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# Panel Discussion

# A SYMPOSIUM

# *Brown v. Board of Education*: An Exercise in Advocacy

## A TRANSCRIPT *FEATURING* WILLIAM H. HARBAUGH, E. BARRETT PRETTYMAN, JR., MARK O. TUSHNET, LELAND B. WARE, JOHN O. COLE, *MODERATOR*, AND A SPECIAL VIDEO PRESENTATION BY OLIVER W. HILL

*MR. SMITH*: Good morning everyone, and welcome to *Mercer Law Review*'s symposium on *Brown v. Board of Education*: An Exercise in Advocacy. I want to thank everyone for coming out this morning. Thanks to our panelists for being here this morning. I also want to thank Suzanne Cassidy in our Law Library for helping us set everything up, and Laura Kostovetsky in the Dean's Office for helping set everything up. And, of course, thanks go to Yonna Shaw for helping make this symposium happen. Thanks to all the Law Review members who have helped carry the participants back and forth and make sure everybody is where they need to be. Thank you very much.

I'm going to let Billy Miles, our Lead Articles Editor, introduce our panelists, and then we'll get right into the program. Billy.

*MR. MILES*: Good morning. I'd like to thank so many people for being here today. I realize many of you are missing class, and some of you are missing work, which I'm sure is not all bad. But I'm here to introduce our panelists.

We had one panelist who was supposed to be here but because of health problems we had to do an interview with him instead. Tanya Davis, our Barbara Walters of Mercer Law School, was kind enough to visit Oliver W. Hill and interview him at his home.

Oliver W. Hill earned his dual degrees at Howard University as an undergraduate and from the Law School in 1933. He is a member of the law firm of Hill, Tucker, and Marsh in Richmond, Virginia. Since the mid-1930s he has worked tirelessly in activities that have as their objectives the securing of all rights incidental to the first class citizenship for African Americans.

Some of the landmark cases in which Oliver Hill participated on behalf of African Americans involved such diverse matters as equalization of salaries for public school personnel, inclusion in the programs of free bus transportation for public school children, equalization of public school facilities, and the rights of African Americans through organizations like the NAACP to assert their constitutional rights and seek redress of their grievances in the courts.

On August 16, 1996, the new Juvenile and Domestic Relations Court Building in Richmond, Virginia was named the Oliver W. Hill Courts Building. In August 1999, Mr. Hill received the Presidential Medal of Freedom, the highest civilian award in America. In July 2000 Mr. Hill received the American Bar Association Medal.

His recently published autobiography, *The Big Bang: Brown v. Board of Education, The Autobiography of Oliver W. Hill, Sr.*, was published in 2000 and edited by Professor Jonathan K. Stubbs.

Professor William H. Harbaugh, sitting here to my left, graduated from the University of Alabama in 1942, received his masters from Columbia University in 1947, and his Ph.D. from Northwestern University in 1954. He served as an Artillery Officer in Europe during World War II for three and a half years.

Professor Harbaugh is Professor Emeritus of History at the University of Virginia. He taught at the University of Virginia from 1966 to 1990. He was Senior Fellow at Yale Law School from 1960 to 1961. His book on John W. Davis, published in 1973, *Lawyer's Lawyer*, was nominated for the National Book Award and was runner-up for the Pulitzer Prize.

Mr. E. Barrett Prettyman graduated from Yale University in 1949 and received his law degree from the University of Virginia School of Law in

1953, where he was an editor of the *University of Virginia Law Review* and a Moot Court winner. After law school he was a law clerk successively to Justices Jackson, Frankfurter, and Harlan of the United States Supreme Court.

He joined Hogan and Hartson in 1955, after his clerking experience during the 1954 and 1955 terms, and he has remained with the firm since that time, except for approximately three and a half years in government.

He has been counsel in over 150 matters before the United States Supreme Court, personally arguing 19 cases before the Court. He is one of five national recipients of the 1999 Common Cause Public Service Achievement Awards, was named "Lawyer of the Year" in 1998 by the D.C. Bar Association, and received a Distinguished Public Service Award from the government of the District of Columbia in 1999. He is listed in *Who's Who in the United States.*

Professor Mark O. Tushnet graduated from Harvard University in 1967 and received his masters, as well as his law degree, in 1971 from Yale University. After receiving his J.D. from Yale, Professor Tushnet served as a clerk to United States Supreme Court Justice Thurgood Marshall from 1972 to 1973.

