 494.

Yet Jackson also believed that, even if the courts were powerless to prevent wartime "excesses," it was too dangerous to sanction them,[138] for finding such measures constitutional would make them precedents for future racial discrimination. He described the slippery slope as follows:

> A military order, however unconstitutional, does not last longer than the military emergency…. But once a judicial opinion … rationalizes the Constitution to show how the Constitution sanctions such an order, the Court has validated racial discrimination and transplanting of American citizens as practices permissible by American constitutional law when plausible claim of need can be brought forward.

Once the precedent is issued,

> The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thanking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic." A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident is incorporated into the body of the law as a principle. There it has a generative power of its own, and all that it creates will be in its own image.[139]

Thus, while the courts could not change wartime policy, they should refuse to become an "instrument of enforcing a policy which is outside of ordinary constitutional limitations,"[140] by finding that "the principle of crime based upon ancestry is one which

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[138] Jackson, draft concurring opinion, June 1, 1943, Hirabayashi v. United States 13-14; Jackson, draft concurring opinion, June 3, 1943, Hirabayashi v. United States 8.

[139] Jackson, draft dissenting opinion, November 13, 1944, Korematsu v. United States 11-12; Jackson, draft dissenting opinion, November 30, 1944, Korematsu v. United States 11-12; 323 U.S. at 245-46.

[140] Jackson, draft dissenting opinion, November 13, 1944, Korematsu v. United States 13; Jackson, draft dissenting opinion, November 30, 1944, Korematsu v. United States 13; 323 U.S. at 247.

The Korematsu majority's reliance on Hirabayashi's approval of the curfew as authority for sanctioning internment – despite the insistence in Hirabayashi that its ruling should not imply approval of a greater intrusion -- demonstrated for Jackson how decisions take on lives of their own: "Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. And the precedent which it is said requires us to do so is Hirabayashi. The Court is now saying that in Hirabayashi we did decide the very things we there said we were not deciding." 323 U.S. at 247. Jackson, draft dissenting opinion, November 13, 1944, Korematsu v. United

cannot outlast the emergency, cannot be applied where an emergency does not exist, nor can it be received as a principle of American constitutional law."[141]

Jackson's suggestion that the military should have its way during wartime did not favorably impress most commentators, for whom this part of Jackson's dissent overshadowed the rest of his analysis.[142] That the Court could simply stand aside as Constitutional rights were at risk struck one commentator as having "left the impression of someone voting 'present' on a monumental aye nay issue." But Jackson viewed what was, to him, the only other practical option in wartime – enshrining racial prejudice in the

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States 12-13; Jackson, draft dissenting opinion, November 30, 1944, Korematsu v. United States 12-13; 323 U.S. at 247. As Jackson declared in conference, "I stop with Hirabayashi … and no further." Dickson, ed., The Supreme Court in Conference 690; Irons, Justice at War 322.

This was a danger that Jackson had foreseen from the beginning. In the first paragraph of an early Hirabayashi draft, he presented the court's institutional dilemma as follows:

> When this Court judges an incident it makes a precedent, and a precedent may introduce a new principle into the law of the Constitution. Executive or military power under pressure or emergency may overstep constitutional bounds, as in our history it often has done, without establishing a pattern for future conduct and without creating a permanent menace to liberties. If the Executive or Congress travels outside the realm of constitutional right, they may be recalled to the path of duty by replacing them [sic] at the polls with personnel committed to a new policy. But this Court is not to be extricated from excesses so easily. There is no possibility for the Court to hold measures temporarily or locally constitutional without becoming generally compromised and indefinitely committed to them on principle.

Jackson, draft concurring opinion, May 21, 1943, Hirabayashi v. United States 1; Jackson, draft concurring opinion, May 22, 1943, Hirabayashi v. United States 1.

[141] Jackson, draft concurring opinion, June 1, 1943 Hirabayashi v. United States 12; Jackson, draft concurring opinion, June 1, 1943, Hirabayashi v. United States 12.

[142] Rostow, "The Japanese American Cases -- A Disaster" 510-12; Dembitz, "Racial Discrimination and the Military Judgment" 224-38; Konvitz, The Alien and the Asiatic in American Law 268-70; Irons, Justice at War 332; ten Broek et. al., Prejudice, War and the Constitution 217-23, 240; Hutchinson, "'The Achilles Heel' of the Constitution" 456, 463; Schubert, Dispassionate Justice 214. Urofsky instead argued that Jackson, "whatever his personal feelings about the relocation, took the most lawyerly approach, worrying what the decision would mean in the future if the Court approved a policy based entirely on racial classification." Urofsky, Division and Discord 75, 78.

Jackson felt unconstrained by military considerations in Endo's case: she was in civilian custody, and "virtually imprisoned, without charge or conviction of crime," when "there has been ample time to place and try such a charge." The only basis given for her continued confinement -- "'protective custody'" -- is one that "on an involuntary basis has no place in American law." Robert H. Jackson, undated draft concurring opinion, Box 133, Legal File, Supreme Court October Term 1944, No. 70, Ex Parte Mitsuye Endo, Box 133, Robert H. Jackson Collection, Library of Congress 1-3.

Constitution in the name of national security -- as the greater long-term risk, and he refused to take it.[143]

The abdication of responsibility detected in Jackson's Korematsu opinion seemed, at least to one critic, related to the Justice's belief in judicial restraint:

> … law should not be allowed to grow through its application to the serious and intensely difficult problems of modern life … It should be kept in orderly seclusion, and confined to problems like the logical adumbration of the full faith and credit clause, and other lawyers' issues. The problems which deeply concern us should be decided outside the courts, even when they arise as the principal and inescapable issues of law suits. Judges are thus to be relieved of the political responsibilities of their citizenship and their office. They will be allowed to pretend that the judicial function is to "interpret" the law, and that law itself is a technical and antiquarian hobby, not the central institution of a changing society.[144]

This critique of Jackson's "rather defeatist" view of judicial power vis-a-vis the war power was exceptionally snide, with a swipe at Jackson's latest scholarly publication.[145] Yet while it should not be forgotten that Jackson did dissent in Korematsu, the Justice's ability sharply to distinguish between the technical legal issues he placed in the Court's purview, and policy issues he believed were outside it, reflected his skepticism about judicial power.

Particularly important to Jackson was the Court's ability "to make its rulings stick."[146] The fear that the Court's authority would be compromised if it made rulings that other branches of government refused to obey was greatest in Hirabayashi and Korematsu, which reviewed military judgments in wartime; this same concern animated his thinking in other cases. According to one scholar, Jackson's own experiences in the

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[143] Hutchinson, "'The Achilles Heel' of the Constitution" 456, 485.
[144] Rostow, "The Japanese American Cases -- A Disaster" 511-12.
[145] Dembitz, "Racial Discrimination and the Military Judgment" 232; Robert H. Jackson, "Full Faith and Credit: The Lawyer's Clause of the Constitution," 4th Annual Benjamin N. Cardozo Lecture, Association of the Bar of the City of New York, republished in Columbia Law Review 45 (January 1945) 1-34, and republished the same year in book form by Columbia University Press.
[146] Hutchinson, "'The Achilles Heel' of the Constitution" 488.

Justice Department -- Roosevelt discussed the possibility of "outright defiance of the Court" if it invalidated executive orders on monetary policy at the height of the Great Depression, and he attempted to pack the Supreme Court when decisions failed to go his way one too many times – made the justice acutely sensitive to the notion that judicial decisions, and with them judicial authority, could be rendered nugatory by a recalcitrant political authority. Jackson was also all too aware of the leading historical precedent for such behavior, the Lincoln-Taney impasse during the Civil War, and had discoursed on the issue at length in The Struggle for Judicial Supremacy; this concern also animated his thinking in the Steel Seizure Case in 1952, in a lecture he gave while the university segregation cases were before the Court, and in the later segregation cases.[147] The widespread defiance of school desegregation rulings proved, posthumously, that Jackson's concerns were well-founded, even if minds could differ over the best means to avoid massive resistance.[148]

Hirabayashi and Korematsu are stark reminders that, even in the face of blatant, unconstitutional racial discrimination, Jackson's narrow view of judicial power – a product of both his deference to the political branches of government on social issues, and the concern that political branches were ultimately responsible for the enforcement of Court rulings on public policy -- could lead to a decision bypassing serious constitutional issues. Yet these cases, in which he ultimately opposed his old boss and a law justified on national security grounds, also demonstrated the ends to which he would avoid enshrining racial discrimination in the Constitution.

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[147] Hutchinson, "'The Achilles Heel' of the Constitution" 488; see chapters 3 and 9.
[148] See pp. 504-08, 512-14, 519-22.

Nuremberg

Jackson described his tenure as chief United States prosecutor of the surviving Nazi leadership as "the most important, enduring, and constructive work" of his life, one "'infinitely more important'" than his Supreme Court career: there is "'only a very temporary distinction in the work of a judge,'" but Nuremberg was "'unique in the annals of law,'" as it set a precedent for internationally prosecuting leaders who waged a war of aggression and for "'crimes against humanity,'" including genocide.[149] Nuremberg also proved to be the biggest adventure of his life: he spent over a year working with dignitaries from other countries; he traveled extensively through Europe, the Middle East, and North Africa; and he became a world figure.[150]

Jackson's legal experience made him a natural choice for the position, and the attorney who "always loved advocacy and trial work" jumped at the chance to use his talents on what he believed "was about the most important trial that could be imagined." The new post was also a refuge from an increasingly contentious Court.[151] Far from

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[149] Robert H. Jackson, Introduction to Whitney Harris, Tyranny on Trial (1954. Dallas, TX: Southern Methodist University Press, 1999) xxxvii, quoted in Telford Taylor, The Anatomy of the Nuremberg Trials: A Personal Memoir (New York: Knopf, 1992); Jackson Reminiscences 1644; Hockett, "Justice Robert H. Jackson, The Supreme Court, and the Nuremberg Trial" 257; Hockett, "Justice Robert H. Jackson and the Role of the Supreme Court in American Politics" 202 ff.; Stephen Breyer, "Crimes Against Humanity: Nuremberg, 1946," New York University Law Review 71 (1996) 1161, 1163; Chernack, "The Clash of Two Worlds" 77. It should be noted that, in the absence of a body of law and court system applicable to this proceeding, Jackson was "a principal architect" of the proceedings as well as a lawyer plying his trade. See William H. Rehnquist, "Remarks of the Chief Justice, Dedication of the Robert H. Jackson Center."

[150] Taylor, Anatomy of the Nuremberg Trials 206; Abraham, Justices and Presidents 237. Over one fourth of Jackson's oral history is devoted to this relatively brief chapter of his life. Jackson Reminiscences 1155-1644.

[151] Jackson Reminiscences 1163-64; Hockett, "Justice Robert H. Jackson and the Role of the Supreme Court in American Politics" 200-01. In addition to his role in providing, as Attorney General, legal sanction for vital aid to Britain and the Soviet Union before American entry into the war, Jackson advocated strengthening international law on the speechmaking circuit after becoming an Associate Justice. Jackson Reminiscences Part 6, chs. 16-27; Robert H. Jackson, "The Challenge of International Lawlessness," Address at the Annual Meeting of the American Bar Association, Indianapolis, IN, October 2, 1941, published in International Conciliation 374 (November 1941) 683-91; Robert H. Jackson, "The

being an impediment, his position on the Court made him a more provident choice, as his position lent prestige to the enterprise.[152] Yet the appointment was not without controversy: Chief Justice Stone, who opposed both trial by the victors and outside work by sitting justices, sniped in a dyspeptic moment about Jackson's "high-grade lynching party."[153] The pressure on the Court worsened, as tensions and 4-4 decisions mounted. Jackson's "foolishly optimistic" belief that he would be back in time for the October 1945 Term of Court proved to be about one year off,[154] as Jackson negotiated with other countries to set up a new, hybrid legal system with its own procedures and rules of evidence, and readied court facilities in devastated postwar Germany.[155]

Besieged Strongholds of the Mind," Address to Assembly of the International Student Service, Washington, D.C., September 2, 1942, Box 1, File: Jackson, Justice Robert H., Lowell Mellett Papers, Franklin D. Roosevelt archives, Hyde Park, NY; Robert H. Jackson, Address to the American Society of International Law, April 13, 1945; Taylor, Anatomy of the Nuremberg Trials 43-45.

Roosevelt might have had this position planned for Jackson since early in the conflict: when Jackson conveyed "frustration and dissatisfaction" with being "in a sort of back eddy" on the Court while the war was on, his former boss, rejecting his offer to resign from the Court to help with the war effort, vaguely allowed "that it was quite possible … that when the peace came and the time for the settlement arrived, there would be important things which I was particularly qualified to do." Jackson Reminiscences 1129-30. Other Justices had some involvement in the war: Roberts chaired the commission investigating the attack on Pearl Harbor; Frankfurter, Douglas and Black informally advised the White House; Byrnes became so involved in advising the Administration that he resigned from the bench; and Murphy actually donned a uniform, as a member of the army reserves. Mason, Harlan Fiske Stone 707; Hutchinson, "'The Achilles Heel' of the Constitution" 492.

[152] At that point, the appointment was Truman's to make, but Jackson had reason to believe that Truman was simply implementing, through White House Counsel Samuel Rosenman (who had conveyed the offer to Jackson), what had been worked out under Roosevelt. Jackson Reminiscences 1149-50, 1154, 1158, 1259.

[153] Mason, Harlan Fiske Stone 714-19. Jackson, who intuited that Stone would not react well to his appointment, did not discuss it with him in advance, which further irritated the Chief Justice. Jackson Reminiscences 1160, 1163.

Jackson's most recent biographer believes that Stone's "lynching party" comment "doesn't represent what Stone really thought at all," as it was simply "one stray comment in a private letter." Email from John Q. Barrett to author, May 27, 2004. But impromptu quips sometimes can be more revealing because of their inadvertence.

After the trial, Jackson devised a strongly felt answer to his critics, which focused on the need to determine actual, individual guilt before retribution was meted out. See Robert H. Jackson, draft Introduction for Tyranny on Trial, 1954 ed. 7-8, Box 57, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress; Jackson Reminiscences 1639-40.

[154] Jackson Reminiscences 1160, 1589ff.; Abraham, Justices and Presidents 236.

[155] Taylor, Anatomy of the Nuremberg Trial chs. 3-4, 6-7; Harris, Tyrrany on Trial chs. 1-2; Jackson Reminiscences Part 8, chs. 4-5, 7-21, 25-27, 31-43, 45-58; Lord Shawcross, "Robert H. Jackson's Contributions During the Nuremberg Trial," Four Lectures 97ff.

Jackson assumed his new post fully aware of anti-Semitism as well as white supremacy. He also maintained a close friendship with Frankfurter, and worked in fairly close quarters with Secretary of the Treasury Henry Morgenthau. His papers contain no evidence of bigotry or discrimination on Jackson's part, but a person's or organization's Jewish affiliation was a subject worth noting in family correspondence.[156]

The chief American prosecutor's attitude toward Jewish activists closely tracked his feelings about African Americans – that each group was pushing its agenda too hard in a hostile world. He believed that "one of the handicaps of" a proposed plan for deindustrializing postwar Germany was "that it bore the name of Morgenthau, because it was so easily labeled for that reason as a Jewish vengeance program."[157] At Nuremberg, "A good many" Jews worked on the staff, and "at least one Jewish lawyer" helped present the case in open court, "because we thought it would be just as bad to let it appear that we were not willing to let any appear, as it would be to let too many appear."[158]

Yet despite his understanding that "the Jewish people felt a proprietary interest in the trials because they had been the chief victims of Hitler's atrocities," Jackson was adamant that Jewish individuals or groups not play "prominent" roles in the trials:

> I tried to point out to them the very great damage they would do to their surviving people if they let this trial become a Jewish trial. I pointed out to them that what we must do was to get away from the racial aspects of the situation. We were prosecuting these Nazis not because they had killed Jews, but because they had

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[156] Jackson's daughter Mary reported that the time she had spent with Morgenthau's son had raised eyebrows among some of her college classmates. Mary Jackson to Robert and Irene Jackson, 1938, Box 1, File: Family Papers -- Family Correspondence -- Mary (Jackson) Loftus Craighill, Robert H. Jackson Papers, Library of Congress 6-7; Mary Jackson to Robert and Irene Jackson, January 6, 1941, Box 1, File: Family Papers -- Family Correspondence -- Mary (Jackson) Loftus Craighill, Robert H. Jackson Papers, Library of Congress 4.

[157] Jackson Reminiscences 1146. For a discussion of Jackson's concern about African American activism, see pp. 300-06, 363-65.

[158] Jackson Reminiscences 1207.

> killed men and women. We didn't want to exaggerate racial tensions. The only thing to do about that was to avoid making this a vengeance trial.[159]

According to Jackson, even more insistent Jewish leaders (including Chaim Weizmann, the future president of Israel) backed off when they realized "how thorough our plans were."[160] Also, many Jews were also wary of appearing to push a special interest agenda. But the Chief Prosecutor's efforts "to steer a course that would cause no greater anti-Semitism that would eventually be taken out on the few remaining Jews in Europe" had the same effect as a Jewish quota.[161]

Jackson's participation affected him greatly. Modern eyes cannot imagine the shock of an eyewitness at the unprecedented nature of the Holocaust. There is evidence of soldiers weeping, and vomiting, and committing acts of violence against captured SS troops, in reaction to having seen the death camps.[162] Jackson, like his staff, was exposed to mountains of evidence "so horrifying that" staffers "could hardly believe" it.[163] He was not the type to "wear his heart upon his sleeve,"[164] but there is nonetheless ample evidence that the Nazi war crimes had made a strong and lasting impression on Jackson, and affected his subsequent performance on the Court.[165]

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[159] Jackson Reminiscences 1205.
[160] Jackson Reminiscences 1206.
[161] Jackson Reminiscences 1207.
[162] See also Jackson Reminiscences 1160, 1143-44 ("sentiment had become very inflamed against the Germans" as a result of reports by soldiers and members of Congress who had seen the camps firsthand).
[163] Taylor, The Anatomy of the Nuremberg Trials xxxi, 234, 442, 476; Jackson, The Nurnberg Case, as Presented by Robert H. Jackson, Chief of Counsel for the United States, Together with other Documents (New York: Alfred A. Knopf, 1947) xvi, 52-63, 129-31.
[164] Paul A. Freund, "Individual and Commonwealth in the Thought of Mr. Justice Jackson" 24.
[165] Frankfurter, for his part, theorized after his friend's death (in a passage I doubt he would have published when Jackson was alive) that Nuremberg "had a profound influence on his endeavor to understand the human situation. An essentially good-natured, an even innocently unsophisticated temperament, was there made to realize how ultimately fragile the forces of reason are and how precious the safeguards of law so painstakingly built up in the course of the centuries." Felix Frankfurter, "Foreward," Columbia Law Review 55 (April 1955) 437.

Nuremberg may have made Jackson more solicitous of certain individual freedoms, particularly the right to be free from unreasonable searches and seizures, and the right to a full and fair hearing, but it

In his correspondence with constitutional scholar Charles Fairman, he made the observations one might expect, about how Nuremberg brought home the horrors of racism to him.[166] A different kind of influence can be detected in several Supreme Court cases involving First Amendment rights decided after Jackson's time at Nuremberg. The twin evils of the Nazi legacy, racism and the violation of civil liberties, could sometimes pull Jackson in opposite directions. He believed in the right to free expression but, having studied in excruciating detail how the Nazis created the conditions for seizing political power in Germany, he feared the consequences should radical international movements like fascism and communism create large movements and foment general

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also led to greater deference to the doctrine of federalism (which was often more restrictive of individual freedoms and minority rights than the central government). Hockett, "Justice Robert H. Jackson, The Supreme Court, and the Nuremberg Trial" 294-96; Hockett, "Justice Robert H. Jackson and the Role of the Supreme Court in American Politics" 220ff., 225 ff.; Chernack, "The Clash of Two Worlds" 77. See Johnson v. United States, 333 U.S. 10, 14, 17 (1948); Brinegar v. United States, 338 US 160, 180-81 (1949); Schaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 225 and n.8 (1953). But see Hockett, "Justice Robert H. Jackson and the Role of the Supreme Court in American Politics" 197 ff. (there was a Nuremberg effect on Jackson's constitutional jurisprudence, but on the whole there was "greater continuity than has been thought"). The fullest expression of Hockett's views appears in New Deal Justice ch. 9. Yet Hockett also argued that the former Nuremberg prosecutor and "once-liberal or moderate Justice lost an appreciation for the protections afforded by the Bill of Rights because of his understanding of the events that led to the destruction of the Weimar Republic and the rise of" Nazi Germany. Hockett, "Justice Robert H. Jackson, The Supreme Court, and the Nuremberg Trial" 286.

Other scholars noted a conservative trend, whether a "slight but not significant trend toward greater political conservatism," a strong conservative influence "in matters affecting national security and state criminal-justice procedures," or an alliance with judicial restraint guru Frankfurter. Yet another argued that "his acquaintance with European experience colored his opinions, if it was not actually decisive in his judgments." Schubert, "Jackson's Judicial Philosophy" 962-63. Abraham, Justices and Presidents 236; Ray, "A Law Clerk and His Justice" 540-41. Paul A. Freund, "Individual and Commonwealth in the thought of Mr. Justice Jackson" 17.

Ray qualified that the career disappointment with the failing to be appointed Chief Justice – a factor alleged by other historians – may have helped account for his ideological transformation. Ray, "A Law Clerk and His Justice" 541. See also Schubert, Dispassionate Justice 22-25.

Jackson's experience might have also made him more protective of American government as a counterweight to fascism and communism. In his Final Report to the President Concerning the Nurnberg War Crimes Trial, Jackson concluded that the Nazi takeover of Germany and the carnage of World War II "might have been averted ... has it not been for the 'complacency and tolerance as well as the impotence of the Weimar Republic towards the growing organization of Nazi power.'" Avoiding similar calamities in the United States would require vigilance by the government, to crush growing antidemocratic movements in their early stages, before a powerful "'system of organizations'" could "'rival[],'" and then "'dominate[],'" the government itself. Hockett, "Justice Robert H. Jackson, The Supreme Court, and the Nuremberg Trial" 287, 288. Jackson thus maintained that revolutionaries' right to free expression had to be balanced against the public peace, to avoid risking major disorder, followed by a European-style calamity.

[166] See p. 407-08.

disorder. He continued with the fact-based analysis of free speech cases that he employed before Nuremberg, determining what government restraints were reasonable based on each case's unique circumstances.[167] But after Nuremberg, he found more reason than ever to fear the consequences of hate speech.

Terminiello v. Chicago provided the situation most comparable to the street riots Jackson came to fear from his Nuremberg experience. The Court reversed, by a 5-4 vote, the disorderly conduct conviction of suspended Catholic priest and self-styled Coughlinite Arthur Terminiello, whose anti-Communist, anti-Semitic diatribe at a Chicago auditorium sparked a riot in and around the lecture hall. In his dissenting opinion, the former Nuremberg prosecutor insisted that "The choice is not between order and liberty. It is between liberty with order and anarchy without either."[168] He chastised the majority for ignoring "the circumstances of Terminiello's speech."[169] Since nothing in the Constitution took away a local government's "power to deal with … problems of local peace and order," Jackson believed that the Court should have deferred to the judgment of the local authorities, court and jury that Terminiello's diatribe constituted a breach of the peace.[170]

Jackson probably would have decided the case the same way regardless of his Nuremberg experience, as the result was consistent with his pre-Nuremberg approach to First Amendment cases.[171] Yet Jackson's experience there made the issue more

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[167] Paul A. Weidner, "Justice Jackson and the Judicial Function" 585-90.
[168] Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).
[169] 337 U.S. at 13.
[170] 337 U.S. at 28-29; Chernack, "The Clash of Two Worlds" 79.
[171] Before Nuremberg, for example, he defended the right of a young Jehovah's Witness to remain silent during the Pledge of Allegiance but denied the right of Jehovah's Witnesses to proselytize unregulated. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943). For a more comprehensive discussion of Jackson's role in the numerous Jehovah's Witness cases to reach the Court, see Paul A. Freund, "Individual and Commonwealth in the Thought of

compelling and immediate to him. Observing that, despite Terminiello's denials, "His speech … followed, with fidelity that is more than coincidental, the pattern of European fascist leaders"[172]; Jackson viewed the episode as

> a local manifestation of a world-wide and standing conflict between two organized groups of revolutionary fanatics, each of which has imported to this country the strong-arm technique developed in the struggle by which their kind has devastated Europe….[173]

Lest his American readers think that he was exaggerating, Jackson – who quoted from Hitler's *Mein Kampf*, one of the documents he had used as prosecutor to prove the Nazi conspiracy to perpetrate an aggressive war -- explained that "First laughed at as an extravagant figure of speech, the battle for the streets became a tragic reality when an organized *Sturmabterlung* began to give practical effect to its slogan that 'possession of the streets is the key to power in the state.'"[174]

Believing that "The present obstacle to mastery of the streets by either radical or reactionary mob movements is … the authority of local governments which represent the free choice of democratic and law-abiding elements," Jackson warned that "this drive by totalitarian groups to undermine the prestige and effectiveness of local democratic

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Mr. Justice Jackson" 13-16, 17; Pritchett, The Roosevelt Court ch. 5 (chart showing Jackson voted 3 times in favor of Jehovah's Witnesses' rights, and 6 against, in the 1941-43 Terms, while the Court record was 5-4). Hockett concluded that "Terminiello … did not mark a shift in Jackson's First Amendment jurisprudence, since it fit comfortably within a free speech philosophy, developed early in his judicial tenure, that balanced liberty claims against societal interests in public order and tranquility." Hockett, "Justice Robert H. Jackson, The Supreme Court, and the Nuremberg Trial" 291. See also Hockett, "Justice Robert H. Jackson and the Role of the Supreme Court in American Politics" 208 ff., 237.

For background on the Jehovah's Witness cases, see Shawn Francis Peters, Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution (Lawrence: University Press of Kansas, 2000).

[172] 337 U.S. at 22-23.

[173] 337 U.S. at 23.

[174] 337 U.S. at 24. The quote from Mein Kampf was translated as follows: "We should not work in secret conventicles but in mighty mass demonstrations, and it is not by dagger and poison or pistol that the road can be cleared for the movement but *by the conquest of the streets.* We must teach the Marxists that the future *master of the streets* is National Socialism, just as it will some day be the master of the state. 337 U.S. at 23-24 (emphasis in the original).

governments is advanced whenever either of them can win from this Court a ruling which paralyzes the power of [public] officials."[175] He darkly observed that "Terminiello's victory today certainly fulfills the most extravagant hopes of both right and left totalitarian groups, who want nothing so much as to paralyze and discredit the only democratic authority that can curb them in their battle for the streets."[176]

Jackson made clear that he believed in the "utmost freedom of utterance," that every side to a controversy was entitled "to advocate peaceful adoption of" their agenda, whether "fascism or communism, socialism or capitalism," and "may go far in expressing sentiments whether pro-semitic or anti-semitic, pro-negro or anti-negro, pro-Catholic or anti-Catholic…."[177] Yet he also observed that "It is naïve, or worse, to teach that oratory with th[e] object or effect" of inciting "serious outbreak of mob violence, race rioting, lynching or public disorder … is a service to liberty. No mob has ever protected any liberty, even its own…."[178] Even legally permissible speech can threaten public order. In such a situation, "there certainly becomes a point beyond which [a speaker] cannot indulge in provocations to violence without being answerable to society."[179] He would thus give the elected branches of local government discretion to strike the balance between free speech and public order.[180]

A Nuremberg-stoked fear of ethnic strife, along with compassion for the victims of Nazism, animated his lone dissent in Kunz v. New York. Kunz challenged a New

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[175] 337 U.S. at 24. He quoted at length Chief Justice Hughes, who observed in Cox v. New Hampshire: "'Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.'" 337 US at 31.
[176] 337 U.S. at 24-25.
[177] 337 U.S. at 32.
[178] 337 U.S. at 32.
[179] 337 U.S. at 33-35.
[180] Chernack, "The Clash of Two Worlds" 80.

York City ordinance that banned religious meetings on the street without a permit from the police commissioner. The Court found the law "clearly invalid as a prior restraint on the exercise of First Amendment rights."[181] Jackson, noting that Kunz caused "'a flood of complaints' to city authorities that he was engaging in scurrilous attacks on Catholics and Jews," including

> "The Catholic Church makes merchandise out of souls," that Catholicism is "a religion of the devil," and that the Pope is "the anti-Christ." The Jews he denounced as "Christ-killers," and he said of them, "All the garbage that didn't believe in Christ should have been burnt in the incinerators. It's a shame they all weren't."[182]

Jackson noted simply that "Jews, many of whose families perished in extermination furnaces of Dachau and Auschwitz, are more than tolerant if they pass off lightly the suggestion that unbelievers in Christ should all have been burned."[183] When appropriately expressed, even unpopular positions must be constitutionally protected, including "a tempered and reasoned criticism of Roman Catholicism or Judaism"[184]; yet he wondered, "Does the Jew … have the benefit of [constitutional] freedoms when, lawfully going about, he and his children are pointed out as 'Christ-killers' to gatherings on public property by a religious sectarian sponsored by a police bodyguard?"[185]

Jackson felt that law enforcement had to be given wide latitude when seeking to avoid disorder resulting from racial speech as well:

> If any two subjects are intrinsically incendiary and divisive, they are race and religion. Racial fears and hatreds have been at the root of the most terrible riots that have disgraced American civilization. They are ugly possibilities that overhang every great American city…. These are the explosives which the Court

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[181] Kunz v. New York, 340 U.S. 290, 293 (1951).
[182] 340 U.S. at 296.
[183] 340 U.S. at 299.
[184] 340 U.S. at 301.
[185] 340 U.S. at 302.

> says Kunz may play with in the public streets, and the community must not only tolerate but aid him. I find no such doctrine in the Constitution.[186]

He also was quick to quell racially incendiary speech in Feiner v. New York, in which he joined a majority that affirmed the conviction of a defendant who "in a colored neighborhood … urged the colored people to rise up in arms and fight."[187]

In another dissent, Jackson sided with a white supremacist, but on procedural grounds; he again defended authorities who sought to control hate speech. In Beauharnais v. Illinois, the defendant distributed lithographs from a pro-segregation group called the White Circle League, which importuned, "'If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions … rapes, robberies, knives, guns and marijuana of the negro, surely will.'" The defendant was convicted of violating an Illinois law banning portrayals of "'depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.'"[188] By a 5-4 vote, the Court upheld the Illinois law. Jackson, along with Reed, Black and Douglas, dissented.

It was rare for Jackson to vote with First Amendment stalwarts Black and Douglas in a sharply-divided First Amendment case. Yet in direct opposition to Black and Douglas, he did not object to the concept of state laws on "group libel."[189] He again drew on his Nuremberg experience:

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[186] 340 U.S. at 313-14.
[187] 340 U.S. at 310 n.9; Feiner v. New York, 340 US 315 (1951).
[188] Beauharnais v. Illinois, 343 U.S. 250, 251-52 (1952).
[189] He even staked out a position apart from those of all of the other Justices on the issue of incorporation: Jackson, reversing his view from earlier cases, concluded that the Fourteenth Amendment did not make the

> Group libel statutes represent a commendable desire to reduce sinister abuses of our freedoms of expression – abuses which I have had occasion to learn can tear apart a society, brutalize its dominant elements, and persecute, even to extermination, its minorities. While laws or prosecutions might not alleviate racial or sectarian hatreds and may even invest scoundrels with a specious martyrdom, I should be loath to foreclose the States from a considerable latitude of experimentation in this field.[190]

Jackson instead parted company with the majority over the constitutionality of the trial judge's refusal to let Beauharnais attempt to prove the truth of his racist slurs, or testify about his understanding of "certain phrases" in the leaflet or about "the reason for forming the White Circle League."[191] While Jackson made clear that "I do not intimate that this defendant stood even a remote chance of justifying what impresses me, as it did the trial court, as reckless and vicious libel," he insisted, "Society has an interest in preserving truth as a justification [in libel cases], however obnoxious the effort…."[192]

Despite his willingness to give local authorities discretion on when to prosecute hate speech, Jackson also allowed that hate speech in the appropriate setting was a Constitutionally protected part of the discourse on race relations, for "When any naturally cohesive or artificially organized group possess a racial or sectarian solidarity which is or may be exploited to influence public affairs, that group becomes a legitimate subject for public comment."[193] "Of course," qualified Jackson, "one can only deplore the habitual intemperance and bitter disparagement which characterizes most such comment." While the state can attempt to "place decent bounds upon" hate speech, it cannot legislate "that group purposes, characteristics and histories are to be immunized from comment or may

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First Amendment protection of free speech binding on the states. 343 U.S. at 288, 290-95. Therefore, according to Jackson, the group libel ban would be unconstitutional only if it were obnoxious "to 'the concept of ordered liberty.'" 343 US at 291 (quoting Palko v. Connecticut, 302 U.S. 319, 324-25[1937]).

[190] 343 U.S. at 304.

[191] 343 U.S. at 300.

[192] 343 U.S. at 301.

[193] 343 U.S. at 301.

be discussed only at the risk of prosecution free of all usual safeguards."[194] Near the end of his opinion, Jackson cautioned: "No group interest in any particular prosecution should forget that the shoe may be on the other foot in some prosecution tomorrow."[195] Thus, Jackson's Nuremberg-fed fear of an explosion of political violence led him to express frustration with both sides in the growing controversy over civil rights, a frustration that recurred as he pondered the constitutionality of desegregation.

* * *

Over the course of Jackson's judicial career, his mixed record on civil rights cases reflected his weighing of competing constitutional principles, and the powerful lessons he drew from his life experience. Neither a leading civil libertarian nor a proponent of social reform when he became a justice, Jackson brought to the Court a strong belief in judicial restraint and maintained it throughout. Believing that free government could survive only through majority will, and understanding the racism present in others, he feared the majority's backlash if courts made social policy. His Nuremberg-fed fear of ethnic violence led him to give law enforcement more discretion in preserving constitutional rights, and even sometimes to blame the victims of racism as well as the racists for threatening social peace, a peace he cherished even more after witnessing the horrors of postwar Europe. His comments in postwar First Amendment cases sometimes suggested skepticism at the ability of many of his countrymen to handle racial justice.

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[194] 343 U.S. at 301. Jackson noted that he might have ruled differently had there been proof that (and had the jury been instructed to determine whether) the leaflet had caused actual harm to a particular African American." 343 U.S. at 302. In such a case, the jury might have been instructed to consider "whether a leaflet is so emotionally exciting to immediate action as the spoken word," and to "take into account the realities of race relations and any smouldering fires to be fanned into holocausts," given the particular situation at the particular place and time. 343 U.S. at 303-04. Here, however, "The leaflet was simply held punishable as criminal libel *per se* irrespective of its actual or probable consequences." 343 U.S. at 302.

[195] 343 U.S. at 305.

Yet despite the maze of his conflicting principles, Jackson's record in civil rights cases hovered at the Court mean. Despite lingering influences from his interest in genealogy and popular culture, his judicial writings suggest that he had absorbed the American Creed of racial enlightenment. His experiences at Nuremberg showed him in stark terms the logical consequences of racism, while the Japanese internment cases helped shape a view of racial discrimination as the aggregate concern of wronged individuals.

Viewing racial justice through Jackson's world view could lead to mixed results. Group justice could be inimical to individual rights, and even wrong the racists, who are entitled to espouse their own views; Jackson's ranking in criminal cases suggests that sympathies for crime victims might trump those of defendants who had not received due process. Yet since he prided himself on considering each case on its own merits, it is only through analyzing what survives of Jackson's thought process in individual cases that his resolution of these dilemmas will reveal themselves.

Chapter 5: Jackson and Employment Discrimination Cases

> I am continually astonished at the heat generated by the question of admitting Negroes...
>
> -- Robert H. Jackson[1]

Introduction

The civil rights cases decided during Jackson's tenure as Associate Justice covered a wide array of issues: employment discrimination; voting rights; mistreatment of African Americans within the criminal justice system; and racial segregation in neighborhoods, transportation, and education. One way to order these varied topics was suggested by the most immersed observer of race relations in Jackson's time. Gunnar Myrdal, seeking to determine which types of discrimination African Americans thought most important to eliminate, and which ones white Southerners most wanted to keep, found that African Americans' "own rank order is just about parallel, but inverse, to that of the white man." Myrdal described the rankings, in order of importance to white Southerners, as:

> Rank 1. Highest in this order stands the bar against intermarriage and sexual intercourse involving white persons.
>
> Rank 2. Next come the several etiquettes and discriminations, which specifically concern behavior in personal relations… (sometimes referred to as the denial of "social equality" in the narrow meaning of the term.)
>
> Rank 3. Thereafter follow the segregations and in discriminations in use of public facilities such as schools, churches and means of conveyance.
>
> Rank 4. Next comes political disenfranchisement.
>
> Rank 5. Thereafter come discriminations in law courts, by the police, and by other public servants.
>
> Rank 6. Finally come the discriminations in securing land, credit, jobs, or other means of earning a living, and discriminations in public relief and other social welfare activities.[2]

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[1] Robert H. Jackson to Philip J. Wickser, January 4, 1944, Box 21, File: Wickser, Philip J., Robert H. Jackson Collection, Library of Congress 1.

[2] Gunnar Myrdal, An American Dilemma I (1996 ed.) 60-61.

Since the types of discrimination least important for white Southerners to maintain were most important for African Americans to eliminate, and vice versa, the list appeared to provide, if not a fully formed strategy for resolving the problem of racial discrimination, at least a sense of which issues should have been more or less difficult to resolve. The higher ranks were also easier to resolve under existing legal doctrine, as they did not require overturning Jim Crow.

Yet the Myrdal list also, in a contrary way, confirms the validity of Jackson's fears about obtaining the compliance of white Southerners, as making progress in any area proved difficult. Even with economic discrimination lawsuits, ostensibly the least disruptive of prevailing social attitudes, the Court had to hear repeated cases on the same subject, because their first decision had failed to settle the issue. Parties who discriminated sought not to end their legally objectionable behavior, but to avoid the law: they would invite another round of litigation by employing slightly different procedures, designed to fall outside the purview of the Court's initial ruling. Parties engaging in the same conduct as the loser of the lawsuit often continued to discriminate, waiting to lose in court before reforming. Followup cases frequently posed new legal dilemmas, such as the choice of stretching established precedent to reach "sophisticated as well as simpleminded" forms of discrimination,[3] or procedural issues apart from racial discrimination.[4]

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[3] Lane v. Wilson, 307 U.S. 268, 275 (1939).

[4] Since Myrdal's list simultaneously presents a logical framework for remedying racial discrimination and vividly illustrates the problems with applying any logic to the issue, I have chosen to order my discussion of civil rights cases accordingly. This chapter will cover employment discrimination; Chapter 6, the rights of African Americans in the criminal justice system; Chapter 7, voting rights; and Chapters 8 and 9, segregation, with the university segregation cases discussed in Chapter 8 and Brown, in Chapter 9.

Jackson easily accepted the concept of protecting African Americans from economic discrimination to the full extent of the law, but the extent of that law sometimes presented a choice between unacceptable alternatives. When federal jurisdiction could be found, Jackson would seek to end the offending conduct; and his ire would be raised when followup cases were required to enforce an initial ruling. Yet his reluctance to stretch the Constitution beyond accepted limits posed real problems in employment cases, as most employers were private entities beyond the reach of Due Process and Equal Protection requirements. Moreover, the inability of discriminating parties to accept Court rulings did nothing to allay his concern about the enforceability of Court orders. And when procedural requirements seemed to block the reach of civil rights doctrine, Jackson could find himself struggling to choose between a moral imperative and what he viewed as the proper scope of judicial authority.

As the Court confronted discrimination cases that were increasingly difficult legally and politically, Jackson voted to end employment discrimination, though he was not immune to letting procedural requirements limit the scope and timing of relief, often with potentially dire consequences for the workers involved.

Background: Jackson and Discrimination Against African American Attorneys

Jackson had experience with fairness of professional opportunity in his own profession. While Attorney General, he had to contend with the District of Columbia Bar Association's refusal to open its law library, located in a federal building and thus subject to federal law, to African American attorneys.[5] He announced plans to issue an order requiring the bar association to make its "space and its facilities … available to all members of the bar in good standing without discrimination on account of race, color,

[5] For further details of this episode, see pp. 132-34.

religion, or sex" -- on a segregated basis. It was then the bar association's choice whether "to get out of the building with its library, or to open it to Negroes without discrimination." When the Association's rank and file rejected that compromise, Jackson witnessed firsthand white southern intransigence on the issue of equal opportunity: the bar association moved out of the federal building.[6]

The American Bar Association's handling of its racial exclusion issue was more satisfactory, yet even there the situation gave Jackson further occasion to reflect on white Southerners' resistance to change in race relations. In 1943, the ABA adopted a resolution "'That it is the sense of this meeting that membership in the American Bar Association is not dependent upon race, creed or color.'" No hint of dissent appeared in the American Bar Association Journal report – the resolution reportedly was the product of "unanimous action by the Committee on Resolutions," and passed by the House of Delegates "Amid applause" and "without a division." Yet when an old colleague from Buffalo, Philip Wickser, found his candidacy for ABA president sidetracked, Jackson either knew or assumed that the membership issue was responsible, writing, "I am continually astonished at the heat generated by the question of admitting Negroes to the Association." The Justice understood that the need for admitting African Americans was rooted in the needs of a biracial society:

> I think it was de Tocqueville who said that having got them here, the only choice we have is to make them equals or enemies – and by equals he meant in rights. I find it hard to understand how, after they are made members of the profession, they can be excluded from the profession's organizations if they are otherwise worthy.

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[6] Jackson Reminiscences 1070-72; T.H. Watkins, Righteous Pilgrim: The Life and Times of Harold L. Ickes 1874-1952 (New York: Henry Holt and Company, 1990) 644.

His emphasis on "equal in rights" was not meant to imply more controversial issues of social equality or racial mixing, but rather what appeared to him to be a self-evident need for equality in opportunity. His frustration with those who could not recognize this historical imperative was palpable. Nonetheless, he also gave credence to white Southerners' beliefs that they had been unfairly treated by Northerners, whose "attitude" was "too often provoking and patronizing and hypocritical on the whole subject," because "all of the prejudices that are apparent in the South are latent in the North and only await occasions to stir them."

With an outlook informed by having witnessed white Southern resistance against liberalization of race relations during his time in Washington, the Justice continued, "It may well be … that the feeling over this subject will bring about a solidarity of southern interests which will make the election of a northern man at this time impossible" within the bar association. Surmising that "the pendency of a national election will further stimulate whatever sectional feeling there is," Jackson sought to comfort his friend by assuring him, "I do not see that it is an event of major importance in your life…."[7] The top office that year ultimately went to a Texan, whose qualifications suggest that he was extraordinarily well qualified for the post; and Wickser was elected ABA president in a subsequent year. Yet Jackson's assumptions, even if inaccurate, were understandable, especially given the Texas bar's pique that year over the voting rights case, Smith v.

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[7] "Resolution Declaring the Sense of This Meeting on Admissions to Membership is Adopted," American Bar Association Journal 29 (October 1943) 565; "The 1943 Assembly," American Bar Association Journal 29 (October 1943) 537; Robert H. Jackson to Philip J. Wickser, January 4, 1944 1.

Jackson's observation that sectionalism would be exacerbated by the 1944 presidential election was prescient. See Garson, The Democratic Party and the Politics of Sectionalism; Frederickson, The Dixiecrat Revolt.

Allwright.[8] And this episode is one more example of how heavily the prospect of white Southern backlash weighed on the justice whenever he contemplated expanding African Americans' rights.

Jackson and the Railroad Brotherhood Cases

The legal struggle over employment discrimination during Jackson's tenure on the Court centered on railroad workers' unions. In a time of declining employment opportunity in the industry, all-white unions used their collective bargaining power to save jobs for whites, by forcing African Americans out of theirs. As the twentieth century unfolded, African Americans began losing their already restricted occupational opportunities – opportunities that provided one of the best avenues for their upward mobility.[9] In the South, where they had worked as firemen and brakemen, less senior white workers began taking those jobs from more experienced African Americans. In the 1930s and 1940s, all-white railroad brotherhoods took advantage of the Railway Labor Act, a federal law designed to help workers form unions, and negotiated racial exclusions to benefit their members, at a time when total employment in the industry was waning. The desire to force African Americans out of their positions was so strong, that some African Americans were even assassinated when they worked at "white" jobs.[10]

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[8] "David A. Simmons Nominated for President," American Bar Association Journal 30 (April 1944) 206; "Association Officers are Elected and Inducted," American Bar Association Journal 30 (April 1944) 579; see Chapter 7, pp. 16-17.

For proof of sectional sensitivity, one need only examine the front covers of the 1944 American Bar Association Journal. Each month (with the exception of the July issue commemorating Flag Day), the cover was graced by an "eminent soldier lawyer" from the Civil War, with an article about the featured legal warrior inside. Union soldiers and Confederates took turns occupying the place of honor. Indeed, the fact that the new ABA president's predecessor was a Pennsylvanian suggests the possibility of compromise on the ABA presidency issue by sectional turn-taking.

[9] Eric Arnesen, Brotherhoods of Color: Black Railroad Workers and the Struggle for Equality (Cambridge, MA: Harvard University Press, 2001) pp. 1-2, 5-28, 39-41, 160 and chs. 3, 5; Bernstein, Only One Place of Redress p. 46 and ch. 3.

[10] Arnesen, Brotherhoods of Color pp. 2-3, 28-41, 68-83, 85-86, 120-26, 181-83, 187-202 and ch. 4; Bernstein, Only One Place of Redress 47-52; Malcolm Ross, All Manner of Men (New York: Reynal and

African American labor leaders had begun to recognize the need for legal action against white brotherhoods by the mid 1930s.[11] By the middle of the next decade, two cases had made their way to the Supreme Court: Steele v. Louisville & Nashville Railroad and Brotherhood of Locomotive Firemen and Enginemen, and Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76. Bester William Steele and Tom Tunstall, both locomotive firemen and labor activists, sued to invalidate the 1941 Southeastern Carriers Conference agreement reserving all diesel jobs for candidates "promotable" to engineer, a position from which African Americans were excluded. The SCC pact "almost instantly resulted in black demotions and furloughs," and would ultimately amount to "nothing less than an occupational death sentence for African-American firemen."[12]

The Supreme Court found itself confronting what seemed to some of its members an obvious injustice, but ruling in the plaintiffs' favor would require resolving two

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Hancock, 1948) pp. 118-20 and ch. 5; William H. Harris, The Harder We Run: Black Workers Since the Civil War (New York: Oxford University Press, 1982) 39, 46.

The use of all-white unions and collective bargaining requirements to force African Americans out of jobs was not confined to the railroad industry. "Broad-based New Deal labor legislation … typically did not have discriminatory intent but had harsh, foreseeable, discriminatory effects. Many unions used the power they received under the National Industrial Recovery Act 'to organize a union for all the workers, and to either agree with the employers to push Negroes out of the industry or, having effected an agreement with the employer, to proceed to make the union lily-white.' The effects of the Wagner Act were more complex, but ultimately African Americans suffered from the power that law granted to unions, too," as white-controlled unions sought to save whites' jobs at the expense of African Americans. The National Recovery Act was unpopular with African Americans, who called the program, among other things, the "Negro Run Around." Bernstein, Only One Place of Redress pp. 6, 86, 93-94 and ch. 5. See also Louis Coleridge Kesselman, The Social Politics of FEPC: A Study in Reform Pressure Movements (Chapel Hill: University of North Carolina Press, 1948) ch. 9; Harris, The Harder We Run chs. 1-2 and p. 118.

Bernstein suggested that the type of "freedom of contract" analysis employed in Lochner v. New York, 198 U.S. 45 (1905), if used to invalidate the NLRA, might have been beneficial to African American workers. Bernstein, Only One Place of Redress 2-6. But given the way white workers were treated under the Lochnerian rubric, an unregulated workplace was not bound to be much of a boon to African Americans; and there was no reason to believe that deregulation would have erased the influence of racism in the American workplace or anywhere else.

[11] Arnesen, Brotherhoods of Color 149-50.

[12] Arnesen, Brotherhoods of Color 195-96, 203-06; Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 212 (1944); Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192,196; Herbert Hill, Black Labor and the American Legal System I: Race, Work, and the Law (Washington, DC: Bureau of National Affairs, 1977) 107.

questions.[13] The ultimately determinative issue was a matter of statutory construction. According to the National Labor Relations Act, a union receiving a majority vote would be certified the sole bargaining agent for the relevant class of workers. Just a year earlier, the Court ruled that a union could not challenge a rival's certification in court because Congress did not provide for judicial review of those decisions. In one case, the Court refused to entertain a lawsuit by an African American union challenging the certification of a rival union, claiming racial discrimination.[14] Jackson's law clerk advised against granting certiorari in Tunstall despite its "considerable importance" to African American railroad firemen throughout the South, because of these precedents: "if the courts have no jurisdiction to determine a dispute as to the appropriate representative, they must have none to decide whether the representative is acting fairly…."[15]

The second barrier was the unavailability of constitutional relief to the aggrieved workers. While the unions (generally in collusion with the railroads) engaged in

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[13] Robert H. Jackson, Conference Notes, Box 133, File: Supreme Court – O.T. 1944 – No. 37, Tunstall v. Brotherhood of Locomotive Firemen, Robert H. Jackson Collection, Library of Congress.

There were also procedural issues, one of which – the exhaustion of administrative remedies – concerned to some extent Jackson's clerk. At the post-argument conference, Roberts saw no administrative remedy but allowed that there "may be one." Reed argued that there was in fact a remedy, but also believed there was a possibility of "different results in different courts." Frankfurter, Douglas, Murphy, Jackson and Rutledge found no procedural bar to the merits. Philip C. Neal, Memorandum on certiorari petition, Box 133, File: Supreme Court – O.T. 1944 – No. 37, Tunstall v. Brotherhood of Locomotive Firemen, Robert H. Jackson Collection, Library of Congress; Robert H. Jackson, Conference Notes, Tunstall v. Brotherhood of Locomotive Firemen.

[14] Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297 (1943); General Committee of Adjustment v. Missouri-Kansas-Texas Railroad Co., 320 U.S. 323 (1943); General Committee of Adjustment v. Southern Pacific Company, 320 U.S. 338 (1943); Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees et al. v. United Transport Service Employees of America, 320 U.S. 715, rehearing denied 320 U.S. 816 (1943); Bernstein, Only One Place of Redress 61. Jackson himself was not satisfied with the Court's rationale, as he concurred in the result (but did not join the Court's opinion) in the General Committee of Adjustment cases and joined Justice Reed's dissent in Switchmen's Union. General Committee of Adjustment, 320 U.S. at 338, 344; Switchmen's Union of North America, 320 U.S. at 323. Brotherhood of Railway & Steamship Clerks was summarily reversed *per curiam*, with bare citations of the cases mentioned above.

[15] Black, Douglas and Reed also opposed taking the cases. Philip C. Neal, Memorandum on certiorari petition, Tunstall v. Brotherhood of Locomotive Firemen; Harry H. Wellington, Labor and the Legal Process (New Haven, Connecticut: Yale University Press, 1968) 148.

obviously discriminatory behavior, the equal protection clause of the Fourteenth Amendment barred only "state action," that is, action by a state government; the Fifth Amendment, action by the federal government. With the unions and railroads private entities, a reversal on constitutional grounds would have "'require[d] some rather sophisticated doctrinal analysis of the most far-reaching constitutional, and, therefore, fundamentally political sort to equate Brotherhood action to state action.'" This was the sort of action that any Court would hesitate to attempt, especially when a statutory ground might be found to reach the same result.[16]

Douglas felt that both cases should be reversed on statutory grounds, while Rutledge believed the Court "has to go to [the] constitutional question."[17] Stone, who drafted the Court opinions in both Steele and Tunstall, sidestepped constitutional issues, instead finding an implied duty on the part of the union charged by Congress to act as the "'representative of the craft or class'" in its entirety.[18] If the majority's union "is thus chosen to represent all of its members, regardless of their union affiliations or want of them," it would follow that

> Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes as their representative, the minority would be left with no means of protecting their interests, or indeed, their right to earn a livelihood by pursuing the occupation in which they are employed.[19]

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[16] Hill, Black Labor and the American Legal System 109, quoting Wellington, Labor and the Legal Process 145; Philip C. Neal, Memorandum on certiorari petition, Tunstall v. Brotherhood of Locomotive Firemen. Much of the civil rights legislation passed in the 1960s was based on Congress's right to regulate interstate commerce, and not on the Constitutional rights of African Americans. Heart of Atlanta Motel v. United States, 379 U.S.241 (1964).
[17] Robert H. Jackson, Conference Notes, Tunstall v. Brotherhood of Locomotive Firemen.
[18] 323 U.S. at 199; Arnesen, Brotherhoods of Color 207-08; Hill, Black Labor and the American Legal System 107-09.
[19] 323 U.S. at 201.

Bestowing representative powers on the union "comparable to those possessed by a legislative body," the Court held that Congress also intended to impose a corresponding "duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."[20] Without fleshing out what constituted an appropriate differentiation between employees within a class, the Court ruled that discrimination based on "obviously irrelevant and invidious" factor such as race was "plainly" not intended by Congress.[21] The Tunstall opinion relied for the most part on Steele.[22]

It has been suggested that the Court's rationale – "because there was no evidence that Congress intended to authorize race discrimination under the act, the Court could prohibit union representatives from engaging in it" – was not only "creative," but also "disingenuous," since it was inconceivable that Congress harbored a "strong objection to the unions' policies."[23] Jackson, however, had some firsthand experience with similar logic, and was not hostile to it. While Steele and Tunstall were pending, he apparently reflected on a 1937 correspondence with New York's Robert Wagner, the Senator credited with the National Labor Relations Act. The letters, which ended up in the Justice's Tunstall file, raised the general question of the rights possessed by a minority opposed to a duly-elected union. Jackson suggested to Wagner, "It appears … that the Court adopts the government's interpretation that when a majority of a class has selected a representative the carrier can not make with anyone other than that representative a

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[20] 323 U.S. at 202-03.
[21] 323 U.S. at 203.
[22] Harlan Fiske Stone, draft opinion, Box 133, File: Supreme Court – O.T. 1944 – No. 37, Tunstall v. Brotherhood of Locomotive Firemen, Robert H. Jackson Collection, Library of Congress 2-3.
[23] Bernstein, Only One Place of Redress 63. Bernstein further argued that Congress (or at least a rather sizeable proportion of its members) intended for the Railway Labor Act to have a racially discriminatory result. Id. at 57-59, 63.

collective contract covering the class as a whole or a part thereof." Wagner replied, "It is indeed clear that the representative selected by the majority of a class is held to be the sole collective bargaining representative of that class to the exclusion of any other collective bargaining representative," but he added, "I am not clear on the question whether the collective bargaining representative of the majority would be entitled to represent the whole class even if a large minority of the class wished to deal individually with the employer."[24] Though not raising the precise issue presented in Tunstall and Steele, this exchange suggested the existence of enough ambiguity on the question of minority rights vis a vis a duly elected collective bargaining agent, to conclude that the minority is not totally at the mercy of the majority, as the defendant unions had claimed in their cases against the African American trainmen.

Jackson agreed with Stone's opinion in Steele, but expressed concern about the case's relationship with the pending Wallace Corporation v. NLRB, in which four dissenters (including Jackson and Stone) argued that employers are not liable for union misconduct.[25] Ultimately, Jackson, author of the Wallace dissent, distinguished the two cases by arguing that different statutes were applicable in each.[26] The results in Steele and Tunstall were unanimous. Black concurred in the result, without opinion, in Steele, while Murphy issued separate concurring opinions in both, maintaining that the cases

[24] Robert H. Jackson to Robert F. Wagner, March 30, 1937, Box 133, File: Supreme Court – O.T. 1944 – No. 37, Tunstall v. Brotherhood of Locomotive Firemen, Robert H. Jackson Collection, Library of Congress; Robert F. Wagner to Robert H. Jackson, April 1, 1937, Box 133, File: Supreme Court – O.T. 1944 – No. 37, Tunstall v. Brotherhood of Locomotive Firemen, Robert H. Jackson Collection, Library of Congress.
[25] Robert H. Jackson to Harlan Fiske Stone, December 1, 1944, Box 133, File: Supreme Court – O.T. 1944 – No. 37, Tunstall v. Brotherhood of Locomotive Firemen, Robert H. Jackson Collection, Library of Congress, quoted in Mason, Harlan Fiske Stone 634.
[26] Wallace Corporation v. NLRB, 323 U.S. 248, 271 (1944) (Jackson, J., dissenting).

should have been decided on constitutional grounds.[27] Yet even in the Warren Court's heyday, federal courts continued to refrain from relying on constitutional arguments in union discrimination cases, so it is hardly surprising that the Court would rely on a statutory framework here, especially given the lack of state action.[28]

Even as statutory cases, Tunstall and Steele were narrow, especially in terms of the benefit they conferred on those they were supposed to help. The ruling provided for injunctions barring unions and railroads from engaging in discriminatory conduct, and for money damages to displaced workers, but did not require the brotherhoods, which still acted as exclusive collective bargaining agents, to admit African Americans as members. That outcome was due, in part, to a strategic decision by Steele's attorney Charles Houston, himself a leading architect of modern civil rights litigation, that it "'may be best that we do not bite off too much at one time …."'[29]

The cases' practical consequences could not have caused skeptics of Court action to reconsider their views. In a pattern repeated many times in civil rights litigation, a landmark victory in one case would not be enough to change the behavior of non-parties, many of whom would wait to be sued, and then would defend against the lawsuit (often, unions did so with railroad collusion).[30] Since lawsuits "'are expensive, time consuming

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[27] 323 U.S. 210, 214 (Murphy, J., concurring); 323 U.S. 192, 208-09 (Black, J., concurring and Murphy, J., concurring).

[28] Hill, Black Labor and the American Legal System 110; see notes 15 and 59.

[29] 323 U.S. at 203-04, 207; Arnesen, Brotherhoods of Color 209; Hill, Black Labor and the American Legal System 110-11. The standard biography of Houston is Genna Rae McNeil's Groundwork.

In a subsequent successful challenge to an all-white railroad's discriminatory practices, Houston tried but failed to open union membership to African Americans; the African American labor organizations he represented had no interest in merging with the white brotherhoods. Arnesen, Brotherhoods of Color 210, 217. Nonetheless, the legal strategy shifted from insistence on fair representation to demands for full union membership in the years following Steele and Tunstall. Arnesen, Brotherhoods of Color 217.

[30] Hill, Black Labor and the American Legal System 111, quoting "The Law and Racial Discrimination in Employment," Arthur M. Ross and Herbert Hill., eds., Employment, Race, and Poverty (New York: Harcourt, Brace & World, 1967) 488-89; Arnesen, Brotherhoods of Color 210ff.; Hill, Black Labor and the American Legal System 132.

and precarious… only… the most outraged of individuals'" would seek to vindicate their rights when denied them, "'and only in critical circumstances.'" Nor did the cases change the federal bureaucracy, which "refused to use its powers for swift and pervasive action against the discriminatory racial practices of management and organized labor"; it was not until 1964 that the NLRB deemed racial discrimination an unfair labor practice.[31]

While Steele and Tunstall were pending, Jackson played a role in another union exclusion case. The Railway Mail Association, an organization of some 22,000 postal clerks which limited its membership to men "of the Caucasian race, or a native American Indian," ran afoul of a New York state law prohibiting exclusion or other discrimination for reasons of "race, color or creed." The RMA lost in the state's appellate courts, and sought Supreme Court review by the less commonly-used route of appeal. Jackson, as the Justice assigned to the Second Circuit (the federal appeals jurisdiction that includes New York), declined to rule until it was presented to the Chief Judge of the New York Court of Appeals, Irving Lehman. After Lehman had found no substantial federal question, and the case was brought back to Jackson, the Justice granted the appeal, permitting the RMA a day in court, before the entire Supreme Court. In an explanatory letter, Jackson assured Lehman that "[p]ersonally, I agree with you fully, and will so advise the conference…. I feel greatly strengthened in my conclusion to know that you felt as I did about it, and I have no doubt that the conference will agree with us both."[32]

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[31] Hill, Black Labor and the American Legal System 94, 109-10.

[32] Robert H. Jackson to Irving Lehman, October 20, 1944, Box 15, File: General Correspondence -- Le, Robert H. Jackson Collection, Library of Congress 1.

The Supreme Court's Revised Rules at the time allowed appeal applications to be decided "by the chief justice or presiding judge of the state court or by a justice of this court." Revised Rules of the Supreme Court of the United States 36, sec. 1, printed at 306 U.S. 671, 714 (1939). Yet even a negative determination from the state's presiding judge would not block review by the Court, leaving at least one observer wondering what the point of the state judge's review was. The procedures for bringing an appeal

Yet, the Justice explained, "when the request is presented to me as if there is a federal question in form presented but I do not think it is a substantial one," he would "usually allow the appeal, which preserves the right until it can be passed on in conference." That option – a standard practice, according to one scholar -- "gives the entire Court a chance to consider the question of substantiability," which is important because "[t]here might be difference of opinion as to whether a question is substantial and, even if there was agreement that the question was not substantial, sometimes so much confusion is evident in state courts of different jurisdictions that we think it wise to take the case and write it out."[33] The full Court unanimously decided Corsi as Jackson had predicted.[34]

After Steele and Tunstall had appeared to put the issue of union discrimination to rest, 21 firemen initiated a new lawsuit against the Brotherhood of Locomotive Firemen and Enginemen. This time, the union did not contest the suit's merits, but instead disputed the proper venue for the proceedings. Since Steele and Tunstall, the aggrieved firefighters had trouble enforcing the decisions, as the union's headquarters was in Cleveland, Ohio, and the railroads,' in Southern states; there was no single court with jurisdiction over all of the parties. The aggrieved workers brought their action in the District of Columbia, which had a local law permitting lawsuits as long as a defendant is "found within" its borders. The union conceded that it could be "found within" the District, but argued that the federal venue statute, which required that a defendant be sued in its jurisdiction of residence, should apply. The trial court agreed with the plaintiffs,

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before the Court were overhauled in 1954. Frederick Bernays Wiener, "The Supreme Court's New Rules," 68 Harvard Law Review (1954) 20, 41-44.

[33] Robert H. Jackson to Irving Lehman, October 20, 1944, Box 15, File: General Correspondence -- Le, Robert H. Jackson Collection, Library of Congress 1; Wiener, "The Supreme Court's New Rules," Harvard Law Review 68 (1954) 20, 41-44.

[34] Railway Mail Accosication v. Corsi, 326 U.S. 88 (1945).

but the District of Columbia Circuit Court transferred the case to the Northern District of Ohio. Jackson's law clerk recommended the granting of certiorari on the ground that the issue raised was "important enough," in light of a recent case attempting to settle the issue of jurisdiction in the District of Columbia courts. But the equities of the case seeped through, in an aside that the petitioners "have still been unable to enforce this Court's decisions in Steele and Tunstall," with the union as the "guilty party."[35]

The case raised four issues: whether the District of Columbia court was a proper venue; whether the defendants were properly brought into the action by sufficient service of process; whether an injunction would be permissible under the Norris-LaGuardia Act; and whether the Court should take action on the trial court's temporary injunction barring further firings of African American firefighters.[36] While there was some difference of opinion about the temporary injunction, the conference unanimously decided to reverse the Circuit Court on the other three issues, thereby allowing the lawsuit to continue in the trial court.[37]

The job of drafting the Court's opinion fell on Jackson, whose conference notes and draft reflected his intent to write an opinion on the venue and service issues, while avoiding a ruling on both "troublesome" injunction issues.[38] Yet while avoiding the

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[35] Memorandum on certiorari petition in No. 452, Leroy Graham et al v. Brotherhood of Locomotive Firemen & Enginemen, Box 159, File: Supreme Court -- O.T. 1949 – No. 16, Graham v. Brotherhood of Locomotive Firemen and Enginemen, Robert H. Jackson Collection, Library of Congress; Graham v. Brotherhood of Locomotive Firemen and Enginemen, 338 U.S. 232, 233-35 (1949). The other District of Columbia jurisdiction case referred to in the memorandum is National Mutual Insurance Company of District of Columbia v. Tidewater Transfer Company, Inc., 337 U.S. 582 (1949).

[36] Two justices did not take part in Graham: Sherman Minton was officially appointed to the seat vacated by Justice Rutledge's death after oral argument had taken place; Justice Douglas was absent. 328 U.S. at 240.

[37] Robert H. Jackson, conference notes, Graham v. Brotherhood, Box 159, File: Supreme Court -- O.T. 1949 – No. 16, Graham v. Brotherhood of Locomotive Firemen and Enginemen, Robert H. Jackson Collection, Library of Congress.

[38] Robert H. Jackson, conference notes, Graham v. Brotherhood; Robert H. Jackson, draft opinion, October 24, 1949, Graham v. Brotherhood, Box 159, File: Supreme Court -- O.T. 1949 – No. 16, Graham v.

injunction issues, he criticized the union's intransigence in the face of clear legal rulings in the earlier cases. As he wrote in one early draft, "what before … might have been a mistaken view of [railroad brotherhood] rights now continues as a wilful [sic] disregard of the adjudicated rights of negro firemen, which the union has continued to press upon the railroads and in which the railroads have acquiesced."[39] (The sentiment was put more crisply in the published opinion, which referred to "a continuing and willful disregard of rights which this Court in unmistakable terms has said must be accorded the Negro firemen.").[40] Jackson explained that he did not reach the injunction issues, because the Circuit Court did not; he allowed that "Since the District of Columbia Courts are authorized to entertain the action, applications for other relief may be considered on remand."[41]

Some of Jackson's brethren disagreed. The recently-appointed Tom Clark sent a note urging him to "incorporate in your draft a provision reinstating the temporary injunction," as "the respondents here appear to have been using dilatory tactics to prevent

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Brotherhood of Locomotive Firemen and Enginemen, Robert H. Jackson Collection, Library of Congress 5-6; Robert H. Jackson, draft opinion, October 25, 1949, Graham v. Brotherhood, Box 159, File: Supreme Court -- O.T. 1949 – No. 16, Graham v. Brotherhood of Locomotive Firemen and Enginemen, Robert H. Jackson Collection, Library of Congress 6; Robert H. Jackson, draft opinion, October 27, 1949, Graham v. Brotherhood, Box 159, File: Supreme Court -- O.T. 1949 – No. 16, Graham v. Brotherhood of Locomotive Firemen and Enginemen, Robert H. Jackson Collection, Library of Congress 5; Robert H. Jackson, draft opinion, November 1949, Box 159, File: Supreme Court -- O.T. 1949 – No.16, Graham v. Brotherhood of Locomotive Firemen and Enginemen, Robert H. Jackson Collection, Library of Congress 6.

[39] Robert H. Jackson, draft opinion, October 24, 1949, Graham v. Brotherhood 2. See also Robert H. Jackson, draft opinion, October 25, 1949, Graham v. Brotherhood 2; Robert H. Jackson, draft opinion, October 27, 1949, Graham v. Brotherhood 2; Robert H. Jackson, draft opinion, November 1949, Graham v. Brotherhood 2.

[40] 338 U.S. at 234.

[41] Robert H. Jackson, draft opinion, October 24, 1949, Graham v. Brotherhood 5-6; Robert H. Jackson, draft opinion, October 25, 1949, Graham v. Brotherhood 6; Robert H. Jackson, draft opinion, October 27, 1949, Graham v. Brotherhood 5; Robert H. Jackson, draft opinion, November 1949, Graham v. Brotherhood 6.

the doctrine of Steele and Tunstall from becoming effective."[42] Black threatened to dissent from the part of the decision not reinstating the injunction, for much the same reason as his new colleague:

> I voted to decide the questions that you here send back to the District Court of Appeals. One reason for my vote was that I thought delay incident to remand for this purpose would simply result in giving respondents more time to deprive colored people of jobs to which we have held they might be entitled. Reinstatement of the injunction here would protect their rights in this respect. Consequently, unless someone else writes my view as to the decision of the other questions, I am willing to go along on that part, provided the injunction is reinstated. It appears to me that your opinion contains a proper predicate for reinstatement, and I hope you can obtain a court majority for this action. I should regret to dissent from failure to reinstate where the opinion so obviously indicates that such action is proper.[43]

Burton indicated his intention to join Frankfurter's planned concurring opinion on the availability of injunctive relief.[44]

Jackson then crafted a section explaining why an injunction was appropriate. He insisted that "were it a question of first impression we should not be disposed to consider it here at the present stage of the proceedings," as "a reviewing court [should] have the advantage of the views of the tribunals below whenever practicable."[45] In this case, however, the law was well-settled. He restated the rationale of Steele and Tunstall, which arose out of circumstances almost indistinguishable from those of this case, and

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[42] Tom C. Clark to Robert H. Jackson on #16 – Graham v. Brotherhood, Box 159, File: Supreme Court – O.T. 1949 -- No. 16, Graham v. Brotherhood of Locomotive Firemen and Enginemen, Robert H. Jackson Collection, Library of Congress.

[43] Hugo L. Black to Robert H. Jackson, October 28, 1949, Graham v. Brotherhood, Box 159, File: Supreme Court – O.T. 1949 -- No. 16, Graham v. Brotherhood of Locomotive Firemen and Enginemen, Robert H. Jackson Collection, Library of Congress.

[44] Harold H. Burton to Robert H. Jackson, undated comments on reverse of Jackson's October 28 circulated draft opinion, Box 159, File: Supreme Court – O.T. 1949 -- No. 16, Graham v. Brotherhood of Locomotive Firemen and Enginemen, Robert H. Jackson Collection, Library of Congress 5; Harold H. Burton to Robert H. Jackson, October 28, 1949 memorandum re Felix Frankfurter's circulation, Box 159, File: Supreme Court – O.T. 1949 -- No. 16, Graham v. Brotherhood of Locomotive Firemen and Enginemen, Robert H. Jackson Collection, Library of Congress.

[45] Robert H. Jackson, draft opinion, November 1949, Graham v. Brotherhood 5; see also 338 U.S. at 237.

which had resulted in injunctive relief for the plaintiffs.[46] The basis for permitting courts to entertain a claim for breach of duty by craft representatives was simply that the right to a remedy "would be sacrificed or obliterated if it were without the remedy which courts can give … and which it is their duty to give in cases in which they have jurisdiction."[47] He also emphasized that "It would serve no purpose to review at length the reasons which, in the Steele and Tunstall cases … impelled us to conclude that the Railway Labor Act imposes upon the Brotherhood the duty to represent all members of the craft without discrimination and invests a racial minority of the craft with the right to enforce that duty. It suffices to say that we reiterate here that such is the law."[48] Of the union's argument that the Norris-LaGuardia act barred injunctive relief, he concluded, "If … there remains any illusion that under the Norris-LaGuardia Act the federal courts are powerless to enforce these rights, we dispel it now."[49]

The justice added, in response to the request for reinstating the injunction, "let the mandate go down forthwith,"[50] but the Court did not actually reinstate it, despite

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[46] 338 U.S. at 238; Robert H. Jackson, draft opinion, November 1949, Graham v. Brotherhood 8.
[47] 338 U.S. at 239; Robert H. Jackson, draft opinion, November 1949, Graham v. Brotherhood 9.
[48] 338 U.S. at 239; Robert H. Jackson, draft opinion, November 1949, Graham v. Brotherhood 10.
[49] 338 U.S. at 240; Robert H. Jackson, draft opinion, November 1949, Graham v. Brotherhood 11.
[50] Robert H. Jackson, draft opinion, dated both November 1949 and October 27, 1949, Graham v. Brotherhood, Box 159, File: Supreme Court – O.T. 1949 -- No. 16, Graham v. Brotherhood of Locomotive Firemen and Enginemen, Robert H. Jackson Collection, Library of Congress 5-12; Robert H. Jackson, draft opinions, November 1 and 7, 1949, Graham v. Brotherhood, Box 159, File: Supreme Court – O.T. 1949 -- No. 16, Graham v. Brotherhood of Locomotive Firemen and Enginemen, Robert H. Jackson Collection, Library of Congress 4-7; 338 U.S. at 237-40; Felix Frankfurter to Robert H. Jackson, undated note on the reverse of copy of draft opinion, November 1, 1949, Graham v. Brotherhood, Box 159, File: Supreme Court – O.T. 1949 -- No. 16, Graham v. Brotherhood of Locomotive Firemen and Enginemen, Robert H. Jackson Collection, Library of Congress 7; Harold H. Burton to Robert H. Jackson, November 1, 1949 note on reverse side of copy of draft opinion, November 1, 1949, Graham v. Brotherhood, Box 159, File: Supreme Court – O.T. 1949 -- No. 16, Graham v. Brotherhood of Locomotive Firemen and Enginemen, Robert H. Jackson Collection, Library of Congress 7; untitled typewritten list, November 2, 1949, Graham v. Brotherhood, Box 159, File: Supreme Court – O.T. 1949 -- No. 16, Graham v. Brotherhood of Locomotive Firemen and Enginemen, Robert H. Jackson Collection, Library of Congress; Tom C. Clark to Robert H. Jackson, November 2, 1949 handwritten note on copy of draft opinion, November 1, 1949, Graham v. Brotherhood, Box 159, File: Supreme Court – O.T. 1949 -- No. 16, Graham v. Brotherhood of Locomotive Firemen and Enginemen, Robert H. Jackson Collection, Library of Congress 1.

representations that the rapid pace of firings would cause irreparable harm to many.[51] Jackson's plea for the lower court to act "forthwith" was by no means as good as an immediate reinstatement of the injunction, but apparently it sufficed to keep Black and Clark on board, and Frankfurter from issuing a concurring opinion.[52]

Union efforts to force out African American railroad workers continued, as did the litigation. In March of 1952, the Court agreed to hear a case in which a 40-year employee of the St. Louis-San Francisco Railway Company sued the Brotherhood of Railroad Trainmen in federal court for using strike threats to force the railroad to fire African American trainmen. The contractual legerdemain in use here was somewhat different from that in the earlier cases: the railroad was required to fire all "train porters" who had done brakemen's work; as it happened, all of the African American brakemen were classified as "train porters," a separate job classification not under the brakemen's union's purview. This complicated the legal reasoning needed to find for the plaintiffs, in that a court would have "to include the union's obligation [of fair representation] to workers who were not members of the union, who did not work under the union's jurisdiction, and who were not even represented by the union in the bargaining process."[53] The District Court stopped the railroad from eliminating the disputed job classification, on the ground that the railroad had given the workers insufficient notice. The Eighth Circuit Court of Appeals instead found that the brotherhood had engaged in

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[51] In addition to the final decision to pass on the injunction, the order granting certiorari denied the petitioners' request to vacate the Circuit Court's stay and to reinstate the injunction. 337 U.S. 954.
[52] Tom C. Clark to Robert H. Jackson, November 2, 1949 handwritten note on copy of draft opinion, November 1, 1949, Graham v. Brotherhood, 1; Hugo L. Black to Robert H. Jackson, November 1, 1949, Graham v. Brotherhood, Box 159, File: Supreme Court – O.T. 1949 -- No. 16, Graham v. Brotherhood of Locomotive Firemen and Enginemen, Robert H. Jackson Collection, Library of Congress; 338 U.S. at 240.
[53] Hill, Black Labor and the American Legal System 113.

an illegal "'attempted predatory appropriation'" of jobs, in violation of the fair representation doctrine.[54]

On the Supreme Court, six justices, including Jackson, affirmed the Circuit Court decision, with Black writing the majority opinion. He noted that "the pattern of racial discrimination in this case is much the same" as in the earlier cases:

> these train porters are threatened with loss of their jobs because they are not white and for no other reason. The job they did hold under its old name would be abolished by the agreement; their color alone would disqualify them for the old job under its new name. The end result of these transactions is not in doubt; for precisely the same reasons as in the Steele case "discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations." …And courts can protect those threatened by such an unlawful use of power granted by a federal act.[55]

The majority "penetrated the artificiality of the craft distinction": as Black put it, "the racial discrimination practiced is unlawful, whether colored employees are classified as 'train porters,' 'brakemen,' or something else." The solid workmanship of the section on injunctive relief which Jackson had added to his opinion in Graham permitted Black to write that "We need add nothing to what was said" in that case and in Steele about the availability of injunctive relief to the aggrieved workers.[56]

The opinion instructed that "the District Court should permanently enjoin the Railroad and the Brotherhood from use of the contract or any other similar discriminatory bargaining device to oust the train porters from their jobs." Yet while leaving the trial court "free to consider what provisions are necessary to afford these employees full

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[54] Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 769-72 (1952); Brotherhood of Railroad Trainmen v. Howard, 342 U.S. 940 (1952); Arnesen, Brotherhoods of Color 224-25.
[55] 343 U.S. at 772-74; Arnesen, Brotherhoods of Color 225.
[56] 343 U.S. at 774; Arnesen, Brotherhoods of Color 225; Hill, Black Labor and the American Legal System 113.

protection from future discriminatory practices," the High Court instructed the District Court to "bear in mind that *disputed* questions of reclassification of the craft of 'train porters' are committed … to the National Mediation Board," and are therefore outside the purview of the courts.[57] This directive suggests some understanding on the part of the Court that, by circumventing a clear jurisdictional rule, its ruling was "surprising," and "a long step forward."[58]

Also suggestive of Howard's doctrinal reach was the relatively close vote. Minton, Vinson and Reed dissented, distinguishing this case from the previous ones with the differing classification between the African American "porters," who in fact had their own bargaining agent, and white brakemen.[59] They accused the majority of, in effect, deciding the matter on constitutional grounds, which was wrong because discriminatory behavior by private entities did not meet the state action requirement.[60] Yet Jackson, who often joined with some or all of the three dissenters in hesitating to expand the Court's reach, apparently had no difficulty with this stretch of doctrine: he had resolved the injunction issue once and for all in Graham, and was now participating in a second review of a case in which a union sought to evade the Court's clear ruling in Steele and Tunstall.

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[57] 343 U.S. at 774-75.

[58] Arnesen, Brotherhoods of Color 224-25, quoting "Labor Law – Collective Bargaining Agent – Racial Discrimination," New York University Law Review 27 (October 1952) 713-19; Pritchett, Civil Liberties and the Vinson Court 144.

[59] 323 U.S. at 775-77.

[60] 323 U.S. at 777-78.

Howard was not the only case in which Minton voted to deny relief to African Americans based on his reading of the Constitution's state action requirement. He similarly voted to sustain the all-white Jaybird Primary one year later. See p. 364. Yet he was consistent: in the school segregation cases, in which state action was not at issue, he quickly announced his intention to vote against Jim Crow. See pp. 435, 460. One should not underestimate the difficulty of the problem he posed as, one decade later, the Court's constitutional theory for upholding legislation outlawing private discrimination was based on Congress's power to regulate interstate commerce, not on the Reconstruction amendments. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

Yet as far as Howard, in the eyes of some, extended the Court's reach into what had been considered private matters, the Court still "avoided the larger constitutional issues" for years to come.[61] And the victory, again, was Pyrrhic for many African Americans. By the time they were admitted into the brotherhoods in the late 1950s and early 1960s, their share of brakemen's and firemen's jobs had precipitously declined (in Steele's district, 98% of the firemen were African American when he was first hired in 1910; that figure had dropped to 80% in 1941, and fell to 20% after the discriminatory contract was put in place), and the railroads, themselves in serious decline, were in no position to hire large numbers of new employees, regardless of race.[62] Nonetheless, a small number of African Americans, in the latter decades of the 20th century, managed to rise to such hallowed positions as railroad engineer, thanks in no small part to the cases heard by the Supreme Court during Jackson's tenure.[63]

* * *

Employment discrimination cases were the most straightforward type of civil rights cases for the Court, yet even they presented difficulties with legal doctrine and enforceability. Jackson had a perfect voting record with regard to African American trainmen's rights, one comporting with his unwavering belief in equality of employment opportunity; yet he avoided granting injunctive relief in Graham, though it seemed to some of his colleagues that doing so was the only way to give practical effect to their ruling. There is no complete statement explaining why Jackson refused to do so, but his stance is consistent with his view that substantive issues should be reached only when no

[61] Arnesen, Brotherhoods of Color 225-26.
[62] Bernstein, Only One Place of Redress 63-65 (quoting economist Herbert Northrup).
[63] Arnesen, Brotherhoods of Color ch. 8.

procedural issues dictate the Court's decision. When there were no such bars to granting relief, he was willing to expand legal doctrine to block union efforts at circumventing prior Court rulings, even in Howard, in which some of the colleagues with whom he often agreed on issues of Court power felt obliged to dissent.

