(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

The Attorney General was invited to take part in the oral argument—an invitation not extended for the first argument the preceding December—and to file a new brief.

Jim Crow was still alive.

Richard Kluger, Simple Justice (New York: 1977)

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The Six-Month Summer

Over the names of Walter White and Thurgood Marshall, the NAACP dispatched emergency telegrams on June 9, 1953, to several hundred well-heeled supporters of civil-rights and civil-liberties causes. The message read:

> UNITED STATES SUPREME COURT TODAY DEFERRED JUDGMENT ON FIVE HISTORIC CASES CHALLENGING RACIAL SEGREGATION IN ELEMENTARY AND HIGH SCHOOLS. . . . POSTPONEMENT COMES AFTER THREE YEARS LEGAL ACTIONS . . . COSTING $58,000. . . . WORK MADE POSSIBLE ONLY THROUGH CONTRIBUTIONS FROM CITIZENS WHO UNDERSTAND SIGNIFICANCE TO NATIONAL LIFE AND IMPACT UPON WORLD STRUGGLE. FUNDS ENTIRELY SPENT. HIGHEST COURT NOW REQUESTS PREPARATION OF ANSWERS WITHIN THREE MONTHS TO MANY BROAD QUESTIONS REQUIRING LEGAL ARGUMENT ON HISTORIC CONSTITUTIONAL FACTORS, SOCIOLOGICAL DATA AND AUTHORITATIVE OPINION. NO MONEY AVAILABLE MEET EMERGENCY.
>
> OPPORTUNITY FOR DECENT PUBLIC EDUCATION AFFECTING NEARLY THREE MILLION NEGRO AMERICAN CHILDREN DEPENDS UPON RESOLUTION THIS DILEMMA. $15,000 NEEDED IMMEDIATELY TO FORESTALL POSSIBILITY THESE YOUNGSTERS MUST WAIT DECADES BEFORE EQUAL OPPORTUNITY ESTABLISHED. PLEASE SEND YOUR TAX-DEDUCTIBLE GIFT TODAY TO . . .

Among those receiving the urgent wire was Allen Wardwell, a partner in the giant Wall Street law firm of Davis, Polk, Wardwell, Sunderland & Kiendl. That made him an intimate associate, of course, of his partner John W. Davis, who was leading the pro-segregation lawyers. Wardwell naturally passed the NAACP telegram on to Davis, who thought it was pretty rich that a partner of his would be solicited for such a purpose. It was too good a joke not to share, and so Davis sent a copy of the wire down to James F. Byrnes in the governor's mansion at Columbia, South Carolina, along with a short, ironic note. Wardwell "unfortunately" felt that he could not "contribute to the end in view," Davis quipped. "I send it on the possibility that you might be willing to take his place or select some other person similarly disposed."

There is no record of how broadly Jimmy Byrnes smiled upon reading that. But later correspondence between him and Davis indicates that the governor set his agents to work checking out Washington sources to see if such gifts to the NAACP were in fact lawfully tax-deductible. The South was using every weapon at its disposal.

The lack of money did not slow the NAACP effort. While the nation's black newspapers promptly opened a strong fund-raising drive on their pages, Thurgood Marshall gathered his troops for a morning-after assessment of the situation.

It could not be said that the Legal Defense Fund had frittered its scarce financial resources on baubles. The Fund, cramped in its sector of the main NAACP office on 40th Street near the Public Library, had recently moved into its own headquarters at 107 West 43rd Street, a seedy five-story building just a short stroll from Times Square. Wedged into the little offices on the third floor were six lawyers, as many secretaries, a bookkeeper, a switchboard operator, and a file clerk. The place, frankly, was a dump. Winos were forever congregating in front of it downstairs. Burglars were forever coming up the fire escape and in through the back windows at night to grab any visible typewriter. And the smell of urine was noticeable in and around the scissors-gate elevator. But these inelegant surroundings were to become, during the summer and autumn of 1953, the nerve center of a remarkable intellectual effort affecting the fate of black America.

As Felix Frankfurter had anticipated, the Court's intentions were not entirely clear from the five questions it had now put to the litigants in *Brown.* Thurgood Marshall's staff, while hopeful, was of two minds about the delay and what it meant. Jack Greenberg, perhaps because he was young and still new and born white, was among the more sanguine of the Fund personnel. "We thought we basically had the case won," Greenberg recalls. "Not automatically, by any means, but the questions suggested a clear frame of mind to us. Why would the Court have asked help in framing a remedy if the Justices weren't contemplating a remedy? They were asking us to help figure out pragmatically how to do it, so the implication seemed to be that the injustice of segregation was by then established in their minds. We were quite encouraged."

But Robert Carter, perhaps because he was older and a Fund veteran and born black, was not so optimistic. The Court's questions, he says, "shook us—not completely—but they shook us. Where we had been 75 percent confident, we now were down to 50 or 55 percent confident." It seemed plain to Carter that the Court, in reaching a decision on so sweeping and potentially convulsive a social issue, was trying to demonstrate to the nation that an exhaustive investigation of the legal and historic background had preceded its judgment day and that nothing precipitous or impulsive had been done. "The questions seemed by design—a design in which we saw the hand of Felix Frankfurter—to give the Court an out as well as maximum flexibility in shaping an opinion," Carter remarks. "The Justices, with their answered questions before them, could always cite the intentions of the framers of the Fourteenth Amendment. But we had no real idea why the questions had been invented. Nor did anybody at the office ever feel we were just going through an exercise. We took it all very seriously, knowing that we had to deliver—or the Court wouldn't. We had a lot to do. It was a very exhilarating time, that summer."

Marshall himself indulged in scant speculation. The Court had spoken,

and his job was now plain. The historical evidence did not all have to line up on his side just so long as there was enough of it to show how far the Court and Congress and the Presidents had all strayed from the original ennobling intentions of the Radical Republicans who had guided the nation during the ten years following the Civil War. Or as Marshall put it in his disarming vernacular: "A nothin'-to-nothin' score means we win the ball game."

A mammoth research job loomed, without much time to do it. The Fourteenth Amendment could not be examined in a vacuum. It was the centerpiece in a decade of unprecedented congressional ferment, and to understand the intentions of its framers, one had to comb through the spoken and written words of hundreds of lawmakers. And since there were thirty-seven states in existence at the time the amendment was ratified, the understanding of legislators, governors, and other public officials in every one of them would have to be examined as carefully as time and manpower allowed. It was a job for scholars—constitutional experts, historians of the period, authorities on the South and the Negro—and one of such complexity as to dwarf the efforts by Kenneth Clark and his social-science experts. The Court's timing, moreover, could not have been worse. Most scholars had long since made their summer plans. What chance did Marshall have of lining up top people for his crash research program? And whom should he get?

To head up his research task force, which would number more than 200 by the time the brief on reargument was filed with the Court, Marshall turned to a friend with just the right combination of inter-disciplinary skills and knowledge—forty-one-year-old John A. Davis, then a professor of political science at Marshall's alma mater, Lincoln University. A native of Washington, D.C., Davis had graduated from Williams College and done advanced work bridging law and political science at Wisconsin and Columbia. In his early twenties, he had become involved as a civil-rights worker with the New Negro Alliance in Washington, where he connected with Marshall, Houston, Hastie, Lawson, and the rest of the black legal elite. At Lincoln, he had taught Bob Carter and recommended him to Dean Hastie's attention at Howard Law School. The work of his brother, Allison Davis, a prominent anthropologist at the University of Chicago and one of the first to argue that standard IQ tests were culturally biased, had given John insight into the social sciences. He was "full of ideas," says Carter, "at home with lawyers as well as scholars," and willing to work, though Marshall could not pay him anything like the fifty dollars a day he was due to earn as a consultant to the State Department that summer. That Davis was not a widely renowned scholar or the author of any major book mattered less than the enthusiasm he brought to his task. For the summer he took a five-dollar-a-day room at the Hotel Paris on New York's West End Avenue at 96th Street—a hostelry that, whatever its other deficiencies, boasted a swimming pool. "But I never got back in time to use it," says Davis. They all worked into the night regularly that summer.

Davis was given a desk and a phone and a secretary at the Fund office on West 43rd Street and started puzzling over how to organize his task. "I talked with everyone I knew in constitutional history, Reconstruction

history, the history of education, and Negro history—and the leading political scientists concerned with civil rights," he recalls. After breaking the overall project into manageable sectors, Davis began to search for leading scholars to prepare research papers that would serve as the grist for a series of late-summer mini-conferences of leading authorities in each field; the essence of the papers, as then tempered by the judgments of the other experts in each field, would in turn form the nucleus for part of the final brief. At once, Davis ran into problems.

His first choice to write on the constitutional history was Dartmouth's Robert Carr, professor of government who had written books on judicial review and civil rights and, equally to the point, had served as staff director of President Truman's Civil Rights Committee. But Carr was about to become president of Oberlin College and could not spare Davis any time. Then there was Columbia's renowned Henry Steele Commager, whose ten books constituted a cosmic *oeuvre* of a kind rapidly going out of style among the younger generation of historians. Davis had studied under Commager at Columbia, knew that the white-maned historian was the very embodiment of the liberal academic establishment, and thought that his work in preparing *Documents in American History*, the classic reference book in the field, would have qualified him additionally to cope with the avalanche of documents that had to be untangled by NAACP researchers before summer ended. Commager, though, was over at Oxford, England. More troubling was what he wrote to Davis about the nature of the NAACP's request. He "greatly feared" that what Davis had had in mind for him "is not a valid point," Commager wrote. "The framers of the amendment did not, so far as we know, intend that it should be used to end segregation in schools." He cited two well-known law-review articles on the subject, by way of suggesting he knew what he was talking about, and closed: "I strongly urge that you consider dropping this particular argument as I think it tends to weaken your case."

That was about the last thing the Fund office wanted to hear just then. It was not as if they had any choice about facing the question; the Supreme Court had commanded it. And here was one of the foremost historians in America saying they probably didn't have a leg to stand on. "I had a great deal of respect for the man," Robert Carter comments of the Commager letter. "His rejection of our position was a real blow—it put us right down on the ground." Davis was less perturbed. Commager, for all his medals, was not the most insightful member of his breed, as Davis saw it. "He could tell you every damn thing about a constitutional case—except what was decided by it. So when he turned us down, I rationalized, 'Well, he really doesn't know that much about it.' "

The same could not be said about Carl Swisher, Johns Hopkins political scientist and author of a leading work of American constitutional history. Swisher, teaching that summer in Claremont, California, said he would have no time for research or writing along the lines Davis had suggested. And, like Commager, he offered a disquieting comment with his rejection: "I have some doubt as to what historical investigation of the point in question would

show, and I should not want to offer even a comment thereon without opportunity for careful investigation and thought." Another glancing blow that Davis shook off: "Swisher was probably too much of an accommodationist to the Court's post-1877 decisions—too much of an apologist to be of any value to us, except to show how the other side's mentality was running in the case."

Not surprisingly, Davis began reaching for those he knew, starting with his boss, Horace Mann Bond, then finishing his seventh year as president of Lincoln. Bond, in his notable career, had combined the scholarship and militancy of a Du Bois with the leadership, patience, and pragmatism of a Booker Washington to emerge as the most prominent black educator in America after Howard's Mordecai Johnson. At the age of thirty, he had published a major scholarly work that at the same time was a scorching rebuke to the nation's professed ideals—*The Education of the Negro in the American Social Order*, a thickly documented study pinpointing the grossly deficient finances provided for colored schools and arguing that, thus hobbled, education could do little to relieve the ill health, economic dependence, or family disorganization of America's blacks. But he was scarcely a radical. Bond's 1934 book despaired of an early end to segregated schools—an attitude Du Bois had adopted at about that time—and called instead for a massive, though very gradual, program of equalization through federal funding. His thinking took a more controversial turn with the publication in 1939 of *Negro Education in Alabama: A Study in Cotton and Steel*, an important contribution to social history, then undergoing a badly needed purge of the saga-strewn version of the post-Civil War South as victimized by a conspiracy of the shiftless and incompetent black man, the cunning and malicious carpetbagger, the thieving and merciless scalawag, and the vindictiveness of politically opportunistic Radical Republicanism. Bond demonstrated that most white Alabamans, far from being selfless defenders of the lost cause of the Confederacy, were politically unrepentant and economically desperate, riddled by class distinctions, and thus easily exploitable by Northern capital that brought the steel industry and railroads to the state. With them came Yankee fiscal imperialism, the restoration of white supremacy, and the terror-induced resubjugation of the Negro. Thus, Bond understood how black education had been caught in the crossfire of politics and economics—precisely the areas that NAACP researchers needed to know about in fashioning their argument for the Supreme Court. Bond, moreover, had had firsthand experience dealing with Southern officialdom during his six-year tenure as president of Fort Valley State College, a state-backed shoestring school in central Georgia that Bond converted into a vital center for rural Negroes, who were instructed there in everything from better teaching techniques to raising poultry and canning vegetables. He did the job without either antagonizing or buttering up Georgia whites, and his subsequent elevation to the presidency of academically outstanding Lincoln in Pennsylvania anointed Bond as a major black intellectual leader. White America, of course, had never heard of him or his books.