He joined the faculty at Georgetown University Law Center in 1981. Professor Tushnet is the Carmack Waterhouse Professor of Constitutional Law and Associate Dean of Research at the Georgetown University Law Center. He has published a number of casebooks and he has also published books that include: *The NAACP's Legal Strategy Against Segregated Education 1925-1950*, which received the Littleton Griswald Award of the American Historical Association; *Red, White and Blue: A Critical Analysis of Constitutional Law*; *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961*; *Making Constitutional Law: Thurgood Marshall and the Supreme Court 1961-1991*; and *Taking the Constitution Away from the Courts.*

Professor Leland B. Ware received his J.D. from Boston College in 1973. He is the Louis L. Redding Professor of Law and Public Policy at the University of Delaware. He has published a number of articles in scholarly journals on various civil rights topics including, among other things, affirmative action, employment discrimination, housing discrimination, discrimination issues in higher education, and legislative programs for minority business enterprises. He was a professor at St. Louis University School of Law, as well as a visiting professor at Boston College in 1992 and a visiting professor at Ruhr University in Bochum, Germany in 1997. Professor Ware serves on the Board of Directors of the national office of the American Civil Liberties Union.

Our own Professor John O. Cole has agreed to be our moderator. He received his A.B. from Duke University in 1958, his masters from Indiana University in 1962, and his J.D. from the University of Pennsylvania in 1970.

We hope you enjoy our symposium. And, again, we thank so many people for being here today.

*PROFESSOR COLE*: Okay. We're going to begin with a video presentation and ask the panelists to sit out front so we can see it for the first time before we get to our speakers.

(*First of Three Video Presentations of Interview With Oliver W. Hill*)

*VOCALISTS*: Freedom. Freedom. Oh, Freedom.

*MS. DAVIS*: Hi, Mr. Hill. I'm Tanya Davis, and we're doing a symposium on the *Brown v. Board of Education* [347 U.S. 483 (1954)] litigation. Our focus is the actual strategy used in litigation and how that possibly, in your opinion, changed the way lawyers practice today.

*MR. HILL*: Well, see, you've got to recognize the fact that it was different times. Back then you try to look at the situation and recognize the fact that to challenge segregation per se at that time, in the 1930s, was like banging your head up against a stone wall. In the *Plessy v. Ferguson* case [163 U.S. 537 (1896)], the decision said it was all right to save the negroes but separate them.

So I took the challenge at this point to respond to the inequality. There was nothing equal. Everything of any consequence per se, and even in some places water fountains were segregated. Restrooms, they had restrooms for white ladies and white gentlemen, colored men and colored women and all that kind of foolishness. They had up-to-date water fountains but they were vastly different—the water fountains for negroes. In some places they wouldn't even let negro women try on dresses or hats or that sort of thing. It all, of course, depended on where you were and what have you.

But, anyway, what I want to point out is that situation was such that we had to adopt a strategy to cope with the situation. And another point, we recognized we not only had to educate the negroes, we had to educate white folks and we had to educate the courts. So, therefore, we brought suits challenging saying it was unconstitutional because it was unequal. And one of the hardest problems, it wasn't that easy for us to prove that it was unequal because with regards to—Everybody

recognized the fact that it was unequal except the died in the wool segregationists that didn't think negroes ought to have anything education-wise to start out with.

One of the earliest suits that we filed was teachers' salaries. And I don't remember what the scale was in Norfolk at that time—we filed suit against Norfolk—but I remember at the same time, in 1940, that I filed suit here in Richmond, teachers, negro teachers, their beginning salaries ranged from $350 to around $399 for a nine-month term. They went up gradually to $999. That was the highest negro salary. White salaries started at $1,000 and went up to $1,700 and $1,800. Now that kind of disparity existed all over.

*MS. DAVIS*: Why did your team, the NAACP, begin the strategy to desegregate at the graduate level rather than the public school level?

*MR. HILL*: Well, see, these things were simultaneous. We went to the graduate level because we figured that if you could challenge, we were still challenging inequality now, we didn't challenge per se. The first case that Charlie was successful in was *Gaines* [*v. Canada*, 305 U.S. 337 (1938)]. That was a law school case in Missouri where Gaines had applied to the law school and they offered to send him to an Iowa law school, and he refused that and filed suit, and Charlie argued the case in the Supreme Court. And we won the first case in the new court building. Prior to that the Court used to be over in the Capital in the basement.

But, anyway, a whole lot of attorneys turned around and looked at the wall. He had his back to Charlie. I mean that's someone sitting on the Supreme Court of the United States.