VOLUME II

Chapter 6 – Jackson, Criminal Justice and Racial Equality

> I do not hold out any hope of an irreproachable or infallible system of criminal justice. Any procedure that enables the conviction of the guilty holds some danger of convicting the innocent, while any system that tries to protect the innocent will allow occasional escapes of the guilty through what the public will regard as loopholes or technicalities. The best that we can hope to do is to achieve a proper balance between the two objectives knowing that miscarriages will now and then occur.
>
> -- Robert H. Jackson[1]

Introduction

According to Gunnar Myrdal, the second barrier for African Americans to overcome in their struggle for racial equality consisted of "discriminations in law courts, by the police, and by other public servants."[2] In the late 1860s, the Fourteenth Amendment promised legal equality through guarantees of "privileges and immunities of citizenship," "due process of law," and "equal protection of the laws."[3] Yet for many decades thereafter, the legal system continued its systematic denial of equal treatment to African Americans.[4] While discriminatory laws, practices and violence occurred nationwide, there was little question that "a sharp division between North and South in

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[1] Robert H. Jackson, Speech, Student Bar Association, University of Pittsburgh School of Law, May 6, 1954 (cancelled), Box 51, File: Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 1-2.

[2] Myrdal, An American Dilemma I (1996 ed.) 60-61.

[3] U.S. Const., Amend. XIV, sec. 1.

[4] Myrdal, An American Dilemma I (1996 ed.) chs. 24-27; Randall Kennedy, Race, Crime, and the Law (New York: Pantheon Books, 1997).

It goes without saying that, even today, racial prejudice is still a problem in the American legal system. A. Leon Higginbotham, Jr., Shades of Freedom: Racial Politics and Presumptions of the American Legal Process (New York: Oxford University Press, 1996) introduction; Michael J. Klarman, "Race and the Southern Criminal Justice System in the 1940s," Journal of American History (June 2002) 142; David Cole, No Equal Justice: Race and Class in the American Criminal Justice System (New York: New Press, 1999); Kennedy, Race, Crime, and the Law 387.

the granting of legal justice to Negroes" existed, with African Americans in the South facing more pervasive, more severe, and more deeply-rooted injustice.[5]

The issues of legal equality at the forefront of the Court's docket during Jackson's tenure as Justice concerned the criminal justice system. Offering little (if any) help to poor defendants, the criminal process was made even worse for African Americans by pervasive racial prejudice, especially in the South.[6] Cases in which dubiously convicted African Americans faced the death penalty had their own term of art: "legal lynchings," in which "prosecutors knew how to enforce the existing racial order within the constraints of new procedural guidelines."[7] African American crime victims also lacked recourse when biased officials and jurors refused to hold their attackers accountable.[8] Appeals attorneys and appellate courts could do little to reverse even some of the most hideous miscarriages of justice once the damage had been done on the trial level.[9]

Occasionally, the Supreme Court could, and did, bring a measure of justice to African American defendants and victims.[10] Yet the final results were, taken as a whole,

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[5] Myrdal, An American Dilemma I (1996 ed.) p. 529 and ch. 24; Franklin and Moss, From Slavery to Freedom (1994 ed.) 312-17, 354.

[6] Myrdal, An American Dilemma I (1996 ed.) chs. 25-26.

[7] Adam Fairclough, Race & Democracy: The Civil Rights Struggle in Louisiana, 1915-1972 (Athens: University of Georgia Press, 1995) 119; Eric W. Rise, The Martinsville Seven: Race, Rape, and Capital Punishment (Charlottesville: University Press of Virginia, 1995) 3; see also Lisa Lindquist Dorr, White Women, Rape, and the Power of Race in Virginia, 1900-1960 (Chapel Hill: University of North Carolina Press, 2004).

[8] Tushnet, Making Civil Rights Law 47 ff.; Kennedy, Race, Crime, and the Law ch. 2.

[9] Myrdal, An American Dilemma I (1996 ed.) ch. 27. Thurgood Marshall, who regularly answered pleas for aid from convicts doing hard time or awaiting execution on death row, often "could do nothing to salvage" their chances. Tushnet, Making Civil Rights Law 51-52.

[10] The Court had invalidated the practice of barring African Americans from juries in 1880 [Strauder v. West Virginia, 100 U.S. 303 (1880); Norris v. Alabama, 294 U.S. 587 (1935); Hale v. Kentucky, 303 U.S. 613 (1938); Pierre v. Louisiana, 306 U.S. 354 (1939)]; thrown out coerced confessions, even issuing summary reversals on those grounds, by 1940 [Brown v. Mississippi, 297 U.S. 278 (1936); Chambers v. Florida, 309 U.S. 227 (1940); Canty v. Alabama, 309 U.S. 629 (1940); White v. Texas, 309 U.S. 631 (1940)]; and blocked manifest injustices such as kangaroo courts and lack of legal representation for capital crimes by finding denials of "due process of law" in the early decades of the 20th century [Moore v. Dempsey, 261 U.S. 86 (1923); Powell v. Alabama, 287 U.S. 45 (1932)]. Tushnet, Making Civil Rights Law 50-51, 56-57 and accompanying fns; Braeman, Before the Civil Rights Revolution 87-115; Klarman,

"equivocal." Relatively few cases were in the proper procedural posture for review, which in any event was a rare privilege granted not in cases of "marginal unfairness," but only to remedy "flagrant injustices … most likely to take place in the South, in cases involving black defendants charged with serious interracial crimes" like rape or murder.[11] And a favorable ruling was no guarantee of justice.[12]

In sharp contrast to his record in other civil rights cases (which hovered at the Court median), Jackson had a worse record than any of his colleagues in cases involving the criminal justice system and African Americans.[13] The reasons why were apparent before his career on the bench, and became even more pronounced with each written opinion. He professed concern that the innocent not be railroaded, calling for greater professionalization in police departments, improving aid to indigent criminal defendants, better understanding of the potential unreliability of eyewitness testimony, and abolishing the death penalty. Yet more often than not, he was more concerned with "strengthening the hand of society in its dealings with crime": reducing what he perceived as a multiplicity of pretrial motions and post-trial stays; curtailing "the privilege against self-incrimination, and the absurd practice of setting aside convictions if the prosecutor mentions that the defendant did not take the stand, although every juror knows it, and also knows that the instinct of an innocent man is to deny a false accusation"; and abolishing grand juries. He criticized the legal profession which, he believed,

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"Race and the Southern Criminal Justice System in the 1940s" 120-22; Kennedy, Race, Crime, and the Law 94-100, 102-07, 169-77.

[11] Klarman, "Race and the Southern Criminal Justice System in the 1940s" 122.

[12] In response to a request from the Supreme Court librarian, the NAACP compiled followup data on what had happened to defendants in six cases after the Court had reversed convictions: while some were freed, convicted of less serious crimes or given life in prison instead of the death penalty, others were reconvicted and resentenced to death, ended up in insane asylums or became victims of vigilante justice. Tushnet, Making Civil Rights Law 51.

[13] See pp. 178, 180.

"consistently obstructs legislative efforts to make criminal enforcement effective." And he wrote that "the best we can hope to do" in the criminal justice system "is to achieve the proper balance between" protecting the innocent and punishing the guilty, "knowing that miscarriages will now and then occur."[14]

When it came to striking the balance between freeing the guilty and railroading the innocent, Jackson trusted local law enforcement more than the federal government. As Attorney General, he urged his subordinates to put bias aside, because "the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community"; and warned that "the greatest danger of abuse of prosecuting power" could be found in singling out "some group of unpopular persons" and trying to "get" them. Yet moral judgments and standards of criminal practice were local concerns:[15]

> In spite of the temptation to divert our power to local conditions where they have become offensive to our sense of decency, the only long-term policy that will save federal justice from being discredited by entanglements with local politics is that it confine itself to strict and impartial enforcement of federal law, letting the chips fall in the community where they may. Just as there should be no permitting of local considerations to stop federal enforcement, so there should be no striving to enlarge our power over local affairs and no use of federal prosecutions to exert an indirect influence that would be unlawful if exerted directly.[16]

His fear of federal prosecutors contrasted with his view that rural justice of the peace courts, if "not always models of neutrality," reflected the community's "collective idea of

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[14] Pritchett, Civil Liberties and the Vinson Court 176; Robert H. Jackson, "The High Cost of Justice," address before the Norden Club, Jamestown New York, reprinted in the Jamestown Evening Journal Nov. 20, 1920; Jackson, "The Lawyer: Leader or Mouthpiece?" Address by the Chairman, Conference of Bar Association Delegates, Milwaukee, WI, August 27th, 1934, 3-4; Robert H. Jackson to Harrison Tweed, February 28, 1950, Box 20, Correspondence File: Tweed, Harrison, Robert H. Jackson Collection, Library of Congress 1-2; Robert H. Jackson, "Serving the Administration of Criminal Justice," Address before the Criminal Law Section, American Bar Association., Harvard Club, Boston, MA, August 26, 1953, reprinted in 15 F.R.D. 65, 67-76; Jackson, Speech, Student Bar Association, University of Pittsburgh School of Law, May 6, 1954 (cancelled) 1-2, 5, 6, 7, 9, 10, 12-13, 14, 15.

[15] Jackson, Address, Second Annual Conference of United States Attorneys, Washington, D.C., April 4, 1940 19.

[16] Jackson, Address, Second Annual Conference of United States Attorneys, Washington, D.C., April 4, 1940 20.

the decent thing," which was "generally… not far off."[17] His blinders toward imperfections in rural justice led him to disregard the plight of African Americans in small Southern communities, where community standards were the problem: the results of biases all too often ended up being "far off."[18]

Jackson's deference to the states on criminal justice matters, paired with his suspicion of federal authority, continued through his career on the bench.[19] His hesitation to overturn state convictions, and his relative passiveness in a federal civil rights prosecution like the Screws case, suggests that Jackson's federalism was motivated in large measure by a fear of federal power, a fear which, according to some scholars, might have been exacerbated by his experience in viewing the results of centralized power in post-Nazi Germany, but which had been already in place when he left for Nuremberg.[20]

At a historical moment when the criminal cases involving African Americans involved dubious practices by state law enforcement and federal steps toward vigorously confronting racist behavior by state officials, one would expect that an application of these views would disproportionately inure against the interests of African American. And that is exactly what Jackson's fear of national power did: he sided with African American criminal defendants, or African American victims of crime, less often than any of his contemporaries.

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[17] Jackson Review 137.
[18] Powell, You Can Go Home Again 43, 91-93, 148-49, 233-34, 277-78.
[19] Pritchett, Civil Liberties and the Vinson Court 190; Hockett, "Justice Robert H. Jackson and the role of the Supreme Court in American politics" 229-32.
[20] See pp. 167, 214, 250 and sources cited therein; discussion in Hockett, "Justice Robert H. Jackson and the role of the Supreme Court in American politics" 229-32; see generally A.E. Dick Howard, "Does Federalism Secure or Undermine Rights?", Federalism and Rights, ed. Ellis Katz and G. Alan Tarr (Lanham, MD: Rowman & Littlefield, 1996) 12.

Race, Due Process and Justice: The Juror Exclusion Cases

By the time Jackson joined the Court, the law was already well settled – "systematic" exclusion of African Americans from juries, trial and grand juries alike, violated the constitutional guarantee of equal protection of the laws.[21] Nor was there a requirement that a defendant show that the discrimination hurt his case to obtain a new trial or grand jury presentation.[22] Yet the Court's repeated and unequivocal stand against jury discrimination did not end the practice of systematic exclusion from juries because of race.[23] Southern defense attorneys often hesitated to raise the issue, whether to avoid angering their white client base or because they feared that raising the claim would be taken out on their client at sentencing.[24] And even with intrepid defense counsel, judges rarely found that discrimination had taken place, and the Supreme Court rarely disturbed those findings, reversing only one such case between 1881 and 1935, and five more over the next seven years: in each of the post-1935 cases, all-white juries meted out death sentences, in counties where there had been no African American jurors for years.[25]

As justice, Jackson participated in seven African American jury discrimination cases. The Court record in them was 5-2 in favor of the convicted defendant or defendants claiming discrimination. Jackson's was 4-3, and he voted for the accused in one of those four on a ground unrelated to jury composition, so his record on the issue was actually 3-4. The Court decided those three unanimously, with one opinion. In them, the evidence of systematic discrimination in jury selection was so clear, that it left

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[21] Patton v. Mississippi, 332 U.S. 463, 466 (1947); Hill v. Texas, 316 U.S. 400, 404-06 (1942); Smith v. Texas, 311 U.S. 128, 129-30 (1940); Pierre v. Louisiana, 306 U.S. 354, 357-58 (1939); Neal v. Delaware, 103 U.S. 370, 386, 394 (1881); Strauder v. West Virginia, 100 U.S. 303 (1880); Kennedy, Race, Crime, and the Law 169-72.
[22] 316 U.S. at 406.
[23] Kennedy, Race, Crime, and the Law 172-73.
[24] Kennedy, Race, Crime, and the Law 174.
[25] Kennedy, Race, Crime, and the Law 175-78.

no room for disagreement.[26] Yet under this veneer of doctrinal solidarity, Jackson was dubious of the remedy – reversing a conviction and requiring the defendant to be re-charged. In a draft dissenting opinion for one of these ultimately unanimous cases, Hill v. Texas, Jackson wrote, "'I can think of no assumption more discreditable to the negro race, or more harmful to it in its struggle for its rights, than that negroes … would have given this person immunity from indictment…. I would affirm this conviction and right race wrongs in a cause more representative of the race grievance.'" After having circulated the draft, he decided to withhold it and change his vote "to avoid having 'a bad effect on race relations' during the war."[27]

When the cases were less clear cut, Jackson harbored fewer reservations. In Akins v. Texas, the second of three Dallas County cases, the petitioner alleged, with support in the evidence, that the jury commissioners sought to limit the number of African Americans serving on a grand jury to no more than one. Six justices voted to affirm the conviction. Five, including Jackson, joined in an opinion written by Reed, which relied on the factual findings of the Texas courts that no discriminatory intent existed.[28] Nor did the statistical evidence "alone prove[] racial discrimination."[29]

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[26] Hill v. Texas, 316 U.S. 400, 402-04 (1942); Patton v. Mississippi, 332 U.S. 463, 464-65 (1948); Brunson v. North Carolina, 333 U.S. 851 (1948). Jackson would later comment of Brunson that "The law on this subject is now so settled that we no longer find it necessary to write out expositions of the Constitution in this regard." Moore v. New York, 333 U.S. 565, 568 (1948). See also Hernandez v. Texas, 347 U.S. 475 (1954), in which the Court reversed a Hispanic's murder conviction in Jackson County, Texas, because no one with a Hispanic surname had served on a jury there in over a quarter of a century. In conference on that case, Jackson indicated he would reverse because "It is clear that they disqualified part of population because of the national origin," yet allowed that "The standard, however, is different from proportional representation." When Minton laid out problems with the defendant's evidence, however, Jackson then said, "I would affirm on weak proof." Yet in the end, the Court unanimously agreed to reverse. See Dickson, ed., The Supreme Court in Conference 564.

[27] Tushnet, Making Civil Rights Law 59-60 (quoting Jackson draft dissent with note by Black, Hugo Black Papers; and returns on draft opinion, Harlan Fiske Stone Papers); Chernack, "The Clash of Two Worlds" 86 n.171.

[28] Akins v. Texas, 325 U.S. 398, 406-07 (1945).

[29] 325 U.S. at 405-06; Tushnet, Making Civil Rights Law 61.

In the third Dallas County case, Cassell, Jackson was the lone dissenter in a 7-1 reversal of the petitioner's death sentence.[30] This case was closer than the final vote indicated: Justices Reed and Burton joined the majority after originally having voted with Jackson to affirm.[31] Nor could the majority agree what it was about the grand jury commissioners' conduct that failed to pass constitutional muster.[32] Yet seven of eight justices harbored no doubt that improperly excluding African Americans from a grand jury violated an accused's rights. Jackson, alone in dissent, urged a reexamination of that doctrine.[33] At the heart of his argument was the view that a "grand jury right" is a "pure technicality," when, as in Cassell's case, there was "enough" evidence to support a guilty verdict.[34] The presence of legally sufficient evidence to convict should, according to Jackson, cure the prejudice resulting from any fault in a grand jury proceeding, in which the burden of proof is considerably lower. Requiring a new indictment and new trial for

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[30] Seven justices agreed to reverse the petitioner's conviction on the ground of racial discrimination in selecting grand jurors; Justice Douglas took no part in the case. 339 U.S. at 290.

[31] Burton had written a brief dissent before changing his mind. Stanley Reed, Memorandum to the Conference, December 2, 1949, Box No. 160, Legal File: Supreme Court – O.T. 1949 – Cases – No. 46, Cassell v. Texas, Robert H. Jackson Collection, Library of Congress; Harold Burton, draft dissenting opinion, February 1950, Box No. 160, Legal File: Supreme Court – O.T. 1949 – Cases – No. 46, Cassell v. Texas, Robert H. Jackson Collection, Library of Congress.

[32] 339 U.S. at 287-90 and n. 23, 295.

[33] Near the midpoint of his drafting process, Jackson had considered not dissenting, but merely setting forth his views, concluding that "Since however no majority of the Court is willing to do this, and since the recent precedents however unconsidered they may have been support them I acquiesce in the reversal of this conviction." Robert H. Jackson, draft opinion, March 1950, Box No. 160, Legal File: Supreme Court – O.T. 1949 – Cases – No. 46, Cassell v. Texas, Robert H. Jackson Collection, Library of Congress 7. Frankfurter, too, urged him not to vote to "overrule the doctrine which has had such a long acceptance," but instead join his opinion, which "may get a majority, or at least tie" that of Reed who, Frankfurter believed, was "extending the doctrine" with his rationale. Felix Frankfurter to Robert H. Jackson, March 25, 1950, Box No. 160, Legal File: Supreme Court – O.T. 1949 – Cases – No. 46, Cassell v. Texas, Robert H. Jackson Collection, Library of Congress 1-2.

[34] Robert H. Jackson, "Cassell," undated notes, Box No. 160, Legal File: Supreme Court – O.T. 1949 – Cases – No. 46, Cassell v. Texas, Robert H. Jackson Collection, Library of Congress. In fact, Jackson would not have minded ending all grand juries, but recognized the impracticability of seeking a constitutional amendment eliminating them in federal cases. Robert H. Jackson to Harrison Tweed, February 28, 1950 1-2.

a defendant already judged guilty after an admittedly fair trial imposed a penalty to society without resulting in a real benefit for the accused.

The dissenter understood "that discriminatory exclusion from a trial jury does, or at least may, prejudice a Negro's right to a fair trial, and that a conviction so obtained should not stand."

> The trial jury hears evidence of both sides and chooses what it will believe. In so deciding, it is influenced by imponderables – unconscious and conscious prejudices and preferences – and a thousand things we cannot detect or isolate in its verdict and whose influence we cannot weigh. A single juror's dissent is generally enough to prevent conviction. A trial jury on which one of the defendant's race has no chance to sit may not have the substance, and cannot have the appearance, of impartiality, especially when the accused is a Negro and the alleged victim is not.[35]

By contrast, "The grand jury is a very different institution," one that "States are not required to use … at all":

> Its power is only to accuse, not to convict. Its indictment does not even create a presumption of guilt; all that it charges must later be proved before the trial jury, and then beyond a reasonable doubt. The grand jury need not be unanimous. It does not hear both sides but only the prosecution's evidence, and does not face the problem of a choice between two adversaries. Its duty is to indict if the prosecution's evidence, unexplained, uncontradicted and unsupplemented, would warrant a conviction. If so, its indictment merely puts the accused to trial. The difference between the function of the trial jury and the function of the grand jury is all the difference between deciding a case and merely deciding that a case should be tried.[36]

Given the more stringent standards to which the prosecution is held in a trial, versus a grand jury proceeding, "It hardly lies in the mouth of a defendant whom a fairly chosen jury has found guilty beyond a reasonable doubt, to say that his indictment is attributable

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[35] 339 U.S. at 301-02 (Jackson, J., dissenting).

[36] 339 U.S. at 302 (Jackson, J., dissenting). The counterargument is that an improperly-composed grand jury could prejudice the rights of a convicted defendants, in that the grand jury frames the charges brought to trial in the first instance, and may even choose in its discretion not to indict at all. Vasquez v. Hillery, 474 U.S. 254, 263 (1986); Kennedy, Race, Crime, and the Law 187. But given the low burden of proof and the lack of a unanimity requirement, this argument may be more theoretical than real, which may explain why the Court continued the practice of automatically granting a new hearing and trial.

to prejudice," as "it is frivolous to contend that any grand jury, however constituted, could have done its duty in any way other than to indict."[37]

Jackson believed that challenges to grand jury composition were impeding the administration of justice, as they had been "lately so much resorted to for purposes of delay, and the spectacle of a defendant putting the jury system on trial before he can be tried for a crime is so discrediting to the administration of justice…."[38] Moreover, overturning a conviction "for errors that have nothing to do with the defendant's guilt or innocence, or with a fair trial of that issue … conflicts with another principle important to our law, *viz*., that no conviction should be set aside for errors not affecting substantial rights of the accused." In this case, for example, "a Negro convicted of murder by crushing the skull of a sleeping watchman with a piece of iron pipe to carry out a burglary" had been granted a new trial despite the fact that "No question is here as to his guilt" and an admission "that Negroes were not excluded from the trial jury by which he was convicted."[39] This result was bad public policy, because "decisions which allow a defendant to put the grand-jury system on trial for technical defects unrelated to his case … are contributing greatly to the deserved disrepute of our criminal law administration."[40]

Nor was the cause of racial justice well served by continuing to reverse convictions over grand jury composition. Such results "identify[] in the public mind the right of the most worthy Negroes to share jury service with the right of the least worthy

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[37] 339 U.S. at 302 (Jackson, J., dissenting).
[38] Jackson, draft opinion, March 1950, Cassell v. Texas 1.
[39] 339 U.S. at 298-99 (Jackson, J., dissenting); Jackson, draft opinion, March 1950, Cassell v. Texas 1; Robert H. Jackson, draft opinion, March 8, 1950, Box No. 160, Legal File: Supreme Court – O.T. 1949 – Cases – No. 46, Cassell v. Texas, Robert H. Jackson Collection, Library of Congress 1; Robert H. Jackson, draft opinion, February 17, 1950, Box No. 160, Legal File: Supreme Court – O.T. 1949 – Cases – No. 46, Cassell v. Texas, Robert H. Jackson Collection, Library of Congress 1.
[40] Jackson, draft opinion, February 17, 1950, Cassell v. Texas 1.

to escape, or defer, punishment for crime."[41] Nor would it speak very highly of those "most worthy Negroes" if they quashed an indictment of someone whose guilt could be proven beyond a reasonable doubt. As he wrote in an early draft:

> There is one assumption, and only one, on which it can be claimed that the exclusion of Negroes from that body injured or prejudiced this defendant. That assumption is that nondiscriminatory selection would have put on the jury one or more Negroes who would be willing and able to prevent a true bill against a Negro, just because he is a Negro. In other words, that they would shield him for racial reasons. I can think of no assumption more discreditable to the Negro people than the proposition that those who by education and moral character meet the qualification for grand jurors would give this conduct immunity from indictment just because he is a Negro. *That is the unfortunate assumption which leads so many otherwise well-meaning whites to tolerate and perpetuate the discriminatory exclusion. We should not adopt their premises, and unless we do, this defendant has suffered no prejudice* from any discrimination that may have occurred in choice of a grand jury.[42]

Thus, Jackson feared that vindicating African American rights by reversing convictions of the guilty might perpetuate the racial attitudes that lead to discrimination.[43]

Yet he also understood that a right without a remedy would not exist for long; and acknowledged the constitutional dimension of grand jury discrimination. He sought to resolve this dilemma by suggesting that the right of a non-racially discriminatory grand

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[41] Jackson, draft opinion, March 1950, Cassell v. Texas 7; Jackson, draft opinion, February 17, 1950, Cassell v. Texas 4.

[42] Jackson, draft opinion, March 1950, Cassell v. Texas 5 (emphasis added); Jackson, draft opinion, February 17, 1950, Cassell v. Texas 7.

Jackson was not alone in fearing such Balkanization. A letter sent to Jackson about the Shepherd case a year later opined:

> America is a nation of many races and nationalities and if such men as you continue to favor and cultivate the shockingly over-rated word of "prejudice," as it is surely being done, I can only visualize the obvious outcome as America being a nation of many small, bickering groups, each one feverishly shouting "prejudice" whenever they decide it's to their advantage to do so. I also reason that the Scotchman apprehended for a crime and convicted by a jury minus a Scotchman has just as much right and legal authority, which is nil, to seek and find sanction by shouting "Nationality prejudice." As the woman convicted of a crime by an all male jury could cry "sexual prejudice" and have her plea recognized.

Al Murdock to Robert H. Jackson, April 11, 1951, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420 Shepherd and Irvin v. Florida – Robert H. Jackson Collection, Library of Congress.

[43] Nullification – the purposeful acquittal of an obviously guilty defendant -- by African Americans has been documented in recent decades, and has even been encouraged by a few African Americans. It has also raised concerns similar to those raised by Jackson in his 1950 hypothetical. Kennedy, Race, Crime, and the Law 295-310.

jury ultimately attached to "the qualified colored" juror, by virtue of federal law providing that no otherwise qualified person might be excluded from jury duty "'on account of race, color, or previous condition of servitude.'"[44] The right may properly attach to jurors, argued Jackson, for there were "direct and effective" remedies to enforce their right to sit on grand juries, including criminal penalties and civil causes of action for exclusion.[45] This method of dealing with constitutional violations also prevented the Court from holding that "the crime of discrimination offsets the crime of murder."[46]

The problem, however, was that even with a remedy, potential grand jurors would have little incentive to sue, if they even had been aware of the discrimination against them: unlike education or employment discrimination cases, here the jurors would have to balance the real risk of reprisal against no tangible benefit to oneself if successful. Indeed, Jackson admitted that there was a record of no such lawsuit since 1878, and sidestepped the issue of whether African Americans would sue for not being allowed to sit on a jury; or how Southern juries, picked out of jury pools similar to those in state courts, would decide those actions. So a criminal defendant was actually the most "expedient vehicle" through which to "deter future constitutional violations," in spite of the heavy cost it sometimes imposed on society.[47] Ignoring the unrealistic nature of his expectations, he nonetheless encouraged excluded jurors to "maintain in federal court an individual or a class action … against the state officers responsible,"[48] and urged the Court "in this and similar cases" to "send a copy of the record to the Department of

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[44] 339 U.S. at 299-300 (Jackson, J., dissenting); Jackson, draft opinion, February 17, 1950, Cassell v. Texas 2 [quoting 18 U.S.C. sec. 243 (1875)].
[45] 339 U.S. at 303 (Jackson, J., dissenting).
[46] 339 U.S. at 304 (Jackson, J., dissenting).
[47] Kennedy, Race, Crime, and the Law 187-88; Chernack, "The Clash of Two Worlds" 67.
[48] 339 U.S. at 303-04 (Jackson, J., dissenting).

Justice for investigation as to whether there have been violations of the statute and, if so, for prosecution."[49]

But his point was perhaps more popular than his lone vote would indicate. Clark shared Jackson's concern that "a conviction should be reversed because of purposeful exclusion of the members of a race from the grand jury which returned the indictment," but concluded that "we must adhere to the settled course of decision by this Court."[50] The NAACP's Legal Defense Fund was aware of the impulse, for they held to a general policy of not taking on cases with guilty defendants, even rejecting a chance to handle Hill v. Texas on appeal.[51] After the Warren Court revolution in criminal procedure, some justices agreed with Jackson, urging an end to reversals of convictions on the basis of racially discriminatory grad jury selection.[52]

In Moore v. New York, Jackson wrote for a majority that found no racial discrimination in the State's "blue ribbon" grand jury system, which maintained a panel of jurors prescreened with more stringent standards meant for particularly complex or high-publicity cases.[53] With four other justices – Reed, Frankfurter, Vinson and Burton – Jackson concluded that the petitioners had produced no evidence of intent to discriminate on the basis of race (according to the uncontradicted testimony of a county official, about

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[49] 339 U.S. at 305 (Jackson, J., dissenting).

Urging the institution of enforcement actions against officials violating the constitutional rights of criminal defendants occurred to Jackson again, when he (along with new Chief Justice Earl Warren) suggested that remedying unlawful searches and seizures was best accomplished with civil rights prosecutions of those performing the searches, and not by disturbing criminal convictions resulting from the recovery of fruits of crime. Irvine v. California, 347 U.S. 128, 137-38 (1954).

[50] 339 U.S. at 296, 298 (Clark, J., concurring).

[51] Tushnet, Making Civil Rights Law 60.

[52] Kennedy, Race, Crime, and the Law 187. In Vasquez v. Hillery, Justice Powell, joined by Berger and Rehnquist, cited Jackson's Cassell rationale with favor, calling it "typically prescient." 474 U.S. at 274-75.

[53] Fay v. New York, 332 U.S. 261, 282-84, 292-94 (1947).

one dozen African Americans had been picked for special panels); and noted that statistical proof of discrimination was wanting.[54]

Jackson's Moore opinion was relatively brief, as he had recently written the lead case upholding the "blue ribbon panel" system against a challenge alleging economic discrimination, Fay v. New York. While racial discrimination claims were, according to Jackson, "in a class by themselves," because Congress had outlawed that form of bias, the views on due process, federalism and judicial restraint which he set forth in Fay would seem to apply with equal force in Moore:

> The function of this federal Court under the Fourteenth Amendment in reference to state juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ. No device … can be set up by which the judicial process is reduced to a sham and courts are organized to convict. They must be organized to hear, try and determine on the evidence and the law. But beyond requiring conformity to standards of fundamental fairness that have won legal recognition, this Court has always been careful not so to interpret this Amendment as to impose uniform procedures upon the several states whose legal systems stem from diverse sources of law and reflect different historical influences.
>
> We adhere to this policy of self-restraint and will not use this great centralizing Amendment to standardize administration of justice and stagnate local variations in practice.… Well has it been said of our power to limit state action that "To stay state experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[55]

Jackson's concern for an accused's substantive rights was more than lip service, as demonstrated by his concurring opinion in Shepherd v. Florida. On September 8,

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[54] Moore v. New York, 333 U.S. 565, 567-69 (1948). The four dissenters – Murphy, the author; and Black, Douglas, and Rutledge -- found the blue ribbon panels violative of the requirement that jurors be drawn from "a fair cross-section of the community." 333 U.S. at 569 (Murphy, J., dissenting).

[55] 332 U.S. at 294-96 [in part quoting New York Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)].

1949, Samuel Shepherd and his co-defendant Walter Irvin, both 22-year-old war veterans, were sentenced to death for raping a white woman in Groveland, Florida; a 16-year-old co-defendant received life in prison, and a fourth co-defendant had been lynched before trial.[56] The evidence of their guilt – or even that a crime had been committed at all -- was, at best, shaky.[57] Ultimately, the case was less about an alleged rape than white panic over the local breakdown of racial deference.[58] Meanwhile, the local papers widely reported the sheriff's claim that the accused had confessed, though no confessions were later adduced at trial.[59] The lynch-mob flavor of it all was perhaps best summarized in one editorial cartoon depicting four electric chairs, entitled "'No Compromise – Supreme Penalty'"; and was reinforced by countless and "highly prejudicial" articles.[60] At trial, the prosecutor, careful not to create issues for appeal, decided not to introduce the defendants' tainted confessions, and placed the first African American ever on a Lake County, Florida grand jury. A few African Americans were interviewed for the trial jury, but the one selected was excused.[61] Given that a death sentence was socially

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[56] Ted Poston, "Florida's Legal Lynching," The Nation, September 24, 1949, reprinted in Reporting Civil Rights Part One 126.

[57] Aside from the word of a complainant who had ulterior motives for fabricating the charge, there was no proof that a crime even had been committed. The defendants confessed, but those statements were obtained by such brutal methods, that the prosecution elected not to introduce them into evidence at trial. The defense, on the other hand, proved that none of the three surviving defendants was anywhere near the alleged crime scene; the trial court denied their request for a postponement to "investigate new evidence" that the alleged victim fabricated the whole incident "to cover up a fight she had had with her estranged husband." Poston, "Florida's Legal Lynching" 125, 126, 127, 129.

[58] Poston, "Florida's Legal Lynching" 125, 128.

[59] 341 U.S. at 51-53 (Jackson, J., concurring). Jackson logically observed that "The only rational explanations … are that the story was false or that the confession was obtained under circumstances which made it inadmissible or its use inexpedient." He added in a footnote that the defense had proffered "evidence of brutal, inhumane beatings of defendants by state officers in whose custody they were held," proof "the court rejected as completely irrelevant and immaterial…" 341 U.S. at 51 n.4.

[60] 341 U.S. at 53-54; Poston, "Florida's Legal Lynching" 127-28.

[61] Poston, "Florida's Legal Lynching" 126-27.

"mandatory," the small measure of mercy shown the third co-defendant was an admission "that the prosecution had not proved its case" against any of them.[62]

The Supreme Court reversed Shepherd and Irvin's convictions per curiam, merely citing Cassell.[63] Yet Jackson, in a move unusual for cases decided so tersely, filed a separate opinion (joined by Frankfurter) suggesting alternate grounds for reversal: "prejudicial influences outside the courtroom, being all too typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which is generated."[64] Given the gross injustice of the atmosphere surrounding the trial, the racial overtones of which were undeniable despite the Florida Supreme Court's "more charitable than realistic" claim that "the inflamed public sentiment" was targeted at "the crime … rather than defendants' race,"[65] Jackson believed that "for the court to reverse these convictions upon the sole ground that the method of jury selection discriminated against the Negro race, is to stress the trivial and ignore the important." Explaining that "this trial took place under conditions and was accompanied by events which would deny defendants a fair trial before any kind of jury," he went on to ask "as a practical matter, how any Negro on the jury would have dared to cause a disagreement or acquittal." He suggested that "The only chance these Negroes had of acquittal would have been in the courage and decency of some sturdy and forthright white person of sufficient standing to

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[62] Poston, "Florida's Legal Lynching" 128. In the South, especially, the death penalty for rape – later outlawed by the Supreme Court – was almost exclusively reserved for black men accused of raping white women. See, e.g., Marvin E. Wolfgang and Marc Riedel, "Racial Discrimination, Rape, and the Death Penalty," Hugo Adam Bedau, ed., The Death Penalty in America (third ed. New York: Oxford University Press, 1982) 194-205; Kennedy, Race, Crime, and the Law 312-26; Coker v. Georgia, 433 U.S. 584 (1977).
[63] Shepherd v. Florida, 341 U.S. 50 (1951).
[64] 341 U.S. at 51 (Jackson, J., concurring).
[65] 341 U.S. at 53-54.

face and live down the odium among his white neighbors that such a vote, if required, would have brought." But, recognizing the improbability of a fair verdict, he concluded,

> To me, the technical question of discrimination in the jury selection has only theoretical importance. This case presents one of the best examples of one of the worst menaces to American justice. It is on that ground that I would reverse.[66]

The emotional content of this case was demonstrated by Frankfurter's notation to Jackson: "Please honor me by letting me join this."[67]

The opinion generated much public reaction; according to one of the Justice's friends, "The lawyers I have met in the past week all, it seems, noticed" it.[68] Most negative reaction came from the South, where newspapers accused the justice of attempting to dismantle the First Amendment, or at least of "making a whipping boy out of the newspapers."[69] Not all Southerners were quite as charitable: letters ostensibly fearing crime used the word "niggers," insisted that the death penalty was American womanhood's only protection against rape, and asserted that reversals of criminal

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[66] 341 U.S. at 54-55.

[67] Felix Frankfurter to Robert H. Jackson, notation on Jackson April 6, 1951 draft opinion, Box #170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress 1.

[68] Primo Columbus to Robert H. Jackson, April 17, 1951, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress.

[69] Bert Struby, Executive Editor, Macon (GA) Telegraph/News, Address, annual judicial conference of the Fifth Circuit Court of Appeals, May 1951, cover letter, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress 1, 3, 5; Bert Struby, to Robert H. Jackson, June 22, 1951, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress; "We Dissent, Justice Jackson," Editorial, Tampa Morning Tribune, April 11, 1951, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress; Lynn Landrum, "Thinking Out Loud," Dallas Morning News, undated clipping, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress; "Press and Evidence," Editorial, Miami Herald April 11, 1951 at 6A, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress.

convictions infringed on "'State's Rights.'"[70] Others, mostly but not exclusively outside the South, praised the opinion.[71]

The Justice's note expressing his own "hope [that] we will eventually be able to overcome the mischief"[72] in his reply to one of the writers begs a key question: which "mischief" was most on the justice's mind, the legal lynchings of African Americans, or the racially-neutral issue of harmful pretrial publicity? There is ample evidence that Jackson saw the case as primarily a pretrial publicity case, even beyond the final opinion's legal analysis balancing the First Amendment's guarantee of a free press against a defendant's Due Process right to a fair trial. It was Justice Frankfurter, and not Jackson, who added – in his one major revision to his colleague's draft -- the reference to

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[70] Anonymous (Atlanta, GA) to Robert H. Jackson, April 10, 1951, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress; Al Murdock to Robert H. Jackson, April 11, 1951, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress 1; Anonymous (no location given) to Robert H. Jackson, April 9, 1951, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress; Mrs. Ed. Harris to Robert H. Jackson, [unintelligible] Texas, April 10, 1951, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress.

As if to prove the point that race mattered in this case, the Dallas Morning News writer sardonically observation that "The Supreme Court is apparently of the mind that sentiment in the South is more vigorously anti-Negro than it is anti-rape." Landrum, "Thinking Out Loud."

[71] "Free Trial and Free Press," New York Herald Tribune, April 11, 1951, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress; "When Rights Collide," New York Times, April 11, 1951, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress; "Justice vs. Mobbism," Washington Post April 11, 1951, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress; "Menace to Justice," Pittsburgh Press April 14, 1951, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress; J.W. Haywood to Robert H. Jackson, April 25, 1951, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress; George E. Holt to Robert H. Jackson, May 7, 1951, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress; Robert H. Jackson to George E. Holt, Circuit Judge, Eleventh Judicial Circuit of Florida, May 21, 1951, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress; undated letter from Robert Cross to Robert H. Jackson, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress.

[72] Robert H. Jackson to George E. Holt, May 21, 1951.

Moore v. Dempsey, the seminal legal lynching case.[73] Moreover, in an early draft, Jackson seemed to deny the influence of race when he referred to the publishing of claims that the defendants had confessed as "one of the most vicious and reprehensible practices which menace and at times make impossible a fair trial in a highly publicized case *for any defendant, be he black or white,*" language taken out of later versions.[74] Yet for all of his desire to sidestep the issue, he understood that the "prejudice" stirred up by the improper pretrial publicity in this case was racial in nature; and that its result could not stand.[75]

Competing Claims of Right: The Coerced Confession Cases

Confessions obtained through Third Degree tactics of "physical compulsion" and "psychological pressure" grew epidemic by the 1920s. There was no racial monopoly on the use of coercion to secure confessions, yet "such conduct was more widely or frequently employed against" African Americans "than against any other group in the country...."[76] The Court excluded coerced confessions from evidence at trial because other potential remedies, such as civil suits against the police, "proved inadequate and impractical," and the Justice Department lacked motivation to bring large numbers of federal civil rights prosecutions.[77] Even downright reactionary justices could find it in

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[73] Felix Frankfurter to Robert H. Jackson, notation on Jackson April 6, 1951 draft opinion, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress 5 (citing Moore v. Dempsey, 261 U.S. 86 [1923]).
[74] Robert H. Jackson, March 30, 1951 draft opinion, Box 170, File: Supreme Court – O.T. 1950 – Cases – No. 420, Shepherd and Irvin v. Florida, Robert H. Jackson Collection, Library of Congress 5.
[75] 341 U.S. at 53-54.
[76] A 1931 report by the national Commission on Law Observance and Enforcement -- more commonly known as the Wickersham Commission – unearthed widespread evidence of coerced confessions used in the courts of fifteen of the nation's major cities. Otis H. Stephens, Jr., The Supreme Court and Confessions of Guilt (Knoxville: University of Tennessee Press, 1973) 15, 37-40.
[77] Stephens, The Supreme Court and Confessions of Guilt 10-13.

their hearts to invalidate confessions – and guilty verdicts -- produced by hangings, whippings and beatings.[78]

But there was also a countervailing concern that guilty defendants, often convicted of killings and rapes, not be allowed to go free merely as a result of police misconduct. And it was the concern that proved more important to Jackson. Protecting society against criminals, and maintaining local control over law enforcement, often proved decisive to Jackson in confession cases, including those involving African American defendants.[79]

As part of its "general commitment to the enlargement of individual rights," the Court began tackling the problem in earnest in the years immediately preceding Jackson's appointment, invalidating convictions of African Americans due to coerced confessions in six cases, all from the Deep South. The Court based the results on the Due Process guarantee to a fair trial: if a coerced confession were used in a trial, the trial would be considered fundamentally unfair, and the conviction reversed.[80] This doctrinal development was connected to increasing concern about the treatment of African

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[78] Perhaps most telling were the votes for reversal cast in Brown v. Mississippi by Justices McReynolds (an inveterate racist) and Van Devanter, the two justices who refused to reverse convictions in the Scottsboro cases. Stephens, The Supreme Court and Confessions of Guilt 42.

[79] In Upshaw v. United States, 335 U.S. 410 (1948), a federal case not raising issues of federal-state relations, Jackson joined a dissenting opinion by Reed, which objected to suppressing the confession of an African American larceny suspect on the sole ground that officers detained him for 30 hours for the purpose of eliciting a confession, without taking him before a magistrate. Among other arguments, Reed maintained that extending federal restrictions on police conduct relating to interrogations simply "puts another weapon in the hand of the criminal world." 335 U.S. at 436; Stephens, The Supreme Court and Confessions of Guilt 75-77.

[80] Stephens, The Supreme Court and Confessions of Guilt 23-27; Malloy v. Hogan, 388 U.S. 1 (1964).

Only after the ratification of the Fourteenth Amendment was the Supreme Court believed to have any say over the use of confessions in state prosecutions, and it was not until 1964 that the Fifth Amendment's guarantee against self-incrimination was incorporated into the Fourteenth, therefore becoming an independent ground for invalidating a coerced confession. Until that time, the Court's power was based on due process guarantees. Id.

American defendants in the South.[81] But the vagueness of the "fair trial" standard, and the question of how courts should use it to regulate state conduct, led to erratic results.

In Jackson's first year on the bench, the Court reversed the conviction of an African American who had confessed to having strangled a 72-year-old man. For three days the accused was isolated from all sources of aid and ended up 110 miles from home in a game of musical jails, in clear violation of Texas law requiring that an accused arrested without a warrant be brought "immediately" before a magistrate. Interrogation was "continuous," and included threats of lynching.[82] Justice Byrnes (later a segregationist governor of South Carolina) wrote for a unanimous Court:

> This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal. All of them are to be found in this case.[83]

These tactics, employed against "uneducated, indigent Negroes, tried in Southern states," made Ward a relatively easy case under existing precedent.[84]

Jackson's earliest, and most intricate, analysis of those factors was in Ashcraft v. Tennessee, a case in which the main defendant, Ashcraft, was convicted of hiring an African American, Ware, to murder his wife. Both men unsuccessfully challenged the

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[81] Stephens, The Supreme Court and Confessions of Guilt, p. 29 and ch. 3; Brown v. Mississippi, 297 U.S. 278 (1936); Chambers v. Florida, 309 U.S. 227 (1940).
[82] Ward v. Texas, 316 U.S. 547, 548-51, 555.
[83] 316 U.S. at 555. The petitioner also claimed that he had been "beaten, whipped, and burned by the officer to whom the confession was finally made." 316 U.S. at 549. The Court chose not to credit these allegations because the verdict indicated that the jury chose not to credit the petitioner's testimony (despite the fact that a county sheriff noticed cigarette burns on the detainee's body several days after the interrogation ended). Instead, the justices relied only on uncontested evidence of the circumstances surrounding the obtaining of the statement in making their decision. 316 U.S. at 552.
[84] Stephens, The Supreme Court and Confessions of Guilt 55. Compare Ward with Lisenba v. California, 314 U.S. 219 (1941) (by a 7-2 vote, Court refused to suppress confession of a businessman and experienced criminal after protracted pre-arraignment interrogation and followup questioning 11 days later). Stephens, The Supreme Court and Confessions of Guilt 61.

admissibility of their confessions at trial.[85] Six justices overturned Ashcraft's conviction, because the 36 hour period of intermittent interrogation to which he was subjected was "inherently coercive."[86]

In a dissent joined by Roberts and Frankfurter, Jackson accused the majority of reneging on its responsibility to treat state court findings with "a presumption of regularity and legality."[87] The only way to give force to that presumption, he reasoned, was to continue with established precedent and uphold state court findings of admissibility "unless it was proved and found that it was obtained by pressures so strong that it was *in fact* involuntarily made…." And when a state court so found, Jackson argued, "respect for the sovereign character of the several states always has constrained this Court to give great weight to" it, so that "in close cases the decisions of state courts have often been sufficient to tip the scales in favor of affirmance."[88] While the Court had the "general supervisory power" to deem certain interrogation practices as "inherently coercive" in federal courts, it lacked such power over the states.[89]

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[85] Ashcraft and Ware were each convicted on the strength of his own confession, and both were sentenced to 99 years in prison. Ashcraft v. Tennessee, 322 U.S. 143,144-45 (1944).

[86] 322 U.S. at 154; Stephens, The Supreme Court and Confessions of Guilt 91. Black's unwillingness to engage in an inquiry about the period of interrogation's effect on this particular defendant might have been explained by the Court's unwillingness to overturn the jury's finding that the defendant had confessed voluntarily – a finding backed by the police and prosecutor's amazingly thorough job of documenting the circumstances surrounding the confession.

[87] 322 U.S. at 156.

[88] 322 U.S. at 157.

[89] 322 U.S. at 157-58; Stephens, The Supreme Court and Confessions of Guilt 92.

Yet even when the Court had the supervisory power to make bright line rules limiting police interrogations, Jackson opposed them. For example, he indicated in writing to Chief Justice Stone his displeasure with a proposed rule change for federal prosecutions, which provided that "'No statement made by a defendant in response to interrogation by an officer or agent of the Government shall be admissible in evidence against him if the interrogation occurs in violation of" a provision requiring prompt arraignment of all arrestees. Concerned that "we may take one position in our rule-making capacity and another in adjudication," Jackson noted that "This goes beyond anything that the Court has ever yet said, to my knowledge," and doubted, "I do not think I could accept such an extreme rule as this." Robert H. Jackson to Harlan Fiske Stone, September 28, 1942, Box 125, Legal File: Supreme Court -- O.T. 1942 – Chief Justice, Robert H. Jackson Papers, Library of Congress.

Jackson then turned to what he believed to be the most important consideration in determining whether evidence should be excluded because of police misconduct – the solving of crimes – and argued that, outside certain limits, it was up to the states to decide how best to solve crimes and protect their people:

> The burden of protecting society from most crimes against persons and property falls upon the state. Different states have different crime problems and some freedom to vary procedures according to their own ideas. Here, a state was forced by an unwitnessed and baffling murder to vindicate its law and protect its society.[90]

While the Justice agreed that "brutality, torture" or other forms of physical mistreatment rendered a confession "prima facie 'involuntary,'" and that threats may also be coercive, depending on the state of mind of the individual suspect, questioning itself "is an instrumentality of justice," and as such "call for a more responsible and cautious exercise of our office":

> … we may err on the side of hostility to violence without doing injury to legitimate prosecution of crime; we cannot read an undiscriminating hostility to mere interrogation into the Constitution without unduly fettering the States in protecting society from the criminal.[91]

Conceding that "Thirty-six hours is a long stretch of questioning," he nonetheless concluded that the absence of mistreatment and the suspect's own status in the community – he was "a white man of good reputation, good position, and substantial property," who was detained only after a week's investigation, and who "was defended by resourceful and diligent counsel" – gave ample weight to the state courts' refusal to

[90] 322 U.S. at 158.
[91] 322 U.S. at 160.

suppress Ashcraft's confession.[92] He feared that this precedent might send the Court into a direction of ending police interrogation altogether, because, as he observed, all questioning was "'inherently coercive,'" regardless of length. And if the line separating coercive and noncoercive is a matter of degree, he asked, "are not the states entitled to know, if this Court is able to state, what the considerations are which make any particular degree decisive?"[93]

Since for Jackson, a finding of voluntariness required an examination into the suspect's status and state of mind – whether he maintained "possession of his own will and self-control at the time of the confession" -- he wondered why Ware, the illiterate African American hit man who directly fingered Ashcraft, should not have his case reversed, but instead merely sent back to the state court for reconsideration. The likely answer is straightforward: Ware confessed after less than six hours in police custody.[94] Jackson used the possibly hapless codefendant to illustrate the illogic of using an objective standard of coerciveness:

> Except for Ware's own testimony, all of the evidence is that when he confronted Ashcraft in custody Ware confessed immediately, voluntarily, and almost spontaneously. But he had been arrested, taken from bed into custody, and detained and questioned. Does the doctrine of inherent coerciveness condemn the Ware confession? Should the Tennessee court decide whether Ware obviously a much weaker character than Ashcraft, was *actually* coerced into confessing? It already has decided that question and this Court does not hold the fact determined wrongly. Ware's case is properly in this Court. Why should not this Court decide Ware's case on the merits and thus test and expound its novel ruling as applied to a different set of circumstances? [95]

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[92] 322 U.S. at 173-74; Hockett, "Robert H. Jackson and the role of the Supreme Court in American politics" 227-28.
[93] 322 U.S. at 161-62; Stephens, The Supreme Court and Confessions of Guilt 92-93; Hockett, "Robert H. Jackson and the role of the Supreme Court in American politics" 227.
[94] 322 U.S. at 147, 151; Stephens, The Supreme Court and Confessions of Guilt 92-93.
[95] 322 U.S. at 163.

During the same term, Jackson joined with fellow Ashcraft dissenters Roberts and Frankfurter, and with Ashcraft majority members Stone and Reed, in ruling that a first, probably coerced, confession, made 11 days after the suspect's arrest, did not necessarily taint a second confession made twelve hours after, and at a different correctional facility from, the first.[96] In Lyons v. Oklahoma, Jackson stayed right where he was in Ashcraft, in favor of using confessions, even if made in less than pristine circumstances. It does not take a vivid imagination to deduce with whom Jackson's sympathies lay when, in dissent, Murphy cited the "gruesome effects of having had a pan of human bones [those of the three murder victims, a husband and wife and their four-year-old son, who were killed and then burned with their house to conceal the murders] placed on [Lyons'] knees in order to force incriminating testimony from him."[97]

Jackson continued to give the imperatives of law enforcement priority over protecting suspects against coercive interrogations in Haley v. Ohio. Five justices voted to reverse the conviction of a 15-year-old African American who had confessed to acting as a lookout in a store robbery and murder. Arrested at his home at about midnight, Haley confessed after about five hours of interrogation. The police then held him incommunicado for three days; his mother was not allowed to see him for five. For the plurality of Douglas, Black, Murphy and Rutledge, age was a major factor, though, they claimed, not decisive.[98] Jackson joined a dissent written by Burton, also joined by Vinson and Reed. Since the crime "involved the same fatal consequence to a law-abiding

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[96] Lyons v. Oklahoma, 322 U.S. 596 (1944). Murphy wrote a blistering dissent arguing that the Court should apply the Fifth Amendment guarantee against forced self-incrimination to state prosecutions; he also disputed the factual findings made in the state courts. Black joined the Murphy opinion; Rutledge dissented without opinion; and Douglas concurred in the result. 322 U.S. at 605-07.

[97] 322 U.S. at 604-606; Tushnet, Making Civil Rights Law 64; Stephens, The Supreme Court and Confessions of Guilt 96-97.

[98] Haley v. Ohio, 332 U.S. 596, 598-99, 600-01 (1948); Stephens, The Supreme Court and Confessions of Guilt 100.

citizen of Canton as would have been the case if it had been committed by adult offenders,"[99] it deserved the same type of review as other cases. Moreover, despite the petitioner's age and race, this case was not "one of civil rights … There is no suggestion that racial discrimination or any prejudice existed in the attitude of any of these witnesses, or of the courts or the community of Canton." Instead, the record revealed "ample evidence to support the action taken by the trial judge and jury against the accused if this Court chooses to believe that evidence and to disbelieve the conflicting evidence."[100] The jury resolved those issues against the petitioner, and the Supreme Court should not overturn their findings.[101] This result is consistent with Jackson's general reluctance to reverse a trier of fact's findings, as witnesses' credibility was best resolved by those who had heard them.[102]

The ruling in Lee v. Mississippi was rare for the Vinson Court: a unanimous reversal of a criminal conviction.[103] The Justices found that the trial judge had erred when he refused to instruct the jury to disregard the defendant's confession if they found it involuntarily given, even though the accused took the seemingly inconsistent position

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[99] 332 U.S. at 614 (Burton, J., dissenting).

[100] 322 U.S. at 618 (Burton, J., dissenting). While the majority looked only at the undisputed evidence in making its determination of involuntariness, 322 U.S. at 597-98, the dissenters resolved conflicting testimony in favor of the prosecution, as the finders of fact in the state courts chose to believe them. And "that evidence, is so believed, is strong and specific enough greatly to offset conflicting inferences which otherwise might be suggested to this Court by the undisputed evidence." 322 U.S. at 618, 624-25.

[101] 322 U.S. at 615-16, 623-25.

[102] United States v. Yellow Cab Company, 338 U.S. 338, 340-41 (1949).

Stephens has argued that Jackson and others inexplicably overturned a California Supreme Court factual finding that a confession was coerced, in Stroble v. California, 343 U.S. 181 (1952). Stephens, The Supreme Court and Confessions of Guilt 106-07. But the lower court assumed the confession's involuntariness for the sake of argument, meaning that the best result the defendant could expect was a remand for further findings by the state court. 343 U.S. at 202-03 (Frankfurter, J., dissenting). In any event, the Court bent the rules of reviewing factual findings in the petitioner's favor and still ruled against him. 343 U.S. at 190-91.

[103] Stephens, The Supreme Court and Confessions of Guilt 98 n.15.

According to Jackson's docket sheet, Burton originally voted to affirm the conviction at conference. Robert H. Jackson, Docket Sheet, Box 144, File: Supreme Court – O.T. 1947 -- Cases -- No. 91, Lee v. Mississippi, Robert H. Jackson Collection, Library of Congress.

of denying that he had made the confession at all. Murphy, to whom the opinion was assigned, evidently assumed that the state's high court ruled that the confession was voluntary, and circulated an early draft overturning that factual finding.[104]

Unhappy with the tone of Murphy's draft, Reed produced a concurring opinion inferring that the state court would have reversed if the accused had not denied making the confession. The justice thereby concluded that the case should be sent back to the Mississippi court, to make a clear factual finding of its own.[105] Frankfurter and Burton planned to join the concurrence; Frankfurter wrote to Murphy that he opted for the Reed draft because it was "'mild… in a domain where feelings are deeply rooted and easily stirred, a strong conclusion is reinforced by mildness of expression," adding:

> Long experience … has left me with the conviction that while we should deal with these ugly practices of racial discrimination with fearless decency, it does not help toward harmonious race relations to stir our colored fellow citizens to resentment, however unwittingly, by needless detail or even sturdy expression of sentiment, nor do we thereby wean whites from what is so often … merely the unanalyzed irrational tradition of the past.[106]

Jackson was willing to sign onto the Reed version as well, and suggested that "the Chief might join too … and it would gain a majority." Yet in his handwritten note, Jackson made one request, which he ended up crossing out: that he "would feel better about" the opinion "if we could recognize that there is some possibility, which we resolve in favor of the petitioner, that [the court] did not believe him." This was important to Jackson because, as some handwritten draft material in his file indicated, he believed that if the

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[104] Frank Murphy, December 29, 1947 draft opinion, Box 144, File: Supreme Court – O.T. 1947 – Cases -- No. 91, Lee v. Mississippi, Robert H. Jackson Collection, Library of Congress.
[105] Stanley Reed, December 31, 1947 and January 2, 1948 draft concurring opinions, Box 144, File: Supreme Court – O.T. 1947 – Cases -- No. 91, Lee v. Mississippi, Robert H. Jackson Collection, Library of Congress.
[106] Tushnet, Making Civil Rights Law 69 (quoting Felix Frankfurter to Frank Murphy, Box 170, File 14, Felix Frankfurter Papers, Harvard Law School Library).

Mississippi court "finds the defendant to have testified falsely about the matter as to which there is other testimony and therefore refuses to believe his … testimony as to matters in which there can be no verification," the Court should affirm the conviction."[107]

Ultimately, Murphy revised his opinion along the lines pressed by the Reed group, and all of the justices, including Jackson, signed on.[108] Yet, despite the unanimous opinion's insistence that violating the right to due process would be so "fundamental" that "inconsistent testimony as to the confession should not and cannot preclude the accused from raising" the question of voluntariness, Jackson toyed with the idea that uncontroverted testimony of prisoner abuse could be disregarded.[109]

Jackson's protestations about protecting the rights of the particularly vulnerable were proven genuine in the right case; but it also proved to be a peripheral consideration to his primary concern, the solution of violent crimes. Watts v. Indiana was one of three cases decided on the same day in June 1949, in which capital murder convictions of African Americans were overturned because of confessions extracted by long and intense interrogations.[110] Eight justices decided them all the same way, with Black, Douglas,

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[107] Robert H. Jackson, handwritten notation on Stanley Reed's January 2, 1948 draft concurring opinion, Box 144, File: Supreme Court – O.T. 1947 – Cases -- No. 91-- Lee v. Mississippi, Robert H. Jackson Collection, Library of Congress 1; Robert H. Jackson, handwritten draft, Box 144, File: Supreme Court – O.T. 1947 – Cases -- No. 91, Lee v. Mississippi, Robert H. Jackson Collection, Library of Congress.

[108] Frank Murphy, January 14, 1948 draft opinion, Box 144, File: Supreme Court – O.T. 1947 – Cases -- No. 91, Lee v. Mississippi, Robert H. Jackson Collection, Library of Congress 1; 332 U.S. 744-46.

[109] 332 U.S. at 745-46.

[110] Watts v. Indiana, 338 U.S. 49 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Harris v. South Carolina, 338 U.S. 68 (1949). Watts was questioned by relays of six to eight police officers over the course of five nights (with an intervening day of rest on Sunday); four of these sessions lasted more than 10 hours. He was also questioned intermittently and driven around town to obtain identifications during the day. He was denied a prompt arraignment as prescribed by state law, denied contact with anyone who might give him aid, and was housed for two days "in solitary confinement in a cell aptly enough called 'the hole' in view of its physical conditions." 338 U.S. at 52-53. Turner was questioned for about 4-6 hours a day for five days, and was similarly deprived of arraignment and aid. 338 U.S. at 63-64. Harris was arrested on a Friday, and interrogated in long stretches on Monday, Tuesday and Wednesday, with relays of officers "relieving each other from time to time to permit respite from the stifling hear of the cubicle in which the interrogation was conducted." Even then, Harris did not confess until the police threatened to arrest his mother "for handling stolen property." 338 U.S. at 69-70. See undated memorandum, "No. 567 Misc.

Murphy and Rutledge joined by Frankfurter in voting to reverse; and Vinson, Burton and Reed voting to affirm. Jackson sided with the dissenters in two, Turner v. Pennsylvania and Harris v. South Carolina, but joined the majority in Watts. Jackson wrote a single opinion for all three cases, in which he spent little time discussing the facts of the cases at all, and alluded to his vote for the defendant in Watts only once.[111]

Jackson's conference notes in Watts suggest that he originally had voted to affirm his conviction as well as that of the others.[112] Before then, he had drafted a dissenting opinion in Harris and Turner, which at least one Justice, Reed, had agreed to join. It focused on an issue related to Jackson's views on federalism and his belief in the Court's duty to make its reasoning clear to those who must implement its opinions: the majority reversed the highest courts of three states with an "opinion" containing nothing more than case citations, thereby not explaining to these bodies what was unconstitutional about the interrogators' conduct.[113] When Jackson opted to reverse in Watts, his only explicit statement about that case was that he would have joined Frankfurter's opinion "were [it] based solely on the State's admissions as to the treatment of Watts." He thereby kept faith with the principle that the Court should not overturn factual findings of a state's highest court, but he alluded to it and did not develop it; his fellow dissenters in Harris

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1947 Term, Turner v. Pennsylvania," Box 153, File: Supreme Court – O.T. 1948 – Cases – No. 107 – Turner v. Commonwealth of Pennsylvania, Robert H. Jackson Collection, Library of Congress 1; undated memorandum, "No. 610 – Robt. Watts v. State of Indiana," Box 157, File: Supreme Court – O.T. 1948 – Cases – No. 610 – Watts v. Indiana, Robert H. Jackson Collection, Library of Congress.

Harris was the lone defendant of the three whose race was mentioned in Court opinions, and the only one from a Southern state. Watts and Turner were not included in the tables in Chapter 4, as the defendant's race was not mentioned in the opinions for either case.

[111] 338 U.S. at 60.

[112] Robert H. Jackson, Conference Notes, April 26, 1949, Box 157, File: Supreme Court – O.T. 1948 – Cases – No. 610 – Watts v. Indiana, Robert H. Jackson Collection, Library of Congress.

[113] Stanley Reed to Robert H. Jackson, December 2, 1948, Box No. 152, File: Supreme Court – O.T. 1948 – Cases – No. 76 – Harris v. South Carolina, Robert H. Jackson Collection, Library of Congress; Robert H. Jackson, undated draft opinions and November 30, 1948 draft opinion, Box No. 152, File: Supreme Court – O.T. 1948 – Cases – No. 76 – Harris v. South Carolina, Robert H. Jackson Collection, Library of Congress.

and Turner (who also dissented in Watts) more explicitly decided the cases "[o]n the records before us and in view of the consideration given to the evidence by the state courts and the conclusion reached."[114]

Instead, Jackson cast off his original opinion and crafted a new, solo opinion into a plea – the strongest in his judicial career -- for not unduly restricting police power to interrogate. Observing that "no one suggests that any course held promise of solution of these murders other than to take the suspect into custody for questioning," he concluded (in an era when forensic science was much less advanced than it is today) that the only other choice "was to close the books on the crime and forget it, with the suspect at large." To Jackson, that alternative was "a grave choice for a society in which two-thirds of the murders already are closed out as insoluble."[115] He seemed alarmed by Douglas' concurring opinion, which called for barring use of confessions produced during "[d]etention without arraignment," a rule Jackson argued that "in practice, means all of them."[116]

Jackson acknowledged that interrogating defendants without informing them of their right to counsel "presents a real dilemma in a free society," for "[t]o subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom" and "largely negates the benefits of the constitutional guarantee of the right to assistance of counsel."[117] Yet on the other hand, "[t]o bring in a lawyer

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[114] Watts v. Indiana, 338 U.S. 49, 60, 62 (1949).
[115] Watts v. Indiana, 338 U.S. 49, 58 (1949). Jackson interpreted Douglas's call for suppressing all confessions obtained during a period of "detention without arraignment" as "seem[ing] to declare for outlawing any confession." (338 U.S. at 57). See also Hockett, "Robert H. Jackson and the Role of the Supreme Court in American Politics" 228-29.
[116] Watts v. Indiana, 338 U.S. at 57, 58; William O. Douglas, June 1949 draft opinion, Box 157, File: Supreme Court – O.T. 1948 – Cases – No. 610 – Watts v. Indiana, Robert H. Jackson Collection, Library of Congress 2.
[117] 338 U.S. at 59.

means a real peril to solution of the crime because, under our adversary system … any lawyer worth his salt will tell the suspect to make no statement to police under any circumstances."[118] He suggested how he resolved the dilemma with a rhetorical question: "… if the ultimate quest in a criminal trial is the truth and if the circumstances indicate no violence or threats of it, should society be deprived of the suspect's help in solving a crime merely because he was confined and questioned while uncounseled?"[119] As he put it tersely in a draft outline, "test is reliability."[120] Reliability continued to trump concerns over police conduct: noting the reconviction of Haley (of Haley v. Ohio) upon retrial, he observed, "He apparently had not been so greatly wronged as our opinion [in that case] implied."[121]

> Jackson had no doubt that his stand saved lives. Predicting that if the Constitution
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> require[d] us to hold that the state may not take into custody and question one suspected reasonably of an unwitnessed murder … the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested. Is it a necessary price to pay for the fairness which we know as "due process of law"? And if not a necessary one, should it be demanded by this Court? I do not know the ultimate answer to these questions; but, for the present, I should not increase the handicap on society.[122]

Jackson then went on to justify extended interrogation of the type condemned by Black in Ashcraft:

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[118] 338 U.S. at 59. Jackson could not have foreseen that, when future suspects were warned of their right to an attorney as part of the universally-known Miranda warnings, they would still confess in large numbers in spite of the offer of counsel; and that many more false confessions are given than was thought in Jackson's time. Barry Scheck, diector of the Innocence Project, quoted in "DNA Testing Frees Man Imprisoned for Half His Life," New York Times September 21, 2006 (available at www.nytimes.com).
[119] 338 U.S. at 60.
[120] Robert H. Jackson, "107 – Turner v. Penna," undated notes, Box 153, File: Supreme Court – O.T. 1948 – Cases – No. 107, Turner v. Commonwealth of Pennsylvania, Robert H. Jackson Collection, Library of Congress 2.
[121] Robert H. Jackson, June 20, 1949 draft opinion, Box 157, File: Supreme Court – O.T. 1948 – Cases – No. 610 – Watts v. Indiana, Robert H. Jackson Collection, Library of Congress 6.
[122] 338 U.S. at 61-62.

> The suspect at first perhaps makes an effort to exculpate himself by alibis or other statements. These are verified, found false, and he is then confronted with his falsehood. Sometimes (though such cases do not reach us) verification proves them true or credible and the suspect is released. Sometimes, as here, more than one crime is involved. The duration of interrogation may well depend on the temperament, shrewdness and cunning of the accused and the competence of the examiner. But assuming a right to examine at all, the right must include what is made reasonably necessary by the facts of the particular case.[123]

With all questions concerning a confession's admissibility, the Supreme Court must be careful to respect the special province of the case's initial factfinders: "[i]f the right of interrogation be admitted, then it seems to me that we must leave it to trial judges and juries and state appellate courts to decide individual cases, unless they show some want of proper standards of decision."[124]

These considerations generally comported with Jackson's reasoning in other contexts. In interrogation cases involving non-African Americans, he would reverse, as he did in Watts, when convinced that the mistreatment of the accused was so severe, that his free will was overcome.[125] Yet solving violent crime took priority over regulating police conduct when a confession appeared not to be coerced, for the Constitution's sake as well as society's: "We are not willing to discredit constitutional doctrines for protection of the innocent by making of them mere technical loopholes for the escape of the guilty …. The people of the State are also entitled to due process of law."[126] His refusal in another confession case, Stein v. New York, to "discredit constitutional doctrines for protection of the innocent by making of them mere technical loopholes for

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[123] 338 U.S. at 60-61.
[124] 338 U.S. at 60; Robert H. Jackson, June 20, 1949 draft opinion, Watts v. Indiana 7.
[125] Von Moltke v. Gillies, 332 U.S. 708 (1948) (guilty plea should be vacated if motivated by FBI agent's inaccurate legal advice about suspect's complicity in complex criminal conspiracy).
[126] Stein v. New York, 346 U.S. 156, 196-97 (1953); Hockett, "Robert H. Jackson and the Role of the Supreme Court in American Politics" 229.

the escape of the guilty," is extraordinary in suggesting that constitutional protections are available only to the innocent. So the desire to prevent murderers from going free to kill was, consistently, the Justice's primary consideration.[127]

Jackson's concern that the constitution not be used to circumvent findings of factual guilt animated many of his views on criminal law and procedure, regardless of issue.[128] And his reluctance to invalidate convictions based on confessions appears to have applied equally to defendants regardless of race.

Criminalizing Free Labor: The Peonage Cases

The Thirteenth Amendment's ban on unfree labor was often a promise to be broken by businessmen who wanted to maintain a cheap, stable labor supply by keeping former bondsmen literally in their place.[129] One effective restraint on free labor was debt peonage. Employers would delay their payments until the end of the contract period, and loan workers the money and/or supplies they needed. All too often, workers would owe more than they were paid at the end, and employers would not release them from their

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[127] For example, in oral argument of the cruel and unusual punishment case, Louisiana ex rel. Francis v. Resweber, the state's attorney argued that, if the death sentence were overturned, there was no other law under which the petitioner could be sentenced, thereby requiring the state to hold him "in custody indefinitely unless and until the Louisiana legislature passed a law to deal with" the situation. Jackson replied that "in the absence of a law under which Francis could be punished, the state might be required to release him," an observation that made the petitioner's attorney "wince" because "he knew that the Court would never block a second execution attempt if it meant allowing a person described as a 'convicted murderer' to go free." The day was saved when "Frankfurter suggested that the Supreme Court itself might step in and propose an alternative punishment…." Arthur S. Miller and Jeffrey H. Bowman, Death by Installments: The Ordeal of Willie Francis (New York: Greenwood Press, 1988) 73-74.

[128] In Pritchett's sampling of 58 criminal cases during the Vinson Court years, involving both state and federal prosecutions and defendants of various races as well as varied legal issues, Jackson ranked higher than the Court record (55% to 43%) in finding for defendants in federal criminal cases; but in state cases, in which African American defendants were concentrated, he tied for second to last (14%), the same as Reed and two percentage points ahead of Minton. Pritchett, Civil Liberties and the Vinson Court 190.

[129] One such means, anti-enticement legislation, regulated the labor market by banning agents seeking workers in the industrial North; other means sought to bind workers by their own contract, as opposed to the antebellum contracts of sale. For example, the Black Codes passed immediately after the Civil War sought to limit worker movement through requiring workers to enter into annual labor contracts. Foner, Reconstruction: America's Unfinished Revolution 198-216, 225, 372; Jonathan W. Wiener, "Class Structure and Economic Development in the American South, 1865-1955," American Historical Review 84 (October 1979) 970-992.

contracts. Thanks to employer-friendly laws, workers who tried to escape faced a criminal prosecution for theft or fraud, with harsh sentences. While evidence of debt peonage existed in other parts of the country, it was most prevalent, and "openly tolerated," in the South's turpentine and cotton belts (and, for a time, on Southern railroads).[130] And while many peons were white immigrants, mostly Italians whose plight was championed by the Italian and Austrian embassies, the system's foundation "was anchored in the long-practiced abuse of black laborers."[131] As one contemporary writer explained, peonage amounted to the "'continuation of the system of slavery,'" a part of the "violent South" like "lynching, whitecapping, intimidation at the polls, and shooting on sight."[132]

In 1905, the Supreme Court had deemed peonage "a form of involuntary servitude within the meaning of the Thirteenth Amendment" and found Congressional anti-peonage legislation "an 'appropriate' implementation" thereof. But peonage was very difficult to prove, especially since the victims often engaged in self-help and disappeared, requiring cases to be dropped.[133] By contrast, it was much easier to prosecute workers for leaving their contracts unfulfilled, especially under state laws that created a legal presumption of a worker's fraudulent intent if he or she left without paying the debt in full.[134] In 1911, the Court found an Alabama rule of evidence barring testimony from the accused when the employer proved nonpayment of forwarded funds a violation of the Thirteenth

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[130] Pete Daniel, The Shadow of Slavery: Peonage in the South 1901-1969 (Urbana, IL: University of Illinois Press, 1972) chs. 1-2.
[131] Pollock v. Williams, 322 U.S. 4, 18 (1944); Daniel, The Shadow of Slavery 34-39, 58-59, 107-09, ch. V.
[132] "The Fruits of Peonage," New Republic 26 (April 20, 1921) 224, quoted in Daniel, The Shadow of Slavery 127; Daniel, The Shadow of Slavery 10. For a bitter taste of life under the peonage system, see Daniel, The Shadow of Slavery chs. 6-8.
[133] Daniel, The Shadow of Slavery 16, 18. See also Clyatt v. United States, 197 U.S. 207 (1905), cited and quoted in Taylor v. Georgia, 315 U.S. 25, 29 (1942); Daniel, The Shadow of Slavery ch. 1.
[134] Daniel, The Shadow of Slavery chs. 3-4.

Amendment and the federal anti-peonage law.[135] Peonage nonetheless continued "in Alabama [and] throughout the South"; the difference made by the Court's decision was "significant" but not "spectacular."[136]

In Jackson's first years as Associate Justice, the Court overturned two fraud convictions of African American laborers. In Taylor v. Georgia, all voting justices joined in an opinion by South Carolinian James Byrnes.[137] Given established precedent, the case was relatively easy: that the Georgia statue allowed the defendant to attempt to overcome the presumption by making an unsworn statement was insufficient to remedy the law's obvious constitutional flaw. Indeed, the supposedly ameliorative provision for an unsworn statement served only to "accentuate the harshness of an otherwise invalid statute."[138]

In the second case, Mann Pollock pleaded guilty to fraudulently obtaining five dollars from his employer by falsely promising to perform a labor contract executed on October 17, 1942; a warrant for his arrest was issued on January 2 of the next year, and he was apprehended and pleaded guilty three days later.[139] The Florida law contained the same type of presumption in Georgia's, but permitted its use only when "the failure or refusal to perform [the contracted] labor or service or to pay for the money or other thing of value" was "without just cause."[140] The state's highest court ruled that the presumption was irrelevant because the petitioner had pleaded guilty, and the underlying

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[135] Daniel, The Shadow of Slavery 66-77.
[136] Daniel, The Shadow of Slavery 78-80.
The Court also invalidated an Alabama convict labor law in 1914 on similar grounds, and sustained an indictment against an employer for forcing a worker into peonage in 1942. United States v. Reynolds, 235 U.S. 133 (1914); United States v. Gaskin, 320 U.S. 527 (1944). See Pollock v. Williams, 322 U.S. 4, 10 (1944).
[137] Justice Roberts took no part in the case. Taylor v. Georgia, 315 U.S. 25, 26, 31 (1942).
[138] 315 U.S. at 26-30, 31.
[139] 322 U.S. at 6.
[140] 322 U.S. at 6 n. 1.

offense for which he was convicted was valid.[141] Justice Reed wrote a dissent agreeing with the Florida Supreme Court that the conviction could survive in spite of the unconstitutional presumption, and Chief Justice Stone joined it.[142]

Jackson wrote the majority opinion. His early drafts effectively marshaled the facts, and made a masterful restatement of the existing law – little new was added after he had begun circulating his work among his colleagues, on or before March 9.[143] Over the next month, however, its analysis was transformed. The first issue was whether the petitioner's guilty plea barred review of the presumption's validity (normally, a guilty plea waives objections to evidentiary rulings). Unlike trials, guilty pleas were far less likely to produce a record on such questions as a petitioner's understanding of legal issues that might have had a bearing on his decision.

The Justice turned this lack of clarity against the state. Observing that the prosecution alleged no fact establishing fraudulent conduct by Mr. Pollock, Jackson reasoned that the evidence in the record – the issuing of the warrant almost three months after he had obtained the advance (suggesting that he worked for a time and quit due to intervening events), and the petitioner's allegation in his habeas corpus papers that, appearing without counsel, he believed "that if he owed any money to his prior employer and had quit his employment without paying the same, he was guilty" – suggested that the presumption had played a role in extracting the guilty plea.[144]

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[141] The issue was raised not through direct appeal, but by a writ of habeas corpus. The Circuit Court of Brevard County granted the writ, but the state's highest court reversed. Daniel, The Shadow of Slavery 182; 322 U.S. at 6-7.
[142] 322 U.S. at 25-30 (Reed, J., dissenting).
[143] Robert H. Jackson, undated draft opinion, Box 130, File: Supreme Court – O.T. 1943 – Cases -- No. 345, Pollock v. Williams, Robert H. Jackson Collection, Library of Congress; Hugo L. Black to Robert H. Jackson, March 9, 1944, Box 130, File: Supreme Court – O.T. 1943 – Cases – No. 345, Pollock v. Williams, Robert H. Jackson Collection, Library of Congress.
[144] 322 U.S. at 6, 14; Jackson, undated draft opinion, Pollock v. Williams 2-3.

It appeared to the Justice from the timing of the presumption's enactment that the whole idea was "to make it possible to convict where proof of guilt is lacking":

> No one questions that we clearly have held that such a presumption is prohibited …. [yet] The Florida Legislature has enacted and twice re-enacted it since we so held. We cannot assume it was doing an idle thing. Since the presumption was known to be unconstitutional and of no use in a contested case, the only explanation we can find for its persistent appearance in the statue is its extra-legal coercive effect in suppressing defenses….[145]

Showing a sensitivity to the defendant's plight not always demonstrated in his opinions on criminal justice matters, Jackson continued:

> The possibility of obtaining relief by appeal was not bright, as the event proved, for Pollock had to come all the way to this Court and was required, and quite regularly, to post a supercedeas bond of $500, a hundred times the amount of his debt. He was an illiterate Negro laborer in the toils of the law for the want of $5. Such considerations bear importantly on the decision of a prisoner even if aided by counsel, as Pollock was not, whether to plead guilty and hope for leniency or to fight. It is plain that, had his plight after conviction not aroused outside help, Pollock himself would have been unheard in any appellate court.[146]

In view of the Legislature's persistent reenactment of an unconstitutional law, he concluded, the state "may not be heard to say that a plea of guilty under the circumstances is not due to the pressure of its statutory threat…."[147]

According to the leading scholar on African American peonage, "The case ending the contract law in Florida would have been merely a footnote to the *Taylor* decision had not" Jackson "written such a significant decision."[148] The Justice pieced together a comprehensive survey of peonage law, all derived from the 1867 federal anti-peonage legislation that served as "both a shield and a sword against forced labor because of

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[145]Robert H. Jackson, undated draft opinion, Pollock v. Williams 15; 322 U.S. at 15. Jackson noted elsewhere in his opinion that "there might be provable fraud even in such matters…. But in not one of the cases to come before this Court under the antipeonage statute has there been evidence of such subtlety or design. 322 U.S. at 21-22.

[146] 322 U.S. at 15; Jackson, undated draft opinion, Pollock v. Williams 15-16.

[147] 322 U.S. at 16.

[148] Daniel, The Shadow of Slavery 182.

debt."[149] And "induced by the evident misunderstanding of our decisions by the Florida Supreme Court," he made a detailed and forceful restatement of the constitutional objections to the Florida law and others like it, and how it was inimical to the Thirteenth Amendment's purpose "to maintain a system of completely free and voluntary labor throughout the United States."[150]

Pollock's most important legal contribution was its definitive rejection of the state's claim that its "labor fraud" statute should stand without the presumption of fraud from the fact of nonpayment – that is, the underlying fraud statute was severable from the improper evidentiary rule. The Court rejected this argument, voiding the entire statute. Yet Jackson did not do this at first. In the first draft preserved in Jackson's file,[151] reversal was required because the presumption was instrumental in obtaining the guilty plea. On the larger question of whether the entire debt fraud statute should be thrown out, he seemed to suggest that viewing the substantive section without the presumption was impossible in this case, as "the substantive section seems to have contributed largely to the conclusion of unconstitutionality of the presumption section."[152] He also marshaled facts demonstrating that the legislature did not wish to sever the two sections.[153] But he refused to issue a conclusive ruling on the severability issue, "In the absence of a clear holding as a matter of state law to that effect."[154] Handwritten comments in his file and the comments of others also indicate that he tried to sidestep the

[149] 322 U.S. at 8; Jackson, undated draft opinion, Pollock v. Williams 3-6.
[150] 322 U.S. at 17ff.; Jackson, undated draft opinion, Pollock v. Williams 9.
[151] Usually, Jackson kept some handwritten or typewritten drafts, but in Pollock the earliest draft in his file is the printed version approved by Black on March 9.
[152] Jackson, undated draft opinion, Pollock v. Williams 8-9.
[153] Jackson, undated draft opinion, Pollock v. Williams 13-14.
[154] Jackson, undated draft opinion, Pollock v. Williams 15, 16.

severability issue.[155] Avoiding the severability question would bypass the opportunity to outlaw labor fraud statutes, once and for all.

The underlying reason for Jackson's initial reluctance to overturn the underlying statute as well as the presumption is suggested in a memorandum from his clerk, Philip C. Neal, who was "disturb[ed] very much" by the justice's draft. Demonstrating that the Florida courts' reasoning amounted to a finding that the statute was severable, the clerk advised that the Court "must say either (1) that so long as the presumption section stands on the statute books the whole thing is bad, absolutely; or (2) that even if the presumption section is wiped out, by repealing it, still the substantive section is bad and cannot stand."[156] The second draft, dated March 16, asserted that the Court could not find the statute severable because, in part, the Supreme Court of Florida "made no express holding of separability"; he refused to decide whether the underlying labor fraud statute was constitutional by itself, because "We do not … deal with the substantive section alone for the good reason that it does not stand alone." He demonstrated the sections' interdependence, with the underlying criminal prohibition infecting what might have been an otherwise permissible evidentiary presumption.[157] Neal took issue with the justice's refusal to hold the underlying statute unconstitutional, because "the presumption doesn't have any meaning by itself; it's never used by itself" – implying that if an

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[155] Robert H. Jackson, handwritten notation "statute is constitutional as separated," on Philip C. Neal, bench memorandum, "No. 345 – Pollock v. Williams – Appeal from the Supreme Court of Florida," Box 130, File: Supreme Court – O.T. 1943 – Cases – No. 345, Pollock v. Williams, Robert H. Jackson Collection, Library of Congress.