"I called him on the phone," John A. Davis recalls, "and said, 'Horace,

I'm in trouble. None of these guys around here has any sense of the real political strategies that were involved back then.' I knew him well, of course. I was a headstrong professor and he was a college president trying to keep his school going and growing. Being somewhat dependent on the state legislature for funds, he was not eager for his faculty and students to rile up local officials, yet I remember being astonished when he called me one night and said, 'Professor Davis'—he always called me that or just 'Davis'—'we're going over to integrate the Oxford Hotel, and you'd be welcomed if you chose to join us.' I was dumfounded." Horace Bond's son Julian did not need to rebel from his father to become a militant twenty years later.

Bond took up Davis's invitation with enthusiasm. His packed response to Davis sketched out a major research program full of leads and speculations that a group of younger scholars began pursuing. Later in the summer, Bond came to New York, conferred with Davis, assembled the research material gathered at his direction, and locked himself into a cheap hotel room on West 43rd Street to hammer it all together—a charged monograph on the effects of the Fourteenth Amendment on the development of public education. Bond was convinced that the NAACP's key to answering the Court's leading question was the course followed by the ex-Confederate states which had to adopt the amendment in order to be re-admitted to the Union by the Radical Republicans dominating Congress. None of the states had a word about segregated schools in their newly framed constitutions, which Bond viewed as *prima facie* evidence of their understanding that the amendment had outlawed Jim Crow schools and other forms of racial discrimination. "He kept saying that it was like dropping a pebble in the water," Davis recalls, "and Congress was that pebble and the waves kept going out farther and farther from it. To get back into the Union, the rebel states knew they had to toe the mark."

It was an argument that would finally be woven into the NAACP brief, yet it was as much a hypothesis as a scholarly conclusion, for five of the ten rebel states thus re-admitted adopted segregated school systems within a year of ratifying the amendment and all the others followed within varying periods. What did that swingover to segregation mean? Did it mean that the ex-rebel states had known that the Fourteenth Amendment forbade the practice and that the only way they could be re-admitted to the Union was to present racially immaculate, discrimination-free constitutions for congressional approval? That was Bond's contention, but it ran into complications. One of them was that it implied the state legislatures that proceeded to institute Jim Crow schools did so in knowing violation of the Constitution — an arguable proposition since most of the Southern state legislatures were by no means controlled by diehard Confederates but by shifting alliances of at least nominal allegiance to the Republican Party. The public school systems of the South, moreover, were in their fetal stage at this period, and Southern lawmakers may well have seen little connection between the strictures of the Fourteenth Amendment and the establishment of a system of public education, resented as a costly innovation at a time when economic survival was the principal concern of the region. To Negroes, too, judging by the

remarks of blacks serving in Reconstruction legislatures and Congress, mixed schools were not the crucial thing; what mattered was that blacks, fresh from bondage and badly in need of basic learning, should be offered free public schools of any kind on a sustained basis. Such ambiguities cast a fog over Bond's brainstorm and were to plague the historical findings of NAACP researchers all summer.

As early as mid-July, Davis was convinced that the most his researchers would find was that the evidence, like that produced by so enlightened a scholar as Horace Bond, was largely inconclusive. And that would give Thurgood Marshall the "nothin'-to-nothin' " stalemate he thought would be enough to win. But Davis also pushed on a more aggressive tack, the one Marshall and Spottswood Robinson had begun to take at the first oral argument before the Court the previous December. In a memo to Carter, Davis suggested that the second part of the Court's second question—had the framers of the Fourteenth Amendment intended to empower the judiciary to outlaw segregation "in light of future conditions"?—could be effectively answered "by a document which shows that the intent of those who would segregate was to make things unequal. Such an intent would impose a duty on the Court in terms of the equal protection clause."

Toward documenting that anti-Negro intent of Jim Crow lawmakers, Davis's team was reinforced by two ranking historians. Though he was in Tokyo that summer, C. Vann Woodward of Johns Hopkins, whose massive *Origins of the New South, 1877–1913* had recently been acclaimed by the profession as a masterpiece, wrote Davis that he would be pleased to participate. Woodward, a white native of Arkansas, would go on to greater fame as the author of a far slimmer volume, *The Strange Career of Jim Crow*, and the ranking historian of the post-Reconstruction South. Davis had written Woodward that "It is our feeling that the Court's questions reveal either historical ignorance or historical unreality . . . [and] imply a kind of Elmo Roper or George Gallup approach to history." Woodward's only concern in producing a paper for the NAACP—it ended up dealing with how the idealistic and humanitarian goals of Reconstruction had given way before the money-making pragmatism of Northern and Southern whites alike—was that "I should feel constrained by the limitations of my craft . . . I would stick to what happened and account for it as intelligently as I could. . . . You see, I do not want to be in a position of delivering a gratuitous history lecture to the Court. And at the same time I do not want to get out of my role as historian."

It would not be the only time that summer that Davis would have to face the tough question of whether historians, presumably dedicated to as objective a version of the truth as possible, and lawyers, presumably seeking to shape as forceful and partisan a case for their clients as possible, could really work together in an effort such as the NAACP brief to the Supreme Court. "We wanted the historians to look at the whole thing from the viewpoint of the blacks and their aspirations, not from some cloud," acknowledges Carter, who coordinated all the paperwork and helped put it together. "All history is a distortion of sorts, depending on the historian's

myopia and precepts." That, though, was not quite how Carter's colleague Davis put it to reassure Woodward. "Your conclusions are your own," Davis wrote. "If they do not help our side of the case, in all probability the lawyers will not use them. If they do help our argument, the present plan is to include them in the overall summary argument and to file the whole work as a brief in an appendix. No matter what happens, your work will be of real educational value to the men who must argue before the Court. . . ."

Another star historian whom Davis enlisted was Howard's John Hope Franklin, whose 1947 history of black America, *From Slavery to Freedom*, was generally regarded as the most candid and inclusive account of its kind. Franklin, who was later to turn down the presidency of Howard to remain a practicing historian and eventually become chairman of the department at the University of Chicago, was first contacted that summer by Marshall. "Thurgood made it clear that I had no choice in the matter whatever," Franklin recalls. "It was merely a matter of beginning as soon as I could." What emerged at summer's end was a Franklin monograph on, as he put it, "the way in which the Southerners defied, ignored, and worked against every conception of equality laid down in the Fourteenth Amendment and subsequent legislation." Its use in the final NAACP brief would sting the segregating states. The South Carolina brief called it "this catalogue of inflammatory labels. . . ."

More top-grade brainpower flowed into the NAACP camp early that summer when, without being asked, William Coleman, the tough-minded black Philadelphia lawyer, phoned Marshall and asked to coordinate the research in the various states—a task that in most cases had to be done in the state capital, where archives and official accounts of legislative and other governmental proceedings were generally stored. From his experiences as an editor of the *Harvard Law Review*, a clerk to Felix Frankfurter, and an associate at the Paul, Weiss firm in New York, Coleman had a growing network of acquaintances in the profession who shared with him a notably high-caliber intellect—young lawyers and legal scholars who had been, in effect, the law-school All-Americans of their day. "Sitting here in my office one afternoon," Coleman remembers, "I figured I knew someone in each of the thirty-seven states who could do a superior research job for us. Thurgood said fine." Indeed, Marshall was delighted to obtain such gifted assistance from across the nation. Among those Coleman would enlist was a white Alabaman who made it plain that he was unsympathetic with the NAACP's anti-segregation efforts but would, out of respect for Coleman as well as his own intellectual curiosity, undertake the research.

The most critical of the areas to be researched from the Negro's standpoint was what Congress had said and done about segregation in fashioning the Fourteenth Amendment, which passed both houses overwhelmingly in the middle of 1866 and was pronounced ratified by three-fourths of the states two years later. In *Plessy*, decided by the Court thirty years after Congress had passed the amendment, the Justices held that the measure had no doubt guaranteed Negroes equality but it had by no means voided all state-imposed "distinctions based on color" since such distinctions were not necessarily discriminatory except in the mind of the Negro. A separate equality was lawful.

To determine whether the framers of the amendment had thought that segregation was indeed discriminatory, Davis and Marshall needed the nation's most authoritative scholar on the Fourteenth Amendment. The two experts probably most deeply versed in the subject shared a pair of traits that presented problems to the NAACP. Both lived on the West Coast: Jacobus tenBroek, whose 1951 book *The Antislavery Origins of the Fourteenth Amendment* had established his reputation, taught political science at Berkeley. And Howard Jay Graham, whose meticulous articles in various law reviews and journals had gained wide attention in the field, was a bibliographer at Los Angeles County Law Library. And there was the other problem: tenBroek was totally blind and Graham was stone-deaf.

The disabilities of the two men had to be weighed. TenBroek explained to Davis on the phone how he worked and what kind of assistance he would need—conditions that made his cooperation almost impossible on such short notice and with so little time to complete the project. Jay Graham, on the other hand, was about to begin a year's leave from his library post to be a Guggenheim Fellow and extend his studies on the Fourteenth Amendment. His scholarly research was indeed the love of his life. At college, where he got by well enough as a lip-reader, he had had ambitions to become a professor and teach history. But the severity of his handicap, he eventually realized, would prevent such a career and caused him to turn to library work, which, according to colleagues at the Los Angeles County Law Library, he came to scorn in his frustration. He had worked in the acquisitions section of the library, eagerly buying books and materials on his favorite field of study, the anti-slavery period—a practice that his superiors were forced to curtail. His later work as a bibliographer left him isolated from colleagues, with whom he communicated on a scratch pad that he always carried. Regarded as a gifted man with a short fuse, he was haunted by the hunch that he might have reached the uppermost rung of the intellectual world but for a grim trick of nature. When the NAACP invited his help, he therefore responded to the self-validating enterprise with unreserved enthusiasm. He called it "an honor and privilege" to serve and left the fee for his services entirely up to Marshall, to whom he wrote: "I didn't undertake the job for money, but to help redress an evil and errors that go back far beyond our lifetime. It promises to be one of the most satisfying experiences of my life. . . ."

Soon he was suggesting that the only truly systematic way to organize the contents of the *Congressional Globe* during the years in question was to commit the essence of every relevant speech to punchcards—that is, to computerize it all—an undertaking that he thought could be done for no more than $3,000. Marshall gulped, wrote back that it was no doubt a fine idea but such money was not available, and urged Graham to do the best he could by conventional methods. Doggedly, the scholar went at the job. "Without him," Carter recalls, "we would have felt very vulnerable."

Graham scrutinized the evolution of the Fourteenth Amendment and focused on its anti-slavery origins and the egalitarian principles that guided

its champions in the Capitol. To complement that effort, Davis enlisted an historian in midsummer who would put in more time and stay with the project longer than any of the non-legal scholars—Alfred H. Kelly, the tall, blond, blue-eyed, forty-six-year-old chairman of the history department at Detroit's Wayne University. A native of Pekin, Illinois, in the center of the state, where Southern sympathies ran deep in his growing-up years, Kelly was co-author of *The American Constitution: Its Origins and Development*, a well-regarded work of history that had appeared five years earlier. The NAACP invitation, he recalls, "struck a certain point of idealism in me about the role of the Negro in American life. It just seemed to me that the constitutional and statutory impediments to Negro equality were an outrage —almost as bad as slavery in their way." But Kelly, like Woodward, was determined not to let the humanitarian aims of the project prostitute his standards as an historian. He went to work at a public library across the street from his college in downtown Detroit and concentrated on the work of the so-called Joint Committee of Fifteen, the nine Representatives and six Senators who shaped most of the Reconstruction legislation for the Thirty-ninth Congress, which sat in 1865 and 1866, the crucial years. What had those key lawmakers said about segregation—and what had they really intended with regard to the protection of the black man's rights?

As the dog days of August began to slip by, the findings by Graham, Kelly, and others included a number of troubling revelations that brought heightened anxiety to the NAACP offices.

The proclaimed equality of all men and their inalienable right to life, liberty, and the pursuit of happiness had made the Declaration of Independence one of history's undying humanitarian statements. But no such exalted declarations had found their way into the much more businesslike Constitution. Part of the reason for the omission, of course, was the continuing toleration of human slavery in the new republic. Viewed as a unit, the decade of legislation beginning with adoption of the Thirteenth Amendment in 1865 and culminating in passage of the Civil Rights Act of 1875 may reasonably be said to have closed the gap between the promise of the Declaration and the tactful, tacit racism of the Constitution.