And then another thing, in order to answer your question, the reason we tried graduate education because people were grown and encountered less resistance in the schools. But even in the graduate classes—McLaurin—they had him sitting outside the class. And in the lunchroom, they had him sitting outside the dining room and all that sort of, you know—that was in the late 1930s.

But the best evidence you want of the fact that Charlie's judgment was correct was that after we had been fighting litigation on probably anything and everything you could imagine for twenty-two years, we finally got the Court to overrule *Plessy v. Ferguson*, we ran into massive resistance. And that was after twenty-two years. So you knew we would have really had it if we had gone into it challenging segregation per se back in the early 1930s when we got started.

*MS. DAVIS*: Now, you brought the *Prince Edward* case [*Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964)], right, in Virginia?

*MR. HILL*: Yes. Spot and I and others brought it. He's a judge, a federal judge now. But, yes, he was Thurgood's assistant at that time. Of course, in the early days, it was known as Legal Defense. Legal Defense was founded by negroes, by the NAACP, in order to get money in Texas. It was almost one organization. Thurgood was general counsel for the NAACP and he was general director of the NAACP Legal Defense and Educational Fund.

*MS. DAVIS*: Now, can you tell us about the *Prince Edward* case? Is that the first, that was challenging segregation per se at that point, correct?

*MR. HILL*: Yes. Well, one so-called high school was built in 1939, and on the day that it was opened it was over-crowded, which shows you how much planning went into developing the schools. And it had a very strong NAACP person there named Dr. Miller. He was a dentist. And he had me come down and appear before the school board for him.

They didn't allow that in those days because negroes would go into before the board of supervisors or the school board and they'd want to know what did they want? "Yeah, we'll look into that. We're going into executive session now." And they would shoo them out of the room. So to at least get the message over, a lot of times I'd go and appear before them and argue the situation for them. At least they'd sit there and listen to what I had to say until it was over.

And, as I told you, it was over-crowded the day it was opened. So to beat that situation they started to build some tar paper shacks and then ran pipes from one to another and had oil, big oil bins, drums rather, to provide heat. And during the bad weather the kids would have to come out of one building and walk through the mud and rain and go in these other buildings. And then, of course, that kind of heat was uneven. It was just a health hazard. The situation had really been terrible for years. And the only solution they gave to it was to continue to put up these old shacks.

And then in 1950 or 1951—I can't remember the exact year; I think it must have been 1950—a young girl, Barbara Johns, organized the kids in the school and they decided—got the principal down to the Superintendent's office—that they'd all walk out. But I don't think any of the

teachers or the principal had any idea about what they were doing. And they went on strike.

And as a consequence, the day they went on strike, Barbara called our office that evening about 5 o'clock. And it just so happened that Spot and Martin and I were sitting there working on motions for further relief in a case known as *Corbin v.* [*County School Board of*] *Pulaski* [*County*, 177 F.2d 924 (4th Cir. 1949)]. We had tried the case and the court had ruled against us on high schools. And we had appealed to the court of appeals and the court of appeals had reversed the case, but they still hadn't done anything about the situation. So we were planning to go up to Christiansburg to take further evidence. We were going to carry a photographer like you all got here now.

And, anyway, Barbara told me what they had done and I congratulated them and I told them that now they had made their point, go on back to school. And she breathed kind of hard, so I pointed out to her that we had already tried a case down in Clarington County, South Carolina, challenging segregation per se, and we didn't need but one suit to establish the precedent.

But, anyway, to make a long story short, she was pleading so strongly, so I said, "Well, all right, I'll tell you what we're going to do. We'll be coming through Cromwell on Wednesday morning. We'll leave a little early and stop by and talk to you. And we'll meet you at Reverend Griffin's church." And that's what we did.

But, of course, on our way up there, prior to going to the church, we told the kids to go on back to school. But when we got there, the kids were so well organized and their morale was so strong that we just had, we didn't have the nerve to tell them, to refuse them, I reckon. So we told them that if their parents, we weren't trying separate but equals anymore, but if their parents would back them on a suit challenging the unconstitutionality of segregation we would take the case; that we were on our way to Christopher, and we'd be coming back through there Thursday night. So if they'd have their parents there, we'd discuss it then.