[156] Philip C. Neal to Robert H. Jackson, undated letter, Box 130, File: Supreme Court – O.T. 1943 – Cases – No. 345, Pollock v. Williams, Robert H. Jackson Collection, Library of Congress.

[157] Robert H. Jackson, March 16, 1944 draft opinion, Box 130, File: Supreme Court – O.T. 1943 – Cases – No. 345, Pollock v. Williams, Robert H. Jackson Collection, Library of Congress 9, 16.

unconstitutional presumption were tainted by an underlying statue, it must necessarily follow that the underlying statute, too, is unconstitutional.[158]

Jackson's March 20 revisions gratified senior justice Owen Roberts, who wrote, "I think you have greatly strengthened your opinion … I am glad you have voided the whole statute."[159] But Jackson still refused to find the underlying statute unconstitutional.[160] Frankfurter argued that the result in favor of the petitioner could not stand unless the underlying statute were invalidated, because he had difficulty with Jackson's argument that the presumption by itself was capable of rendering the guilty plea invalid.[161] Jackson, however, reserved the question of the underlying statute's validity, and even allowed that a man may still be convicted under it on proof that he obtained advances for the same employment period from six employers. If Frankfurter were correct, finding a statue severable would require a change in result; but he suggested instead ruling that "a statute making criminal breach of a contract for labor service even when fraudulently enter[ed] carries in it as a practical matter such seeds of peonage that the question of fraud is too much of a cover for the evil of peonage and therefore that

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[158] Philip C. Neal to Robert H. Jackson, "A further 'bill of particulars' on Pollock," undated memorandum, Box 130, File: Supreme Court – O.T. 1943 – Cases – No. 345, Pollock v. Williams, Robert H. Jackson Collection, Library of Congress 1, 2; Robert H. Jackson, March 16, 1944 draft opinion, Pollock v. Williams 9-10.

[159] Owen J. Roberts to Robert H. Jackson, March 22, 1944 handwritten note, Box 130, File: Supreme Court – O.T. 1943 – Cases – No. 345, Pollock v. Williams, Robert H. Jackson Collection, Library of Congress; Robert H. Jackson, March 20, 1944 draft opinion, Box 130, File: Supreme Court – O.T. 1943 – Cases – No. 345, Pollock v. Williams, Robert H. Jackson Collection, Library of Congress 10-16.

[160] Jackson, March 16, 1944 draft opinion, Pollock v. Williams 10, 15.

[161] Felix Frankfurter to Robert H. Jackson, March 24, 1944, Box 170, Folder 2, Felix Frankfurter Collection, Harvard University (available on microfilm) 1-2.

On the other hand, Rutledge believed that Jackson's guilty plea analysis "strengthens the opinion" and apparently had issues with the other major portion of the opinion, writing that he was convinced by Jackson's analysis "Although this goes further than I originally thought necessary – or do now, in strictness…." Wiley Rutledge to Robert H. Jackson, March 24, 1944 handwritten note on March 20, 1944 opinion, Box 130, File: Supreme Court – O.T. 1943 – Cases – No. 345, Pollock v. Williams, Robert H. Jackson Collection, Library of Congress.

such a statute must fail."[162]

The March 30 revisions (which, with one substantive addition, was almost identical to the published version) apparently relieved Frankfurter, who did not write a separate opinion.[163] Jackson argued that the underlying labor fraud statute was unconstitutional as linked with the presumption, but despite making a host of arguments against severability, he continued to reserve judgment on whether the underlying statute would be unconstitutional without the presumption.[164] Jackson included language Frankfurter conceived – and quite similar to his own imputing intent to the Florida legislature -- in response to Reed's dissent.[165] Since "as a practical matter," labor fraud statutes without the presumption "led to the same result" as those with the presumption,[166] fraudulent laborers could be called to account on general fraud statutes, "which do not either in form or in operation lend themselves to sheltering the practice of peonage," thereby making the special statutes for laborers unnecessary.[167]

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[162] Felix Frankfurter to Robert H. Jackson, March 24, 1944, Box 170, Folder 2, Felix Frankfurter Collection, Harvard University (available on microfilm) 1-2.

[163] Felix Frankfurter to Robert H, Jackson, handwritten notation on March 30, 1944 draft opinion, Box 130, File: Supreme Court – O.T. 1943 – Cases – No. 345, Pollock v. Williams, Robert H. Jackson Collection, Library of Congress.

[164]Specifically, Jackson argued that to uphold the underlying crime would be in violation of Taylor. He also suggested that there was no legitimate substantive law apart from the presumption, because "there is no reason to believe that the law was generally used or especially useful merely to punish deceit." Otherwise, reasoned the Justice, there would be no reason for the state's persistence in reenacting the presumption. 322 U.S. at 10, 16, 24; Jackson, undated draft opinion, Pollock v. Williams 10-11, 14-15.

[165] Felix Frankfurter to Robert H. Jackson, April 1, 1944, Box 130, File: Supreme Court – O.T. 1943 – Cases – No. 345, Pollock v. Williams, Robert H. Jackson Collection, Library of Congress; Robert H. Jackson to Stanley Reed, April 3, 1944, Box 130, File: Supreme Court – O.T. 1943 – Cases – No. 345, Pollock v. Williams, Robert H. Jackson Collection, Library of Congress; 322 U.S. at 16-17. Jackson declined Frankfurter's invitation to extend the Court's reasoning further by adding language "suggesting that the prohibition against peonage would preclude a State from enforcing an agreement like the one in this case by specific performance," because "The threat of jail for non-performance is hardly less coercive than a court decree to perform. Frankfurter to Jackson, April 1, 1944.

[166] 322 U.S. at 20.

[167]Jackson further argued that the State's argument that the underlying statute was sound while the presumption was not turned reality on its head: "the substantive section has contributed largely to the conclusion of unconstitutionality of the presumption section." In Taylor, the Court invalidated the underlying offense as well as the presumption, not because states lacked power to enact presumptions, but

Yet for all of his sophisticated understanding of the practical effects of the peonage laws, Jackson "fell into a trap that had ensnared many other unwary commentators on peonage,"[168] and reflected much of the Justice's thought on racial discrimination. Noting, "accurately," that the bulk of the peonage cases to reach the High Court originated in Florida or its neighbors, Jackson went on to absolve the South of any special blame: "this is not to intimate that that this section, more than others, was sympathetic with peonage, for … its sporadic appearances have been neither sectional nor racial."[169] Using "'neutral' non-racial legal concepts as instruments of decision" has been common through most of the Court's history. Doing so has had several virtues: it allowed opinions "to avoid dealing directly with race prejudice and the moral overstrain it engenders"; it has helped "insure the Court's political health" in the face of powerful opposition to recognition of African American rights; and it is also "a perfectly natural legal approach," invoking the type of neutral logic without which "there would be very few ways for racial cases to appear in court."[170]

Yet there is a certain intellectual dishonesty in concealing – or flat-out denying – what cases are about. In this case, Jackson's historical analysis was mostly based on a since-discredited 1911 Immigration Commission report that "clearly attempted to remove the stigma that peonage existed only in the South," to prove that it existed only sporadically, and that it victimized white immigrants more than African Americans,

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because "It was the substance of the crime to establish which the presumption was invoked that gave a forbidden aspect to that method of shortcutting the road to conviction." In prohibiting and punishing labor fraud, the state "must respect the constitutional and statutory command that it may not make failure to labor in discharge of a debt any part of a crime." As the Thirteenth Amendment specified, "It may not directly or indirectly command involuntary servitude, even if it was voluntarily contracted for." 322 U.S. at 16, 22-24; Jackson, undated draft opinion, Pollock v. Williams 8-9.

[168] Daniel, The Shadow of Slavery 183.

[169] 322 U.S. at 11.

[170] Charles A. Miller, "Constitutional Law and the Rhetoric of Race," Law in American History 158-59.

despite the facts demonstrating otherwise.[171] Jackson described the peonage problem in the forests of Maine, described by the Justice Department as "'the most complete system of peonage in the entire country,'" at extraordinary length.[172] This historical interpretation flew in the face of more recent evidence, a 1939 Georgia Baptist Convention resolution quoted in the government *amicus curiae* brief in Taylor, which asserted that "'there are more negroes held by these debt slavers than were actually owned as slaves before the War between the states.'"[173] It also ignored evidence of the Abolish Peonage Committee, which Jackson "as attorney general so recently evaded…."[174] Yet while Jackson went to great lengths to assure Southerners that the Court was not singling them out for their racial policies, he could not escape the fact that the only laborers in its cases were African American: thus, he referred to the prototypical peon not as the worker or the laborer, but as "the Negro…."[175]

What about the peonage cases aroused Jackson's sympathies? His Pollock opinion suggests two factors. One, his impatience with states' refusal to accept prior Supreme Court decisions, was apparent from some of his caustic references; it was also a factor that would continually frustrate him and his colleagues in civil rights cases. The second, however, was unique to peonage cases: the economic exploitation at the heart of the system. One can detect the former New Dealer in Jackson's flourishes, even in the midst of his dialectical exercises:

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[171] Daniel, The Shadow of Slavery 39, 107-09; Jackson, undated draft opinion, Pollock v. Williams 12.
[172] 322 U.S. at 18-20 and ns. 30, 32.
[173] Daniel, The Shadow of Slavery 181.
[174] Daniel, The Shadow of Slavery 182.
[175] 322 U.S. at 22. Despite the dangers inherent in theorizing why a particular type of case never reached the Supreme Court, it should be noted that there was comparatively little opportunity for immigrant peonage cases to do so, as the institution "lasted only several years and was not typical of the practice." Daniel, The Shadow of Slavery 108.

> Forced labor in some special circumstances may be consistent with the general basic system of free labor. For example, forced labor has been sustained as a means of punishing crime, and there are duties such as work on highways which society may compel. But in general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition. Whatever of social value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service.[176]
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> * * *
>
> Of course there might be provable fraud even in such matters. One might engage for the same period to several employers, collecting an advance from each … or otherwise provide proof that fraud was his design and purpose. But in not one of the cases to come before this Court under the antipeonage statute has there been evidence of such subtlety or design. In each there was the same story, a necessitous and illiterate laborer, an agreement to work for a small wage, a trifling advance, a breach of contract to work. In not one has there been proof from which we fairly could say whether the Negro never intended to work out the advance, or quit because of some real or fancied grievance, or just got tired. If such statutes have ever on even one occasion been put to a worthier use in the records of any state court, it has not been called to our attention. If this is the visible record, it is hardly to be assumed that the off-the-record uses are more benign.[177]

There is something about the specter of slavery that catches most whites' attention.

Capital Punishment, the Frontiers of Decency and the Law: Louisiana ex rel. Francis v. Resweber

We will never know the precise number of African Americans executed for crimes they might not have committed, at the end of a process offering fewer protections than fair-minded people would agree were due in a death penalty case. The justices knew of the difficulties in securing equal justice for African Americans on trial for their lives,

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[176] 322 U.S. at 17-18.
[177] 322 U.S. at 21-22.

from the many brought to their Court.[178] One case raised the issue more directly than any other, and Jackson's role in it demonstrated in the starkest relief his ability to use the doctrines of judicial restraint and federalism to compartmentalize law and ethics.

Willie Francis was sixteen when he was sentenced to death for murdering a white man in Louisiana. "A victim of inept lawyering," Francis would have been just another anonymous victim of a broken criminal justice system had it not been for the events of May 3, 1946. Strapped into the electric chair, Francis failed to die when the switch was thrown, "presumably because of some mechanical difficulty"; whether any electrical current actually passed through the teenager's body was disputed at the time, though according to recent scholarship, "Francis groaned …. His lips puffed out and he jumped so hard that the chair's legs came off the floor. He screamed, 'Take it off! Let me breathe!'" When the state announced plans to try again six days later, attorneys more energetic than Francis's trial counsel sued to bar the second attempt.[179] Francis, who

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[178] American society has not yet achieved racial or regional equity with regard to the death penalty. In the South, slavery expanded the universe of capital cases for African Americans and "was also responsible, although less directly, for the South's retention of capital punishment for whites" as well; and its legacy continues. Stuart Banner, The Death Penalty: An American History (Cambridge, MA: Harvard University Press, 2002) 140-42; David Cole, No Equal Justice: Race and Class in the American Criminal Justice System (New York, New Press, 1999); Racial Disparities in Federal Death Penalty Prosecutions, 1988-1994: staff report by the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, One Hundred Third Congress, second session (Washington, DC: House Judiciary Committee, 1994); Hugo Adam Bedau, ed., The Death Penalty in America: An Anthology (Garden City, NY: Anchor Books, 1967); Bedau, ed., The Death Penalty in America (third ed.) 188-89; Marvin E. Wolfgang and Marc Riedel, "Racial Discrimination, Rape, and the Death Penalty," The Death Penalty in America 194-205; Kennedy, Race, Crime, and the Law ch. 9; Stuart Banner, The Death Penalty: An American History (Cambridge, MA: Harvard University Press, 2002); McClesky v. Kemp, 481 U.S. 279 (1987).

[179] Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 460, 472-73 (1947); Arthur S. Miller and Jeffrey H. Bowman, Death by Installments: The Ordeal of Willie Francis (New York: Greenwood Press, 1988), pp. 9, 23-27 and chs. 3, 5; Klarman, "Race and the Southern Criminal Justice System in the 1940s," 129-30; Tushnet, Making Civil Rights Law 43; Fairclough, Race and Democracy: The Civil Rights Struggle in Louisiana 119-20. The hills in Mr. Francis's emotional roller coaster never seemed to stop. In an event "virtually unparalleled" in its history, the Supreme Court originally – and mistakenly – reported that it had denied certiorari and a stay of execution, and the petitioner had been told the bad but inaccurate news in his prison cell before the error was corrected. Barrett Prettyman, Jr., Death and the Supreme Court (New York: Harcourt, Brace and World, 1961) 111; Miller and Bowman, Death by Installments 55-56. Added to

became a "national *cause celebre*," ultimately lost a 5-4 decision in the Supreme Court and was successfully put to death.[180]

Jackson's views can be fully appreciated only by measuring them against those of his colleagues. On a Court factionalized into fairly well-defined camps, two justices, Black and Burton, forsook their usual allies and voted the opposite way.[181] Although only three opinions were filed (the prevailing opinion to affirm, by Reed; the Burton dissent; and a Frankfurter concurrence), no fewer than seven justices circulated opinions.[182] The proliferation of writing was, according to Frankfurter, a recognition of how "difficult and delicate the issues" were.[183] For the dissenters, ethical and moral considerations were paramount.[184] Rutledge, for example, considered the botched

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this episode was the more customary rescheduling of Francis' execution at least three times while his case was pending. Miller and Bowman, Death by Installments 113.

[180] 329 U.S. at 459-60, 466; Klarman, "Race and the Southern Criminal Justice System in the 1940s," 130; Dickson, ed., The Supreme Court in Conference 604-05; Miller and Bowman, Death by Installments chapters 9-12; Prettyman, Death and the Supreme Court ch. 3; Fairclough, Race and Democracy 119-20.

While Francis' case is unique in that it reached the Supreme Court, prolonged executions caused by a prisoner's failure to die on the first attempt do occasionally occur. According to Miller and Bowman, there were at least five such cases in the eight years after the reinstatement of the death penalty in 1977. And the basic law on the subject has not changed since the Willie Francis case. Miller and Bowman, Death by Installments 144-46.

[181] Although only two justices – Murphy and Rutledge – indisputably voted to reverse sentence at the conference, both Douglas and Burton (who wrote the dissent) claimed in their own records to have voted to reverse at conference; by the time the final results were published, both were in the petitioner's corner. According to Miller and Bowman, Douglas had voted at conference to affirm the conviction, and did not change his vote until he joined Burton's December 20 draft opinion. Miller and Bowman, Death by Installments 78. See also Dickson, The Supreme Court in Conference 605; Prettyman, Death and the Supreme Court 118.

[182] Jackson's files contain no opinion by Vinson, who saw it as a "clear" affirmance; or by Douglas, who ultimately voted with the dissenters. Dickson, The Supreme Court in Conference 605; Miller and Bowman, Death by Installments 87.

[183] Felix Frankfurter, Memorandum for the Conference, January 4, 1946 [sic], Box138, File: Supreme Court – O.T. 1946 – Cases – No. 142 – Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress; Felix Frankfurter, draft concurring opinion, January 2, 1947, Box 138, File: Supreme Court – O.T. 1946 – Cases – No. 142 – Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress 1-2. The case was not difficult for Vinson, or for at least two of the dissenters.

[184] Miller and Bowman, Death by Installments ix, 83; Harold Hitz Burton, draft dissenting opinion, December 1946, Box 138, File: Supreme Court – O.T. 1946 – Cases – No. 142 – Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress 1-2, 4, 8; Harold Hitz Burton, draft dissenting opinion, December 31, 1946, Box 138, File: Supreme Court – O.T. 1946 – Cases – No. 142 –

execution a form of torture,[185] and Murphy, who often wore his heart on his sleeve, *began* his analysis by characterizing the a second execution attempt as "repugnant to a civilized sense of justice."[186] True to his strict view of judicial restraint, Frankfurter agonized over sending Francis to the electric chair a second time but concluded that he lacked the power to prevent it, and later worked "behind the scenes" to stop the execution.[187]

Jackson was not quite racked in the same way by either doubt or conscience, but he strove to repress whatever pangs he felt. Disturbed by the dissenters' claim to the moral high ground on the one hand, yet just as firm about narrowly circumscribing the Court's role on the other, he began his draft concurring opinion by setting out personal views on capital punishment are still not widely accepted in this country:

> If I am at liberty, in the name of due process, to vote my personal sense of "decency," I not only would refuse to send Willie Francis back to the electric chair, but I would not have sent him there in the first place. If my will were law, it would never permit execution of any death sentence. This is not because I am sentimental about criminals, but I have doubts about the moral right of society to extinguish a human life, and even greater doubts about the wisdom of doing so. Throughout the ages that penalty has been exacted, but it never prevented, and it is doubtful if it ever diminished, the crime it penalized. And as it now exists, it is the unspoken but real cause of more reversals of convictions than any errors of

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Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress 1, 3-4, 8-10.

[185] Wiley Rutledge, draft dissenting opinion, December 14, 1946, Box 138, File: Supreme Court – O.T. 1946 – Cases – No. 142 – Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress 1.

[186] Frank Murphy, draft dissenting opinion, December 1946, Box 138, File: Supreme Court – O.T. 1946 – Cases – No. 142 – Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress 1. Both Murphy and Rutledge joined Burton's dissent after the junior justice, still hopeful of persuading a fifth – Frankfurter -- to vote against the reexecution, worked hard to coalesce all opposition in a single opinion. Miller and Bowman, Death by Installments 86-87, 92-93.

[187] Felix Frankfurter to Harold Hitz Burton, December 13, 1946, Box 138, File: Supreme Court – O.T. 1946 – Cases – No. 142 – Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress at 1-2; Miller and Bowman, Death by Installments 93-95. For a cogent critique of the Frankfurter opinion, see Miller and Bowman ch. 8. See also Michael Ariens, "A Thrice-Told Tale, or Felix the Cat," Harvard Law Review 107 (1994) 620, 668 n. 243; Miller and Bowman, Death by Installments ch. 10; Fairclough, Race and Democracy 120.

> trial judges. A completely civilized society will abandon killing as treatment for crime.[188]

Jackson for the most part rejected concern for the accused as a reason for his opposition, and instead focused mostly on his belief that the death penalty impeded law enforcement: it made juries less likely to convict, and appellate courts more likely to reverse convictions.[189] His difficulty with the "unspoken but real" reasons for reversing convictions was a theme that would again surface in his writings on cases involving African Americans convicted of capital crimes.

Yet he unapologetically refused to vote his conscience in Francis. Judges, he believed, were not to impose their will on society, and especially on the states:

> … judges are servants, not masters, of society and it is society's laws that should govern judges. So long as society adheres to its policy of death penalties, it is for us in individual cases to apply the policy of the law, as it is the duty of prosecutors, whatever their personal conviction, to advocate it. If this is our duty as to sentences in federal courts, it is even more imperative that we observe it when, as federal judges, we deal with judgments rendered by courts of the several states.[190]

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[188] Robert H. Jackson, draft concurring opinion, December 20, 1946, Box 138, File: Supreme Court – O.T. 1946 – Cases – No. 142 – Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress 1; Robert H. Jackson, printer's copy, draft concurring opinion, December 20, 1946, Box 138, File: Supreme Court – O.T. 1946 – Cases – No. 142 – Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress 1.

According to an October 2005 Gallup Poll, 64% of Americans supported the death penalty for convicted murderers. Brenda Goodman, "North Carolina Man is 1,000th Person Executed Since 1976," New York Times December 3, 2005 (available at www.nytimes.com).

[189] Jackson, "Serving the Administration of Criminal Justice," Address before the Criminal Law Section, American Bar Association, Boston, Massachusetts, August 26, 1953; Jackson to Tweed, February 28, 1950 2.

[190] Jackson, draft concurring opinion, December 20, 1946, Louisiana ex rel. Francis v. Resweber 1; Jackson, printer's copy, draft concurring opinion, December 20, 1946, Louisiana ex rel. Francis v. Resweber 1.

Given the sentence's fundamental validity, Jackson believed that the Court's review powers were at an end.[191]

Jackson was even more dismissive of the claim that a second execution attempt would violate the constitutional ban on double jeopardy by making the petitioner anticipate the throes of death twice. Theorizing that "the fear of death … counts as one…," he observed: "We are all under sentence to die. Just how much of terror is added by having the unknown hour of death's call made determinate by a court, I don't know. I suppose it varies with temperament…."[192] Thus, Murphy's characterization of forcing Francis to repeat the "mental anguish which characterizes preparation for execution" as "cruel and inhuman" was to Jackson a "good deal [of] nonsense," as "all under sentence of death from birth and most of us manage to live…."[193] He wondered how such a ruling would not produce "some unexpected results" in future cases, where it might be argued that "a stay, a reprieve, a grant of a new trial – any delay after execution was so close at hand to cause anguish" had "an element of prolonging or repeating the ordeal."[194] He

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[191] Robert H. Jackson, draft concurring opinion, December 20, 1946, Louisiana ex rel. Francis v. Resweber 2; Robert H. Jackson, printer's copy, draft concurring opinion, December 20, 1946, Louisiana ex rel. Francis v. Resweber 2.

Jackson appeared to be less ambivalent on the subject than his clerk at the time of the Brown decision might have anticipated. E. Barrett Prettyman, Jr., who had not been in Jackson's employ while Francis was pending, observed in a 1961 book that "It would not have been unlike Jackson to vote originally against a second electrocution and then, when the opinions were in cold print, to change his vote in favor of leaving Louisiana to its own devices." Barrett Prettyman, Jr., Death and the Supreme Court 122-23. While Prettyman perceptively identified the ambivalence so often present in Jackson's decisionmaking process, Jackson's files – which were not yet available at the time Prettyman authored his study of capital punishment and the Supreme Court -- evidence no such doubt in Francis.

[192] Jackson, draft concurring opinion, December 20, 1946, Louisiana ex rel. Francis v. Resweber 3; Jackson, printer's copy, draft concurring opinion, December 20, 1946, Louisiana ex rel. Francis v. Resweber 3-4.

[193] Robert H. Jackson, marginal comments to Francis Murphy, draft dissenting opinion, December 1946, Box 138, File: Supreme Court – O.T. 1946 – Cases – No. 142 – Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress at 2.

[194] Jackson, draft concurring opinion, December 20, 1946, Louisiana ex rel. Francis v. Resweber 4; Jackson, printer's copy, draft concurring opinion, December 20, 1946, Louisiana ex rel. Francis v. Resweber 4. Jackson assumed that "most likely no current reached [Francis'] body" during the first execution attempt. Id. at 2.

believed Francis' plight no worse than that of a cancer victim, who might experience imminent death over an extended period of time; or a soldier, who faces death repeatedly. He also suggested that the Court would have had little trouble with the result if the chair had been fixed in five minutes and Francis executed at that point.[195]

Limitations on the judiciary's role in policy matters, Jackson believed, required the separation of the decent from the legal: "There is a world of difference to me between what a State in decency ought to do and what we as a matter of constitutional law may compel it to do." Seeking to demonstrate the unworkability of a decency standard by highlighting the differences between the approaches of several of his colleagues, he observed, "While I should not want to be thought less zealous for decency, either national or elementary, than my colleagues, I doubt if the word or concept affords either an objective or intelligible test of due process."[196] Even if the fractured Court could agree on a standard, he doubted "that the founding fathers ever intended to nationalize decency: in fact, the purpose of a federal instead of a unitary form of government was to allow each state to retain some individuality in such matters."[197] Just how deeply the emphasis on decency disturbed Jackson is further revealed in language he penned into his printed

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Several years later, while summering at Bohemian Grove, he indicated sympathy with the view of fellow campers, the chief judge of the California Supreme Court and then-California governor Earl Warren, that the Supreme Court had been "a little irresponsible" in granting too many last-minute stays of execution. Robert H. Jackson to Felix Frankfurter, July 24, 1951, Box 170, Folder 4, Part II, Reel 2, 001, Felix Frankfurter Collection (available on microfilm) 1-2.

[195] Robert H. Jackson, "142, Louisiana ex rel Francis vs. Resweber," undated raw notes, Box 138, File: Supreme Court – O.T. 1946 – Cases – No. 142 – Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress. Burton unsuccessfully tried to reach Jackson with an argument based on his reading of the Louisiana capital punishment statute: "When the electrocution ceases to be 'continuous' -- it ceases to be 'instantaneous' and 'painless.' It then becomes cruel enough to be unauthorized by statute and … due process"). Harold Hitz Burton to Robert H. Jackson, December 26, 1946, Box 138, File: Supreme Court – O.T. 1946 – Cases – No. 142 – Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress.

[196] Jackson, draft concurring opinion, December 20, 1946, Louisiana ex rel. Francis v. Resweber 2; Stanley Reed, draft opinion, December 11, 1946, Box 138, File: Supreme Court – O.T. 1946 – Cases – No. 142 – Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress 2-3.

[197] Jackson, draft concurring opinion, December 20, 1946, Louisiana ex rel. Francis v. Resweber 4.

draft, through which he suggested that imposing judicial fiat without clear standards, and in conflict with the acts of the legislature, risked a "sort of authoritarian mysticism."[198] It hardly needs saying that invoking Hitler and Goebbels in this situation was excessive, but doing so underscored the justice's concern that, to maintain the political balance of power necessary in a free country, the branches of government must draw, and scrupulously adhere to, clear lines of authority. And it was Stanley Reed's references to "standards of decency" (variously expressed as "our standards of decency" and "national standards of decency" in different drafts) which initially prevented Jackson from joining his colleague's workmanlike opinion.[199]

Jackson's opposition to the "decency standard" was shared by a justice who was not one of his usual allies. In a draft opinion circulated on January 7, Black argued that formulating a standard of decency "is generally recognized as a legislative function," and that the Framers did not specifically grant that power to the courts.[200] Jackson would not have gone so far: he left open a possible use for such vague concepts as decency in due process analysis, but "it must mean that there is … a disciplined and impersonal decency

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[198] Jackson, draft concurring opinion, December 20, 1946, Louisiana ex rel. Francis v. Resweber 3.

[199] Stanley Reed, draft opinion, December 11, 1946, Louisiana ex rel. Francis v. Resweber 2; Stanley Reed, draft opinion, December 12, 1946, Box 138, File: Supreme Court – O.T. 1946 – Cases – No. 142 – Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress 2; Stanley Reed, draft opinion, December 17, 1946, Box 138, File: Supreme Court – O.T. 1946 – Cases – No. 142 – Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress 2-3; Stanley Reed, draft opinion, January 2, 1947, Box 138, File: Supreme Court – O.T. 1946 – Cases – No. 142 – Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress 3; Felix Frankfurter, draft concurring opinion, January 2, 1947, Box 138, File: Supreme Court – O.T. 1946 – Cases – No. 142 – Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress 2.

[200] Hugo L. Black, draft concurring opinion, January 3, 1947, Box 138, File: Supreme Court – O.T. 1946 – Cases – No. 142 – Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress 3-4. The best source on Black's method of constitutional analysis comes straight from the horse's mouth. Hugo L. Black, A Constitutional Faith (New York: Columbia University Press, 1968) 14ff, cited in Wallace Mendelson, "Hugo Black and Judicial Discretion," Political Science Quarterly 85 (March 1970) 18.

which expresses society's will and the policy of the law – a quite different thing from personal bias or dislike."[201]

Ultimately, Jackson, like Black, left his qualms in his file cabinet and joined Reed's opinion – once the offending reference to a national standard of decency had been excised.[202] Yet although Black agreed with Frankfurter and the dissenters "that a defendant who has been once compelled to suffer the imminence of death by electrocution should not be put through them again," Jackson seemed less troubled about the concept of reelectrocution from an ethical standpoint.[203]

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[201] Robert H. Jackson, draft concurring opinion, December 20, 1946, Louisiana ex rel. Francis v. Resweber 2-3.

It is quite possible that Frankfurter influenced Jackson on this score, if their undated handwritten correspondence is any indication. Frankfurter argued, based on prior precedent and the rather compelling factual argument that "You wouldn't say that a conviction under state law that called for quartering and gibbeting , after public branding, a la The Scarlet Letter, of an adulterer, would not, under modern precedents be offensive to 'due process,'" that there has to be room for such a standard under the Due Process clause. Jackson replied by that "'decency' means different things to different people. A judicial decency, meaning a disciplined and impersonal search for the things the law holds indecent … is quite a different thing from 'decency' in dinner table chat with ladies." Frankfurter crossed out the dinner table chat comment and substituted "personal biases, good or bad." This language fairly closely tracks that of the draft opinion, as quoted in the text above. Felix Frankfurter to Robert H. Jackson, and Robert Jackson to Felix Frankfurter, undated handwritten notes, Box 138, File: Supreme Court – O.T. 1946 – Cases – No. 142 – Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress.

[202] Compare Stanley Reed, draft opinion, January 2, 1947, Louisiana ex rel. Francis v. Resweber 3 with Stanley Reed, draft opinion, January 7, 1947, Box 138, File: Supreme Court – O.T. 1946 – Cases – No. 142 – Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress 1, 3. Miller and Bowman credited Black, and not Jackson, with convincing Reed to omit the offending language in the opinion. It appears that Reed made additional changes to placate Black, but there was already substantial change, seemingly addressing Jackson's concerns, in Reed's January 7 draft, four days before the Reed draft incorporating all of Black's proposed changes. Miller and Bowman, Death by Installments 101-02.

[203] Hugo L. Black, draft concurring opinion, January 9, 1947, Box 138, File: Supreme Court – O.T. 1946 – Cases – No. 142 – Louisiana ex rel. Francis v. Resweber, et al., Robert H. Jackson Collection, Library of Congress 5. Refusing to infer constitutional protections not specifically in the document also led Black to dissent in Griswold v. Connecticut, 381 U.S. 479 (1965), and to take perhaps the most absolutist view on the First Amendment in Court history. New York Times v. Sullivan, 376 U.S. 254, 293 (1964); E. Cahn, "Justice Black and First Amendment 'Absolutes': A Public Interview," NYU Law Review 37 (1962) 557-59; Mendelson, "Hugo Black and Judicial Discretion" 25-26.

The law established in the Willie Francis case has continued to be the last word on humane methods of execution, thereby permitting states to force a condemned person "to sit through jolts of electric current again and again, if need be, until the death sentence has been carried out – which is exactly what happened" in at least three electrocution cases in just the first eight years since the reinstatement of the death penalty in 1977. Miller and Bowman, Death by Installments 145-46.

African Americans as Victims in the Criminal Justice System

In Pollock v. Williams, Jackson observed that "the individual in America is protected against slavery and involuntary servitude by 'both a shield and a sword,'" with Supreme Court decisions as the shield, federal prosecution as the sword.[204] Yet as shy as he sometimes was to hold up the shield, he was even more hesitant to draw his sword.

Jackson and the prosecution of white supremacist hate speech

Jackson generally sided with authorities who sought to control hate speech (or what, in 1951, Jackson described as "hateful and hatestirring attacks on races and faiths"),[205] but his voting record was not one hundred per cent in that direction. An episode in the tumultuous history of white resistance to housing integration in Chicago starred Joseph Beauharnais, who distributed leaflets from a pro-segregation group called the White Circle League. One of its more inflammatory passages urged "all normal white people to stand up and fight for our rights…," for "'If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions … rapes, robberies, knives, guns and marijuana of the negro, surely will.'"[206] Beauharnais was convicted of violating an Illinois "criminal libel law" banning portrayals of "'depravity, criminality, unchastity, or lack of virtue of a class of citizens,

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[204] Carr, Federal Protection of Civil Rights 3-4.
[205] Kunz v. New York, 340 U.S. 290, 295 (1951) (Jackson, J., dissenting).
[206] Joseph Beauharnais, "Preserve and Protect White Neighborhoods!," pamphlet of the White Circle League, published as appendix to Black, J., and Douglas, J., dissenting opinion, Beauharnais v. Illinois, 343 U.S. 250, 267, 276 (1952).

Philip A. Johnson's Call Me Neighbor, Call Me Friend: The Case History of the Integration of A Neighborhood on Chicago's South Side (Garden City: Doubleday and Company, 1965) is an engaging anecdotal account of neighborhood integration in Chicago; the Chicago Commission on Race Relations' The Negro in Chicago: A Study of Race Relations and a Race Riot in 1919 (1922. New York: Arno Press and the New York Times, 1968) is a comprehensive study of the riots and their context; Norman A. Bradburn, Seymour Sudman and Galen L. Gockel's Racial Integration in American Neighborhoods: A Comparative Study (National Opinion Research Center Report No. 111-B. University of Chicago: NORC, 1970) includes information on integration of Chicago neighborhoods, and whites' opinion about it.
[206] Joseph Beauharnais, "Preserve and Protect White Neighborhoods!," 343 U.S. at 276 (1952).

of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.'"[207] By a 5-4 vote, the Court upheld the Illinois statute. In an opinion joined by Burton, Vinson, Clark and Minton, Frankfurter upheld the Criminal Code provision as an appropriate exercise of state power under the Fourteenth Amendment.[208]

Jackson dissented, as did Reed, Black and Douglas.[209] Jackson's rationale, however, differed from that of the others. The two senior civil libertarians believed the law an obvious violation of First Amendment guarantees.[210] Reed, in whose dissent Douglas also joined, voiced no objection to group libel laws *per se*, but concluded that this particular statute was unconstitutionally vague.[211] Jackson unequivocally believed that "'a State has power to bring classes 'of any race, color, creed, or religion' within the protection of its libel laws…."[212] Drawing on his Nuremberg experience, he wrote:

> Group libel statutes represent a commendable desire to reduce sinister abuses of our freedoms of expression – abuses which I have had occasion to learn can tear apart a society, brutalize its dominant elements, and persecute, even to extermination, it minorities. While laws or prosecutions might not alleviate racial or sectarian hatreds and may even invest scoundrels with a specious martyrdom, I

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[207] 343 U.S. at 251-52, 253.
[208] 343 U.S. at 252, 266-67.
[209] According to Jackson's conference notes, only Burton, Douglas, and Reed initially voted to reverse; information on Black's vote is inconsistent, with Jackson's notes saying "reverse" but with the "affirm" box checked at the bottom of the form. Both Jackson and Burton, then, changed their minds after the conference; given the tone of Black's dissent and his clear-cut views on the First Amendment and on the doctrine of incorporation, it is more likely that he voted to reverse throughout. Robert H. Jackson, Conference Notes, Box 173, File: Supreme Court – October Term 1951 – No. 118, Beauharnais v. Illinois, file 2 of 2, Robert H. Jackson Collection, Library of Congress.
[210] 343 U.S. at 267-75 (Black and Douglas, JJ., dissenting).
[211] 343 U.S. at 281-84 (Reed and Douglas, JJ., dissenting).
Douglas's solo dissent staked a middle ground. He allowed the government the right to regulate the kind of speech found in Beauharnais' pamphlet, but only if it were part of "a conspiracy … aimed at destroying a race by exposing it to contempt, derision, and obloquy," or disseminated under circumstances creating a "clear and present danger" to safety. 343 U.S. at 284-87 (Douglas, J., dissenting).
[212] 323 U.S. at 299 (Jackson, J., dissenting).

> should be loath to foreclose the States from a considerable latitude of experimentation in this field….[213]

Yet he voted to overturn the conviction because the trial judge refused to let Beauharnais attempt to prove the truth of his racist slurs; or to testify about his understanding of "certain phrases" in the leaflet or about "the reason for forming the White Circle League," both of which were relevant to the "issue of motive and ends" at the heart of his defense.[214] While Jackson made clear that "I do not intimate that this defendant stood even a remote chance of justifying what impresses me, as it did the trial court, as reckless and vicious libel," he insisted that, despite the dubiousness of the defense in this case, "Society has an interest in preserving truth as a justification [in libel cases], however obnoxious the effort may be…."[215]

Jackson did not stop there. He further suggested that, once African Americans started banding together to fight for their rights, opponents had the right to express their opposition: "When any … group possess a racial or sectarian solidarity which is or may be exploited to influence public affairs, that group becomes a legitimate subject for public comment."[216] "Of course," qualified Jackson, "one can only deplore the habitual intemperance and bitter disparagement which characterizes most such comment." Yet, while the justice voiced his "support" for "the right of a state to place decent bounds upon

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[213] 343 U.S. at 304 (Jackson, J., dissenting).
[214] 343 U.S. at 300 (Jackson, J., dissenting). Beauharnais had offered to prove that crime rates were higher in African American neighborhoods; the specific facts relating to three crimes committed by African Americans; and that property values declined when African Americans moved into a neighborhood. 343 U.S. at 265 n. 21. The defense attorney also unsuccessfully attempted to question Beauharnais about his motives in distributing the pamphlet. 343 U.S. at 266 n. 22. These were evidently attempts to meet the "combined requirement of truth and good motives and justifiable ends," which was "available as a defense in all libel suits," including criminal libel prosecutions, under the Illinois Constitution. 343 U.S. at 265 n.20.
[215] 343 U.S. at 301 (Jackson, J., dissenting).
[216] 343 U.S. at 301 (Jackson, J., dissenting).

it," no government can legislate "that group purposes, characteristics and histories are to be immunized from comment or may be discussed only at the risk of prosecution free of all usual safeguards."[217] Near the end of his opinion, he sounded a cautionary note: "No group interest in any particular prosecution should forget that the shoe may be on the other foot in some prosecution tomorrow."[218] For better or worse, Jackson viewed minority groups – even those subject to grinding discrimination – as powerful actors, often more powerful than the bigots who railed against them: "… when there is arrayed against the lone writer in the dock the collective animosities of a powerful and numerous race or sect the importance of these safeguards is multiplied."[219] His Nuremberg-fed fear of an explosion of political violence either caused, or fed into, his frustration with both sides in the growing controversy over civil rights.[220]

The importance of the potential consequences of political speech to Jackson can be seen in a comparison between Beauharnais and other hate speech cases. In Terminiello v. Chicago, he dissented from a 5-4 decision overturning the disorderly conduct conviction of Arthur Terminiello, whose anti-Communist, anti-Semitic diatribe at a Chicago auditorium sparked a riot.[221] In that case, the justice voiced his belief in the "utmost freedom of utterance," even for white supremacists:

> It is the legal right of any American citizen to advocate peaceful adoption of fascism or communism, socialism or capitalism. He may go far in expressing sentiments whether pro-semitic or anti-semitic, pro-negro or anti-negro, pro-

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[217] 343 U.S. at 301 (Jackson, J., dissenting).
[218] 343 U.S. at 305 (Jackson, J., dissenting).
[219] Robert H. Jackson, undated handwritten and typed draft opinion, Box 173, File: Supreme Court – October Term 1951 – No. 118, Beauharnais v. Illinois, file 1 of 2, Robert H. Jackson Collection, Library of Congress 20.
[220] He also expressed concern with both sides in the struggle over civil rights in his 1950 correspondence with Charles Fairman. See p. 408; see also Terminiello v. Chicago, 337 U.S. 1 (1949) (importance of restraint in expressing controversial views, to avoid repetition of mistakes that led to fascist and communist regimes in Europe).
[221] 337 U.S. 1 (1949).

> Catholic or anti-Catholic. He is legally free to argue for some anti-American system of government to supersede by constitutional methods the one we have. It is our philosophy that the course of government should be controlled by a consensus of the governed. This process of reaching intelligent popular decisions requires free discussion. Hence we should tolerate no law or custom of censorship or suppression.[222]

Yet he also argued that "It is naïve, or worse, to teach that oratory with this object or effect is a service to liberty. No mob has ever protected any liberty, even its own, but if not put down it always winds up in an orgy of lawlessness which respects no liberties."[223] Even legally permissible speech can sometimes threaten public order. In such a situation, "there certainly becomes a point beyond which [a speaker] cannot indulge in provocations to violence without being answerable to society."[224]

Similarly, in Feiner v. New York, the Justice joined a majority that affirmed the conviction of a defendant who "in a colored neighborhood … urged the colored people to rise up in arms and fight," and in the process attracted a "restless" crowd, causing "some pushing, shoving and milling around"; the same record led dissenting justices to believe the police had overreacted.[225] In Kunz v. New York, decided the same day as Feiner, Jackson, this time dissenting, voted to affirm the conviction of a man whose anti-Semitic rantings on a street corner led to his arrest. The Justice voiced the belief that "to blanket hateful and hate-stirring attacks on races and faiths under" the First Amendment "may be a quixotic tilt at windmills which belittles great principles of liberty."[226]

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[222] 337 U.S. at 32 (Jackson, J., dissenting).
[223] 337 U.S. at 32 (Jackson, J., dissenting).
[224] 337 U.S. at 33-35 (Jackson, J., dissenting).
[225] Feiner v. New York, 340 US 315, 317, 323-27, 330-31 (1951). The speaker whose permit at a nearby venue was cancelled -- the cancellation having led to Feiner's presence on the corner – was O. John Rogge, a former Criminal Division chief at the Justice Department, who had clashed with Attorney General Jackson over civil rights prosecutions. See p. 133.
[226] 340 U.S. at 296 (Jackson., J., dissenting).

In language intended for inclusion in a single opinion in both cases, Jackson made clear his fear of the consequences of public speech which might inflame racial and religious strife:

> … if there are two dependably incendiary subjects they are race and religion. Race fears and hatreds have been the root of the most terrible riot [sic] that have disgraced our American civilization. They are ugly possibilities that overhang every great American city. … These are the subjects upon which it is claimed ay speaker has the right to play, upon public property, and at the public's risk, under the public's police protection, but without the least public right to intervene.[227]

Characterizing the defendant's "statement to colored people and in a colored neighborhood that the colored people should rise up in arms and fight" as "a literal invitation to violence," Jackson argued that since "The law of New York does not segregate, according to their diverse nationalities, races, religions, or political associations, the vast hordes of people living in its narrow confines," groups (including Communists and Nazis) which have "brought their traditional political animosities and nationalisms" to America's shores, the localities charged with administering "this frightening aggregation" were entitled to "protect the dignity of these persons against fanatics who take possession of its streets to hurl into its crowds defamatory epithets that hurt like rocks."[228]

In almost all of these cases, Jackson voted on the side of law enforcement, giving them the discretion he felt they needed to maintain the public peace and essential liberty for everyone. As he wrote in an early draft in Feiner, "When speech takes on [an] aspect

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[227] Robert H. Jackson, undated draft segment, Box No. 167, File: Supreme Court – O.T. 1950 – Cases – No. 93, Feiner v. People of the State of New York, Robert H. Jackson Collection, Library of Congress; Robert H. Jackson, undated draft, Box No. 167, File: Supreme Court – O.T. 1950 – Cases – No. 93, Feiner v. People of the State of New York, Robert H. Jackson Collection, Library of Congress 9; Robert H. Jackson, December 4, 1950, draft opinion, Box No. 167, File: Supreme Court – O.T. 1950 – Cases – No. 93, Feiner v. People of the State of New York, Robert H. Jackson Collection, Library of Congress 7.

[228] Kunz v. New York, 340 U.S. 290, 313 (1951) (Jackson, J., dissenting); Jackson, undated draft, Feiner v. New York 17-18; Jackson, December 4, 1950, draft opinion, Feiner v. New York 4, 8, 12.

of aggression, I think the locality has some considerable latitude to judge its effects, actual or prospective and to protect the peace and dignity of the community."[229] There was also every indication in his opinion in Beauharnias that he would not have voted to overturn the conviction there, but for the judge's conduct of the trial. His view that Beauharnais would have had no defense available to him if his publication had created a public disturbance or some other identifiable harm, or an imminent risk of harm, is perhaps the strongest suggestion of his intent:

> Even though no individuals were named or described as targets of this pamphlet, if it resulted in riot or caused injury to any individual Negro, such as being refused living quarters in a particular section, house or apartment, or being refused employment, certainly there would be no constitutional obstacle to imposing civil or criminal liability for actual results. But in this case no actual violence and no specific injury was charged or proved.
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> The leaflet was simply held punishable as criminal libel *per se* irrespective of its actual or probable consequences….[230]

But here, the jury had no opportunity to consider whether the pamphlet was as "emotionally exciting to immediate action as the spoken word, especially the incendiary street or public speech"; "whether this publication was obviously so foul and extreme as to defeat its own ends, whether its appeals for money – which has a cooling effect on many persons – would not negative its inflammatory effect, whether it would not impress the passer-by as the work of an irresponsible who needed mental examination." Nor were they allowed to consider "the realities of race relations and any smoldering fires to be fanned into holocausts."[231]

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[229] Jackson, undated draft, Feiner v. New York 9.
[230] 343 U.S. at 302 (Jackson, J., dissenting).
[231] 343 U.S. at 303-04 (Jackson, J., dissenting). Jackson's determination to separate himself (and his background) from racists was more starkly apparent in his phraseology from an earlier draft – "In communities that I know the most imminent danger this pamphlet would create demand for a mental examination of it[sic] author." Robert H. Jackson, undated handwritten and typed draft opinion, Box 173,

The context in which statements, including those about race, were made, could make otherwise permissible speech a crime. In early drafts of Terminiello, Jackson had suggested that even speech advocating the racial equality demanded by the Constitution, may, in certain parts of the country, be regulated for the sake of public peace: "Because a subject is legally arguable, however, does not mean that public sentiment will be tolerant of its advocacy at all times and in all manners…. custom in some sections will not tolerate a speech on racial equality, intermarriage, or segregation that in other parts of the country would not even keep an audience awake." This language was omitted from Jackson's published opinion, but that he ever made such an argument at all is testament to his placing of order above all else in the hierarchy of ordered liberty; and to his reluctance to tangle with white supremacists on issues of race.[232]

To Jackson, controlling the mob was of utmost importance. As he observed in Terminiello:

> As a people grow in capacity for civilization and liberty their tolerance will grow, and they will endure, if not welcome, discussion even on topics as to which they are committed…. But on our way to this idealistic state of tolerance the police have to deal with men as they are. They crowd mind is never tolerant of any idea which does not conform to its herd opinion. It does not want a tolerant effort at meeting of minds. It does not know the futility of trying to mob an idea. … The authorities must control them and they are entitled to place some checks upon those whose behavior or speech calls such mobs into being. When the right of

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File: Supreme Court – O.T. 1951 – No. 118, Beauharnais v. Illinois, file 1 of 2, Robert H. Jackson Collection, Library of Congress 28.

[232] 343 U.S. at 304 (Jackson, J., dissenting); 339 U.S. at 33 (Jackson, J., dissenting); Robert H. Jackson, April 28, 1949 draft opinion, Box 155, File: Supreme Court – Cases – O.T. 1948 – No. 272, Terminiello v. City of Chicago, file 1 of 2, Robert H. Jackson Collection, Library of Congress k; Robert H. Jackson, May 1949 draft opinion, Box 155, File: Supreme Court – Cases – O.T. 1948 – No. 272, Terminiello v. City of Chicago, file 1 of 2, Robert H. Jackson Collection, Library of Congress 20. Interestingly, Justice Black made a similar argument in support of his proposition that such speech should be protected regardless of circumstance: "Today Beauharnais is punished for publicly expressing strong views in favor of segregation. Ironically enough, Beauharnais, convicted of crime in Chicago, would probably be given a hero's reception in many other localities, if not in some parts of Chicago itself…. the same kind of state law that makes Beauharnais a criminal for advocating segregation in Illinois can be utilized to send people to jail in other states for advocating equality and nonsegregation. What Beauharnais said in his leaflet is mild compared with usual arguments on both sides of racial controversies." 343 U.S. at 274 (Black, J., dissenting).

> society to freedom from probable violence should prevail over the right of an individual to defy opposing opinion, presents a problem that always tests wisdom and often calls for immediate and vigorous action to preserve public order and safety.[233]

On the other hand, he believed that "it is …. Far-fetched to think local censorship is the real danger to civil liberties in the United States": "A serious menace to civil liberties can come only from federal government," as "its measures are the effective, inescapable and unavoidable suppressions, beyond effective political action by the people," while the governments in American cities would be held in check by their "mosaic of minorities, each of which is quick to see in the suppression or oppression of any a threat to all."[234] Indeed, he observed that while New York was singled out for suppressing speech, in fact "suppression of press, stage, speech, assembly are not more but less prevalent there than in the country at large…. This is so true that New York is loathed in some sections as the seat of radicalism, atheism, racial equality, obscenity, and all that goes under the name of agitation."[235]

One is left asking how minds could be changed if speech seeking to change them is stifled. While Jackson believed that the actual outbreak of violence gave a clearer mandate for the police to act, would police hypersensitivity about the imminence of racial violence nip in the bud a discussion of desegregation in the South? And while ethnic diversity might prevent tyranny in great American cities, what countervailing force would hold institutionalized racism in check elsewhere?

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[233] 339 U.S. at 33-34 (Jackson, J., dissenting).
[234] Jackson, undated draft, Feiner v. New York 24-25; Jackson, December 4, 1950, draft opinion, Feiner v. New York 19.
[235] Jackson, December 4, 1950, draft opinion, Feiner v. New York 13.

Jackson and Federal Civil Rights Prosecutions: *Screws v. United States*

The Screws case resulted from a lethal combination of racism and police brutality. M. Claude Screws, sheriff of Baker County, Georgia, and two of his assistants arrested 30-year-old African American Robert Hall at home late at night, pursuant to a warrant charging Hall with theft. The arrest was likely retaliation for legal action taken by Hall against Screws. At the courthouse, the officers beat the victim into a coma. They claimed that the man "had reached for a gun and had used insulting language," but the pummeling continued for 15-30 minutes after he had been handcuffed and knocked to the ground. Hall died less than an hour later, never having regained consciousness.[236]

The assailants stood trial in federal court, because the local prosecutor insisted that he could not charge them, as he depended on Screws' office for investigating cases.[237] Since homicide was a state crime, the officers instead were charged, under federal statutes, with "willfully" depriving another of civil rights "by reason of his color, or race …." Closely tracking language from the statute and from the Fourteenth Amendment's due process clause, prosecutors accused the officers of having violated Hall's rights "not to be deprived of life without due process of law; the right to be tried, upon the charge on which he was arrested, by due process of law and if found guilty to be punished in accordance with the laws of Georgia."[238] The case represented part of a larger effort by the Justice Department, started under Jackson's predecessor Frank Murphy and continued under his successor, Francis Biddle, "to breathe new life in"

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[236] Screws v. United States, 325 U.S. 91, 92-93 (1945); Biddle, In Brief Authority 157.
[237] Biddle, In Brief Authority 157.
[238] Sec. 20 of the Criminal Code, 18 U.S.C. Sec. 52, quoted in 325 U.S. at 93. The Fourteenth Amendment guarantees, *inter alia*, that "No State shall … deprive any person of life, liberty, or property, without due process of law." U.S. Const., Amend. XIV.

moribund civil rights legislation; and marked the first time a Section 20 prosecution based on violations of the Fourteenth Amendment's Due Process Clause reached the Supreme Court.[239]

The Court reversed the petitioners' convictions and sent back the case for a new trial, by a rare three-way vote of 5-1-3. In an opinion joined by Chief Justice Stone, Black and Reed, Douglas found the trial judge's instructions to the jury on what constituted a civil rights violation too vague.[240] Murphy voted to affirm the convictions.[241] Rutledge voted for a new trial although he agreed with Murphy, because he found a 4-2-3 stalemate blocking a final disposition an unacceptable result.[242] The three remaining justices -- Jackson, Frankfurter and Roberts – dissented because they believed that the charges should have been dismissed because the crime was a homicide and not a civil rights violation; and a local crime to be tried in state court, not a federal offense.[243]

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[239] Dickson, ed., The Supreme Court in Conference 237; Biddle, In Brief Authority (Garden City: Doubleday & Company, 1962) 155; Robert H. Jackson, Memorandum, February 2, 1945, Box 133, File 2 of 2, File: Supreme Court – O.T. 1944 – Cases – No. 42, Screws et al v. United States, Robert H. Jackson Collection, Library of Congress 3.

[240] 325 U.S. at 106-07, 113; Howard, Mr. Justice Murphy 363. According to the Douglas opinion, it was not enough that the petitioners had had "a generally bad purpose" – instead, they had to have harbored the specific intent of depriving Hall of his civil rights. The judge's charge to the jury, by allowing a conviction if the petitioners "applied more force than was necessary," improperly permitted a conviction without proof of the critical element of intent to violate the victim's civil rights, and required a new trial. Jackson strongly agreed, believing that if the statute were constitutional, no such instruction was required. Jackson Memorandum, February 2, 1945, Screws v. United States 6-7.

[241] 325 U.S. at 135, 137 (Murphy, J., dissenting). Douglas wrote that reversal was required in spite of the defendant' failure to complain about the instruction, because the error – "not to submit to the jury the essential ingredients of the only offense on which the conviction could rest" – was "so fundamental" that "we think it is necessary to take note of it on our own motion." 325 U.S. at 107.

[242] 325 U.S. at 134 (Rutledge, J., concurring).

[243] 325 U.S. at 139 (Roberts, J., Frankfurter, J., and Jackson, J., dissenting).
Some scholars have given Roberts or Frankfurter credit for the opinion. If it were Roberts', it would appear that Frankfurter had more than normal responsibility for a colleague's opinion – among other reasons, the drafts sent to Jackson had come from Frankfurter. Given Jackson's substantial contribution to the opinion, it is likely that all three played a more equal role in crafting it than was usually the case – which would explain why each justice was listed in order of seniority as "dissenting," as opposed to one clearly singled out as author, with the others joining. Howard, Mr. Justice Murphy 362; Elliff, The United

Jackson found the prospect of letting the killers off the hook distasteful. At one point in conference, he reportedly remarked, "I would like to see it reversed if we could put it on grounds that we could stomach," fretting that by so voting, "We are going to be misunderstood as favoring a beating."[244] But he believed that using Section 20 to prosecute police brutality distorted its original meaning, and stretched it beyond reasonable interpretation. As he argued in a memorandum, the law's "aim was a narrow one," limited in part by the requirement that the deprivation of civil rights take place "under color of any law … or custom…." According to Jackson, this language "meant to reach only those particular deprivations of rights as to which the law or custom of the state gave approval or color of approval at least, or to which it withheld any remedy." Congress thus did not intend to criminalize conduct that constituted a crime under state law or custom, and the actions of Screws and his subordinates clearly constituted a crime under Georgia law.[245]

Jackson associated contemporary federalism with what he perceived as the excesses of the federal government during Reconstruction. When the Reconstruction

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States Department of Justice and Individual Rights 170; Felix Frankfurter to Robert H. Jackson, draft dissenting opinion of Roberts, Frankfurter and Jackson, JJ., April 18, 1945, Box 133, File 1 of 2, File: Supreme Court – O.T. 1944 – Cases – No. 42, Screws et al v. United States, Robert H. Jackson Collection, Library of Congress, reverse side of 15; Felix Frankfurter to Robert H. Jackson, draft dissenting opinion of Roberts, Frankfurter and Jackson, May 3, 1945, Box 133, File 1 of 2, File: Supreme Court – O.T. 1944 – Cases – No. 42, Screws et al v. United States, Robert H. Jackson Collection, Library of Congress, reverse side of 18.

[244] Dickson, ed., The Supreme Court in Conference 237, 239; Howard, Mr. Justice Murphy 359.

[245] 325 U.S. at 144, 147-48 (Roberts, J., Frankfurter, J., and Jackson, J., dissenting); Jackson, Memorandum, February 2, 1945, Screws v. United States 2; Howard, Mr. Justice Murphy 361. Black had expressed similar concerns in conference, and Stone also had his doubts, but they ultimately joined Douglas's opinion. Dickson, ed., The Supreme Court in Conference 236, 238. Jackson, to amplify the point, said that upholding the use of Section 20 this way would turn it into "an anti-lynching bill," a type of legislation which Congress clearly had not wanted. Dickson, ed., The Supreme Court in Conference at 238.

In his memorandum, Jackson briefly considered a second limit – "that a deprivation of federal rights is an offense only when committed by reason of color or race" – but ruled it out because of the Court's earlier opinion in United States v. Classic, 313 U.S. 299. Jackson Memorandum, February 2, 1945, Screws v. United States at 1-2; Howard, Mr. Justice Murphy 358.

Congress' intent came up in conference, he added, "I consider that period one of the most shameful of our times [but even still] Scholars and Charles Sumner were not giving it this interpretation…. It was never used, up to that time…. They did not contemplate the Fourteenth Amendment doing anything as is claimed here."[246] It was probably while Screws was pending that he dashed off a handwritten note to Murphy: "Have your read Claud [sic] Bowers' great book 'The Tragic Era'? If not by all means to before you ascribe high mindedness to the legislative era."[247] Bowers had argued in his 1929 work that "'Never have American public men in responsible positions … been so brutal, hypocritical, and corrupt" as during Congressional Reconstruction: "The Southern people were literally put to the torture.'"[248] Murphy, based on his own observations as a prosecutor, judge and mayor, asserted that even in contemporary times and in the nation's largest cities, "That Negroes have constitutional rights … is purely a fiction."[249] The Screws dissent alluded, in a manner that sounded like Jackson, to the supposed excesses

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[246] Dickson, ed., The Supreme Court in Conference 237.

[247] Robert H. Jackson to Frank Murphy, undated handwritten note, Box 17, General Correspondence, File: Murphy, Frank, Robert H. Jackson Collection, Library of Congress 1.

[248] Claude G. Bowers, The Tragic Era: The Revolution After Lincoln (Cambridge, MA: Harvard University Press, 1929) v-vi, quoted in Grob and Billias, Interpretations of American History, (1992 ed.) 415-16; Verney, African Americans and US Popular Culture 43 ff.

[249] Frank Murphy to Robert H. Jackson, undated handwritten note, Box 17, General Correspondence, File: Murphy, Frank, Robert H. Jackson Collection, Library of Congress 1-2. Murphy's conclusion that "This statute – at this point – satisfies me," and the discussion over Reconstruction that Jackson drafted for the Screws case, suggests that this correspondence relates to the 1945 case. For more information about Murphy's career in Detroit, see Howard, Mr. Justice Murphy ch. 2; Sidney Fine, Frank Murphy: The New Deal Years 1, 236-37.

No reply to Murphy's reply was kept in Jackson's files, but there is an acerbic observation to a Murphy dissent in a Mann Act case on the type of trafficking in prostitution – white slavery: Murphy "has taken a lot or razzing," because "I understand he is being accused of racism." Robert H. Jackson to Charles Malcolmson, March 3, 1945, Box 16, General Correspondence, File: Malcolmson, Charles, Robert H. Jackson Collection, Library of Congress. Jackson's jibe was not totally fair – Murphy saw the offense as arising from the involuntary nature of the type of prostitution involved, and not from the race of the prostitute – see also United States v. Beach, 324 U.S. 193, 196-200 (1945) (Murphy, J., dissenting) -- but Jackson's biting wit suggests something about his attitude toward Murphy and Murphy's reputation on racial issues. One of the best indicators of Jackson's overall disdain for Murphy – whom he believed to be a self promoter and a hypocrite – is his oral history. See Jackson Reminiscences 183-84, 186-88, 204, 206-07, 210, 224, 229-35.

of the post-Civil War period, but in service of the point that not even radicals at that historical moment had favored such a broad interpretation of civil rights laws.[250]

The second limitation on Section 20 involved the question of which rights it covered. Fourteenth Amendment guarantees were broad, and were broadening still under the Stone Court: Jackson described the due process clause as "a cryptic provision whose application we settle only as cases come to us and then not without close division and reversals of position."[251] Under these circumstances, he wondered, should every deprivation of due process rights be punishable under Section 20? The Douglas opinion took the view that since Congress intended Section 20 to enforce the Fourteenth Amendment, all violations should fall under the statute.[252] The dissenters, however, believed that that scope rendered Section 20 unconstitutionally vague, as Due Process "is unbounded and therefore too indefinite" to give an accused adequate notice of what sort of conduct was being criminalized.[253] Accordingly, Congress would be entitled to prohibit actions that deprived a victim of "'the right to be tried by a court rather than by ordeal,'" but until Congress enacted a law specifically providing as much, law enforcement officers choosing to beat their prisoners into comas could not be prosecuted under existing federal law.[254]

Drawing the line was further complicated by the Court's decision in United States v. Classic, in which the Court upheld Section 20 prosecutions of Louisiana officials for election fraud; and the case on which the recent decision outlawing white primaries had

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[250] 325 U.S. at 140, 144 (Roberts, J., Frankfurter, J., and Jackson, J., dissenting).
[251] Jackson Memorandum, February 2, 1945, Screws v. United States 3.
[252] 325 U.S. at 98-100.
[253] 325 U.S. at 150 (Roberts, J., Frankfurter, J., and Jackson, J., dissenting); Howard, Mr. Justice Murphy 357.
[254] 325 U.S. at 151 (Roberts, J., Frankfurter, J., and Jackson, J., dissenting).

been based.[255] Classic created two dilemmas for the Screws dissenters: the Court deemed the defendants in that case to have acted under color of state law although the state had banned election fraud; and the case "assumed … that the scope of Section 20 was coextensive with the Fourteenth Amendment."[256] The final dissenting opinion's disposition of Classic amounted to "the focus of attention in the Classic case was not our present problem."[257] Jackson, for his part, criticized the Classic opinion more pointedly: the rule "that even acts forbidden by the state are done under color of its law, if the actor is dealing with the matter because he holds state office" was backed by a "logic … not flawless" in light of the law's historical context.[258] Yet he freely acknowledged that Classic was still salvageable, as that prosecution was also brought under Section 19, a separate statute which "is in much broader language and involves none of the questions here troublesome."[259] As for the statute's overbreadth in defining what acts were prohibited, Jackson "would not extend the application of [Section 20] beyond the ground already taken in the Classic case"; there, at least, the right (to vote in elections for Federal officials) "is a definitely settled and well understood one, compared with those whose denial we are asked now to add to the catalogue of federal crimes."[260]

Policy considerations typical of Jackson's jurisprudence found their way into the joint dissent. One was the fear that Section 20's broad criminalization of all unconstitutional conduct "would make a potential offender against this act of any State official who as a judge admitted a confession of crime, or who as a public service

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[255] See pp. 336-37.
[256] 325 U.S. at 147 (Roberts, J., Frankfurter, J., and Jackson, J., dissenting).
[257] 325 U.S. at 147 (Roberts, J., Frankfurter, J., and Jackson, J., dissenting).
[258] Jackson Memorandum, February 2, 1945, Screws v. United States 2.
[259] Jackson Memorandum, February 2, 1945, Screws v. United States 3. See Howard, Mr. Justice Murphy 359-62 for how the Court parsed the dilemma of how much of Classic to save.
[260] Jackson Memorandum, February 2, 1945, Screws v. United States 3, 5.

commissioner issued a regulatory order which we should later hold denied due process or who as a municipal officer stopped any conduct we later should hold to be constitutionally protected." Applying the statute to cases like Screws could impede legitimate law enforcement, a core concern of Jackson's.[261] The Justice Department's promised "policy of strict limitation" in instituting prosecutions was no substitute for a properly-written law; as Jackson observed, in a section lifted nearly verbatim from the memorandum and placed in the dissent:

> Such a "policy of strict limitation" is not accompanied by assurance of permanent tenure and immortality of those who make it the policy. Without this the policy is good for today only. Evil men are rarely given power; they take it over from better men to whom it has been entrusted. There can be no doubt that this shapeless and all-embracing statute could be a rather dangerous instrument of political intimidation and coercion in the hands of those so inclined.[262]

Moreover, such prosecutions violated principles of federalism by seizing from the states the power to punish crime. Jackson expressed strong feelings about preserving state power within an increasingly powerful national government in Screws. He said at the first conference:

> I don't think we can transfer into federal action things that are not intended to be. You can't run these things from Washington. Problems of local justice must be left to their communities. If we sustain this, every time a Negro is beaten you are going to have the President and others jumping on the state for action. And then your local officer will lay down on the job, and so will the local judge. They will say, "Let Washington do it"….[263]

He later argued that this kind of intervention "leads the federal prosecutor and the federal courts into a field of peculiar delicacy and difficulty in undertaking to discipline state

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[261] 325 U.S. at 157-61 (Roberts, J., Frankfurter, J., and Jackson, J., dissenting); Jackson Memorandum, February 2, 1945, Screws v. United States 3; Howard, Mr. Justice Murphy 363-64.
[262] Jackson Memorandum, February 2, 1945, Screws v. United States 3-5; 325 U.S. at 158-60 (Roberts, J., Frankfurter, J., and Jackson, J., dissenting); Howard, Mr. Justice Murphy 362-63.
[263] Dickson, ed., The Supreme Court in Conference 237; Howard, Mr. Justice Jackson 359.

officials for acts which are also violations of state law."[264] For his part, the justice who as Attorney General approved the Classic prosecution sheepishly observed, "I am not without fault in the matter, for the prosecution … was instituted and was argued and decided in this Court while I held the responsibilities of Attorney General."[265]

In the dissenters' minds, preventing centralization of power was more important than creating a prosecutors' office of last resort. Murphy restated the argument justifying this use of Section 20 as follows:

> Too often unpopular minorities, such as Negroes, are unable to find effective refuge from the cruelties of bigoted and ruthless authority. States are undoubtedly capable of punishing their officers who commit such outrages. But where, as here, the states are unwilling for some reason to prosecute such crimes the federal government must step in unless constitutional guarantees are to become atrophied.[266]

Jackson responded by first feigning disbelief: "If it be significantly true that crimes against local law cannot be locally prosecuted, it is an ominous sign indeed,"[267] and then adding, "In any event, the cure is a re-invigoration of State responsibility. It is not an undue incursion of remote federal authority into local duties with consequent debilitation of local responsibility."[268]

The dissenters posed no immediate solution to the problem of how African Americans whose rights were trampled by authorities in states dominated by white

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[264] Jackson Memorandum, February 2, 1945, Screws v. United States 2-3; Howard, Mr. Justice Murphy 361.
[265] Jackson Memorandum, February 2, 1945, Screws v. United States 3.
[266] 325 U.S. at 138 (Murphy, J., dissenting); Howard, Mr. Justice Murphy 358-59. For a summary of the Justice Department's argument, see Jackson Memorandum, February 2, 1945, Screws v. United States 4-5.
[267] Jackson Memorandum, February 2, 1945, Screws v. United States 5. His means of getting past a weak denial was a bit too defensive for the final dissent, allowing that "if the whole burden of such law enforcement must be carried in the Central Government, at least the Department should be armed with something better for legal weapons than the old-fashioned scatter gun of Section 20." Id.
[268] 325 U.S. at 160-61 (Roberts, J., Frankfurter, J., and Jackson, J., dissenting).

supremacy might obtain justice.[269] Complaints "poured" into the Civil Rights Unit, "not only from the victims of the illegal acts but … often from local law enforcement officials who found themselves powerless to deal with the situations they reported…."[270] Yet waiting for localities to catch up with the state of the art on race relations was inevitable to a point. Jackson understood as much when he wrote that "it was Georgia citizens sitting as a federal grand jury that indicted and other Georgia citizens sitting as a federal trial jury that convicted Screws and his associates, and it was a Georgia judge [albeit on the federal bench] who charged more strongly against them than this Court thinks he should have." Ultimately, the issue of violent crime had to be solved by local people, whether the prosecuting agency was state or federal; they should do it under the auspices of their own government. In a time when state prosecutors take racial violence more seriously, it is now possible to look back on the dissenters' approach and recognize the legitimacy of their point.[271] But that time was long in coming for victims of racial violence. In Screws, the defendants were acquitted at a retrial, and Screws was elected a state senator.[272]

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[269] Jackson made a strong mental association between contemporary arguments of federalism and what he perceived as the excesses of the federal government during Reconstruction. The Screws dissent alluded to those perceived excesses. 325 U.S. at 140, 144. That the legacy of Reconstruction weighed heavily on Jackson's consideration of civil rights cases is more directly demonstrated in his deliberations on the segregation cases. See pp. 410-11, 472ff.

The result of the Screws case after the Supreme Court reversal indicated the difficulty of getting a conviction for attacking African Americans in the South, even in federal court: all three defendants were found not guilty at the second trial, and Screws was ultimately elected a state senator. Dickson, ed., The Supreme Court in Conference 240.

[270] Biddle, In Brief Authority 155.

[271] Jackson Memorandum, February 2, 1945, Screws v. United States 6.

There are signs of change, if not revolution. For example, in 1997 a North Carolina jury voted 11-1 to execute a white supremacist soldier who killed an African American couple for racially motivated reasons. One of the 11 reportedly said, "'We wanted to send a message that society is tired of this kind of ignorance.'" Because of the lone holdout against execution, the defendant escaped with a sentence of life without parole. "Ex-G.I. Draws Life Sentence for Racially Motivated Killings," New York Times March 7, 1997 (available at www.nytimes.com).

[272] Howard, Mr. Justice Murphy 366. Dickson, ed., The Supreme Court in Conference 240.

Jackson might have predicted as much. In his memorandum, he argued that a "compromise" approach like Douglas's would make matters even worse.[273] By reading a stringent intent requirement into Section 20 – the defendant had to intend to violate civil rights, which is not exactly what the typical wanton attacker has in mind at the time, even if his law library is nearby – "the Court is introducing unwarranted procedural barriers to any conviction under the Act in order to compensate for unwarranted expansion of the substance of the offense." This, it seemed to Jackson, would "make more prosecutions possible and fewer convictions probable – about the most mischievous thing I can imagine."[274] Even a critic of the dissenters' approach understood that "there is no denying that the mode of salvaging Section 20 in Screws blunted the 'sword' of the Civil Rights Division."[275]

According to one civil rights scholar, the Screws dissent demonstrated that "the dissenters were exceedingly distrustful of federal power and fearful that it will be abused"; hence their prescription for the problem of protecting civil rights, "'the cure is a reinvigoration of State responsibility."[276] This is one of those situations in which Jackson apparently accepted the inevitability of injustice, to avoid a creeping centralization of

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[273] Howard, Mr. Justice Murphy 360.

[274] Jackson, Memorandum, February 2, 1945, Screws v. United States 6-7.

[275] Howard, Mr. Justice Murphy 364-65. As Tushnet pointed out, the problem became apparent in Screws's retrial, when a jury hearing the reformulated intent requirement acquitted him. Tushnet, Making Civil Rights Law 50. That view seemed vindicated a generation later, when the same complaints, and an at best spotty response from the federal government continued, with an average of only 40 cases per year during the civil rights heyday of 1964 and 1965.

Howard also suggested that an outright invalidation of the statute as advocated by the dissenters, as opposed to the narrowing of the statute under the plurality, would have made matters worse: if the right abridged in the beating to death of a detainee was too vague under the Fourteenth Amendment, which expressly guaranteed the right to "life" and "due process of law," it would have been "much more difficult" to rule favorably in cases seeking desegregation, which was not mentioned in the amendment? Howard, Mr. Justice Murphy at 364. Yet it may be possible that Howard was making mountains out of molehills, as desegregation cases not relying on statutory grounds were decided on the basis of the amendment's equal protection clause.

[276] Carr, Federal Protection of Civil Rights 200.

federal power which would not necessarily make the immediate problem better, and could make matters worse. His sympathies in Screws, from his feelings about Reconstruction to his concerns about narrowing the scope of federal prosecutorial power over state officials, stayed fairly consistent in his time on the bench; he reaffirmed his support for the Screws dissent in the 1951 case, United States v. Williams.[277]

If given the result of Screws without the justices' names attached, a diligent student of the Stone Court should come very close to correctly guessing how they were aligned. And Jackson was where he often was in cases involving African Americans and the criminal justice system: on the side of limiting federal power to intervene in the old confederacy, out of his concerns with using federal power to prosecute crimes.

Jackson, Enforcing Local Civil Rights Laws and Appropriately Exercising National Power: the *Bob-Lo* Case

While Jackson generally preferred to leave the safeguarding of individual rights up to the states, he denied a state's right to enforce its own civil rights legislation in one

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[277] Collins v. Hardyman, 341 U.S. 651 (1951); United States v. Williams, 341 U.S. 97, 104 (1951) (Frankfurter, Jackson and Minton, JJ., dissenting) ("Experience in the effort to apply the [Screws] doctrine … leads" them "to dissent for the reasons set forth in dissent in that case"). See also Chernack, "The Clash of Two Worlds" 81, analyzing Railway Express Agency v. New York, 336 U.S. 106 (1949).

Jackson's views on Reconstruction might have softened some – but only some – by 1951, when he wrote the majority opinion in Collins v. Hardyman. He conceded in the opinion that "the post Civil War Ku Klux Klan" might have been a private organization constituting "a conspiracy" that was "so far-flung and embracing such numbers" as to be "able effectively to deprive Negroes of their legal rights and to close all avenues of redress or vindication, in view of the then disparity of position, education and opportunity between them and those who made up the Ku Klux Klan," but he concluded that "We do not know." He also put the terms "carpetbag" and "scalawag" in quotation marks. 341 U.S. at 662. This was more progressive than a bench memorandum in his file which, based on sources including Bowers, painted a benign portrait of the Klan leadership during Reconstruction, claiming that "most of the alleged Klan outrages were perpetuated by hoodlums disguised as Klansmen." C. George Niebank, "The Ku Klux Klan," Box 168, File: Supreme Court – O.T. 1950 – Cases – No. 217 – Collins et al. v. Hardyman et al., Robert H. Jackson Collection, Library of Congress 1.

case. His dissenting opinion in the Bob-Lo case raised the question: when was a civil rights case not a civil rights case?

The Bob-Lo Excursion Company owned an amusement park at Bois Blanc (also known as Bob-Lo) island in Canada, and a ferry service transporting passengers between the Ontario locale and Detroit, Michigan. When the Bob-Lo company refused passage to an African American girl on a school trip, it was convicted in the Recorder's Court of Detroit for violating the Michigan Civil Rights Act, which made withholding any public accommodation, amusement, or conveyance "on account of race, creed or color" a misdemeanor.[278]

States were authorized to segregate intrastate transit since before Plessy v. Ferguson,[279] but in interstate transport, two cases held that state regulation of seating arrangements placed an undue burden on commerce: Hall v. DeCuir overturned a Louisiana ban on racial segregation in 1878; and Morgan v. Virginia, decided in 1946, reversed a Virginia imposition of racial separation.[280] With the changing norms of race relations in the 1940s, a Court ruling upholding racial discrimination would be much less palatable than in Hall's day. But Bob-Lo presented an unusual dilemma. While Congress's power to regulate foreign commerce would normally sap the states of jurisdiction over seating on international carriers, the Bob-Lo ferry was no ordinary carrier in foreign commerce. The case's unique circumstances led a five-justice majority, in an opinion by Rutledge, to find circumstances establishing a "special local interest, apart from the necessity of safeguarding the federal interest…" in the Bob-Lo situation:

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[278] Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28, 29-32 (1948).
[279] Plessy v. Ferguson, 163 U.S. 537 (1896).
[280] Hall v. DeCuir, 95 U.S. 485 (1878); Morgan v. Virginia, 328 U.S. 373, 386 (1946). Jackson did not participate in Morgan, as he was in Nuremberg at the time. 328 U.S. at 386; Hockett, "Justice Robert H. Jackson, the Supreme Court, and the Nuremberg Trial" 274.

> Except for [a] small fenced-off portion … the island is economically and socially, though not politically, an amusement adjunct of the city of Detroit. Not only customs and immigrations regulations of both countries, but physical barriers prevent intercourse, both commercial and social, between Canadians and appellant's patrons, except as the former may come first by other means to Detroit, then go to the island from American soil on appellant's vessels, and return from the holiday by the same round-about route.[281]

Since these factors served to "insulate" Bob-Lo "from all commercial or social intercourse and traffic with the people of another country usually characteristic of foreign commerce," there was "no national interest which overrides the interest of Michigan to forbid the type of discrimination practiced here."[282] Douglas and Black voted to affirm Bob-Lo's conviction because the exclusion of Ms. Ray was not "segregation" but the "complete denial of passage" to an individual "because of race," and as such violated all principles of police powers and the "common-law duty of carriers to provide equal service to all…."[283]

To Jackson, however, Michigan had no right to regulate a ferry running to and from Ontario, regardless of the circumstances. Hall read together with Morgan dictated a result barring state regulation of commerce that extended beyond its borders, just as it permitted states to regulate what stayed within its boundaries. In an opinion joined by Chief Justice Vinson, he reasoned that "a state's power has not been thought to expand or contract because of the policy embodied in a particular regulation." This bright line rule was applicable whether the policy sanctioned or banned segregation.[284] Nor was it an

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[281] 333 U.S. at 35.
[282] 333 U.S. at 36-40; see Tushnet, Making Civil Rights Law 79 (the commerce at issue here "was only nominally 'international'").
[283] 333 U.S. at 40-43 (Douglas, J., and Black, J., concurring). Black joined both the majority opinion and Douglas's concurrence.
[284] 333 U.S. at 43-44 (Jackson J., and Vinson, C.J., dissenting).

answer that "the commerce involved in this case is foreign commerce, but subject[] to the state police power on the ground that it is not very foreign."[285]

Jackson argued that there were good countervailing policy reasons for the rule, as "The wholesome and amiable situation" in which Bob-Lo found itself was "made possible only by international relations wholly controlled by the Federal Government." Nor was it as unusual as the majority opinion suggested:

> The commerce involved here is not distinguishable from a great deal of the traffic across our Canadian and Mexican borders, except perhaps in volume. Communities have sprung up on either side, whose social and economic relations are interdependent, but are conducted with scrupulous regard for the international boundary. Localities on either side of the line may develop in reliance on a certain reciprocity and stability of policy which has characterized two nations for years, when they cannot rely on similar stability or farsightedness in local policy.[286]
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> It seems to me no adequate protection of foreign commerce from a multitude and diversity of burdening and capricious local regulations that this Court may stand ready … to apply itself to an analysis of the traffic involved and determine in each case whether the local interest in it is sufficiently strong and the foreign element is sufficiently weak so that we will permit the regulation to stand.[287]

Criticizing the apparent lack of "any standard by which we can judge when foreign commerce is foreign enough to become free of local regulation," he scored the Court as he often did in his later years on the bench: "We do not and apparently cannot enunciate any legal criteria by which those who engage in foreign commerce can predict which classification we will impose upon any particular operation and we lay down no rule other than our passing impression to guide ourselves or our successors. All is left to case-by-case conjecture."[288]

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[285] 333 U.S. at 44 (Jackson J., and Vinson, C.J., dissenting); Chernack, "The Clash of Two Worlds" 88.
[286] 333 U.S. at 44-45 (Jackson J., and Vinson, C.J., dissenting).
[287] 333 U.S. at 44-45 (Jackson J., and Vinson, C.J., dissenting).
[288] 333 U.S. at 45 (Jackson J., and Vinson, C.J., dissenting).

Jackson's call for clear, predictable rules, was a cornerstone of his judicial approach.[289] Yet, in spite of his yearning for bright lines, regulation of commerce was an area of the law which turned on a situation's unique circumstances.[290] Nevertheless, once the threshold fact was established in this case – that the commerce went beyond a state's physical border – whether the commerce was intrastate in a functional sense was irrelevant for, according to Jackson's expansive views of the federal government's power to regulate commerce, that determination decided whether a state government had any regulatory power.[291] This view contrasted with those of Frankfurter, who despite his views on judicial restraint "would weigh" competing interests in such cases. Jackson would not, as he believed that "the Court cannot 'balance' competing claims" because it was not within the Court's competence to "know whether the harm to the state is greater from inaction than the harm to commerce from action"; maintaining a "national market" was the "first concern."[292] Reluctant to allow state interference with commerce beyond its borders, Jackson was consistent with his other votes on the Commerce Clause, in which he stood solidly behind the principle that, in any kind of interstate or foreign commerce, Congress, and only Congress, had the power to regulate.[293]

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[289] See also McDonald v. United States, 335 U.S. 451 (1948) (Jackson, J., concurring) (in search and seizure case, emphasizes need for Court to give guidance to courts and police); Gerhart, Lawyer's Judge 99-100, quoting Fairman, "Mr. Justice Jackson" 487.