For a generation before the outbreak of civil war, abolitionist leaders had shaped the equalitarian doctrines that would find their way into the laws of the land but only after the guns stopped in 1865. Anti-slavery theorists began arguing in the 1830s that Article IV of the Constitution—the so-called comity clause declaring, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"—was in fact nothing less than a proclamation of national citizenship, to which were implicitly attached the natural rights and civil liberties of all men first promised in the Declaration. That claimed national citizenship covered all Americans, it was said, black as well as white. In the Forties, Charles Sumner and other abolitionist stalwarts were asserting that "equal protection before the law" was an absolute cornerstone of American nationhood, and the phrase "equal protection," a variant of some of the more exalted ideology to

emerge from the French Revolution, was sounded by Sumner as he argued the first school-segregation case, *Roberts v. City of Boston*, in 1849. By the Fifties, Ohio's abolition-minded Congressman John A. Bingham, the future draftsman of the Fourteenth Amendment, was taking the floor of the House to declare, "It must be apparent that the absolute equality of all, and the equal protection of each, are principles of our Constitution [as] . . . universal and indestructible as the human race." Slavery itself was increasingly denounced as a manifest deprivation of liberty without due process in both the substantive and the procedural senses of the term.

The passage of the Thirteenth Amendment, all sides in Congress agreed, had given the Negro his liberty, but had it given him more? Was he thereafter, and automatically, a citizen? TenBroek's studies of the congressional debates preceding passage of the abolition amendment argued that proponents of the measure had plainly intended a revolution in federalism and creation of a national citizenship by giving Congress the power to enforce the anti-slavery edict. In the view of such Republican leaders as Thaddeus Stevens in the House and Lyman Trumbull in the Senate, the Thirteenth Amendment had not only commanded freedom from bondage but also proclaimed for every American federal protection for a wide range of natural and constitutional rights. Democrats and conservative Republicans, while outnumbered, challenged so sweeping a reading of the amendment, denied that it had granted citizenship to the Negro, insisted there was no such thing as national citizenship, and said that because civil rights remained within the sovereign discretion of the separate states, Congress could not possibly legislate to protect them.

Imposition of the Black Codes by the unrepentant white South threw the question into yet sharper relief. Under the codes that went into effect in the latter part of 1865, Negroes were widely compelled to work for arbitrarily limited pay, were drastically restricted in their mobility, were forbidden to carry arms and to testify against whites, and were often segregated on conveyances and in public places—in short, driven back as close to bondage as the South thought it could get away with. Congress struck back by invoking the enforcement section of the Thirteenth Amendment and passing the Civil Rights Act of 1866. The shaping of that bill and its metamorphosis into the Fourteenth Amendment were at the heart of the answers to the Supreme Court's questions on segregation in 1953.

As introduced on the Senate floor on January 5, 1866, by Judiciary Committee Chairman Trumbull of Illinois, the Civil Rights Bill declared: "All persons born in the United States, and not subject to any foreign power, are hereby declared to be citizens of the United States, without distinction of color, and there shall be no discrimination in civil rights or immunities among the inhabitants of any state or territory of the United States on account of race, color, or previous condition of servitude. . . ." The Thirteenth Amendment had endowed the Negro with citizenship as a necessary incident of his freedom, Trumbull argued, and now Congress was both confirming that and exercising its duty to guarantee the Negro his natural rights as a citizen, among them freedom from discriminatory laws.

The Black Codes were of course prime examples of such bias-inspired legislation, and the Civil Rights Bill aimed at destroying them. It would do this, according to language in the bill that came just after the sweeping "no discrimination in civil rights or immunities" pledge, by guaranteeing to every American inhabitant, citizen or not

> . . . the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

But were these specifically enumerated rights and immunities the *only* ones intended to be covered by the expansive-sounding "no discrimination" language at the beginning of the bill? Or were these enumerated rights simply specific examples of such civil rights and immunities, listed here to make clear the intention of the bill to negate the Black Codes? If the bill had been passed in this original form, with its broad anti-discrimination language intact, all future segregation laws offered by the states might well have been snuffed out by the congressional prohibition.

Senate conservatives began lambasting the bill at once, attributing an all-inclusive scope to the term "civil rights" and arguing that such a proposal would utterly destroy the power of states to make race the basis of any kind of statutory discrimination or classification. Anti-miscegenation laws and Pennsylvania's requirement of segregated schools were cited as examples of regulations that would be proscribed by the new federal bill. "Monstrous" is what Senator Edgar Cowan, a conservative Republican of Pennsylvania, called such an iron-fisted intrusion on the states by federal power. Some of the Radical Republican leaders, like Lot Morrill of Maine, acknowledged the revolutionary nature of the Civil Rights Bill and asked one of its detractors, "Is the Senator from Kentucky utterly oblivious to the grand results of four years of war?" But the more seemly tactic in the Radical Republican camp, which was not yet sure of the strength of its majority and at any rate was not eager to polarize Congress in the healing time after a terrible fratricidal war, was to gloss over the revolutionary nature of the bill, as Senator Jacob Howard of Michigan did in asserting that its purpose was simply "to secure to these men whom we have made free the ordinary rights of a freeman and nothing else. . . . There is no invasion of the legitimate rights of the states." The bill passed in the Senate, 33 to 12, with the broad "no discrimination" provision intact.

In the House, though, James Wilson of Iowa, chairman of the Judiciary Committee, reported out the bill and at once seemed to narrow its range. While it assured every citizen of equality in his civil rights, said Wilson, the words of that pledge had to be clarified. "Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal?" he asked. "No. . . . Nor do they mean that all citizens shall sit on the same juries, or that their children shall attend the same schools. These are not civil rights or immunities." But the opposition did not read the bill as narrowly as Wilson. Representative Andrew Jackson Rogers, arch-conservative Democrat of New Jersey and a member of the Committee of Fifteen overseeing Reconstruction legislation, declared that the "no discrimination" clause would surely eliminate such measures as Kentucky's law punishing Negroes unequally for committing rape, Indiana's law forbidding Negroes to acquire real estate, and Pennsylvania's requirement of separate schools for Negroes. "Civil rights," Rogers insisted, included "all the rights that we enjoy," and the scope of the words "privileges and immunities" was hardly less expansive. An Ohio conservative argued that the bill as written would wipe out his state's school-segregation law since it "did not, of course, place the black population on an equal footing with the whites. . . . " An Indiana Representative, challenging the applicability of the Thirteenth Amendment, demanded to know how either slavery or involuntary servitude could be read into a state law written "to deny to children of free Negroes or mulattoes . . . the privilege of attending the common schools of a state with the children of white men." Moderate Republican Henry Raymond of New York, who not incidentally was the editor of the *New York Times* just then, agreed with Rogers that the bill's reach probably exceeded any reasonable grant of power that might be read into the Thirteenth Amendment.

The end came for the "no discrimination" clause when House Radical leader John Bingham, a member of the Joint Committee of Fifteen, rose to discuss the rights bill and asked that the offending language be jettisoned. Bingham had drafted the Fourteenth Amendment, which the Joint Committee had presented to Congress only a few days earlier, and the relationship between the two measures had apparently been much on his mind. The Civil Rights Bill, said Bingham, did indeed propose to strike down "by congressional enactment every state constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen," and since practically every state had at least some discriminatory laws, the right way to prohibit them was by a further amendment to the Constitution. Whether he meant the Fourteenth Amendment specifically, he did not say. After some jockeying and despite added disclaimers by Wilson on the potency of the bill, it was finally reported back to the House floor minus the "no discrimination" clause, which, Wilson acknowledged, "might give warrant for a latitudinarian construction not intended." The House passed the watered-down measure, 111 to 38, the Senate concurred, and both houses voted to override Andrew Johnson's veto. The President was evidently less worried about the potentially expansive language that remained in the bill—"the inhabitants of every race . . . shall have the same right . . . to . . . full and equal benefit of all laws and proceedings for the security of persons and property"—than about the assumption by Congress of power to protect even the specifically enumerated anti-Black Code rights in the bill (i.e., that the Negro should have "the same right" as the white man to make and enforce contracts, to sue and testify in court, to buy and sell and hold real estate, and not to suffer

more severe punishments for crimes) against abuse by state governments. If Congress could intervene in the business of the states to that extent, why could it not go further and strike down all discriminatory measures by the states?

Many in Congress evidently believed that the entire question would be placed beyond constitutional dispute by the new Fourteenth Amendment. As introduced by Bingham, its first version began:

> The Congress shall have the power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States [Article IV, Section 2]; and to all persons in the several States equal protection in the rights of life, liberty, and property [Fifth Amendment].

Bingham's bracketed references were offered by way of reassurance that the amendment was not very revolutionary, since the genesis for this national bill of rights against state incursions was plainly in the Constitution already. All that the new amendment would do, Bingham and other Radical leaders said soothingly, was to arm Congress with the express power to enforce the federal guarantee of equality; it did not, as the conservatives charged, transfer all sovereignty over civil rights from the states to the federal government.

For strategic reasons, perhaps, the first section of the new amendment was represented by some of its backers as having no more ennobling an aim than to place the specifically enumerated guarantees of the Civil Rights Act beyond constitutional challenge. Some leading Radicals, including Thaddeus Stevens, went on to suggest that the amendment was offered partly to place the Civil Rights Act guarantees beyond the reach of future Congresses that might be tempted to dilute or remove them. Whether that interpretation was offered in an excess of either candor or guile is unclear, but if it succeeded in softening the opposition of conservatives, it also managed to harden the resolve of radicals, who noted that the proposed language of the amendment, beginning with "the Congress shall have the power . . . ," still left the protection of the rights in question to the mercies of Congress—and congressional majorities had a way of shifting. It was not strong enough as worded.

The amendment was left to brew for six weeks and then emerged, under Bingham's hand, in approximately the form in which it was to be adopted, beginning with these crucially changed words: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person the equal protection of the laws." Here, plainly, was language that placed the natural rights of every American inhabitant beyond the power of Congress to impair or destroy by either taking or withholding legislative action. Congress, under the fifth section of the redrafted amendment, was apparently to enforce the guarantees of the first section in the event a state violated the absolute commandment of the Constitution not to deny those critical privileges and

immunities to any of its residents. Even without congressional action, though, the self-executing command against state usurpation of those rights could presumably be enforced by the federal judiciary, like any other such imposition of federal supremacy prescribed in the Constitution. That principle of judicial enforceability of Fourteenth Amendment rights was unmistakably illustrated by the Supreme Court in *Strauder v. West Virginia*, eleven years after the adoption of the amendment, in striking down a state prohibition against Negroes on juries.

That the framers of the new amendment intended it to go well beyond the specifically enumerated rights of the Civil Rights Act of 1866 was strongly suggested by its sweeping language and the grand, hard-to-pin-down terms that had not been part of the rights bill. The amendment's key phrases, "due process" and "equal protection," had a majesty to them that could be taken as narrowly applicable only by those in willful opposition. Senator Howard, acting as co-chairman of the Joint Committee of Fifteen, declared that the amendment "abolishes all class legislation in the states, and does away with the injustice of subjecting one caste of persons to a code not applicable to another. . . ." Co-chairman William Pitt Fessenden, Senator from Maine, denied that the first section of the amendment had been drawn merely to protect the constitutionality of the Civil Rights Act—or, indeed, had any connection with it. To illustrate how the amendment was far more than a prop to the Civil Rights Act and would go well beyond it in mandating equal protection, Senator Timothy Howe of Wisconsin cited an outrageously discriminatory Florida school law which provided that whites and Negroes would be taxed for white schools but only Negroes would be taxed for the colored schools; most of the money raised by the tax for colored schools, moreover, would go to pay state superintendents who would have absolute power over whether a Negro might be allowed to attend any given school in his area. Could any Congressman, Howe asked, hesitate to amend the Constitution to place a "positive inhibition upon exercising this power of local government to sanction such a crime . . . ?"

Howe's example was notable for several reasons. It was one of the few instances during the congressional debates on the amendment when its supporters got very specific. They much preferred to use the generalized language of Bingham, who spoke of "the inborn rights of all persons" that would be protected by the addition to the nation's organic law. Such a tactic was almost certainly intentional if not downright evasive, for the Radical Republican leadership was probably not eager to advertise just how far-reaching the amendment was or might be taken to be. The Fourteenth Amendment corroborated the outcome of the Civil War—and could not have passed Congress had the outcome of the war been different—by installing the glorious language of the Declaration of Independence as the supreme law of the land, in every state. It did not assume that masters would naturally choose to treat their former slaves as legal equals or that non-slaveholding whites would like the idea any better. In the end, the constitutional guarantee of the Negro's rights was cast not in the negative anti-discrimination form that had originally been proposed in the Civil

Rights Bill, but in the positive, broad language of equal protection and due process. In writing a constitution, you do not outlaw murder; you guarantee the right to life.