[290] Morgan v. Virginia, 328 U.S. at 377-78.

[291] 333 U.S. at 45 (Jackson J., and Vinson, C.J., dissenting); JMM, clerk's memorandum "Re: Bob-Lo – No. 374," Box 145, File: Supreme Court – O.T. 1947 – Cases – No. 374, Bob-Lo Excursion Co. v. People of the State of Michigan, Robert H. Jackson Collection, Library of Congress.

[292] Louis L. Jaffe, "Mr. Justice Jackson," Harvard Law Review 68 (1955) 954-55.

[293] Wickard v. Filburn, 317 U.S. 111, 118-27, 129 (1942) (Jackson wrote unanimous opinion for Court deciding that crops raised for consumption on the farm on which they were grown were subject to federal regulation under the Commerce Clause); United States v. Yellow Cab Co. , 332 U.S. 218, 228-29 (1947) (Jackson joined opinion deciding that taxi company between train stations in same city was in interstate commerce); Buck v. California, 343 U.S. 99, 107-08 (1952) (Jackson joined dissenting opinion arguing that taxi company engaged solely in foreign commerce between the San Diego County and Mexico should not have been subject to state regulation). Gerhart, Supreme Court Justice Jackson: Lawyer's Judge ch. 1 and p. 57; Jaffe, "Mr. Justice Jackson" 954 and n. 46.

The author of a leading monograph on transit desegregation observed, "Viewed simply in Commerce Clause terms, Bob-Lo was a close case that could arguably have been decided either way…."[294] As a human rights case, the result was clear. The question for each justice was what kind of case it was. As one admiring biographer put it, Jackson "was not inclined to let sentiment or rationalizing a popular result taint his judgment."[295] What he really decided was that federal supremacy over economic regulation trumped state efforts to move ahead of the federal government on civil rights.

Jackson and the Availability of Habeas Corpus

Prisoners who believe themselves unjustly incarcerated and have no recourse left in state courts may seek a writ of habeas corpus in federal court. Usually, the issues raised resemble those set forth in direct appeals of criminal convictions, but habeas corpus actions are civil and not criminal, with the prisoner suing in the name of the United States government. Since the prisoner carries the burden of proof, this kind of action raises sometimes maddening issues. Often barely literate and rarely advised by counsel, prisoners must nonetheless allege facts entitling themselves to relief, and proffer evidence sufficient to prove them. If this were not difficult enough, they must also confront volumes of rules on court procedure. Since many rightly convicted prisoners facing death sentences or long prison terms see habeas actions as no-lose propositions, frivolous petitions fill many a federal judge's docket. Doing justice is nearly impossible for judges who must deal with incomprehensible papers, the long odds of having a meritorious case, and the dilemma of deciding which rules to enforce rigorously and

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[294] Catherine A. Barnes, Journey from Jim Crow: The Desegregation of Southern Transit (New York: Columbia University Press, 1983) 49-50.
[295] Gerhart, Supreme Court Justice Jackson: Lawyer's Judge 57.

which to bend in the name of doing substantial justice to a prisoner who might not have received it in earlier proceedings.

Jackson's concurring opinion in the Court's most extensive decision on the use and abuse of habeas corpus during his tenure, Brown v. Allen, made clear where his sympathies lay. Unlike the other eight justices, who found no procedural bar to reaching the merits of two of four prisoners' claims (three dissenters -- Black, Douglas and Frankfurter – would have reached the merits on them all), Jackson vented his frustrations with frivolous prisoner appeals and a Court that he believed was indiscriminately extending prisoners' rights. His arguments – consistent with views he had expressed years earlier -- demonstrate even more than his voting record his single-mindedness in limiting review of criminal convictions, regardless of the issues at stake.[296]

The Court's decision affirmed denials of petitions filed on behalf of four North Carolina prisoners, each facing death sentences for rape or murder convictions obtained in state court; they challenged the admissibility of their confessions and the racial composition of their juries. The procedural issues were complex and contentious, requiring a second oral argument by the parties, and yielding seven opinions from the nine justices.[297]

All of the opinions addressing the availability of habeas corpus relief emphasized the need to balance the rights of the potentially innocent against the integrity of state and federal courts.[298] But Jackson was the justice most concerned about a "breakdown of

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[296] 344 U.S. at 447-48; 344 U.S. at 549 (Black and Douglas, JJ., dissenting); 344 U.S. at 556 (Frankfurter, Black, and Douglas, JJ., dissenting). For a sense of how consistent Jackson's views on restricting habeas relief stayed over time, see Price v. Johnston, 334 U.S. 266, 295-300 (1948) (Jackson, J., dissenting).
[297] Brown v. Allen, 344 U.S. 443, 447 (1953).
[298] 344 U.S. at 461-65; 344 U.S. at 548 (Jackson, J., concurring); 344 U.S. at 554 (Black and Douglas, JJ., dissenting); 344 U.S. at 497, 510-11 (Frankfurter, J., dissenting).

procedural safeguards against abuse of the writ" by prisoners availing themselves of limitless free chances at freedom.[299] He laid the blame at the feet of his colleagues, for using the Fourteenth Amendment as "a ready instrument … to magnify federal, and incidentally its own, authority over the states," and exploiting the amendment's expanding "protection to those charged with crime" to substitute "personal impressions which from time to time may be shared by a majority of Justices" for the "impersonal rules of law" on which courts, litigants and lawyers had the right to expect.[300] As a result, "Quite naturally prisoners read minority opinions as hopeful signs that there may be a change on the Court. These changes have been so frequent in recent years that no prisoner and no counsel for a prisoner can be blamed for bringing a case, however frivolous, to the courts because they cannot have the slightest assurance that the old land marks which would point out the uselessness of the petitions will be observed."[301] Trends toward entertaining petitions that did not meet procedural requirements – also the Court's responsibility – made matters worse.[302]

Jackson sympathized with state jurists, who were being "gradually subordinated to the federal judiciary" and who, he argued, faced legal liability under Screws v. United States for failing to predict increasingly unpredictable Supreme Court rulings extending criminal defendants' constitutional rights.[303] To prove that he was not imagining their concerns, Jackson cited a resolution passed by the states' chief justices, criticizing the use

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[299] 344 U.S. at 533 (Jackson, J., concurring).
[300] 344 U.S. at 533-35 (Jackson, J., concurring); Robert H. Jackson, January 2, 1953 draft opinion, Box 120, Legal File: Supreme Court opinion notes -- Habeas Corpus, Robert H. Jackson Collection, Library of Congress 1.
[301] Robert H. Jackson, December 29, 1952 draft opinion, Box 120, Legal File: Supreme Court opinion notes -- Habeas Corpus, Robert H. Jackson Collection, Library of Congress 6.
[302] 344 U.S. at 536-37 (Jackson, J., concurring); Robert H. Jackson, January 9, 1953 draft opinion, Box 120, Legal File: Supreme Court opinion notes -- Habeas Corpus, Robert H. Jackson Collection, Library of Congress 6.
[303] 344 U.S. at 535 (Jackson, J., concurring); Jackson, January 9, 1953 draft opinion, Habeas Corpus 1.

of habeas corpus by lower federal judges to overturn rulings by state high courts.[304] The Justice also bemoaned the crowding of federal dockets, the plight of state prosecutors who had to answer petitions many years after convictions had been obtained, the lack of deference shown to state rulings, and the difficulties the truly innocent must have in getting their petitions taken seriously: "It must prejudice the occasional meritorious applications to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."[305]

Jackson would solve these problems by limiting habeas claims to "a jurisdictional question involving federal law on which the state law allowed no access to its courts… and that he therefore has no state remedy; or … that the petition shows that although the law allows a remedy, he was actually improperly obstructed from making a record upon which the question could be presented…."[306] They should not "raise any question which was, or could have been, decided by appeal or other procedure for review of conviction" for, "habeas corpus will be deemed to lie only for defects not disclosed on the record, going to the power, legal competence or jurisdiction of the committing state court."[307] He objected to federal reviewing of issues raised in state court, because "the Constitution does not prevent the state courts from determining the facts in criminal cases" or "make it unconstitutional for them to have a different opinion than a federal judge about the weight to be given to evidence."[308] On the other hand, "retrying *de novo* state court criminal issues…. by hearing new evidence in a new proceeding" rendered "the pretense

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[304] 344 U.S. at 539. For general background on the action of the Conference of Chief Justices, see "Conference of Chief Justices -- 1952," 25 State Government No. 11 (Nov. 1952) 249-50, copy in Box 120, Legal File: Supreme Court opinion notes -- Habeas Corpus, Robert H. Jackson Collection, Library of Congress.
[305] 344 U.S. at 536-37 (Jackson, J., concurring).
[306] 344 U.S. at 545 (Jackson, J., concurring).
[307] 344 U.S. at 546-47 (Jackson, J., concurring).
[308] 344 U.S. at 548 (Jackson, J., concurring).

of exhaustion of state remedies … a sham, for the state courts could not have given a remedy on evidence which they had no chance to hear."[309]

The justice did not pretend to know how to cull the meritorious claims from the frivolous, allowing that "There may be circumstances so extraordinary that I do not now think of them which would justify a departure from this rule…."[310] Yet he had little difficulty applying blunt instruments when other justices felt that more delicate surgery was required. For example, when deciding the effect of filing appeal papers on the 61st day after judgment, instead of the 60th required by state law, Jackson wrote, "the attorneys made defaults in appearances or in compliance with state rules and they urge us that cases which were not important enough in their practice for them to give attention to according to the rules of the state are so important to civil liberties that we must overlook or disregard state rules."[311] A busy or addled lawyer's mistaken recollection as to which months have 30 days, and which 31, seemed to the dissenters a slender reed on which to refuse review of a death sentence, but not to Jackson.[312]

Frankfurter directly questioned his friend's position, both publicly and in private correspondence. One letter sought to debunk, through Frankfurter's own study of habeas corpus cases – a study he said was inspired by Jackson's concerns -- "the feeling of the State judges that the Federal Courts butt in unduly to open State prison doors." Another primarily expressed the concern that "the predominant grievance you express is against recent decisions and attitudes by this Court." Warning "that resentment, like fear, is not the best of counselors in devising reforms for that which stirs rightful resentment,"

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[309] 344 U.S. at 546 (Jackson, J., concurring).
[310] 344 U.S. at 545 (Jackson, J., concurring).
[311] Robert H. Jackson, undated draft opinion, Box 120, Legal File: Supreme Court opinion notes -- Habeas Corpus, Robert H. Jackson Collection, Library of Congress 18.
[312] 344 U.S. at 552-53 (Black and Douglas, JJ., dissenting); 344 U.S. at 557-60 (Frankfurter, J., dissenting).

Frankfurter urged Jackson to look at his "authenticated data" about habeas corpus petitions and "indicate[] explicitly on my opinion where I went off the rails." As the letter continued, the tension over this issue between the two customary allies became readily apparent.[313] Finally, in his own opinion, the Court's greatest champion of judicial restraint characterized the suggestion that federal courts were being overburdened with habeas cases as "baseless," pointing out that only 67 petitions had been granted, and only five prisoners actually released, in the last seven years.[314] While Jackson wanted to prevent petitions from being heard, Frankfurter's priority was to "insure that those few" meritorious "claims are not stifled by nondiscriminating generalities," such as the arbitrary denial of an appeal filed one day late.[315]

While concerned about maintaining balance in the federal system and avoiding frivolous legal actions, Frankfurter – along with his customary adversaries Black and Douglas, who concurred with his observations -- also sought to maintain the writ as a safety valve against miscarriages of justice in the state courts.[316] Its need was greatest in the South, where such injustices disproportionately afflicted the African American community. In one early draft, even Jackson allowed,

> I can not exonerate the state courts from some responsibility for the extension of federal interference. One is sometimes shocked at the callousness with which the rights of defendants are treated, particularly where the defendant happened to be of particularly unpopular groups in the locality. We cannot claim either that federal justice is free of that. But it has been lawless procedures and savage

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[313] Felix Frankfurter to Robert H. Jackson, January 20, 1954, Box 120, Legal File: Supreme Court – habeas corpus, Robert H. Jackson Collection, Library of Congress 1-2; Felix Frankfurter to Robert H. Jackson, January 29, 1953, Part III, Reel 2, Felix Frankfurter Papers, Harvard University (available on microfilm) 001-002.

[314] 344 U.S. at 498, 510 (Frankfurter, J., concurring). Of that argument, Jackson wrote, "Nor is it any answer to say that few of these petitions in any court really result in the discharge of the petitioner. That is the condemnation of the procedure which has encouraged frivolous cases." 344 U.S. at 537 (Jackson, J., concurring).

[315] 344 U.S. at 498 (Frankfurter, J., concurring).

[316] 344 U.S. at 513 (Black and Douglas, JJ., concurring).

> penalties which were discreditable to the profession that originally moved the federal government into the state field.[317]

He cited Moore v. Dempsey, which overturned the kangaroo court convictions of African Americans in 1920s Arkansas, and a case which he had put to such powerful effect in Shepherd. Yet he was less disturbed by the plight of those perhaps wrongly on death row than on the balance of state versus federal power, and decided that his colleagues had gone too far in the direction of safeguarding defendants' rights. In his published opinion, he used Moore v. Dempsey to contrast those petitioners' "meticulously pleaded facts and circumstances" with the vagaries alleged in more recent cases, in which it seemed "It really has become necessary to plead nothing more than that the prisoner is in jail, wants to get out, and thinks it is illegal to hold him," to get one's case heard.[318]

Yet for almost every justice, procedural requirements sometimes trumped allegations of serious abuse. In Sweeney v. Woodall, an escapee from an Alabama prison sought relief from a federal court in the state to which he had fled, and from which he was facing extradition back to Alabama. The allegations of brutality included offers to prove

> … that the Alabama jailers have a nine-pound strap with five metal prongs that they use to beat prisoners, that they used this strap against him, that the beatings frequently caused him to lose consciousness and resulted in deep wounds and permanent scars.
> … that he was stripped to his waist and forced to work in the broiling sun all day long without a rest period.
> … that on entrance to the prison he was forced to serve as a "gal-boy" or female for the homosexuals among the prisoners.[319]

Douglas was moved to dissent because "this Negro must suffer torture and mutilation or risk death itself, to get relief in Alabama," to whose prison system he would be returned

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[317] 344 U.S. at 535 (Jackson, J., concurring); Jackson, December 29, 1952 draft opinion, Habeas Corpus 4.
[318] 344 U.S. at 540-41 (Jackson, J., concurring).
[319] Sweeney v. Woodall, 344 U.S. 86, 91-92 (1952) (Douglas, J., dissenting).

and in whose hands he would again suffer, if the accusations were true but he lost the habeas action.[320] Frankfurter, for all of his "regard for the relation of the States … in our federal system," was sufficiently troubled to warn in a concurring opinion, "Our federal system presupposes confidence that a demanding State will not exploit the action of an asylum State by indulging in outlawed conduct to a returned fugitive from justice."[321]

But the majority, including Jackson, was unmoved, and instead focused on "Considerations fundamental to our federal system," which "require that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that State…."[322] A passage in a Jackson draft opinion for Brown v. Allen, written a month later, can lead the reader to imagine what he thought of Sweeney:

> We are also besought frequently to release state prisoners because of prison conditions, objection to prison discipline, to prison food and, of course, escapees from prison resist return upon the ground that their conditions of imprisonment violate constitutional rights. All of these things are litigation breeders by their very indefiniteness and the fact that a prisoner has nothing to lose by losing another law suit, and with no risk at all he never can tell when he will hit the jackpot.[323]

In drafts of Brown v. Allen, the last opinion he wrote on criminal cases involving African Americans, he seemed to be experiencing a general hopelessness about the criminal justice system's ability to protect the innocent. Allowing in one of his more measured moments that "A considerable part of the vagueness of the effect of the Fourteenth Amendment on state trials is inherent," he went on to wonder how the promise of Moore v. Dempsey might be kept in the age of broadcast media:

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[320] 344 U.S. at 92, 93 (Douglas, J., dissenting).
[321] 344 U.S. at 90-91 (Frankfurter, J., concurring).
[322] 344 U.S. at 90.
[323] Jackson, December 29, 1952 draft opinion, Habeas Corpus 10.

> With the development of modern methods of publicity which are free to project into the juror's home, the voice and visage of commentators as well as the words of news writers, journalists of various types brings to bear in any highly publicized trial today force so powerful in their impact upon the juror's mind that it is almost impossible to say when a fair trial has been had…. Repeatedly it comes to our attention that they on the air and in the press alleged confessions which either have not been proved to be valid confessions in court or have actually been rejected by the trial [judge]. Yet, the rejection in order not to prejudice the jury is utterly unavailing if at his dinner table, during his evening and again at his breakfast, he hears the content of that confession recited over the radio perhaps with extortions to suit the predilections of the commentator…. I am frank to say that I do no know whether any highly publicized trial today, state or federal, could bear the scrutiny indicated in Moore v. Dempsey and I do not know at what point the manifestations of outside influence would reach the point where five men on this Court would hold it illegal.[324]

Jackson ultimately feared more than "lawyers and prisoners feel[ing] quite justified" in trying for the habeas lottery. Instead, Jackson – who had written so eloquently in Shepherd -- questioned the very possibility of justice itself.[325]

* * *

Jackson's hierarchy of values in criminal cases led him in directions inimical to the claims of African Americans appearing before the Court. He firmly believed that law enforcement was primarily a state function that should endure minimal federal interference.[326] His reservations about federal prosecutorial power found its voice when he was Attorney General; and his concerns about federal judicial power informed his performance as a Justice, whether in the racially-motivated police brutality in Screws or in the judicial rulings reviewed in Brown v. Allen. He also refused to use the Fourteenth Amendment to impose a national standard of decency on the State of Louisiana in Francis. His compartmentalized view of governmental powers was perhaps best

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[324] Jackson, December 29, 1952 draft opinion, Habeas Corpus 7.
[325] Jackson, January 2, 1953 draft opinion, Habeas Corpus 4.
[326] Freund, "Individual and Commonwealth" 22; Paul A. Weidner, "Justice Jackson and the Judicial Function" 580-81; Pritchett, Civil Liberties and the Vinson Court 190.

demonstrated in Bob-Lo, in which he denied a state the right to intrude on a federal function, the regulation of foreign commerce.

Especially when violent crime was at issue, Jackson passionately believed that the courts – especially the federal courts – had no business tying the hands of law enforcement. In confession cases, he justified police interrogation tactics, given what he perceived as their importance in breaking homicide cases. His distaste for retrying African American defendants found guilty beyond a reasonable doubt, under indictments brought by all-white grand juries, reached its climax in Cassell, when he dissented, alone, to call for a change in the rule. And in the name of preventing mob violence and its potential political consequences, the former Nuremberg prosecutor deferred to the police at the scene in hate speech cases. When other Justices tried to expand defendants' rights Jackson, motivated by his belief that "The people of the state are also entitled to due process of law," would often step in to object.[327]

Jackson's views on constitutional rights for criminal defendants varied, depending on the right at stake. For example, he gave greater priority to the Fourth Amendment ban on unreasonable searches and seizures than to cases involving coerced confessions and Grand Jury composition. Unfortunately for the African American criminal defendants before him, their cases often raised jury composition and illegal interrogation issues, but not the Fourth Amendment.[328] Given Jackson's concerns with overturning capital

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[327] Stein v. New York, 346 U.S. 156, 197 (1953).

[328] Jackson's dogged defense of Fourth Amendment rights are perhaps best exemplified by his opinions in Johnson v. United States, 333 U.S. 10 (1948) and Brinegar v. United States, 338 U.S. 160 (1949), both of which suggest that his Nuremberg experience influenced his views on search and seizure law. See Hockett, "Justice Robert H. Jackson, the Supreme Court, and the Nuremberg Trial" 295-96. Yet even before that chapter of his life, Jackson displayed a deep-seated conviction, one compatible with Fourth Amendment values, that "home is a refuge" in which one should be safe from intrusion. Douglas v. City of Jeannette, 319 U.S. 157, 181 (1943) (Jackson, J., concurring in part and dissenting in part). The Justice's differing

convictions – he never lost sight of the potential future victims of a vicious killer -- the Court's tendency to take only the most serious cases involving African American defendants might have made it more difficult for those prisoners to get Jackson's vote, as he believed that the police needed wide latitude to investigate those suspects posing the greatest risk to society.[329]

That is not to say that Jackson was unconcerned with defendants' rights or with racial justice in the criminal justice system: he felt deeply the plights of the South's peons, and insisted on due process when Shepherd and his co-defendants were railroaded by white hysteria. In these situations, though, he felt the need to downplay race, whether by characterizing debt peonage as a nationwide problem, or by focusing on the racially neutral issue of pretrial publicity. His hostility toward federal judicial intervention in criminal matters was just as passionate, even when the defendant was not an African American facing capital punishment in the South.[330]

Others – including some of his colleagues – saw the administration of criminal justice as one more front in the war for racial equality, but Jackson resisted all such temptation. His record in cases involving African Americans and the criminal justice system primarily reflected his pro-prosecution views on the issues raised in the cases reaching the Court, and not the cases' racial implications.

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view on confessions is represented in Watts v. Indiana, 338 U.S. 49 (1949) (Jackson, J. concurring), in which he emphasized the societal need to grant law enforcement latitude in interrogating murder suspects.

[329] 338 U.S. 49 (1949); Brinegar v. United States, 338 U.S. at 183 (exceptions to Fourth Amendment prohibitions permissible, depending on offense; roadblock search for kidnap victim "might be reasonable … if it was the only way to save a threatened life and detect a vicious crime"). See also G. Edward White, "The Dilemmas of Robert Jackson," The American Judicial Tradition: Profiles of Leading American Judges (New York: Oxford University Press, 1988) 245.

[330] Price v. Johnston, 334 U.S. 266, 295-300 (1948) (Jackson, J., dissenting).

Chapter 7: Voting Rights for African Americans

> …social problems walk right into the courtroom and address the court, sometimes openly, sometimes in veiled terms, and sometimes such issues are properly and inescapably involved in legal controversies. I do not need to remind you of … the multiplication of cases that originate in strained racial relations….
>
> It has never seemed to me that it is the function of the judiciary, notwithstanding the immense grant of power to it under our system, to try to determine what the philosophy or policy of our organized society shall be. That must be decided at the polls.
>
> -- Robert H. Jackson[1]

Background

Before the Civil War, African Americans were either entirely barred from voting, or subject to more stringent qualifications than their white counterparts, in all but a few Northeastern states. Afterwards, the Fifteenth Amendment provided that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Yet no sooner had the ink dried than methods, both legal and illegal, were employed to gut its promise, particularly in the South. Enforcement efforts failed, due to white Southern tenacity and want of political will by non-Southern whites. After peaking during Reconstruction, African American voting, and the number of African American elected officials, declined. By 1910, African American political participation in the South was negligible at best.[2]

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[1] Robert H. Jackson, Address before the Judicial Section, New York State Bar Association, New York, NY, January 22, 1944, The Felix Frankfurter Papers, Harvard Law School Library, Cambridge, MA (University Publications of America Microfilmed version, Frederick, MD, 1986, Part III, Reel 2) 4.

[2] U.S. Const. Amend. XV; Robert J. Dinkin, Voting in Revolutionary America: A Study of Elections in the Original Thirteen States, 1776-1789 (Westport: Greenwood Press, 1982) 41-43; William Gillette, The Right to Vote: Politics and the Passage of the Fifteenth Amendment (Baltimore, MD: Johns Hopkins University Press, 1965); Everette Swinney, "Enforcing the Fifteenth Amendment, 1870-1877," Journal of Southern History 28 (May 1962) 202-18; Michael Perman, Struggle for Mastery: Disenfranchisement in the

The Supreme Court had not been unsympathetic to pleas for equal voting rights, but its ability to effect change was limited by the resourcefulness of racist legislatures and the nature of judicial process. In 1915, for example, the Court struck down Oklahoma's "Grandfather Clause," which denied the franchise to descendants of those previously ineligible to vote; in 1939, it invalidated another Oklahoma law meant to circumvent the initial ruling. Speaking for a six-justice majority in the latter case, a new Justice -- Felix Frankfurter -- acerbically noted that "The [Fifteenth] Amendment nullifies sophisticated as well as simpleminded modes of discrimination."[3] Yet for over two decades, the offending statute remained in force.

Of the many legal devices designed to keep African Americans from the polls, the method of choice during Jackson's time on the Court was the white primary. Devised to circumvent the state action requirement, state governments would repeal their laws pertaining to primaries, thereby "leaving parties free to define their membership as private associations, protected by the state but not directed or controlled or authorized by law."[4] With the Democrats maintaining a nearly complete stranglehold on Southern

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South, 1888-1908 (Chapel Hill: University of North Carolina Press, 2001) ch. 1; Eric Foner, Reconstruction: America's Unfinished Revolution 1863-1877 (New York: Harper & Row, 1988) 271-80, 423-44, 446-49, 459 ff, 569-601; Steven F. Lawson, Black Ballots: Voting Rights in the South, 1944-1969 (New York: Columbia University Press, 1976) 5-15, 19-20; Williamson, The Crucible of Race chs. 7 and 11; Braeman, Before the Civil Rights Revolution 57 ff., 75-84; J. Morgan Kousser, The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910 (New Haven: Yale University Press, 1974) ch. 9; V.O. Key, Jr., Southern Politics in State and Nation (New York: Alfred A. Knopf, 1949; Vintage Books ed.) chs. 26-27 and 29, pp. 644-45; Tushnet, Making Civil Rights Law 99; Myrdal, An American Dilemma I ch. 20; Darlene Clark Hine, Black Victory: The Rise and Fall of the White Primary in Texas (Millwood, NY: KTO Press, 1979) ch. 1; Richard Claude, The Supreme Court and the Electoral Process (Baltimore: Johns Hopkins University Press, 1970) ch. 3; Franklin and Moss, From Slavery to Freedom (1994 ed.) 254-59, 495; Paul Lewinson, Race, Class, and Party: A History of Negro Suffrage and White Politics in the South (New York: Russell & Russell, 1963) chs. 1-6. For studies showing where African Americans voted most and least in the South by 1930 and 1940, respectively, see Lewinson, Race, Class and Party ch. 7 and Key, Southern Politics in State and Nation 518 ff.

[3] Lawson, Black Ballots 12, 18-21; Guinn v. United States, 238 U.S. 347 (1915); Lane v. Wilson, 307 U.S. 268, 275 (1939); Franklin and Moss, From Slavery to Freedom (1994 ed.) 495.

[4] Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," Harvard Law Review 75 (1959) 1.

politics, electoral quarrels were resolved in an all-white primary, and general elections were mere coronations of Democratic nominees. Thus, even where African Americans could vote in general elections, they effectively were kept out of the electoral process.[5]

The constitutionality of the all-white primary vexed the Supreme Court for over a generation. The key series of cases concerned practices in Texas where, capitalizing on the 1921 Supreme Court ruling in Newberry v. United States that primary elections were not governmental affairs subject to Constitutional strictures, the "Klan-dominated" state legislature barred African Americans from voting in the Democratic primary.[6] A unanimous Supreme Court struck down that law in Nixon v. Herndon.[7] In response, the legislature passed a law leaving voter qualifications in primaries up to the political party. In Nixon v. Condon, the high court found for the disenfranchised voter, but only because the state legislature's act of conferring authority to exclude African Americans on the

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Justice Douglas, in his dissent in United States v. Classic, suggested yet another constitutional basis for outlawing the white primary: the right of Congress under Article I to regulate federal elections. Aside from the uncertainty as to whether Article I could be read to cover primaries, this provision's reach – it would not concern state or local contests – would have left African Americans bereft of rights in the election of most officials. David M. Bixby, "The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at *United States v. Classic*," Yale Law Journal 90 (1981) 796, 799-803.

[5] Perman, Struggle for Mastery 300-02; Tushnet, Making Civil Rights Law 99-100; Key, Southern Politics in State and Nation pp. 11-12, 313 and ch. 29; Clark Hine, Black Victory ch. 2; Claude, The Supreme Court and the Electoral Process ch. 4; Bixby, "Another Look at *United States v. Classic*" 789-90. According to Key, three Southern states – Florida, North Carolina and Tennessee – legally permitted localities to choose to include African Americans in primaries, although prohibitions were not followed in some places. Key, Southern Politics in State and Nation 620-21. According to Clark Hine, African Americans white primary cases in the lower courts in 1929 (Virginia) and 1932 (Florida), but a lack of effective political organization rendered their victories "hollow." Clark Hine, Black Victory ch. 5. See also Lewinson, Race, Class, & Party 153-56.

For a discussion of how suffrage restriction assured Democratic Party dominance in the South, see Kousser, The Shaping of Southern Politics ch. 9 and Tushnet, Making Civil Rights Law 100.

[6] Lawson, Black Ballots 24-25; Clark Hine, Black Victory ch. 2; Claude, The Supreme Court and the Electoral Process 67-68; Key, Southern Politics in State and Nation 621-22. The Supreme Court case inspiring the legislation was Newberry v. United States, 256 U.S. 232 (1921), which held that party primaries were not elections for purposes of constitutional analysis.

[7] Lawson, Black Ballots 26-27; Nixon v. Herndon, 273 U.S. 536 (1927); Kluger, Simple Justice (1977 ed.)122-23; Tushnet, Making Civil Rights Law 100; Clark Hine, Black Victory ch. 4; Claude, The Supreme Court and the Electoral Process 68; Key, Southern Politics in State and Nation 622; Bixby, "Another Look at *United States v. Classic*" 790.

party's executive committee constituted state action.[8] When party officials – armed with their declaration that primaries were all-white affairs -- still denied the vote to African Americans, a third suit was filed, Grovey v. Townsend. In that case, the Court found that the state convention making that rule was private, and unanimously denied the constitutional claim.[9]

While Jackson was justice, the Court decided two more white primary cases in Texas, each pitting the constitutional imperative of the Reconstruction amendments against the state action requirement. Both cases gave Jackson some pause, but he ultimately sided with the opponents of the white primary each time.

Keeping one Promise, Breaking Others: Smith v. Allwright and Stare Decisis

Regaining African American Southerners' right to vote was an integral part of the African American community's agenda.[10] Five years after Grovey, the NAACP (which had not been involved in Grovey and had advised against bringing it) started another test case. Meanwhile, the Supreme Court upheld a federal indictment for election fraud on the ground that the Constitution protected voting rights in a primary election so long as

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[8] Lawson, Black Ballots 28-32; Nixon v. Condon, 286 U.S. 73 (1932); Kluger, Simple Justice (1977 ed.) 137-38; Tushnet, Making Civil Rights Law 100-01; Hine, Black Victory ch. 6; Claude, The Supreme Court and the Electoral Process 68-69; Key, Southern Politics in State and Nation 622; Bixby, "Another Look at *United States v. Classic"* 790-91.

[9] Lawson, Black Ballots 32-36; Grovey v. Townsend, 295 U.S. 45 (1935); Kluger, Simple Justice (1977 ed.) 138, 167; Tushnet, Making Civil Rights Law 102; Clark Hine, Black Victory ch. 8; Claude, The Supreme Court and the Electoral Process 69; Mason, Harlan Fiske Stone 614; Key, Southern Politics in State and Nation 622-23; Bixby, "Another Look at *United States v. Classic"* 791-92.

The white primary did not always prove to be a major stumbling block to African American participation; in some parts of the South, it was more honored in the breach. Virginia's white primary, for example, was struck down by a federal district court in 1929, and by the Fourth Circuit Court of Appeals in 1930. Party rules still provided for an all-white primary for many years thereafter, but in deference to the courts' ruling, the rule was never enforced. In 1947, party leaders considered changing the rule but chose not to, deciding "that it would be preferable not to … creat[e] an opportunity for intolerant elements to sound off, unnecessarily and undesirably opening the whole race issue, which is little discussed in Virginia," while "Negroes sat as members of the convention and participated in primaries." Key, Southern Politics in State and Nation 624.

[10] Lawson, Black Ballots 12, 18-21; 238 U.S. 347; 307 U.S. at 275; Franklin and Moss, From Slavery to Freedom (1994 ed.) 495.

"the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice." That case, United States v. Classic, did not directly address Grovey. Yet Classic's likely impact on the white primary was "almost universally appreciated by commentators after the decision was announced," and by at least some members of the Court. Then-Attorney General Jackson undoubtedly also understood: even though no direct writing has been found, according to those familiar with the Justice Department's handling of the case, "After a period of uncertainty [Jackson] agreed to go through with the prosecution, apparently believing that it could be used to reverse *Newberry*," the 1921 case finding primaries private elections outside the purview of the Fifteenth Amendment.[11]

In response, the NAACP withdrew the test case it had begun in 1940 and started a new one, Smith v. Allwright; its legal underpinning was based in large part on the Classic decision.[12] Smith lost in the lower courts, which relied on Grovey.[13] The High Court thus was left to decide what, if anything, remained of Grovey after Classic. Eight Justices agreed "that the Classic case had spelled the ultimate destruction of" Grovey, but the opinion was completed only after confronting "[G]reat difficulties": one author attributed some of the problems to the Justices' being "somewhat leery of openly

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[11] Lawson, Black Ballots 36-41; Elliff, "Aspects of Federal Civil Rights Enforcement" 615; 313 U.S. at 318; Kluger, Simple Justice (1977 ed.) 233-34; Tushnet, Making Civil Rights Law 103-04; Claude, The Supreme Court and the Electoral Process 69; Mason, Harlan Fiske Stone 586-89; Key, Southern Politics in State and Nation 623-24; Bixby, "Another Look at United States v. Classic" 793-94, 797-803, 803-05, 812. Perhaps the most important person not to have understood Classic's implications was Justice Roberts, who went on to dissent in Smith v. Allwright. Bixby, "Another Look at United States v. Classic" 804-05.

For a discussion of Jackson's handling of the investigation of electoral fraud in Louisiana (which resulted in the Classic prosecution), see pp. 129-32.

[12] Lawson, Black Ballots 41-42; Tushnet, Making Civil Rights Law 104-05; Clark Hine, Black Victory ch. 10. For a discussion of the controversial decision to substitute one test case for another, see Clark Hine, Black Victory ch. 9.

[13] Smith v. Allwright, 321 U.S. 649, 651-52; Clark Hine, Black Victory 215-17.

discarding still another landmark of the old Court," during a period when several other major precedents fell.[14]

The state of the historical record concerning the case's two post-argument conferences makes absolute clarity impossible, but Jackson almost certainly hesitated to reverse at both. At the first, he voiced concern about the consequences of reversing what had appeared to be well-settled law before Classic, saying, "You are faced with Grovey, and then people may be liable for damages when they acted on our opinion." At the second, he raised issues of state action and free association: "I am not sure that this primary is an election. If it is not election, then you can't have control over it. You have here the rights of people to form groups. I don't see how you are going to work it out." Stone replied, "But I am not talking about all primaries, but this primary." According to Murphy, Jackson and Black originally voted to affirm, and both Jackson and Rutledge expressed concern about judicial oversight of state elections. While the best evidence of what happened in the conference suggests that Black, at least, actually sided with Stone during the first conference vote, there can be little doubt about Jackson's leanings toward finding against the African American petitioner. Ultimately, however, all three doubting justices voted to invalidate the white primary.[15]

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[14] Mason, Harlan Fiske Stone 614; Clark Hine, Black Victory 218.

[15] Dickson, ed., The Supreme Court in Conference 838; Lawson, Black Ballots 44, quoting Howard, Mr. Justice Murphy 356; Tushnet, Making Civil Rights Law 105-06; Bixby, "Another Look at *United States v. Classic*" 812-13.

Murphy's observation about Black is at odds with the most recent evidence about the first conference, in which Black flatly said, "I agree with the Chief Justice." Dickson, ed., The Supreme Court in Conference 837. Other evidence suggests that Murphy's recollection about Black's conference vote might have been influenced by an essential truth about the Alabama populist's lack of concern about the voting rights issue. In a 1940 interview with Ralph Bunche, Black voiced the belief that the Court "'cannot change political opinion in the South'"; that curing the economic ills afflicting poor Southerners of all races would help African Americans more than securing the right to vote; and that changes in race relations "'should come only gradually.'" Jackson, Gunnar Myrdal and America's Conscience 125-26, (quoting Ralph Bunche, "Interview with Mr. Justice Black, Feb. 13, 1940," Box 85, Ralph Bunche Papers, UCLA).

Stone originally assigned the majority opinion to Frankfurter. Yet "[i]mmediately some other justices had misgivings" about the choice, especially Jackson, who emerged as the lead player in an unusual effort to reassign the case. According to Frankfurter's April 10, 1944 memorandum to file, Jackson approached him the afternoon he had been assigned "and said that he wanted to talk to me about a matter with his customary feeling of freedom in putting anything to me." Frankfurter recounted his friend's concern:

> … it was a very great mistake to have me write the Allwright opinion. For a good part of the country the subject – Negro disenfranchisement – was in the domain of the irrational and we have to take account of such facts. At best it will be very unpalatable to the South and should not be exacerbated by having the opinion written by a member of the Court who has, from the point of view of Southern prejudices, three disqualifications: "You are a New Englander, you are a Jew and you are not a Democrat – at least not recognized as such."

When Frankfurter acknowledged "that all three accusations are true," Jackson suggested that

> it ought to be written either by the Chief or by a Southern member of the Court and, unless I seriously objected, he was going to tell the Chief why he thought that of all the members of the Court I was the last to be asked to write this opinion. Bob said, "Of course, I am primarily interested in this matter for the Court's sake, but I am also concerned about you. A lot of people are bent on exploiting Anti-Semitism, as you well know, and I do not think that they ought to be given needless materials."

Frankfurter responded that "I see the force of his suggestion and that so far as I am concerned of course he is free to put his views to the Chief and I would leave him to state whether he had or had not seen me and that he was free to say that the Chief should not feel the slightest embarrassment in reassigning the opinion."[16]

Jackson wrote Stone a note in which, once having apologized for "intruding into" the Chief Justice's prerogatives, he asked "if you have not overlooked some of the ugly

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[16] Felix Frankfurter, "Memorandum on Smith v. Allwright," April 10, 1944, Box 6, File 17, The Felix Frankfurter Papers, Harvard Law School Library, Cambridge, MA (University Publications of America Microfilmed version, Frederick, MD, 1986, Part I, Reel 10) 1-2.

factors in our national life which go to the wisdom of" assigning the opinion to Frankfurter. He pressed for breaking what would be seen as bad news in the South, in the most politic manner possible:

> It is a delicate matter. We must reverse a recent, well-considered, and unanimous decision. We deny the entire South the right to a white primary, which is one of its most cherished rights. It seems to me very important that the strength which an all but unanimous decision would have may be greatly weakened if the voice that utters it is one that may grate on Southern sensibilities.[17]

Viewed from this perspective, Frankfurter was a particularly unfortunate choice, for the reasons Jackson had laid out in his conversation with the assigned Justice. Jackson recommended that a decision which was "bound to arouse bitter resentment, will be much less apt to stir ugly reactions if the news that the white primary is dead is broken to it, if possible, by a Southerner who has been a Democrat and is not a member of one of the minorities which stir prejudices kindred to those against the Negro."[18] He added that "I have talked with some of [the other justices] who are still in the building, and they feel as I do"; he did not specifically mention Frankfurter.[19]

Stone called the assigned author that night "and with some anxiety in his voice said that he had a delicate matter to take up with me" in the morning. At their face-to-face meeting the next day,

> The Chief looked and talked like one under a heavy burden and in a round-about way he began to tell me how a member of the Court, not at all in a hostile spirit but in a friendly one, put to him reasons that he never thought about – because he

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[17] Robert H. Jackson to Harlan Fiske Stone, January 17, 1944, reproduced in Mason, Harlan Fiske Stone 615; Clark Hine, Black Victory 219.

[18] Jackson to Stone, January 17, 1944, reproduced in Mason, Harlan Fiske Stone 615; Clark Hine, Black Victory 219; Abraham, Justices and Presidents (1992 ed.) 219-20. Jackson's observation about Frankfurter's relatively tenuous connection to the Democratic Party was true enough, despite his close association with the New Deal (which, with the exception of increasingly progressive views on race relations, was looked upon by white Southern leaders with reservations, if not outright hostility). Liva Baker, Felix Frankfurter (New York: Coward-McCann, 1969) 312-13.

[19] Jackson to Stone, January 17, 1944, reproduced in Mason, Harlan Fiske Stone 615; Hine, Black Victory 219.

> does not think about such things – why I was not a good choice for writing the Allwright opinion. He then repeated the three reasons – you are a New Englander, a Jew and not a Democrat.

When Frankfurter reassured him that "that the case is back on your desk as thought [sic] it had never been assigned… He promptly responded as though a great weight had been lifted from his soul…." The Chief Justice asked "for suggestions for making the appropriate assignment," noting that "of course the two people he would naturally be thinking of were Black and Reed, that he did not know that Black would do it and that Reed was rather loaded up and that there was Douhlas [sic], but that he was political."[20] Stone "seemed indecisive about the matter." Frankfurter refrained from advising "what seemed to me to be the obvious thing, that the Chief Justice should write an opinion like this, particularly when he was helping to overrule an opinion in which he had joined only a few years ago." (Since two of Jackson's three objectionable categories applied to Stone, a New England Republican, that option may not have been as obvious to Stone as it was to Frankfurter). But he did advise "that the job required, of course, delicacy of treatment and absence of a raucous voice and that I thought of the Southerners Reed was the better of the two for the job." Frankfurter offered to take one of Reed's other case assignments, to avoid burdening him. Stone "asked if I thought Reed would mind and I told him that Reed was a soldier and glad to do anything that the interest of the Court might require." The solution "seemed to relieve" the Chief Justice.[21]

Upon receiving his new assignment, Reed "immediately came under pressures to adopt one device or another for mitigating the storm of resentment certain to be aroused in the South and elsewhere." Frankfurter, "[u]neasy lest the Court be accused of a

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[20] Felix Frankfurter, "Memorandum on Smith v. Allwright," April 10, 1944 2.
[21] Felix Frankfurter, "Memorandum on Smith v. Allwright," April 10, 1944 2-3.

disingenuous discarding of the Grovey case" and not letting his removal from the opinion dampen his desire to wield influence over the final product, "spoke to Reed at length reinforcing … the importance of the most aggressive candor in dealing with Grovey v. Townsend and the duty of resting the overruling on a change of opinion and our duty in the case of constitutional questions to follow our convictions even though a prior decision has to be overruled."[22] Reed rejected a suggestion that the ruling not be made retroactive, but chose not to explicitly overrule Grovey, instead "'recognizing' that Grovey had been dead since the Classic case." The diplomatic niceties involved in deciding how to phrase what was being done to the 1935 precedent seemed, to the Chief Justice, "'very skillfully'" handled by Reed.[23]

Acknowledging that the Democratic Party in Texas was considered a "'voluntary association'" under state law, with its membership restricted to white voters, the Court was left to decide whether the scheme involved state action.[24] Reed argued that the state action requirement would be satisfied if the discriminatory primary "'is by law made an integral part of the election machinery.'"[25] Classic redefined the problem the Court faced in Grovey:

> When Grovey v. Townsend was written, the Court looked upon the denial of a vote in a primary as a mere refusal by a party of party membership. [citation omitted] As the Louisiana statutes for holding primaries are similar to those of Texas, our ruling in Classic as to the unitary character of the electoral process calls for a reexamination as to whether or not the exclusion of Negroes from a Texas party primary was state action.[26]

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[22] Mason, Harlan Fiske Stone 615; Felix Frankfurter, "Memorandum on Smith v. Allwright," April 10, 1944 3; McCune, Nine Young Men 66; Henry J. Abraham, Justices and Presidents 219-20; Hine 219; Lawson, Black Ballots 44-45.
[23] Frankfurter concurred in the result without opinion. 321 U.S. at 666.
[24] 321 U.S. at 654, 656-59.
[25] 321 U.S. at 654, 656-59, 660 (quoting United States v. Classic, 313 U.S. at 318).
[26] 321 U.S. at 660-61; Hine, Black Victory 219-20.

Another passage in the opinion suggested that Texas's use of legal technicalities in a persistent quest to bar African Americans from the electoral process had also influenced the Court:

> … Grovey v. Townsend upheld exclusion of Negroes from primaries through the denial of party membership by a party convention. A few years before this Court refused approval of exclusion by the State Executive Committee of the party. A different result was reached on the theory that the Committee action was state authorized and the Convention action was unfettered by statutory control. *Such a variation in the result from so slight a change in form influences us to consider anew the legal validity of the distinction which has resulted from barring Negroes from participating in the nominations of candidates of the Democratic party in Texas.*[27]

Texas' "statutory system for the selection of party nominees" – from poll tax requirements for primary voters, to the structure for the party nomination process, to the court system's role as arbiter in a contested primary result – was like Louisiana's in Classic, in that it "makes the party which is required to follow these legislative directions an agency of the state in so far as it determines the participants in a primary election."[28] As an integral part of the government's electoral machinery, the white primary in Texas was obviously unconstitutional.[29]

Reed explained that the Court, though "not unmindful of the desirability of continuity of decision in constitutional questions," had "freely exercised its power to reexamine the basis of its constitutional decisions":

> This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself." Here we are applying, contrary to the recent decision

[27] 321 U.S. at 661 (emphasis added). The point might have been made even more pointedly at page 664: "The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied."
[28] 321 U.S. at 662-64.
[29] 321 U.S. at 664.

> in Grovey v. Townsend, the well-established principle of the Fifteenth Amendment, forbidding the abridgement by a state of a citizen's right to vote. Grovey v. Townsend is overruled.[30]

Reed held seven votes, including Jackson's, but could not get more. Frankfurter strongly objected to what he saw as the Kentuckian's "appeasement' on Grovey. In fact, Reed had included some new language to address concerns shared by Frankfurter, Stone and others on the issue, but it was not enough for the former Harvard professor, who wrote a brief concurring opinion discussing his own views on the subject. On April 3, Jackson asked his friend "whether I planned to put out my concurring opinion." When Frankfurter replied that he did, Jackson responded,

> "I think that would be a great mistake for the same reasons that led me to think it would be a mistake to write the Court's opinion." He emphasized anew that we were dealing with an irrational situation and that he would greatly regret my giving ground for what is bound to be a perversion of my actions and said that if I gave my opinion the Court's opinion would inevitably be deemed to be due to me. He added, "I have now told you what I think, but if you decided nevertheless, that you owe it to your self to put out that concurring opinion, I will not think one wit the less of you."

Frankfurter assured his friend "that I had very great respect for his judgment, and that my only difficulty was that I just could not swallow the pussyfooting and pettyfogging of Reed's opinion and especially the uncandid use he was making of the Classic case," which he apparently believed did not affect Grovey. He then "asked Bob whether he thought it would be sufficient for me to just concur in the result and no more"; Jackson "answers [sic] that he did." Relying on his friend's advice, Frankfurter ultimately concurred in the result, with no opinion.[31]

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[30] 321 U.S. at 665-66.

[31] Harlan Fiske Stone to Felix Frankfurter, March 18, 1944, The Felix Frankfurter Papers, Harvard Law School Library, Cambridge, MA (University Publications of America Microfilmed version, Frederick, MD, 1986, Part I, Reel 11); Felix Frankfurter, "Memorandum on Smith v. Allwright," April 10, 1944 4; 321

Owen Roberts – the author of the opinion in the unanimously decided Grovey – penned a "bitter" dissent chiding his colleagues for harboring "an assumption that knowledge and wisdom reside in us which was denied to our predecessors."[32] Claiming that "the instant decision … tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only," he complained that this case, and another overruled that term, not only called into question the ability of parties, lawyers and lower courts to rely on Supreme Court decisions as established precedent, but in a larger way caused "fresh doubt and confusion in the public mind as to the stability of our institutions."[33]

Smith v. Allwright's aftermath confirms its significance in the burgeoning legal controversy over the Supreme Court's overruling of established precedent – a debate that would continue to grow in importance and in intensity during Jackson's tenure, culminating in the overruling of Plessy v. Ferguson. The legal profession spoke out against what it saw as the Court's disregard of precedent the spring Smith v. Allwright was issued. Much of the bar's ire was raised by other decisions; the single most-objected-to case changed the law governing the insurance industry's relationship to interstate commerce. Those protests were national in character: Massachusetts and New

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U.S. at 666; Dickson, ed., The Supreme Court in Conference 838; Tushnet, Making Civil Rights Law 106; Bixby, "Another Look at *United States v. Classic*" 805, 813-14; 321 U.S. at 666.

[32] 321 U.S. at 666 (Roberts, J., dissenting); Claude, The Supreme Court and the Electoral Process 70-71.

[33] 321 U.S. at 666, 669-70 (Roberts, J., dissenting) (citing Mahnich v. Southern Steamship Co., 321 U.S. 96 [1944]) ; Claude, The Supreme Court and the Electoral Process 70-71; Clark Hine, Black Victory 220-21. According to Frankfurter's memorandum to file, Roberts told him that his vote might have been different had Reed not written such an "uncandid" opinion. Frankfurter, "Memorandum on Smith v. Allwright," April 10, 1944 4. Roberts, like Frankfurter, believed that Classic did not affect the continued vitality of Grovey. Bixby, "Another Look at *United States v. Classic*" 805; 321 U.S. at 670 (1944) (Roberts, J., dissenting).

York lawyers griped along with Texans, and thirty-nine states requested a rehearing.[34] Yet it was the State Bar of Texas that passed, at its 1944 annual meeting, a resolution condemning the Supreme Court for

> losing … the high esteem in which it has been held by the people, an esteem created by their belief that it had always remained free of political, personal and unworthy motives, and had interpreted and declared the law as it is written, according to tradition and precedent, and agreeably to the provisions of the Constitution and the Bill of Rights.

On its face, this resolution is about more than insurance, though only the insurance case was specifically referred to. Discussing rules about insurance in terms of "tradition" would be odd, but "tradition" was a perfectly normal way for Southern whites to defend their system of race relations. Moreover, the resolution's initial version included a protestation omitted from the final, that complaints about the Court were "confined to no section of the country" – a protestation superfluous in a discussion about insurance, as no one would think of that issue as confined to the section of the country which included Texas. The revised version (which omitted the disclaimer but contained more pointed language about the political motives of the Court's Roosevelt appointees) was rejected, without debate, by the full American Bar Association at its annual meeting;[35] but the resolution demonstrates that, ten years before the Brown decision, Southern whites were already feeling the sting of Supreme Court decisions protective of African Americans' rights, and organizing publicly to express their disagreement.

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[34] Walter Gordon Merritt, "Two Federal Legislatures?" American Bar Association Journal 30 (July 1944) 379-84; C. Perry Patterson, "Jefferson and Judicial Review," American Bar Association Journal 30 (August 1944) 443-51; Frank W. Grinnell, "The New Guesspotism," American Bar Association Journal 30 (August 1944) 507-11; "Thirty Nine States Ask for a Rehearing on Insurance Decision," American Bar Association Journal 30 (October 1944) 580; Mason, Harlan Fiske Stone 617-25.

[35] "Resolution Adopted by State Bar of Texas at 1944 Annual Meeting, Fort Worth, Texas," American Bar Association Journal 30 (August 1944) 484-85; "State Bar of Texas," American Bar Association Journal 30 (September 1944) 542-43; "Texas Resolution as to the Supreme Court is not Adopted," American Bar Association Journal 30 (September 1944) 641-42.

As a general rule, Jackson believed in the need to maintain the integrity of precedent, and often expressed concern that the Court's decisions be predictable to practitioners (a difficult value to honor if reversals were too frequent). Despite those considerations, he was no believer in maintaining precedent for mere certainty's sake: only months before Smith, he had penned one of his greatest opinions, in which the Court overruled a three-year-old decision letting schools punish students who refused to recite the Pledge of Allegiance.[36] (As he once aphorized, "I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday").[37] But cases challenging established authority revisited the "old problem of choosing between standing by a not very good rule … or making an innovation with its attendant confusion."[38]

In the midst of the 1944 controversy, and one month after the Smith v. Allwright decision, Jackson broached the subject of overruling precedent at the American Law Institute's annual meeting. On one hand, he believed that "We cannot deny to the judicial process capacity for improvement, adaptation, and alteration unless we are prepared to leave all evolution and progress in the law to legislative processes… ." Yet he also acknowledged "that our times have witnessed considerable relaxation in the authority of … precedent," in all courts. This development concerned him, because "I cannot believe that any person who at all values the judicial process or distinguishes its method and philosophy from those of the political and legislative process would abandon or substantially impair the rule of *stare decisis*." He attributed the phenomenon to the

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[36] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), overruling Minersville School District v. Gobitis, 310 U.S. 586 (1940).
[37] Massachusetts v. United States, 338 U.S. 611, 639-40 (1948), listed in Gerhart, Lawyer's Judge 138.
[38] Robert H. Jackson to Henry Upson Sims, April 2, 1945, Box 19, File: Correspondence Sh-Sl, Robert H. Jackson Collection, Library of Congress.

recent and dramatic increase in reported cases: "in this great mass of opinions by men of different temperaments and qualifications and viewpoints, writing at different times and under varying local influences, some printed judicial word may be found to support almost any plausible proposition." With the dilution, through proliferation, of "high authority" and "individual quality" of opinions, there was not always the "thoroughness" of workmanship and strength of "conviction" with regard to the underlying principle, without which a precedent cannot endure. Jackson dissented from the controversial ruling in the insurance case, and intimated disagreement with some of his brethren on the value of prior authority in his ALI speech; yet that criticism did not affect his vote in Smith v. Allwright, in which he joined the majority in overruling a precedent less than ten years old.[39]

Smith v. Allwright "effectively destroyed the white primary." Efforts to evade the ruling "were confined mainly to the Deep South" and "consistently rebuffed" by federal courts, while states in the Upper South were more likely to tolerate African American participation. Due at least in part to the decision and followup litigation, more African Americans registered to vote in the South: one study estimated that African Americans' presence on the rolls more than doubled (and may have tripled) after Smith, and quintupled between the years 1940 and 1956; yet efforts to keep African Americans away from the polls were still effective, especially in the Deep South. The NAACP cited estimates that 700,000 African Americans voted in 1948, a jump from 150,000 in 1940, but noted that the 1948 figure represented only fourteen percent of African Americans of voting age in the South. Thurgood Marshall correctly predicted that "new contrivances to

[39]Robert H. Jackson, "Decisional Law and Stare Decisis," Address delivered at the Annual Meeting of the American Law Institute, May 9, 1944, reprinted in American Bar Association Journal 30 (June 1944) 334-35.

bar Negroes from voting in primary elections" would quickly take the white primary's place, and indeed they did, especially in the Deep South: literacy and understanding tests, educational requirements, poll taxes and voter oaths pledging support for the racial relations status quo worked hand in hand to with violence and intimidation to perpetuate a situation that would be remedied only with federal legislation and decades of enforcement efforts.[40] But those efforts would not take place until the 1960s: the Justice Department was "'to put it mildly, reluctant'" to enforce Smith v. Allwright immediately following the decision.[41]

As one of the landmark civil rights cases of the 1940s, Smith was significant and somewhat effective in increasing African American voting;[42] but the last bastion of the white primary would not fall until nearly a decade later. And that, too, was in Texas.

The Frontier of Primary Elections: Terry v. Adams

The most enduring legal contrivance to preserve the white primary challenged Jackson's understanding of the limits to government action in racial discrimination cases. The Jaybird Democratic Association was founded in 1889, for the express purpose of ending African American political influence in Fort Bend County, Texas. It was one of at least half a dozen "white man's unions" in coastal and upper coastal counties in the

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[40] Elmore v. Rice, 72 F. Supp. 516 (1947), aff'd, 165 F.2d 387 (1948), cert. denied, 333 U.S. 875 (1948); Brown v. Baskin, 78 F. Supp. 933 (1948); Key, Southern Politics in State and Nation 625-43; Claude, The Supreme Court and the Electoral Process 71-72; Clark Hine, Black Victory 224-26, 238-40; Lawson, Black Ballots 49ff. See also Thurgood Marshall, "The Rise and Collapse of the 'White Democratic Primary,'" Journal of Negro Education xxvi (Summer 1957) 253; Bixby, "Another Look at *United States v. Classic*" 814; National Association for the Advancement of Colored People and American Jewish Congress, "Civil Rights in the United States in 1948: A Balance Sheet of Group Relations," copy found in Box 184, File: Legal File – Supreme Court – October Term 1953 – Cases – Segregation Cases – Correspondence and Press Clippings, Robert H. Jackson Collection, Library of Congress 9-11; Sidney A. Jones, Jr., "The Participation of Negroes in Democratic Primary Elections in the South Since 1944," National Bar Journal 6 (June 1948) 144-54. The District Court judge in South Carolina, Waities Waring, later provided the lone vote in favor of the African American plaintiffs in the South Carolina desegregation lawsuit decided together with Brown in the Supreme Court. Kluger, Simple Justice (1977 ed.) 366.

[41] Ware, William Hastie 183.

[42] Galloway, "The Roosevelt Court" 530.

state.[43] Article XII of the Jaybird constitution extended membership only to "Every bona fide white citizen of Fort Bend County."[44]

Though not a governmental body, the Jaybird Association effectively controlled the political life of Fort Bend County, at first by nominating candidates at a convention, then later by a primary.[45] The Jaybird primary "carefully followed the state primary pattern," with one addition: Section 5 of the rules provided that "'Any member inducing a Negro to vote in a Jaybird primary or any election officer or clerk responsible for or allowing such a vote, shall be expelled from this association.'"[46] The personnel running the Jaybird and Democratic primaries (and the general election) were largely the same.[47] The winners of the Jaybird primaries filed for the Democratic primary as individuals, but Jaybird nominees invariably won the Democratic nomination and the general election in November "with the exception of a few precinct officials"; Jaybird victors were generally uncontested.[48] The voters of Fort Bend County recognized this, because "Always more votes were cast in Jay Bird primaries than in either the Democratic primaries or in the general election."[49]

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[43] Pauline Yelderman, The Jay Bird Democratic Association of Fort Bend County: A White Man's Union (Waco: Texian Press, 1979) pp. iv, v, 44, 55, 74, 134, 136, 251; ch. 2; Appendix 4.
[44] Yelderman, The Jay Bird Democratic Association of Fort Bend County 134-35 and Appendix IV.
[45] Yelderman, The Jay Bird Democratic Association of Fort Bend County 154.
[46] Yelderman, The Jay Bird Democratic Association of Fort Bend County 165, reproducing amendment to the Jay Bird constitution.
[47] Yelderman, The Jay Bird Democratic Association of Fort Bend County 168.
[48] Yelderman, The Jay Bird Democratic Association of Fort Bend County 151, 171, 184-85. The by-laws barred members from becoming "'a candidate for any county office without the endorsement of the association,'" or being appointed to county office "'except upon the request of the association.'" Yelderman, The Jay Bird Democratic Association of Fort Bend County 136, Appendix IV.
[49] Yelderman, The Jay Bird Democratic Association of Fort Bend County 170.

The Jaybirds faced "no meaningful challenge" until 1950.[50] Willie Melton, a local African American farmer and NAACP member, organized the group that initiated legal action.[51] Among the plaintiffs – all over 60 years of age and therefore less vulnerable to coercion – was 77-year-old John Terry, who concluded, "'I am an old man, use my name, they can no longer hurt me.'"[52] The case seemed unwinnable to Thurgood Marshall and his mentor, Charles Houston, who refused to take it; the plaintiffs proceeded without counsel from the NAACP.[53] The lower federal courts could not agree on a result: the District Court ruled in favor of the African American plaintiffs, finding the Jaybird organization a political party within the meaning of Smith v. Allwright; the Fifth Circuit Court of Appeals reversed the District Court, on the ground that the primary did not amount to "'action under color of state law.'"[54]

The Supreme Court's decision to accept the case for review was close. The Justices had voted four times to "hold" the case, thereby delaying decision. Ultimately, as few as four justices – the minimum number – may have voted to grant certiorari: Black, Reed, Burton and Clark. Three – Vinson, Jackson and Minton – voted to deny

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[50] Yelderman, The Jay Bird Democratic Association of Fort Bend County 151. Divided counsels, a wait-and-see attitude, and fear "for their jobs, security, or maybe, for their lives" made the African American community loathe to mount a challenge. Yelderman, The Jay Bird Democratic Association of Fort Bend County 191.

[51] Yelderman, The Jay Bird Democratic Association of Fort Bend County 202-06. Initially, Melton and his associates sent letters to the Jaybirds asking that African Americans be included in future primaries, and by presenting a petition signed by 100 African American voters. At a special meeting, the Jaybirds concluded that, being a "'voluntary organization,'" it had no need to accede to the African Americans' demands. It chose simply to "disregard[]" the letters and petition, refusing even the courtesy of a reply. Efforts to involve the state Attorney General in the dispute yielded a response, but was equally fruitless, as the office claimed it lacked jurisdiction. Yelderman, The Jay Bird Democratic Association of Fort Bend County 206-07.

[52] Yelderman, The Jay Bird Democratic Association of Fort Bend County 206, 208-09.

[53] Tushnet, Making Civil Rights Law 110. When the case reached the high court, civil rights attorney James Nabrit, then a law professor at Howard University, joined the plaintiffs' Texas attorney. Yelderman, The Jay Bird Democratic Association of Fort Bend County 235-38.

[54] 345 U.S. at 462-65; Clark Hine, Black Victory 25-29, 39-41, 226-27; Tushnet, Making Civil Rights Law 109-110; Yelderman, The Jay Bird Democratic Association of Fort Bend County 213-34.

review and let stand the Fifth Circuit ruling in favor of the Jaybirds. Frankfurter voted to dismiss the case as moot, since the election had already occurred.[55]

At oral argument on January 23, 1953, the Court peppered both sides with questions. One exchange memorable to plaintiffs' counsel occurred between Jackson and the Jaybirds' attorney:

> When [defense counsel] Townes stated that the practical effect of the Jay Bird primary was to elect 'good people' to office and to prevent 'bad people' from being elected, Mr. Justice Jackson glared across the bench and asked, 'Let me hear that again.' Townes then repeated his statement about 'good people' and 'bad people,' following which, Mr. Justice Jackson said, 'Give me a moment to reflect. If I understand clearly, you are saying your party elects 'good people' and prohibits voting by blacks to prevent election of 'bad people.' To that Townes replied, 'That is right, Mr. Justice.' Justice Jackson, still glaring, said, 'I see. In other words you first resolve that only angels shall inherit the earth and next resolve that you are the angels.' Townes seemed disturbed by this statement but made no reply.[56]

Jackson was not alone in showing his distaste for the Jaybirds, if reports of other justices' "glaring" looks are any indication.[57] His comment, moreover, was fundamentally hostile to white supremacy – he questioned the right of the Fort Bend County whites to lord over their African American neighbors. No wonder the Jaybirds' counsel was "disturbed."

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[55] Douglas did not participate. William Hubbs Rehnquist, bench memorandum, Box 179, Legal File: Supreme Court – O.T. 1952 Cases – No. 52, Terry et al. v. Adams et al., Robert H. Jackson Collection, Library of Congress; Tushnet, Making Civil Rights Law 110; 344 U.S. at 883.

Rehnquist wrote a bench memorandum in which he confessed that "I have a hard time being detached by this case, because several of the Rodell school of thought among the clerks began screaming as soon as they say this that 'Now we can show those damn Southerners,' etc." He added that he took "a dim view of this pathological search for discrimination, a la [NAACP chief] Walter White, [Justice] Black, [Justice] Douglas, [former Douglas clerk and legal scholar Fred] Rodell, etc." His legal analysis pointed to a denial of review "in the absence of a conflict among circuits," with "doubts as to its transcending importance", and in light of "my feeling that the decision is probably right to a lawyer, rather than a crusader." Nonetheless, "in spite of" all of those considerations, Rehnquist decided to "over-compensate and recommend a grant [of certiorari]." Despite the importunings of his callow law clerk, Jackson voted against granting review. William Hubbs Rehnquist, bench memorandum, Terry v. Adams; Tushnet, Making Civil Rights Law 110; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1896-97.

[56] Yelderman, The Jay Bird Democratic Association of Fort Bend County 235-38.

[57] Yelderman, The Jay Bird Democratic Association of Fort Bend County 235-38.

Yet the dismayed lawyer for the Jaybirds would have been mistaken to write off Jackson's vote. The justice's notes summarized his views at the time of the January 16, 1953 conference with "an ambivalence" that resembled some of his initial thoughts on Smith v. Allwright: while the "14th Amendment prevents State by law from rigging election or primaries by color line … [i]t does not deprive groups from associating themselves on color nationalistic or religion line"; the "Right of association [is] not taken away" by the Fourteenth Amendment"; there is a "majority" as well as minority "right to unite," and therefore "success [does] not make unconstitutional" the Jaybird primary; with "[n]o state officer or party" involved, the Court cannot hold that the organization "[c]an't take a straw vote for nominees." Yet incongruously, he also added a thought that was preoccupying him in the school segregation cases (which were pending before the court at the time: the primary "[c]an be outlawed by Congress." In the margin of his notes, he posed the question "[i]s it state action to fail to disband them?" and added, "temperence."[58]

The justices voted on Terry v. Adams twice at the January 16 session. The initial result was 5-4 in favor of upholding the Jaybird primary, with Vinson, Reed, Frankfurter, Jackson, and Minton in the majority and Black, Douglas, Burton, and Clark dissenting. In a revote, Frankfurter switched sides (according to one scholar, "perhaps because he could not bring himself to be the decisive vote to uphold a white primary"), making the final post-conference tally 5-4 against the primary. This time, Black, Frankfurter, Douglas, Burton, and Clark were in the majority, and Vinson, Reed, Jackson, and Minton

[58] Jackson, Notes of January 16, 1953 conference, Box 179, Legal File: Supreme Court – O.T. 1952 Cases – No. 52, Terry et al. v. Adams et al., Robert H. Jackson Collection, Library of Congress; Tushnet, Making Civil Rights Law 111.

dissented.[59] Jackson noted that while "The Fourteenth Amendment prevents a state from setting up any form or device" of discrimination, "having set up a primary that is open does not prevent this." He refused to decide that "its success makes it unconstitutional," because "people have some rights."[60]

Black drafted what was supposed to be a majority opinion, but the only two justices to join would be Douglas and Burton. He argued, based on trial testimony and the trial judge's findings, "that Jaybird activities follow a plan purposefully designed to exclude Negroes from voting and at the same time to escape the Fifteenth Amendment's command that the right of citizens to vote shall neither be denied nor abridged on account of race."[61] He also concluded, like the trial judge, that "the Jaybird organization was a political organization or party" within the meaning of Smith v. Allwright and circuit court cases on white primaries, and that the distinction between its primary and the all-white Texas primary "is not one of substance but form."[62] According to Black, it was "significant that precisely the same qualifications as those prescribed by Texas entitling electors to vote at county-operated primaries are adopted as the sole qualifications entitling electors to vote at the county-wide Jaybird primaries with a single proviso – Negroes are excluded." Since "Everyone concedes that such a proviso in the county-operated primaries would be unconstitutional," Black concluded that "The Jaybird Party thus brings into being and holds precisely the kind of election that the Fifteenth

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[59] Jackson, Notes of January 16, 1953 conference, Terry v. Adams; Tushnet, Making Civil Rights Law 111.
[60] Dickson, ed., The Supreme Court in Conference 840.
[61] 345 U.S. at 463-64.
[62] 345 U.S. at 465 n.1. According to Black, the Fifteenth Amendment, applicable statutory law (8 U.S.C. sec. 31) and prior case law "together show the meaning of 'elections'" to be "any election in which public issues are decided or public officials selected." 345 US at 468.

Amendment seeks to prevent."[63] Initially, the plurality opinion's author avoided a direct discussion of how the structure of the Jaybird Association affected the state action issue. Instead, he focused on how its primary served the function of neutralizing African American voting rights:

> It is argued that the right to vote is not wholly 'denied' – Negroes in Fort Bend County, Texas, it is said, are free to vote in the Democratic primary or the general election. But these elections because of the customs and usage in that county have become mere formal ratifications of the policies and the candidates Jaybirds have already selected. The Fifteenth Amendment forbids not only complete denial of the right to vote because of race; it forbids abridgment or dilution of that right.[64]

On March 13, Frankfurter circulated a draft concurrence in which he observed that "the Jaybird primary is as a practical matter the instrument of those few in this small county who are politically active – the officials of the local Democratic party and, we may assume, the elected officials of the county,"[65] who sanction the Jaybird primary with their "participat[ion] by voting" in it.[66] To Frankfurter, Terry v. Adams was another instance "in an endeavor to screen what is effectively an exertion of State authority in preventing Negroes from exercising their constitutional right of franchise." The difference between Terry and Smith v. Allwright, was "'so slight a change in form' … that the result should not differ in substance." [67] Even though "the action of the Association itself may not be outlawed, its role in the entire scheme to subvert the operation of the official primary," joined by "the entire white community, including the

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[63] 345 U.S. at 469; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1898.
[64] Hugo Black, Jan. 30, 1953 memorandum, Box 179, Legal File: Supreme Court – O.T. 1952 Cases – No. 52, Terry et al. v. Adams et al., Robert H. Jackson Collection, Library of Congress 7. Black deleted this language from the final version. Hugo Black, May 4, 1953 proof, Box 179, Legal File: Supreme Court – O.T. 1952 Cases – No. 52, Terry et al. v. Adams et al., Robert H. Jackson Collection, Library of Congress 8.
[65] Felix Frankfurter, March 13, 1953 memorandum, Box 179, Legal File: Supreme Court – O.T. 1952 Cases – No. 52, Terry et al. v. Adams et al., Robert H. Jackson Collection, Library of Congress 3.
[66] Felix Frankfurter, March 13, 1953 memorandum, Terry v. Adams 3.
[67] Felix Frankfurter, March 13, 1953 memorandum, Terry v. Adams 3-4.

election officials charged by Texas law with the fair administration of the primaries, brings it within the reach of the law."[68]

In his next draft, dated March 23, Frankfurter admitted that "This case is for me by no means free from difficulty" with regard to the state-action requirement, but ultimately concluded in his final version that "This phrase gives rise to a false direction in that it implies some impressive machinery or deliberative conduct normally associated with … a sovereign state," when all that is required is "somewhere, somehow, to some extent, one must find the infusion of conduct by officials, thereby panoplied with State power, into conduct resulting in any scheme by which colored citizens are denied voting rights merely because they are colored."[69] And Frankfurter found sufficient action to invoke the Fifteenth Amendment here.[70]

In an undated memorandum most likely written when Black's and Frankfurter's were the only two opinions in circulation, law clerk William Hubbs Rehnquist critiqued them in anticipation of a possible Jackson dissent. The clerk argued that Black's approach "simply assumes the whole point in issue," as it "utterly fails to face the problem of state action": Black "says rather that the effect of the Fifteenth Amendment is to prevent the states from discriminating against Negroes in official elections; the result

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[68] Felix Frankfurter, March 13, 1953 memorandum, Terry v. Adams 6-7.

[69] Felix Frankfurter, March 23, 1953 memorandum, Box 179, Legal File: Supreme Court – O.T. 1952 Cases – No. 52, Terry et al. v. Adams et al., Robert H. Jackson Collection, Library of Congress 2; 345 U.S. at 473.

[70] Frankfurter disagreed with the relief granted by the District Court and approved by Black, "that petitioners be allowed to vote in the Jaybird primary," because "the vice in this situation is not that the Jaybird primary itself is the primary discriminatorily conducted under State law but is that the determination there made becomes, in fact, the determination of the Democratic primary by virtue of the participation and acquiescence of State authorities." According to Frankfurter, "We cannot tell the State that it must participate in and regulate this primary; we cannot tell that State what machinery it will use" to comply with the Constitution. Instead, the Jaybird Association "should be enjoined from holding its primaries or in any like manner from bringing together the entire electorate but excluding Negroes to predetermine the primary candidates." Frankfurter, March 13 Memorandum, Terry v. Adams at 7.

here is to accomplish that result 'by indirection;' therefore that result is bad."[71] Frankfurter's approach was little better, because it "places the weight of the decision on the rather skimpy support" in the fact that "the county election officials voted in the Jaybird primary!" Rehnquist concluded, "When one must strain this hard to reach a result, the chances are that something is the matter with the result …"[72]

Rehnquist then marshalled "ideas which [Jackson] expressed last week." These thoughts as summarized by Rehnquist, were not inconsistent with those expressed by the Justice himself. They centered on the constitutional right to "freedom of association and majority rule." Beginning with the proposition, "the constitution does not prevent the majority from banding together, nor does it attaint success in the effort," he went on to discuss race relations in the South, and the Court's role in changing them, in terms harsher than those used by his boss: "It is about time the Court faced the fact that the white people on the South don't like the colored people; the constitution restrains them from effecting this dislike thru state action, but it most assuredly did not appoint the Court as a sociological watchdog to rear up every time private discrimination raises its admittedly ugly head." Alluding to the issues that had festered between the Court and the Roosevelt Administration, Rehnquist warned: "To the extent that this decision advances the frontier of state action and 'social gain,' it pushes back the frontier of freedom of association and majority rule. Liberals should be the first to realize, after the past twenty

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[71] William H. Rehnquist, "Re: Opinions of Black and FF in Terry v. Adams," Box 179, Legal File: Supreme Court – O.T. 1952 Cases – No. 52, Terry et al. v. Adams et al., Robert H. Jackson Collection, Library of Congress; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1899-1900.

[72] William H. Rehnquist, "Re: Opinions of Black and FF in Terry v. Adams." Rehnquist referred in his memorandum to his boss's dissent a month earlier in Lutwak v. United States, 344 U.S. 604 (1953). Jackson began that opinion, "Whenever a court has a case where behavior that obviously is sordid can be proved to be criminal only with great difficulty, the effort to bridge the gap is apt to produce bad law." 344 U.S. at 620 (Jackson, J., dissenting).

years, that it does not do to push blindly through towards one constitutional goal without paying attention to other equally desirable values that are being trampled on in the process."[73]

At about the same time, Jackson received a different analysis from Justice Tom Clark; in Jackson's file is his colleague's typewritten, undated rough draft. Clark, a Texan, was a controversial Truman appointment, a reputed lightweight tainted by charges of "blatant cronyism" and an "antilibertarian posture, especially regarding procedural safeguards in criminal justice and toward minority groups." Yet the NAACP and the Anti-Defamation League both supported him, and one might sense why by his performance in the Jaybird case.[74] His first draft (more of a pre-draft) represented an early effort at expanding upon a one-page list of arguments and argument fragments, written in Clark's handwriting and kept in his files:

> primaries are a part of the election machinery of the state and a state cannot, by allowing a political party to take over this part of its election machinery avoid the provisions of the Constitution
>
> They are trying to do by indirection that which they cannot do
>
> The device shows plainly the unconstitutional purpose for which they were designed
>
> Here the state allows the Jaybirds to take over and operate a vital part of the election machinery in Fort Bend County
>
> when it appears that this discrimination is practiced through rules of a party which controls the primary elections these must be enjoined just as any other practice which threatens to corrupt election or divert them from their constitutional purpose
>
> Exclusion from the primary renders his vote at the Democratic primary insignificant and useless – with this the state is bound to concern itself for the primary is a function of the State government & discrimination is prohibited by the Constitution[75]

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[73] William H. Rehnquist, "Re: Opinions of Black and FF in Terry v. Adams"; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1900.
[74] Abraham, Justices and Presidents (1992 ed.) 246-47.
[75] Tom C. Clark, undated notes, Box A20, Folder 18, Clark Collection, Tarlton Law Library, University of Texas School of Law, Austin, TX.

Clark, focusing mostly on the Jaybirds' intent to supersede the official primary and the government's acquiescence in the scheme, seemed to be attempting a new legal theory with which to invalidate the Jaybird primary.

On March 14, Clark sent to Jackson and the other three dissenters a typeset, more detailed draft. By then, the author had already talked to Vinson "and have changed the old draft as per attached," though Vinson was still "non-committal." He asked Jackson for "suggestions," and circulated a revised version on April 2.[76] Clark premised this opinion on the argument, that "the Jaybird Democratic Association operates as part and parcel of the Democratic Party, an organization existing under the auspices of Texas law" and subject to the strictures of Smith v. Allwright. He marshalled a number of facts he found telling, some of which could be found in other opinions, others not. "Whether [it was] a separate organization or an adjunct of the local Democratic Party," what was critical for Clark was the organization's "selecting its nominees and using its machinery for carrying out their admitted design of eliminating the weight and effect of Negro ballots in Fort Bend County." Under the circumstances, granting African Americans access to the Democratic primary mattered little, because

> … his must be an empty vote cast after the real decisions are made. And because the Jaybird-indorsed nominee meets no opposition in the Democratic primary, the Negro minority's vote is nullified at the sole stage of the local political process where the bargaining and interplay of local political forces would make it count.[77]

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[76] Tom C. Clark, Memorandum and attached note, March 14, 1953, Box 179, Legal File: Supreme Court – O.T. 1952 Cases – No. 52, Terry et al. v. Adams et al., Robert H. Jackson Collection, Library of Congress; Tom C. Clark, Memorandum, April 2, 1953, Box 179, Legal File: Supreme Court – O.T. 1952 Cases – No. 52, Terry et al. v. Adams et al., Robert H. Jackson Collection, Library of Congress.

[77] Clark, March 14, 1953 Memorandum, Terry v. Adams at 1-3; Clark, April 2, 1953 Memorandum, Terry v. Adams at 1-3. Among the parallels significant to Clark were: that voter qualifications (save for race) were the same in both; that "each candidate offers his candidacy subject to the action of [the Jaybird] primary *and the Democratic primary of July*, "[t]hus linking the two primaries together"; that more voters participated in the Jaybird primary than in the Democratic primary; "since 1889 the winners of the Jaybird

Of the state action requirement, Clark suggested that if, under the Fifteenth Amendment, government "devolve[] upon a political organization the uncontested choice of public officials," that organization may be regulated as a governmental body. [78]

With the benefit of arguments from all sides, Jackson drafted a dissent. His April 3 version professed concern for racial justice, but concluded that the Constitution and applicable statutes failed to authorize the morally prescribed action. The violence of his mental conflict, as well as the degree of his conviction, was expressed in his melodramatic insistence that "… if I were to be choked to death for saying so, I would still have to affirm that [the majority opinion] is not good law."[79]

Jackson professed that "[t]he result which the Court reaches," unlike the one to which he planned to give his vote, "is consistent with my political views and my crude concept of sociology." He predicted that, should the Court's ruling be "accepted in good part, it will probably be an improvement in race relations in the little area affected," as the primary was "a hateful little local scheme," and "what happens to it would cause me no worry." And yet:

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balloting, with but a single exception … ran unopposed and invariably won" the Democratic primary and general election for countywide office.

[78] Clark, March 14, 1953 Memorandum, Terry v. Adams at 1-3; Clark, April 2, 1953 Memorandum, Terry v. Adams at 1-3. Shortly thereafter, Minton sent Jackson a note in which he "noted acerbically to Jackson" that "When the Jaybird opinion comes down, there may be some question as to which election returns the Court follows! It will be damn clear they aren't following any law." Tushnet, Making Civil Rights Law 112; Sherman Minton to Robert H. Jackson, March 28, 1953, Box 16, File: Minton, Sherman, Robert H. Jackson Collection, Library of Congress.

[79] Robert H. Jackson, Memorandum, April 3, 1953, Box 179, Legal File: Supreme Court – O.T. 1952 -- Cases – No. 52, Terry et al. v. Adams et al., Robert H. Jackson Collection, Library of Congress 1.

Tushnet has argued that the Jackson draft confirms that the second Rehnquist memorandum "speaks not only of Jackson's views but captures some of the flavor of Jackson's phrasings," and yet it "picked up on only one side of Jackson's ambivalence and perhaps amplified it a bit in outlining the dissent." Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1900-01. Moreover, Rehnquist's writing expressed none of the sympathy for African Americans present in Jackson's. The similarities and dissimilarities parallel those in the memoranda each wrote in the early days of Brown. See Chapter 9.

> … unfortunately, in 1937, I participated in a struggle led by President Franklin D. Roosevelt to keep this Court from writing its own views into the law of the land on the pretense that they were distilled from the Constitution. It is true that on most of these questions the Court has changed sides; but I still happen to believe that it is not the function of the judiciary to read its political, sociological views into constitutional law. That is what is being done here.[80]

How can a judge so passionate about the moral incorrectness of a result feel so passionate about his vote in favor of it? Not quite one page into a nine-page draft, Jackson began to construct his argument, although signs of his lack of confidence in the result surfaced from time to time.

In Terry, "no law is being held unconstitutional and no official action is being so condemned…. The decision is that the individuals comprising the unofficial group of Jaybirds are behaving unconstitutionally."[81] The Fifteenth Amendment guaranteed the right to vote regardless of race, but it "prohibits only governmental action."[82] As in Brown (which was already pending while the justices were deciding Terry), Jackson suggested, in a bit of a *non sequitur*, suggested "that Congress … could prohibit any concerted action by individuals which had the effect of frustrating the provision by preventing Negroes from voting in the elections" under section 2 of the Amendment, which provides that "'Congress shall have the power to enforce this article by appropriate legislation.'"[83] Unlike the early stages of Brown, however, here Jackson conceded the political impossibility of what he was seeking, as Congress was "perhaps, small comfort for the Negroes, for Congress has shown no disposition in something like seventy years

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[80] Jackson, April 3, 1953 Memorandum , Terry v. Adams 1.
[81] Jackson, April 3, 1953 Memorandum, Terry v. Adams 1-2.
[82] Jackson, April 3, 1953 Memorandum, Terry v. Adams 4.
[83] Jackson, April 3, 1953 Memorandum, Terry v. Adams 3-4, quoting U.S. Const., Amend. XV, sec. 2.
The fundamental analytical problem with Jackson's argument is that, regardless of whether the Court or Congress took up the issue, the substantive meaning of the Amendment would be the same; Congress (even if it were willing to do so) would have to face the same state action question as the Court.

to modernize its civil rights laws but has left the courts to deal with the cases coming before them by the application of unfitted, archaic and ill-considered reconstruction legislation." That is why "The Court … has taken the initiative in creating new law, and it is now suggested that it go further in that field."[84]

As willing as Jackson was to accept the soundness of the policy underlying the majority's decision, he concluded that the Court's decision to take the initiative was misguided. He dismissed Black's partial reliance on 8 U.S.C. sec. 31, which barred certain individual acts that would deny African Americans the right to vote,[85] because the statute contained "not one word to prohibit a White caucus for the purpose of determining candidates whom the White voters would support." And in this case, in any event, "There is not a pretense that the Negro is denied the right to vote or that his vote does not count for its full constitutional weight in any election…. There is no suggestion here that the Negro does not vote freely and have his vote counted in the official primary."[86]

Instead, observed Jackson, "these Jaybirds take a vote of the White inhabitants by concerted action to mass the White vote behind favored candidates so as to outvote the Negroes. What this amounts to," he continued, "is a combination of the White voters, originally through an assembly but now through a ballot, to assure that they will act in

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[84] Jackson, April 3, 1953 Memorandum, Terry v. Adams 4. For Jackson's handling of the Congressional execution issue in Brown, see pp. 438, 449-52.

[85] Individuals were liable under the statute if they, for example, "'by force, bribery, threats, intimidation, or other lawful means … hinder, delay, prevent, or obstruct, or shall combine and confederate with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote or from voting at any election ….'"; or "prevent, hinder control, or intimidate a voter by threats of depriving him of employment, ejecting him from rented … property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence; or "'band or conspire … or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution.'" Jackson, April 3, 1953 Memorandum, Terry v. Adams 4-6.

[86] Jackson, April 3, 1953 Memorandum, Terry v. Adams 7.

concerted action." The disadvantage to African Americans stemmed not from misconduct, but from the racial demography of Fort Bend County. And, he concluded, the Constitution should not bar an activity simply because the majority is behind it, regardless of the majority's composition:

> Since there are about 18,000 White inhabitants and only less than 5,000 Negroes, the movement pretty uniformly succeeds. But if the colored people held a colored caucus to unite their scattered forces back of single candidates, I would not think that either under the Constitution or this statute we could say it was illegal. I do not think it becomes so because those who hold it are White nor because it succeeds.[87]

In Jackson's case file, in his own hand, is an undated sheet of legal pad with a little less than half a page of raw notes apparently corresponding to this section of the April 3 draft. After outlining the

> Negros right to vote every election, every primary
>
> to combine their strength any precinct or region
>
> to strike down every device not give full weight

Jackson wrote,

> So have whites.

Addressing the countervailing value of "majority rule," Jackson wrote that it had been "never held illegal to combine to make such." Indeed, "Every pol[itical] party is in [a] sense [a] conspiracy to gain or keep control." The "Difference" between "legal" and "illegal," claimed Jackson, "is one uses no force when does." He concluded, "Combination essence politics."[88]

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[87] Jackson, April 3, 1953 Memorandum, Terry v. Adams 7-8.
[88] Robert H. Jackson, undated raw notes, Box 179, Legal File: Supreme Court – O.T. 1952 -- Cases – No. 52, Terry et al. v. Adams et al., Robert H. Jackson Collection, Library of Congress.

As for Frankfurter's argument that the participation of county officials in the Jaybird Primary constituted state action, Jackson argued that the parallels resulting from the fact that "any group numerous and cohesive enough to elect the officers of government [will] have a certain superficial identity with government," could not justify viewing the group and the state as a single entity: "the identification of the dominant party with the state was not a device that was accepted in this country, except to the extent that the law confers upon the party the right to make a nomination and have it appear on the ballot."[89] He distinguished political from legal consequences, claiming, "If these Jaybirds put a Jaybird ticket on the voting machine or had official recognition in any other form so that their action had legal consequences, I would agree that [the Jaybird primary] should be stricken down. But the Jaybird action has only political consequences," because the Association "does not put a ticket on the voting machine," and only "brings the Jaybird vote back of a particular candidate."

The Jaybirds, like "a malignant-minded demagogue," engaged in "hateful business, contrary to the spirit of our institutions, and no one can have any regret at its passing," and despite the "misfortune to think more of the integrity of the law than of any social policy," Jackson could not help but follow his belief that "to do a good deed toward the Negro population of this parochial community we have departed from any sound principle of interpretation of the law." Thus, "Worthy as the end is, I do not believe the end justifies the means, and I think this foul doctrine will yield bitter fruit."[90]

Jackson could not have been satisfied by the consequences likely to attend such a dissatisfying, if legally correct, result. If the Jaybirds were allowed to perpetuate their

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[89] Jackson, April 3, 1953 Memorandum, Terry v. Adams 8-9.
[90] Jackson, April 3, 1953 Memorandum, Terry v. Adams 9.

scheme of racial discrimination, an entire network of similar associations was bound to sprout up throughout the South (indeed, there were already other such groups in existence). Jackson understood this, too, writing that Vinson initially voted in favor of the Jaybirds although he "understood" the case's "implications." Someone as concerned about the rule of law as Jackson could not feel right about wholesale avoidance of the Constitution, especially when that avoidance would harm even more members of an already mistreated minority. The relatively emphatic language Jackson employed in this draft suggests a restless mind, yet possibly also an entrenched one. Would he do what his colleagues did, and look for a way legally to justify the morally right result? Could he reach a result correct both from the standpoint of social policy and from his understanding of legal doctrine?

On April 20, Jackson attempted to answer those questions, with another draft opinion -- this time, of a concurrence that treated the case as a review of the trial court's factual finding that "this Jaybird Democratic Association … despite its form as a voluntary association of individuals, is a legal political party [which] appears in fact to have merged or taken over the Democratic Party of its locality." By so doing, the trial judge brought the Jaybirds "within our ruling in Smith v. Allwright." Because "These findings are supported by evidence," Jackson concluded that the trial judge's ruling against the Jaybirds should be reinstated.[91]

The justice acknowledged that "not … every club, association or league organized to influence elections or primaries becomes subject to the limitations applicable to a political party." Conceding that "Certainly there is a large area of freedom of peaceable

[91] Robert H. Jackson, Memorandum, April 20, 1953, Box 179, Legal File: Supreme Court – O.T. 1952 Cases – No. 52, Terry et al. v. Adams et al., Robert H. Jackson Collection, Library of Congress 1.

assembly and concerted action for political purposes that may be exercised separately by white or colored inhabitants,"[92] the Jaybirds represented more than an instance of factional mobilization. Instead, the facts – "the absence of any basis of selection of cooperation except in the matter of color, the fact that the membership base was as broad and unselective as the whole electorate except the one and only exclusion of color, and that its cohesion and continuity were such that the Jaybird Association completely controlled and virtually supplanted the regular Democratic primary" -- supported the trial judge's finding that the Jaybird Democratic Association was "the de facto political party of their region."[93]

By making it seem a routine case – the District Court made reasonable findings of fact, under well-settled law – Jackson avoided further Supreme Court regulation of elections, while at the same time coming to the right result as he saw it. He also avoided the more doctrinally aggressive approach of Black's opinion, which virtually equated results unfavorable to racial minorities with unconstitutional conduct. But given the aura of routineness with which Jackson clothed his draft concurrence – the reinstatement of a trial court's factual finding, based on established law -- one can only ask what the previous fuss was all about.[94]

Jackson sent his April 20 draft to Clark, and Clark returned four new drafts within the next week. The first, dated April 22, was accompanied by a note that expressed

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[92] Jackson, April 20, 1953 Memorandum, Terry v. Adams 1-2.
[93] Jackson, April 20, 1953 Memorandum, Terry v. Adams 2.
[94] Though Jackson's interpersonal feuding on the Court might have occasionally affected his decisions (E. Barrett Prettyman, Jr. to Felix Frankfurter, October 13, 1955, Felix Frankfurter Collection, Part III, Reel 2 at 4 n.), it may not be fair to attribute Jackson's struggle here to his contretemps with Black, especially since three other justices joined in the same opinion, and since there had been some healing between him and Black by this time.

"Hope [that] this is O.K. as per our conversation."[95] The new introductory paragraph emphasizing the similarity between Smith v. Allwright and this case; the restatement of Smith's holding; and the statement agreeing with the trial court "that this Jaybird Democratic Association is a political party whose activities fall within the Fifteenth Amendment's self-executing ban," all demonstrate how thoroughly Clark incorporated the Jackson draft's line of argument.[96] By more prominently invoking Smith v. Allwright, and emphasizing the role the allegedly "voluntary association" assumed within Fort Bend county's electoral structure, the Jackson argument gave Clark's opinion a more secure doctrinal grounding. And to recognize the countervailing concern that troubled Jackson, the Texan lifted practically verbatim from his colleague's draft a passage asserting the freedom of individuals to combine and act politically, even on the basis of race:

> Not every private club, association or league organized to influence public candidacies or political action must conform to the Constitution's restrictions on political parties. Certainly a large area of freedom permits peaceable assembly and concerted action for political purposes to be exercised separately by white or colored citizens.[97]

Jackson then decided to go along with Clark.[98]

Yet it is in the April 27 draft that the real reason for the reversal might lie. Clark began his factual explication with "An old pattern in new guise is revealed by the record," citing the Court's prior decisions invalidating the white primary in Texas. He

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[95] Robert H. Jackson, April 20, 1953 Memorandum, Box A20, folder 18, Tom Clark Collection, Tarleton Law Library, University of Texas, Austin, TX.
[96] Tom C. Clark, Memorandum, April 22, 1953, Box A20, folder 18, Tom Clark Collection, Tarleton Law Library, University of Texas, Austin, TX (also available in Box 179, Legal File: Supreme Court – O.T. 1952 Cases – No. 52, Terry et al. v. Adams et al., Robert H. Jackson Collection, Library of Congress) 1.
[97] Clark, April 22, 1953 Memorandum, Terry v. Adams 1-2.
[98] Clark, April 23, 1953 Memorandum, Box A20, folder 19, Tom C. Clark Collection, Tarleton Law Library, University of Texas, Austin, Texas.

concluded that paragraph with, "And for more than half a century the [Jaybird] Association has adhered to its guiding principle: to deny the Negro voters of Fort Bend County any effective voice in their government."[99] It was this impatience with some whites' persistence to avoid or evade Constitutional rulings protecting African American rights – the same impatience Jackson himself displayed in prior cases[100] -- which undoubtedly drove all but one of the justices to find reasons for reversing the Circuit Court. Finding the appropriate legal basis for that instinctive decision took a great deal of trial and error, and for four of them, including Jackson, a change of vote.[101]

Minton, once in the majority but now standing alone in dissent, circulated a draft on April 28. His argument resembled in broad strokes Jackson's initial attempt: he made clear at the outset his contempt for the Jaybirds "or their unworthy scheme," but concluded that their primary failed to meet the Fifteenth Amendment's state action requirement.[102] His view of the applicable legal doctrine was strict and literal, as shown by his criticism that the Clark opinion failed to establish "that the Jaybird Association is in any way associated with or forms a part of or cooperates in any manner with the Democratic Party of the County or State, or with the State,"[103] and of the trial judge's finding ("Even if it be said to be a political organization, the Jaybird Association avails

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[99] Tom C. Clark, Memorandum, April 27, 1953, Box A20, folder 19, Tom C. Clark Collection, Tarleton Law Library, University of Texas, Austin, Texas 4. Jackson approved the revisions, and was indeed working so closely with Clark that he approved certain revisions before they had even been typeset. Tom C. Clark, Memorandum, April 27, 1953, Box 179, Legal File: Supreme Court – O.T. 1952 -- Cases – No. 52, Terry et al. v. Adams et al., Robert H. Jackson Collection, Library of Congress 1; Tom C. Clark, Memoranda of April 24 and April 27, 1953, Box A20, folder 19, Tom C. Clark Collection, Tarleton Law Library, University of Texas, Austin, TX.

[100] See pp. 236-40.

[101] Reed and Vinson joined in the Clark opinion, while Frankfurter concurred alone. 345 U.S. at 470, 477.

[102] Sherman Minton, Memorandum, April 28, 1953, Box 179, Legal File: Supreme Court – O.T. 1952 -- Cases – No. 52, Terry et al. v. Adams et al., Robert H. Jackson Collection, Library of Congress 1.

[103] Minton, April 28, 1953 Memorandum, Terry v. Adams 2-5.

itself of no state law open to political organizations…"[104]). If, as the Clark opinion conceded, whites legally can mobilize politically, Minton asked, "Does … failure of the State to act to prevent individuals from doing what they have the right as individuals to do amount to state action? I venture the opinion it does not."[105] The Jaybird-dominated county sounded to him like "situations common in many other places far north of the Mason-Dixon line, such as areas where a candidate must obtain the approval of a religious group…. The propriety of these practices is something the courts sensibly have left to the good or bad judgment of the electorate"[106]:

> all elections and other public business are influenced by all sorts of pressures from carefully organized groups. We have pressure from labor unions, from the National Association of Manufacturers, from the Silver Shirts, from the National Association for the Advancement of Colored People, from the Ku Klux Klan and others. Far from the activities of these groups being properly labeled as state action, they are to be considered as attempts to influence or obtain state action.[107]

A former Minton clerk recalled that his former boss was "'extremely conscious of and insistent upon adhering to the constitutional and statutory limitations imposed on the Court's jurisdiction, regardless of resulting justice or injustice.'"[108] He rarely thought that the law as it stood should be "'outweighed by … fundamental rights,'" as so doing "would have required a more active role for the Court than he was willing to embrace."[109] Minton's most cogent statement of his argument suggests as much:

> It is only when the State by action of its legislative bodies or action of some of its officials in their individual capacity cooperates with such political party or gives it

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[104] Minton, April 28, 1953 Memorandum, Terry v. Adams 5.
[105] Minton, April 28, 1953 Memorandum, Terry v. Adams 6.
[106] Minton, April 28, 1953 Memorandum, Terry v. Adams 10.
[107] Minton, April 28, 1953 Memorandum, Terry v. Adams 10.
[108] Rudko, Truman's Court 124, quoting Wallace, "Mr. Justice Minton – Hoosier Justice on the Supreme Court" 145, 421.
[109] Rudko 124, quoting Barrows v. Jackson, 346 U.S. 249, 257 (1953).

> direction in its activities that the Federal Constitution may come into play. A political organization not using state machinery or depending upon state law to authorize what it does could not be within the ban of the Fifteenth Amendment. … the Jaybird Association did not attempt to conform or in any way to comply with the statutes of Texas covering primaries. No action of any legislative or quasi-legislative body or of any state official or agency ever acted in any manner to deny the vote to Negroes, even in the Jaybird Association primaries.[110]

One serious problem with Minton's approach is that bright lines often fail to contemplate future situations, particularly those in which parties try to evade earlier rulings. Another concerns his narrow view of legal interpretation at the Supreme Court level. Jackson, despite his love of legal certainty, understood that "constitutional questions often leave the judge without the steadying guidance of the common law, and much turns upon the social or judicial philosophies of the judges."[111] While Jackson might sometimes be pilloried for his preference for "techniques of law" over "constitutional provisions with social and political considerations," he understood the need for policy judgments on certain constitutional issues, and had the capacity for struggling with and resolving them.[112]

In his April 28 draft, Black finally tackled the state action issue head-on. He wrote that "For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment," and "The use of the county-operated primary to ratify the result of the prohibited election merely compounds the offense." He concluded, "It [thus] violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any

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[110] Minton, April 28, 1953 Memorandum, Terry v. Adams 6.
[111] Jackson, Full Faith and Credit 2; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*"1901.
[112] Jackson, Full Faith and Credit 2.

device that produces an equivalent of the prohibited election."[113] Black's understanding of the way white supremacy operated gave the situation a whole new meaning, one similar to that of the other Southerner writing an opinion, Clark. Clark, like Black, began with a far different understanding of the organization's intent than did Northerners Jackson and Minton. The Jaybirds did far more than set up a club or pressure group, with a structure parallel to the county board of elections; instead, with the complicity of the white electorate, they privatized the election, leaving behind an eviscerated shell of a government-run apparatus. With that understanding, the fact that "The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded," was no mere statistic, but confirmed the county's earlier intent.[114]

It did not take a Southerner to understand, however. *New York Times* reporter Luther A. Huston, in a newspaper clipping found in Jackson's case file, also seemed to get it, when he wrote that the Jaybird Primary "was a device to bar Negroes from voting and dodge the guarantee of the Fifteenth Amendment…."[115] The organization was the product of an intent to privatize elections, with the distinct purpose of excluding African Americans. Using the state action requirement as a bar to relief for those discriminated against would have not only ignored the county's initial complicity, but also would have

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[113] Hugo L. Black, Memorandum, April 28, 1953, Box 179, Legal File: Supreme Court – O.T. 1952 Cases – No. 52, Terry et al. v. Adams et al., Robert H. Jackson Collection, Library of Congress 8; 345 U.S. at 469.
[114] 345 U.S. at 469-70. In his May 1 draft, Clark chided Minton for his exclusive reliance on the parties' stipulated facts in a new footnote 12: "The record in this case comprises not only a concise stipulation of facts, but also 43 additional pages of directly relevant testimony. Obviously the whole of the record underlay the determinations of the courts below, and must be considered in an appellate review of their decisions." Tom C. Clark, May 1, 1953 memorandum, Box A20, folder 19, Tom C. Clark Collection, Tarleton Law Library, University of Texas, Austin, Texas 6 n.12. As Justice Black's copious use of the testimony in his opinion indicated, the Association's discriminatory purpose most clearly came out through the witnesses, but Minton failed to address this part of the trial record in his dissent.
[115] Luther A. Huston, "High Court Upsets a Limited Primary," undated clipping from the New York Times, Box 179, Legal File: Supreme Court – O.T. 1952 Cases – No. 52, Terry et al. v. Adams et al., Box 179, Robert H. Jackson Collection, Library of Congress.

set a horrible precedent, by sanctioning a means for evading the Constitution which would have been all too easy for the rest of the South to emulate. Devising an opinion that both honored the constitutional rights of these voters and satisfied the precise dictates of the Fifteenth Amendment was a struggle for all of the justices, but no one epitomized that struggle better than Jackson, who almost dissented like Minton, but gradually found his peace with the tangle of legal issues involved and improved the Clark opinion in the process. Yet he still lacked the fundamental understanding of what happened and why, a deficiency that made the case much more difficult for him than it could have been.

The leading scholar on the Jaybird Democrats concluded that in Terry v. Adams the Court "stretched the constitution so as to correct" a perceived injustice.[116] That was Jackson's initial impression as well, but the electoral system as it had evolved in Fort Bend County left a sufficiently bitter taste in his mouth, that he reexamined the facts and concluded that they and established precedent left enough room for invalidating the Jaybirds' racial exclusion. Yet Jackson, too, probably never lost the sense that he was stretching things a bit. Given the timing of Terry, the feeling that the Court was starting to make rulings beyond the Constitution's purview could not have come at a worse time – right when the Court was considering overruling Plessy v. Ferguson.[117]

The Court did not invalidate the Jaybird organization or even the primary; it simply found the exclusion of African Americans unconstitutional. Yet neither the Jaybirds nor their primary long survived their loss in the Supreme Court. They chose to carry on, confident that their term limits and candidate prescreening provided enough reason for their continued existence. Voting in the primary was still heavy in 1956. But

[116] Yelderman, The Jay Bird Democratic Association of Fort Bend County 241.
[117] Hutchinson noted the same timing in the context of a Court, fractured by Terry, facing fundamental disagreements on Brown. Htuchinson, "Unanimity and Desegregation" 37-38.

after that year, increasing numbers of newcomers to the area raised questions of the Jaybirds' continued relevance. The last year of Jaybird endorsements was 1958. On October 15, 1959, the executive committee recessed the primary in what turned out to be the organization's last meeting. Its financial accounts were closed in 1970.[118]

Conclusion

Protecting African Americans' right to vote would seem to present, if the Fifteenth Amendment were any indication, an obvious task for the Court; but Southern efforts to privatize the key part of the electoral process in that region created, depending on one's perspective, legal subtleties or red herrings. In Smith v. Allwright, Jackson had some difficulty resolving dilemmas posed by the right of free association (a dilemma put in even starker relief in Terry v. Adams), and the likely consequences of the Roosevelt Court's overruling of one more established precedent. With an ostensibly more difficult set of circumstances in Terry v. Adams, deciding what to do about white supremacists' efforts to bypass the state action requirement was not Jackson's (and Minton's) problem alone. Indeed, it was an issue that survived their departure from the bench, with the Civil Rights Act of 1964 (which required privately-owned public accommodations, such as restaurants and hotels, to serve customers without regard to race) upheld not under the authority of the Reconstruction amendments, but on the basis of Congress' power to regulate interstate commerce.[119]

Yet for the two justices from the Deep South, Terry presented a totally different issue: the usurpation, by a private organization, of a government function for the purpose of engaging in racial discrimination, and not, as some of their colleagues -- including

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[118] Yelderman, The Jay Bird Democratic Association of Fort Bend County p. 242 and ch. 7.
[119] Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

Jackson – believed, the right of free association. So a case that seemed to present a situation of bending Constitutional state action requirements probably should not have been seen that way at all; but the existence of that belief could not have helped Jackson come to terms with the school segregation cases – cases which would have required overruling a well-established precedent nearly sixty years old -- then on his desk.

Another aspect of Terry v. Adams bears examination. In his first draft, Jackson laid bare his frustration with the concept of any kind of racial consciousness, just as he had when he commented on "the right to [express opinion] upon matters of public interest" in his dissenting opinion in the hate-speech case, Beauharnais v. Illinois. In a comment in that case, referring to the nascent civil rights movement, Jackson suggested that, once African Americans started banding together to fight for their rights, opponents had the right to express their opposition: "When any naturally cohesive or artificially organized group possess a racial or sectarian solidarity which is or may be exploited to influence public affairs, that group becomes a legitimate subject for public comment."[120] Yet while Jackson agreed that the state could "place decent bounds upon" that type of comment, he was "not ready to hold that group purposes, characteristics and histories are to be immunized from comment or may be discussed only at the risk of prosecution free of all usual safeguards."[121] Jackson sounded a cautionary note to those on the then morally right side of the civil rights struggle: "No group interest in any particular prosecution should forget that the shoe may be on the other foot in some prosecution tomorrow."[122]

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[120] 343 U.S. at 301.
[121] 343 U.S. at 301.
[122] 343 U.S. at 305.

Seeing how wildly political fortunes, and the balance of the power on the Court, have changed in the decades since Jackson's death, one cannot say that he was wrong in warning about not raising the stakes for countervailing forces in Beauharnais, any more than he overestimated the power of racial and religious bigots when he urged his friend Frankfurter to step back from his rightful role in Smith v. Allwright. In the voting rights cases, Jackson came to realize that what was right, and what was constitutional, had more in common than someone like Minton realized; yet even here, perhaps because of his limited understanding of the nature of Southern white supremacy, he believed there existed a split between the right result and the constitutionally required one. His belief in that dichotomy must have made the school segregation cases more difficult.

Chapter 8: Jackson At the Precipice -- Desegregating Graduate Education and Railroad Dining

> My real concern, insofar as I can read my own feelings is to see this thing decided wisely rather than to see either side win.
>
> -- Robert H. Jackson[1]

Introduction

By the late 1940s, it was becoming increasingly apparent that the Supreme Court was headed for a showdown with Jim Crow itself. All the pieces were coming into place: lawsuits from civil rights groups and individuals challenging segregated facilities; a growing awareness of racial injustice among white Americans; and a growing realization among the justices themselves that segregation was a constitutionally intolerable form of discrimination.[2]

Yet at the same time, concerns about reconciling those Americans steeped in the traditions of segregation to the emerging new social realities gave pause to some of the justices, including Jackson. The Court passed on initial pleas to overrule Plessy v. Ferguson, and instead searched for less sweeping justifications for their rulings.[3] Jackson emerged as an advocate for avoiding use of the Constitution as a rationale for civil rights decisions whenever possible.[4] Justices also sought to narrow the scope of rulings to their specific facts, rather than extend the rationale to other situations; and to avoid ruling in cases raising procedural issues.[5] But he and his colleagues knew that more pervasive

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[1] Robert H. Jackson to Charles Fairman, March 13, 1950, Box 12, File: General Correspondence – Fairman, Charles, Robert H. Jackson Collection, Library of Congress 1; undated draft of Mar. 13, 1950 letter from Jackson to Charles Fairman, Box 12, File: General Correspondence – Fairman, Charles, Robert H. Jackson Collection, Library of Congress 1.
[2] Tushnet, Making Civil Rights Law chs. 5-10; Klarman, From Jim Crow to Civil Rights ch. 5.
[3] Urofsky, Division and Discord ch. 9; Kluger, Simple Justice (1977 ed.) ch. 11; Morgan v. Virginia, 328 U.S. 373 (1946).
[4] See notes 90-91 and accompanying text.
[5] Fisher v. Hurst, 333 U.S. 147 (1948).

forms of segregation were bound to fall in the face of ostensibly confined precedents. So the trio of major decisions in 1950 -- Henderson v. United States, outlawing segregation in railroad dining cars; Sweatt v. Painter, the law school segregation case; and McLaurin v. Oklahoma State Regents for Higher Education, the graduate school segregation case[6] -- marked for Jackson the start of a multi-year effort to make his peace with the eventual overruling of Plessy itself.

Jackson, Race Relations and Resistance to Social Change

The Supreme Court, and Jackson, reflected trends in American society. In Washington, Harry Truman, whose Committee on Civil Rights had stunned many Americans with its groundbreaking report "To Secure these Rights," presided over the first nonsegregated inaugural in 1949; black and white professionals broke bread together; fewer public facilities were segregated. The Court welcomed its first African American clerk (to Frankfurter's chambers) in 1948.[7] And, as political scientist and Supreme Court scholar C. Herman Pritchett concluded, "the liberal record of the Vinson Court on racial discrimination cases stands out in sharp contrast to the generally antilibertarian trend of its decisions in other fields."[8] National trends also moved in the direction of desegregation, with the first steps toward integrating the military and professional sports.[9]

Racial turmoil worsened through the war and beyond.[10] Truman paid for his civil rights efforts with a third-party challenge from a Southern Democratic faction in 1948,

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[6] 339 U.S. 816; 339 U.S. 629; 339 U.S. 637.
[7] Gardner, Harry Truman and Civil Rights chs. 2 and 4, and p. 149; McCoy and Ruetten, Quest and Response 86ff.; Bernard Schwartz, Decision: How the Supreme Court Decides Cases (New York: Oxford University Press, 1996) 66.
[8] Pritchett, Civil Liberties and the Vinson Court 145.
[9] Klarman, From Jim Crow to Civil Rights 209.
[10] Green, The Secret City 274-77.

and with congressional inaction. Party loyalists in the South were forced to turn up the race-baiting rhetoric to keep their jobs against racial hard-liners.[11] In Washington, municipal parks maintained Jim Crow despite citizen protests, and private accommodations frequently excluded African Americans.[12] Among the whites who found change too disturbing to bear was a senior Supreme Court Justice. Plans for an office Christmas party were "quietly shelved" in 1947 because the clerks insisted on inviting African American employees, and Justice Reed refused to go under those circumstances. The Court's washrooms remained segregated until after Earl Warren's arrival in 1953, and there was no Christmas party until 1959.[13]

Jackson personally participated in racial change in the city. While he had "relatively few contacts with African Americans, not because he avoided them, but because he traveled in different circles,"[14] he did, occasionally, have meaningful interracial interaction. In 1947, he gave a well received talk on the legacy of Nuremberg at a convention of the National Bar Association (the organization for African American

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[11] McCoy and Ruetten, Quest and Response chs. 5-10, 12-14; Frederickson, The Dixiecrat Revolt and the End of the Solid South 96-101, 199, 203-05, 205-16.

The States' Rights Party candidacy of the then-Democratic governor of South Carolina, Strom Thurmond, made the efforts of Thurmond and others to humiliate Truman at that year's Jefferson-Jackson Day Dinner in Washington, in retaliation for the "symbolic insistence that no special provisions … be made to segregate Negro guests," seem sophomoric by comparison. Garson, The Democratic Party and the Politics of Sectionalism 241.

[12] Green, The Secret City 262-64, 269-70, 272; Kenesaw M. Landis, "Segregation in Washington: A Report of the National Committee on Segregation in the Nation's Capital" (Chicago, 1948) *passim*. Gardner, Harry Truman and Civil Rights 107, 118; Sean Dennis Cashman, African Americans and the Quest for Civil Rights 1900-1990 (New York: NYU Press, 1991). Pioneering civil rights attorney Charles Hamilton Houston could enjoy going out for lunch when he was working in New York City, but not in his hometown of Washington, DC "because of segregation." McNeill, Groundwork 131.

The city was not to desegregate the last of its public facilities until the night of May 17, 1954 – the date on which the Supreme Court announced the Brown decision. Green, The Secret City 290-95, 308-10.

[13] The party precipitated close to an hour's debate at conference, with a particularly memorable exchange between Reed and Frankfurter. Reed insisted that, despite the Court's recent concern with civil rights, an all-white party was a "private" affair; Frankfurter retorted by observing that with the not inconsiderable amount of the Court's conference time consumed on the issue, "The Court is entangled no matter what way you look at it." The first African American law clerk in the Court's history came to work for Frankfurter the next year. Schwartz, Decision 66-67.

[14] Telephone interview with E. Barrett Prettyman, Jr., September 17, 2004.

lawyers); the next speaker on the program used the Nuremberg example to argue that "discrimination against minorities should be looked upon as a crime by all Americans." His visible role at the convention was not unique among the justices: Rutledge offered greetings at the convention's evening meeting and banquet and, according to the program, Chief Justice Vinson and the associate justices -- no exceptions noted -- attended as special guests.[15] A few months later, Jackson (like Douglas and Frankfurter before him) was guest of honor at a trustees' dinner meeting on the Howard University campus; it was a "quite informal" and integrated affair for about 30-40 people.[16]

Yet public resistance, and Jackson's own judicial inclinations, left him ambivalent. While the university desegregation cases and Henderson were pending, he indicated his support of the poll tax despite its racial implications, exchanging in a sympathetic correspondence with a lawyer whose Georgia Bar Journal defense of the levy included a transparently incredible denial that it was designed to depress the African

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[15] The president-elect of the NBA wrote to Jackson: "Your address was so scintillating and inspiring and its sincerity so palpable, that there has been a widespread request for copies of your remarks when the proceedings have been transcribed. The occasion of your appearance on our program was certainly one of the highlights of the convention, and it contributed in no small way in making this the most outstanding convention which the Association has ever had." Thurman L. Dodson to Robert H. Jackson, December 4, 1947, Box 45, Speeches and Writings Files – Speech, National Bar Association, Washington, DC, November 28, 1947, Robert H. Jackson Collection, Library of Congress; "Jackson Says Nazi Trials Put Law on Side of Right," unidentified press clipping, Box 45, Speeches and Writings Files – Speech, National Bar Association, Washington, DC, November 28, 1947, Robert H. Jackson Collection, Library of Congress. Unfortunately, there is no text of the "informal" speech in Jackson's files, nor in the NBA's official publication, the National Bar Journal. Robert H. Jackson to Thurman L. Dodson, October 24, 1947, Box 45, Speeches and Writings Files – Speech, National Bar Association, Washington, DC, November 28, 1947, Robert H. Jackson Collection, Library of Congress; "Program of the National Bar Association, 22nd Annual Convention," National Bar Journal 5 (Dec. 1947) 476; "Highlights of the 22nd Annual Convention of the National Bar Association," National Bar Journal 6 (Mar. 1948) 80, 81.

[16] Jacob Billikopf to Robert H. Jackson, January 22, 1948, Box 45, Speeches and Writings File: Speech, Howard University Board of Trustees Dinner Meeting, Washington, DC, Feb. 27, 1948 (Speech notes), Robert H. Jackson Collection, Library of Congress; Robert H. Jackson to Jacob Billikopf, January 30, 1948, Box 45, Speeches and Writings File: Speech, Howard University Board of Trustees Dinner Meeting, Washington, DC, Feb. 27, 1948 (Speech notes), Robert H. Jackson Collection, Library of Congress; Jacob Billikopf to Robert H. Jackson, Feb. 2, 1948, Box 45, Speeches and Writings File: Speech, Howard University Board of Trustees Dinner Meeting, Washington, DC, Feb. 27, 1948 (Speech notes), Robert H. Jackson Collection, Library of Congress; Mordecai W. Johnson to Robert H. Jackson, Mar. 8, 1948, Box 45, Speeches and Writings File: Speech, Howard University Board of Trustees Dinner Meeting, Washington, DC, Feb. 27, 1948 (Speech notes), Robert H. Jackson Collection, Library of Congress.

American vote.[17] Meanwhile, he joined a majority in upholding racially discriminatory voting apportionment in Georgia, maintaining a hands-off approach in state elections which would continue until the heyday of the Warren Court.[18] Jackson aired his apprehension about a court-ordered end to segregation in correspondence with Charles Fairman, a leading legal scholar and former Nuremberg staffer, about the university desegregation cases. Resolving the dilemma of race relations would only get more difficult for the justice, but his misgivings did not affect his votes in cases directly contesting racial discrimination – a concept which, over the course of the 1940s, came to include segregation.

Restrictive Real Estate Covenants

The Court barred judicial enforcement of racially restrictive real estate covenants in 1948.[19] Jackson, along with Reed and Rutledge, recused himself from those cases, Shelley v. Kraemer and Hurd v. Hodge; Jackson and Reed, still on the Court in 1953, also

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[17] Robert H. Jackson to Hon. Samuel H. Sibly, July 8, 1949 and attached article, Box 19, File: General Correspondence Sh-Si, Robert H. Jackson Collection, Library of Congress. Providing a contrast was Court moderate Harold Burton, who as a United States senator had opposed the poll tax. Clement E. Vose, Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases (Berkeley: University of California Press, 1959) 183.

[18] Black and Douglas dissented, finding an Equal Protection violation that undermined earlier voting rights precedent. South v. Peters, 339 U.S. 276 (1950); Pritchett, Civil Liberties and the Vinson Court 219-20; Reynolds v. Sims, 377 U.S. 533 (1964).

[19] Sources discussing racially restrictive real estate covenants and other forms of housing discrimination against African Americans include Green, The Secret City; Thomas J. Sugrue, The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit (Princeton, NJ: Princeton University Press, 1996); Arnold R. Hirsch, Making the Second Ghetto: Race and Housing in Chicago, 1940-1960 (New York: Cambridge University Press, 1983; Chicago, University of Chicago Press, 1998); Kluger, Simple Justice ch. 11; Vose, Caucasians Only; Tushnet, Making Civil Rights Law ch. 6; George S. Schuyler, "All over the Country," The American Mercury (June 1949), republished in Reporting Civil Rights Part One 112, 115.

Five years later, in Barrows v. Jackson, the Court split on whether enforcing judgments from lawsuits against the seller of covenanted property violated the Fourteenth Amendment. The majority found that it did, while Vinson, issuing a "bitter" dissent, claimed that the rights of white property owners were unrelated to those of African Americans. Barrows v. Jackson, 346 U.S. 249, 260 (1953); Vose, Caucasians Only ch. 10; James Jerome Bolner, "Mr. Chief Justice Vinson: His Politics and His Constitutional Law" (diss., UVA, 1962) 305-06; Pritchett, Civil Liberties and the Vinson Court 142-43; Klarman, From Jim Crow to Civil Rights 216, 261; Urofsky, Division and Discord 249-50; St. Clair and Gugin, Chief Justice Fred M. Vinson of Kentucky 302-03.

removed themselves from a followup case, Barrows v. Jackson. Justices decide not to participate from a case at their own discretion, when they have, or appear to have, conflicts of interest which might call their impartiality into question. They do not have to explain why they removed themselves from a case, but those reasons can become the object of speculation, especially in high-visibility cases. In these cases, it was generally supposed that Jackson, Reed and Rutledge did so because they owned or occupied covenanted property.[20] In private correspondence, Jackson confirmed the truth of the media speculation.[21]

Jackson and the other recused justices received letters and telegrams attacking their decision from partisans on both sides of the issue.[22] In correspondence with Madison scholar Irving Brant – who had suggested that the justices "strained the springs of your chairs a bit"[23] -- Jackson explained that the covenant could benefit him in some situations, and harm him in others. As a general proposition, however, "the most

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[20] Philip Dodd, "Justices Bar Real Estate Racial Curbs," Chicago Tribune Press Service, undated news clipping, Box 143, File: Supreme Court – October Term 1947 – Nos. 72, 87, 290, 291 – Shelley v. Kraemer et al. (restrictive covenant cases), Robert H. Jackson Collection, Library of Congress; "3 Justices Bow Out of Racial Squabble," Free Press, January 16, 1948, Box 143, File: Supreme Court – October Term 1947 – Nos. 72, 87, 290, 291 – Shelley v. Kraemer et al. (restrictive covenant cases), Robert H. Jackson Collection, Library of Congress; see also Tushnet, Making Civil Rights Law 94; Kluger, Simple Justice (1977 ed.) 254; Vose, Caucasians Only 177-79, 200, 233.

[21] Robert H. Jackson to Irving Brant, Feb. 9, 1948, Box 143, File: Supreme Court – October Term 1947 – Nos. 72, 87, 290, 291 – Shelley v. Kraemer et al. (restrictive covenant cases), Robert H. Jackson Collection, Library of Congress.

[22] Samuel Lubell, The Future of American Politics (Second ed., revised) (New York: Harper, 1952; Garden City, NY: Doubleday Anchor Books, 1956) 86-91, 97; Charles Brooks Eaton to Robert H. Jackson, January 16, 1948, Box 143, File: Supreme Court – October Term 1947 – Nos. 72, 87, 290, 291 – Shelley v. Kraemer et al. (restrictive covenant cases), Robert H. Jackson Collection, Library of Congress (the letter ended with a slash of anti-Semitism aimed at the Solicitor General, Philip Perlman) 1-2; Roy C. Carter to Robert H. Jackson, Jan 16, 1948, Box 143, File: Supreme Court – October Term 1947 – Nos. 72, 87, 290, 291 – Shelley v. Kraemer et al. (restrictive covenant cases), Robert H. Jackson Collection, Library of Congress; Clyde M. Allison to Robert H. Jackson, January 16, 1948, Box 143, File: Supreme Court – October Term 1947 – Nos. 72, 87, 290, 291 – Shelley v. Kraemer et al. (restrictive covenant cases), Robert H. Jackson Collection, Library of Congress.

[23] Irving Brant to Robert H. Jackson, January 26, 1948, Box 143, File: Supreme Court – October Term 1947 – Nos. 72, 87, 290, 291 – Shelley v. Kraemer et al. (restrictive covenant cases), Robert H. Jackson Collection, Library of Congress; Irving Brant to Stanley Reed, January 26, 1948, Box 143, File: Supreme Court – October Term 1947 – Nos. 72, 87, 290, 291 – Shelley v. Kraemer et al. (restrictive covenant cases), Robert H. Jackson Collection, Library of Congress.

important thing … is that the members of the Court who render their decision are not open to the charge that they have been serving their own financial interests." Invoking a "time when New Dealers made a good deal of criticism … on such grounds," Jackson professed that he had "never been able to accept the view that the 'newly constructed Court' … should adopt the same practices that we had condemned in the old." Especially since there was a quorum of six which was "disinterested – at least, financially – in the results," Jackson "decided it would be better not to sit."[24] Jackson's logic is unassailable. If a credible argument could be made that a justice has a financial interest in a case's outcome, participating would create the impression of self-dealing, a particularly dangerous perception in an area like civil rights, which would prove sensitive from a public relations perspective. The prudence of Jackson's move was confirmed by the decisions of Reed and Rutledge, who tended to be on opposite sides in civil liberties cases, to do the same thing.

Given whites' attitudes toward integrated housing – a majority favored segregated neighborhoods through the 1960s – much, if not most, of white America was unhappy with the Court's decisions.[25] After Shelley, critics still wrote to Jackson. One decried how African Americans supposedly took sections of Chicago which were that city's "pride and pleasure," and turned them into "just hell."[26] Another expressed the belief that

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[24] Robert H. Jackson to Irving Brant, February 9, 1948, Box 143, File: Supreme Court – October Term 1947 – Nos. 72, 87, 290, 291 – Shelley v. Kraemer et al. (restrictive covenant cases), Robert H. Jackson Collection, Library of Congress.

[25] Vose, Caucasians Only ch. 9; Bradburn, Sudman, and Gockel, Racial Integration in American Neighborhoods: A Comparative Survey 212-13; Klarman, From Jim Crow to Civil Rights 215-16, 264; Urofsky, Division and Discord ch. 9; St. Clair and Gugin, Chief Justice Fred M. Vinson of Kentucky 302-03.

[26] F.C. Pratley to Robert H. Jackson, May 4, 1948, Box 143, File: Supreme Court – October Term 1947 – Nos. 72, 87, 290, 291 – Shelley v. Kraemer et al. (restrictive covenant cases), Robert H. Jackson Collection, Library of Congress.

Shelley might become "another Dred Scott decision that compelled the Southern States to secede from the union":

> Inside of the next 50 years, the negro race, the way they are breeding, will be strong enough to challenge the white race if they are not under control, kill off the white males and enslave the white females to lighten the blood of their own race. The Nation made the mistake of not sending the freed slaves back to Africa in 1865. Are we going to make the mistake of ultimately dooming our own race to extinction in this country that the white race has built? God Forbid![27]

Public Southern commentary was every bit as opposed, if for more technical reasons.[28] It is hard to imagine that Jackson or his colleagues found the reaction comforting as they faced the cases ahead.[29]

Almost immediately, commentators also began wondering what Shelley might mean for the future of segregation. One piece in the California Law Review opined that "'the Court appears … to have seriously undermined the foundation of an extensive field of state segregation laws previously deemed unassailable.'"[30] Yet those laws were left standing. As Pritchett wrote: "the Court skillfully brought itself into line with the liberal position on civil rights without harming a hair on the head of its apparently contrary

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[27] J.W. Hough to Robert H. Jackson, May 9, 1948, Box 143, File: Supreme Court – October Term 1947 – Nos. 72, 87, 290, 291 – Shelley v. Kraemer et al. (restrictive covenant cases), Robert H. Jackson Collection, Library of Congress.

[28] Vose, Caucasians Only 217-18. Urofsky considered the expansion of the state action doctrine the biggest news from Shelley. Urofsky, Division and Discord 250.

[29] The decision's impact was significant but not tremendous, and it varied from location to location. But other forms of discrimination (including discrimination by bankers and realtors), coupled with mob violence (sometimes without police interference), for the most part maintained discriminatory housing patterns. Green, The Secret City 283; Sugrue, The Origins of the Urban Crisis 46, 55; Hirsch, Making the Second Ghetto 16, 29-30, 180, 217; Vose, Caucasians Only 227 ff., 250-51; Homer A. Jack, "To Preserve White Neighborhoods," The Nation (July 28, 1951), republished in Reporting Civil Rights Part One 130-33; George Schuyler, "All Over the Country," The American Mercury (June 1949), republished in Reporting Civil Rights Part One 116; Klarman, From Jim Crow to Civil Rights 262-63; Franklin and Moss, From Slavery to Freedom 471.

[30] Vose, Caucasians Only 213.

precedents."[31] It would not be long before segregation itself would be a target. But there was still room for delaying the final reckoning.

University Segregation I: Sipuel

By the late 1930s, the ultimate goal of many civil rights activists was not equality of facilities, but the end of separate but equal itself. Segregation of educational institutions – required by law in seventeen states, plus the District of Columbia -- produced the most persistent and complex series of lawsuits.[32] Amidst internal differences of opinion within the NAACP, differing opinions at the grass-roots level and existing social conditions, the long legal fight against discrimination, which had begun with challenges to unequal facilities (or no facilities), turned toward ending segregation in the late 1940s.[33] As a matter of strategy, civil rights groups began the effort with graduate and professional schools.[34]

In 1938, the Supreme Court created the first opening for ending "separate but equal" in higher education, by ruling that, if a state university opened a graduate or professional program to white students only, it could do so only if it provided another, equal, in-state program to African Americans.[35] Over the next ten years, five of the 17 states requiring segregation loosened the practice in some or all of their professional and graduate schools. But only two states, Maryland, and West Virginia, had any truly

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[31] Pritchett, Civil Liberties and the Vinson Court 145.
[32] Felix Frankfurter, Footnotes to Memorandum, 1949, No. 39, McLaurin v. Board of Regents, Reel 40.0001, Felix Frankfurter Papers (available on microfilm); Sipuel Fisher, A Matter of Black and White 98.
[33] Mark V. Tushnet, Inside the NAACP's Legal Strategy against Segregated Education, 1925-1950 (Chapel Hill: University of North Carolina Press, 1987) provides the historical background on the generation-long formation of the legal campaign against segregation in education. Tushnet, Inside the NAACP pp. 13ff, 20, 25-28, 114-16, 144-60, 162-63 and chs. 3-7. See also Tushnet, Making Civil Rights Law 126-28; Urofsky, Division and Discord 243.
[34] William H. Hastie, "A Look at the NAACP," The Crisis 46 9 (September 1939) 236-64, 274, reprinted in Negro Protest Thought in the Twentieth Century 193, 195; Tushnet, Inside the NAACP 145.
[35] Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); David W. Levy, "Before Brown: The Racial Integration of American Higher Education," Journal of Supreme Court History 24 (1999) 302-03; Klarman, From Jim Crow to Civil Rights 204.

integrated programs. In the entire South, there were no PhD programs, one accredited law school, and no accredited medical, dental or pharmacy schools for African Americans. The extant facilities were "by most standards, inferior operations starved for funds, poor in staff, buildings and equipment."[36]

For litigants, the road to an equal post-baccalaureate education was arduous. Applicants had to sue – and go through years of privation if not fear of "intimidation, harassment, and even physical harm" – to get admitted to one school, in one state. Even then, states could act out of spite: Missouri, for example, closed its journalism school, one of the country's best, to avoid creating one for African Americans. Even if losing universities expanded educational opportunities for African Americans, lawsuits applied to only one school, there were few student-plaintiffs willing to put their lives in limbo for several years, and prosecuting lawsuits took major commitments of legal and money.[37]

One litigant willing to come forward was Ada Lois Sipuel, an honor student from Langston University who applied to the University of Oklahoma Law School. The university president, sympathetic to Sipuel's plight, cooperated with her attorney and issued a letter rejecting her solely because of her race, thereby setting up a test case. In no small part due to conflicting opinions on legal strategy within the NAACP, the courts, once they agreed that the failure to provide Sipuel with a legal education was unconstitutional, were left with broad discretion in determining the type of relief available to Sipuel – admission to the University of Oklahoma, or the creation of a new

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[36] Felix Frankfurter, Footnotes to Memorandum, 1949, McLaurin v. Board of Regents; Levy, "Before Brown" 299-300.

[37] Tushnet, Making Civil Rights Law 70, 120-24; Tushnet, Inside the NAACP 35-37, 81, 82, 88, 104; Sipuel Fisher, A Matter of Black and White xviii, 94-95, 105, 141.

law school for African Americans. That strategy led to a majority of the Court, including Jackson, to let stand a problematic result.[38]

Sipuel's case reached the Court twice. The first time, the NAACP urged the justices to reject Plessy outright and admit the rejected applicant to the all-white law school. The oral argument was marked by sharp questioning of university counsel. Jackson "wanted to know why, after two years, Oklahoma had made no effort to do anything about the problem." When Frankfurter brought up the option of creating a separate law school for African Americans, Jackson "interrupted to ask if counsel really believed that a school with a single student could afford an acceptable legal education." When the lawyer said that he did, the Justice -- showing credence in one of the winning arguments used three years later in Sweatt v. Painter, the case that would end legalized law school segregation -- "said such foolishness was neither reasoned nor equitable." He then inquired whether Sipuel should "be required to waive constitutional rights for the benefit of the State's social policy." The plaintiff – who went on to be a lawyer, professor and regent of the university that had rejected her – thought them "good questions – great questions."[39]

At conference, Reed protested, "This case is not that easy," and professed, "I am not in sympathy with what the Court has been doing in this field." The others, however, readily agreed to rule in Sipuel's favor. Douglas and Murphy would have ordered her admitted to the white law school, but the panel decided instead to follow the 1938 Gaines precedent, which allowed creation of a separate school. Jackson, meanwhile, expressed

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[38] Tushnet, Making Civil Rights Law 129; Dickson, ed., The Supreme Court in Conference 635; Tushnet, Inside the NAACP 49-50, 121ff. ; Levy, "Before Brown" 303-04; Urofsky, Division and Discord 250-51; Sipuel Fisher, A Matter of Black and White 75-85.

[39] Sipuel Fisher, A Matter of Black and White 120-21.

frustration with the resistance to Gaines: "I thought it very simple, and every discussion of the race problem makes it worse." He suggested that the reversal be as matter of fact as possible: "I hope that we can dispose of it in a per curiam on Monday." Reed, Frankfurter and Douglas also supported reversing through a short, unsigned per curiam opinion. Over Rutledge's protests (he wanted a full opinion in Sipuel's favor), the Court issued such a reversal, four days after argument. The result was unanimous.[40]

Sipuel's lawyers thought it significant that the Court decided the case so quickly, and just in time for registration at the existing law school, but the Court provided no specifics about how to comply with its ruling: it merely directed that the university provide her with a legal education "in conformity with the equal protection clause of the Fourteenth Amendment, and provide it as soon as it does for applicants of any other group."[41] On remand, the district court in Oklahoma ordered the university to admit Sipuel to the all-white law school "until … a separate law school for negroes is established and ready to function, or … not enroll any applicant of any group … until said separate school is established and ready to function." The state then started to slap together an African American law school without admitting the plaintiff to the white school in the interim, as directed by the Court. Since it was "manifestly impossible" to

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[40] Tushnet, Making Civil Rights Law 129; Dickson, ed., The Supreme Court in Conference (1940-1985) 635-36; Tushnet, Inside the NAACP 121-22; Dennis J. Hutchinson, "Unanimity and Desegregation: Decisionmaking in the Supreme Court 1948-1958," Georgetown Law Journal 68 (Oct. 1979) 7; Sipuel v. Board of Regents, 332 U.S. 631, 632-33 (1948); Klarman, From Jim Crow to Civil Rights 205; Robert H. Jackson, Conference Notes, No. 369, Sipuel v. Board of Regents, Box 145, File: Supreme Court – O.T. 1947 – Cases – No. 325 -- Fisher v. Hurst et al., Robert H. Jackson Collection, Library of Congress. The type face of the draft *per curiam* suggests that Jackson might have drafted it. Draft *per curiam*, January 12, 1948, No. 369, Sipuel v. Board of Regents, Box 145, File: Supreme Court – O.T. 1947 – Cases – No. 325 -- Fisher v. Hurst et al., Robert H. Jackson Collection, Library of Congress.

[41] 332 U.S. at 633; Tushnet, Inside the NAACP 121-22.

open the new school in time for the spring semester, the plaintiff filed a mandamus action demanding prompt compliance with the Court order.[42]

Jackson and other justices were troubled by the university's actions. Walter White of the NAACP recalled that during oral argument, Jackson "implacably pursued his questioning" of the Oklahoma attorney about the school's compliance with the Court's earlier ruling. At one point, "Mr. Justice Jackson snorted that at that rate of speed of compliance Miss Sipuel would be 'an old lady' before she became a lawyer."[43] But the Court announced in a second per curiam opinion that the state "did not depart from our mandate."[44] Nothing that happened after the Oklahoma district court's order on remand – including the hasty assemblage of a new law school -- was in the record for it to consider. And since the state court maintained "jurisdiction to hear and determine any question arising under its order," the question properly belonged before it.[45] The result, however, was not unanimous despite Vinson's best efforts; Murphy and Rutledge dissented.[46]

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[42] Dickson, ed., The Supreme Court in Conference 636-37; Fisher v. Hurst, 333 U.S. 147, 149-50 (1948); Tushnet, Inside the NAACP 122; Sipuel Fisher, A Matter of Black and White 126-27.

[43] Walter White, A Man Called White: The Autobiography of Walter White (New York: Viking Press, 1948) 145.

[44] 333 U.S. at 150; Tushnet, Inside the NAACP 122.

[45] 333 U.S. at 150-51. Frankfurter circulated a memorandum urging the Court to drop two passages and substitute a new passage for a third in the opinion. He wanted the per curiam opinion to "avoid every possibility of serving as a target for contention," and "restrict[] itself to narration and avoid[] all interpretation." He objected to sentences at issue that might give rise "to the kind of arguments that lawyers are not unaccustomed to make." He believed that this was the only way "to avoid needles controversy in this case, within or without the Courts." Felix Frankfurter, Memorandum for the Conference, February 13, 1948, Box 145, File: Supreme Court – O.T. 1947 – Cases – No. 325 -- Fisher v. Hurst et al., Robert H. Jackson Collection, Library of Congress.

[46] Klarman, From Jim Crow to Civil Rights 205; Levy, "Before Brown" 304-05; Urofsky, Division and Discord 251-52; Sipuel Fisher, A Matter of Black and White 132; St. Clair and Gugin, Chief Justice Fred M. Vinson of Kentucky 308-09. Murphy called for a hearing "to determine whether the action of the Oklahoma courts subsequent to the issuance of this Court's mandate constitutes an evasion of that mandate." Rutledge was satisfied on the basis of the existing record that the Court's original mandate had not been followed, for the makeshift Langston Law School could not possibly have been equal to the University of Oklahoma Law School. He presaged in this, his last university segregation case before his untimely demise, the winning argument two years later when he concluded that

The case led to an "immediate and … positive result" – the desegregation of the University of Arkansas – but desegregation in Oklahoma took longer. The short-lived Langston University School of Law was comprised of three roped-off rooms in the state capitol; it had three white attorneys as faculty, and only one African American student. Meanwhile, Sipuel Fisher (who had gotten married while her case was pending) applied to the University of Oklahoma a second, and then a third, time. Admitted on the third try, she received the support of many faculty members and fellow students, but was "required to sit alone in the back of the room, seated behind a chain in a chair marked 'Colored.' She also had to eat separately at the school cafeteria." By the time Fisher graduated in 1951, however, the Court no longer countenanced makeshift schools or chains and separate tables, as two new cases forced the Court to confront segregated graduate education head on.[47] With a third case challenging segregation in dining cars, they would bring a reluctant Court to the verge of finding segregation illegal. Yet only to the verge.

Sweat, McLaurin and Henderson

The result in Sipuel left little doubt in observers' minds about the fate of graduate school segregation, whether out of the belief that the Court could not dodge the issue forever, or because Southern states could not fund a second set of facilities.[48] Betting on the former, the NAACP redoubled its efforts to find suitable test plaintiffs to challenge

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

333 U.S. at 151 (Murphy, J., dissenting); 333 U.S. at 151, 152 (Rutledge, J., dissenting); Tushnet, Inside the NAACP 122-23.

[47] Dickson, ed., The Supreme Court in Conference 636-37; Tushnet, Inside the NAACP 123; Levy, "Before Brown" 305; Sipuel Fisher, A Matter of Black and White 129-32, 145-47, 149-51. Klarman argued that Sipuel and its progeny (particularly Sweatt), "were instrumental to desegregating higher education in the border states and the peripheral South," for "Without these decisions, desegregation could not possibly have happened when it did." Klarman, From Jim Crow to Civil Rights 253.

[48] Tushnet, Inside the NAACP 123-24.

graduate school segregation.[49] It ultimately proceeded with two: Herman Sweatt, a letter carrier in Texas inspired to go to law school because of his employer's refusal to promote him; and George McLaurin, a teacher at a black college, who applied to the University of Oklahoma's doctoral program in education. Sweatt had been offered a separate law school much along the lines of the short-lived Langston Law School; and McLaurin, admitted to the university, was forced to sit apart from his fellow students, at first in alcoves or anterooms to classrooms, and later in a special roped-off row in the main classroom; and at separate tables in the library and dining room.[50] Lower courts found the educational opportunities afforded in both instances "substantially equal."[51]

Meanwhile, Elmer Henderson was litigating a case arising when he was traveling in 1942, as a field representative for the Committee on Fair Employment Practices. He took an overnight train from Washington, DC to Birmingham, Alabama, where he was refused dining car service three times: waiters had given the two tables in the curtained-off "black" section to white customers. Later that year, Henderson complained to the Interstate Commerce Commission, which found that he had been subjected to "undue and unreasonable prejudice and disadvantage" in violation of Section 3(1) of the Interstate Commerce Act, but declined to take action based on what they considered "a casual

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[49] Tushnet, Inside the NAACP pp. 104, 121-22, 163 and ch.7; Tushnet, Making Civil Rights Law 120-24. Finding suitable test plaintiffs was made difficult not only by what was required of plaintiffs once they brought suit, but also because African American applicants often lacked bachelor degrees from accredited institutions of higher learning. That is why it was often critical for lawyers to find cooperative university officials who specified race as the sole reason for denial of an applicant. See Tushnet, Inside the NAACP 35-37, 82, 125-26. But after Sipuel's experience in Oklahoma, plaintiffs there were easier to come by, as six applicants (including McLaurin) followed her to the admissions office in Norman. Sipuel Fisher, A Matter of Black and White 131, 142.

[50] Tushnet, Inside the NAACP 125-26; Tushnet, Making Civil Rights Law 128-29, 131-35; Klarman, From Jim Crow to Civil Rights 205-06; Levy, "Before Brown" 305-07; Hutchinson, "Unanimity and Desegregation" 14; St. Clair and Gugin, Chief Justice Fred M. Vinson of Kentucky 309-10; 339 U.S. 629, 63 31-32; 339 U.S. 637, 640-41.

[51] Dickson, ed., The Supreme Court in Conference 637-38; Levy, "Before Brown" 306-08; 339 U.S. at 632-33; 339 U.S. at 639-40; Urofsky, Division and Discord 253-54.

incident brought about by the bad judgment of an employee." A three-judge federal panel hearing Henderson's appeal disagreed and sent the case back to the ICC for reconsideration. Meanwhile, the railroad changed its rules with ICC approval, requiring one table in each dining car to be set aside only for African Americans. Henderson then asked for a court order "to provide equal dining facilities and to remove the signs, curtains and partitions." The three-judge panel approved the new rules by a 2-1 vote "on the ground that accommodations are adequate to serve the average number of Negro passengers and are 'proportionately fair.'"[52]

The NAACP litigators saw these cases as raising a direct challenge to Plessy itself, and made sure the issue was unmistakably raised from the first. Their strategy was also well publicized in the press, and therefore widely known: Jackson had kept some early press clippings.[53] Also in Jackson's files were reports of episodes of racial problems -- the Chicago race riot of 1949 and the continued controversy in the Democratic Party after the 1948 presidential election, in which segregationist Strom Thurmond, then a Democrat, ran against Harry Truman on the States Rights Party line.[54]

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[52] Dickson, ed., The Supreme Court in Conference 699-700; 339 U.S. at 818-22; David Stout, "Elmer Henderson, 88, Dies; Father of Major Civil Rights Case," New York Times July 19, 2001 B9, cols. 5-6; Tushnet, Making Civil Rights Law 135-36; Klarman, From Jim Crow to Civil Rights 218-19; St. Clair and Gugin, Chief Justice Fred M. Vinson of Kentucky 311.

[53] Richard L. Strout, "Supreme Court Considers the Historic U.S. Paradox of 'Separate but Equal,'" The Christian Science Monitor April 8, 1950, clipping in Box 160, File: Supreme Court – O.T. 1949 – Cases – No. 25 -- Henderson v. United States, Interstate Commerce Commission and Southern Railway Co., Robert H. Jackson Collection, Library of Congress; Chalmers M. Roberts, "Graduate Schools' Segregation at Issue," The Washington Post April 5, 1950, clipping in Box 160, File: Supreme Court – O.T. 1949 – Cases – No. 34 – McLaurin v. Oklahoma State Regents, Robert H. Jackson Collection, Library of Congress; Bolner, "Mr. Chief Justice Vinson" 324-25; St. Clair and Gugin, Chief Justice Fred M. Vinson of Kentucky 311; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1886-87.

[54] R.M. Cunningham, Jr., "Close-up of a Race Riot," The Progressive October 1949, clipping in Box 160, File: Supreme Court – O.T. 1949 – Cases – No. 34 -- McLaurin v. Oklahoma State Regents, Robert H. Jackson Collection, Library of Congress; C.P. Trussell, "Rights 'Hypocrisy' Laid to Democrats; Hill Speech Cited," undated New York Times clipping in Box 160, File: Supreme Court – O.T. 1949 – Cases – No. 25 -- Henderson v. United States, Interstate Commerce Commission and Southern Railway Co., Robert H. Jackson Collection, Library of Congress; Levy, "Before Brown" 308; Hutchinson, "Unanimity and

While the article on the Chicago riot argued that desegregation was the only way to prevent future racial violence, one wonders whether Jackson believed it.

Attitudes on the relevant university campuses gave grounds for hope and for fear. Large groups of students and faculty voiced their support for integrated graduate schools on both campuses. In Oklahoma, the public was starting to come around, if for no reason than to avoid embarrassing national coverage; and those African Americans admitted from the "steady stream" of applicants witnessed no problems on campus. Yet the legislature and regents remained vehemently opposed to integration.[55] A poll conducted at the University of Texas and published in the school newspaper (a copy of which ended up in Jackson's file) days after oral argument in Sweatt found that 55.92% of students at the University of Texas favored admission of African Americans to their graduate and professional schools "on an unsegregated basis," with another 10.44% favoring admitting African Americans "with segregation in the classroom." Yet only 37.59% favored ending segregation in the undergraduate schools, with only another 8.82% favoring classroom segregation. The results barely moved from a similar poll taken the year before.[56] And yet another letter to Jackson opposing desegregation (this time, from a New York City clergyman) represented the substantial portion of the population feeling "a sense of frustration by the intrusion of negros [sic] into every realm of Life…."[57]

Desegregation" 14. Sources on the events leading to the departure of most white Southern politicians from the Democratic Party include Frederickson, The Dixiecrat Revolt and the End of the Solid South.

[55] Klarman, From Jim Crow to Civil Rights 210; Levy, "Before Brown" 306; Urofsky, Division and Discord 250-52.

[56] Claude Villarreal, "55.92 Per Cent for Unsegregated Admission," The Daily Texan April 18, 1950, clopping in Box 160, File: Supreme Court – O.T. 1949 – Cases – No. 34 -- McLaurin v. Oklahoma State Regents, Robert H. Jackson Collection, Library of Congress.

[57] Rev. Karl H. Englmann to Robert H. Jackson, Dec. 23, 1949, Box 12, File: General Correspondence -- "E," Robert H. Jackson Collection, Library of Congress.

McLaurin proved to be the easier of the university cases. At conference, most of the justices (including those who later proved to have the hardest time in Brown) readily agreed, if for subtly different reasons. Vinson believed that "'Negroes are entitled to enter the university without restriction if they are admitted at all,'" but still treated segregation and equality as separate issues: "'If Oklahoma had provided separate but equal facilities, we would have said that segregation was not involved'" in Sipuel.[58] Douglas sought to "'overrule *Plessy*'" then and there, while Clark was willing to rule "'that separate and equal is O.K., but you can't have it now at the graduate school.'"[59] The issue in Sweatt was closer for Vinson and Reed, both of whom indicated some willingness to affirm the lower courts' findings that both schools were equal.[60]

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[58] Dickson, ed., The Supreme Court in Conference 638; Hutchinson, "Unanimity and Desegregation" 23; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1887-88. In substantial agreement with Vinson were Reed, who commented "When you admit a person to school. Should he have full freedom? You must admit him on an equal basis"; Frankfurter, who despite his protestations that he "would not put it on Reed's grounds," found that segregating within a facility open to both races "produces self-consciousness and introduces an irrelevance that is bad"; Burton, who remarked, "He can't be in and not the same. You can't segregate where they are not separated"; and Minton, who added "if you admit him, it must be on an equal footing. This is not a reasonable classification," but allowed that "There may be a reasonable classification" (thereby suggesting that he would prefer to rely on the facts of this case). Dickson, ed., The Supreme Court in Conference 639-40.

[59] Dickson, ed., The Supreme Court in Conference 640, 644; Robert H. Jackson, Conference notes, Box 160, File: Supreme Court – O.T. 1949 – Cases – No. 34 -- McLaurin v. Oklahoma State Regents, Robert H. Jackson Collection, Library of Congress (unanimous result at conference); Tom C. Clark, Memorandum to the Conference, April 7, 1950, Nos. 34 and 44, Box 160, File: Supreme Court – O.T. 1949 – Cases – No. 34 -- McLaurin v. Oklahoma State Regents, Robert H. Jackson Collection, Library of Congress 2-4; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1890.

[60] Black, Clark and Frankfurter ultimately prevailed on Vinson, who was so close to voting to affirm that he had originally assigned the majority opinion explaining the reversal to Black. Meanwhile, Frankfurter worked on minor textual changes to satisfy Reed, who originally suggested either affirming or remanding for further consideration. Hutchinson, "Unanimity and Desegregation" 22-23, 25; Tushnet, Making Civil Rights Law 145; Dickson, ed., The Supreme Court in Conference 641-42; Klarman, From Jim Crow to Civil Rights 208-09; St. Clair and Gugin, Chief Justice Fred M. Vinson of Kentucky: 311.

The university cases, in which Vinson ultimately wrote opinions staying within the four corners of Plessy but whose analysis "proves much more," represented the frontiers of his innovation in civil rights law. James Jerome Bolner, "Mr. Chief Justice Vinson" 321. He delayed any decision on Brown until his sudden death in 1953. See Chapter 9, pp. 432-44.

Jackson and Black made the two most complex statements at conference.[61] Black considered two logically possible outcomes. The first, a factual finding that these schools (or even all separate graduate schools) were not equal, seemed easy, especially if, as Black suggested, the burden for proving equality were to fall on the state.[62] The second, overruling Plessy as it applied to graduate schools, seemed right, as "I can't say that the Fourteenth Amendment was not intended and designed to prevent a caste system – and that is what this is." The Alabamian also criticized his fellow Southerners for following "Hitler's creed." He concluded that finding graduate school segregation "unreasonable" under the "separate but equal" rubric, had the "advantage" of being "a gradual approach" that would still "strike at a basic idea in the South."[63]

Jackson, too, recognized the potential for negative reaction from a ruling hostile to segregation, but his trepidation about the prospect got the better of him. His first and primary consideration seemed to be that a ruling perceived as hostile by white Southerners could cause "great harm to the Court and the country…. These cases can do this Court more harm than any other case." Professing, "I don't know the answer. I have not made up my mind," Jackson insisted, "I never had any segregation personally until I came here. Whites as well as blacks are victims of this system." Yet he went on to discard, sometimes for clearly stated reasons, sometimes not, and sometimes expressing two seemingly contradictory thoughts at once, the logical universe of rationales for ruling

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[61] Clark's memorandum to the conference made a case for distinguishing graduate and elementary schools. Much of his substantive argument made its way into the Sweatt opinion. Hutchinson, "Unanimity and Desegregation" 21-22; Tushnet, Making Civil Rights Law 143-45; Tom C. Clark, Memorandum to the Conference, April 7, 1950.

[62] Despite the lower courts' having come to the opposite conclusion, eight deans of leading law schools who testified at the hearing deemed it impossible to create a black-only law school equal in quality to an established whites-only institution, and there was pathetic little on the record to dispute them. Felix Frankfurter, Footnotes to Memorandum, 1949, No. 39, McLaurin v. Board of Regents.

[63] Dickson, ed., The Supreme Court in Conference 638-39; Hutchinson, "Unanimity and Desegregation" 20; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1888.

in favor of the plaintiffs. He claimed both that "We must amend the Fourteenth Amendment if we are to ban segregation," and that "it is easier to get segregation banned by statutory interpretation than by constitutional interpretation." Noting that Congress had never sought to end segregation in schools "[or] in housing, or the Army, or in atomic energy," Jackson seemed to foreclose the possibility of Congressional action. Commenting that racial "amalgamation" was "the only solution, ultimately," he disagreed with Black's suggestion "that this is a badge of 'inferiority,'" deciding, "It is not a badge of inferiority today. It is a historical hysteria." He opposed drawing "a constitutional line between segregation in graduate schools and in elementary schools." Warning that "We owe the South candor…," as the region "is building regional schools for Negroes and is spending lots of money," he also mused that "Maybe we will do the subject more harm than good" by finding the schools at issue unconstitutional, as "Segregation is too expensive to whites [and] It is breaking down at the top levels" anyway. He concluded that "We probably must reverse these three cases," and said that he "would reverse all on Henderson." Yet this rationale was also a blind alley, as Henderson was decided on the basis of an Interstate Commerce Act provision applicable to common carriers and not schools.[64] According to Clark, Jackson's position was, "My views are fluid enough to join any theory."[65]

Jackson's analytical flailing at conference suggests that he was determined to resolve the larger problem of race relations before he decided these cases, but could not do so. The contents of his case files confirm this. His Henderson file included a British

[64] Dickson, ed., The Supreme Court in Conference 638-40, 699-703; Tushnet, Making Civil Rights Law 143; 339 U.S. at, 824-26; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1889-90.
[65] Hutchinson, "Unanimity and Desegregation" 24.

newspaper article on the Commonwealth Relations Office's refusal to recognize an heir to an African chieftainship because of his marriage to a European. The matter reflected the sometimes two-sided nature of racial exclusion, as the union stirred controversy among Africans and Europeans alike, but ultimately the issue was the British non-recognition, as the tribe decided to accept the marriage.[66] From a potentate in Bechuanaland, to nuclear energy sites (he had gotten reports on segregation at nuclear facilities from a former Nuremberg staffer then at the AEC), to segregation of graduate schools and passenger trains, the issue to him was an indivisible whole; segregation could not be broken down piece by piece, each handled in turn, as it was for, say, Black. Jackson, as well as Vinson, viewed the university cases as the point of no return on segregation, as it would be hard to justify the practice anywhere if lifted anywhere. Yet unlike his chief, Jackson could not bring himself to sanction segregation; and so he struggled.[67]

During the conference for Sweatt, a critical mass of Justices coalesced around a ruling "on the ground that this is not equal."[68] Jackson said simply, "I reverse on Henderson."[69]

All three cases were decided unanimously, with Burton writing the opinion in Henderson, and Vinson (who changed his vote in Sweatt five days after the conference)

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[66] "Reason for Non-Recognition of Seretse Khama," March 23, 1950 clipping from unspecified newspaper, Box 160, File: Supreme Court – O.T. 1949 – Cases – No. 25 -- Henderson v. United States, Interstate Commerce Commission and Southern Railway Co., Robert H. Jackson Collection, Library of Congress.

[67] See section on Jackson's correspondence with Charles Fairman, pp. 399-424; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1887-88; Dickson, ed., The Supreme Court in Conference 642.

Vinson, a Kentuckian, was an "adjuster" who "was especially suspicious of the use of judicial power to further libertarian ends in cases which did not demand it." He went along with pro-integration results in civil rights cases when he could do so "without stretching established doctrine." Bolner, "Mr. Chief Justice Vinson" 341, 343.

[68] Dickson, ed., The Supreme Court in Conference 642-44; Hutchinson, "Unanimity and Desegregation" 24.

[69] Dickson, ed., The Supreme Court in Conference 643.

those in Sweatt and McLaurin.[70] The Court found the law schools in Sweatt unequal, but for factual reasons that made it nearly certain that no new graduate school for African Americans ever could pass constitutional muster. That was done in paragraphs reflecting in turn the views of Tom Clark, a University of Texas Law School alumnus, and former Harvard Law Professor Felix Frankfurter:[71]

> In terms of number of faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree these qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name 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 close.
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> … Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.[72]

The Court declined to consider Plessy's continued vitality, its firmness punctuated with case citations standing for the proposition "that this Court will decide constitutional questions only when necessary to the disposition of the case at hand, and that such

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[70] The cases had originally been assigned to Black, who "relinquished the assignment" after Vinson's change of heart. Newman, Hugo Black: A Biography 429; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1892-93.

[71] Dickson, ed., The Supreme Court in Conference 644; Tom C. Clark, Memorandum to the Conference, April 7, 1950, McLaurin v. Oklahoma State Regents 3; Felix Frankfurter, Memorandum for the Conference, May 31, 1950, Henderson v. United States, Box 160, File: Supreme Court – O.T. 1949 – Cases – No. 25 -- Henderson v. United States Interstate Commerce Commission and Southern Railway Co., Robert H. Jackson Collection, Library of Congress 2-3.

[72] Levy, "Before Brown" 309; Klarman, From Jim Crow to Civil Rights 206-07; 339 U.S. at 633-34; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1890-92.

decisions will be drawn as narrowly as possible."[73] But the justices' reliance on the intangibles of graduate education – intangibles that might have been on Jackson's mind when he acted dismissively toward the University of Oklahoma's lawyer in the Sipuel reargument -- assured a final result that would, as a practical matter, be tantamount to an outright outlawing of separate schools. It also introduced into school segregation jurisprudence the type of sociological analysis later used in Brown.[74]

In McLaurin, too, the Court framed the legal question as narrowly as possible, tracking the Reed/Vinson argument: "whether a state may, after admitting a student to graduate instruction in its state university, afford him different treatment from other students solely because of his race."[75] It found that the University of Oklahoma's procedures violated the petitioner's rights, because of intangibles similar to those employed in Sweatt:

> … they signify that the State, in administering the facilities it affords for professional and graduate study, sets McLaurin apart from the other students. 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.[76]

Yet it was unlikely that such arguments could avoid Plessy for long, as the segregation the Court found unconstitutional was minimal. If that level of discrimination violated the Fourteenth Amendment, how could the Court go on to approve greater separation? If these cases represented a "gradual but continual narrowing of the meaning of 'equal,'" how much more minor could a claimed inequality be, before it required desegregation

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[73] Levy, "Before Brown" 308-09; Klarman, From Jim Crow to Civil Rights 207; 339 U.S. at 631, 636.
[74] Tushnet, Inside the NAACP's Legal Strategy against Segregated Education 126-29, 161ff.; Urofsky, Division and Discord 256-57; St. Clair and Gugin, Chief Justice Fred M. Vinson of Kentucky 314.
[75] 339 U.S. at 638.
[76] Levy, "Before Brown" 309-10; 339 U.S. at 641.

under Plessy?[77] Moreover, its historical/sociological analysis about the increasing importance of education in modern society bears much in common with a similar argument later used to end all racially-based school segregation in Brown:

> 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.[78]

In fact, a fatalistic view on Plessy crept into the Court's deliberations in the university cases: as Clark wrote in his conference memorandum, "If some say this undermines Plessy then let it fall, as have many Nineteenth Century oracles."[79] These opinions insured that the Court was well on its way to invalidating segregation, whether Vinson liked it or not, and despite Jackson's trepidations.[80] Except for some Southerners in denial, observers at the time could foresee the end result – as one editorial's headline announced, "Jim Crow Doomed."[81]

Clark was sanguine that the "'horribles'" predicted by most segregationist states were "highly exaggerated," at least with regard to graduate schools, and on that even the

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[77] Stephen L. Wasby, Anthony A. D'Amato and Rosemary Metrailer, Desegregation from Brown to Alexander: An Exploration of Supreme Court Strategies (Carbondale: Southern Illinois University Press, 1977) 57.
[78] 339 U.S. at 641; see Brown v. Board of Education, 347 U.S. 483, 493 (1954).
[79] Tom C. Clark, Memorandum to the Conference, April 7, 1950, McLaurin v. Oklahoma State Regents 4; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1892.
[80] Bolner, "Mr. Chief Justice Vinson" 327-28; Levy, "Before Brown" 309-10; Klarman, From Jim Crow to Civil Rights 208; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1893.
[81] Nation, June 17, 1950, 589-90, quoted in Kellogg, Northern Liberals and Black America 393-94; Tushnet, Inside the NAACP 135-36; Tushnet, Making Civil Rights Law 147; Hutchinson, "Unanimity and Desegregation" 30; Klarman, From Jim Crow to Civil Rights 211 ("the justices have frequently proved capable of limiting their rulings by fiat when logic has failed them," but he noted that "many observers, then and since, have doubted whether the justices could have limited Sweatt and McLaurin to segregation in higher education").

reluctant Vinson agreed. As things happened, McLaurin left school after two semesters, due to unsatisfactory grades that perhaps resulted from the stress of his situation, but his schooling proceeded without much incident; Sweatt, on the other hand, ended up leaving the University of Texas, due at least in part to "harassment by students and faculty, including cross burnings, destruction of his personal property, and verbal abuse,"[82] at an institution where most of the students reportedly supported his presence on campus. Yet these men were only two of some 1500 African American students admitted to previously all-white Southern universities in the late 1940s and early 1950s.[83] The precedents "were instrumental to desegregating higher education in the border states and the peripheral South," yet in all but a few states, the first admissions resulted from additional lawsuits.[84] Even states outside the Deep South complied with Sweatt and McLaurin reluctantly.[85] Except for Lousiana (and apparently, South Carolina as well, where African Americans were reportedly admitted to the University of South Carolina's law school), "In the Deep South, Sweatt was almost completely nullified," with financial and at times physical retaliation as payback for challenging the racial status quo.[86] And yet it was extending

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[82] Tom C. Clark, Memorandum to the Conference, April 7, 1950, McLaurin v. Oklahoma State Regents 1; Dickson, ed., The Supreme Court in Conference 644; Tushnet, Inside the NAACP 130ff.; Tushnet, Making Civil Rights Law 149; Klarman, From Jim Crow to Civil Rights 210; Hutchinson, "Unanimity and Segegregation" 30 ff; Sipuel Fisher, A Matter of Black and White 144-45. See also the upcoming book by Dwonna Goldstone, Integrating the 40 Acres: The Fifty Year Struggle for Racial Equality at the University of Texas (Athens, GA: University of Georgia Press).

[83] Lubell, The Future of American Politics (2nd ed.) 126.

[84] In 1948, Delaware agreed to abandon segregation, but only in courses without counterparts at the state's African American schools; the admission of the first African American student to the University of Arkansas' law school was made on a segregated basis, though segregation was quickly abandoned; and the University of Maryland announced plans to admit qualified African Americans to its graduate school. Augustus M. Burns III, "Graduate Education for Blacks in North Carolina, 1930-1951," The Journal of Southern History 46 (1980) 210-11 Klarman, From Jim Crow to Civil Rights 253.

[85] Decisionmakers in North Carolina, for example, dragged their feet until 1951, partly out of sincere belief in segregation, partly because of the political climate, and partly because they feared reprisals against their main campus at Chapel Hill if it voluntarily desegregated. Their compliance came only after a loss in court. Burns, "Graduate Education for Blacks in North Carolina" 217-18.

[86] Bolner, "Mr. Chief Justice Vinson" 335ff.; Kellogg, "Northern Liberals and Black America" 395; Klarman, From Jim Crow to Civil Rights 253-61; Urofsky, Division and Discord 256. See also Robert A.

desegregation to elementary schools which would constitute "the real test of community acceptance."[87]

The Henderson opinion also avoided Plessy, and also in a way leaving little hope for Jim Crow's continued legal vitality. The ultimate basis for the Court's ruling that Henderson was improperly denied service was based on statute and existing case law.[88] Jackson was responsible for excising one relatively casual mention of the Constitution. He wrote to Burton, indicating that he "should be happier" if "the reference to the Constitution" were removed in the passage, "What this Court has said of rights protected by the constitutional guaranty of the equal protection of the laws is applicable to the personal rights protected by the Interstate Commerce Act. That protection is not achieved 'through indiscriminate imposition of inequalities.'" Jackson wrote, and then crossed out, "It may give the impression," revising his comment to, "Since the decision is based on the statute is it necessary?"[89] Burton removed the offending sentences from the final version.[90] Yet when the removal of the signs and curtains was factored in,

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Pratt, We Shall Not Be Moved: The Desegregation of the University of Georgia (Athens, GA: University of Georgia Press, 2002).

[87] Bolner, "Mr. Chief Justice Vinson" (quoting Arthur Krock editorial in the New York Times).

[88] 339 U.S. at 824-25; Urofsky, Division and Discord 248.

[89] Robert H. Jackson, handwritten comments on May 25, 1950 Harold Burton draft opinion, Box 160, File: Supreme Court – O.T. 1949 – Cases – No. 25 -- Henderson v. United States Interstate Commerce Commission and Southern Railway Co., Robert H. Jackson Collection, Library of Congress 1, 8-9.