Senator Howe's denunciation of the Florida school law was also notable, as litigants in *Brown v. Board of Education* reviewed the congressional debates eighty-seven years later, because it was one of the very few references to the effect of the amendment on public schools. During the Civil Rights Bill debate, there had been a number of such references, and there was considerable evidence that many Congressmen believed that the bill as originally framed would have eliminated racially segregated schools. But elimination of the "no discrimination" language seemed to have ended that debate. Under the "equal protection" language of the amendment, however, the question seems to have been left unresolved. Indeed, it was scarcely raised. Howe's railing against the Florida school law was due not to the fact that it sanctioned separate schools but to its grossly unequal provisions for colored education. More than likely, school segregation was not much on the lawmakers' minds: compulsory public education in America at that time was still in its rudimentary stage. The provision of any public education at all for the newly freed slaves was viewed by the abolitionist bloc as a major advance in the South.

Public education, in fact, had been strongly resisted by the antebellum South even as the idea grew in the North and in the frontier states, where it was seen as a great uplifting force and harbinger of a bright future. The values that Horace Mann, Henry Barnard, and other apostles of compulsory common-school education preached in the first half of the nineteenth century—the school as the seedbed for civic-mindedness and a sense of national unity, for the spread of humanitarian and egalitarian values, for the homogenization of immigrants and all the varying religious and racial strands of the people, for enhancing human efficiency and building a wiser electorate in a land where universal manhood suffrage would be practiced—were almost all unwelcome in the plantation South. Elitist planters were no more inclined to send their offspring to school with the children of the white rabble than they were to put rebellious thoughts in the heads of their enslaved darkeys by providing them with even the most basic sort of formal education. A broad-based, well-informed electorate with all sorts of fool notions about the equality of men was about the least appetizing prospect the masters of the pre-war South could have contemplated. Community facilities of any sort, paid for by planters' tax dollars, were rare throughout Dixie, where the widely dispersed populace had few meeting grounds and those who ran its politics saw no harm at all in keeping the region a cultural wasteland. Even Virginia, where the Jefferson legacy might have encouraged public education, made no real provision for it until the middle of the nineteenth century; fewer than one out of ten Southern children between the ages of five and fifteen attended formally organized schools in the two decades before the war. As Congress sat down to write the Fourteenth Amendment, no Southern state could be said to have had a public school system worthy of the name.

In deep financial distress, the South was not anxious to correct its educational backwardness during the last third of the century. Only Kentucky would pass a compulsory-school-attendance law by the year 1900. The Freedmen's Bureau, as an emergency measure, had begun to teach the Negro basic reading, writing, and ciphering skills in the immediate aftermath of the war when it was estimated that no more than one freedman in ten had managed to snatch even the most primitive sort of education. But the desperate need of the ex-slaves for food and clothing and shelter, the constantly shifting population, widespread illness and epidemics, the lack of classrooms and books, and the failure of many Negroes to grasp the practical applications of book learning all conspired to limit the achievements of the Freedmen's Bureau program at the time Congress was mulling the amendment. When the bureau's federal funding ended, the ex-Confederate states balked at assuming the burden of carrying on the colored schools. The financially reduced upper classes were unhappy about being taxed to educate their former slaves, though it was the labor of those very blacks, of course, that had brought the gentry its former wealth. The lower-class whites were equally resentful that their black social inferiors should now be offered, free of charge, an education—the sort of privilege formerly reserved for their social betters. Poor-whites, moreover, were openly hostile to the idea of enhancing the Negro's skills and thereby making him a more formidable economic competitor, and propertied whites still badly needed the blacks to work the land, a task for which they needed little schooling. The equal-protection requirement of the Fourteenth Amendment served, no doubt, to deter many Southern states from forsaking public education for Negroes entirely, for white children were increasingly benefiting from the growth of the Southern public school system. What support the South did give to colored schools was grudging and minimal. A major share of the financial load was carried by Northern-based philanthropies that brought some light to the darkness but served as well both to relieve the states of their obvious responsibilities and to inculcate a severely restricted life outlook among the colored children. Had they lifted the eyes of the blacks too far above the cotton fields, the Northern schoolmarms would soon have been sent packing. Fifty years after ratification of the Fourteenth Amendment, "equal protection" in Southern schools meant that scarcely one-third as much was spent on the education of each black child as on each white one.

By all available evidence, then, the framers of the Fourteenth Amendment would have been familiar with public education only as a developing concept in most states, not only the South. Whether those schools were segregated mattered a good deal less, to most contemporary supporters of the Negro's rights, than that schoolhouses and teachers be provided in sufficient numbers and with adequate financing to improve his skills and economic opportunity. At the time the amendment became law, the practice and nature of school segregation varied widely. Thirteen states either had no segregation laws or specifically forbade the practice (the six New England states plus Iowa, Michigan, Minnesota, Nebraska, New Jersey, Oregon, and Wisconsin). Eight states either provided for separate schools or left it up to local

communities to adopt that practice if they wished (California, Kansas, Missouri, Nevada, New York, Ohio, Pennsylvania, and West Virginia). Five states outside the old Confederacy either directly or by implication excluded colored children entirely from their public schools (Delaware, Indiana, Illinois, Kentucky, and Maryland). Only five states could reasonably have been said to have abandoned segregated schools in the immediate wake or as a result of the Fourteenth Amendment—Connecticut, Florida, Louisiana, Michigan, and South Carolina—and three of those subsequently restored the practice. What changes there were in the public schools in the decade following adoption of the amendment were directed not toward the abolition of segregation but toward strengthening or equalizing the school rights of the colored children. In Indiana, for example, where no schools had been provided for Negroes before the amendment, the state superintendent of public instruction ruled that "whatever distinctions may have been previously made in the rights and privileges of citizens by our laws, they have been set aside by the amendations of our National Constitution and the Civil Rights Bill." Negroes, in other words, had as much right to attend public schools as whites—but not the *same* schools, as Indiana saw it.

Thus, the historical evidence seemed to demonstrate persuasively that neither the Congress which framed the Fourteenth Amendment nor the state legislatures which adopted it understood that its pledge of equal protection would require the end of segregation in the nation's public schools. But it is quite another—and unwarranted—matter to conclude that that Congress and those states contemplated that the amendment would not or could not, at some future time, require the abolition of segregation. For, as many historians and commentators have noted, the framers of the Constitution did not contemplate any number of legislative or judicial steps that future social and economic conditions would dictate. Agricultural price supports, social-security payments, and minimum-wage laws are obvious examples of legislative measures never envisioned by the Founding Fathers but nevertheless framed by a future Congress and sanctioned as constitutional by the Court. Similarly, the framers of the Fourteenth Amendment never said that they intended it to apply to corporations as "persons." Yet the Court later in the nineteenth century was to apply just such an apparently unintended—but not explicitly prohibited—use of the amendment to the property rights of corporations, which proved to be the major beneficiaries of the enactment while the Negro's rights under it were construed so narrowly as to become nearly inoperative.

It is scarcely surprising, then, that as the NAACP's scholars uncovered this highly ambiguous evidence, spirits alternately rose and ebbed at the Legal Defense Fund's New York headquarters.

From Los Angeles, Jay Graham checked in with the not very encouraging news that he had found almost no discussion at all during the congressional debates on school segregation, and what he had found was of little help. He was particularly troubled by Representative Wilson's insistence during the phase of the debates dealing with the "no discrimination"

clause that the Civil Rights Bill was not intended to outlaw separate schools. That negative reference, Graham reported, was "unfortunate, particularly since he was House manager of the . . . bill." Out in Detroit, historian Alfred Kelly was seriously troubled by the removal of the "no discrimination" clause from the Civil Rights Bill, which he, along with many other scholars, still believed to be the keystone to the Fourteenth Amendment. "Now from the NAACP standpoint, this was very damning, as I saw it," Kelly remembers. "The bill was amended specifically to eliminate any reference to discriminatory practices like school segregation, and I was really stumped at that point in trying to figure out how to answer the Court's question, because it looked as if a specific exclusion had been made, and so here I was caught between my own ideals as an historian and what these people in New York wanted and needed."

Other troubling evidence began accumulating from those researching the understanding of the state legislatures that ratified the amendment. Loren Miller, the NAACP's West Coast attorney and one of Marshall's most astute advisors, put the matter concisely when he wrote him on August 8:

> My own research into California, Oregon and Nevada historical and judicial attitudes toward the separate school issue has led me to the tentative conclusion that none of them believed that the Amendment struck down separate schools but that all of them recognized the equalitarian impact of its commands. Its impact on separate schools was recognized only as it became plain that such schools denied that equalitarianism. . . .

The harder they looked, the more trouble spots the NAACP team found. Since twenty-four of the thirty-seven states in the country had either required or allowed segregated schools at the time of the amendment, it seemed highly unfavorable that so little discussion during the congressional debates and those in the state legislatures had been devoted to the effect of the amendment on Jim Crow schools. If Congress and state legislators had understood that the amendment was to wipe away the practice, surely there would have been more than a few howls.

And no one in the NAACP camp had come up with a persuasive rebuttal to the fact that Congress had permitted segregated schools in the District of Columbia from 1864 onward—and that, though the matter was debated thoroughly between 1871 and 1875, Congress had declined to include a prohibition against segregated schools in the Civil Rights Act of 1875. If, furthermore, the framers of the Fourteenth Amendment had truly intended to wipe away all racial discrimination as the climax of the anti-slavery crusade, as tenBroek, Graham, and other scholars believed, why had the Negro not been granted suffrage by the amendment, as all sides held he had not been? Why, in fact, had the Fifteenth Amendment been necessary at all if the reach of the Fourteenth was all that its most expansive interpreters insisted? Could it be reasonably claimed that segregation had been outlawed by the Fourteenth when the yet more basic emblem of citizenship—the ballot—had been withheld from the Negro under that amendment? To answer that the true intentions of the legislators of that day could be

fathomed only by viewing their handiwork over the 1865–75 decade was no doubt a reasonable contention, but it somewhat begged the Supreme Court's question for the *Brown* reargument.

Adding to the complex data the NAACP had to rebut or rationalize were the determination and resources of their adversaries. That the South was not sparing the horses in its preparations for the second Court argument of *Brown* was clear to Thurgood Marshall, who wrote to a friend in mid-August:

> . . . Incidentally, one of the evidences of our general problem of fighting governmental agencies is that the Attorney General of Virginia had written to the Attorney General of each of the [thirty-six other] states which considered the Fourteenth Amendment and, in turn, each of these Attorneys General are doing the research for them without cost or obligation.

Considering their difficulties, Marshall's staff was scarcely woebegone when it received a request from the new Attorney General of the United States, Herbert Brownell, Jr., to agree to postponing the reargument until early December so that the Justice Department could complete its own comprehensive research on the Court's questions. Aside from being able to use the extra time to fashion as convincing an historical presentation as possible, Marshall could not afford to say no and thereby risk antagonizing the government, now under the control of Republicans who were by no means certain to behave half so kindly as the Truman administration.

By September, the research was flowing into the NAACP office from all over the nation, and the director-counsel of the Legal Defense Fund, as Marshall was now known, studied most of it himself before channeling it to other hands. The mimeograph machine was going all the time, churning out a cross-flurry of monographs, memos, and rough drafts. Everyone was working late all the time, and food consisted of sandwiches, coffee, and beer, with an occasional *gemütlich,* if somewhat heavy, meal at the nearby Blue Ribbon restaurant when notable visitors came to town. "The mood was hectic, driving, disordered, and anxious," recalls John A. Davis. "We knew we were going to be made or broken within a couple of months," Robert Carter remembers feeling. "I think we all felt that we might be making history," says Alice Stovall, who managed the office.

And through it all, Marshall kept pushing them without ever becoming abrasive about it. "I have *never* seen a man work so long and so hard," recounts John Hope Franklin, who logged a lot of hours around the office that fall during the never-ending series of conferences. "It was nothing for him to say at one a.m., 'How about a fifteen-minute break?' " Typical, too, was the letter Marshall sent to the NAACP's counsel for the Southwest, U. Simpson Tate, who had mailed in his findings on the Texas legislature's handling of the Fourteenth Amendment. Marshall was pleased with Tate's material but felt there was room for improvement: "It seems to me that you had better make a pretty careful check of whatever books are available concerning this problem and let us know about that also. Whatever you do, please do not let up but keep digging until we are sure that we have everything that will do us any good."

Toward the end of September, Marshall brought the whole operation together in a giant conference running for three days and nights at the Overseas Press Club. Nearly a hundred scholars and lawyers broke into smaller seminars, each attacking a different aspect of the questions the Court had asked. But the key session was devoted to the papers by Jay Graham and Alfred Kelly on the troubling relationship between the Civil Rights Act of 1866, which had been specifically stripped of its broad "no discrimination" language, and the Fourteenth Amendment, created in its immediate aftermath and conceived, as many historians believed, simply to constitutionalize the rights act. At the center of the controversy was Kelly, a tall, hearty Midwesterner with a radio-announcer's voice and a favorite blue suit that one office regular that summer recalls "was rather brighter than most blue suits."