[90] Hutchinson, "Unanimity and Desegregation" 27-28; Harold H. Burton, June 5, 1950 draft opinion, Box 160, File: Supreme Court – O.T. 1949 – Cases – No. 25, Henderson v. United States Interstate Commerce Commission and Southern Railway Co., Robert H. Jackson Collection, Library of Congress 8-9; 339 U.S. at 826.

Jackson was not the only justice to read the Henderson draft with a sensitive eye. Frankfurter threatened not to join in the opinion, and only concur in the result, if it referred to the curtain, partition and signs separating the tables as "at most symbolic." Because that phraseology "is the anti-segregation slogan," it implied to Frankfurter that the Court was doing more than applying precedent, and was "borrowing future trouble" by "needlessly deciding issues not before the Court … particularly when popular passion is involved." Felix Frankfurter, May 31, 1950 Memorandum for the Conference, Henderson v. United States Interstate Commerce Commission and Southern Railway Co. 1-3 and unnumbered insert; Tushnet, Making Civil Rights Law 145-46; Hutchinson, "Unanimity and Desegregation" 28-29.

Henderson did more than attack a denial of service. Instead, it directly attacked segregation itself. Burton's opinion specifically "criticized" the partition as calling attention to "the artificiality of a difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility," analogizing the situation to that in McLaurin.[91] Desegregation in transportation proceeded more quickly and easily than that in education, but was still at best uneven for several years after Henderson.[92]

Jackson's Correspondence with Charles Fairman

Jackson met Charles Fairman, then a colonel in the Judge Advocate General's Division, at Nuremberg.[93] In late September 1949 – shortly after the Court had noted probable jurisdiction in Henderson, and just before granting certiorari in Sweatt and McLaurin[94] -- the justice wrote his old acquaintance, who in civilian life was a professor of law and political science at Stanford. Jackson asked Fairman when his rumored-to-be-upcoming work on the legislative history of the Fourteenth Amendment might become available, as "We have some very important cases coming on, which involve the application and interpretation of the Fourteenth Amendment and … I would certainly like whatever guidance I can get from it."[95] The scholar promptly obliged Jackson with an

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Burton's final opinion removed the sentence with the objectionable word, but let stand the substantive point (with a citation to McLaurin): "The curtains, partitions and signs emphasize the artificiality of a difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility." Compare Harold H. Burton, May 25, 1950 draft opinion, Henderson v. United States 8 with 339 U.S. at 825.

[91] 339 U.S. at 825; Klarman, From Jim Crow to Civil Rights 218-19.

[92] Klarman, From Jim Crow to Civil Rights 264-66.

[93] Charles Fairman to Robert H. Jackson, December 10, 1945, Box 12, File: General Correspondence – Fairman, Charles, Robert H. Jackson Collection, Library of Congress.

[94] Henderson v. United States, 69 S.Ct. 740 (March 14, 1949); Sweatt v. Painter, 338 U.S. 865, 70 S.Ct. 139 (November 7, 1949); McLaurin v. Oklahoma State Regents for Higher Education, 70 S.Ct. 139 (November 7, 1949)

[95] Robert H. Jackson to Charles Fairman, September 30, 1949, Box 12, File: General Correspondence – Fairman, Charles, Robert H. Jackson Collection, Library of Congress.

unpublished version sans footnotes.[96] The article – still widely cited and discussed today – not only became the leading work opposing the doctrine of incorporation, but also fell in line with Jackson's sympathies.[97] The justice commended Fairman for "demonstrating the danger of going into history to reconstruct past attitudes as a basis for changing the constitutional doctrine," and expressed his own belief that "we have gone too far in going into legislative history to clear up ambiguities which we sometime go to legislative history to create," which is "even more treacherous … in constitutional matters." He promised to call the article to his colleagues' attention and added, "It is not unlikely that I will have some questions concerning the history that I would like to put up to you…."[98]

The followup letter of February 28, 1950 expressed Jackson's desire "to draw upon [Fairman's] store of knowledge," as he knew "of no one who has made so thorough and disinterested a study"; and the Court, with its press of business, had "no time to begin to approach" the quality of scholarly research, even though "we are probably faced with as important Fourteenth-Amendment decisions as any that have been rendered." It was not unheard of for other justices to contact surrogates, to promote a particular stance on legal issues.[99] But Jackson was seeking the advice of an outside expert, and on matters

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[96] Charles Fairman to Robert H. Jackson, October 7, 1949, Box 12, File: General Correspondence – Fairman, Charles, Robert H. Jackson Collection, Library of Congress; Robert H. Jackson to Charles Fairman, October 18, 1949, Box 12, File: General Correspondence – Fairman, Charles, Robert H. Jackson Collection, Library of Congress; Brandwein, Reconstructing Reconstruction 127.

[97] Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" Stanford Law Review 2 (1949) 5; Richard L. Aynes, "Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment," Chicago-Kent Law Review 70 (1995) 1198; Adamson v. California, 332 U.S. 46 (1947); Brandwein, Reconstructing Reconstruction 103-04.

[98] Jackson to Fairman, October 18, 1949; Robert H. Jackson to Charles Fairman, January 6, 1950, Box 12, File: General Correspondence – Fairman, Charles, Robert H. Jackson Collection, Library of Congress; Robert H. Jackson to Charles Fairman, January 16, 1950, Box 12, File: General Correspondence – Fairman, Charles, Robert H. Jackson Collection, Library of Congress.

[99] Robert H. Jackson to Charles Fairman, February 28, 1950, Box 12, File: General Correspondence – Fairman, Charles, Robert H. Jackson Collection, Library of Congress.

Cooper's Battles on the Bench 74-83 discussed the Justices' use of surrogates, such as Black's of Alexander Meiklejohn on First Amendment issues. But pointing a scholar to public documents to further a

ranging beyond the question of the Fourteenth Amendment's legislative history. He characterized the "questions which give me a good deal of trouble about the segregation cases as a judicial problem [versus a legislative problem]" as being "based on the Fourteenth Amendment," but admitted that they "present difficulties of conclusion perhaps rather than problems of research, and it is your ultimate judgment that I would want to tap because it has been matured by a study of the subject, or at least of related ones." He then made an offer that presented quite a temptation to Fairman: "If you would be willing to give me your views, I would like to write you quite candidly about the things that trouble me."[100]

Although Jackson disliked the ethical prohibition on using, unknown to the parties, *ex parte* advisors, he was well aware of the rule. As he had written to legal scholar Edward Corwin several years earlier:

> It is one of the disadvantages of the position that one cannot take counsel of others before taking his position. There are many cases where the position of the two adversaries leaves much by way of research to be desired, and where the pressure of work does not leave us much opportunity to pursue it. I often wish I were free as in the old days in the Department of Justice to call in men like yourself in whom I have confidence. However, one stumbles along and does the best he can.[101]

To Fairman, he again decried a system in which "it is considered quite permissible for a Justice to rely on the knowledge and opinion of a boy just out of law school," but not on those of "more experienced and mature minds." Yet in contrast to his correspondence with Corwin, Jackson professed to "know of no reason why one should be foreclosed

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public debate on legal issues is far different from what Jackson did. Not even Cooper, who concluded that "Jackson knew that he was not only fostering a surrogate relationship for battle outside the Court, but obtaining the assistance of an outside consultant who could help wage war within the Court," appeared fully to appreciate Jackson's intent with Fairman. Cooper, Battles on the Bench at 83.

[100] Jackson to Fairman, Feb. 28, 1950.

[101] Robert H. Jackson to Edward S. Corwin, March 28, 1944, Box 10, File: Personal Correspondence – File: CO, Robert H. Jackson Collection, Library of Congress 1.

from consultation with" scholars, as long as "they are disinterested." He was prepared to consult with Fairman as long as the professor had "no interest in the litigations other than the intellectual interest which any legal scholar would have."[102]

In his March 7 response, the professor assured Jackson that he had no such interest in the segregation cases. He would "gladly" correspond with the justice, and promised to hold their writings "in impervious confidence."[103] But with his acceptance came a clear signal where the professor planned to lead the discussion. He mentioned that he was writing on the 100th anniversary of Daniel Webster's Seventh of March address in the Senate – the speech in which Webster advocated the Compromise of 1850 and thus earned the emnity of the antislavery New Englanders who had so ardently championed him. Fairman quoted the opening lines from "Ichabod," the John Greenleaf Whittier poem inspired by the oration:

> "So fallen! so lost! the light withdrawn
> Which once he wore!

Fairman reminded Jackson of Webster's fall from grace – a fall caused by his compromise on the issue of slavery – to convey a warning: "Perhaps one can't keep such things from being said, but a statesman wants to be sure that they are not deserved."[104]

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[102] Jackson to Fairman, February 28, 1950.

[103] Charles Fairman to Robert H. Jackson, March 7, 1950, Box 12, File: General Correspondence – Fairman, Charles, Robert H. Jackson Collection, Library of Congress 1-2. Fairman apparently did his best to keep his correspondence with Jackson in the strictest confidence. His March 30 letter included an apology for the quality of his typing, explaining that "Home typing avoided any awareness of this in Law School." Fairman's subsequent letters to Jackson were handwritten, suggesting that the author continued to avoid any risk of having his correspondence detected at work. And in response to Jackson's "I would not mind, if you were so disposed, if you thrashed them out with Stanley Morrison and Phil Neal," Fairman replied that he would talk to Neal (who was a former clerk of Jackson's), but only in the context of hashing out issues for a seminar, and would provide him no "further explanation." Jackson to Fairman, February 28, 1950; Charles Fairman to Robert H. Jackson, Mar. 30, 1950, Box 12, File: General Correspondence – Fairman, Charles, Robert H. Jackson Collection, Library of Congress 9.

[104] Fairman to Jackson, March 7, 1950 2-3; The Complete Poetical Works of Whittier, Cambridge ed. (Cambridge: The Riverside Press and Boston: Houghton Mifflin Company, 1894) 186-87.

Less than a week later, Jackson sent Fairman his questions. He prefaced them with some self-examination on the issue of race relations, confessing, "I am almost embarrassed to be in doubts about a matter on which nearly everyone here seems, one way or the other, to be fully convinced. Perhaps it is my background."[105] The Justice explained: "I was brought up in a community where no serious racial problems or tensions existed, attended public school along with a few Negro pupils and never gave it a thought; I cannot remember that it was ever even discussed."[106] In areas with a small African American population, racism can easily go underground, as the target is less visible, and Jackson's qualifier – that there were "no *serious* racial problems or tensions" (emphasis mine) – is reminiscent of how, in high school, he and others had taunted an African American janitor.[107] Yet he was not alone among fellow justices who had grown up in non-Southern areas with small African American populations, in remembering little or no discrimination from their youth.[108]

The contrast between relatively quiet Jamestown and the racially turbulent capital, where he "first encountered real racial consciousness and antagonism," undoubtedly helps explain this nostalgia, but one wonders whether there may have been other psychological forces at work. Jackson, who apparently typed the letter himself (there was no typist's initials at the end), skipped two lines of draft; given the presence of some

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[105] Jackson to Fairman, March 13, 1950, 1.
[106] Jackson to Fairman, March 13, 1950 1.
[107] See Chapter 1, pp. 31-32.
[108] In his autobiography, Douglas allowed that "There probably was discrimination against Blacks in Yakima as I was growing up, but I was unaware of it." He recalled that the relatively small number of African American families in his hometown – "only about a hundred" – kept tensions down, but when the number increased to "nearly a thousand … the feeling of racial discrimination is closer to the surface." O. Douglas, Go East, Young Man 69-70. Warren, like Jackson, recalled that students of all races attended the high school in Bakersfield, California together without incident. The future chief justice recalled one black-white racial incident in his Memoirs: there were "plenty of fisticuffs but fortunately no gunplay" in the oil boomtown of Maricopa after the racially-charged heavyweight boxing match between James "The Great White Hope" Jeffries and Jack Johnson. Warren, The Memoirs of Earl Warren 27, 29-30.

crossing-out in this portion of the draft, and the two lines at issue were not, the omission could have been inadvertent. The lines alter somewhat the initial impression conveyed by his discussion of race relations in Washington (although the argument overall remains much the same) – he blamed both sides for the racial tensions he saw.[109] The text without brackets appears in both the draft and the final; the bracketed portion appeared only in the draft:

> I am amazed and disappointed at the depth and bitterness of the feeling [among whites on both sides of the issue – which can hardly be exceeded by any feeling] among the Negroes. The stupidity and recklessness of extremists on both sides is such that they seem ready to precipitate any kind of conflict. So I find a good deal of demagoguery and hypocrisy on both sides of this issue.

Jackson seemed to be groping for a middle way, for a part of the ideological spectrum where each side could understand the other and where impartiality – a core principle behind his concept of the judicial role -- was possible. Hence, as he later wrote, "My real concern, insofar as I can read my own feelings is to see this thing decided wisely rather than to see either side win."[110]

Jackson was not the only one condemning behavior on both sides of the struggle for civil rights. In 1948, for example, the man who had served for three years as the chair of the wartime FEPC decried "the loud mouthed shouters on each side of the Ohio River who use racism for selfish purposes," and who drown out "Those in the North and those

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[109] Jackson's wariness of social activism ran very deep, and continued long after his departure from Jamestown. One of the best examples concerned the lynching, not of an African American, but of the Jewish manufacturer Leo Frank. While Jackson deplored the lynching and saluted the Georgia politician who tried to save him, he blamed the case's bad end on the "friends of the Jew unwittingly and … his enemies maliciously," for they "fanned" the "racial hatreds" on both sides. Jackson Review 137-38. See also Woodward, Origins of the New South 393. The most recent book-length treatment of this sorry episode in the annals of American justice is Steve Oney, And the Dead Shall Rise: The Murder of Mary Phagan and the Lynching of Leo Frank (New York: Pantheon, 2003).

[110] Jackson to Fairman, March 13, 1950 1; Jackson, undated draft of March 13, 1950 letter to Fairman 1.

in the South who see it as a problem of national unity."[111] But who would Jackson have identified as "the extremists," and "the demagogues and hypocrites" favoring a civil rights agenda? At the time, African Americans were trying to push along sweeping social change, and some more militantly than others.[112] Some Howard University students staged sit-ins in whites-only establishments. The poet Langston Hughes urged African Americans to sue railroads if they were denied proper dining facilities. Rising impatience with gradual progress among rank and file African Americans "increased … to the point that it threatened to leave black leaders behind": even the relatively assertive union leader A. Philip Randolph "lost much prestige" in the African American community for compromising with the Roosevelt Administration on employment discrimination. During the war, some Howard University students resisted the draft, while reports circulated of some African Americans expressing pleasure that the Japanese "showed the white man that a brown hand could handle a plane and a machine gun," and calling the war "*their* war" until white Americans "let us work and fight for the country as much as we are willing and able"; the Justice Department prosecuted members of several African American organizations for assisting draft evaders and encouraging African Americans to side with the Japanese.[113] For those inclined to complain about

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[111] Ross, All Manner of Men 180.
[112] Roi Ottley, "Negro Morale," The New Republic (November 10, 1941), reprinted in Reporting Civil Rights Part One 9.
[113] Pauli Murray, "A Blueprint for First Class Citizenship," The Crisis, November 1944, reprinted in Reporting Civil Rights Part One 62-66; Langston Hughes, "Adventures in Dining," Chicago Defender, June 2, 1945, reprinted in Reporting Civil Rights Part One 68-70; Roi Ottley, "Negro Morale," Reporting Civil Rights Part One 8-9; Jackson, Gunnar Myrdal and America's Conscience 234-36; Sterling A. Brown, "Out of Their Mouths," Survey Graphic November 1942, reprinted in Reporting Civil Rights Part One 31-32; Gerald Horne, "Race from Power: US Foreign Policy and the General Crisis of White Supremacy," Brenda Gayle Plummer, ed., Window on Freedom: Race, Civil Rights, and Foreign Affairs, 1945-1988 (Chapel Hill: University of North Carolina Press, 2003) 53-54; Elliff, The United States Department of Justice and Individual Rights 193-97.

civil rights advocates, there was material for constructing a complaint about excessive militancy; and there was as well, for those concerned about those inclined to complain.[114]

Of two other details in Jackson's explanation, one was potentially indicative of his emotional baggage on the issues of race relations and civil rights, while the other was quite possibly the baggage itself. When groping in his draft for the right words to describe his feelings about "the depth and bitterness of the feeling" in Washington, Jackson ultimately decided on "amazed and disappointed," which appears in the draft; but before he settled on the word "disappointed," he had written down and crossed out "a little frightened."[115] His final revision was the omission of a sentence from the draft:

> Perhaps it is the tradition of my grandfather who firmly believed the Civil War was an unnecessary conflict precipitated by hot headed slaveowners and hot headed abolitionists whom the moderate and sensible people allowed to run away with the country.[116]

Grandfather's and grandson's thinking on the great issue of race relations of their respective times -- that the advocates of African American rights are as culpable as the oppressors, that "moderate and sensible people" could have found a peaceful solution – obviously parallel each other. Jackson's placement of this sentence – after the passage decrying the "the stupidity and recklessness of extremists on both sides" in Washington, but before the one indicating that Jackson found "a good deal of demagoguery and hypocrisy on both sides" – suggests that the parallels also were apparent to Jackson.

The justice doubted the Court's ability to let wisdom win out: "if it chances to be wisely done, the wisdom seems likely to be a by-product." While mentioning no names,

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[114] Odum, Race and Rumors of Race 167.
[115] Jackson, undated draft of March 13, 1950 letter to Fairman 1.
[116] Jackson, undated draft of March 13, 1950 letter to Fairman 1.

he ascribed a variety of political motives to his fellow Justices (including Black), and he expected few if any of his colleagues to consider the issue as objectively as he:

> Some have records to live up to, some have records to live down. Some want to see the Administration's hand strengthened politically. In short, nearly everyone seems under conscious or subconscious emotional commitments of one sort or another.[117]

He eschewed further recriminations, suggesting that "Perhaps the cause of so much irrationality is the scarcity of satisfactory materials for a rational attitude." He found the Fourteenth Amendment "cryptic," with "three-fourths of a century of judicial interpretation … called in question." In reliance, "Congress itself created a segregated school system in Washington, and the Administration, which denounces segregation, maintains it in the armed forces, Federal Housing and other agencies." Underlying the continued existence of segregation was "an atmosphere of fear that a flat outlawing of segregation would meet with real resistance and trouble in the South – a view which Justice Black, for example, privately shares." Considerations among "the other side" included "the general philosophy of the Amendment, the inherent offensiveness of compulsory segregation, and the general duty of the Court to outlaw evil and advance democracy and equality." He added, "They add, of course, suggestions of fear that upheavals among the Negroes will result if segregation is sustained."[118]

While desegregation was morally right, it would eviscerate established precedent, and risk the kind of lawlessness and violence that had so affected him at Nuremberg and during the Cold War. He injected his Nuremberg experience when he thought about civil rights, but in a more ambivalent way than one might expect:

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[117] Jackson to Fairman, March 13, 1950 1.
[118] Jackson to Fairman, March 13, 1950 1-2.

> You and I have seen the terrible consequences of racial hatred in Germany. We can have no sympathy with racial conceits which underlie segregation policies. Neither can we overlook that widely held beliefs and attitudes, even if mistaken, are real factors in law and statecraft and a state of mind may be as real a hazard as a mountain range or a river boundary.[119]

Jackson's dilemma was how to prioritize: the moral good of ending segregation and avoiding the "hazard" of encouraging American fascism. Civil rights, he argued, had already given a platform to bigots trading in anticommunism: he blamed (and not totally without factual basis, especially in the South) the anti-communist hysteria across the country "in some large part" on "the identification of left-wingers with this movement to end segregation." And "nothing promotes fascism as surely as a real and widespread fear of communism."[120] But would biding time allow the problem to recede quietly, or would it simply delay the reckoning?

All of these concerns were reflected in Jackson's eight questions. The first – "What is the function of the Court in the matter?" – raised the issue of whether segregation was a legislative, as opposed to a judicial, issue. Assuring Fairman that "I am clear that I would support the constitutionality of almost any Congressional Act that prohibited segregation in education," he felt that a judicial ban clashed with "the doctrine on which the Roosevelt fight against the old Court was based … that it had expanded the Fourteenth Amendment to take an unjustified social control over social and economic affairs," as he had argued in *The Struggle for Judicial Supremacy*. Distressed that "a good many … in that fight now abandon that position [and] think the Court should decide such questions provided it will decide their way," Jackson wrote, "The problem in my mind is not merely should we nine decide this case but should such an institution decide

[119] Jackson to Fairman, March 13, 1950 2; Klarman, "Brown at 50" 5-6.
[120] Jackson to Fairman, March 13, 1950 3.

such questions for the Nation."[121] This concern was more than a fear of being charged with hypocrisy. It also went to the core of Jackson's beliefs about the nature of judicial fairness: the same set of rules should be consistently applied, over time, to all classes of litigants.[122]

He then broached the subject of legislative intent, asking for "the historical evidence as to whether abolition of segregation was intended by the Fourteenth Amendment." Facing the prospect of overruling Court precedent that had survived decades of legislative and judicial acquiescence, Jackson asked:

> … if such was the legislative intent, why was it unknown to contemporary judges? What weight should we give to the fact that contemporaries and later Courts decided as they did, and Congress for years acquiesced [in upholding segregation]? If the courts found a basis for a doctrine of equality with separation, does that also afford a basis for equality when it can be achieved only without separation?[123]

Here the justice might have been groping for a way to turn precedents like Plessy on their heads without overruling them: if the Fourteenth Amendment mandated equality, in a situation where equality "can be achieved only without separation," segregation would have to be abandoned.

Jackson's next three questions explored the consequences of a ruling ending graduate school segregation for other areas of life: whether there was "any basis for distinguishing between graduate schools and public grade schools," as "It seems to be the latter that arouse most feeling – the former affect fewer persons and at a different stage of life"; whether ending segregation in education would of necessity end it in all areas of life – "Must the prohibition be immediate, complete and absolute?"; and whether a

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[121] Jackson to Fairman, March 13, 1950, 2.
[122] See pp. 170-72; Klarman, "Brown at 50" 6.
[123] Jackson to Fairman, March 13, 1950 2.

desegregation ruling would apply to the District of Columbia, "where it exists by congressional sanction" and where "The Court of Appeal of the District of Columbia has just held segregation valid in the schools," or to the federal government, including "the armed forces and other federal agencies." [124]

His final two queries explored "What, if any, weight should we give to widely and deeply held attitudes whether of the South or of the colored peoples":

> This, of course, would be of no concern if we were applying a clear constitutional or congressional command. But when we are asked to overrule prior interpretations and initiate a rule that will cut deeply into social customs, should be balance the probabilities of good or evil to come of it?[125]

"And," he continued, "if we were to weigh [the] effects" of a ruling ending segregation, "what would they be?":

> I don't know – probably no one else does. But I have seen a good deal of progress in the recognition of Negro rights in the South in the last few years. It is quite possible to move too fast if we have any choice of pace. There is no doubt that the present rather hysterical state of fear of communists, etc. is due in some large part to the identification of left-wingers with this movement to end segregation. You and I have seen that nothing promotes fascism as surely as a real and widespread popular fear of communism and "radicalism."[126]

Jackson, who hoped that desegregation could be accomplished gradually, voluntarily and peacefully in the South, feared that peaceful change could be rendered impossible if the Court should "move too fast."

Fairman's March 30 reply seemed calculated to be the gentle nudge that Jackson apparently required. The scholar wrote that he was close to concluding in his own mind

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[124] Jackson to Fairman, March 13, 1950 3.
[125] Jackson to Fairman, March 13, 1950 3.
[126] Jackson to Fairman, March 13, 1950 3.

how Sweatt, Henderson and McLaurin should be decided. But as the letter went on, it became clear that he had done so without answering many of the justice's questions. For Fairman, the chief considerations were moral and historical, not legal, and they easily tipped the balance in favor of desegregation.

But before Fairman took on the issue directly he, like Jackson, described his personal background and attitudes on the subject of race relations. This self-portrait seemed calculated to enhance his authority with his correspondent. Fairman explained that he had grown up in East St. Louis, Illinois, and Alton, Illinois – "an intellectual climate similar neither to the South nor to Boston." Each handled race relations differently – East St. Louis was segregated while Fairman had lived there, though he was quick to report that the city had recently "abandoned segregation…apparently without incident." Alton (the home of Elijah P. Lovejoy, the abolitionist publisher assassinated by a pro-slavery mob in 1837) was not legally segregated.[127]

Fairman then claimed that, from his surroundings, he had "learned no positive animus – simply the attitudes implicit in existing arrangements," and had spent very little time with African Americans. On the rare occasions when he had – he could "recall only three occasions when I have sat at table with one (on two of these it was Ralph Bunche)" -- he confessed a need to "call upon my mind to direct me in the course I know I ought to take."[128] Yet Fairman also suggested that, though people absorb biases from their childhoods, they sometimes, as grownups, must eschew those attitudes. Thus, it was permissible to admit one's prejudices, as long as one recognized their folly and fought them. He further elucidated his personal experience on the subject of interracial

[127] Fairman to Jackson, March 30, 1950 1.
[128] Fairman to Jackson, March 30, 1950 1.

interaction by combining it with a mode of analysis which Jackson liked, the historical precedent: the scholar compared his "respect" for abolitionist/Radical senator Charles Sumner with his far greater esteem for Abraham Lincoln. The historian set forth other views of history consistent with the dominant thought of his and Jackson's youth. First, he wrote that he identified with "the men who, while identifying the distant goal, work in their own time to achieve the substantial advances that are presently attainable."[129] Second, he showed even-handedness by insisting, like Jackson, that Congress had treated white Southerners unfairly during Reconstruction.[130]

Such moderation, however, left no room for equivocation in deciding the university segregation cases. Admitting that he had never specifically examined Fouteenth Amendment history as it pertained to segregation, Fairman's tentative "impression" was "that in 1866-68 'Equality' did not have an accepted meaning that excluded segregation."[131] Yet the scholar also believed that changed historical conditions rendered legislative intent irrelevant. In the 1860s, "it would have been a notable achievement to assure [African Americans] the enjoyment of even the most elementary rights," and the framers of the Amendment "regarded it as applying its leverage almost wholly upon the South," and not against their own discriminatory practices.[132] Yet the same, Northern, justice who had written in Plessy v. Ferguson that "distinctions based upon color were 'in the nature of things,'" characterized the law in a later case as "to a certain extent, a progressive science," and claimed that "methods once 'deemed essential'

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[129] Fairman to Jackson, March 30, 1950 2; Brandwein, Reconstructing Reconstruction 74, 115.
[130] The Justice disapproved of Congressional Reconstruction throughout his Court years, as demonstrated in his handwritten note to Murphy extolling the virtues of Claude Bowers' The Tragic Era, a pro-white Southerner history he would cite with approval in his 1951 opinion in Collins v. Hardyman (though his discussion in that case seems to suggest a slight softening of his views). Robert H. Jackson to Frank Murphy, undated handwritten note 1; 341 U.S. at 657 n. 8 (1951); see p. 307.
[131] Fairman to Jackson, March 30, 1950 2.
[132] Fairman to Jackson, March 30, 1950 2.

may be 'found to be no longer necessary.'"[133] Therefore, Fairman concluded, segregation should not be considered a matter of original intent, "but as one more instance of the progressive search for more equal justice."[134]

Fairman disposed of Jackson's concern over the Court's power to end segregation by distinguishing "Unequal treatment of a racial minority in a matter of public right" from the types of economic and social questions Jackson recalled from his New Deal days. The scholar believed that questions of labor regulation confronted by the Court in the Lochner case differed from the segregation cases, in which "there seems to me to be a right and a wrong side."[135] It seemed self-evident to Fairman that Sweatt had been denied a legal education as good as that offered to other students; that Henderson was denied his supper; and that each denial was wrong. He concluded that, in cases invoking moral rights, the attitudes of white Southerners were irrelevant, as such claims "should not be remitted to persuasion and to the slow process of evolution of Southern sentiment."[136]

Expressing disbelief that any lawyer in practicing in federal court "would deny that the Negro is entitled to 'equal' treatment," Fairman suggested that the dispute over segregation was really about the meaning of equality. On one hand, he supposed, white Southerners "will contend that 'substantial equality' meets the test," but that rubric left open the issue of which disparities in treatment were great enough to bar a finding that the facilities in question were "substantially" equal. On the other hand, "The Negro

[133] Fairman to Jackson, March 30, 1950 2-3, citing Holden v. Hardy, 169 U.S. 366 (1898).
[134] Fairman to Jackson, March 30, 1950 3.
[135] Fairman to Jackson, March 30, 1950 3-4.
[136] Fairman to Jackson, March 30, 1950 4.

hopes to establish the proposition that no segregated treatment can be fully 'equal."[137] The scholar predicted that the latter proposition would become the prevailing view "sooner or later … because I believe it is true and will become recognized as true." He found himself "a good deal impressed by" the appellants' argument "not for any 'authority' there found but because as I read it I think, This must be true."[138]

Addressing Jackson's concerns about dealing with likely Southern opposition to the decision, Fairman posed the question, "If one comes to the conclusion that Plessy v. Ferguson must sooner or a little later be abandoned, and that this is a matter which the Court may not properly evade, what is the statesmanlike course?" The scholar accepted that avoiding Southern resistance to a Court ruling would be preferable to the alternative,[139] but he was hopeful that accommodation to white Southereners would be unnecessary, noting that "the South has been making considerable progress in accommodating itself to" decisions in other cases, such as the primary cases, the juror discrimination cases, and the previous higher education cases.[140] Despite frequent foot-dragging by Southern officials, he still believed that, in light of his prediction "that the South will keep on responding (however dilatorily and reluctantly…) … the wisest statesmanship would be to keep the situation evolving, to exert a constant rather than a sudden pressure."[141] An incremental decision in this case, he believed, would be easy to achieve. Observing that "There is plenty of room in the Sweatt case for finding inequality," to the point that "the witnesses testifying to the 'substantial equality' of the

[137] Fairman to Jackson, March 30, 1950 4.
[138] Fairman to Jackson, March 30, 1950 4. He added, "My general reading is pretty limited, so I have never looked at Myrdal and the rest." Id.
[139] Fairman to Jackson, March 30, 1950 4-5.
[140] Fairman to Jackson, March 30, 1950 5.
[141] Fairman to Jackson, March 30, 1950 5.

two schools must have had to do a lot of wrestling with their consciences,"[142] he concluded that desegregating on the authority of Plessy v. Ferguson – that the African American law school and the established institution were unequal – would continue progress by incrementally changing minds as well as policy, without causing a sudden jolt to Southern sensibilities from an outright reversal of precedent. After all, he believed, that Texas attorneys would know full well that the Court correctly found that the law schools were not equal. Such a ruling, then, "could intimate pretty broadly that" graduate-level segregation "would be practically impossible" to defend under the separate-but-equal analysis. That would leave the issues of segregation in undergraduate colleges and public schools "for later days," which would be fine, because outlawing graduate-level segregation "might teach a big enough lesson for one day – and give food for thought."[143] Hopefully, "A big doubt would be planted whether the raising and elaborating of separate State institutions was not going to prove too costly and, in the end, vain."[144]

He also believed that ending segregation would improve the United States' position in the Cold War. With the United Nations Charter and the Universal Declaration of Human Rights calling for "'human rights and fundamental freedoms for all without distinction as to race,'"[145] Fairman contended that American shortcomings in reaching

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[142] Fairman to Jackson, March 30, 1950 5; Tushnet, Making Civil Rights Law 135. The professor elaborated why, despite some efforts to create a quality institution, the new school could never be considered the equal of the University of Texas: "Law reviews certainly exert a tremendous force by sharpening wits and inspiring emulation within the student body…. Moot courts, with intra-mural and inter-school competition; legal aid; special studies under experts – these are other values not attainable in a little school." He added that the new law school's emphasis on rote learning could never be considered the equivalent of law reviews, moot courts and other activities at leading schools. Fairman to Jackson, March 30, 1950 5-6.

[143] Fairman to Jackson, March 30, 1950 6.

[144] Fairman to Jackson, March 30, 1950 6.

[145] United Nations Charter, Arts. 1, 55, 56, as quoted in Fairman to Jackson, March 30, 1950 6.

for that ideal "makes us vulnerable to our enemies – pinning firmly upon the advocates of discrimination the odium of lending aid to the Soviet Government."[146] Segregation accomplished this, either directly or by driving postcolonial governments into the Soviet sphere of influence.[147] The scholar thought that that point would be politic to include in an opinion, given that "our treatment of the Negro is an exceedingly vulnerable spot in our armor," and that "the sentiment should appeal to patriotic Southerners and also to the internationalists."[148]

Turning to Jackson's concern about the consequences of a ruling ending segregation, Fairman argued that African American leaders, "however they may chafe under a sense of gross injustice, must realize that no words of the Court can really remove the difficulties." They must know, he believed, that while explicitly overruling Plessy v. Ferguson might deliver "a great moral triumph," such a ruling would have to be enforced and obeyed by recalcitrant whites.[149] So, he believed that the African American leadership "would understand" decisions that found for the plaintiffs in each case currently before the Court, even without an express overruling of Plessy, so long as the opinions contained "intimations that gave hope for justice in other cases as they arose."[150]

Yet he was emphatic that the Court had to move forward on desegregation, however incrementally. It would be "a disaster" for the justices to "wash[] their hands"

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[146] Fairman assumed that holding the United States to the exact letter of the United Nations language with regard to racial discrimination might require "deft draftsmanship" because the Declaration itself "holds up merely 'a common standard of achievement.'" Nonetheless, he concluded that the UN's language "seems inconsistent with 'equal but separate.'" Fairman to Jackson, March 30, 1950 6-7.
[147] Landis, "Segregation in Washington" ch. 2; Borstelmann, The Cold War and the Color Line 75; Dudziak, Cold War Civil Rights ch. 5 and pp. 37ff., 56-63, 91 ff.
[148] Fairman to Jackson, March 30, 1950 7.
[149] Fairman to Jackson, March 30, 1950 7.
[150] Fairman to Jackson, March 30, 1950 7; Kluger, Simple Justice (1977 ed.) ch. 12; Tushnet, Making Civil Rights Law ch. 9.

and leave the matter to the legislative branch of government. Assuming that segregation was an issue of "right and wrong" -- and recognizing that as a matter of constitutional analysis, "however obscure the constitutional history of the XIV Amendment, equal protection seems to express a pretty elementary conception" – it was up to the judiciary to decide the matter. Turning Jackson's fear of African American violence on its head, Fairman retorted that African American respect for the law also rested in the Court's hands: It would be "a great evil" if the oppressed minority, having "learned cynicism" from Democrats and Republicans alike, also "lost confidence that ultimate justice could be had at the hands of the Court."[151]

The last substantive paragraph in Fairman's reply discussed the Truman Administration's efforts to desegregate the armed forces. Conceding that immediate integration "would be ruinous to" military effectiveness, he noted that the army was transitioning to a desegregated fighting force, by setting up companies with both white and black platoons. The theory was that doing so gave each race a chance to be "close enough … to become acquainted with the members of the other, and to develop mutual respect on the basis of proved worth, without rushing the matter." Analogously, even if desegregating all schools would generate serious resistance, the Court could and must make progress toward that final result with Sweatt and McLaurin.[152]

On April 5, Jackson wrote back, complaining bitterly about what he perceived to be the excessively partisan air surrounding the previous day's oral argument: "all parties seemed to vie with each other in enlisting pressure groups and giving the whole thing a

[151] Fairman to Jackson, March 30, 1950 7-8.
[152] Fairman to Jackson, March 30, 1950 8.

general atmosphere of politics."[153] But more important, "The argument has not been very enlightening on the points that trouble me." He repeated his concern that "Neither side has suggested any logical division as to constitutional questions between higher education, graduate schools, and grade schools. They all take the position that it is all or none, and that even though this case involves only the one thing, it will control all." Jackson termed this resolute failure to compromise "the great hope of one side and the great fear of the other."[154] McLaurin in particular "seems to present a pretty naked question whether there is any constitutional right to make any classification based on race." Jackson fretted that

> Oklahoma now gives everything, from an education viewpoint, equally to the Negroes and the whites. They sit in the same classes, hear the same lectures, recite in the same way, have access to the same books and the same food. But it maintains separate seating in the classroom, separate tables in the library, and separate dining tables.[155]

Yet he still hoped that segregation would end without Court intervention. He found reason for optimism in Oklahoma's scheme of minimalist segregation:

> One of the interesting results of the Oklahoma line of cases is that I think it shows pretty conclusively that the segregation system is breaking down of its own weight and that a little time will end it in nearly all States. Faced with the cost of a separate but equal system, Oklahoma admitted the Negroes to the white University. It has saved face by preserving within it a sort of token separation, which seems to gratify the one race and chafe the other, more for its symbolism than for any real advantage or disadvantage.

In fact, the state's cost-benefit analysis had come to a similar conclusion; and McLaurin's white classmates, "Nauseated by the spectacle … tore the sign down until officials settled

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[153] Jackson placed much of the blame on Attorney General Howard J. McGrath, "who added nothing except to get into a position to capitalize any advantages for the administration." Robert H. Jackson to Charles Fairman, April 5, 1950, Box 12, File: General Correspondence – Fairman, Charles, Robert H. Jackson Collection, Library of Congress 1; Tushnet, Making Civil Rights Law 141.

[154] Jackson to Fairman, April 5, 1950 1; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1889.

[155] Jackson to Fairman, April 5, 1950 1; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1889.

for assigning McLaurin to an unmarked row set aside for him and any other colored student who might enroll in quest of similar humiliation."[156] The justice seemed to float in and out of comprehension as he was writing: in one sentence, he could use language undervaluing the African American hunger for "symbolism," yet in the next, he could convey understanding that signs labeling areas "white" and "colored" humiliated African Americans, and knew that some whites found it unacceptable, even nauseating. He also could have hoped that segregation would collapse without intervention, given the financial cost of separate schools and the fact that some whites, at least, found less drastic forms of segregation troubling.[157]

In reiterating his concerns about the legislative history of the Fourteenth Amendment, Jackson complimented Texas' brief in Sweatt: "It makes the most complete review of historical materials, including a good many citations to your work." While the Justice had "not yet read it with care," his initial impression was that the state's lawyers

> seem to have established pretty clearly, first, that there was no intention on the part of most of the proponents of the Fourteenth Amendment to interfere with the state school systems on the question of segregation; secondly, that not even those who wanted to see [biracial school systems] accomplished acknowledged that it was not accomplished by the Amendment or the civil rights legislation.[158]

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[156] Jackson to Fairman, April 5, 1950 1-2; Sipuel Fisher, A Matter of Black and White 143; Kluger, Simple Justice (1977 ed.) 268.

[157] Jackson to Fairman, April 5, 1950 1-2; Kluger, Simple Justice (1977 ed.) 133-36, 289, 290; Tushnet, Making Civil Rights Law chs. 16-20.

One of the most succinct expressions of the differing perspectives of segregation's "symbolism" occurred in one of the Brown oral arguments, when school district attorney John W. Davis urged African Americans not to eschew "equal education" for "some fancied question of racial prestige." Thurgood Marshall replied, "Exactly correct. Ever since the Emancipation Proclamation, the Negro has been trying to get … the same status as anybody else regardless of race." Kluger, Simple Justice (1977 ed.) 290, 294, 674; Leon Friedman, ed., Argument: The Oral Argument Before the Supreme Court in *Brown v. Board of Education of Topeka, 1952-55* (New York: Chelsea House Publishers, 1969.

[158] Jackson to Fairman, April 5, 1950 2; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1889.

If they were correct, "our question becomes a little more than whether we will fill gaps or construe the Amendment to include matters which were unconsidered. It really becomes whether we will construe it to include what was deliberately and intentionally excluded." Jackson closed by "hoping" for additional input.[159]

In an April 25 response, Fairman admitted that he still had "not been able to go over the legislative history," yet he remained firm in his belief that "I just don't think the answer lies in history." Repeating the Plessy author's view that the law was progressive and not static, he advised that even though the framers of the Amendment "pretty certainly" did not mean to desegregate schools, nor did they explicitly sanction segregation as a permanent option. The concept of equal protection could not be interpreted as if it were still 1866, for both "the position of the Negroes" and "the treatment they are accorded today" were much improved from back then. He thus continued to press his belief that "the idea of equal protection should continue to be unfolded by the Court in the spirit of its great tradition of keeping our constitutional law consistent with the best prevalent thought."[160] Jackson, like most jurists of his time,

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[159] Jackson to Fairman, April 5, 1950 2; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1889.

The April 5 letter also referred to the civil rights lawyer for Homer Plessy in Plessy v. Ferguson, Albion Tourgee, to whom Fairman had referred in his March 30 letter. Jackson replied to Fairman that he had "taken the pains to look hastily at the brief he filed in the Plessy case," and "would say, from what it indicates that he may have deserved rather better than [his] biography" – a Dictionary of American Biography entry by J.G. de R. Hamilton, a white Southerner who had an axe to grind against Reconstruction -- "indicates. As briefs go," concluded the former Solicitor General, "it was pretty good." Jackson to Fairman, April 5, 1950 2; Fairman to Jackson, March 30, 1950 9.

Later that month, Jackson sent his scholarly correspondent some firsthand information on Tourgee from a Jamestown friend, Walter Edson. Edson himself seems to have some blinders about white Southerners – he believed that Tourgee's books would receive a relatively dispassionate reception from them -- "To a native of the South such presentations of conditions would, perhaps, seem to lack in originality, so far as they adhered to the truth." Robert H. Jackson to Charles Fairman, April 25, 1950, Box 12, File: General Correspondence – Fairman, Charles, Robert H. Jackson Collection, Library of Congress 2; Walter H. Edson to Robert H. Jackson, April 14, 1950, Box 12, File: General Correspondence – Edson, Walter H., Robert H. Jackson Collection, Library of Congress.

[160] Fairman to Jackson, April 25, 1950 2. As Jackson's writings on Brown v. Board of Education demonstrate, this argument was pivotal to his resolution of the segregation issue. See chapter 9.

was no strict literalist, and was by no means hostile to the living Constitution theory behind such arguments; indeed, he was to provide an analogous argument to Chief Justice Warren for the Brown opinion.[161] So he might have been receptive to Fairman's argument, at least so long as a ruling finding segregation *per se* unconstitutional did not contradict the Framers' intent; but for Jackson, the prospect that such a decision might contradict the original meaning of the Amendment presented a real obstacle.

To address Jackson's concerns about white Southerners' reaction, Fairman reported on the thoughts of some of his law students, a group that included some Southerners. One Arkansan complained about "local conditions" and "uppity Negroes," but when Fairman questioned him, he said that he would "reverse the Texas Court [and desegregate], of course." The student confirmed the wisdom of the NAACP strategy that brought Sweatt and McLaurin to Jackson's door. In all, "about half" of Fairman's sample "said they would put an end to the separate but equal doctrine at once," and the other half would "put the decision on some narrower ground and move from case to case"; but "No one" defended Plessy.[162] Among professors at the Northern California Political Science Association's annual meeting, the sentiment registered was about the same. Two of the attending professors were Texans and University of Texas alumni, who had been teaching government there when Sweatt commenced. They reported that, as far as they and their students were concerned, it was time to end segregation; that the contrary view was mostly held by "the older people, confined in the traditional ways of the South."[163] The professor predicted that deciding for the plaintiffs "would probably

[161] See pp. 500-01.
[162] Fairman to Jackson, April 25, 1950 3-5.
[163] Fairman to Jackson, April 25, 1950 5.

clear the air and leave people wondering in the morrow what the controversy had all been about."[164]

It is doubtful that Jackson found this information reassuring. The justice's fear of white Southerners' reaction was not so much based on graduate and professional school desegregation, but on his belief (not incorrect, as it turned out, and one he shared with his colleagues) that ending university segregation would build momentum toward a result outlawing desegregation in all public schools. Fairman avoided undue optimism on that, but he concluded from his "small bit of sampling … that Southern opinion has evolved a good deal more than I'd have guessed in January…."[165]

The professor also argued that the Oklahoma segregation scheme failed even under the constitutional analysis most deferential to acts of government, the "rational basis" test, and in the course of so doing answered Jackson's argument that minor inequalities are not of constitutional moment. Fairman could imagine, in the instance of physical separation, "a justification, such as it was … that physical encounter & conflict were thus reduced. But," he continued, "what rational purpose can be served by requiring the Negro to sit at a special table?" Even though, under the law, "heavy burdens can be sustained when they are dictated by some rational need," it is the smallest of injustices which might in fact be the hardest to justify, for "even the slightest discrimination must go down when no valid objective can be attained by it."[166]

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[164] Fairman to Jackson, April 25, 1950 5.
[165] Fairman to Jackson, April 25, 1950 5-6. He also sought to assure Jackson that African Americans were willing to exercise some patience, relating an NAACP attorney's opinion that his colleagues "knew it would take a long time in practice …They had made the record in Sweatt in hope that the entire doctrine of separate but equal could be presented to the Court" but in McLaurin, "the emphasis was placed upon segregation in higher education." Id.
[166] Fairman to Jackson, April 25, 1950 6-7.

He also sought to demonstrate, through unrelated recent events, "that the country is moving rather conclusively against racial discrimination." He cited two items from that morning's San Francisco Chronicle suggesting that discrimination against Japanese Americans was receding in California.[167] Several days later, Fairman sent Jackson news clippings about the desegregation of Kentucky institutions of higher learning. In 1950, the state legislature amended its 1904 segregation law, so that institutions could admit African American applicants if "an equal, complete and accredited course is not available for students at Kentucky State College for Negroes." Once the legislation became law, Berea College and three Catholic colleges in Louisville reopened their doors, after 46 years, to African Americans.[168]

Fairman concluded that the Court should rule against the unequal treatment established in the cases before it, on the basis of the equal protection clause, which also comported with the United Nations Charter's mandate that persons be treated "'without distinction as to race.'" Such a ruling would be the right thing to do, and would also allow the South to go forward without past recriminations, and therefore be the option least likely to encounter resistance. It would also "give the country a new framework within which to view the old problem." He advised against "examin[ing] the bloody shirt of '66," and revisiting the Civil War on a section of the country which still smarted from

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[167] A unanimous panel of federal judges in Los Angeles invalidated the Alien Land Act (a 1920 California state law barring land sales to all non-United States citizens, which was specifically targeted at Japanese immigrants, who were prohibited from seeking citizenship); and a human interest story reported how a formerly interned Japanese family "reestablished itself successfully," and indicated that "Californians are now feeling rather unhappy about [that] entire episode." Fairman to Jackson, April 25, 1950 7; Daniels, The Politics of Prejudice ch. 6. In 1948, Jackson himself voted against relieving a Japanese family from the requirements of the Alien Land Act in Oyama v. California, 332 US 633, 685-89 (1948) (Jackson, J., dissenting).

[168] Charles Fairman to Robert H. Jackson, May 4, 1950, Box 12, File: General Correspondence – Fairman, Charles, Robert H. Jackson Collection, Library of Congress.

it. Instead, he would "set the matter in a new and universal context, hoping thereby to make it easy for even the Southerners to go along."[169]

Jackson still had four years to come to terms with the overruling of Plessy v. Ferguson, and it took him almost that long to do so.[170] Fairman gave him additional reason to believe that outlawing graduate school segregation could be done within accepted legal doctrine, and without causing social upheaval in the South. And while the scholar could not give his correspondent reassurances that the next challenges to Jim Crow would be as painless, he effectively marshaled the arguments explaining why finding separate but equal unconstitutional was a moral, legal and public policy imperative.

Careening Toward the Showdown with Jim Crow

After the decisions in Sweatt, McLaurin and Henderson, a justice seeking to avoid a direct showdown with Plessy v. Ferguson was running out of options.[171] The evolving view of what constituted racial discrimination under the law – which, in the 1940s, came ever closer to including segregation *per* se -- meant that Plessy would likely be overruled once the right case was brought. A majority on the Court, including Jackson, still attempted to rest civil rights decisions on the narrowest of legal grounds, but those efforts looked increasingly like attempts to postpone the inevitable. Speaking truth to power,

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[169] Fairman to Jackson, April 25, 1950 8. Jackson took this advice in Brown, urging Warren to write a forward-looking opinion, rather than dwelling on white Southerners' past oppression of African Americans. See Chapter 9, pp. 499, 510.

[170] Hutchinson, "Unanimity and Desegregation" 87 (after 1950, individual Justices needed time to work out their reservations before taking on Plessy).

[171] Tushnet, Making Civil Rights Law 146-47. While Pritchett, in a work published the year of the first Brown decision, detected "a progressively developing boldness in the handling of discrimination cases," the boldness he perceived was, to say the least, tempered with refusals to decide the ultimate question. Pritchett, Civil Liberties and the Vinson Court p. 145 and ch. 7.

one of Jackson's law clerks wrote in a 1952 memorandum on an action seeking desegregation of the University of Tennessee, "I find it hard to go along with the court below saying there is no real constitutional question presented.… But since this Court itself has seen fit to dodge the same sort of issue you can hardly blame the Court below."[172] The Court indeed dodged Plessy in Gray v. Board of Trustees of the University of Tennessee, as the case was rendered moot: the university admitted one of the plaintiffs, and the rest "were, because of changed circumstances, unable to avail themselves of the opportunity at present."[173]

The finely-tuned dance around constitutional issues continued with the refusal of restaurants in the nation's capital to serve African Americans. Jackson withdrew from the test case, District of Columbia v. John R. Thompson Co., but the ground for the result – a long-forgotten Reconstruction-era regulation – seemed the kind of chance occurrence on which a decision of international importance should not rest.[174] Jackson's law clerk summarized the dilemma the case posed – how to decide a case on the basis of a moral imperative -- in terms his boss surely understood:

> So as a matter of pure analysis I suppose the proper disposition is to deny cert. However, that does not seem to be a satisfactory disposition, at least to me. First of all, the case is of great interest, since after all this is the nation's capital. Secondly I have a strong prejudice in favor of curtailing discrimination against colored folks because of their color; for if there is any principle which can be demonstrated … it is that moral considerations, not physical ones, ought to determine man's conduct. But since I berate Black for deciding on the basis of

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[172] C. George Neal to Robert H. Jackson, jurisdictional memorandum, No. 120, Gray et al v. Board of Trustees of the University of Tennessee, Box 173, File: Supreme Court – O.T. 1951 – Cases – Nos. 129, 159 Misc. -- Gray et al. v. Board of Trustees of the University of Tennessee, Robert H. Jackson Collection, Library of Congress.

[173] Gray v. Board of Trustees of the University of Tennessee, 342 U.S. 517, 518 (1952)

[174] District of Columbia v. John R. Thompson Co., 346 U.S. 100, 116-18; Marvin Caplan, Farther Along: A Civil Rights Memoir (Baton Rouge: Louisiana State University Press, 1999) 139-41. See Dudziak, Cold War Civil Rights ch. 5.

> his prejudices, I can't very well suggest that you should decide on the basis of mine.[175]

Yet the day of reckoning was on its way, as "vast social forces were afoot, tending in the direction of the general breakdown of segregation."[176] The case that would ultimately provide the vehicle for the necessary legal transformation was already before the Court, which was avoiding decision as long as it could. The justices could not lock the briefs in their chambers forever. And this time, the issue was joined on terrain far more sensitive than graduate education: public elementary and high schools.

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[175] Donald Cronson, undated Memorandum, No. 617, District of Columbia v. John R. Thompson, Box 183, File: Supreme Court – O.T. 1952 -- Cases – No. 617 -- District of Columbia v. John R. Thompson Co., Robert H. Jackson Collection, Library of Congress 3. Cronson would go on to write one of the bench memoranda for Jackson on Brown. See Chapter 9, p. 439.

[176] Levy, "Before Brown" 311.

Chapter 9: Jackson's Leap of Faith **-- Brown v. Board of Education**

> … as a member of this Court, he labored manfully with the complex and baffling problems of our time. His contributions were great. He has earned his rest.
>
> --Chief Justice Earl Warren[1]

> … any man with the Justice's views who could join the segregation opinions could hardly be characterized as going off "half-cocked."
>
> --E. Barrett Prettyman, Jr.[2]

When Simple Justice is an Oxymoron

As observers look back today, over fifty years after the Supreme Court issued its decision in Brown v. Board of Education, a contrary result hardly seems possible. Even a Supreme Court nominee whose views on minority rights liberals find alarming gushed, in a confirmation hearing performance noteworthy for its dogged avoidance of expressing any opinion, that Brown "was one of the greatest, if not the single greatest thing, that the Supreme Court of the United States has ever done."[3] And yet, as the momentum toward Brown's celebrated decision mounted in the early 1950s, factors combined to make that decision difficult: the legislative history of the relevant constitutional amendment failed to support an end to segregated schools; some justices, including a Chief Justice, harbored serious doubt, to the point of possibly being on the verge of voting to reaffirm Plessy v. Ferguson; and everyone on the Court feared social unrest if the Court outlawed the practice.[4]

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[1] Earl Warren, "Justice Robert H. Jackson, Supreme Court of the United States," 348 U.S. vii (1954).
[2] E. Barrett Prettyman, Jr. to Felix Frankfurter, October 13, 1955, Box 170, Folder 6, Felix Frankfurter Collection, Harvard University (available on microfilm) 2.
[3] Samuel Alito, U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court, January 11, 2006, Congressional Quarterly Transcript available at www.washingtonpost.com; "Judge Alito's Radical Views," Editorial, New York Times Jan. 23, 2006, p. 18, col. 1.
[4] Klarman, "Brown at 50" 1.

Of all the justices, Jackson may well have been the one who had the hardest time making up his mind. While expressing an abiding hostility to segregation, Jackson fretted over the Court's power to issue such a ruling and the legal basis for it, and its consequences for the judiciary and the country. The case also made him revisit his mixed feelings about race relations. Yet by the end of the process, he sufficiently resolved his doubts to play a significant role in bringing the Constitution up to date with an integrated future. The resources documenting the story of how he resolved his doubts is rich enough to catch many telling glimpses of an extraordinary journey.

A Thumbnail History of School Segregation

Before the Civil War, separate black schools were nearly universal. Thereafter, in some of the northern reaches of the country, where racial attitudes were less hardened and the African American population was small, ending racial separation in the schools happened largely without incident. (Indeed, Jackson himself graduated from Jamestown High with at least one African American classmate). In large swaths of the North, however, there were separate schools, or African Americans were encouraged to attend predominantly black schools by school officials who had to contend with whites' displeasure at integration. In the twentieth century, legally imposed segregation disappeared from the North, but *de facto* segregation, often as an adjunct of housing discrimination, continued. This was especially true in areas outside of New York City with large African American populations that had burgeoned during the Great Migration.[5]

In the old confederacy and several border states, segregation was legally required, and African American schools were allotted unequal and grossly inadequate funding,

[5] Hughes, Refusing Ignorance 36-39, 63-64, 76, 79; Franklin and Moss, From Slavery to Freedom (1998 ed.) 407-08; Davison M. Douglas, Jim Crow Moves North: The Battle over Northern School Segregation, 1865-1914 (Cambridge: Cambridge University Press, 2005) chs. 1-4.

facilities and instruction. The further South and the more rural an area, the greater the disparity, but disparities were universal: in ten Southern states in the 1935-36 school year, the average per capita expenditure for African American students was slightly more than 1/3 of that for whites. Black schools were not all bad for African Americans, as they fostered African American literacy and helped create a professional class of African American educators; but "Separate schools was doubtless one of the strongest supports of the concept of white supremacy in the South," and "contributed … to the maintenance of economic and political inequalities between the white and black populations."[6]

As school segregation's day of constitutional reckoning approached, some states and school districts located funds to make expenditures in black schools approach those in whites.'[7] Ironically, the move toward equalization made it easier to argue that segregation was *per se* unconstitutional, as the more intermediate remedy of equalization was no longer available. Yet all of the Justices, including Jackson, harbored concerns about how desegregation would be received. Public opinion changed radically on race during the postwar years, but serious resistance to desegregation persisted nationwide. Even of more concern, was the expectation that white Southerners would resist school desegregation, the fear of which began to galvanize Southern politics even before the Brown decision.[8]

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[6] Franklin and Moss, From Slavery to Freedom (1998 ed.) 406-07, 408. Recent works on segregated schools include Adam Fairclough, A Class of Their Own: Black Teachers in the Segregated South (Cambridge, MA: Belknap Press, 2006).

[7] Klarman, From Jim Crow to Civil Rights 311; Kluger, Simple Justice (1977 ed.) ch. 15.

[8] Klarman, From Jim Crow to Civil Rights 215; Lubell, The Future of American Politics (1956 ed.) 86-91, 97, 112, 114; George S. Schuyler, "All over the Country," Reporting Civil Rights Part One 115-16; Harbaugh, Lawyer's Lawyer 501; Fredrickson, The Dixiecrat Revolt and the End of the Solid South.

Brown, Jackson and Social Engineering Through Litigation

Procedurally, the case that has come to be known as Brown v. Board of Education was actually an amalgam of five. Four challenged schools in a representative selection of states from among the 20 then mandating or permitting racially segregated education; the fifth challenged segregated schools in the District of Columbia. Each suit made two types of claims, alleging both that laws mandating or permitting segregated schools were unconstitutional *per se*, and that facilities named in the particular lawsuit were unequal. Since all five were either conducted by, or coordinated with, personnel from the NAACP Legal Defense Fund, their similarities for the purposes of judicial review were more important than their local variations.[9]

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[9] The five -- Brown v. Board of Education, in Topeka, Kansas; Briggs v. Elliott, in School District No. 22, Clarendon County, South Carolina; Davis v. County School Board, in Prince Edward County, Virginia; Belton v. Gebhart, in Delaware; and Bolling v. Sharpe, in the nation's capital -- arrived at the Court in differing procedural postures. Brown, Briggs, and Davis were all brought in federal district courts, where three judge panels (as was required under the procedural rules of the time) all declined to overturn Plessy v. Ferguson. In Brown, the judges made factual findings that the segregated schools were equal under the Plessy standard, but concluded, based upon the expert testimony of psychologists and other social scientists heavily relied on by the petitioners in these cases, that even in equal facilities, "Segregation of white and colored children in public schools has a detrimental effect upon the colored children." Brown v. Board of Education of Topeka, Shawnee County, Kansas, 98 F. Supp. 797 (D. Kan. 1951).

In Briggs, the panel initially found, with one judge (District Judge J. Waties Waring, who retired and lived out his life in exile in New York shortly after issuing his dissent) dissenting, that black and white schools in Clarendon County were unequal under Plessy, but gave the state (which had pledged a $75 million bond for equalizing the schools) six months to make progress on correcting the inequities. When the plaintiffs first reached the Supreme Court, the justices, by a 7-2 margin, sent the case back to the District Court for the purpose of making findings required by the upcoming report; Black and Douglas dissented, believing that since "the additional facts contained in the report to the District Court are wholly irrelevant to constitutional questions presented by the appeal to this Court," the Court "should note jurisdiction and set the case down for argument." On remand, the district court issued a final injunction "directing the equalization of educational facilities and opportunities." Briggs v. Elliott, 98 F. Supp. 529 (E.D.S.C. 1951), 342 U.S. 350 (1952), Civ. No. 2657 (E.D.SC 1952).

The panel in Davis unanimously found "no hurt or harm to either race" in racial separation *per se*, but found course offerings, availability of busing and quality of facilities unequal. It ordered the school district to remedy inequalities in curriculum and transportation immediately, and to "pursue with diligence and dispatch" its plan to improve the African American high school's physical plant. Davis v. County School Board of Prince Edward County, Va., 103 F. Supp. 337 (E.D. Va. 1952).

The trial judge in the Delaware case, Belton v. Gebhart, like the Briggs and Davis panels, found the African American schools inferior to those earmarked for whites. Yet unlike his Southern brethren, Chancellor Seitz ruled that the appropriate relief was not to order improvements to the African American schools, but instead to require the school districts to admit African American students to the white schools

The inspiration for these unparalleled actions was more complicated, and of the type likely to present difficulties for Jackson. They were the crowning achievement of a generation-long effort to use the courts to end discrimination against African Americans.[10] Most of the litigation was conducted by graduates of Howard University Law School, where the dean, Charles Hamilton Houston, considered it the school's "'indispensable social function' … to train lawyers" for that mission. Believing that "'A lawyer's either a social engineer or he's a parasite on society,'" Houston trained his students to think as much about history and sociology as the law.[11] This approach to litigation fit in perfectly with the chief legal thought of the time, legal realism. One leading scholar's explanation demonstrates how the assumptions behind the litigation that Houston set in motion fit in with the approaches of realist/instrumentalist Justices such as Douglas and (later) Warren:

> Realism was, in fact, less a philosophy than an attitude. It rejected the mind-set of judges and scholars of the late nineteenth century, who had emphasized legal logic and purity of concepts…. The realists had no great reverence for legal tradition as such. Realist judges and writers were openly instrumental; they asked: what use is this doctrine or rule? A string of citations was definitely not a sufficient answer; it was not an answer to invoke noble judges from the past, or to appeal to so-and-so's treatise, or to deduce a result logically from principles expressed in prior cases…. Law had to be a working social tool; and it had to be *seen* in that light.[12]

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immediately. The Supreme Court of Delaware affirmed the Court of Chancery's ruling, but allowed that the school districts could seek to modify the order mandating school integration at such time as they cured the inequalities between black and white schools. Belton v. Gebhart, 87 A.2d 862 (Del. Ch., New Castle, 1952); Gebhart v. Belton, 91 A.2d 137 (Del. 1952).

Kluger, Simple Justice (1977 ed.) pp. 366, 533 and Part II; Tushnet, Making Civil Rights Law ch. 11; Harbaugh, Lawyer's Lawyer ch. 28 and part I; Bolling v. Sharpe, 347 U.S. 497 (1954).

The lower court decisions for all four state cases are reprinted as an appendix to Leon Friedman, ed., Argument 539-81.

[10] During most of that period, segregated education was fought by bringing actions seeking enforcement of the separate but equal doctrine; segregation in graduate and professional schools ended because achieving equality in separate facilities was deemed impossible at that educational level. Once they won Sweatt and McLaurin, lawyers went on to attack all school segregation as being *per se* unconstitutional. Dickson, ed., The Supreme Court in Conference 638; Tushnet, Making Civil Rights Law 126-27; see pp. 381-85.

[11] McNeil, Groundwork 67, 70, 84-85.

[12] Friedman, A History of American Law (1985 ed.) 688-89.

This approach was inimical to Jackson, who abhorred using the judiciary to benefit a type of litigant or particular point of view, and not as an impartial arbitrator; and whose hostility toward using the law as an instrument of social policy would compound his distrust of civil rights litigation.[13]

First Round of Argument: the Court and Jackson in Paralysis

From the earliest stages of the segregation cases, Jackson believed that handling them well, as opposed to deciding them promptly, was vital. When the Court was considering the certiorari petition from the Kansas plaintiffs on June 9, 1952, Jackson voted to hold over the case, while every justice but he and Vinson voted to grant review. The reason for Jackson's vote became apparent in a memorandum entitled "For 436 – Something like this?" -- a draft order that conveyed his thoughts on how to structure the docket, and why:

> The Court recognizes the Constitutional issues herein however decided are of far reaching effect on many States, and interests. It has been a frequent practice in such situations to accumulate cases presenting similar issues for hearing together in order that the Court may have the benefit of argument from different settings and aspects…. A number of cases raising the same or related issues are pending in this or lower courts. This case is continued to the Oct 1952 Term when it [sic] time for hearing will be given further consideration in light of the foregoing policy.[14]

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[13] See, e.g., Robert H. Jackson, Address, Tribute to Judge Learned Hand and Judge Augustus Noble Hand, Box 170, Folder 5, Felix Frankfurter Collection, Harvard University; available on microfilm (Part III, Reel 2, p. 0001); Robert H. Jackson, Speech before the American Society of International Law, Washington, DC, April 13, 1945, Box 43, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 7-8; Robert H. Jackson, "The Call for a Liberal Bar," Address to the National Lawyers Guild, Washington, DC, February 20, 1938, Box 35, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 1-2; Wasby, D'Amato and Metrailer, Desegregation from Brown to Alexander 39.

[14] Robert H. Jackson, "For 436 – Something like this?", undated memorandum, Box 184 – Legal File – Supreme Court October Term 1953 – Segregation Cases, Robert H. Jackson Collection, Library of Congress; Kluger, Simple Justice (2004 ed.) 540-41; Hutchinson, "Unanimity and Desegregation" 32 n.254.

The docket number in the memorandum, 436, was the original docket number for the Kansas case. See Brown v. Board of Education, 343 U.S. 989 (1952); C. George Neal, "No. 436 – Brown et al v. Board

Frankfurter agreed that the order should read "something like the above."[15] On September 8, 1952, Jackson informed Frankfurter that, after Vinson had consulted with Clark and Reed (the two justices in the building at the time), agreement had been reached whereby the three state cases then before the Court – from Kansas, South Carolina and Virginia – were going to be argued together, "if counsel would cooperate by getting their briefs in on time." He "fully agree[d]" with Frankfurter "that it would be a great mistake not to have them heard together," adding, "my only regret is that the District of Columbia case is not in shape to be heard at the same time.[16] But Jackson ultimately got his wish: on November 10, the District of Columbia case was joined with the other three for argument. A fourth state case, from Delaware, followed on November 24.[17]

Jackson's view on combining a range of cases raising the school segregation issue differed from two other approaches. Black and Douglas seemed ready to overrule Plessy at the first opportunity: when their colleagues voted to send the South Carolina case back to the District Court for additional findings, they wanted to "note jurisdiction and set the case down for argument," because "the facts contained in the report to the District Court [on the state's efforts to equalize the schools] are wholly irrelevant to the constitutional questions presented by the appeal to this Court."[18] On the other hand, Vinson's paralysis had apparently overtaken the Court: in his reply to Jackson's consolidation suggestion,

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of Education of Topeka et al," certiorari memorandum, Box 184 – Legal File – Supreme Court October Term 1953 – Segregation Cases, Robert H. Jackson Collection, Library of Congress.

[15] Felix Frankfurter, reply to "For 436 – Something like this?", undated memorandum, Box 184 – Legal File – Supreme Court October Term 1953 – Segregation Cases, Robert H. Jackson Collection, Library of Congress.

[16] Robert H. Jackson to Felix Frankfurter, September 8, 1952, Box 170, Folder 3, Felix Frankfurter Collection, Harvard University (available on microfilm).

[17] 344 U.S. 1 (1952); 344 U.S. 873 (1952); 344 U.S. 891 (1952).

[18] 342 U.S. at 352 (Black and Douglas, JJ., dissenting); Hutchinson, "Unanimity and Desegregation" 31 n.257; Kluger, Simple Justice (1977 ed.) 539.

Frankfurter was already chafing at "the cowardly thing of 'passing' from week to week."[19]

The first oral argument for the five cases took place on December 9, 10 and 11, 1952. Divining a judge's exact thoughts about a case through his or her questioning at oral argument is often impossible, and can be foolish even to try. Jackson's most persistent line of questioning, however, involved an area which later proved to be of real concern to him: whether ending segregation should be left up to Congress under Section 5 of the Fourteenth Amendment, which provided that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[20] He also asked factual questions about three of the cases, which might have suggested an openness to the possibility of a result based on the individual merits of each case (perhaps a ruling on the equality of each school or school system in question), rather than a blanket ruling.[21] One line of questioning – the applicability of a decision to American Indian children, who were permitted separate schools if they chose – suggested to one of the plaintiffs' attorneys that Jackson might have been inclined to use American Indian policy as a reason not to overturn Plessy. Other lawyers at the argument, however, – including, apparently, Thurgood Marshall – saw the repartee between Marshall and Jackson as

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[19] Felix Frankfurter, reply to "For 436 – Something like this?", undated memorandum.

[20] Friedman, ed., Argument 93-95, 101-02; U.S. Const., Amend. XIV, sec. 5; Kluger, Simple Justice (2004 ed.) 579.

Argument provides something rarely available in appellate cases: complete and published transcripts of oral arguments. For those wanting a briefer and more general flavor of these proceedings, reasonable good accounts may be found in Kluger, Simple Justice (1977 ed.) 564-81 and 667-78, and in Wasby, D'Amato and Metrailer, Desegregation from Brown to Alexander 67-80 and 80-88.

[21] Friedman, ed., Argument 30-31, 140, 150-51, 167.

"important, because in its casual good-naturedness, it showed a kind of rapport and confidence that might well have predisposed some justices in Thurgood's favor."[22]

The notes from the December 13, 1952 postargument conference demonstrates that the Court was too burdened with many concerns, including those raised by Jackson, to speak with one voice.[23] Four justices – Black, Douglas, Burton and Minton – voiced a clear intent to vote right then to end segregation,[24] in spite of serious concerns about the consequences of the outcome. For example, Black, who as a native Alabamian (and former Klan member) knew as much about Southern society as anyone, believed that the fallout from a decision ending segregation "would be serious and drastic," with "some violence":

> States would probably take evasive measures while purporting to obey. South Carolina might abolish its public school system. One of the worst features is that the courts will be on the battle front. It will be law by injunction and contempt, and I don't believe in law by injunction.[25]

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[22] Jack Greenberg, Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution (New York: Basic Books, 1994) 170-71; Kluger, Simple Justice (2004 ed.) 574.

[23]The historical record of the postargument conferences in Brown was unusual (if not unique), in that "No fewer than six Justices" saved their raw notes from at least one of the main meetings at which Brown was discussed, those on December 13, 1952 and December 12, 1953. The richness provided by so many contemporaneous recollections, producing accounts whose "integrity is quite good" according to a scholar who worked with them extensively, gives us perhaps the most complete picture of conferences for any case. This view is relatively recent, given the unavailability or use restrictions on these sources for many years after the Justices' deaths, and provides a better perspective on their positions. Dickson, ed., The Supreme Court in Conference xxv-xxvii. Two of the most important sources that which have taken advantage of this newly available evidence are Kluger, Simple Justice (2004 ed.) 590-618; and Klarman, From Jim Crow to Civil Rights 293-98.

[24]Dickson, ed., The Supreme Court in Conference 648, 652-53; see also Newman, Hugo Black: A Biography 431-32.

[25] Dickson, ed., The Supreme Court in Conference 648, 652-53. Black's trepidation was even more pronounced in outside conversations, in which he predicted "blood in the streets" and that "people are going to die" over this issue. Newman, Hugo Black: A Biography 428, 438-39.

He and Douglas ultimately took the position that relief in these cases should be limited to the plaintiffs who actually filed the lawsuits; allowing delay in implementing the ruling struck Douglas and Burton as a good idea.[26]

Concerns, both of law and of policy, were even greater among the less certain. Vinson did not "see in the District of Columbia case how we can get away from this Court's long and continued acceptance" of segregation. He hesitated reversing in the South Carolina case because "The abolition of the separate school system in the South raises serious practical problems," given the number of students involved and the "very serious and very emotional" nature of the situation."[27] In the Delaware and Virginia cases, he was "inclined toward giving these states the time to make their facilities equal."[28] Reed (a Kentuckian like Vinson) recounted the stock arguments for "uphold[ing] segregation as constitutional."[29] Frankfurter announced that he was "prepared to vote today that segregation in the District of Columbia violates the *due process clause*," yet he believed that the Fourteenth Amendment made it more difficult to rule against the states. He urged his brethren to "set all of these cases down for

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[26] Newman, Hugo Black: A Biography 428, 439-40; Dickson, ed., The Supreme Court in Conference 652-53.

[27] Dickson, ed., The Supreme Court in Conference 647; Hutchinson, "Unanimity and Desegregation" 37.

[28] Dickson, ed., The Supreme Court in Conference 647. Vinson's clerk recalled hearing indirectly "that he was opposed to overruling *Plessy v. Ferguson* … because of his belief that a decision that had lasted that long should not be overturned by the Supreme Court," but by Congress or by constitutional amendment. John Q. Barrett, Mod., "Supreme Court Law Clerks' Recollections of Brown v. Board of Education," transcript of April 28, 2004 panel discussion, Robert H. Jackson Center, Jamestown, NY, transcript printed in St. John's Law Review 78 (summer 2004) 530 (recollection of Earl E. Pollock, clerk to Chief Justices Vinson and Warren). The suggestion that Vinson thought that this problem was best solved by Congress was belied by his in-conference criticism of that argument. See p. 447.

The full complement of conference notes also cast doubt on Mark Tushnet's suggestion, based on Jackson's notes and a secondary source, that "on balance the tone suggested [Vinson] would go along with a majority decision to hold segregation unconstitutional." Mark Tushnet, Making Civil Rights Law 191.

[29] Arguing that "separation of the races is for the benefit of both," he added that "There has been great, steady progress in the South in the advancement of the interests of the Negroes"; that "States should be left to work out the problem for themselves"; and that they would, in 15 or 20 years "in the border states." But "In the Deep South, separate but equal schools must be allowed." Dickson, ed., The Supreme Court in Conference 649.

reargument on specific issues," not as "a delaying tactic," but to "avoid the use of needless force in changing this."[30]

Jackson suggested that "If we are going to take turns, it is better *not to take a vote now.*"[31] The wisdom of this "unusual" move was confirmed later. As explained by one who extolled a similar decision by Chief Justice Warren, "it would be inadvisable to take a vote that might freeze certain Justices into a fixed position before further work and discussion could take place in order to arrive, one hoped, at unanimity…."[32] But at the time, Warren "was simply following the precedent set a year earlier at Justice Jackson's suggestion."[33]

Approaching his analysis of the merits "as a lawyer would," Jackson found "nothing in the *text*" – neither in the legislative history nor in prior court cases – "that says this is *unconstitutional*." Nor was there anything "in the acts of Congress either way." Thus, "On the basis of precedents I would have to say that it is constitutional." Noting that "Marshall's brief starts and ends with sociology, not legal issues," he insisted, "I don't know the *effect* of *segregation, or the reason* for it. You can't *cure* this situation" -- apparently meaning the larger problem of racism – "by putting children together." He added that "I was never really conscious of racial problems until I came to the District of Columbia," but acknowledged (unlike in his letters to Charles Fairman) that "We had segregation in Jamestown, New York in the 1860s and 1890s." He also

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[30] Dickson, ed., The Supreme Court in Conference 649-51.
[31] Dickson, ed., The Supreme Court in Conference 652; Hutchinson, "Unanimity and Desegregation" 36.
[32] Barrett, Mod., "Supreme Court Law Clerks' Recollections of Brown v. Board of Education" 543-44 (recollection of Earl E. Pollock, clerk to Chief Justices Vinson and Warren).
[33] Schwartz, "Chief Justice Rehnquist, Justice Jackson, and the *Brown* Case" 251-52; Hutchinson, "Unanimity and Desegregation" 39. Unlike Schwartz, Hutchinson did not see the decision to delay a vote as particularly important.

pointed out how white lawyers (Catholics and Jews) would not let Negroes use books in the library," with the library being moved out of the courthouse.

Jackson concluded, "I won't be a party to immediate unconstitutionality – to say that it is unconstitutional to practice segregation tomorrow," as "It will be bad for the Negroes to be put into white schools." "But," he added, "segregation is nearing an end. (If two or three deaths on the Court – this will come – it is no way out.)." He thought that "We should perhaps give them time to get rid of it, and I would go along on that basis." He would therefore "not object to such a holding" ending segregation "with a reasonable time element," as "equitable remedies … can be shaped to the needs." He ended with a thought recorded as a sentence fragment: "If we can work it out so we can say segregation 'bad' – under approval of the Constitution and with the support of Congress – *and that it must* be done in a certain period." He suggested inviting the Senate and House Judiciary Committees to participate, hoping that "If stirred up to a point, they may abolish it."[34]

Douglas, whose relationship with Jackson was virtually nonexistent by the early 1950s, suggested that Jackson was prepared to uphold segregation at the first conference. Jackson's comments (as represented by a composite report of his colleagues) suggested a more complex view.[35] Yet there is no question that Jackson had major concerns with a

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[34] Dickson, ed., The Supreme Court in Conference 652-53; Kluger, Simple Justice (2004 ed.) 611. The controversy about allowing African Americans access to a law library to which Jackson alludes sounds like the incident in Washington, D.C., over which he presided as Attorney General. See pp. 132-34. But the Dickson distillation implies that the incident had occurred in Jamestown.

Bernard Schwartz wrote that, at the first conference, Jackson said, "I would have to say [segregation] is constitutional…. We can't ease this situation by putting children together." A more complete rendition of his lengthy statement suggests that, in context, the statement's meaning was more subtle and complex than could be divined from the bare declaration. Schwartz, Super Chief 89.

[35] Dickson, ed., The Supreme Court in Conference 652-53. Douglas went so far as to claim in his memoirs, written some thirty years after the case had been decided, that Jackson was the last justice to agree to vote against segregated schools. That recollection, however, flies in the face of other evidence, including a

Court decision ending segregation. His two law clerks at the time – Donald Cronson and future Chief Justice William Rehnquist – each wrote memoranda before the conference, each focusing on different concerns Jackson had about voting to end segregation. Cronson argued that, while Plessy should have been decided along the lines of Harlan's dissent (that segregation is discriminatory), "A large segment of the country has oriented much of its culture" around the Court's decision. He then summoned a series of precedents – none particularly persuasive – indicating that decisions so relied upon should remain undisturbed. But the argument with the most significance for Jackson was one that Cronson merely alluded to in recommendations at the end of his memorandum:

> I think this Court should confess error in Plessy, and straighten out the mess so that Congress may by legislation prohibit segregation. If Congress refuses to do so, even though it is informed by this Court that the present system is Unconstitutional, then surely this Court should not do so.[36]

Rehnquist likewise displayed some knowledge of Jackson's thoughts, but strayed even further from his boss' views than did Cronson. The justice could see merit in both

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memorandum Douglas himself had written on decision day. Douglas, The Court Years 114-15; Douglas, Memorandum for the File, May 17, 1954, reprinted in Urofsky, ed., The Douglas Letters 165-67; Hutchinson, "Unanimity and Desegregation" 43; Kluger, Simple Justice 705-07.

The full text of the last section of Jackson's comments, as recorded by his colleagues and distilled by Dickson, is as follows:

> I won't be a party to immediate unconstitutionality – to say that it is unconstitutional to practice segregation tomorrow. It will be bad for the Negroes to be put into white schools. But segregation is nearing an end. (If two or three deaths on the Court – this will come – it is no way out.) We should perhaps give them time to get rid of it, and I would go along on that basis…. These are equitable remedies that can be shaped to the needs. If we can work it out so we can say segregation "bad" – under approval of the Constitution and with the support of Congress – *and that it must* be done in a certain period.

Dickson, ed., The Supreme Court in Conference 652-53.

[36] Donald Cronson, "A few expressed prejudices on the Segregation cases," undated memorandum, Box 184, Legal File: Supreme Court – October Term 1953 – Cases – Segregation Cases, Robert H. Jackson Collection, Library of Congress 1-3. Cronson's dubious authorities were Justice Roberts' dissent in Smith v. Allwright (Jackson voted the other way); the idea that failing to amend the Constitution to overrule Plessy amounted to acquiescence in the decision (not a winning argument, given the paucity of similar amendments); and a decision of the Appellate Division of the Supreme Court of South Africa. Id.

sides of an argument, but that gift was nonexistent in his clerk.[37] The young lawyer's argument that the Court should not "read its own sociological views into the Constitution," particularly if they are "palpably at variance with precedent and probably with legislative history," stated some of Jackson's concerns accurately enough. Equating the "'liberal'" members of the Court with the Four Horsemen of Roosevelt's time, he employed arguments that were consistent with the types of sentiments Jackson had expressed before: that a Court anxious to strike down existing precedent "differs from the McReynolds court only in the kinds of litigants it favors and the kinds of special claims it protects"; that "'personal'" Constitutional rights deserve no more protection than "'property'" rights; that "in the long run it is the majority who will determine what the constitutional rights of minority are.'"[38]

Yet seeing nothing wrong with segregation itself, as evidenced by his estimation that this was "not one of those extreme cases which commands intervention from one of any conviction," Rehnquist closed with a militant, Holmesian flourish that might have reflected Jackson's overall judicial ideology and his pique at his colleagues, but that clashed with his stated views on race relations:

> I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think Plessy v. Ferguson was right and should be re-affirmed. If the Fourteenth Amendment did not enact Spencer's Social Statics [sic], it just as surely did not enact Myrdahl's [sic] American Dilemna [sic].

A by-product of Rehnquist's own nomination to the Court, the controversy over how completely and accurately Rehnquist's memorandum reflected Jackson's thinking has

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[37] For a persuasive elaboration of this argument, replete with examples, see Ray, "A Law Clerk and His Justice" 562-63, 568-72, 590-91.

[38] William H. Rehnquist, "A Random Thought on the Segregation Cases," undated memorandum, Box 184, Legal File: Supreme Court – October Term 1953 – Cases – Segregation Cases, Robert H. Jackson Collection, Library of Congress 1-2.

largely been put to bed, with limited credence given to Rehnquist's alibi that his memorandum reflected Jackson's views and not his own. While it might be fair to say that each memorandum represented certain aspects of Jackson's thinking, there seems no support for the claim, other than Rehnquist's self-serving testimony, that Jackson was at all enthusiastic about affirming Plessy at any time during the case's pendency.[39]

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[39] William H. Rehnquist, "A Random Thought on the Segregation Cases" 1-2.