The paper he delivered on what he called "the damning modification of the Civil Rights Bill in the House and its apparent identity in purpose with the Fourteenth Amendment" was "not adequate by any standard," in Kelly's own estimate. "I didn't understand the relationship between advocacy and history at that point," he says. "I was trying to be both advocate and historian within the same paper. I just should have spelled out the problem for them." But the problem looked nearly insurmountable to Kelly just then; "I didn't see the good argument that might be available to us," he adds by way of acknowledging that his summer study had dwelt so much on the trees that the contours of the forest itself had gone unnoticed. "I did get the devastating facts on the table, though," Kelly suggests. Those "facts" so discouraged some of the NAACP advisors that the conference became mired over choosing a strategy to overcome the historical evidence that the framers of the Fourteenth Amendment had apparently had segregation itself very little on their minds in light of the far more appalling inequities burdening the black man just then.

No one was more troubled about the historical findings than William Robert Ming, Jr., the forty-two-year-old black native Chicagoan who was then a full professor at the University of Chicago law school and one of Thurgood Marshall's most gifted consultants. A sharp legal logician, a forceful and often eloquent debator, and a sometimes bareknuckled infighter, Ming vibrated with confidence born of an outstanding career in teaching and government. He had moved from nearly all-black Howard Law School to nearly all-white Chicago Law School, where one of his students in a federal-procedure course was Ramsey Clark, later U.S. Attorney General. "He was a very bright man," Clark recalls of Ming, "and the kids loved him. They and the faculty people were 'proud' of him in a kind of unintentionally patronizing way. He had a real zest for life, though he was perhaps overly sophisticated in his approach to the law."

Ming's approach to the problem presented by the findings of Kelly and Graham was quite direct. He thought that the textual evidence, based on the pronouncements of Congressmen and the wording of the various drafts of the Civil Rights Bill and the Fourteenth Amendment, was so scanty or unconvincing that the NAACP ought not even to attempt an argument based

on the framers' immediate intent. Perilous as the idea might be, Ming urged that the Court's question be, in effect, bypassed and the historical case argued in terms of the approach suggested in Jay Graham's paper—namely, by invoking the overall spirit of humanitarianism, racial equalitarianism, and social idealism that had fueled the abolitionist movement and, by obvious implication, had shaped the objectives of the Radical Republicans who wrote the amendment. The papers by Vann Woodward and John Hope Franklin, arguing that the original equalitarian intentions of the post-Civil War amendments had been eroded in ensuing decades by unbearable political and economic pressures and extra-legal tactics, strongly supported this general position. The historians present were generally enthusiastic over this broad approach to the Court's questions. "We were putting the intellectual establishment on notice," comments John A. Davis, "that we rejected the conventional Columbia school of thinking on Reconstruction and its aftermath. That school argued that the country had turned away from the words of the Fourteenth Amendment to bind up regional wounds and to make the country whole again. It was a step rationalized on grounds of alleged Negro incompetence and pressing economic need by the white South. The fastening of the Jim Crow caste system on America was thus justified by this school of historians who did not want to turn their backs on their fathers or face the moral issues raised by that forfeiture of Negro rights. We were saying to all of them, 'No, goddammit, now you're going to have to face the truth.' "

Alfred Kelly left that September conference with a $400 fee (plus expenses) for his efforts and the expectation that the next word he received about the school-segregation cases would come on the front pages of the newspapers. But just ten days or so later, in early October, Thurgood Marshall rang him up. "In the curiously winning manner so characteristic of the man," Kelly later recounted, "he informed me that since I wasn't doing anything anyhow, I might as well come on down to New York for four or five days and waste my time there. My help, he said with careful flattery, was needed very badly on the brief. My vanity thus touched to the quick, I came."

Marshall had been uneasy about the so-called "broad approach" favored by the September conference. In close consultation then with William Coleman, who knew the mind of Felix Frankfurter better than any of the other NAACP advisors did, Marshall was fearful about looking evasive to the Court. He called his inner circle together—Carter, Greenberg, and Motley of the office staff, Spot Robinson from Richmond, Louis Redding from Wilmington, Jim Nabrit from Washington, Bob Ming from Chicago, psychologist Ken Clark, and research project director John Davis—and invited Kelly and John Hope Franklin in for a four-day intensive re-examination of the historical evidence. "I never worked for harder taskmasters," Franklin recalls. He and Kelly were pumped with question after question on the detailed events of the period. "I soon sensed that the role I was expected to play was that of devil's advocate," Kelly noted, "of a foil to prepare them all for the main event."

During the intensive sessions, Kelly was struck by two not quite contradictory qualities in the black men who sat around the table with him. "If I had ever entertained any lurking white-man's suspicion of the intellectual adequacy of this group of lawyers, all but one or two of whom were Negroes, these men soon kicked it out of me," Kelly later said. "Without exception, they were razor-keen, deadly at argumentation, and, as far as a layman who knew some law could tell, thoroughly competent in their profession." But there was that other quality that frankly surprised Kelly: "In a sense, these men were profoundly naïve. They really felt that once the legal barriers fell, the whole black-white situation would change. I was more skeptical, but they were convinced that the relationship between the law and society was the key. There was a very conservative element in these men then in the sense that they really believed in the American dream and that it could be made to work for black men, too. Thurgood Marshall was—and is—an American patriot. He truly believed in the United States and the Constitution, but that the whole system was tragically flawed by the segregation laws. Wipe away those laws and the whole picture would change. Marshall and his colleagues were no rebels. They felt that the social order was fundamentally good. What they wanted was the chance to share in it like men."

While the October conference progressed mostly in the evenings, Kelly and Ming were isolated with a stenographer for three exhausting days in a suite at the main NAACP office on 40th Street, where they turned out a draft for the historical sections of the brief. Ming did most of the writing while Kelly kept sharpshooting at his history and constitutional law. "We got on famously," says the historian.

With the Ming draft in hand, the conference broke up on a Saturday night after having resolved, as Carter noted in a letter to Kelly a few days later, "to take the position that segregated schools would necessarily be violative of the intended reach of the Fourteenth Amendment even though very little, or nothing, was said specifically about segregated schools as such" during the congressional debates. Bill Coleman came up to New York on weekends to work over the Ming draft with Marshall while other hands developed the less troubling parts of the brief. Kelly kept sending in suggestions of key speeches that might be worked into the brief to support "the broad approach," but Marshall remained uneasy. He sent out copies of the draft and started getting unsettling feedback. His West Coast advisors were particularly direct. Graham wrote that he liked what had been done with Kelly's material: ". . . it seems to me an excellent job—it has organization, balance, and—by skirting the weak points and by cleverly using the argument from silence the way lawyers customarily do in matters of this sort—it comes out with the conclusion you need and want." So much for the good news. Then Graham said, "[F]or these very reasons, one can't snip out segments of Kelly's narrative and combine them into a legal brief, as has been attempted here, apparently by different hands working on different segments of the problem. You destroy one carefully worked out presentation without achieving another, because there is no real mastery of the material as

a whole, no coherence or progression. The plan simply breaks down." Loren Miller chipped in:

> The section devoted to the debates . . . is namby-pamby. It is hesitant and unconvincing, a fault that seems to me to stem from the fact that too little stress is laid on the underlying philosophy of the proponents of the Civil Rights Acts and framers of the Amendment. . . .
>
> It also seems to me that the point should be made that to the proponents of the Civil Rights Act and the framers of the Amendment, segregation was, per se, discrimination . . .

and he cited specific passages in the debates where the segregated schools of Pennsylvania were recognized as having discriminated "as between the two classes of children." Marshall himself recognized the shortcomings of the brief. He sent the latest draft to Kelly on October 30, remarked that it was "not in good shape," and added:

> After kicking around the debates in three or more different drafts we ended up with a draft which is merely a rehash of your paper. The obvious criticism to this approach is that as it now appears in our brief it is more of a historical document than an argument. I am still convinced that there must be some way to redo the debates, yet I must confess that I have not come up with the idea yet. . . .

Marshall might well have meant to characterize the troublesome section of the brief in just the opposite fashion—more of an argument than an historical document. He wanted more grit in there. Would Kelly come back to New York for yet another session, this time with John Frank of Yale Law School? The Ming draft was just too generalized and seemed to Marshall to fudge on the central question of the framers' intentions. "I gotta argue these cases," Marshall told Kelly, "and if I try this approach, these fellows [the Justices] will shoot me down in flames."

During the early November sessions with Frank and Marshall, Kelly has recounted, "I am very much afraid that . . . I ceased to function as an historian and instead took up the practice of law without a license. The problem we faced was not the historian's discovery of the truth, the whole truth, and nothing but the truth; the problem instead was the formulation of an adequate gloss on the fateful events of 1866 sufficient to convince the Court that we had something of an historical case. . . . It is not that we were engaged in formulating lies; there was nothing as crude and naïve as that. But we were using facts, emphasizing facts, bearing down on facts, sliding off facts in a way to do what Marshall said we had to do—'get by those boys down there.'" And yet Kelly would become increasingly convinced with the passing years that the last-minute interpretation he came up with on the two sorest points in the historical evidence was essentially the correct one.

The hardest problem was John Bingham's speech calling for the removal of the broad "no discrimination in civil rights and immunities" clause from the Civil Rights Bill. In calling for the deletion, Bingham, the former abolition theorist, had openly acknowledged that the bill as drafted would have prohibited statutes such as school segregation. Since that broad language was in fact deleted from the final form of the bill and since many of

the proponents of the Fourteenth held that the amendment had no purpose beyond constitutionalizing the Civil Rights Act, it had therefore seemed to Kelly, Marshall, Ming, and others in the NAACP camp that they could not reasonably argue that the framers intended the amendment to prohibit school segregation. But the more Kelly pondered Bingham's remarks—and the fact that a few days earlier Bingham had presented a draft of the Fourteenth Amendment to the House—the clearer the picture became to him: Bingham's objection to the "no discrimination" clause was based solely on the apparent lack of constitutional authority for so sweeping a congressional enactment, Kelly suggested. That shortcoming could be cured only by a new amendment to the Constitution, Bingham indicated, and Kelly took that to be a reference to the Fourteenth Amendment that Bingham himself had drafted and was eagerly promoting. If that were the case, then a whole new interpretation, far more favorable to the NAACP, could be put on Bingham's speech on the Civil Rights Bill—namely, that once the Fourteenth Amendment had been passed by Congress and ratified by the states, then constitutional power would exist for a sweeping congressional prohibition of discriminatory statutes by the states, segregation included. And since the amendment, as finally redrafted by Bingham to remove its dependency on Congress, itself became a direct prohibition on the states, Kelly believed it could plausibly be claimed to have outlawed all discriminatory legislation, just as the original draft of the Civil Rights Bill would have done.

One hurdle in the way of that reading of Bingham's intentions was a later speech by Thaddeus Stevens, the most powerful man in the House and a strong ally of Bingham. Among other things, Stevens said that a principal purpose of the Fourteenth Amendment had indeed been to re-enact and therefore insure the constitutionality of the Civil Rights Act (even shorn of its broad "no discrimination" language)—an apparent concession to those who wished to interpret the amendment narrowly. But Kelly concluded that the apparently damaging portion of Stevens's speech had to be considered against the larger political picture and the clear drift of Stevens's generally radical utterances. Stevens did not mince words except when there might be a political dividend in it, as there may indeed have been in passing off the new amendment as less of an earthquake than its opponents claimed. When Bingham had first presented the amendment, Stevens had said—in words that latter-day conservatives and segregationists preferred to glide over—that it plainly meant "where any state makes a distinction in the same law between different classes of individuals, Congress shall have the power to correct such discriminations and inequality" and that under the amendment ". . . no distinction would be tolerated in this purified Republic but what arose from merit and conduct."

"It was like a light breaking through," Kelly remembers. "Here finally was a really plausible interpretation. Thurgood got up from his chair and began pacing excitedly around the room, as if to say, 'Hot damn! Here's something finally that we can use that isn't manipulating the facts.'"

As Thurgood Marshall ran against the clock now toward his most fateful rendezvous with the Supreme Court, he did not abandon the qualities that had set him apart as a leader. "What impressed me most about Thurgood," says John Frank, who had first met Marshall while teaching law at Indiana University in the late Forties, "was that he had worked his way through the hell and the tedium and the travel and the endlessness of all those cases long before he ever came to this great day. I remember him particularly vividly at some kind of a meeting in Indianapolis when I taught at Indiana. We were not then approaching the millennium or anything like it. It was just little people with grim problems in somebody's living room. . . . What I felt then is what I remember now: that it was a good thing that someone would come to us this way. What impressed me at the meetings in 1953 was Thurgood's good humor, and his calm, and the steadiness of his judgment."

That judgment was particularly notable for its negative as well as its positive uses. William Coleman remembers that Marshall was a good deal less taken with the research material uncovered in the states than Coleman himself had been. "Thurgood had the greatest ability an advocate can have in this regard," says Coleman. "He knew how and when to reject things—the way a painter does. He had the knack for looking over a memo and saying, 'Yeah, page five is great for us, but page seven can kill us.' "

He had another knack of incalculable value: he kept everybody feeling he or she was contributing and he reduced friction to a minimum among men who were in no way his intellectual inferiors.