The significance of Rehnquist's memorandum for Jackson scholarship was complicated when Rehnquist became a nominee to the Supreme Court (first as Associate Justice, and later as Chief). His militantly pro-segregation memorandum could have cost him either post, but for his testimony that he wrote the piece as an expression of the justice's views, not his own, for the justice's use at conference. The ensuing credibility battle, fought with Rehnquist on one side, and the then-custodian of Jackson's papers, Jackson's projected biographer and Jackson's longtime secretary on the other, became a full-blown scholarly debate as well: most have dismissed Rehnquist's claim as perjury, but one leading scholar, Tushnet, gave Rehnquist a little more of the argument: "The memorandum certainly is not a transcription of what Jackson said to Rehnquist, but during the discussions in chambers Jackson probably expressed sufficient ambivalence that a law clerk with Rehnquist's inclinations could reasonably expect his employer to sympathize with an argument against overruling *Plessy*." Nomination of Justice William Hubbs Rehnquist: Hearings Before the Senate Comm. on the Judiciary, 99th Cong., 2nd Sess. 161-65 (1986), quoted in Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1868, 1879-80,1882, 1910-12; Tushnet, Making Civil Rights Law 190; Chernack, "The Clash of Two Worlds" 55 n.21; Donald E. Boles, Mr. Justice Rehnquist, Judicial Activist: The Early Years (Ames: Iowa State University Press, 1987); Joseph L. Rauh, Jr., "An Unabashed Liberal Looks at a Half-Century of the Supreme Court," North Carolina Law Review 69 (November 1990) ns. 114-117 and accompanying text; Kluger, Simple Justice (2004 ed.) 607-15, 609 n.*; Schwartz, "Chief Justice Rehnquist, Justice Jackson, and the *Brown* Case" 250, 267; Ray, "A Law Clerk and His Justice" 555-59. For a well constructed version of the case that Rehnquist lied, based on an analysis of how Rehnquist dealt with the allegations during his 1971 confirmation, and on a comparison of this memorandum with others that Rehnquist had written while in Jackson's employ, see John W. Dean, The Rehnquist Choice: The Untold Story of the Nixon Appointment that Redefined the Supreme Court (New York: The Free Press, 2001) 274-84.

Does it seem likely that Rehnquist's views represented Jackson's at the time Rehnquist wrote the memorandum? Jackson's subsequent writings, and his colleagues' written summaries of his comments at conferences (for which it is hard to believe that someone like Jackson, who drafted his own opinions, not to mention his own speeches at Nuremberg, would have used a clerk's memorandum as crib notes) suggest otherwise. It is also possible, whether Rehnquist lied to the Senate or not, that his memorandum represented a good faith but mistaken attempt to restate Jackson's position: some of the justice's thoughts are there but the subtleties are not, which would not be surprising for a young lawyer who, like Rehnquist, lacked both Jackson's "dialectical" analytical style and the type of close relationship with the Justice which might have aided his understanding of his boss's mind; and whose political activities suggested that he was an ideologue with little concern for individual or minority rights, or for opposing points of view. Laura K. Ray, "A Law Clerk and His Justice" 535, 547, 558-59, 562, 577, 590; Hockett, "Justice Robert H. Jackson and the role of the Supreme Court in American Politics" 70, 105 (Jackson's views "considerably more complex" than his clerk's); Prettyman to Frankfurter, October 13, 1955 (refuting a Rehnquist letter highly critical of Jackson's tenure as Justice); see generally William H. Rehnquist, The Supreme Court: How It Was, How It Is 32, 76 ff., 83 ff. (Rehnquist seemed to have a better relationship with Frankfurter than with Jackson); William H. Rehnquist to Irene Jackson, December 8, 1954, Box 5, File: Family Papers – Other Papers – "R," Robert H. Jackson Collection, Library of Congress ("I am sure that I saw only one side of a many-sided man; but as an employer, and in a way, a preceptor, he was fair, considerate, and wise"); Kluger, Simple Justice (2004 ed.) 609 n.* (Rehnquist's political activities and expressed opinions

Except for a discursion about racial problems in Texas centering more on Mexicans than African Americans because there were "Far more retarded" Mexicans, Clark's comments sounded more like Jackson's than those of any of his other colleagues, in that he required a delay in implementation in return for a vote against segregation. But he took Jackson's idea to its logical conclusion: "Our opinion should give the lower courts the opportunity to withhold relief in light of troubles…. Otherwise, I would say that we have led states on to believe that separate but equal is O.K., and we should let them work it out." He was already prepared to rule for the Delaware plaintiffs.[40]

One leading scholar wrote, reasonably enough and in opposition to the traditional account that only four (and no more than six) justices were prepared to overrule Plessy at the time, that all of the justices (except perhaps for Reed) seemed to understand which result they would have to reach, but were all over the map "over how to justify the result," and were concerned about the consequences of immediate enforcement.[41] Yet without a clear vision on which they could all agree, it was not yet time to move such a revolutionary and potentially divisive case to decision, even if they all felt pulled in that

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consistent with support of Plessy). So, while the memorandum provides clues about elements of Jackson's thinking at the time, it cannot be read as a complete reflection of his views.

One last point should be addressed. Jackson's hiring of a doctrinaire conservative like Rehnquist should not be read as evidence that the Justice agreed with clerk on certain issues or on overall philosophy, for "justices often hire at least one clerk whose ideological predispositions do not match their own, to promote the likelihood that a clerk will spot an ominous approach or use of language immediately." Cooper, Battles on the Bench 169.

[40] Dickson, ed., The Supreme Court in Conference 653.

[41] Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*," 1907ff. For the classic view – based on Douglas, whose credibility has been seriously damaged elsewhere -- see Klarman, From Jim Crow to Civil Rights 300-01; Kluger, Simple Justice (1977 ed.) 614; Schwartz, Super Chief 72 (Frankfurter claimed there were five votes in favor of overruling Plessy: Black, Douglas, Burton, Minton and himself); Klarman, "Brown at 50" 1-2. Kluger's 2004 edition amended somewhat his initial view that the Court was "about as severely divided as it could be" after the first argument, instead concluding on the basis of newly available argument notes and the conflicting guesstimates of the justices themselves that four of them (Black, Douglas, Burton and Minton) were definitely in favor of overruling Plessy, one was opposed (Reed), and the remaining four expressed concerns and contingencies. Kluger, Simple Justice (2004 ed.) 617-18.

direction. Jackson and Frankfurter "may have been the justices who were most conflicted," as they abhorred segregation but questioned the Court's authority to do much about it; and they were trying to justify what they saw as a correct result that was difficult to justify as a legal decision.[42]

But the tension Jackson felt in 1953 involved more than the law-versus-politics conundrum. That the political question arose at all was because of his doubts that the legislative history gave any support to overruling Plessy. At the time, he saw the issue of legislative intent as perhaps the decisive issue. When asked by a schoolgirl for Court materials on the segregation case to help with a debate on whether "Negro segregation should be abolished," Jackson replied:

> I am sorry that I do not seem to have information that is helpful on the subject you are debating. The question that is before this Court is not whether segregation "should be abolished," but whether, by virtue of the Fourteenth Amendment to the Constitution, it was abolished. This is a rather technical legal argument and I doubt if the briefs or proceedings here would be of much help to you.[43]

That he saw the case as raising a "technical legal" issue of legislative intent suggests that he had still not come to terms with the need for transcending the legislative history – whether because he was still uncertain what the legislative history demonstrated, which was quite possible given his later observations; or because he knew he had to come up with a different rationale, but as yet had no idea what it should be. Given his later concerns about flying against legislative intent and raising the ire of the legal profession (not to mention the white South), and the difficulty he was to have with devising a

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[42] Klarman, From Jim Crow to Civil Rights 299-300; Klarman, "Brown at 50" 2-4 (emphasizing Frankfurter's decisionmaking process); Kluger, Simple Justice (2004 ed.) 656; Chernack, "The Clash of Two Worlds" 92; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1901, 1914-15; Tushnet, Making Civil Rights Law 169.

[43] Sally Parsons to Robert H. Jackson, March 28, 1953 and Robert H. Jackson to Sally Parsons, April 7, 1953, Box 184, Legal File – Supreme Court October Term 1953 – Cases – Segregation Cases: Correspondence and Press Clippings, Robert H. Jackson Collection, Library of Congress.

rationale for reversal which he could live with, it was no wonder that the justice was hoping for Congress to step in.

The Reargument Memorandum: Jackson Records his Reservations at Length

On June 8, 1953, with its collective indecisiveness unresolved, the Court ordered reargument on five questions concerning "the meaning and intent of the Fourteenth Amendment, and whether the courts had the authority to end segregation under the Fourteenth Amendment or the courts' equitable powers." The vote was 5-4, with Jackson joining Black, Frankfurter, Burton and Minton in favor.[44] This time, the Court asked the Justice Department to participate. Black strongly opposed its inclusion, believing it would politicize the process. But Jackson had been perhaps the first Justice to suggest that the new Eisenhower Administration, which would have responsibility for enforcing a Court ruling "full of perplexities … should be asked to face that responsibility as part of our process of adjudication."[45]

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[44] 345 U.S. at 972; Dickson, ed., The Supreme Court in Conference 653; Klarman, From Jim Crow to Civil Rights 301; Hutchinson, "Unanimity and Desegregation" 38.

The "standard version" of the narrative about how *Brown* came to be decided the way it did centered on Frankfurter, who proceeded to "fill the leadership void" left by Vinson by, *inter alia,* conjuring reargument questions to buy time for the Court to sort out its concerns. Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1872 ff. Tushet and Lezin argued that traditional accounts, fed by information from the Justice's cadre of devoted former clerks, "overstates his contribution to the deliberative process, at least to the extent that it attributes to him substantial influence over his colleagues' positions," while it "neglects the important role Jackson played in structuring the way in which Frankfurter thought about the problems of segregation and remedy." Id. at 1875, 1883, 1909, 1930. This author is somewhat skeptical of Tushnet's assessment of Jackson's influence on Frankfurter, who was not in the habit of letting himself be swayed so fundamentally by a colleague's views, and who was probably not shown Jackson's writings on the subject (which would have been the logical thing to do if Jackson were trying to persuade his colleague -- something which, as a general proposition, Jackson was loathe to do. See p. 170). Yet their argument is plausible, because Jackson played a major role in charting the case's progress, both procedurally and substantively; he shared (and influenced, to a degree) Warren's views on the proper rationale for overruling Plessy; he was more flexible than Frankfurter on judicial restraint; and he and Frankfurter, both of whom harbored doubts about Brown, normally discussed cases and Court business.

[45] Schwartz, "Chief Justice Rehnquist, Justice Jackson, and the *Brown* Case" 252, quoting Felix Frankfurter to Fred Vinson, June 8, 1953, Felix Frankfurter Papers, Library of Congress; Schwartz, Super Chief 81-82; Wasby, D'Amato, and Metrailer, Desegregation from Brown to Alexander 80.

Jackson reflected on his views in a memorandum drafted on the first day of reargument, in which he sought to "record my thoughts and difficulties."[46] Those problems, he insisted, had nothing to do with his feelings about segregation, whose end "is congenial to my own background and policy preconceptions." Rather, "My difficulty is to justify it upon any sound juridical basis, other than the will of the temporary occupants of the Bench." He doubted that the legislative history indicated whether the Fourteenth Amendment was meant to end school segregation: its proponents, among whom were "those … who hoped for complete social equality and consequent early amalgamation of the races … played down the consequences of the legislation they were proposing in order to ease its passage while the opponents exaggerated its consequences in order to frighten away support."[47]

Moreover, he feared that, given the country's progress in race relations, a decision ending segregation would gain too little and risk too much. "If we are using judicial power to promulgate a political decision, we may be paying a large price for some acceleration of a movement that is already swiftly progressing."[48] If public opinion indeed were turning quickly against the "custom" of segregation, "the place for recognition of public current opinion should be in the legislative branch of the government":[49]

> However desirable it may be to abolish educational segregation, we cannot, with a proper sense of responsibility, ignore the question whether the use of the judicial office to initiate law reforms that cannot get enough national public support to put them through Congress, is our own constitutional function. Certainly policy

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[46] Robert H. Jackson, December 7, 1953 memorandum, Box 184, Legal File: Supreme Court O.T. 1953 – Cases – Segregation Cases – RHJ Working Papers not Circulated, Robert H. Jackson Collection, Library of Congress 4.
[47] Jackson, December 7, 1953 memorandum, Segregation Cases 3.
[48] Jackson, December 7, 1953 memorandum, Segregation Cases 4-6.
[49] Jackson, December 7, 1953 memorandum, Segregation Cases 6-7.

> decisions by the least democratic and the least representative of our branches of government are hard to justify.[50]

Thus, should the Court "intervene, to promulgate as law, that which our Constitutional representative system will not," then "It means nothing less than that we must act because our representative system has failed."[51]

Jackson's reservations were thus based on two of his long-held beliefs about the limits of judicial power – that social reform was a task best left to legislatures, not courts; and that courts are ill-suited to force compliance with their dictates. He regularly opposed judicial interference in social and economic matters;[52] and there was as yet nothing about the segregation cases which changed his mind. His reservations were also based on his reading of the Fourteenth Amendment, whose fifth section provided that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[53] Jackson pondered the significance of this enabling section half a decade before Brown, in his majority opinion in Fay v. New York. In that case, he distinguished jury selection cases from others, observing that the federal statute banning racial discrimination in jury selection "was a factor so decisive in establishing the Negro case precedents that the Court even hinted that there might be no judicial power to intervene *except in matters authorized by Acts of Congress*,"[54] barring violations giving rise to denial of a fair trial.[55]

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[50] Jackson, December 7, 1953 memorandum, Segregation Cases 7-8.
[51] Jackson, December 7, 1953 memorandum, Segregation Cases 13.
[52] See pp. 135-51, 164, 166-68.
[53] U.S. Const., Amend. XIV, sec. 5.
[54] 332 U.S. at 282-83 (emphasis added).
[55] 332 U.S. at 292-93.

Yet on this point, he was not on solid legal footing. He quoted extensively from a nineteenth-century case, Ex parte Commonwealth of Virginia:

> All of the [Reconstruction] amendments derive much of their force from the [empowering] provision. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation.[56]

However, the next sentence suggested a meaning contrary to Jackson's: "Some legislation is contemplated to make the amendments fully effective."[57] If the justice's argument pressed the need for enabling legislation to implement a desegregation decision (an argument he was to make later in the process), Commonwealth of Virginia would support it. But the idea that the Court should not venture an opinion on Plessy's continued vitality confused implementation with interpretation -- which was, indisputably, the Court's job.[58]

The other justices gave short shrift to Jackson's argument. Vinson thought little of it, if for no other reason than "if they *do not* act, this leaves us with it" in any event; and he surmised that the legislative body "probably will *not* act…."[59] Black considered, "If we had decided this case right after passage of the Civil War Amendments, I believe that we would have" left enforcement to Congress, but he could not draw a rational distinction between this and other Fourteenth Amendment cases: "If we can declare … other laws unconstitutional, then we can do the same with segregation."[60] During the

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[56] Ex parte Commonwealth of Virginia, 100 U.S. 339, 345 (1879), quoted in 332 U.S. at 283.
[57] 100 U.S. at 345.
[58] Civil Rights Cases, 109 U.S. 3, 14 (1883) ("It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character.").
[59] Dickson, ed., The Supreme Court in Conference 647; Chernack, "The Clash of Two Worlds" 107-08.
[60] Dickson, ed., The Supreme Court in Conference 648.

first oral argument, Douglas peremptorily cut off some of Jackson's questioning on the subject with the query, "Has the Court ever held that the Fourteenth Amendment is not executed unless Congress acts?"[61] The only one to give the argument credit, Reed, added it to his standard litany of pro-segregation arguments.[62] Recognizing the weakness of his position, Jackson concluded the written version of this argument by conceding that even if the Fourteenth Amendment's power had been intended to reside in Congress and not the courts, any judicial misinterpretation "was made long ago and we should probably not now retreat from it."[63]

Court-ordered solutions to social problems like segregation troubled Jackson for yet another reason: because the courts could not force a recalcitrant public to obey. He consistently took this view through his judicial career. In his autobiographical draft, he used arguments closely paralleling Federalist Number 78 in describing a Supreme Court justiceship "as a position, not so much of power as one of influence": "The Court has neither purse nor sword. It turns its judgments over to the executive department for enforcement."[64] With nearly a dozen terms of judicial experience, he wrote in his final major work, The Supreme Court in the American System of Government, "Judicial functions … can be discharged only in that kind of society which is willing to submit its

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[61] Friedman, ed., Argument 102.
[62] Dickson, ed., The Supreme Court in Conference 655-56.
[63] Jackson, December 7, 1953 memorandum, Segregation Cases 8.
[64] Robert H. Jackson, Chapter I, Introduction, Autobiographical draft 1. Compare Jackson's words, above, with Hamilton's: "The judiciary … has no influence over either the sword or the purse … It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." Alexander Hamilton, "A View of the Constitution of the Judicial Department in Relation to the Tenure of Good Behaviour," Number 78, The Federalist Papers (London: Penguin Books, 1987) 437.

conflicts" to the courts.[65] As a man who was always "to the core, practical,"[66] he knew that, for all of the progress made in race relations, there would be widespread disapproval of desegregation; and that if the Court attempted the job, the weight of that opposition would fall on the branch of government least capable of defending itself. It was also the branch of government whose influence depended on its being perceived as neutral: the public "always seems to sustain the power of the Court," he observed, as it was "still the most detached, dispassionate and trustworthy custodian" of the process of applying the Constitution to concrete problems. So a ruling siding with African Americans against the segregationist South would risk the Court's authority in all matters.[67]

Balanced against that risk was a benefit he considered at best uncertain, as he doubted the persuasive force of the Court's influence. The separate but equal doctrine itself was not properly implemented, despite being "the law of the Constitution as declared by this Court": "One needs only to be a casual traveler in many parts of our country to see for himself that the facilities provided for negroes are not equal to those provided for white pupils and … we need not, on a matter of nationwide common knowledge, be so dumb as to pretend absence of knowledge."[68] Jackson attributed the lack of compliance to "the judicial department which has no power to enforce its own decrees."[69] Even so, "the separate but equal doctrine encountered little resistance and was easy to enforce in comparison to the edict that segregation be totally abolished."[70]

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[65] Jackson, The Supreme Court in the American System of Government 83, quoted in John Q. Barrett, A Commander's Power, A Civilian's Reason: Justice Jackson's *Korematsu* Dissent," Legal Studies Research Paper #06-0038 (The Social Science Research Network Electronic Paper Collection, Feb. 2006) 762.
[66] John Q. Barrett, "Some Words on Jackson (1892-1954), Including His Own," email, October 7, 2004.
[67] Jackson, The Supreme Court in the American System of Government 17ff. See also Chernack, "The Clash of Two Worlds" 74-75.
[68] Jackson, December 7, 1953 memorandum, Segregation Cases 8-9.
[69] Jackson, December 7, 1953 memorandum, Segregation Cases 9.
[70] Jackson, December 7, 1953 memorandum, Segregation Cases 9.

His concern about segregation undoubtedly was compounded by the fear, rooted in World War II and the Cold War, of a kind of ideological struggle not amenable to compromise, which was needed for social and political peace. In his Terminiello opinion, and in other postwar writings,[71] he expressed concern that the Court could end up mediating and be identified with such divisions, including racial divisions:

> … some say, "what are these matters to the judge? They are important to the politician, to the peace officer, to the legislator; but the judge, if he attends to his business, will know them not." I wish it could be so. But …. These social problems walk right into the courtroom and address the court, sometimes openly, sometimes in veiled terms, and sometimes such issues are properly and inescapably involved in legal controversies. I do not need to remind you of … the multiplication of cases that originate in strained racial relations ….

Though in certain limited circumstances the judiciary was unable to avoid it, arbitrating social strife, Jackson strongly believed, simply was not the job of the courts:

> It has never seemed to me that it is the function of the judiciary, notwithstanding the immense grant of power to it under our system, to try to determine what the philosophy or policy of our organized society shall be. That must be decided at the polls. In the nature of things great movements and currents of economic or political life will not, and should not, submit to judicial control. We must be careful not to obstruct or discredit the legitimate and constitutional exercise of the legislative and executive power, if for no better reason, because our judicial power is no substitute for that of the legislature or executive in dealing with matters that now threaten us.[72]

On a more practical level, Jackson argued that the courts are simply not a practical forum for such disputes, as they lacked jurisdiction and competence to fashion appropriate relief. In Brown, he used the Justice Department's brief to illustrate the point:

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[71] See pp. 212-17, 298-303.

[72] Robert H. Jackson, Address before the Judicial Section, New York State Bar Association, The Waldorf Astoria Hotel, New York City, January 22, 1944, Box 42, Speeches and Writing File, Robert H. Jackson Collection, Library of Congress 3-4.

> the Department of Justice concedes that immediate enforcement is impossible and that it is necessary to remand these cases to the District Court under some vague instructions to proceed with enforcement when it may appear practicable. We are offered no standards for the practicability and none exist in the law. From our experience with litigants requiring affirmative action, we know that devices of delay are numerous and often successful…. Members of Boards of Education may resign, they pass away and the coercion to be effective must be directed at the voting population in fact, so that they will appropriate, tax and provide facilities to carry out this program. Moreover, the judicial process is so limited and quite properly so limited that its decree against one school district or one set of school officials does not bind any other district so as to subject them to contempt proceedings…. It casts upon the lower courts a burden of litigation, subjects them to gusts of local pressure and at the same time provides them with no standards for their decision. All that we can say is that a school district must make some change, we don't know what, whenever the local judge tells them to.[73]

He doubted whether the Justice Department would "over the years exert itself more" to bring enforcement suits, as "it cannot do that without Congressional appropriations and approval and there is little reason to believe that a Congress which will not enact legislation to end segregation, is going to appropriate funds to the Executive Department to accomplish the same end."[74] Thus, his "preference for legislative as opposed to judicial action is not a mere desire to pass responsibility to others. It goes to the effectiveness of the remedy and to the use to be made of the judicial process over the next generation."[75]

Congress, by contrast, "could enact a constructive policy abolishing educational segregation," providing: administrative remedies; "standards for determining the rapidity and conditions under which changes should be ordered"; federal funding "where changes are required that are beyond the means of the community"; programs to "lift the heavy burden of private litigation from disadvantaged people and … make investigation [sic]

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[73] Jackson, December 7, 1953 memorandum, Segregation Cases 9-10.
[74] Jackson, December 7, 1953 memorandum, Segregation Cases 11.
[75] Jackson, December 7, 1953 memorandum, Segregation Cases 11.

administrative proceedings against recalcitrant districts the function of some agency that would secure enforcement of the policy"; and, most importantly, a "rule and standard of conduct binding on everyone in the country," something "judicial process which binds only the parties to the particular litigation" cannot do.[76] In situations where "many persons of a class" find their rights violated, the justice who had thought so much about the relative strengths and weaknesses of each of the branches of government during his legal career concluded that such rights "have to be made public concern and dealt with by mass methods, not by the slow evolution of decisional law."[77]

Similar concerns had surfaced in his August 24, 1953 speech to the American Bar Association, in which he discussed the dilemmas posed by the making of social policy by the courts. He believed, as always, that jurists should aim for objectivity and neutrality, and that almost all of them do: "Few judges like to be accused of acting from merely personal predilections."[78] But if objectivity requires "application of existing and ascertainable legal criteria and standards," those "concrete factors" do not exist in constitutional cases:

> … as an advocate at the Supreme Court bar in many constitutional cases, I never was able to determine what material would really be considered by the several Justices as controlling of such issues. And I am bound to admit that a decade of experience as a judge throws little more light on the problem. Nothing has more perplexed generations of conscientious judges than the search in juridical science, philosophy and practice for objective and impersonal criteria for solution of politico-legal questions put to our courts…. Confusion at the bar and disagreement on the bench usually begin in lack of an accepted system of weights

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[76] Jackson, December 7, 1953 memorandum, Segregation Cases 13-14; Robert H. Jackson, January 11, 1954 memorandum, Box 184, Legal File: Supreme Court O.T. 1953 – Cases – Segregation Cases – RHJ Working Papers not Circulated, Robert H. Jackson Collection, Library of Congress 9-10.
[77] Jackson, December 7, 1954 memorandum, Segregation Cases 14.
[78] Robert H. Jackson, "The Role of the Judiciary in Maintaining Our Freedoms," Address at the Annual Dinner in Honor of the Judiciary of the United States, American Bar Association, Boston, MA, August 24, 1953, Box 50, File, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress 3. See generally Charles Fairman, "Associate Justice of the Supreme Court," Columbia Law Review 55 (1955) 460.

> and measures to mete out constitutional justice. Unfortunately, the conclusion of judges having the highest sense of professional responsibility is that the present state of our constitutional development provides no definitive principles of decision.[79]

With *stare decisis* having only "limited application in constitutional cases"; with competing judicial ideologies of "natural law'" and "'realism'" providing judges "with an impersonal and probably unconscious camouflage for holdings that emerge out of the mists of preconception"; with "long-sustained public opinion" unavoidably playing a role in judicial decisionmaking; and with the law operating as "a progressive discipline … giv[ing] much latitude to our judgment," it is no wonder that "we find standards of constitutional decision soft and transient."[80]

Jackson understood that some flexibility in constitutional interpretation was necessary – hence his quotation, more than once, of the Cardozo axiom that "words which express our great constitutional generalities 'have a content and a significance that vary from age to age.'"[81] Yet Jackson believed that the great jurist, by the end of his life, "feared a trend might go too far and was somewhat alarmed at the interpretation some scholars of thought were putting upon his words." It was Jackson's conviction, informed by his understanding of his illustrious predecessor, that judicial lawmaking must be subject to tangible limits and standards. [82]

How, then, should a constitutional case be decided? Jackson believed that responsibilities should be assigned to the appropriate branches of government.[83] Yet he was never as doctrinaire about judicial restraint as his colleague and friend, Frankfurter,

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[79] Jackson, "The Role of the Judiciary in Maintaining Our Freedoms," 3.
[80] Jackson, "The Role of the Judiciary in Maintaining Our Freedoms" 3-5, 10-11.
[81] Jackson, "The Role of the Judiciary in Maintaining Our Freedoms" 10.
[82] Robert H. Jackson to G.V.V. Nichols, June 8, 1953, Box 17, File: General Correspondence -- "N," Robert H. Jackson Collection, Library of Congress.
[83] Fairman, "Associate Justice of the Supreme Court" 451.

and understood that these classifications were not as neat and tidy on a practical level as they might appear theoretically; even the more doctrinaire Frankfurter defined constitutional law as "not at all a science, but applied politics, using the word in its noble sense."[84] Ultimately, however, the courts cannot protect another branch of government from itself.[85]

Second Argument

The second oral argument, based on the questions the Court posed in its June 8, 1953 order, took place over three days -- December 7, 8 and 9, 1953. Jackson used the occasion to press old and new concerns.[86] On "the propriety of exercising judicial power to reach this result, if the result would be reached, in the absence of any legislation," he received little encouragement from the attorneys, who took the view that courts could act in the absence of Congress to implement constitutional guarantees. The justice dusted off his Fay argument that legislation barring racial discrimination on jury composition provided a precedent for congressional action, but the acting Solicitor General pointed out that the Court regularly enforced other constitutional rights without statutes in place.[87]

Jackson also devoted a line of questioning to legislative intent. Prefacing his inquiry with, "I almost hesitate to ask a question in a case of this kind because people jump to the assumption that if you want information, it is stating a judgment that I have," he probed the subissue of how, if the Fourteenth Amendment's framers had sought to end

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[84] Alexander M. Bickel, Politics and the Warren Court (New York: DaCapo Press, 1973) xi.
[85] Fairman, "Associate Justice of the Supreme Court" 452-53 [quoting Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952)].
[86] As one might expect from a seasoned appellate attorney, Jackson raised a number of procedural issues affecting the individual parties. Friedman, ed., Argument 260, 263, 265, 287, 293, 301, 320-21; Kluger, Simple Justice (2004 ed.) 680-81.
[87] Friedman, ed., Argument 195, 214, 243-44, 250-51; Kluger, Simple Justice (2004 ed.) 672-73; Tushnet, Making Civil Rights Law 207.

school segregation, their judicial contemporaries – often as Radicals as any at the time – could have missed it:

> How do you account for the decisions of the State of New York, for example, holding that the Amendment did not reach this question, when there was a state where there was no problem of numbers, there were few Negroes, the court that last decided this was predominantly a Republican court, predominantly from upstate New York, where the underground railway [sic] had plenty of stations, all kinds of things to fight the war, a popular war.
>
> How do you account for judges like that not understanding what this Amendment meant? The very section that promulgated it – it was a northern product, there was no getting away from that.
>
> You studied the history of this a great deal. How do you account for those interpretations?[88]

Reed joined in, pointing out that some of the same Northern state legislatures that ratified the Fourteenth Amendment also "passed legislation which recognized segregation…."[89]

When the attorney suggested that the state courts had ruled the way they did because the judges had failed to conduct an adequate study of the Amendment's "history and background," Jackson hounded him, counterpunching each time the advocate tried to regain his bearings: "You can't say that of the New York case…. These men had lived with the thing. They didn't have to go to books. They had been through it. They didn't have to go to books any more than we have to read books on what is going on today…. And the Grand Army of the Republic was the strongest force in the community, don't make any mistake about that….Then the assumption is that they didn't understand what it was about…. That is what it comes to, isn't it?"[90] As Jackson had pointed out in the beginning of the exchange, one should not presume a judge's leanings from his or her questions; but Jackson's rejoinders, and the heat behind them, indicated what he was

[88] Friedman, ed., Argument 247.
[89] Friedman, ed., Argument 247.
[90] Friedman, ed., Argument 247-48.

thinking at the time – that the Fourteenth Amendment was not intended to outlaw school segregation.

His most persistent colloquy, however, concerned implementation of a ruling ending segregation. Again besetting the Justice Department attorney, Jackson wondered how standards for implementation and enforcement might be formulated and then applied to every school district which would be sued following the Court's decision. His proclivity for addressing problems in their entirety, and not in steps or parts, recurred in his question:

> … what I do not get in your statement here are any criteria that we are to lay down to the lower court in your view to determine what shall be taken into consideration.
>
> Now, you mention the antitrust cases, but we have been fifty years in interpreting the antitrust cases in this Court, laying down the criteria, the standards.
>
> Some districts may have to have bond issues, some may have to submit to a vote; commissioners may resign; no commissioners would take the job – I wouldn't want it, to be caught between these forces.
>
> What criteria are we going to lay down? I am all for having the district courts frame decrees and do all the rest of the work that we can put on them, but what are we going to tell them: "This is something different from antitrust? This is something that hasn't been before?"
>
> What are we going to do to avoid the situation where in some districts everybody is perhaps held in contempt almost immediately because that judge has that disposition, and in some other districts it is twelve years before they get to a hearing? What criteria do you propose?
>
> MR. RANKIN: If I may try to answer some of the questions that Your Honor –
>
> JUSTICE JACKSON: It is all one question: What are the standards?[91]

Treating the attorney's response as an evasion, Jackson led him back to his point:

> That leads you squarely to Mr. Marshall's position that they have the right; children are getting older, they get out of school before they get this right and,

[91] Friedman, ed., Argument 253-54; Kluger, Simple Justice (2004 ed.) 678.

> therefore, it should be done, and then you say there are some conditions that should postpone that.
>
> Now, what is to be taken, financial conditions, unwillingness of the community to vote funds? What are the conditions that the lower court should consider?[92]

In response to Rankin's suggestion, "I think that the problem will have to be tried," Jackson replied unhappily, "I foresee a generation of litigation if we send it back with no standards, and each case has to come here to determine it standard by standard."[93] Not mollified by Frankfurter's attempt to distinguish between standards and "the means by which this standard can be satisfied" (which he had raised in an effort to address "some of the things which worry my Brother Jackson"), Jackson retorted, "They do not worry me; they will be worrying our children."[94]

After Reed had tried to cover roughly the same ground, Jackson focused on the heart of his complaint: "what considerations would you say would justify postponing [admission of an African American to a white school] until next term, if he has a present right to enter?" As Rankin began to rattle off "sound reasons that the action should be delayed … transportation problems, whether or not the building is adequate…," Jackson posed a hypothetical that was bound to occur in the many localities where separate was anything but equal:

> Suppose you have two schools; you have a school that has been used by white pupils, a pretty good school; you have a pretty poor one that has been used by colored children. What are you going to do? How are you going to decide – you either have got to build a new school or you have got to move some white people

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[92] Friedman, ed., Argument 255; Kluger, Simple Justice (2004 ed.) 679.
[93] Friedman, ed., Argument 255; Schwartz, "Chief Justice Rehnquist, Justice Jackson, and the *Brown* Case" 252-53; Kluger, Simple Justice (2004 ed.) 679; Tushnet, Making Civil Rights Law 208; Hutchinson, "Unanimity and Desegregation" 39.
[94] Friedman, ed., Argument 255-56.

> into the poor school, which would cause a rumpus, or you have got to center them all in the good school. What would the court take into consideration?"[95]

Referring to the government's brief he asked, "This is the most definite one, what appears on page 186, being the most definite thing that you have been able to devise?" The attorney replied with a response not destined to please his questioner: the Justice Department had "explored the possibility of more definite decrees, but experience seems to dictate that the more definite courts are, appellate courts, in trying to describe the activities of lower courts, the more often they are apt to not give them the opportunity to solve the problem in the best manner possible."[96]

The reargument unearthed little new law or history,[97] but its ultimate effect was the buying of time, a delay which proved more advantageous than anyone could have imagined when the Court ordered it. The new round of proceedings took place under new leadership: Vinson had died unexpectedly of a heart attack the previous September.[98] His replacement was California Governor Earl Warren, a progressive Republican with a largely positive, though mixed, record on race issues.[99] Before the appointment, Jackson and the new chief had gotten to know each other socially through summer vacations at the Bohemian Grove in the forests of Northern California, an all-male summer resort described as "the greatest men's party on earth," and attended by some of the most

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[95] Friedman, ed., Argument 257.
[96] Friedman, ed., Argument 257.
[97] Dickson, ed., The Supreme Court in Conference 653-54. John Q. Barrett, Mod., "Supreme Court Law Clerks' Recollections of Brown v. Board of Education" 539-40 (assorted recollections); see also Klarman, From Jim Crow to Civil Rights 305.
[98] Dickson, ed., The Supreme Court in Conference 653.
[99] The major blot on Warren's otherwise good record on race relations was his joining of the mass hysteria calling for internment of Japanese Americans after the attack on Pearl Harbor. He later realized his mistake and had no desire to repeat it. Warren, The Memoirs of Earl Warren 4, 149, 152, 155, 170-71, 212, 232, 258; Kluger, Simple Justice (1977 ed.) 661-62.

Not yet confirmed by the Senate, Warren presided over the three-day affair as a recess appointment. Dickson, ed., The Supreme Court in Conference 653-54.

prominent men in the country.[100] Many of Jackson's friends, who thought he should have been elevated to Chief Justice, sent him condolences after hearing that Warren would get the job. But Jackson must have been politically savvy enough to understand that no president would appoint him to preside over a fractious Court when he was a player in one of the warring factions, and when his personal relationship with some colleagues might charitably be described as strained. He showed every indication that he was prepared to go into the new arrangement with a positive and friendly attitude, and welcomed the new chief's state government experience, expressing the view that, with the Court having "been recruited almost exclusively from federal officeholders … to have one who is trained in the problem of a great state will make for a better-balanced Court in issues of federal-state relationships."[101]

The new chief began the post-reargument conference of December 12, 1953 by professing, "I do not yet know what we should do," and promising to have "perhaps, many discussions" among his colleagues. [102] Yet his direction was unmistakeable:

> The more I read and hear and think, the more I come to conclude that the basis of the principle of segregation and separate but equal rests upon the basic premise that the Negro race is inferior. That is the only way to sustain *Plessy* – I don't see how it can be sustained on any other theory…. [yet] If oral argument proved anything, the arguments of Negro counsel proved that they are not inferior.[103]

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[100] Warren, The Memoirs of Earl Warren 276; Robert H. Jackson to Irene Jackson, June 30, 1951, Box 2, Personal File – Family Correspondence -- Robert H. Jackson: Letters to Irene Jackson, 1929-54, Robert H. Jackson Collection, Library of Congress; Robert H. Jackson to Valentine Brookes, October 8, 1953, Box 31, Subject File: Warren, Earl – Appointment as Chief Justice, Robert H. Jackson Collection, Library of Congress; see generally John Van der Zee, The Greatest Men's Party on Earth: Inside the Bohemian Grove (New York: Harcourt Brace Jovanovich, 1974).

[101] Undated statement and assorted correspondence, Box 31, Subject File: Warren, Earl – Appointment as Chief Justice, Robert H. Jackson Collection, Library of Congress; Kluger, Simple Justice (2004 ed.) 660-61.

[102] Perhaps the best secondary account of the post-reargument conference is Kluger, Simple Justice (2004 ed.) 682-86.

[103] Dickson, ed., The Supreme Court in Conference 654.

> I don't see how we can continue in this day and age to set one group apart from the rest and say that they are not entitled to *exactly the same* treatment as all the others. To do so is contrary to Thirteenth, Fourteenth and Fifteenth Amendments. Those amendments were intended to make those who were once slaves equal with all others…. Personally I can't see how today we can justify segregation based solely on race….[104]

Warren allowed that ending segregation "will perhaps cause trouble," and insisted that "we should do it in a tolerant way," as "It would be unfortunate if we had to take precipitous action that could inflame the issue more than necessary."[105] But the Court finally had a leader who, while respecting the concerns of Jackson and others, refused to postpone decision indefinitely.

The four justices who had indicated their willingness to vote against segregation last time – Douglas, Black, Burton and Minton -- were ready to agree.[106] Reed remained the major voice for upholding segregation, defending it with arguments straight from Plessy:

> Segregation is not done on a theory of racial inferiority, but on racial differences. It protects people against the mixing of races. The argument was not made here that the Negro is an inferior race. Of course there is no "inferior race," although they may be handicapped by a lack of opportunity. But on equal protection, they demonstrably have equal protection. It is a police power that has been exercised.

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[104] Dickson, ed., The Supreme Court in Conference 654; Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1876-77.
[105] Dickson, ed., The Supreme Court in Conference 654-55.
[106] The District of Columbia case, however, presented different issue based on the plaintiffs' assumption – on which they predicated a request for a declaratory judgment ending segregation -- that segregation in the District of Columbia was mandatory, not optional. Douglas suggested remanding that case to decide that threshold issue. Dickson, ed., The Supreme Court in Conference 658, 655 n.61, 658-60; Hutchinson, "Unanimity and Desegregation" 39.

He concluded, using arguments more like Jackson's, that while "This is not a political question … we should not move to change the law"; yet "If there is to be a change, Congress should do it."[107]

The others indicated a willingness to vote to end segregation, at least if the opinion adequately addressed their concerns. Frankfurter wanted "no time limit on when the decision should come down." He further insisted that the Court "not be self-righteous … when writing this" because "the Fourteenth Amendment *did not* have as its purpose to abolish segregation…," and "A host of legislation and history in Congress and in the Court indicates that *Plessy* is right." The Court should instead admit that "'time works changes.'"[108]

Jackson still voiced concerns about the nonjudicial nature of the task at hand. He again invoked Cardozo, who "said that much of constitutional interpretation is partly statutory construction and partly politics. This is a political question. To me personally, this is not a problem. But it is difficult to make this other than a political decision." He was ready to "go along with" a decision against segregation, "but with a protest that it is politics." "The problem," he said, "is to make a judicial basis for a congenial political conclusion." A pure legal decision – one based on interpreting the law based on legislative history, "custom or precedents" – differed from one based on public policy. The difference could be a subtle one to Jackson – at about this time, he wrote that some

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[107] Dickson, ed., The Supreme Court in Conference 655-56; Hutchinson, "Unanimity and Desegregation" 39. Reed did not go along with the majority until, probably, late April; Warren, however, claimed that there was a unanimous vote in conference sometime in February. Barrett, Mod., "Supreme Court Law Clerks' Recollections of Brown v. Board of Education" 557 (recollection of Earl E. Pollock, clerk to Chief Justice Warren).

[108] Dickson, ed., The Supreme Court in Conference 656-57; Hutchinson, "Unanimity and Desegregation" 39.

of the Court's "early cases show how thin is the line that separates law and politics."[109] Yet he was still mired in the law/policy conundrum, as there was no basis for it in the legislative history:

> Lincoln was not quoted in the NAACP's argument – he was extremely limited in his objectives. It is pure hypocrisy to say that there was strong feeling on this issue at that time. There is not much legislative history. We don't have custom or precedents against segregation in education. Education at the time of the Fourteenth Amendment was not an issue. The precedents and customs are for segregation.

For those reasons, Jackson confessed, "I don't know how to justify the abolition of segregation as a judicial act."

This issue probably fed into his concerns about Court implementation and enforcement of such a widespread social reform. He fretted, "If we have to decide this question, then representative government has failed," as the Courts would have to take on legislative and executive functions: "We would have to give advice to the lower courts," and a huge disparity in treatment would result, as "Some would put all boards of education in jail, and others would not give Negroes any relief." He felt it necessary to "go way beyond" the Justice Department's vague recommendations. Nor did he "think it wise to just throw the abolition of segregation into the hopper, and leave the rest to another fight." He expressed the need -- "perhaps, []as a slap" to an earlier suggestion by Douglas, that the Court might have to make "adjustments" to its decree later -- to come to a complete resolution, decree and all. Yet he believed that, if the Court issued "a flat and immediate doctrine," white "resistance will be immeasurably increased."[110]

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[109] Jackson, The Supreme Court in the American System of Government p. 31 and ch. 3; Hutchinson, "Unanimity and Desegregation" 39.

[110] Dickson, ed., The Supreme Court in Conference 658; Dennis Hutchinson, "Unanimity and Desegregation" 39-41; Schwartz, Super Chief 89; Kluger, Simple Justice (2004 ed.) 684; Tushnet, Making Civil Rights Law 211. Schwartz's narrative of Jackson's comments in the post-reargument conference

Burton disagreed. He was convinced that "The problem is a judicial one," as "The Fourteenth Amendment problems have been a gradual development":

> There is a trend away from separation of the races in restaurants, the armed forces, and so forth. The Fourteenth Amendment is nationwide, and calls for uniform practices. You can't draw a line between the type of schools – the same principle that is applicable to graduate school is equally applicable to primary school. At the time of the Fourteenth Amendment life was separate; now it is inadequate preparation for life today.[111]

Clark, referring to former justice and then-South Carolina governor Byrnes (who had threatened to close the state's public schools if the Court banned segregation) insisted that the matter be handled with care:

> We can't handle this by a brief policy statement. There is a danger of violence if this is not well handled. In some counties, it runs up to 60 percent colored in Mississippi, and Alabama is much the same. They can get their temper from Byrnes. He made a strong statement that he would just abolish the public schools. Violence will follow in the South. This is a very serious problem. If segregation is unconstitutional, it must be handled very carefully, or we will cause more harm than good.

He felt that district courts needed flexibility, as "various conditions will require different handling." Yet the courts would have to make the decision, because Southern legislators "couldn't vote to integrate … and then return home to the South."[112]

Jackson expanded on the idea that the Court's decision might threaten public education in the South. He noted, "There is no great loyalty to *public* schools in the South. There will be trouble when you send white children to colored schools and locations."[113] Clark pretty much agreed with Jackson: "I don't like the system of segregation and will vote to abolish it… even though we can't rely on the legislative

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harmonizes much more closely with Dickson's distillation than did his summary of Jackson's comments at the first oral argument.

[111] Dickson, ed., The Supreme Court in Conference 658-59.

[112] Dickson, ed., The Supreme Court in Conference 659; Hutchinson, "Unanimity and Desegregation" 39.

[113] Dickson, ed., The Supreme Court in Conference 659.

history," but insisted that "the remedy … be carefully worked out, and some variations permitted…."[114] Minton concurred: "As to possible remedies, I am inclined to let the district courts have their heads in this matter, and not merely see our opinion."[115]

Again, no formal vote was taken. Justices' personal tallies of where the Court stood were sufficiently inconsistent, that it was unlikely that a concrete vote had taken place until sometime in 1954.[116] Douglas, the main source of the five-justice theory, was probably correct about Reed's belief "that segregation was constitutional," even if the classic reconstruction – that Reed held out until the last minute – might not have been the case.[117] But Jackson, Frankfurter and Clark, unlike Reed, did not oppose reversal at the post-reargument conference. Instead, their language suggests that they were still searching for the right rationale to justify the decision, or the right way to implement it, but that they were planning to reach that conclusion. Indeed, having heard the same discussions at conference as had Douglas, Burton concluded that six justices favored reversal seven months before reargument, and that possibly seven were ready to vote that way immediately thereafter.[118]

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[114] Dickson, ed., The Supreme Court in Conference 660; Hutchinson, "Unanimity and Desegregation" 41.
[115] Dickson, ed., The Supreme Court in Conference 660.
[116] According to Douglas's file memorandum of May 17, 1954, five had been ready to hold segregation unconstitutional in the December 1953 conference – the four from the previous conference (Black, Douglas, Burton and Minton), and Warren. Frankfurter wrote to Reed shortly after the decision that without Warren there would have been four dissenters and "several opinions for the majority view." Schwartz, Super Chief 72 (quoting May 20, 1954 letter from Frankfurter to Reed); Melvin I. Urofsky, "Among the Most Humane Moments in All Our History," Black, White, and Brown: The Landmark School Desegregation Case in Retrospect, ed. Clare Cushman and Melvin I. Urofsky (Washington, DC: Supreme Court Historical Society/CQ Press, 2004) 20-21.
[117] Dickson, ed., The Supreme Court in Conference 661; Kluger, Simple Justice (1977 ed.) 692, 698; John D. Fassett, "A Plea for the Demise of a Stubborn Myth," Black, White, and Brown 117-56; Barrett, Mod., "Supreme Court Law Clerks' Recollections of Brown v. Board of Education" 532-33, 546-48, 557 (recollections of John David Fassett, clerk to Justice Reed; and Earl E. Pollock, clerk to Chief Justice Warren).
[118] S. Sidney Ulmer, "Earl Warren and the Brown Decision," The Journal of Politics 33 (1971) 697, 698.
Warren claimed in his memoirs that the Court cast a unanimous vote against segregation in February 1954, but this recollection may have been colored by a desire, which appears obvious in the opening pages of his memoir, to downplay disharmony. Warren, The Memoirs of Earl Warren 1-4.

Jackson might have been influential in breaking the logjam, by clearing the way for a vote on the threshold question of segregation's constitutionality, and leaving the complex and divisive questions about enforcement for a third argument. He had come around from his earlier belief that the decree should be worked out with the opinion, and instead suggested at the January 16, 1954 conference, "'let's have a reargument on terms of a decree!!" Clark and Black immediately agreed, and eventually the entire Court went along. Though it carpeted over fundamental disagreements over enforcement (a dilemma Jackson avoided only with his death in October 1954), the bifurcation enabled "a solid majority to overrule *Plessy*" to coalesce.[119] One scholar concluded that Jackson's suggestion to split off the thornier enforcement issue from that of Plessy's continued vitality "may have been his most important contribution to the *Brown* decision process."[120] Contemporary observers inside the Court have agreed that the decision to delay enforcement made unanimity possible.[121]

Jackson's Draft Concurring Opinion: Toward a Workable Rationale

Jackson continued to wrestle with the school desegregation cases the way he best knew how: by writing about them. After the December 1953 conference, the justice produced five additional drafts of a memorandum, with the last on March 15, shortly before his first heart attack.[122] There has been some speculation as to whether he was

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[119] Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1922-24; Schwartz, Super Chief 92-93.
[120] Bernard Schwartz, "Chief Justice Rehnquist, Justice Jackson, and the *Brown* Case" 253, 254.
[121] Barrett, Mod., "Supreme Court Law Clerks' Recollections of Brown v. Board of Education" 562 (assorted recollections).
[122] Robert H. Jackson, January 6, 1954; January 11, 1954; February 15, 1954; March 1, 1954; March 15, 1954 memoranda, Box 184, Legal File: Supreme Court O.T. 1953 – Cases – Segregation Cases – RHJ Working Papers not Circulated, Robert H. Jackson Collection, Library of Congress; Barrett, Mod.,

writing a draft dissent or a draft concurrence.[123] According to his clerk, Jackson started a concurring opinion in the belief that most or all of his colleagues would file separate opinions.[124] It was unusual for justices (or at least for Jackson) to draft opinions before the first version of a majority opinion was circulated, so some anticipated unusual circumstance, such as the expectation of individual opinions, seems logical enough.[125]

More importantly, these writing exercises served the same function Jackson's ultimately-unfiled draft opinions had performed in the past, such as those in Terry v.

"Supreme Court Law Clerks' Recollections of Brown v. Board of Education" 529 (recollections of E. Barrett Prettyman, Jr., clerk to Justice Jackson).

Bernard Schwartz described the contents of the March 15 memorandum in "Chief Justice Rehnquist, Justice Jackson, and the *Brown* Case" 254-65. Kluger reported the contents of what he said was the February 15 memorandum (and Prettyman's written critique), but the date was a mistake, as the narrative was more consistent with the March 15 version. Kluger, Simple Justice (1977 ed.) 688-90. Chernack also picked up on Kluger's error. Chernack, "The Clash of Two Worlds" 56 n.25.

Without discussions of earlier drafts, these sources fail to track the development of Jackson's argument over time. Hockett worked with more than one draft, but did not perform an in depth comparison of them, not even of the critical "changed circumstances" sections. Hockett, "Justice Robert H. Jackson and Segregation" 52.

[123] Schwartz assumed, as did Kluger, that "Jackson took his draft seriously as a potential concurring opinion" until someone, whether Prettyman or Warren, talked him out of filing it. Schwartz, Super Chief 98; Schwartz, "Chief Justice Rehnquist, Justice Jackson, and the *Brown* Case" 264; Kluger, Simple Justice (1977 ed.) 697-99; Kluger, Simple Justice (2004 ed.) 691, 695. Ray, as well as Kluger and Hockett, suggested that Jackson's health also may have had something to do with it. Ray, "A Law Clerk and His Justice" 552-53; Kluger, Simple Justice (1977 ed.) 697-98; Hockett, "Justice Robert H. Jackson and the role of the Supreme Court in American politics" 115-16 n. 12; Hockett, "Justice Robert H. Jackson and Segregation" 52, 64 n.11. Tushnet also suggested that the justice's inability to clear up his ambivalence about the case may have been a factor. Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1917-18; Tushnet, Making Civil Rights Law 213.

This author finds it hard to believe that, especially given Jackson's personal concern about presenting a united front – as illustrated by his insistence on leaving the hospital to be physically present at court for the reading of the Brown opinion -- that he required much, if any, persuasion not to file his concurring opinion, which never neared filing quality and which was not submitted to the printer. While we may never know the precise motivation at work, either for having written it or not preparing to file it, the draft had (or could have had) several functions, short of being officially filed: it helped Jackson clarify his thinking; it provided him with a written version of his point of view to show others, such as the assigned author of the Court's opinion (in this case, Warren); and, as a potential separate opinion, he could have used it as a bargaining chip to obtain desired changes in the majority opinion.

[124] Barrett, Mod., "Supreme Court Law Clerks' Recollections of Brown v. Board of Education" 529, 531-32 (recollections of E. Barrett Prettyman, Jr., clerk to Justice Jackson). See Chernack, "The Clash of Two Worlds" 54, 90.

[125] Barrett, Mod., "Supreme Court Law Clerks' Recollections of Brown v. Board of Education" 545 (recollections of E. Barrett Prettyman, Jr., clerk to Justice Jackson). At least one other justice had started preparing an opinion long before Jackson – Reed had begun a dissent, possibly as early as the summer of 1953. John Q. Barrett, Mod., "Supreme Court Law Clerks' Recollections of Brown v. Board of Education" 526-28, 546-48 (recollections of John David Fassett, clerk to Justice Reed).

Adams: they helped him think through the case's complexities.[126] His Brown opus never reached the point of being ready for printing or for circulation among Jackson's colleagues (though he eventually showed it to his clerk and to Warren).[127] Yet the memorandum was reworked enough so that a legal rationale for ending segregation evolved substantively over time. As he found legal underpinning he could live with, and as he gained command over his many thoughts on the subject, Jackson's voice grew stronger, though it was still as unbold a statement as one could make on such a topic – whether because he lacked the opportunity to make all needed revisions, or because his misgivings about the likely result of court-ordered desegregation survived despite his resolve to vote against Jim Crow, or because he felt it the best way to mollify the white Southern audience he wanted to address. And his personal journey on the issue, the influence of the attitudes he grew up with, the evolution of his own thinking throughout his lifetime, was in evidence throughout.

Jackson began his introduction with "Since the close of the Civil War the United States has been 'hesitating between two worlds – one dead – the other powerless to be born.'"[128] He employed the Matthew Arnold conceit in his 1951 review of Merlo Pusey's biography of Chief Justice Hughes, to describe how, after World War I, "The country stood, as it stands today, between two worlds…."; he also had used it in a

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[126] See pp. 357-64.

[127] Hutchinson, "Unanimity and Desegregation" 42; Elsie Douglas, undated note, Box 184, Legal File: Supreme Court O.T. 1953 – Cases – Segregation Cases – RHJ Working Papers not Circulated, Robert H. Jackson Collection, Library of Congress. Two major indications of the draft's rough state were its dearth of citations to cases or statutes; and the failure of the subheadings to comport with the text. Jackson, March 15, 1954 memorandum, Segregation Cases.

[128] Jackson, January 6, 1954 memorandum, Segregation Cases 1; Jackson, March 15, 1954 memorandum, Segregation Cases 1.

commencement address in 1943.[129] In his Brown draft, the quotation evoked the country's inability, since the Civil War had ended slavery, to solve its racial problems:

> War and military measures brought an old order to an end but as usual proved unequal to founding a new one. The reunited country neither in North or in South has been willing really to adapt its practices to its professions on the subject of negro equality.[130]

By March 15, his vision of impotence came to include the Court as well as his home region: "Constitutions are easier amended than social customs, and even the North never fully conformed its racial practices to its professions."[131] The country as a whole, for all of its platitudes, had failed to achieve racial equality. Or, as he more acerbically put it in one draft, "The race problem would be quickly solved if some way could be found to make us all live up to our hypocrisies."[132]

He next attempted to open a dialogue with segregationists, setting forth his differing perspective in a way intended to be non-judgmental, since their feelings, like his, were a product of the region in which they had grown up: "One whose impressionable years were spent in public schools in a region where Negro pupils were very few and where economic, social and political motives united against segregating them is predisposed to the conclusion that segregation elsewhere has outlived whatever justification it may have had."[133] But he added a dose of reality for those wrestling with the demise of a social institution, observing: "The practice seems marked for early

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[129] Robert H. Jackson, review of Merlo J. Pusey's Charles Evans Hughes, Washington Post, November 18, 1951, B 1-2; Robert H. Jackson, Address at Commencement Exercises, Syracuse University, Syracuse, NY, May 9, 1943, Box 42, Speeches and Writings File, Robert H. Jackson Collection, Library of Congress *; Schwartz, "Chief Justice Rehnquist, Justice Jackson, and the *Brown* Case" 255.
[130] Jackson, January 6, 1954 memorandum, Segregation Cases 1.
[131] Jackson, March 1, 1954 memorandum, Segregation Cases 1; Jackson, March 15, 1954 memorandum, Segregation Cases 1.
[132] Jackson, February 15, 1954 memorandum, Segregation Cases 1.
[133] Jackson, March 15, 1954 memorandum, Segregation Cases 1; Robert H. Jackson, March 1, 1954 memorandum, Segregation Cases 1.

extinction," if for no other reason than "the forces of mortality and replacement which operate upon" the Court.[134]

The March 1954 version, which resigned itself to abolishing segregation through judicial action, did not contain the optimism of his January 6 sentiment that "economic and social forces seem to mark discrimination for extinction even faster than legal measures."[135] And no wonder. While protesting that "these cases would be simple if our personal opinion that school segregation is morally, economically or politically indefensible made it legally so," he explained that its status as a social institution in much of the country rendered ending it far beyond the Court's purview:

> But it is not only established in the law of seventeen states and the national capital; it is deeply imbedded in social custom in a large part of this country. Its eradication involves nothing less than a substantial reconstruction of legal institution [sic] and of society. It persists because of fears, prides and prejudices which this Court cannot eradicate, which even in the North are latent, and occasionally ignite where the ratio of colored population to white passes a point where the latter vaguely, and perhaps unreasonably, feel themselves insecure.[136]

Having seen (and undoubtedly heard) the uglier manifestations of those "fears, prides and prejudices," he nonetheless believed that "However sympathetic we may be with the resentments of those who are coerced into segregation, we cannot, in considering a

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[134] Jackson, March 15, 1954 memorandum, Segregation Cases 1; Jackson, January 6, 1954 memorandum, Segregation Cases 3; Jackson, March 1, 1954 memorandum, Segregation Cases 1; Tushnet, Making Civil Rights Law 211; Chernack, "The Clash of Two Worlds" 98.

[135] Jackson, January 6, 1954 memorandum, Segregation Cases 2-3. He admitted that "While I candidly have great difficulty in finding that segregation is contrary to any law that presently exists, I have no doubt that it is contrary to the law as it will be within a generation." Jackson, January 6, 1954 memorandum, Segregation Cases 3-4.

[136] Jackson, March 15, 1954 memorandum, Segregation Cases 1-2; Jackson, January 6, 1954 memorandum, Segregation Cases 2; Jackson, March 1, 1954 memorandum, Segregation Cases 2; Hockett, "Justice Robert H. Jackson and Segregation" 53-54; Klarman, From Jim Crow to Civil Rights 305; Klarman, "Brown at 50" 5.

recasting of society by judicial fiat, ignore the claims of those who are to be coerced out of it."[137]

The justice thus viewed segregation as presenting two competing claims of right, with one side reacting to what he (and the prevailing historiography of his time) perceived as Northern oppression of Southern whites. Indeed, while labeling the plaints of victims of racial oppression as "resentments," he refused to "deny the sincerity and passion with which many feel that their blood, lineage and culture are worthy of protection by enforced separatism of races," and their reliance on legal sanction for the institution they designed to protect it: "they have built their segregated institutions for many years on an almost universal understanding that that segregation is not constitutionally forbidden."[138] This sounds much like the Jackson who identified with the rural South; and who saw genealogy as the source of one's identity and as historical precedent for living one's own life.[139]

Indeed, he surmised that racial tensions in the South involved two components, neither of which was the fault of white Southerners. The first was "the antagonisms present in other states and countries," through which he characterized racism as a nearly universal problem. The justice's pride in his own family history and ethnic background, and his willingness to credit the often-used Southern policy justifications for segregation, formed the basis of his explanation:

> It has seemed almost instinctive with every race, faith, state or culture to resort to some isolating device to protect and perpetuate those qualities, real or fancied, which it especially values in itself. Separatism, either by voluntary withdrawal or by imposed segregation, has been practiced in some degree by many religions,

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[137] Jackson, March 15, 1954 memorandum, Segregation Cases 2; Tushnet, Making Civil Rights Law 211.
[138] Jackson, March 15, 1954 memorandum, Segregation Cases 2; Tushnet, Making Civil Rights Law 211; Chernack, "The Clash of Two Worlds" 93.
[139] See pp. 21-25.

> nationalities and races, and by many – one can say all – governments, to alleviate tensions, prevent subversions and to quell or forestall violence.[140]

Then, expressing the concept of insularity more generically, he might well have had in mind the Jews whose victimization he prosecuted at Nuremberg as well as those whose way of life was in the dock in the segregation cases. Separation, he observed,

> … is today being practiced on a voluntary basis by minorities, who discourage or forbid intermarriage, maintain separate denominational schools, and otherwise seek to prevent contacts which threaten dilution of blood or dissipation of faith. This instinct for self-preservation is enough to account for the prevalence of segregation in several of the Northern states.[141]

In one draft, Jackson used Korematsu as a recent example of how the Court (over his dissent) had practiced racism.[142]

Yet despite the nearly universal nature of discrimination, and the nationwide nature of prejudice against African Americans, the type of legal discrimination at the heart of the segregation cases was Southern. Jackson opined that the practice stemmed from Reconstruction when, he believed, white Southerners were oppressed by Northerners. The Civil War was, to Jackson, the "great American white conflict," with Northern persecution of white Southerners at least partly to blame for white Southern mistreatment of African Americans, who were liberated from slavery upon the North's victory:

> … in the South, the Negro appears to suffer from other antagonisms that are an aftermath of the great American white conflict. The white South harbors in historical memory, with deep resentment, the program of reconstruction and the deep humiliation of carpetbag government imposed by conquest. Whatever other

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[140] Jackson, March 15, 1954 memorandum, Segregation Cases 2-3; Jackson, February 15, 1954 memorandum, Segregation Cases 1-2; Hockett, "Justice Robert H. Jackson and Segregation" 53; Chernack, "The Clash of Two Worlds" 94. In his January 6 draft, Jackson wrote that resort to "isolating devices" "seems instinctive," less qualified and more rooted in the present than "has seemed almost instinctive." Jackson, January 6, 1954 memorandum, Segregation Cases 1-2.

[141] Jackson, March 15, 1954 memorandum, Segregation Cases 3.

[142] Jackson, March 1, 1954 memorandum, Segregation Cases 2-3.

> motives were behind these offensive reconstruction measures and whatever their necessity or merit, the North made the Negro their emotional symbol and professed beneficiary, with the natural consequence of identifying him with all that was suffered from his Northern champions. Thus, I am convinced the race problem in the South involves more than mere racial prejudice. It is complicated emotionally with a white war and white politics.[143]

Not many years after Jackson had written these words, his view of Reconstruction, and his equating of white Southerners' discomfort at the prospect of ending segregation with African Americans' sting from the institution, would seem outdated.[144] Yet leading historians of the Civil War/Reconstruction era during Jackson's lifetime took the side of white Southerners; this view was steeped in American culture, with a view more sympathetic to African-Americans taking hold after Jackson's death.[145]

There is an apparent irony to this line of argument – that a Northerner, Jackson, made extraordinary efforts to empathize with white Southerners, while a white Southerner, Black, cast whites' efforts to maintain segregation in a less positive light.[146] Yet Jackson's romanticizing of white Southerners' plight comports with his family history and the views about Southern history, which he had held since his youth.[147] And it was further understandable on a level beyond his personal beliefs, for as off base as he might have been factually, white Southerners shared his view of things. Since that

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[143] Jackson, March 15, 1954 memorandum, Segregation Cases 3-4; Jackson, January 6, 1954 memorandum, Segregation Cases 2; Jackson, March 1, 1954 memorandum, Segregation Cases 3; Hockett, "Justice Robert H. Jackson and Segregation" 53; Chernack, "The Clash of Two Worlds" 94.

[144] Kenneth M. Stampp, The Era of Reconstruction, 1865-1877 (New York: Knopf, 1965); Tushnet, Making Civil Rights Law 213.

[145] Works like William Archibald Dunning's Essays on the Civil War and Reconstruction and Related Topics (New York: P. Smith, 1931); Claude G. Bowers' The Tragic Era: The Revolution After Lincoln (New York: Halcyon, 1929); and Margaret Mitchell's Gone With the Wind (New York: Macmillan, 1936) gave way to Kenneth M. Stampp's The Peculiar Institution: Slavery in the Ante-Bellum South (New York: Vintage Books, 1956); Stampp's The Era of Reconstruction; and John Hope Franklin's, Reconstruction After the Civil War (Chicago: University of Chicago Press, 1961). See pp. 310-11.

[146] Dickson, ed., The Supreme Court in Conference 648. See also Newman, Hugo Black: A Biography 431-32.

[147] See Chapter 1, pp. 23-24, 37-44.

group's compliance would be necessary to end segregation, their perceptions had to be taken into account. One, then, could understand why Jackson might have believed that writing an opinion to sell the concept of desegregation to that group, by telling the story from their perspective, made some political sense.

It was also the white Southern belief system that made Jackson most concerned about the tone and rationale of the decision, and the content of the Court's order:

> Whether a use of the power of this Court to decree an end of segregation will diminish or increase racial tensions in the South I have no personal experience or knowledge to judge, nor is that my responsibility. But I am satisfied that it would retard acceptance of this decision if the Northern majority of this Court should make a Pharisaic and self-righteous approach to this issue or were inconsiderate of the conditions which have brought about and continued this custom or should permit a needlessly ruthless decree to be promulgated.[148]

With the last sentence even Black, who condemned segregation as a racial caste system, could have little disagreement.

Jackson divided his main legal analysis into three sections, each asking and answering a key question. The first, "Does Existing Law Condemn Segregation?," comprised more than one third of his March 15 draft. In it, he concluded that neither legislative history nor legal precedent provided a basis for banning school segregation.[149] Conceding that "for over three quarters of a century … the Due Process and Equal Protection Clauses of the Fourteenth Amendment were capable of being read to require a full and equal racial partnership in all matters within reach of law," he nonetheless believed that the Court could not ignore the fact that neither Congress nor the courts had

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[148] Jackson, March 15, 1954 memorandum, Segregation Cases 4; Hockett, "Justice Robert H. Jackson and Segregation" 53; Tushnet, Making Civil Rights Law 212; Chernack, "The Clash of Two Worlds" 97-98.
[149] See also Jackson, January 6, 1954 memorandum, Segregation Cases 4-9; Jackson, March 1, 1954 memorandum, Segregation Cases 4-11; Hockett, "Justice Robert H. Jackson and the role of the Supreme Court in American politics" 74ff; Chernack, "The Clash of Two Worlds" 94.

read those clauses that way.[150] Due Process language in the Fifth Amendment, which was "identical" to that of the Fourteenth, "tolerated slavery in the District of Columbia"; the Fourteenth was deemed insufficient to guarantee African Americans the right to vote, requiring passage of the Fifteenth; and the Fourteenth mentioned neither "segregation or education."[151]

Turning to the legislative history, the justice observed:

> Among its supporters may be found a few who hoped that it would bring about complete social equality and early assimilation of the liberated Negro into an amalgamated population. But I am unable to find any indication that their support was decision[sic], and certainly their view had no support from the Great Emancipator himself.[152]

Rather, "The majority was composed of more moderate men who appeared to be thinking in terms of … conferring upon the freed man certain limited civil rights." Thus, "It is hard to find an indication that any influential body of the movement that carried the Civil War Amendments had reached the point of thinking about either segregation or education of the Negro as a current problem, and harder still to find that the Amendments were designed to be a solution." Indeed, Congress itself, "from that day to this, established or maintained segregated schools in the District of Columbia," and otherwise "never has touched the segregation question."[153] Similarly, nineteen states that ratified the

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[150] Jackson, March 15, 1954 memorandum, Segregation Cases 5; Jackson, February 15, 1954 memorandum, Segregation Cases 4-5; Jackson, March 1, 1954 memorandum, Segregation Cases 4-10; Klarman, "Brown at 50" 5.

In his March 1 draft, he added that such a reading would also "virtually replace our federation with a unitary form of government," something of which the great defender of federalism would not have approved. Jackson, March 1, 1954 memorandum, Segregation Cases 4-5; Tushnet, Making Civil Rights Law 212.

[151] Jackson, March 15, 1954 memorandum, Segregation Cases 5-6; Jackson, February 15, 1954 memorandum, Segregation Cases 4-5; Hockett, "Justice Robert H. Jackson and Segregation" 54; Klarman, From Jim Crow to Civil Rights 305.

[152] Jackson, March 15, 1954 memorandum, Segregation Cases 7; Hockett, "Justice Robert H. Jackson and Segregation" 54; Klarman, From Jim Crow to Civil Rights 305.

[153] Jackson, March 15, 1954 memorandum, Segregation Cases 7-8; Hockett, "Justice Robert H. Jackson and Segregation" 54; Klarman, From Jim Crow to Civil Rights 305.

Fourteenth Amendment "either continued or established segregated schools" after ratification.[154] In the judiciary, "Almost a century of decisional law rendered by judges, many of whom risked their lives for the cause that produced these Amendments, is almost unanimous in the view that the Amendment tolerated segregation by state action, at least in the absence of congressional action to the contrary."[155] And "the force of long custom" has made the courts hesitate "to use judicial power to try to recast social usages established among the people."[156]

That the Reconstruction Congress had not affirmatively intended the Fourteenth Amendment to outlaw school segregation – whether because it had not considered the issue, or because it could not agree on it -- was consistent with the facts unearthed by contemporary scholarship on the Amendment's legislative history.[157] Yet whether the conclusion Jackson drew from those facts – that neither the text of the Amendment nor its legislative history supported an end to school segregation in the absence of a clearly specified original intent on the part of the framers, or of evidence that Congress and the courts read the amendment that way – was open to interpretation. Authors in the years immediately before and after Brown claimed that the historical record left room for adjustments, over time, in the meaning of constitutional terms. Numerous scholars argued that the framers had intentionally built elasticity into constitutional language, so

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[154] Jackson, March 15, 1954 memorandum, Segregation Cases 8-9; Hockett, "Justice Robert H. Jackson and Segregation" 54; Klarman, From Jim Crow to Civil Rights 305.
[155] Jackson, March 15, 1954 memorandum, Segregation Cases 9; Hockett, "Justice Robert H. Jackson and Segregation" 54; Klarman, From Jim Crow to Civil Rights 305-06.
[156] Jackson, March 15, 1954 memorandum, Segregation Cases 9.
[157] Alexander M. Bickel, "The Original Understanding and the Segregation Decision," Harvard Law Review 69 (November 1955) 58-59; John P. Frank and Robert F. Munro, "The Original Understanding of 'Equal Protection of the Laws,'" Columbia Law Review 50 (Feb. 1950) 147-48, 153-58, 167-68. Frank and Munro concluded that the Framers had intended the equal protection clause to protect a laundry list of rights. They offered most without qualification, but included school segregation "with reservations, for here there is substantial divergence" in the historical record. Id. at 168.

that the list of protections might grow with the country.[158] Some put a heavy moral gloss on the subject, claiming the Fourteenth Amendment to be a general statement of principle leavened by the "moral and ethical opinions [that] were the matrix of the War Amendments."[159] This was not an approach with which Jackson was likely to feel comfortable, given his refusal to condemn white Southerners for white supremacy; his narrow view of judicial power; his hostility toward more expansive legal thinkers like Douglas and (sometimes) Black who, he believed, abused judicial authority to press decisions based on their policy preferences; and his view, so eloquently set forth in the joint dissent in Screws, that the rights encompassed by Due Process be predictable by those against whom they would be enforced.[160]

Yet Jackson refused to "shut the door"[161] to a ruling ending school segregation, in spite of the roadblocks he saw in the historical record. There were few legal scholars at the time who were strict originalists in interpreting the constitution.[162] Jackson himself allowed that the Constitution was a "living" document, which meant that it could shift

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[158] Jonathan O'Neill, Originalism in American Law and Politics: A Constitutional History (Baltimore: Johns Hopkins University Press, 2005) 73-75; Alfred H. Kelly, "The Fourteenth Amendment Reconsidered," Michigan Law Review 54 (June 1956) 1083-85; Bickel, "The Original Understanding and the Segregation Decision" 63-65.

[159] Howard Jay Graham, "The Fourteenth Amendment and School Segregation," Buffalo Law Review 3 (1953) 18, 21; see also Charles Fairman, "Foreward: The Attack on the Segregation Cases," Harvard Law Review 70 (1956) 92 ("When the Court is called upon to apply the broad constitutional promises of liberty and equal protection, it takes account of the moral sentiment of the American nation. To set quixotic or visionary standards would be an abuse of power; to enforce nothing better than a laggard conscience would stultify the historic responsibility of our highest court of justice"); Bickel, "The Original Understanding and the Segregation Decision" 65 ("the record of history, properly understood, left the way open to, in fact invited, a decision based on the moral and material state of the nation in 1954, not 1866.").

[160] See pp. 309ff.

[161] Kluger, Simple Justice (2004 ed.) 607.

[162] O'Neill, Originalism in American Law and Politics 7, 55 ff.

Of the supporters of a more expansive constitutional interpretation which would permit the result in Brown, Fairman opposed incorporation of the Bill of Rights into the Fourteenth Amendment; and Bickel was a former clerk and protégé of Felix Frankfurter. See p. 400.

meaning based on societal changes.[163] Nor was he particularly rigid about following precedent.[164] Yet he was reluctant to stray far from what seemed to him to be established law,[165] especially when it seemed so firmly in place, and governmental and social institutions grew in reliance on it. So, to vote to end school segregation, he needed to come to terms with how the change in legal doctrine might be accomplished, within the limits of his understanding of the law.

It therefore seems logical that he entitled the second section "Does the Amendment Contemplate Changed Conditions?" Appropriately, it opened with an argument in favor of "giving effect from time to time to the changes of conditions and public opinion always to be anticipated in a developing society." But the title ended up a misnomer. Answering the question in the affirmative, but explaining that the text conferred that power on Congress through its enabling section, Jackson devoted this portion of his draft to set forth his reasons for believing that desegregation should be handled by Congress and not the federal courts.[166]

The justice reminded his readers about "the limitations on the nature and effectiveness of the judicial process," especially as it involved "widespread reform of social customs and habits of countless communities." The Court could not enforce the equality requirement of the separate but equal doctrine "because the courts have no power to enforce general declarations of law by applying sanction against any persons not before them in a particular litigation." Declaring all segregation unconstitutional

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[163] Jackson, February 15, 1954 memorandum, Segregation Cases 9; Jackson, March 1, 1954 memorandum, Segregation Cases 11.
[164] Schubert, "Jackson's Judicial Philosophy" 943; Gerhart, Lawyer's Judge 83-84.
[165] Hockett, "Justice Robert H. Jackson and the role of the Supreme Court in American politics" 95.
[166] Jackson, March 15, 1954 memorandum, Segregation Cases 11; Hockett, "Justice Robert H. Jackson and the role of the Supreme Court in American politics" 80-84; Chernack, "The Clash of Two Worlds" 97.

would not be "any more efficiently executed," as each offending school district would have to be sued. [167] Thus, "we are rendering a decision incapable of competent enforcement and beyond declaring the abstract principle we leave it all to the local judge."[168] And while contempt of court "is an effective sanction in a private controversy … it is a weak reed to rely on in initiating a change in the social system of a large part of the United States." So, "With no machinery except that of the courts to put the power of the government behind it seems likely to me to result in a failure that will bring the Court into contempt and the judicial process into discredit."[169]

The Justice Department's request that the Court, in effect, "embark upon a supervised revamping of the educational system of the South," served only to demonstrate further the unsuitability of judicial remedies.[170] According to Jackson, "any constructive policy for abolishing" segregation "must come from Congress," because:

> Only Congress can enact a policy binding on all states and districts, and it can delegate its supervision to some administrative body provided with standards for determining the conditions under which sanctions should apply. It can make provisions for federal funds where changes required are beyond the means of the community, for mixing the races will require extensive changes in physical plants and will impose the largest burden on some of the nation's lowest income regions. Moreover, Congress can lift the heavy burden of private litigation from

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[167] Jackson, March 15, 1954 memorandum, Segregation Cases 12; Jackson, January 11, 1954 memorandum, Segregation Cases 4-6; Jackson, March 1, 1954 memorandum, Segregation Cases 15-16; Tushnet, Making Civil Rights Law 212; Hockett, "Justice Robert H. Jackson and Segregation" 54.

[168] Jackson, January 11, 1954 memorandum, Segregation Cases 7.

[169] Jackson, March 15, 1954 memorandum, Segregation Cases 13; Klarman, "Brown at 50" 6; Chernack, "The Clash of Two Worlds" 96, 98.

It was wise that Jackson removed from later drafts his January 11 fit of frustration: "It is everywhere admitted that an attempt at immediate enforcement would fail. It is a strange practice revealing the unjudicial nature of the problem when we enter decrees saying that individuals have present and personal rights but that they will not be enforced until some future contingencies occur." Jackson, January 11, 1954 memorandum, Segregation Cases 9-10. Jackson was not necessarily wrong: the Court's opinion in Brown II admitted there would be difficulties with immediate enforcement, and the Justices had known long before they issued their first Brown opinion, that there would be some resistance to that course of action. But a Justice admitting as much in an official opinion could only have encouraged a resistance that would prove to be virulent and pervasive. Brown v. Board of Education, 349 U.S. 294, 301 (1955); Tushnet, Making Civil Rights Law chs. 16-18.

[170] Jackson, January 11, 1954 memorandum, Segregation Cases 10-13.

> disadvantaged people and make the investigation and administrative proceedings against recalcitrant districts the function of some public agency that would secure enforcement of the policy.[171]

A Court decision, by contrast, "will not produce a social transition, nor is the judiciary the agency to which the people should look for that result." He allowed – consistently, as it happened, with the aftermath of Brown – that the Court might end segregation "in Delaware and Kansas," where "it lingers by a tenuous lease of life," but not "where the practice really is entrenched." In the latter places, "it exists independently of any statute or decision as a local usage and deep-seated custom sustained by the prevailing sentiment of the community." For that reason, "To eradicate segregation by judicial action means" not one, as he stated in oral argument, but "two generations of litigation."[172]

With unsolvable logistical problems superimposed on a conflict unresolvable over the short run, "our decision does not end but begins the struggle over segregation." African Americans "contend with great force that if to enter white schools is a right at all it is a present and personal right and that deferred relief may be a denial of rights to those pupils who meanwhile pass school age," while the states "contend that if segregation is abolished at all, the process must be adapted to varying local conditions which will require time and consideration and varying periods of adjustment," especially since "in building their present administrative, education[sic] and physical structures they have relied on the teaching of this Court and the attitudes of Congress."[173] Even the Justice Department "concedes that uniform and immediate enforcement of a Court decree condemning segregation is impossible," for attitudinal, financial and logistical reasons,

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[171] Jackson, March 15, 1954 memorandum, Segregation Cases 13-14; Hockett, "Justice Robert H. Jackson and Segregation" 55; Chernack, "The Clash of Two Worlds" 97.
[172] Jackson, March 15, 1954 memorandum, Segregation Cases 14; 349 U.S. at 299; Tushnet, Making Civil Rights Law, pp. 212, 217-18 and chs. 16-18; Klarman, From Jim Crow to Civil Rights 306-07.
[173] Jackson, March 15, 1954 memorandum, Segregation Cases 14-15.

all of which will be "impossible now to anticipate," and whose solution will take an unknown amount of time:

> It points out that school districts may have to be consolidated or divided, or their boundaries revised, and the teachers and pupils may have to be transferred. The Government points out that an essential part of the plan will involve placing white children under colored teachers, unless colored teachers are to be dismissed in some areas where they have been hired in substantial numbers. This is one of the most controversial problems of adjustment…. In some regions, the white schools are good, the Negro schools poor. If both classes are to be accommodated in both schools, it would require white pupils to shift to the Negro schools, a measure not likely to be accepted without strong local opposition. New facilities are necessarily to be provided, and that involves taxation, the sale of bonds, and the votes of taxpayers and affirmative actions by public bodies.[174]

To achieve educational desegregation, "A gigantic administrative job has to be undertaken," one for which Congress was much better suited.[175] Yet how to accomplish this seemingly impossible task when the branch of government best suited to deal with it refused to do so was a conundrum to which Jackson had no answer – and neither, according to the justice, did the Justice Department,[176] which "advises that the courts assume this task" of supervising a massive transition:

> I will not be a party to thus casting upon the lower courts a burden of continued litigation under circumstances which subject district judges to local pressures and provide them with no standards to justify their decisions to their neighbors, whose opinions they must resist. The Department offers us no standards, and none exist in the law, to determine when and how the school system should be revamped. For the courts to supervise the educational authorities with the aid of town meetings seems to me manifestly beyond judicial power or functions. Our sole authority is to decide an existing case or controversy between the parties. Nothing has raised more doubts in my mind as to the wisdom of our decision than the character of the decree which the Government conceives to be necessary to its success. We are urged, however, to supply means to supervise transition of the country from segregated to nonsegregated schools upon the basis that Congress

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[174] Jackson, March 15, 1954 memorandum, Segregation Cases 15-16.
[175] Jackson, March 15, 1954 memorandum, Segregation Cases 16; Jackson, March 1, 1954 memorandum, Segregation Cases 16-19; Hockett, "Justice Robert H. Jackson and Segregation" 55.
[176] Jackson, March 1, 1954 memorandum, Segregation Cases 19-22; Hockett, "Justice Robert H. Jackson and Segregation" 55.