There was Carter, careful and conscientious and efficient, keeping a thousand loose ends from getting knotted. There was Coleman, a superb technician, bringing his clinical intellect to bear on the language of the brief itself. There was Spottswood Robinson, habitually cautionary, battling fatigue and the loud, bold policy-forging of Bob Ming. Recalls one regular at the NAACP councils: "Ming might say, 'They *got* to listen to us,' and Spot would say, 'No, they *don't* got to listen to us. . . .' " For all the dogmatism of his style, Ming's mind was supple and his position on the cases fluid, and Marshall knew how to get the most out of him—and when to stop taking. Others added vital ingredients. Nabrit supplied "a kind of drive and poetry" to the sessions, remarks another insider. And a pair of youngish Columbia professors, Jack Weinstein and Charles L. Black, Jr., brought, besides their insights, first-rate writing skills to the homestretch drive.

What struck Weinstein and Black was Marshall's great gift for keeping his crew feeling good. "I never had so much fun in my life as during those sessions," remarks Black. "It was exactly the opposite of the image the South would later try to project of a bunch of hard-eyed conspirators." Adds Coleman, "There were no prima donnas in that room—only a lot of high spirit." A good deal of the humor, not unnaturally, stemmed from the racial predicament that had brought them together. Some of it was harmlessly sophomoric. When most of the men at one of the conferences had ordered chocolate milkshakes and one of the white professors in attendance ordered a vanilla one, Marshall pounded the table and roared, "We'll have no white

chauvinism around here!" On another occasion, the group was discussing the question of the Supreme Court's power to rule in the segregation cases. Suddenly Marshall leaned forward in his place, looked around as if addressing the Justices, and said, "White bosses, you can do *any*thing you want 'cause you got de power!" Marshall was forever telling jokes on himself, as he had done all his professional life. A lot of them were one-liners, like the one he told of his appearance before a particularly crusty Southern judge who demanded of him, "What do you want from this court?" and Marshall said, "Anything I can get, your honor."

While most of Marshall's humor served to relieve the growing tension, part of it had the reverse effect, especially when it seemed to be aimed, consciously or not, at discomforting some of the white participants. Alfred Kelly, especially, was not prepared for Marshall's more mordant thrusts. Marshall once playfully asked one of the secretaries, who had been a trifle slow in bringing in some papers, if she had forgotten who "de H.N." was around there. Kelly recoiled upon learning that H.N. stood for "head nigger." Another time, Marshall was going through an old Midwestern newspaper from the post-Civil War period they had been dealing with and he came across a story about a colored worker who somehow had fallen from the track during railroad construction and hurt himself landing in a ditch. "Nigger in a Pit," the headline said. Marshall kept reading the headline out loud, over and over, savoring the sound of it: "Nigger in a pit, nigger in a pit. . . ." Or he would describe his great-grandfather as "the most worthless nigger there ever was" and toss off double-edged gags like one he once foisted on a white associate who had run out of matches and borrowed Marshall's cigarette lighter but couldn't get it lighted. Marshall took it back and lit it for him, needling, "No way you can operate that—this here's a lighter I had made special for people who say niggers ain't mechanical."

One day the playfulness seemed to be missing when they sat around the conference table puzzling silently over a particularly difficult problem. Looking over at Kelly, Marshall said softly, "Alfred, I like you. And it's very good of you to come here and work this way." Then he took off his glasses and added, voice rising, "But know one thing, Alfred—when we niggers take over the power, every time a white man takes a breath, he's gonna have to pay a fine!" A great stillness hovered over the room until the large man subsided in his chair and the discussion picked up again. Kelly, an easy mark for such shocking gambits, perfectly well grasped the serious part of Marshall's needling. To Kelly, Marshall was saying, without saying it, "Look here, don't you see now how the white man has rigged the law to deprive us Negroes of a fair shake? How'd *you* like to be in *our* place?" Remarks Kelly: "The frustration and anger in the man would come welling up in those rare moments, as if he sensed the appropriateness of reminding us what it was all about—of the need to dramatize for us the whole catastrophe of black-white relations in America." Marshall's intramural use of the word "nigger" seemed to serve a similar end. It sorely bothered a few of the black NAACP lawyers who otherwise held Marshall in high regard. Kelly, after a while, came to understand what Marshall was up to: "That word seemed to

epitomize for him the entire tragedy of the black man's situation, but he wasn't somber about it. He could invest the word with as much humor as sadness."

At least one white man in that company was Marshall's match at brandishing gallows humor. Charles Black was a native of Austin, Texas, where he had been taught to play the harmonica by an aged ex-slave. In time, Black fell under the spell of jazz, which he suspects was part of the emotional lure to him of the black man's cause. The element of racial protest in jazz and the blues was plain to the young Texan, who grew up in Austin surrounded by statues of Confederate heroes. After taking his bachelor's degree at the University of Texas, where anti-racist students were then in short supply, Black came east to Yale. He earned a master's degree in English before swinging over to the law school, where he became a minor legend by avoiding lectures, not studying for exams until the last possible moment, and then doing so well that he was invited to join the *Yale Law Journal*—but declined the honor. As a young law professor at Columbia, Black also wrote poetry, studied the trumpet, haunted Greenwich Village, and socialized with some of his students—habits that earned him the reputation of an oddball among the more conservative members of the Columbia law faculty, which was no hotbed of permissiveness. Intense and effusive, Black seemed to be drifting in those years. "There was a fair sense of social injustice gnawing at him," recalls Jack Weinstein, who had the office next to Black's at Columbia in the early Fifties. When Bob Carter came to address a campus group which Black was advising, the professor was struck by the black lawyer's earnestness and volunteered his services. His work with the NAACP thereafter did not greatly enhance Black's standing with the more orthodox members of the Columbia law faculty, who did little to try to keep him when Yale made an offer. "He was an original," says Columbia's Walter Gellhorn, "and Herb Wechsler and I and some others wanted to keep him. But the feeling among a majority of our colleagues was that Charlie was not a terribly effective teacher in those days. I think a very bad error in judgment was made in not keeping him here. He has turned out to be a very original and useful writer and free spirit." At Yale, Black would also become one of the nation's recognized authorities on admiralty law.

His arrival at the NAACP inner councils stirred some curiosity. Black was, after all, a white Texan. "It took us a few sessions to believe he was really on our side," Carter remarks. After the first one, Thurgood Marshall could not restrain his curiosity. "We're glad to have you with us, Professor Black," said Marshall, according to one who was on hand, "but what is it exactly that brings you here?" Black, as expansive in his way as Marshall, replied: "Well, I'll tell you, Mr. Marshall, I come from deep, deep in Texas—so deep that I can't even remember hearing the word 'Republican' before I was eleven years old. But well before then, I'd heard of this really terrible organization way up North called the N-A-A-C-P. It was an awful place with a great big office all the way up there in New York, they said. And the worst thing of all about it was that right in that big office there was this room, this special secret room, a room with no windows and no doors and

walls about a foot thick—and the only way you could get in was with a combination to this huge lock. And inside that room, they said, there was nothing but hooks on the walls—hundreds and hundreds of hooks—and do you know what was hanging on each and every one of those hooks?" Marshall, foaming with curiosity now, asked what. "Why, they said that on each of those hooks was a key to the bedroom of a Southern white woman. And so I figured *that's* an organization I wanna get involved in!"

Black threw all his passionate brilliance into the NAACP effort that fall as he joined in the brief-drafting and spoke up strongly to urge Marshall not to invite the Court to frame a decree implementing desegregation on a gradual basis if it should vote to outlaw Jim Crow schools—an issue the Justices had raised in the fourth of their five questions to the litigants. Black did not balk at seeing his prose tinkered with or discarded. "Everything was torn to pieces," he recalls. But Black's gift for clear, vigorous, and moving prose was evidenced in this sort of passage that he contributed to the final brief:

> These infant appellants are asserting the most important secular claims that can be put forward by children, the claim to their full measure of the chance to learn and grow, and the inseparably connected but even more important claim to be treated as entire citizens of the society into which they have been born. We have discovered no case in which such rights, once established, have been postponed by a cautious calculation of conveniences. The nuisance cases, the sewage cases, the cases of the overhanging cornices, need not be distinguished. They distinguish themselves.

Black did not blink when, later that fall, Marshall once looked at him and said, "You are a Negro."

Spottswood Robinson, whose balanced judgment, scrupulous care, clarity of expression, and remarkable recall made him Marshall's most valuable all-around associate, locked himself away from the world and went over the whole thing a final time, ironing out the bumps. What emerged was both a 235-page legal brief and an eloquent manifesto of the black man's claim to a long-deferred equality. Bristling with conviction, the consolidated brief presented the NAACP side in all four of the state cases combined. It deserves a place in the literature of advocacy.

The historical evidence in Congress and the states, declared the NAACP brief, showed that the Fourteenth Amendment was intended, in and of itself, to prohibit all forms of state-imposed racial discrimination. Even if the historical evidence were otherwise, the brief added, it was clear that segregation laws violated all the conventional tests for a reasonable basis to state classification of citizens. Whatever appeal the separate-but-equal doctrine may have had at the time it was sanctioned in *Plessy*, "it stands mirrored today as the faulty conception of an era dominated by provincialism, by intense emotionalism in race relations . . . and by the preaching of a doctrine of racial superiority that contradicted the basic concept upon which our society was founded. Twentieth century America, fighting racism

at home and abroad, has rejected the race views of *Plessy v. Ferguson* because we have come to the realization that such views obviously tend to preserve not the strength but the weakness of our heritage." There was no longer any question, furthermore, that "furnishing public education is now an accepted governmental function," and equality was not provided by a system of separate schools, the only purpose of which was the perpetuation of an inferior status among black Americans.

The Court in *Plessy* had approved the enforcement of racial distinctions, the brief contended, because it said it found them in accordance with "the established usages, customs and traditions of the people"—and that was precisely what was wrong with the Court's opinion, the NAACP asserted, using its "broad approach," because

> . . . the very purpose of the Thirteenth, Fourteenth and Fifteenth Amendments was to effectuate a complete break with governmental action based on the established uses, customs and traditions of the slave era, to revolutionize the legal relationship between Negroes and whites, to destroy the inferior status of the Negro and to place him upon a plane of complete equality with the white man. . . . When the Court employed the old usages, customs and traditions as the basis for determining the reasonableness of the segregation statutes designed to resubjugate the Negro to an inferior status, it nullified the acknowledged intention of the framers of the [Fourteenth] Amendment, and made a travesty of the equal protection clause. . . .

Drawing upon the collective work of the scholars they had enlisted, the NAACP lawyers sketched out a slashing account of the history of segregation in the wake of the Compromise of 1877, which, they said, handed control of the Republican Party "to those who believed that the protection and expansion of their economic power could best be served by political conciliation of the southern irreconcilables, rather than by unswerving insistence upon human equality and the rights guaranteed by the postwar Amendments." Once the Redeemers of white supremacy took over in the South, they brought massive peonage, disenfranchisement, segregation, and terror to the colored masses, the brief argued, and *Plessy* legitimized that caste system. Thus the Negro "was effectively restored to an inferior position through laws and through practices, now dignified as 'custom and tradition.' " The fact was, the brief thundered, that

> . . . Segregation was designed to insure inequality—to discriminate on account of race and color—and the separate but equal doctrine accommodated the Constitution to that purpose. Separate but equal is a legal fiction. There never was and never will be any separate equality. Our Constitution cannot be used to sustain ideologies and practices which we as a people abhor.

The states defending segregation in *Brown* were encouraged when the Supreme Court set the cases down for reargument.

"We felt the posing of the five questions would strengthen our position," recalls J. Lindsay Almond, then attorney general of Virginia. "We knew what the contents of the debates over the Fourteenth Amendment had been—we knew that Congress had allowed segregated schools in Washington. We thought our research would give the Court the basis on which to lodge its interpretation of the Constitution consistent with our position."

The Virginia and South Carolina lawyers gathered at the Davis, Polk law offices in New York in mid-June a week after the Court's reargument order had come down. While all present recognized that the Court, throughout its history, had felt free to veer from what had likely been the original intentions and understanding of the framers of the Constitution—the Court's expansive interpretation of the interstate-commerce clause, they agreed, was an obvious case in point—the segregation issue as viewed from historical perspective seemed far more resistant to Court tampering. John W. Davis, presiding, said that the framers of the Fourteenth Amendment had "so clearly understood" that it was not applicable to schools that the South was on safe ground to argue that it was now "not properly within the judicial power . . . to construe the amendment so as to abolish segregation."

The research load was divided. Davis's office would explore the congressional debates on the amendment, and the Virginians in Justin Moore's Richmond firm would follow through on the ratification process in the states. They would cooperate fully, of course, but Virginia insisted on filing its own brief, partly out of state pride, partly because it still felt that the stronger record it had produced through its expert witnesses in the trial court might make its case a more attractive one in the eyes of the Supreme Court.

Half a dozen summer trainees from the Davis firm, most of them crack law students, camped out for weeks in the New York Public Library combing through the congressional debates, and several of them made extended sorties to the Library of Congress. "We didn't find a scintilla of evidence to the effect that the framers intended the amendment to outlaw segregated schools," says William Meagher, Davis's associate on the case. "And the evidence in the states was the same. Why, in New York State there was a permissive school-segregation law on the books as late as 1909. And of course there was the fact that the Congress that had voted for the amendment had also permitted segregated schools in the District of Columbia. Mr. Davis felt that the judicial and legislative authority was so much in support of his case that, unless the Court was going to disregard all that history and all the judicial precedent, he had the case won." Meagher himself was convinced that the Court's questions signaled that the Justices were still open-minded on the whole issue. "We thought it was pretty plain from those questions what was bothering them," Meagher adds—the lack of legal or historical justification to overturn segregation, whether or not they wanted to do so on humanitarian grounds.

The humanitarian aspect of the question was put to one side in the interest of professionalism by Davis's other principal associate in preparing the brief on reargument—New Hampshire-born and New England-educated Taggart Whipple. "I felt we had a just and solid case," Whipple remembers, "that we were not merely raising a cry in the dark nor a medieval prospect. I wasn't concerned with the sociological judgment but with the legal precedent only. The more I got into it, the more it seemed to me that, based on

authority, we had a strong case—and that the subject area was the kind of thing that the Court had traditionally felt ought to be settled by the people most directly concerned—the local communities. There was no wringing of hands among us over whether segregation was, *per se*, discrimination. We had no internal struggle over the substantive legal points."

It was perhaps not surprising that the Virginia brief, prepared by born and bred white Southerners, was more spirited than the South Carolina brief turned out by Davis's New York office. The tone throughout the Virginians' argument was a match for the certitude of the NAACP brief. Reading the two briefs in succession, a moderately astute Martian would have concluded that each side had examined totally different historical evidence. It was beyond dispute, declared the Virginia brief, that the Civil Rights Act of 1866 did not outlaw school segregation. Representative Wilson, who was chief sponsor of the bill in the House, had made that clear. And of course the "no discrimination" clause had been scrubbed from the bill before its passage. But then Virginia made the jump in its argument that set it apart from any further resemblance to the NAACP account of the congressional debates. The reason for passage of the Fourteenth Amendment, said the Virginians, was "simply" to constitutionalize the Civil Rights Act, and so Congress kept the amendment "within the same bounds" as the rights bill. Regulation of schools was "outside those bounds." Such a statement was based, of course, on as conclusionary a selection of the remarks made during the debates as the NAACP had indulged in, and it failed to acknowledge that the generalized language of the Constitution had historically been subjected to far more expansive interpretation than specific statutes such as the rights bill. In short, Virginia was having no part of the NAACP view that even though the rights bill itself did not outlaw segregation, that was no reason for the Court to hold that the Fourteenth Amendment could not be interpreted in 1953 to find the practice a denial of equal protection.

The other historical evidence seemed to clinch the matter for Virginia. Its brief maintained that in not one of the thirty-seven states then in the Union was there "any substantial evidence" that the Fourteenth Amendment had been thought to outlaw school segregation (the South Carolina brief said it could find even circumstantial evidence in no more than five states, three of which later went over to Jim Crow schools). And if the Fourteenth Amendment had had the grand intentions that the appellants' lawyers had claimed for it (i.e., outlawing all racial discrimination), there would have been no need for the Fifteenth Amendment—a somewhat risky and not very accurate assertion since the NAACP had argued that all three post-Civil War amendments were to be taken in their totality if one wished to understand the full intentions of the framers. Nor, said the Virginians, had Congress acquired the power to prohibit school segregation by the fifth section of the Fourteenth Amendment ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article") since the provisions of the first section could not be expanded to include school segregation, a practice the framers had never intended to outlaw. Indeed, the privilege of

attending public school was not a right that any citizen derived from any part of the Constitution, and to suggest that school segregation offended the Fourteenth Amendment was a twentieth-century "afterthought."

As to the decisions of the Court in classification cases upon which the NAACP was relying as precedent for reversing *Plessy*, the Virginians asserted that all of these—from *Strauder* and *Yick Wo* to *Shelley* and the Texas primary cases—were readily distinguishable from the segregation question because all those prior cases involved "absolute deprivations" of Negro rights while *Plessy*, pledging a separate equality, could not be so characterized. And *McLaurin*, Virginia argued, was a different sort of case in which the Court had found that "there was separation but not equality"—a slick way of avoiding the Court's holding that it was precisely the sort of separation imposed on McLaurin that constituted the inequality. But the Virginians, for all their confidence in the historical and judicial evidence, could do little to cover their point of gaping vulnerability: what real justification was there in 1953 for a state to segregate its schoolchildren? "The record in this case abounds with testimony as to the reasonableness of school segregation," the Virginia brief insisted. But, on examination, all that that testimony came down to was the claim by a number of state officials and a pair of Virginia-born white psychologists that separate schools were "in the best interests of both races" and that "the general welfare" of the state would likely be harmed by ending the practice. If Virginia had produced documentary evidence to show that all Negroes were so mentally and morally inferior that the very presence of any of them in the same schools with white children would pollute the learning atmosphere, the state might have been able to argue legitimately that a reasonable basis existed for segregation. No such evidence was ever unearthed.

The Davis firm's brief in the South Carolina case was more concise and less strident, but it did not blanch in declaring that it was "the expressed intent of the framers" of the Fourteenth Amendment not to abolish segregated schools—a claim lacking documented foundation, just as the opposite claim could not have been (and finally was not) made by the NAACP.

The Kansas and Delaware briefs echoed the positions in the two Southern briefs for the most part. Delaware was rather more adamant about it. "The original reason for allowing segregation in the public schools undoubtedly was the feeling that there was such a degree of prejudice that the system of mixed schools did not work and that the school system and education of the people as a whole would suffer," the Delaware brief of Attorney General Albert Young stated. "There is nothing in the record to show to this Court that the situation has changed sufficiently to invalidate this reason." Two things were noteworthy in such a statement. First, there were no historical grounds for suggesting that "the system of mixed schools did not work" in the segregating states because in none of them had truly mixed schools ever really been established widely or on a sustained basis. Second, even if that statement had been historically valid for the years

immediately after slavery, could it be said that the Supreme Court should have continued to acknowledge the legitimacy of "such a degree of prejudice" nearly a century after the freeing of the slaves?

The government of the United States, newly under the command of Dwight Eisenhower, was not sure how to deal with the school-segregation cases. Republicans were in command as well of both houses of Congress for the first time in twenty-two years, and they rather liked the feeling. Eisenhower had managed to carry four Southern states (Florida, Tennessee, Texas, and Virginia), and the political strategists guiding the party's newly minted fortunes were not eager to see them dissipated by a strong administration stand in favor of desegregation.

None of Eisenhower's Cabinet members or White House advisors was more politically astute than his Attorney General, Herbert Brownell, a New York corporate lawyer and an intimate of Thomas E. Dewey. It was Brownell's responsibility to recommend the government's course in *Brown.* Shortly after the Court's reargument order, Brownell, a chilly ramrod, summoned his principal aides to a meeting in his office. Among them were Deputy Attorney General (later Attorney General and Secretary of State) William P. Rogers, Assistant Attorney General (later Solicitor General) J. Lee Rankin, Assistant Attorney General (later Chief Justice of the United States) Warren E. Burger, and two Truman-administration holdovers specializing in civil rights, Robert Stern and Philip Elman of the Solicitor General's office. "Their prevailing attitude," recounts Elman of his new Republican superiors, "was expressed by Rogers, who said in effect, 'Jesus, do we really *have* to file a brief? Aren't we better off staying out of it?' Stern and I told them that the Court's invitation to appear at the reargument was tantamount to a command. And there was no point in declining to submit a brief by way of avoiding taking a position on the merits because the question was sure to be raised at the oral argument in view of the prior administration's record of having come out for overruling *Plessy.*"

For a time, Brownell made no move at all other than to pull the case out of the Solicitor General's office and bring it directly under his own wing in the person of Rankin, a native Nebraskan (like Brownell) who had practiced in Lincoln for the previous twenty years and could be counted on to honor the chain of command. An uneasy relationship formed in those midyear months between Rankin and Elman. To Elman, the Republicans seemed unsophisticated and sanctimonious. "They've been out in the wilderness [so long] . . . they've come to believe their own propaganda," he confided to Felix Frankfurter. "Rankin, for example, thinks that there is a distinguishing characteristic of the 'New Deal–Fair Deal' type of person. Such a person, he told me, believes in the philosophy that the end justifies the means. The Republicans—and this too was said with a straight face—do not share that philosophy."

Principled or otherwise, by a month after the first meeting in Brownell's office, the Attorney General had apparently not made up his mind on the segregation cases. Though Rankin was plainly in charge "of whatever-it-is

that we'll be doing," Elman advised Frankfurter in mid-July, "the fact is that as of now the Government of the United States of America has done almost nothing in response to the Court's invitation." Part of the reason was indecisiveness at the top. "Eisenhower was committed to the abolition of segregation," says one of his closest and most powerful White House assistants of that period, "but he did not believe that this ought to be the result of any summary court order applying to immediate termination of every vestige of segregation." While the President favored prompt desegregation of colleges and secondary schools, according to this knowledgeable assistant (who declines to be named), "he thought that in the primary schools a more gradual approach would diminish the probability that severe and very likely violent opposition would result in the event that little children were forcibly intermingled." The assistant adds that "Eisenhower's advisors differed among themselves" and that "the Department of Justice was more eager to promote a definitive resolution of the matter than was the Executive."

By the end of July, the government was finally ready to move. Having dithered for the better part of two months, Brownell acted first to get more time from the Court, and in view of the Justices' jumbled feelings on the cases, they did not seem to mind postponing the reargument for two months. Chief Justice Vinson, not eager for the showdown, granted the request. At the Department of Justice, Rankin gave the go-ahead to Elman, whose work earlier that year in the *Thompson* case, in which the Court had voted to uphold a nineteenth-century statute prohibiting Jim Crow restaurants in the District of Columbia, apparently pleased the Assistant Attorney General. Elman, with a staff of eight under him, produced a massive brief of more than 600 pages. It managed to avoid saying outright on any of them that school segregation was wrong and ought to be outlawed then and there by the Court—but it came very close. When it left his desk to go to Brownell's office and then the White House, Elman's brief "to my best recollection" stated that segregation was illegal and ought to be stopped. But Brownell later advised Anthony Lewis of the *New York Times* that the Elman draft "did not include any such conclusion . . . when it reached my desk and, so far as I know, never did include it. Mr. Rankin . . . and I agreed at all times that since the brief was filed in direct response to questions asked of the department by the Court, it should answer those questions solely."

That the government's written argument did not come out foursquare against segregation was not of great concern to Elman, who titled the new document a "Supplemental Brief" to the Justice Department's 1952 brief and proceeded on the assumption that nothing in the 1953 brief was intended to weaken the unequivocating stand of the earlier one. "No attempt has been made to re-examine other questions briefed and argued at the last term," Elman wrote on the second page of the new brief, which he described a few lines earlier as "an objective non-adversary discussion of the questions stated in the Court's order of reargument."

Elman's brief, filed in late November, did not seem very objective to the South. Examination of all the historical evidence, said the United States

brief, disclosed that there were so few specific mentions in Congress or the ratifying state legislatures of the Fourteenth Amendment's possible or intended effects on education that it was impossible to draw "a definite conclusion" regarding the framers' intentions or the understanding of them in the states. Nor would the government grant that any "persuasive inference" could be drawn from congressional approval of school segregation in the District of Columbia at the time of the amendment's passage or later. The Fourteenth Amendment was not much alluded to during the congressional debates over Charles Sumner's civil-rights bills that would have outlawed segregation in the District as well as the states. What evidence there was suggested that Congressmen who declined to vote to prohibit segregation in public schools might have been persuaded by the declarations of their Southern colleagues that such an action would doom public education in the South—a none too sturdy institution as it was. Then, too, it was important for the Court now weighing the wisdom of continued segregation to recall the state of public education at the time of the amendment:

> In 1868 public schools had been hardly begun in many states and were still in their infancy. School attendance was, as a general matter, not compulsory. The Negroes had just been released from bondage and were generally illiterate, poor, and retarded socially and culturally. To educate them in the same classes and schools as white children may have been regarded as entirely impracticable. It is possible that state legislatures—while recognizing in the Fourteenth Amendment a clear mandate of equality—may have considered separate schools for colored children as a temporary practical expedient permitted by the Amendment. Many proponents of Negro education regarded separate schools as a more effective means of extending the benefits of the public school system to the colored people. . . .