> may or probably will refuse to act. That assumes nothing less than that we must act because our representative system has failed. The premise is not a sound basis for judicial action.[177]

As in Sweatt and McLaurin, Jackson was looking up blind alleys.[178]

Leaving aside his misgivings about the practical effect of a ruling ending segregation, Jackson soldiered on. In his third section, "The Limits and Basis of Judicial Action," he broke free of his intellectual paralysis and set forth an analysis of how what once was law, was law no longer.[179] Formulating this argument had been difficult for him. In his January 6 draft, he considered but rejected "living constitution" theory -- that the meaning of the Constitution changes with time – as an easy out:

> Today it is well agreed, as Judge Cardozo reminded us, that these Constitutional generalities "have a content and a significance that vary from age to age." This brings us, however, squarely to the question whether we shall interpret these generalities as they were understood by the age that framed and adopted them or by the age that now reads them. It is implied in the questions which we asked an on which all of the litigants have bestowed extensive research that the original public will that struggled for expression in these Constitutional phrases is at least relevant to our decision.[180]

While he had no objection to the concept that the Fourteenth Amendment was flexible enough to deal with "changing conditions and currents of opinion in application of its principles to an expanding and developing society," he believed that it was Congress,'

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[177] Jackson, March 15, 1954 memorandum, Segregation Cases 17; Hockett, "Justice Robert H. Jackson and Segregation" 55; Tushnet, Making Civil Rights Law 212-13; Klarman, From Jim Crow to Civil Rights 308; Chernack, "The Clash of Two Worlds" 99.

Jackson foresaw with some accuracy the difficulties with followup litigation. See J.W. Peltason, Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation (New York: Harcourt, Brace & World, 1961); Jack Bass, Unlikely Heroes: The Dramatic Story of the Southern Judges of the Fifth Circuit who Translated the Supreme Court's Brown Decision into a Revolution for Equality (New York: Simon & Schuster, 1981); Michal R. Belknap, Federal Law and Southern Order: Racial Violence and Constitutional Conflict in the Post-*Brown* South (Athens, Georgia: University of Georgia Press, 1987); Tushnet, Making Civil Rights Law chs. 16-17; Klarman, From Jim Crow to Civil Rights 356.

[178] See pp. 391-93.

[179] Jackson, March 15, 1954 memorandum, Segregation Cases 18; Hockett, "Justice Robert H. Jackson and the Role of the Supreme Court in American Politics" 84.

[180] Jackson, January 6, 1954 memorandum, Segregation Cases 6. The Cardozo passage had been simmering in its mind, as he also discussed it in his August 23 speech to the ABA. Robert H. Jackson, "The Role of the Judiciary in Maintaining Our Freedoms" 10.

not the judiciary's, job to take public opinion into account.[181] Given what we know of Eisenhower's views on the Brown decision, Jackson's diagnosis that the country was suffering a "schizophrenic division," in that "it elects presidents who oppose segregation and a Congress that favors or tolerates it," was probably inaccurate.[182] But he knew that Congress had at the very least "tacitly supported" segregation, and that "it is said … that the South has enough representation to prevent" the type of enabling legislation contemplated by the Fourteenth Amendment. The justice was not sure what the courts could do in such a situation, and his despair was palpable in his final sentences:

> … that is to say that the Court should intervene to promulgate as a law that which our Constitutional representative system will not enact. It means nothing less than that either Congressional representation does not represent public sentiment or public sentiment does not resent segregation. It means nothing less than that we must act because our representative system has failed.[183]

Just five days later, in his January 11 version, Jackson began developing in earnest a section overruling Plessy because of changed conditions. Adding a string citation of some 13 cases, Jackson set forth the evolving circumstances that he felt justified altering the Court's stance on segregation:

> Certainly in the 1860's and throughout the nineteenth century the negro population, as a whole, was a different people than today. Lately freed from bondage, without opportunity to show their capacity for education or assimilation into our society without even at that time a chance to demonstrate that in our economy they could be self-supporting or in our public life anything more than a pawn for white exploits. It was not an unreasonable assumption that negro educational problems were elementary, special and peculiar and not easily tied in to the educational institutions of peoples of more favored background. Nor, when we view the progress that has been made under it, can we honestly say that the practice of each race pursuing its education apart was wholly to the negro disadvantage. Its progress, even under these adverse conditions, is spectacular.[184]

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[181] Jackson, January 6, 1954 memorandum, Segregation Cases 12-13.
[182] Jackson, January 6, 1954 memorandum, Segregation Cases 13.
[183] Jackson, January 6, 1954 memorandum, Segregation Cases 13-14; Klarman, "Brown at 50" 7.
[184] Jackson, January 11, 1954 memorandum, Segregation Cases 1-2.

In his opinion, the history of African American advancement, even if not in "proportion" to whites, and even if not "noticeable … in every locality," was "sufficiently general to require us to say that mere possession of colored blood, in whole or in part, no longer affords a general basis for holding that it is a sufficient basis for a classification for educational purposes."[185] This view of African Americans and their history undoubtedly seemed right to someone who had seen whites' views on African Americans change from the early to mid-twentieth century.[186]

The February 15 draft forthrightly admitted that "Today's decision can not, with intellectual honesty, be grounded in anything other than the doctrine, of which Judge Cardozo reminded us, that these Constitutional generalities 'have a content and a significance that vary from age to age.'"[187] The "living Constitution" doctrine was the prevailing view of legal elites at the time, and was one with which Jackson – who was no originalist in today's terms -- was not uncomfortable.[188] Yet he also believed that the doctrine should not be used lightly: "Certainly no one familiar with [Cardozo's] teachings would think this meant, what some people would advocate, that we declare new constitutional law with the freedom of a constitutional convention sitting continuously and with no necessity for submitting its innovations for approval of Congress, ratification by the states or approval of the people."[189]

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[185] Jackson, January 11, 1954 memorandum, Segregation Cases 4.
[186] See Chapters 1-3.
[187] Jackson, February 15, 1954 memorandum, Segregation Cases 9.
[188] Jackson, March 1, 1954 memorandum, Segregation Cases 11. For suggestions of how widespread the living constitution view was, see the comment of Reed at the 1953 post-argument conference ("I agree that the meaning of the Constitution is *not* fixed. What was due process in 1860 may not be due process today"). Dickson, ed., The Supreme Court in Conference 649, 657.
[189] Jackson, February 15, 1954 memorandum, Segregation Cases 9-10; Chernack, "The Clash of Two Worlds" 104.

While arbitrarily changing the meaning of constitutional text amounted to an impermissible arrogation of judicial power in Jackson's eyes, adjusting legal doctrine to changed factual circumstances was "neither novel nor radical doctrine."[190] He set forth his view, tinged by white Southern historiography and the racial views of his youth, that "in the 1860's and throughout the nineteenth century the Negro population, as a whole, was a different people than today.[191] Given what saw as African Americans' "spectacular" improvement, the justice concluded that presumptions of educational inferiority can no longer be used as an excuse for racial discrimination: "Whatever may have been true at an earlier period, the mere fact that one is in some degree colored no longer creates a presumption that he is inferior, illiterate, retarded or indigent."[192] Such a rationale could work for a believer in judicial objectivity and neutrality like Jackson. As one scholar put it, "to show that a policy," like that announced in Plessy, "is based on factual error is an especially powerful, because objective, form of criticism."[193]

At the same time, the politically-minded Jackson would not condemn a party to Plessy. As he wrote in his March 1 draft, "It is not in my opinion necessary or true to say that these earlier judges, many of whom were as sensitive to human values as any of us, were wrong in their time." Instead, "Whatever may have been true at an earlier period, the mere fact that one is colored does not today create a reasonable presumption that he is inferior, retarded, or a special problem in education."[194] He refused "to stigmatize as hateful or unintelligent the early assumption that Negro education presented problems" or

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[190] Jackson, February 15, 1954 memorandum, Segregation Cases 10.
[191] Jackson, February 15, 1954 memorandum, Segregation Cases 13-14.
[192] Jackson, February 15, 1954 memorandum, Segregation Cases 14.
[193] Richard A. Posner, "The Supreme Court 2004 Term Foreward: A Political Court," Harvard Law Review 119 (November 2005) 47.
[194] Jackson, March 1, 1954 memorandum, Segregation Cases 11-12.

"that the practice of each race pursuing its education apart has been, up to now, wholly to the Negro's disadvantage."[195] Recalling with the greatest amount of frankness yet his "little experience in a non-segregated school," he believed "that to mingle closely with White pupils does not full solve the Negro's psychological or educational problem."[196] Yet given the "spectacular" progress of the African American community over the ensuing decades, "The handicap of inheritance and environment has been too generally overcome today to warrant such a classification based on race alone."[197] Thus, he arrived at what might have been the consummate political solution to the problem of finding a palatable judicial rationale.

The justice also excluded as part of his rationale the "import[ing] into the concept of equal protection of the law psychological and subjective factors," such as "criteria from sociological, psychological and political sciences" -- evidence concerning the operation of people's minds, on which the plaintiffs relied, and which he distinguished from externally verifiable facts, like the advanced educational, economic and occupational status of many African Americans. A believer in judicial fallibility, he objected to the subjective nature of such evidence, as "If we adhere to objective criteria the judicial process will still be capricious enough."[198] He was also concerned that ending segregation would create its own psychological hardships: "the woes of the colored child are by no means solved merely by forcing him into white company."[199] He added that "if we should regard the feelings and reactions of those who are coerced into

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[195] Jackson, March 1, 1954 memorandum, Segregation Cases 12-13.
[196] Jackson, March 1, 1954 memorandum, Segregation Cases 13.
[197] Jackson, March 1, 1954 memorandum, Segregation Cases 13; Hockett, "Justice Robert H. Jackson and the role of the Supreme Court in American politics" 85-87.
[198] Jackson, January 6, 1954 memorandum, Segregation Cases 10-11; Jackson, March 1, 1954 memorandum, Segregation Cases 3.
[199] Jackson, January 6, 1954 memorandum, Segregation Cases 10-11; Jackson, March 1, 1954 memorandum, Segregation Cases 3.

segregation I suppose we should also weigh the effect of those who are coerced out of it," even though "the prosegregation emotion may seem to us less rational than antisegregation emotion." He again declined, because "Such factors are not mensurable [sic] by the judicial process. Many classifications that are useful in governing may be disliked and have adverse effect on those classified."[200]

The argument that psychological evidence would have to be considered from both sides, if used by one, is a slightly more subtle version of an argument that segregation sympathizers (like Reed) sometimes used, and which Jackson found himself backing into in at least two cases (Brown and Terry v. Adams, discussed at length in chapter 7): that the associational preferences of white supremacists had to be taken into account in segregation cases. Scholarly reviews on this argument were mixed: one dismissed it as irrelevant, for "The question of our right not to associate with him is concluded when we decide whether he has a right to be there," while another identified it as "the challenge of the school-segregation cases."[201]

In the March 15 version, he emphasized that no one should bear the stigma of having been "wrong" about segregation in the past. Past justices, he explained, applied the correct legal analysis – whether the state made "reasonable classifications of its inhabitants" when it imposed segregation:

> With their fundamental premise that the requirement of equal protection does not disable the state from making reasonable classifications of its inhabitants nor impose the obligation to accord identical treatment to all, there can be no

[200] Jackson, January 6, 1954 memorandum, Segregation Cases 10-11; Jackson, March 1, 1954 memorandum, Segregation Cases 3.

[201] Charles L. Black, Jr., "The Lawfulness of the Segregation Decisions," Yale Law Journal 69 (1960) 428-29; Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," Harvard Law Review 73 (November 1959) 33-35. See also Louis H. Pollack, "Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler," University of Pennsylvania Law Review 108 (November 1959) 24-30 (coerced association emanated from compulsory education laws, which in any event can be circumvented by sending one's children to private school, and not from the Fourteenth Amendment).

> quarrel. We still agree that it only requires that the classifications of different groups rest upon real and not upon feigned distinctions, that the distinction have some rational relation to the subject matter for which the classification is adopted, and that the differences in treatment between classes shall not go beyond what is reasonable in the light of the relevant differences. These legal premises are not being changed today.[202]

But it was their factual assumptions about race which led them to sanction segregation:

> … the second step in their reasoning, sometimes in reliance on precedents from slave days, sometimes from experience in their own time, was not a legal so much as a factual assumption. It was that there were differences between the Negro and the white race, viewed as a whole, such as to warrant separate classification and discrimination not only for their educational facilities but also for marriage, for access to public places of recreation, amusement or service and as passengers on common carriers and as the right to buy and own real estate.[203]

The justice refused to opine on the correctness of those factual assumptions at the time they had been made: "Whether these early judges were right or wrong in their times I do not know." Nor did he believe there was a point to judging them, as "There was strong belief in heredity, and the Negro's heritage was then close to primitive. Likewise, his environment from force of circumstances was not conducive to his mental development."[204] Those racial beliefs and stereotypes were common during the early decades of the twentieth century, and sound – from the belief in heredity to that of black inferiority – like ideas with which Jackson himself had been familiar early in life.[205]

He did "not find it necessary to stigmatize as hateful or unintelligent the early assumption that Negro education presented problems that were elementary, special and peculiar and that the mass teaching of Negroes was an experiment not easily tied in with

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[202] Jackson, March 15, 1954 memorandum, Segregation Cases 18-19; Hockett, "Justice Robert H. Jackson and Segregation" 55; Tushnet, Making Civil Rights Law 213.
[203] Jackson, March 15, 1954 memorandum, Segregation Cases 19.
[204] Jackson, March 15, 1954 memorandum, Segregation Cases 19.
[205] See Chapters 1 and 3.

the education of pupils of more favored background."[206] He even allowed that segregation might have served the interests of both races back then, for two reasons.[207] First, admitting that race relations were less than idyllic in Jamestown, he observed that his own "little experience in a nonsegregated school does not teach that to mingle closely with white pupils fully solves the Negro's psychological or educational problem."[208] This observation indicates a self-awareness wanting before. In his correspondence with Charles Fairman four years earlier, and in his January 6 draft, he claimed to possess "little firsthand knowledge" of the issue, and the little he had, suggested that integration was accomplished with "not even a thought."[209] Of course, he had seen and done enough in his native New York to know that life could not have been an idyll for the few African Americans in his home area.[210] In a sense, he had acknowledged as much with his admission that Northerners had not really accepted African American equality – that they had not "been willing really to adapt its practices," or "live up to our hypocrisies."[211] But his express admission in the March 15 draft that race relations in his school were less than perfect suggests that he may have been coming to terms with his own past.

Second, he argued that segregation prepared African Americans for a nonsegregated future. Extolling the accomplishments of the African American community under rough circumstances, he wrote:

> Indeed, Negro progress under segregation has been spectacular and, tested by the pace of history, his rise is one of the swiftest and most dramatic advances in the

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[206] Jackson, March 15, 1954 memorandum, Segregation Cases 19-20; Hockett, "Justice Robert H. Jackson and Segregation" 55.
[207] Jackson, March 15, 1954 memorandum, Segregation Cases 20.
[208] Jackson, March 15, 1954 memorandum, Segregation Cases 20.
[209] Jackson, January 6, 1954 memorandum, Segregation Cases 1.
[210] See Chapters 1 and 3.
[211] Jackson, February 15, 1954 memorandum, Segregation Cases 1.

> annals of man. It is that, indeed, which has enabled him to outgrow the system and to overcome the presumptions on which it was based.[212]

While one could imagine how distasteful an African American litigant might have found this revisionist view of segregation as a nursery for freedmen, the case's result hinged on the present and future, not the past. And while Jackson relied on some dubious historical assumptions in crafting a rationale he hoped would make abolishing segregation a little less unpalatable to segregationists, his analysis arrived at the desired result, under what he considered a proper legal framework, by using an argument of changed factual circumstances: "The handicap of inheritance and environment has been too widely overcome today to warrant these earlier presumptions based on race alone." Again to palliate those whose way of life was on the block, he conceded, "I do not say that every Negro everywhere is so advanced, nor would I know whether the proportion who have shown educational capacity is or is not in all sections similar."[213] Using an argument that segregationists would turn against the Court's ruling in subsequent years as they scrambled for legal grounds for avoiding or minimizing integration, Jackson allowed, "Retarded or subnormal ones, like the same kind of whites, may be accorded separate educational treatment."[214] Yet to the justice, "it seems sufficiently general to require us to say that mere possession of colored blood, in whole or in part, no longer affords a reasonable basis for a classification for educational purposes and that each individual

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[212] Jackson, March 15, 1954 memorandum, Segregation Cases 20; Jackson, January 6, 1954 memorandum, Segregation Cases 2-3; Hockett, "Justice Robert H. Jackson and Segregation" 55; Tushnet, Making Civil Rights Law 213; Klarman, "Brown at 50" 10; Chernack, "The Clash of Two Worlds" 103.

[213] Jackson, March 15, 1954 memorandum, Segregation Cases 20; Hockett, "Justice Robert H. Jackson and Segregation" 55.

[214] Jackson, March 15, 1954 memorandum, Segregation Cases 21. Jackson's clerk, Prettyman, criticized this comment on similar grounds. Hockett, "Justice Robert H. Jackson and the role of the Supreme Court in American politics" 118-19 n. 38; E. Barrett Prettyman, Jr., "Re Nos. 1-4," Box 12, File: Brown v. Board of Education Working Papers, 1954-56, Special Collections, University of Virginia Law Library 8; Hockett, "Justice Robert H. Jackson and Segregation" 55.

must be rated on his own merit."[215] All told, he was "convinced that present-day conditions require us to strike from our books the doctrine of separate-but-equal facilities and to hold invalid provisions of state constitutions or statues which classify persons for separate treatment in matters of education bases solely on possession of colored blood."[216]

Jackson added a second changed circumstance to his March 15 draft, "the status of the public school." In arguments similar to those in Warren's opinion, Jackson theorized that public education's changed role in society altered its status in equal protection jurisprudence:

> Nor can we ignore the fact that the concept of the place of public education has markedly changed. Once a privilege conferred on those fortunate enough to take advantage of it, it is now regarded as a right of a citizen and a duty enforced by compulsory education laws. Any thought of public education as a privilege which may be given or withheld as a matter of grace has long since passed out of American thinking.[217]

He closed this draft with a paragraph that unfortunately set forth the pattern for future racial discrimination, yet made the narrow point he had sought to make:

> The Negro is not free of local educational control. He must meet the prescribed standards of learning, disciple [sic] and health. He may be treated on his individual merit as a pupil, attend schools set apart for those of his neighborhood. But he may not be included or excluded merely because he has Negro blood wholly or in part.[218]

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[215] Jackson, March 15, 1954 memorandum, Segregation Cases 20-21; Tushnet, Making Civil Rights Law 213; Klarman, "Brown at 50" 11; Chernack, "The Clash of Two Worlds" 103.
[216] Jackson, March 15, 1954 memorandum, Segregation Cases 22.
[217] Jackson, March 15, 1954 memorandum, Segregation Cases 21-22; Jackson, February 15, 1954 memorandum, Segregation Cases 15; Jackson, March 1, 1954 memorandum, Segregation Cases 13-14; Chernack, "The Clash of Two Worlds" 103-04.
[218] Jackson, February 15, 1954 memorandum, Segregation Cases 15; Jackson, March 15, 1954 memorandum, Segregation Cases 21-22.

This author does not know whether Jackson realized when he wrote this how much aid and comfort such a paragraph would give those seeking an excuse to continue racial discrimination – if not, his clerk informed him later.[219] Yet his focus on the more significant role of public education in modern society was yet another factor militating against treating education as a governmental sideline immune to Constitutional guarantees of equal protection.

He then outlined a two-part precedential framework for his factual arguments. Omitting the long string of case citations this time, he observed that "It is neither novel nor radical doctrine that statutes once held constitutional may become invalid by reason of changing conditions, and those held to be good in one state of facts may be held to be bad in another. A multitude of cases, going back far into judicial history, attest to this doctrine." Next, alluding to the cases that had gradually eroded the separate but equal doctrine, he added, "In recent times, the practical result of several of our decisions has been to nullify the racial classification for many of the purposes as to which it was originally held valid," showing, as Burton had argued, that ending school segregation was not a radical departure, but rather the continuation of a trend.[220]

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[219] Prettyman reacted, "there is the 'out' the South is looking for." Jackson, March 15, 1954 memorandum, Segregation Cases 21; Prettyman, "Re Nos. 1-4" 8.

[220] Jackson, March 15, 1954 memorandum, Segregation Cases 22; Hockett, "Justice Robert H. Jackson and Segregation" 56.

Hockett wrote that Brown would have been on a sounder footing had Warren relied more strongly on Jackson's argument that there was no longer any basis for finding African Americans inherently inferior to whites, than on the sociological evidence Warren cited in the infamous Footnote Eleven. Hockett, "Justice Robert H. Jackson and Segregation" 52-53, 56-57, 59-61. This argument makes sense, to a point. It might have provided a more secure legal foundation. See pp. 494-95. Yet in light of the fierceness of the resistance against the decision, it is hard to imagine anything the Court might have said which would have mollified white supremacists, short of deciding the case the other way. Certainly, arguing that African Americans were not inferior to whites would not have done it.

On the other hand, Chernack found Jackson's approach a failure, because it did not confront whether Plessy had been correctly decided. Chernack, "The Clash of Two Worlds" 55 n.21, 91, 104-05. But doing so would not have been possible on a Court that was greatly concerned with not unduly antagonizing white Southerners; it probably would have been unwise politically; and it would have

For all of his seeming defensiveness, Jackson's views on race relations might have been more radical than his draft as a whole would indicate. He resolved the concern about interracial procreation he raised during the university segregation cases:

> … we cannot ignore the fact that assimilation today has proceeded much beyond where it was at the earlier periods. Blush or shudder, as many will, mixture of blood has been making inroads on segregation faster than change in law. No clear line of separation between the races has been observed. More and more a large population with as much claim to white as to colored blood baffles any justice in classification for segregation.[221]

Once again, the justice's factual basis is somewhat off, as black/white interracial marriage was not quite in vogue in 1954, despite its increase in the 1940s and early 1950s.[222] Yet Jackson, as had Myrdal and others, recognized that interracial sex was the white supremacists' biggest fear; he further agreed with white Southerners who believed that easing segregation in certain aspects of life, including schools, would make interracial sex and marriage more prevalent. Segregationists used this prospect as a battle cry against what they called "mongrelization"; civil rights advocates, on the other hand, publicly denied the link between school desegregation and interracial marriage.[223]

While he sided with the anti-segregationists on the factual issue, the concept of interracial marriage did not seem to bother Jackson. In his oral history, the recollections

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overlooked one of the issues weighing heavily on Jackson – that demonizing the South would have been hypocritical.

[221] Jackson, March 15, 1954 memorandum, Segregation Cases 21; Jackson, February 15, 1954 memorandum, Segregation Cases 14; Jackson, March 1, 1954 memorandum, Segregation Cases 13-14; Hockett, "Justice Robert H. Jackson and Segregation" 55.

[222] By 1960, only .1% of all married couples in the United States were comprised of one white and one African American. Jackson's dream of solving America's racial problems by amalgamation is still a way off: only .6% of all marriages were black-white by 2000. Rachel F. Moran, Interracial Intimacy: The Regulation of Race and Romance (Chicago: University of Chicago Press, 2001) 103; Renee C. Romano, "Crossing the Line: Black-White Interracial Marriage in the United States, 1945-1990" (diss., Stanford, 1996) 30-31, 139; Renee C. Romano, Race Mixing: Black-White Marriage in Postwar America (Cambridge, MA: Harvard University Press, 2003) p. 3 and chs. 1, 2, 5.

[223] James T. Patterson, Brown v. Board of Education: A Civil Rights Milestone and its Troubled Legacy (Oxford: Oxford University Press, 2001) 87-88; Romano, "Crossing the Line" chs. 1 and 3, and pp. 33-37, 40-51, 102-14; Romano, Race Mixing ch. 5.

for which he recorded in 1952 and early 1953, he recalled having had repeated discussions with his mentor Roosevelt about race relations on the Caribbean islands:

> He pointed out, as I knew from visits to the islands and as we had discussed before when we had been fishing in southern waters, the differences in race relations in those islands and the race relations in the United States. In those islands there was no discrimination. There was intermarriage. There was a large measure of social, and complete political, equality between the races.[224]

The two men recognized interracial marriage's abhorrence to the white Southerners controlling Congress, and Roosevelt saw it as a powerful reason against annexing more Caribbean islands on the eve of World War II. Yet both of them also recognized it as a valid alternative model for race relations. Jackson saw it, the ultimate form of integration, as an answer to racial issues. With the albeit small increase in its incidence in the United States in the years leading up to Brown, Jackson felt that that was the way American society was headed, too. Nor was he the only educated white who believed that racial amalgamation was on the way in this country.[225] So not only had the worst case scenario of white supremacists already begun to occur (or, in the sense of interracial parentage it had begun to recur, as the history of slavery demonstrates),[226] but in Jackson's mind that very scenario was a positive force that would undermine attempts at maintaining segregation.

Turning to the content of the Court's decree, Jackson indicated that he would balance the equities between African Americans and white Southerners: "I believe that the circumstances under which a large part of the country has grown into the existing system are such that … only a reasonably considerate decree would be an expedient one

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[224] Jackson Reminiscences 896.
[225] Romano, Race Mixing 172 (citing "Rankin is Right," Esquire [February 1954] 91[a tongue-in-cheek treatment]; Allan Nevins, "Historian Predicts: Intermarriage of the Races will Be Inevitable," US News and World Report [November 14, 1958] 72).
[226] Moran, Interracial Intimacy ch. 2.

for the persons it has sought to benefit hereby."[227] He observed that discussion of the decree had been "shunned by both of the parties to the contest, although neither of them accept the Government's proposals," acerbically adding, "They obviously feared it would be inconsistent with their positions to discuss the contents of a decree lest they appear to be acquiescing in it." The justice wanted at this stage to go "no farther than to enter a decree that the state constitutions and statutes relied upon as requiring or authorizing segregation merely on account of race or color, are unconstitutional," and order reargument "on the [further] contents of our decree and request the Government and each of the parties to submit detailed proposed decrees applicable to each case."[228] This was consistent with Frankfurter's clerk's belief that Jackson, Frankfurter and Black had a "mutual understanding" that enforcement would be "gradual" and not "forthwith."[229]

While much of its factual basis was questionable, Jackson's approach zeroed in on the place in the logical chain where the justices could find a law-based explanation for overruling Plessy, yet without condemning those who created and supported it: a changed factual circumstance, altering what once had provided a rational basis for racial classifications under the Fourteenth Amendment. It is hard to imagine a more pragmatic solution, and a solution more faithful to the limits of legal analysis in which Jackson believed.[230] It also had the potential for forging a compromise between the approaches of Black, who felt that separate but equal was based on white supremacy from the beginning; Frankfurter, who noted that segregation would become illegal on the day of

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[227] Jackson, March 15, 1954 memorandum, Segregation Cases 22-23.
[228] Jackson, March 15, 1954 memorandum, Segregation Cases 23; Jackson, March 1, 1954 memorandum, Segregation Cases 22-23; Jackson, January 11, 1954 memorandum, Segregation Cases 13-14; Hockett, "Justice Robert H. Jackson and Segregation" 56.
[229] Kluger, Simple Justice (1977 ed.) 698-99; Kluger, Simple Justice (2004 ed.) 694-95.
[230] For Jackson's reputation as a pragmatist, see Schubert, "Jackson's Judicial Philosophy" 957 and authorities cited therein. Compare with Hockett, "Justice Robert H. Jackson and Segregation" 52-53, 56-57, 59-61.

decision, but not before; Burton, who perceived Brown as part of a legal evolution that began in the university segregation cases; and Clark, who believed that Southern states would have to be given time to unravel their segregated systems, especially in light of their having constructed them in reliance on Plessy.

It has been suggested that Jackson's changed circumstances argument was based on "fundamentally sociological conditions that Jackson defined as political rather than legal."[231] But that is not what happened in the March 15 draft. The underlying facts – the progress of the African American community and the changing role of the public school in American society -- might be defined as socioscientific rather than legal, but facts presented in legal cases rarely are themselves legal, but generally emanate from other fields. The genius of Jackson's approach is his application of those facts to a legal framework, within existing constitutional jurisprudence – that since the factual basis for the legal approval of segregation has eroded, that sanction could no longer stand.

Critique

Jackson submitted his draft to his law clerk. E. Barrett Prettyman, Jr. had been out of law school for less than one year.[232] Yet he knew where he stood on these cases, and it was not beside Bill Rehnquist: "It seemed inconceivable to me that, as late as 1954, a majority of the Supreme Court would say that it is still valid under the law to separate children solely on the basis of race when they go to school."[233] In a long windup to his comments, Prettyman acknowledged that gaining public acceptance for a decision ending

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[231] Tushnet, Making Civil Rights Law 213-14; Chernack, "The Clash of Two Worlds" 106.
[232] Prettyman's relative inexperience was unusual, as most clerks had served with a lower court judge before gaining a Supreme Court clerkship. Barrett, Mod., "Supreme Court Law Clerks' Recollections of Brown v. Board of Education" 523-24 (recollections of E. Barrett Prettyman, Jr.).
[233] Barrett, Mod., "Supreme Court Law Clerks' Recollections of Brown v. Board of Education" 539 (recollections of E. Barrett Prettyman, Jr.).

segregation would not be easy. To accomplish this, he believed, the country "should be made to feel that the decision is honestly arrived at, confidently espoused, and basically sound," and not the product of "a bunch of liberals in Washington [who] have finally foisted off their social views on the public." Otherwise, the country "will not only tolerate but aid circumvention of the decision."[234]

The young lawyer's major criticism of the 23-page draft was that it began with "doubts and fears," and maintained a "negative attitude" through all but two pages near the end. Its "clear and affirmative statement" backing the ruling seemed "almost an afterthought." He counseled:

> It is one thing to have and express many doubts about a difficult decision, as any honest man would in this case; it is another to state them at such length and in such precedence over your affirmative views that the result you reach is swallowed up in them.[235]

Structurally, he recommended a complete reordering: the opinion should begin with a more fully developed section about the importance of universal public education, and continuing with another expanding on the thesis that what might have been a rational racial classification many years ago no longer was. The mollifying sections could follow, with the discussion on enforceability immediately preceding the concluding paragraphs.[236]

Prettyman was particularly critical of his boss's defensiveness about the Court's role:

> I say this in all frankness: if you are going to reach the decision you do, you should not write as if you were ashamed to reach it. It has always been the duty

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[234]Prettyman, "Re Nos. 1-4" 1; Hockett, "Justice Robert H. Jackson and the role of the Supreme Court in American politics" 90.
[235] Prettyman, Jr., "Re Nos. 1-4" 1; Hockett, "Justice Robert H. Jackson and Segregation" 57.
[236] Prettyman, "Re Nos. 1-4" 2-3; Hockett, "Justice Robert H. Jackson and the role of the Supreme Court in American politics" 91-92.

> of the courts to decide as a matter of law whether asserted differences between too classes are too insubstantial to warrant the classification…. The fact that you cannot explain exactly how you know the races are sufficiently equal or that you cannot say just when they reached sufficient equality should not make your opinion apologetic. Some one must make these decisions, and under our system the burden is on the courts…."[237]

He tore into the argument that desegregation was Congress's job, first explaining that "You could hardly expect Congress to abolish segregation, citing the Amendment as its source of power, in the face of this Court's holding that the Amendment does not prohibit it"; and proceeding to explain, in language that makes one wonder who was the Supreme Court justice and who was the recent law school graduate, that "no matter what the Court has held or will hold about segregation and the 14th Amendment, that holding is not a grant of power to Congress":

> This is not the Commerce Clause, but an Amendment limiting the states. The Amendment does not grant correlative rights to the Federal Government merely because it takes power from the states. The whole discussion about the constitutionality of a federal anti-lynching bill revolves around this very point. The fact that we have thrown out coerced confessions under the Due Process Clause does not mean that Congress could make such confessions either legal or illegal in the states. You might argue that a limitation on federal power is automatically a grant to the states, but you can't argue the other way around.[238]

He also believed that the narrow question decided here – "whether Negroes have advanced so far that the mere fact of separation denies them equal protection" – was "a legal one" for the courts, not requiring a policy decision for a legislature.[239] (He later went on to suggest that even congressional implementation of a Court decision would be problematic, resulting in "ever-expanding control" of local schools from Washington).[240]

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[237] Prettyman, "Re Nos. 1-4" 3; Hockett, "Justice Robert H. Jackson and Segregation" 57; Tushnet, Making Civil Rights Law 213; Klarman, From Jim Crow to Civil Rights 306.
[238] Prettyman, "Re Nos. 1-4" 5.
[239] Barrett Prettyman, "Re Nos. 1-4" 6.
[240] Prettyman argued that "a sufficiently thorough and sensible decree that the district courts can follow … with some precision" would be preferable to Congressional control of the public schools. Prettyman, "Re Nos. 1-4" 7.

Conceding the validity of the concern "that abolition of segregation by this Court might well be an empty gesture," the clerk reminded Jackson that "in a case of this magnitude, the very attitude of the Court is important, and that attitude should be one of faith rather than futility." He resumed his pep talk:

> If segregation is no longer legal, of course the country will not tolerate it – that would be a much better tone in your opinion. After all, this is a great country, and its people are great, and they will not tolerate lawlessness if they are convinced it is real lawlessness. How can you expect them to be convinced if you are not yourself?

He counseled that "a practical discussion of the difficulties inherent in the decree" could be done in a manner consistent with an optimistic attitude, as "readjustment would be difficult no matter what the country's attitudes."[241] But if Prettyman imparted nothing else, he made abundantly clear that, unless the Court expressed confidence that the country would abide by the Court's ruling, success would be impossible; and that Jackson had to summon that faith.

Jackson and the Court's Opinion

The justice was about to begin his next reworking of his draft when he was felled by his March 30, 1954 heart attack.[242] He spent close to two months recuperating in the hospital, to avoid, according to the newspapers, the physical strain of negotiating steps at his Virginia home. While there, however, he resumed working after several weeks' recuperation.[243] Meanwhile, Warren was hard at work preparing a draft opinion that, he

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[241] Prettyman, "Re Nos. 1-4" 6; Hockett, "Justice Robert H. Jackson and the role of the Supreme Court in American politics" 90-91; Tushnet, Making Civil Rights Law 213.
[242] E. Barrett Prettyman, Jr., "Notes re Segregation Decision," December 15, 1954, Box 12, File: Brown v. Board of Education Working Papers, 1954-56, Special Collections, University of Virginia Law Library 1.
[243] "Justice Jackson Returns to Bench After Illness," Jamestown Post-Journal, May 20, 1954, p. 1, col. 3.

hoped, would speak for the entire Court.[244] As part of those efforts, he occasionally discussed it with his colleagues in conference and informally, and would "on occasion … visit with Mr. Justice Jackson … to inform him of our progress."[245] Above all, he worked toward the unanimity on which, it was widely believed, the effectiveness of such a potentially divisive decision depended.[246]

In an atmosphere of utmost secrecy – drafts did not go to the printers, and were delivered to the justices by the author himself -- Warren (who in any event "looked after the justices' welfare like a ward captain," and thus probably welcomed another opportunity to visit his hospitalized colleague) hand delivered Jackson's copy to his hospital room.[247] Prettyman, who read the opinion and discussed it with Jackson after Warren's departure, reported that Jackson was, more than anything, "relieved" by the Chief Justice's effort – "He was so pleased that there was no blame." Jackson was not completely satisfied: he did not believe that the legislative history of the Fourteenth Amendment was "'inconclusive,'" but instead "thought it was quite clear that they … had, in fact, approved segregated schools."[248] Yet this shortcoming was relatively trivial

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[244] Schwartz, Super Chief 97ff; Hutchinson, "Unanimity and Desegregation" 42. He strove for an opinion that was "short, non-legalistic" (he suggested at one point that it should be appropriate for printing on the front page of a newspaper) and, "above all … 'non-accusatory,' as he was already thinking in terms of acceptability in the South." Barrett, Mod., "Supreme Court Law Clerks' Recollections of Brown v. Board of Education" 551-52 (recollections of Earl E. Pollock, clerk to Chief Justices Vinson and Warren); Schwartz, Super Chief 97.

[245] Warren, The Memoirs of Earl Warren 286.

[246] Tushnet with Lezin, "What Really Happened in *Brown v. Board of Education*" 1875-78.

[247] Prettyman, "Notes re Segregation Decision" 1; Barrett, Mod., "Supreme Court Law Clerks' Recollections of Brown v. Board of Education" 552 (recollections of Earl E. Pollock, clerk to Chief Justices Vinson and Warren); Dickson, ed., The Supreme Court in Conference 106; Warren, The Memoirs of Earl Warren 282-86; Ulmer, "Earl Warren and the Brown Decision" 699-700; Kluger, Simple Justice (2004 ed.) 704; Hutchinson, "Unanimity and Desegregation" 42.

[248] Barrett, Mod., "Supreme Court Law Clerks' Recollections of Brown v. Board of Education" 554, 555 (recollections of E. Barrett Prettyman, Jr.); Kluger, Simple Justice (2004 ed.) 701; Chernack, "The Clash of Two Worlds" 90 n.199.

to the justice who, according to his clerk, "didn't care what the Framers thought about this now-current problem":

> It couldn't have bothered him less. He thought that you had to interpret – as a very practical man, which he was – he thought you had to interpret the Constitution in terms of today's world, and therefore he put that problem to one side. So he had different approaches from what Warren had. But basically, he very much liked the idea that it was simple, short, people could understand it, you could easily agree. You tended to read those words and say, "Yes. Yes. When you separate people on the basis of race, you are denigrating the black race."[249]

And certainly the opinion's "temperate tone" must have reassured him.[250]

The morning before Warren's return, Jackson directed Prettyman to prepare "a short paragraph, taken substantially from the memorandum I had already written him on his own opinion," that he hoped would be added to the Court's opinion.[251] Jackson later told his clerk that he had "orally suggested its contents to" Warren, who "had a very good reason for not wanting this statement in the opinion as a legal justification: Everything in the Chief's opinion was directed at segregation in public education; the justice's paragraph, on the other hand, could be applied to segregation in general."[252] At that point, both jurists agreed "that the Court should not even intimate that segregation would fall in other fields," but Warren "did say … that he would incorporate the Justice's idea somewhere in the opinion." The end result was the sentence "Today, in contrast, many

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[249] Barrett, Mod., "Supreme Court Law Clerks' Recollections of Brown v. Board of Education" 554 (recollections of E. Barrett Prettyman, Jr.).

[250] Kluger, Simple Justice (1977 ed.) 697; Kluger (2004 ed.) 701.

[251] Prettyman, "Notes re Segregation Decision" 1. Jackson "deleted the clause following the Plessy citation" – apparently the one which read in Warren's draft "Insofar as Plessy v. Ferguson contrary to this finding with respect to public education, that case is overruled" – "because he did not want to pass judgment in any way upon [its] wisdom or justification…." Warren, "Memorandum on the State Cases" 8. In the final opinion, that sentence read, "Any language in Plessy v. Ferguson contrary to this finding is rejected," a somewhat more limited declaration. 347 U.S. at 494-95.

[252] Prettyman, "Notes re Segregation Decision" 1. Prettyman had also counseled Jackson against making arguments that applied to segregation of facilities other than schools: "at least until Southerners have readjusted their thinking to the new situation, why not let them think that the battle had been lost as to schools and is only just beginning on housing, etc." Id. at 8; Hockett, "Justice Robert H. Jackson and Segregation" 118 n.5.

Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world," which supported the argument that new times and new conditions required a retooling of legal doctrine.[253]

Despite the decision to confine the Brown opinion to school segregation, the Court shortly thereafter began desegregating non-educational facilities without further analysis, generally without any opinion at all, or on the authority of Brown.[254] And years later, Warren admitted that "All of the various segregation case decisions went hand-in-hand with the principle of *Brown v. Board of Education*."[255] Limiting Brown to schools, and then applying it to other contexts, differed from Jackson's approach in his March 15 draft, in its ostensibly piecemeal approach to ending segregation which, it was hoped, would ease the sting of the Brown decision. Much of Jackson's draft, on the other hand, contemplated segregation in general, which reflected his tendency to think about civil rights as one big issue rather than as a series of component parts. His approach was also more forthright than the Court's, which in any event had little of the palliative effect for which its proponents had hoped.

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[253] Prettyman, "Notes re Segregation Decision" 1-2; 347 U.S. at 490; Earl Warren, May 14, 1954 draft opinion, Box 184, File: Legal File – Supreme Court October Term 1953 – Cases -- Segregation Cases, Robert H. Jackson Collection, Library of Congress 6; Schwartz, Super Chief 97ff.; Hockett, "Justice Robert H. Jackson and the role of the Supreme Court in American politics" 115 n.2;

[254] Schwartz, Super Chief 97ff.; Tushnet, Making Civil Rights Law 301; Philip B. Kurland, Politics, the Constitution and the Warren Court (Chicago: University of Chicago Press, 1970) 124; Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (lower court decision upholding segregation of auditoriums vacated and remanded for reconsideration in light of Brown); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (lower court decision desegregating public beaches affirmed with no opinion); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (lower court order concerning segregation of public golf courses vacated and remanded in light of Brown); New Orleans Park Ass'n v. Detiege, 358 U.S. 54 (1958) (affirmed without opinion lower court order desegregating golf courses); State Athletic Commission v. Dorsey, 359 U.S. 533 (1959) (affirmed without opinion lower court order barring segregation of state–sponsored sporting events); Gayle v. Browder, 352 U.S. 903 (1956) (Montgomery, AL buses desegregated on authority of Brown, Dawson and Holmes).

[255] Warren, The Memoirs of Earl Warren 299.

One is left to wonder whether health reasons may have led Jackson, who adamantly opposed Court involvement in the making of social policy, not to protest the biggest problem in Warren's opinion – the now-infamous footnote 11, which provided justification for overruling Plessy in psychological studies and other social science evidence.[256] On the other hand, a healthy Justice Black also found the footnote objectionable, but he likewise chose not to protest it.[257] So an appendage to Warren's effort, which was "not thought particularly important" at the time, even by an anti-social science jurist like Jackson, became an "accidental bomb" that "reduced both the legal and moral force of the opinion," generated much scholarly criticism, and gave recalcitrant white Southerners one more reason to criticize the Court.[258]

Outside Contacts Before Decision Day

Judges are not supposed to discuss a pending case with outsiders. But that sometimes does not stop outsiders from attempting to discuss the case with the judges; or judges from bending or breaking the rules. Of the numerous stories of justices' outside conversations during Brown's pendency, two took place at White House social functions. One, in which Jackson did not participate but which embodied his deep concern about the enforceability of a judgment ending segregation, was between Warren and President Eisenhower, who buttonholed him at a White House dinner that took place sometime between reargument and decision day. As Warren described it:

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[256] Critiques of Footnote Eleven include those found in Lucas A. Powe, Jr., The Warren Court and American Politics (Cambridge, MA: Belknap Press, 2000) 41-44; Wechsler, "Toward Neutral Principles of Constitutional Law" 31-33. See also Hockett, "Justice Robert H. Jackson and Segregation" 52, 59 and authorities cited therein.

[257] Newman, Hugo Black: A Biography 437.

[258] Powe, The Warren Court and American Politics 42, 44; Urofsky, "Among the Most Humane Moments in All Our History" Black, White, and Brown 28; Jackson, Gunnar Myrdal and America's Conscience 249-52, 273 ff; Southern, Gunnar Myrdal and Black-White Relations ch. 7; Wechsler, "Toward Neutral Principles of Constitutional Law" 31-33.

> I wondered why I should be invited because the dinners were political in nature, and there was no place for me in such discussions…. I was ranking guest, and as such sat at the right of the President and within speaking distance of John W. Davis, the counsel for the segregation states. During the dinner, the President went to considerable lengths to tell me what a great man Mr. Davis was. At the conclusion of the meal … [Eisenhower] took me by the arm, and, as we walked along, speaking of the Southern states in the segregation cases, he said, "These are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big overgrown Negroes."
>
> Fortunately, by that time, others had filed into the room, so it was not necessary for me to reply. Shortly thereafter the *Brown* case was decided, and with it went our cordial relations.[259]

Another such discussion involved a friend of the Jacksons, Dorothy McCardle, who attended a White House reception as their guest. In a condolence letter to Mrs. Jackson after the justice's death, Mrs. McCardle wrote about how she would "always cherish one memory especially." She reminded Irene that "our talk coming home was of the Negro race and its problems." McCardle did not record specifically what was said, but she left the impression of a Robert Jackson whose "humanity," along with his wife's, made him sympathetic to the plight of African Americans:

> And though I had always admired you both my admiration was all the greater that night when I understood your fine tolerance on that score. And that outstanding example of courage which Bob displayed by leave[sic] the hospital and go directly to the Court and sit on the anti-segregation decision – that moved Carl and myself profoundly.[260]

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[259] Warren, The Memoirs of Earl Warren 291-92. Warren and civil rights advocates were convinced that enforcement might have gone more smoothly had Eisenhower publicly supported the Court, and not undermined it with personal silence and hostility voiced through his aides. Warren, The Memoirs of Earl Warren 289-91; Patterson, Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy 82. Yet despite Eisenhower's "morally obtuse" reticence, id., his Administration continued Truman's efforts on behalf of civil rights in a number of areas, including the desegregation of the nation's capital and the continued efforts to integrate the armed forces. Robert L. Branyan and Lawrence H. Larsen, eds., The Eisenhower Administration 1953-1961: A Documentary History, Volume II, pp. 1057-72 (New York: Random House, 1971); Dwight D. Eisenhower, State of the Union Address, January 7, 1954, Box 43, File: Miscellaneous Quotations, Excerpts, Statements and Poems of Others, Robert H. Jackson Collection, Library of Congress 1.

[260] Dorothy McCardle to Irene Jackson, October 13, 1954 2-3.

Decision and Reaction

The most poignant proof of Jackson's commitment to the Court's unanimity was his decision to leave the hospital on decision day, May 17, to rejoin his fellow justices on the bench for the reading of the decision.[261] Warren recalled visiting Jackson after the May 15 conference, at which his colleagues had "agreed to announce our opinion the following Monday, subject to the approval of Mr. Justice Jackson." The recuperating Justice not only gave his approval, but "to [the] alarm" of the Chief, "insisted on attending the Court that day in order to demonstrate our solidarity." The startled Warren "suggested that it was unnecessary," but Jackson "insisted, and was there at the appointed time."[262]

Immediate reaction to the decision was not as bad as it would get, because the Court had yet to specify the terms of enforcement.[263] But it was "bitterly received by many Southerners," and numerous Southern politicians went on record as quickly as possible to denounce the decision or "express[] a conviction that the states could find ways to circumvent it."[264] The virulence, and the staying power of, the resistance to the Court's decision after the second Brown opinion shocked Jackson's surviving colleagues, many of whom had thought they had been prepared for the worst. Justice Black's ostracism from his beloved Alabama for over a dozen years after the Brown decision seems trivial paired with the violence, the circumvention, the widespread defiance of

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[261] Kluger, Simple Justice (2004 ed.) 701, 703-04; Klarman, From Jim Crow to Civil Rights 302.
[262] Warren, The Memoirs of Earl Warren 286; Schwartz, Super Chief 105.
[263] Schwartz, Super Chief 111; Urofsky, "Among the Most Humane Moments in All Our History," Black, White, and Brown 27.
[264] Robert J. Donovan, "Supreme Court, 9-0, Bans Segregation in Schools, New York Herald-Tribune, reprinted in Reporting Civil Rights Part One 205-07. The Library of America reprinting incorrectly indicated the date of the article as May 13, 1954, four days before the Court's decision. See also Hockett, "Justice Robert H. Jackson and the role of the Supreme Court in American politics" 92-93 (quoting "Ruling Tempers Reaction in the South," New York Times May 18, 1954 p. 20); Kluger, Simple Justice (2004 ed.) 713ff; Urofsky, "Among the Most Humane Moments in All Our History," Black, White, and Brown 27-28.

legal process.[265] And all of this occurred despite the justices' extraordinary willingness to countenance delay and respect local autonomy.[266]

The Summer of 1954

The maxim, imparted by an old friend from Jackson's Jamestown days, that "If a judge is for one side more than he ought to be, he's against the other side," stayed with him.[267] Prominent journalist Herbert Bayard Swope, then serving as Chairman of the Executive Committee of Freedom House, informed him of the group's intent to unveil a plaque commemorating the Brown decision at its annual dinner that October 3. Swope explained that "Freedom House believes that the Supreme Court enormously aided the American philosophy of Life and Government by" its decision, and that "It is difficult to recall a judgment more important to the country…." The group was asking no justice "to speak on his performance of a duty," but was inviting all of them to the dinner and ceremony.[268] Jackson replied that the invitation "troubles me," because "the Court has only done its duty and nothing beyond the line of duty and … it hardly becomes the justices to participate in a memorial to their own work." (He distinguished an honor for a jurist's "particular decision or philosophy" from "a general approval of his workmanship as may be indicated by some honors which are not tied to particular cases," which he

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[265] Warren, The Memoirs of Earl Warren 289-91; Friedman, American Law in the 20th Century 289ff.; Tushnet, Making Civil Rights Law chs. 16-20; Hugo L. Black and Elizabeth Black, Mr. Justice and Mrs. Black 74, 199, 234, 245-46. See also note 177 and sources cited therein.
[266] Warren, The Memoirs of Earl Warren 287-88.
[267] Jackson Reminiscences 107.
[268] Herbert Bayard Swope to Robert H. Jackson, June 30, 1954, Box 184, Legal File: Supreme Court O.T. 1953 -- Cases -- Segregation Cases -- Correspondence and Clippings, Robert H. Jackson Collection, Library of Congress.

would have deemed appropriate). He therefore declined to attend, though he did so "the more reluctantly because I know how sincerely the invitation is proffered."[269]

In the months after the decision, Jackson's complex concerns had ample opportunity to be reinforced -- publicly, privately and professionally, if Jackson's own files are any indication. Nationally, the immediate aftermath of the decision was a time of collective breath-holding: while Northern opinion leaders hailed the decision, and border states began the process of desegregating some if not all facilities many, both North and South, anxiously anticipated the more difficult times to come, when the ruling would take effect. While contrary attitudes had yet to explode into widespread violence, because the Court ordered nothing more than another reargument, it seemed that anyone who had any understanding of Southern attitudes was deeply concerned about that eventuality.[270] The Deep South's initial reaction could not have fostered optimism.[271]

Jackson was sent the sermon of a Southern rector (and one of his in-laws, through his daughter's second marriage), who preached that the decision "was inevitable because it was right," but "involves for us in the South so many social and emotional difficulties

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[269] Robert H. Jackson to Herbert Bayard Swope, July 12, 1954, Box 184, Legal File: Supreme Court O.T. 1953 -- Cases -- Segregation Cases -- Correspondence and Clippings, Robert H. Jackson Collection, Library of Congress.

Swope replied that he "cannot disagree with the underlying principle of your letter," but announced the organization's intention to go ahead anyway, with Ralph Bunche as speaker. Herbert Bayard Swope to Robert H. Jackson, July 19, 1954, Box 184, Legal File: Supreme Court O.T. 1953 -- Cases -- Segregation Cases -- Correspondence and Clippings, Robert H. Jackson Collection, Library of Congress; George Field to Robert H. Jackson, September 23, 1954, Box 184, Legal File: Supreme Court O.T. 1953 -- Cases -- Segregation Cases -- Correspondence and Clippings, Robert H. Jackson Collection, Library of Congress.

[270] Urofsky, "Among the Most Humane Moments in All Our History," Black, White, and Brown 31-32. Newspapers in Northern and Border states hailed the decision as a triumph of democracy; as a victory in the Cold War; and as part "'of a process that has been going on a long time.'" Further South, however, concerns about the rulings consequences permeated just about every expression of opinion, with prayers for "'wisdom and tolerance on all sides'" often expressed. National Council of Churches of Christ in the United States of America, Information Service (June 5, 1954), Box 184, File: October Term 1953 – Cases – Segregation Cases – clippings, Robert H. Jackson Collection, Library of Congress.

[271] Southern, Gunnar Myrdal and Black-White Relations 172; Urofsky, "Among the Most Humane Moments in All Our History," Black, White, and Brown 33ff.

and problems."[272] One of his former law clerks wrote that the decision "was not startling" and "Morally … unquestionably right and, therefore, properly disposed of under the 14th Amendment," but that "had the responsibility been mine, I would seriously have considered ruling that it was a very sensitive problem of a peculiar and local nature, impossible to solve on a national basis, and best left to the police power of the states."[273] He opined that while "the evil consequences predicted to follow from the decision are grossly exaggerated, there certainly will be at least a few areas in which serious problems are going to arise." He praised the Court for delaying a specific decree, "if for no other reason than to allow tempers to cool before the decision's effect is put into operation," and was optimistic that "time will do wonders."[274]

While Jackson was away for the summer, his former colleague, South Carolina governor James Byrnes, tried to communicate with him about a scheduling misunderstanding concerning the reargument (Byrnes ended up discussing the matter with Frankfurter). Immediately after the first decision, the former Supreme Court Justice professed to be "'shocked'" that the Court "'had reversed itself,'" and promised to abolish his state's public school system if it could not remain segregated.[275] Frankfurter reported to Warren (with a copy to Jackson) Byrnes' concerns about reaction in his state:

> He said I could well appreciate the agitation in his State and the somewhat "chaotic" condition (the adjective was his) that was stirring in South Carolina, and that he, Jim, was doing his best in exerting influence with legislators that nothing be done until the Court finally disposed of the matter …. When I interrupted to

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[272] Re. F.H. Craighill, Sermon, Bruton Parish, Williamsburg, VA, May 23, 1954, Box 8, Family Papers – Other Papers – Other Family Members 1816-1954, Robert H. Jackson Collection, Library of Congress 1.
[273] C. George Niebank to Robert H. Jackson, May 26, 1954, Box 17, File: General Correspondence – Niebank, C. George, Robert H. Jackson Collection, Library of Congress 1.
[274] Niebank to Jackson, May 26, 1954 1-2.
[275] Robert J. Donovan, "Supreme Court, 9-0, Bans Segregation in Schools," New York Herald-Tribune, reprinted in Reporting Civil Rights, Volume I 206-07.

> say that I thought his statement last May was wisely calculated to keep hotheads in check he said that he was trying to do so but of course it had its difficulties.[276]

Just before the October 1954 Term, Jackson's clerk, Prettyman, committed to writing his views on the decree. He allowed that the pending case should be limited to "cases and controversies actually before the Court and not … hypotheticals," but also recognized local authorities' need for "practical guides as to their duties and individual roles under the decision." His suggestions included: "Some degree of [district] court control"; the requirement that states "make some moves toward compliance immediately" and "constantly"; approval of gradual integration, even "a class at a time … for 12 years" where needed; rules for determining whether facially race-neutral ways of classifying students, such as redistricting and redrawing of school boundaries, were actually vehicles for racial discrimination.[277] He reasoned that such a result "would make the South realize that the Court is sympathetic toward their problems and is not trying to jam a new social order down their throats," and "would keep integration from being completely unenforceable in the deep South, because it offers opportunity for substantial integration."[278] It also amounted to a concession that a Court decree ordering integration was, to a large extent, unenforceable for a substantial amount of time, but Prettyman believed that "Once a few [African American pupils] are admitted, the way is open for the breach to be widened in future cases," while a more expansive order "would be completely unacceptable to the deep South and therefore unenforceable."[279] While Jackson did not survive for the reargument, he doubtless would have agreed with the

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[276] Felix Frankfurter to Earl Warren, July 8, 1954, Box 184, Legal File: October Term 1953 – Supreme Court Cases – Segregation Cases, Robert H. Jackson Collection, Library of Congress 2.
[277] E. Barrett Prettyman, Jr., Note re Segregation Cases, Box 184, File: Legal File – Supreme Court – October Term 1953 – Cases – Segregation Cases, Robert H. Jackson Collection, LOC 1-2.
[278] Prettyman, Note re Segregation Cases, Jackson Collection 2-3.
[279] Prettyman, Note re Segregation Cases, Jackson Collection 3.

principle that school districts desegregate with "all deliberate speed," and not "forthwith."[280]

Jackson's role in the result

Earl Warren has been credited by some for providing leadership that resulted in what had been called "the most severely fractured Supreme Court in history" making a unanimous decision, with a unanimous opinion, in Brown.[281] But the responsibility for Brown was not entirely his. One scholar believed that a clear majority – perhaps as many as seven – were ready to vote for the plaintiffs by the time Warren was appointed.[282] Frankfurter long has been considered the genius behind achieving it, though now, with a new generation of scholars who did not clerk with him, there is more skepticism about his prominence.[283] Del Dickson, who distilled the justices' conference notes, suggested that, based on their "articulate, pragmatic and passionate" opposition to segregation in conference, Burton and Minton might be unsung heroes.[284] Further support for their significance may be found in the existence of many off-the-record conversations between the Chief Justice and Burton, himself a seasoned politician; and the numerous luncheons between Warren, Burton, Minton and the reluctant Reed.[285] Therefore, it was doubtful that the former chief was being overly generous when he wrote in his memoirs, "The Court was thoroughly conscious of the importance of the decision to be arrived at and the

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[280] Kluger, Simple Justice (2004 ed.) 718, 719 ff.; 349 U.S. at 301.

[281] Schwartz, Super Chief 28-29, 72; Ulmer, "Earl Warren and the Brown Decision" 702; Kluger, Simple Justice (1977 ed.) 695-99. But see Hutchinson, "Unanimity and Desegregation" 34-35, 86 (Warren's role in gaining unanimity exaggerated).

Even if, as Philip Kurland pointed out, the result would have been the same if Vinson had remained alive for the Court's decision, the Court would have almost certainly been divided, with multiple opinions if not with a split vote. Kurland, Politics, the Constitution and the Warren Court xvii; Hutchinson, "Unanimity and Desegregation" 44.

[282] Ulmer, "Earl Warren and the Brown Decision" 698, 700.

[283] Schwartz, Super Chief ch. 3.

[284] Dickson, ed., The Supreme Court in Conference 646.

[285] Ulmer, "Earl Warren and the Brown Decision" 698-99; Schwartz, Super Chief ch. 3; Hutchinson, "Unanimity and Desegregation" 35-36.

impact it would have on the nation. With this went realization of the necessity for …. achieving unity, if possible."[286]

Nor should Jackson's role be overlooked. For one thing, his views and suggestions on a host of procedural matters -- taking a host of segregation cases from around the country; the initial decision not to vote in 1952; his decisive vote on holding the first reargument; his idea to include the Justice Department in the first reargument; his eventual support for bifurcating the decree from the opinion overruling Plessy – were all wise moves that made unanimity possible and intelligently shaped a case of Brown's significance and complexity. Moreover, his concerns and input in the final opinion were critical. As one Jackson scholar persuasively concluded, "an opinion which did not take Jackson's concerns into account also would have stood little chance of acceptance."[287] Indeed, Warren's opinion reflected Jackson's concerns in many respects, in its "non-accusatory" tone; in the prospective nature of its holding; and, perhaps most important of all, in the factual backbone of Jackson's changed circumstances formulation – the growing importance of public education and the advances of the African American community.[288] It also seems plausible that Jackson had some influence on Warren beyond his documented, last minute input in the Chief Justice's opinion (perhaps on those regular hospital visits, if not sooner). That Warren looked up to Jackson was made clear in their decision in the Irvine case, in which Warren, Reed and Minton joined a Jackson opinion declining to apply to the states the exclusionary rule as a sanction against illegal searches; Jackson and Warren, in a part of the opinion which their colleagues refused to

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[286] Warren, The Memoirs of Earl Warren 281-82.
[287] Hockett, "Justice Robert H. Jackson and Segregation" 57.
[288] 347 U.S. at 490, 492-93 (1954). See also Tushnet, Making Civil Rights Law 214 ("the opinion Warren wrote in Brown contained many of the themes Jackson found congenial."); Chernack, "The Clash of Two Worlds" 102; Hockett, "Justice Robert H. Jackson and Segregation" 52-53, 56-57, 59-61 and note 220.

join, announced their belief that the case record should be forwarded to the Justice Department for possible prosecution for civil rights violations.[289] One of the Chief Justice's biographers speculated that, had Jackson lived on, he "would have been a strong second to Frankfurter's efforts to win the new Chief to his judicial philosophy, supplying just the bonhomie that the waspish Frankfurter lacked."[290] It would seem that Warren would have taken all of Jackson's input on Brown seriously, even if he disagreed with some of it.

There is also a plausible theory that Jackson's relationship with, and potential influence on, Frankfurter might have been crucial as well. One leading scholar has theorized that Frankfurter and Jackson were "the key actors inside the Court," as Frankfurter had no easy answers for Jackson's questions, and did not share his friend's limited doctrinal flexibility to decide political/policy questions.[291] Frankfurter could have been anticipated to have problems with the case, based on his steadfast adherence to the philosophy of judicial restraint. According to some authors, the case – particularly the framers' lack of intent to desegregate schools – presented "a painful problem" for him.[292] It appeared to have done the same for Jackson as well, at least in the early stages of his deliberations, but his less doctrinaire adherence to judicial ideology would have freed him to make logical leaps and innovations before his more consistent friend. Indeed, Prettyman, who knew as much as anyone about the justice's thinking in the months

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[289] Irvine v. California, 347 U.S. 128, 137-38 (1954); Kluger, Simple Justice (2004 ed.) 697.
Punishing law enforcement's wrongdoing by methods other than reversals of criminal convictions was one of Jackson's pet ideas – he felt that civil rights actions were better solution to grand jury discrimination cases as well. Warren, a former prosecutor, was willing to go along, but became an advocate of the exclusionary rule when the Justice Department failed to act. Schwartz, Super Chief pp. 10-12 and ch. 4.
[290] Schwartz, Super Chief 175.
[291] Tushnet, Making Civil Rights Law 191.
[292] Schwartz, Super Chief 76.

preceding decision day, believed that the framers' intent was not an issue for him.[293] His concern about justifying the result as a judicial as well as political act might also have been motivated in part by his desire to bring Frankfurter along. And Frankfurter's post-opinion note to Burton, in which he observed that "'it is not fair to say that the South has always denied the Negroes this Constitutional right. It was not a constitutional right till May 17/54,'"[294] reflected Jackson's thoughts to a tee.

On the other hand, Jackson's influence should not be overstated. His effect on Frankfurter, if conceivable, remains uncertain. Of course, Jackson managed to resolve Frankfurter's major dilemmas, and given the closeness of the two Justices (and the extent to which they communicated on Court business), they must have talked about those issues. Yet if Jackson had influenced his colleague to a great extent, one would have suspected him to share with him his writings, but Frankfurter – who had graciously given his friend credit for other accomplishments while the Court wrestled with Brown – seemed not to know much about the drafts, recalling that Jackson had tried in some early writings to leave it to Congress, but "he finally gave up."[295]

And while Jackson "anticipated Southern intransigence to a decision invalidating segregation and his expectations were borne out,"[296] his talents as a prophet should not be overstated. Everyone, not just Jackson, knew there would be trouble (even Minton would admit to it occasionally); no one, not even Jackson, knew in advance how bad the

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[293] Kluger, Simple Justice (2004 ed.) 607. See pp. 504-05.
[294] Ulmer, "Earl Warren and the Brown Decision" 699 (quoting undated note, Harold H. Burton Papers, Library of Congress).
[295] Schwartz, Super Chief 94 (quoting 1958 Felix Frankfurter letter to Learned Hand). On the other hand, Tushnet assumed that Jackson had "probably" shown a draft to Frankfurter. Tushnet, Making Civil Rights Law 214.
[296] Hockett, "Justice Robert H. Jackson and the role of the Supreme Court in American politics" 92.

resistance to Brown would get.[297] Moreover, the idea of a Congress dominated by segregationist Southerners taking on this issue was not exactly an inspired one. As one writer opined, desegregation, if left to Congress and the states, "would have been even more arduous and politically distorting than it was after Brown."[298]

Yet Jackson's concern about the decision's effect on the Court's prestige was prescient.[299] While the decision was perhaps the most popular in Court history, "no case troubled the Court more or caused the Court more trouble than those concerned with the Negro revolution," especially Brown. Even when, in subsequent decisions, the Court relied carefully on legislative history, it was accused of taking its quotations out of context; and Brown's position as first in a long line of Warren Court cases overruling major established precedents – the most for any Court up to that time -- drew fire from the political right, especially (but not limited to) white supremacists.[300]

The lawlessness sometimes detected in this generation's conservative courts stemmed in part from Brown, which gave license for the Court to make ideological or ethical as opposed to legal decisions – which is fine, until the Justices' ideology and ethics differ from one's own. Richard Posner, in criticizing what he saw as the Brown Court's decision, "for reasons of politesse," not "to state forthrightly that segregation was racist and instead … cite unconvincing social science evidence concerning the

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[297] For a comprehensive yet concise treatment of the resistance to Brown, see Tushnet, Making Civil Rights Law chs. 16-20.

[298] Anthony Lewis, "The Legacy of the Warren Court," Bernard Schwartz, ed., The Warren Court: A Retrospective (New York: Oxford University Press, 1996) 399.

Hockett argued that Congress was necessary to jump start civil rights advances, especially in the Deep South and including in the schools; but it took an additional ten years of nationwide foment – for which Brown acted as the catalyst – for Congress to act decisively. Hockett, "Justice Robert H. Jackson and Segregation" 57.

[299] Chernack, "The Clash of Two Worlds" 100-01.

[300] Kurland, Politics, the Constitution and the Warren Court 105-06, 155, 184; Chernack, "The Clash of Two Worlds" 54.

psychological effect of segregated schooling," nonetheless praised it "as a political decision and the opinion as a political document." Stating that "apparently that is good enough, for no responsible critic of the Court questions the soundness of Brown anymore," he allowed that "it is the unusual constitutional case, however, in which it is possible to elide the issue of conventional legal soundness by observing yes, it is a political judgment but unquestionably a sound one and it would be pedantic to demand more."[301] But once a Court makes that kind of decision, it will be up to future Courts – some of which might violently disagree with its predecessors -- to make similar ones. Where subsequent courts will draw the line is anyone's guess.

I doubt that Jackson would have been surprised at the resurgent right wing's use of judicial activism to undo the accomplishments of those they perceived as judicial activists on the left.[302] And while nothing the Court could have possibly said in Brown would have made peace with the segregationists, using a stronger legal framework, of the type Jackson was formulating in his drafts, might have altered the legal climate that permitted the post-Brown direction of the Court.

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[301] Posner, "The Supreme Court 2004 Foreward" 49-50.

[302] An interesting counterpoint is provided by the embrace of judicial restraint by Clinton appointee, Justice Ruth Bader Ginsburg. See, e.g., Jeffrey Rosen, "The New Look of Liberalism on the Court," New York Times Magazine October 5, 1997 (available from the Premium Archive, www.nytimes.com).

Conclusion -- Jackson's Journey

> It is literally impossible for a person to eliminate from his reasoning process his experiences in life up to that point…. A jurist's mind cannot operate in a vacuum.
>
> -- Earl Warren[1]

> He was not necessarily stillborn about changing his initial impressions. He respected the facts and a good sound argument, and I saw him change his mind, on big as well as little points, on countless occasions.
>
> --E. Barrett Prettyman, Jr.[2]

Experience changed Jackson. There were signs of racial intolerance in his hometown environment, and he exhibited signs of it as well, but by all available indications – from public pronouncements to private conversation – the Washington attorney and Supreme Court justice seemed to have overcome the racism of his youthful environment.[3] Of course, one can never say for sure what attitudes continued to lurk beneath the surface of a man known for having "a measure of reserve, even for close friends."[4] Yet early in his tenure on the Court, he condemned racial prejudice in a way that suggested he had internalized the idea and made it his own:

> It is not surprising when group attitudes do not yield readily to persuasion or to argument. But it is more rare and sinister to find that so many recent animosities are also impervious to experience. I have talked with intelligent persons who express an unfavorable opinion in general of a race, a class, or a political or religious group. They will generally admit that every one of the group known to them personally is loyal, honorable, and safe, individually. But those, they will insist, are exceptions; and their good opinion of those they know does not change or mitigate their fear or dislike of the unknown mass of the group as a group. That is a hard attitude to cope with.[5]

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[1] Warren, The Memoirs of Earl Warren 7-8.
[2] Prettyman to Frankfurter, October 13, 1955 2.
[3] See Chapters 1 and 3.
[4] Prettyman, Jr. to Frankfurter, October 13, 1955 4.
[5] Robert H. Jackson, Address before the Judicial Section, New York State Bar Association, The Waldorf Astoria, New York City, January 22, 1944 3.

All the experience in the world, however, is lost on a rigid mind. Jackson's core values stayed pretty much intact throughout his life, yet he was not afraid to change his mind on a case when the facts and arguments pointed in another direction. One could see in civil rights cases like Graham v. Brotherhood of Locomotive Firemen and Enginemen[6] and Terry v. Adams,[7] but most prominently in the segregation cases, how Jackson would let his thinking evolve (sometimes to the point of completely reversing his vote on a result) upon closer examination.

Why did Jackson vote to end segregation? Doing so was against his judicial instincts, "Yet he clearly believed that, as a matter of social policy, segregation was wrong."[8] Unlike a Black or a Douglas, or a Burton or a Minton, in the beginning he could muster at best a conditional attitude toward such a decision. Yet he was not in the same category as Reed, who was so unquestioning of the Southern culture in which he grew up that he needed to be pulled along. Nor was he too rigid in his jurisprudential outlook to set aside his theoretical views, be they his belief that Congress should not make social policy, or his abiding belief in federalism, or his initial impression that the intent of the Fourteenth Amendment's framers should dictate the result.[9] It was clear from his draft opinions in Brown that he was doing something for which he so bitterly attacked his judicial rivals: he was looking for the right arguments to justify a pre-ordained result, for reasons he had rejected in so many other cases – that it was the right thing to do, both morally and as public policy.[10] Given the nearly universal praise for the Brown decision two generations later, it would seem that, if a jurist were to compromise

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[6] See pp. 233-38.
[7] See pp. 357-71.
[8] Tushnet, Making Civil Rights Law 189.
[9] See pp. 443-54, 466-85.
[10] Klarman argued that the Justices, collectively, had done just that. "Brown at 50" 8.

his or her most fundamental beliefs about the nature of law and justice just once, it should be for a case like this one.[11] Jackson chose well.[12]

Another factor contributing to Jackson's decision deserves further consideration. His drafts and his correspondence demonstrate his recognition, shared with many other educated whites of his time, that the forces of history were all pointing toward an end to segregation. As the young Jamestown lawyer wrote in reference to other historical moments, "Individuals cannot cause, and can not resist such movements, regardless of their boasted liberty of choice."[13] For all of his protestations of ignorance, he had seen racism at work in this country; North and South; he saw in his work at Nuremberg the logical extremes of racist ideology; and he was aware of the international implications of American racial discrimination.[14] And though he had not known many African Americans on an intimate basis, he saw their highly competent professional work in his courtroom; and he had friendships with people of a variety of ethnicities that were considered unusual in those days, from his Jewish colleague Felix Frankfurter to lawyers and scholars from all over the globe.[15] He knew the world was trending, however fitfully, toward the breaking down of racial hierarchy, and he knew that it was the right thing to do. He also knew that change was an endemic part of modern life: in one typical comment, made shortly before the American entry into the Second World War, he wrote that peace "cannot be static in a moving world."[16] And he may well have understood that

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[11] Posner, "The Supreme Court 2004 Term Foreward" 49-50.
[12] The precedent set by the prospective approach in Brown was not without its future dangers. See pp. 518-19.
[13] Robert H. Jackson, "The Laws of Probability," University Club, Jamestown, NY, October 2, 1919, Box 31, File: Speeches and Writings File, Robert H. Jackson Collection, Library of Congress.
[14] See Chapter 8, pp. 408, 416.
[15] Boxes 3-23, Correspondence Files, Robert H. Jackson Collection, Library of Congress.
[16] Robert H. Jackson, "The Challenge of International Lawlessness," International Conciliation 374 (November 1941) 688.

the Court's prestige would have suffered more from reaffirming Plessy than from overturning it.[17] He was enough of a student of history, and enough of a politician, to see the writing on the wall.

It actually might have been more difficult for Jackson to vote to reaffirm Plessy than to overrule it, as "the general atmosphere among the political elite rather strongly favored the NAACP's claims," and the overwhelming weight of world opinion found segregation abhorrent.[18] With American opinion seemingly "divided roughly down the middle,"[19] even a justice who believed that courts should not run ahead of public opinion could conclude, apprehensions aside, that the time to act had arrived.

[17] Chernack, "The Clash of Two Worlds" 101-02.
[18] Tushnet, Making Civil Rights Law 187-88; Klarman, From Jim Crow to Civil Rights 308-09.
[19] Klarman, From Jim Crow to Civil Rights 310.

Postscript

> If there is one lesson to be learned from our tragic experience in the Civil War and its wake, it is that the question of racial discrimination is never settled until it is settled right.
>
> --- Earl Warren[1]

More than half a century later, the debate over Brown's value to the cause of racial justice continues to rage. If one cuts through the "half-full" versus "half empty" aspect of the discussion, however, the broad factual outline of the last 50+ years is, in the main, indisputable. Black/white segregation, in fact if not mandated by law, is still widespread and is likely to remain so for a long time, thanks to heavily entrenched patterns of residential segregation exacerbated by Brown, and by the continued resistance of prejudiced whites, who have used Brown and its progeny to make white supremacy a major force in national as well as regional politics.[2] It has even been argued that African Americans might have been better off had Plessy not been overruled, and the "equal" prong of separate-but-equal been properly enforced.[3]

Yet while the millennium of racial harmony has not yet arrived, it is likewise important to recognize the progress that has taken place. Every time whites and African Americans line up to use the same restroom along a Southern interstate; every time a black family moves into a mostly-white subdivision and registers children at the

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[1] Warren, The Memoirs of Earl Warren 293.

[2] Gary Orfield and Susan Eaton, Dismantling Desegregation: The Quiet Reversal of *Brown v. Board of Education* (New York: New Press, 1996); Derrick Bell, interview with Alex P. Kellogg, "A Dream Deferred," American Prospect Online May 14, 2004; Friedman, American Law in the 20th Century 296-97.

[3] Derrick Bell, Silent Covenants: *Brown v. Board of Education* and the Unfulfilled Hopes for Racial Reform (New York: Oxford University Press, 2004), interviewed for Alex P. Kellogg, "A Dream Deferred," American Prospect Online May 14, 2004. Of course, separate but equal probably could not have happened, given the massive expense of maintaining two first-rate educational systems; the legal difficulties with defining and measuring educational equality; and (as Jackson himself noted) given the failure of separate but equal despite the Court's efforts to enforce it. See Tushnet, Making Civil Rights Law ch. 1; pp. 453-54. For an effective rebuttal of Bell, incorporating these and additional arguments, see Kathleeen Sullivan, "What Happened to 'Brown'?" New York Review of Books (Sept. 23, 2004) 47, 49-52.

neighborhood schools; every time blacks and whites patronize country clubs, amusement parks, or shopping malls together; every time persons of all races play in the same sporting event, attend the same classes, or appear on the same television talk show; every time a white bride and black groom cuts a wedding cake; or every time an African American student enters a school not emblazoned with the words "colored only"; there has been another victory in the fight against Jim Crow. And Brown helped make possible these countless triumphs.[4]

The federal court system, especially but not exclusively in the South, and the judges in it, went through the kind of hell with which Hugo Black could readily identify.[5] As the judiciary became ever more beleaguered by the forces of resistance, the Supreme Court felt an even more pressing need to follow its earlier example -- in which Jackson had played a crucial role -- and stick together. In Cooper v. Aaron, the 1958 case ordering a handful of African American students admitted to the all-white high school in

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[4] The sheer number of works discussing the effect of Brown on the lives of African Americans, and on American race relations, is too vast to catalog in one footnote – especially after the decision's fiftieth anniversary in 2004, which prompted many of the works cited below. Sources include Peter Irons, Jim Crow's Children: The Broken Promise of the Brown Decision (New York: Viking, 2002) (Brown's promise unfulfilled); Orfield and Eaton, Dismantling Desegregation (Brown a failure); Klarman, From Jim Crow to Civil Rights ch. 7 and "Brown at 50" 11 ff (direct success limited, but brought civil rights to the forefront of the nation's agenda); Bell, Silent Covenants, interviewed for Kellogg, "A Dream Deferred," American Prospect Online May 14, 2004 ("*Brown* brought about a transformation without real change"); Warren, The Memoirs of Earl Warren 293-301 (despite defeats and resistance along the way, *Brown* had a "great impact … in educational and other fields and in its stimulation of Congress to legislate for equal rights"); Kluger, Simple Justice (2004 ed.) ch. 27 and pp. 751, 782 ("mixed with the good news were too many remnants of an aching disparity between the races that time and good intentions had not cured"); Charles J. Ogletree, Jr., All Deliberate Speed: Reflections on the First Half Century of *Brown v. Board of Education* (New York: Norton, 2004) (courts can do little to further cause of racial equality in a reluctant nation); Patterson, Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy ch. 10 (mixed legacy); Greenberg, Crusaders in the Courts 401 ("a story of conspicuous achievement, flawed by marked failures, the causes of which lie beyond the capacity of lawyers to correct); "Round Table: *Brown v. Board of Education*, Fifty Years After," Journal of American History 91 (June 2004) (19-118) (range of perspectives); Friedman, American Law in the 20th Century 292-95, 542-43 (mixed legacy, with best results achieved in black upper and middle classes); Urofsky, "Among the Most Humane Moments in All Our History," Black, White, and Brown 1-39 (some progress); Cass Sunstein, "Did Brown Matter?" New Yorker (May 3, 2004) 103-04, 106 (progress, not triumph).

[5] Bass, Unlikely Heroes; Friedman, American Law in the 20th Century 291-92; Hugo L. Black and Elizabeth Black, Mr. Justice and Mrs. Black 74, 199, 234, 245-46.

Little Rock, Arkansas, the Court followed Frankfurter's suggestion and issued an opinion signed by each and every justice, to make plain that white supremacists should take no comfort from intervening changes in Court personnel (including Jackson's death, and the retirements of Burton, Minton and Reed) since Brown.[6] The Court went on to desegregate all other facilities, and remained unanimous in school desegregation cases throughout Warren's tenure, only to let that unanimity fall apart during Warren Berger's tenure.[7]

In some respects, the highest hopes for the future of race relations were Jackson's. He anticipated more than desegregation, and more than integration: he optimistically awaited racial amalgamation, the hardest goal to achieve in the face of deeply-entrenched racism.[8] Yet, as he realized throughout, the judiciary cannot solve social problems.[9] This, his more skeptical side, was right on the money.[10] In part because of his understanding of the intransigence of racism, in part because of his belief in federalism, in part because of his judicial humility – his belief in the supremacy of the elected branches of government, and his skepticism at judicial power in making and implementing social policy – he knew that the Court's powers in making social policy were limited. It was he who predicted one, or even two, generations of litigation to implement Brown (although, as we now know, in some respects even two are not enough).

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[6] Warren, The Memoirs of Earl Warren 298.
[7] Warren, The Memoirs of Earl Warren 298; Friedman, American Law in the 20th Century 292-96; Cooper v. Aaron, 358 U.S. 1 (1958).
[8] Myrdal, An American Dilemma I 60-61; Patterson, Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy 88, 205.
[9] Kurland, Politics, the Constitution and the Warren Court 200.
[10] See generally Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (Chicago: University of Chicago Press, 1991); Sunstein, "Did Brown Matter?" 105.

But it may be that opponents of segregation, from activists to Supreme Court justices, expected too much of one judicial decision. As a former clerk of Jackson's third and final chief put it,

> *Brown* did not promise the end of discrimination…. And *Brown* did not promise integration. What *Brown* was all about was a matter of attacking compelled segregation under law. It was not aimed at creating racial balances in our institutions. It was not intended or designed as an end to the horrendous black poverty that continues. It had a very important target, which, I think, it very successfully addressed. And that is ending the blight of post-slavery segregation compelled by state law.[11]

While even this narrow claim of success for Brown was somewhat overstated – ending overt state-imposed segregation took additional litigation, and there followed the prospect of facially neutral laws harboring discriminatory intent and having discriminatory effect – Brown did put legally sanctioned segregation on the run; ended the daily humiliation of African American schoolchildren through legal classification; and, through the legal innovations of the civil rights movement which came to full flower after Brown, "slowly choked segregationists into angry submission." These in themselves were "profound and historic."[12]

If there is one thing that Robert Jackson has taught us, it may be that that was all we had a right to expect from the courts. As one of the lawyers who had argued Brown wrote decades later, "'Lawyers can do right, they can do good, but they have their limits. The rest of the job is up to society.'"[13]

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[11] Barrett, Mod., "Supreme Court Law Clerks' Recollections of Brown v. Board of Education" 566 (recollection of Earl E. Pollock, clerk to Chief Justice Warren).

[12] Pete Daniel, Lost Revolutions: The South in the 1950s (Chapel Hill: University of North Carolina Press for Smithsonian Museum of American History, Washington, DC, 2000) 305; Sullivan, "What Happened to Brown?" 52; Klarman, "Brown at 50" 11 ff; Sunstein, "Did Brown Matter" 104, 206 (50th anniversary cause for "celebration," not "triumphalism").

[13] Greenberg, Crusaders in the Courts 401; Patterson, Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy ch. 10 and p. 223 (in part, quoting Greenburg).

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