History, then, would not aid the Court in determining "the application of the Amendment to the question of school segregation as it exists today, when school attendance is compulsory and there are no considerations of an educational character which warrant separation of children of different races in public schools." What the legislative history did suggest was that the Congress which proposed it understood not that the Fourteenth Amendment would abolish segregated schools but that it "established the broad constitutional principle of full and complete equality of all persons under the law, and that it forbade all legal distinctions based on race or color."

In short, the government essentially agreed with the NAACP.

The summer of 1953 provided a welcome respite for the members of the Supreme Court. The previous term had ended with the segregation cases dangling in irresolution and the painful intra-Court clash over the fate of Julius and Ethel Rosenberg, convicted of atomic espionage.

Never before in American peacetime had civilians been executed for espionage. On seven occasions, the Supreme Court had acted on motions by the Rosenbergs' lawyers. On the first one, in October of 1952, only Justice Black voted to grant *certiorari* to review the trial and conviction. On the final

occasion, at a special session of the Court in mid-June of 1953, Black had been joined by Douglas, who had granted a short stay of execution so that the Court might review the applicability of a 1946 atomic-energy act that provided for the death penalty in espionage cases only on recommendation of the jury—and no such recommendation had been made in the Rosenbergs' case. Vinson wrote for a six-to-two majority, holding that the 1946 act had not mitigated a 1917 espionage act. Frankfurter neither concurred nor dissented, but wrote an enigmatic memo promising to elaborate at a later date; he finally dissented—after the switch had been pulled on the Rosenbergs at Sing Sing. At one point during the motions before the Court, Jackson had joined the old Roosevelt civil-libertarian bloc of Black, Douglas, and Frankfurter, though in the end he sided with the anti-libertarians, of whom only Burton cast a single pro-Rosenberg vote during the course of the Court's ordeal in the charged, divisive case. The net effect of the Justices' deliberations had been to strain further their ideological and personal relationships.

Summertime was generally slow at the Court. Most of the Justices would be out of town until September: In their chambers, the new crop of clerks would be reviewing "cert" applications for recommended disposition by the Justices at the beginning of the October term. At least one outgoing clerk, though, spent the summer of 1953 wrapping up a piece of important unfinished business that was to have its value in the Court's final deliberations on *Brown*.

Alexander Bickel was one of the most gifted young men ever to clerk for Felix Frankfurter. There was a quality of intensity and mental agility about the twenty-eight-year-old Harvard Law graduate that the Justice admired, and Bickel's skill as a writer added to his usefulness. Early in the 1952 Term, Frankfurter had given the clerk an open-ended assignment: he was to do appropriate background reading and then go over every word spoken during the congressional debates in order to advise the Justice on the original understanding of the framers of the Fourteenth Amendment—a project that precisely presaged the research that would be carried on by the litigants and Elman's crew of government lawyers the following summer.

It took Bickel nearly a year to complete his assignment. He was never under any deadline pressure from Frankfurter, who made it clear that he wanted the best piece of work of which the clerk was capable. "But I suppose if it looked as if a decision had to be reached that term, I would have been speeded up," Bickel remarked. He kept beavering away at the project throughout the term. The Court library trundled in a new cartful of *Congressional Globe*s every time Bickel finished another batch of note cards on his typewriter. The cart of *Globe*s beside his desk became a part of Bickel's furniture that year.

Bickel finished up his project late in August, his last piece of work before leaving Frankfurter's employ. The Justice was so impressed by the Bickel memorandum that, after doing a bit of polishing, he had it set in type in the Court's basement print shop and distributed among the Justices a few days before the *Brown* reargument in early December. It was one way the Justice

apparently hoped to sway his brethren, though the Bickel memo was hardly free of the ambiguities confronting any scholar trying to resurrect the past at the distance of nearly a century. Indeed, it was his dissection of the ambiguities, especially as encountered in the sometimes filmy words of Representative John Bingham, who played the critical role in the shaping of both the Civil Rights Act and the Fourteenth Amendment, that made Bickel's nuanced reading of the debates particularly useful. In effect, Bickel disputed the conclusions of all three participants to the *Brown* litigation—the NAACP, the pro-segregationists, and the government—as well as those of earlier historical commentators for tending to oversimplify Bingham's position.

It was by no means certain, Bickel contended, that Bingham's key intervention in moving to strip the Civil Rights Bill of its "no discrimination" clause was based solely on his belief that Congress lacked constitutional authority for such a step. Bickel found evidence that Bingham was concerned about the ends sought as well as the means used in the bill. The congressman, "a man not normally distinguished for precision of thought and statement," as Bickel remarked, indicated that he sought to make the bill less "oppressive" and less "unjust" in urging that it be stripped of its blanket civil-rights coverage. And if Bingham had objected to the bill on policy as well as strictly legal grounds, then the argument by Alfred Kelly, John Frank, and other scholars that Bingham promoted the Fourteenth Amendment mainly to cure the constitutional infirmities of the Civil Rights Bill would be thrown into serious question. On the other hand, Bickel was not smitten by the argument, to be insisted upon by the South's lawyers in *Brown,* that it was the intention of Bingham and other framers of the amendment to do no more than constitutionalize the rights bill, though it surely had that effect as a minimum. In a trenchant letter transmitting his noteworthy memorandum, Bickel wrote to Frankfurter:

> . . . Section 1 of the Amendment was passed to the refrain of assurances and accusations that it embodied the Civil Rights Act. Little regard was had for language by a Congress not notable for the presence in its membership of very many brilliant men. A blunderbuss was simply aimed in the direction of existing evils in the South, on which all eyes were fixed. There were a few muted warnings that the language was broad, but in the hurry of it in the end no one cared much. The dangers to which broad language might lead were distant anyway. It was preposterous to worry about unsegregated schools, for example, when hardly a beginning had been made at educating Negroes at all and when obviously special efforts, suitable only for the Negroes, would have to be made. . . . In any event, it is impossible to conclude that the 39th Congress intended that segregation be abolished; impossible also to conclude that they foresaw it might be, under the language they were adopting. What was in Bingham's mind, God alone knows, and in any event Bingham was unable to impart it to the House.

But that was not the end of it so far as Bickel was concerned in suggesting how the legislative history might affect the Court's handling of the school-segregation cases. It was doubtful that an explicit "no discrimination" provision going beyond the enumerated rights in the Civil Rights Bill as

finally enacted could have passed the Thirty-ninth Congress, Bickel suspected, nor was it likely that the plenary grant of legislative power in the first Bingham draft of the amendment ("The Congress shall have power to make all laws . . . necessary . . . to secure to the citizens of each state all privileges and immunities of citizens in the several states . . . and to all persons . . . equal protection in the rights of life, liberty, and property") would have attracted a majority in both houses. "But may it not be," Bickel wrote in a revision of his memo that appeared in the *Harvard Law Review* two years later, "that the Moderates and the Radicals reached a compromise permitting them to go to the country with language that they could, where necessary, defend against damaging alarms raised by the opposition, but which at the same time was sufficiently elastic to permit reasonable future advances?" Or, as he put it in his farewell letter to Justice Frankfurter: "I think the legislative history leaves this Court free to remember that it is a *Constitution* it is construing. I think also that a charitable view of the sloppy draftsmen of the Fourteenth Amendment would ascribe to them the knowledge that it was a *Constitution* they were writing."

In summary, then, the Bickel-Frankfurter memo as circulated to the Justices held that the legislative history, while revealing no evidence that the framers of the amendment had intended to prohibit school segregation, did not foreclose future generations from acting on the question, either by congressional statute or by judicial review.

The second-busiest clerk at the Supreme Court that summer, in all likelihood, was John Fassett, Justice Stanley Reed's new assistant. A native of the Hamptons on eastern Long Island and a graduate of Yale Law School, where Reed himself had gone, Fassett was put to work chasing down various data that the Justice asked for in helping to strengthen his view that the *Plessy* doctrine was not, in and of itself, a denial of equal protection to segregated Negro schoolchildren. It was not a position that Fassett favored, but he went about his task with diligence. "I was there to assist him," he says in retrospect. "I recognized that it was going to be a difficult decision for him."

Most of the summer, Reed was away from Washington, visiting part of the time with his kin in and around Maysville, Kentucky, but he kept peppering his staff for memos on the segregation cases. First he wanted a rundown on all Court cases in the previous decade involving alleged denial of due process by a state government or one of its subdivisions. Then he wanted a comparison of crime among whites and Negroes in comparable-sized cities tabulated according to whether Jim Crow was practiced in them or not (e.g., Louisville vs. Cincinnati, New Orleans vs. San Francisco, Baltimore vs. Pittsburgh). In mid-August, he wrote in to ask for an updating of attitudes of other nations toward segregation as manifested in the evolving draft of the United Nations Declaration and Covenant on Human Rights. The UN had expressed no interest in the abolition of segregation, Reed was convinced, and remarked in his letter, " 'Segregation' as now presented does not mean 'discrimination' to me. . . ." Earlier in the summer, he had written, "If anyone thinks segregation is discrimination they have decided

the segregation issue against segregation. That is the argument of the N.A.A.C.P. The S.C. rule for 75 years has been 'separate but equal.' No discrimination. . . ."

Justice Reed returned to Washington to stay just before Labor Day. He soon met with Fassett, who gave him the results of the UN and crime research projects and then inquired whether the Court was going to deal directly with the issue of the continued vitality of *Plessy*. "He replied in the affirmative," Fassett recalls, "and added, '*They* know they have the votes and they are determined to resolve the issue.' " Fassett, who was less outspoken in his opposition to Reed's view of the case than the Justice's clerks had been in previous terms, ventured the thought that "the result *they* sought to achieve was desirable." Reed replied that "he did not conceive that to be the criterion of the Court's function, and he asked me whether I was also in favor of 'krytocracy.' He directed me to one of his favorite sets of books, the Oxford English Dictionary, from which I learned that 'krytocracy' means government by judges."

It was during that initial conversation that Reed disclosed his expectation that Chief Justice Vinson and at least one other member of the Court, perhaps Justice Minton, might join him when the crucial vote was taken in *Brown*.

All such bets on the alignment of the Court ended abruptly a few days later when the single most fateful judicial event of that long summer occurred. In his Washington hotel apartment, Fred M. Vinson died of a heart attack at 3:15 in the morning of September 8. He was sixty-three.

All the members of the Court attended Vinson's burial in Louisa, Kentucky, his ancestral home. But not all the members of the Court grieved equally at his passing. And one at least did not grieve at all. Felix Frankfurter had not much admired Fred Vinson as judge or man. And he was certain that the Chief Justice had been the chief obstacle to the Court's prospects of reaching a humanitarian and judicially defensible settlement of the monumental segregation cases. In view of Vinson's passing just before the *Brown* reargument, Frankfurter remarked to a former clerk, "This is the first indication I have ever had that there is a God."

25

Arrival of the Superchief

Fred Vinson was not yet cold in his grave when speculation rose well above a whisper as to whom President Eisenhower would pick to heal and lead the Supreme Court as it faced one of its most momentous decisions in the segregation cases. The members of the Court themselves were hardly immune from this instant epidemic of curiosity.

The day after the funeral, Harold Burton noted in his diary that he and Justice Jackson had discussed the subject. Burton, as the only Republican on the Court, became by that fact alone an immediate candidate for elevation to the Chief's chair by a Republican President. Jackson confided that he would be happy if the mantle were to pass to Burton, though both men agreed that Earl Warren, governor of California, was the most logical candidate. At breakfast on Saturday morning, September 12, with Justice Black, Burton again discussed the subject. Black echoed Jackson's satisfaction with the thought of Burton's elevation to Chief, according to Burton's diary, and there is scant reason to doubt the sincerity of either Jackson or Black, for Burton's personality was surely the least abrasive of any on the Court. His intellectual capacity, however, hovered near the bottom, and his assumption of the Chief's spot would almost surely have invited a mortal clash for his judicial soul by the Big Four Roosevelt appointees. The Washington *Post* that Saturday morning carried a United Press article stating that Jackson, in view of his widely recognized brilliance and conservative swing in the post-war era, was a leading contender to take Vinson's place, and Burton told Black that that would be fine with him. Burton was too kind a man to have been needling Black with such a remark, so one is left to conclude that the earnest Justice from Ohio did not know how unappealing the elevation of Robert Jackson to Chief Justice would have been to Hugo Black. Black confined his response to the thought that no Democrat was likely to be chosen and that, at any rate, it was better for the Court to reach outside for a new Chief. Warren, they both agreed, would be the best choice.

Eisenhower, in his memoirs, recorded the qualities he ranked highest in considering candidates to head the Court: character and ability that would inspire "respect, pride, and confidence of the populace" came first. Then he looked for high ideals, a moderately progressive social philosophy—a middle-of-the-roader, in other words, in his own image—and a substantial ration of common sense. Judicial experience would be helpful but not