So that's what happened. On Thursday night we came back through there. They had their parents, and their parents all agreed to support their children. One of them said, "Well, you know, this is going to be a county-wide situation. Maybe we ought to get a county-wide vote on it." So we decided that was a fine idea. This was a Thursday night. So we set up a meeting for not the next day, the next Friday, I mean the Friday of that week, but Friday of the week hence, and Spot and I went back down there and the church was packed to the rafters.

And to make a long story short, after everybody had their say, they voted almost unanimously to go forward with the suit. As a matter of fact, the only opposition, really, was a man who was principal of the school over in Cumberland County but who lived in Prince Edward County. And he was stating we ought to—well, he had two or three folks saying we ought to push along a little longer with the separate but equal and we'd get some new schools this way. But we noted that the new schools we were getting were just new, segregated, unequal schools.

But what prompted us to challenge segregation per se at the time we did was in 1950 we had a case down in Texas, San Antonio—and when I say, "we," I mean the NAACP—I was not involved in this particular case.

*MS. DAVIS*: *Sweatt v. Painter* [339 U.S. 629 (1950)]?

*MR. HILL*: That's right, *Sweatt v. Painter*. And Chief Justice Vinson in his opinion went right down the line with the cases we had recognized in our briefs as to what constituted a first class law school. See, down there what they had done was they got a little store front and put one teacher over there and a couple of books, and said that was an annex to, that was part of the Texas Law School. And we pointed out all the factors that we had taken into consideration: the number of members of the faculty, the library, the prestige of the school, all the sort of things that go into making a first-class law school. And the Court agreed with us.

So we decided now, since we had Vinson, that now was the time for us to challenge segregation per se. And that's when we filed the five suits in the elementary school level.

*MS. DAVIS*: As far as the litigation strategy in challenging segregation per se, what changed? I know at that point you guys used sociological evidence for the first time and psychological evidence.

*MR. HILL*: Yes, that was the first time we used that. But we, see, we really didn't need it to try to prove our case. As a matter of fact, the first case I tried, all I used was Cromwell's report, Secretary Cromwell's report, which carried the statistics on the various things like schools, education facilities, all broken down in counties to how much money was spent on white folks, how much was spent on negroes, what they provided for negroes and what they provided for whites. And things just, they just laid it out for themselves. So I just introduced the report in Court. I put the superintendent on the stand and questioned him as

to what they did, did they follow this. Well, of course, he had to admit it.

One time in a case, the Superintendent of King George County was on the stand, and I asked him, I said, "Why are you all," of course it was a common practice in Virginia to name secondary schools for white children high schools and schools that you have for, secondary schools for negroes are called training schools. He said, "Because we train them to get, do things that they can get jobs doing." And all that was thinking about was getting them menial jobs.

*MS. DAVIS*: How did you feel about using the sociological evidence?

*MR. HILL*: We thought it was a wonderful idea. I don't know whether it was Johnny Davis who taught at Lincoln at that time, who originated the idea. I can't remember now, or whether it was Bob Carter. But, anyway, between them they came up with this idea. And then, of course, his wife's name is Mabel. I can't think of his name right now. What is his name? But, anyway, he used the psychological —

*MS. DAVIS*: Ken Clark?

*MS. DAVIS*: Ken Clark, yes. He used the psychological experiments to show how negro children regard themselves as being bad and evil and all of that and whites as being good, which is reasonable and understandable. They had the best of everything and the negroes didn't. It looked like there must have been some reason for it.

(*End of Part I Video Presentation*)

*PROFESSOR COLE*: I liked the reference there to building a new school in 1939 which was over-crowded the day it opened. There's been a lot of changes since 1939, but one thing's constant, they're still building schools that are over-crowded the day they open in 2001.

Okay, let's get to our main presenters. We've asked them to do twenty to twenty-five minutes on their specialty. It'll be a fascinating story as it unwinds. And we'll start with Mr. Prettyman. He'll stay at the table and speak from there.

*MR. PRETTYMAN*: Well, I thought I would give you a kind of overview of my experience at the Court. I hope that will generate some questions a little bit later.

The most important decision in the entire *Brown* case was made before I ever got there, and that was to take the cases, because once the Court decided to grant certiorari in those cases, you can argue that the dye was cast and that in the world of the 1950s there was no way it could come out differently.

Perhaps it could have come out with all kinds of dissenting and concurring votes, but even though we can look back today and say the dye was cast, it certainly was not clear at that time what was going to happen. The first argument was over several days, December 9th to 11th, in 1952. The Court took no vote. It was entirely unclear from the discussion among the Justices how this was going to come out. The best guess at the time was that there were at least a couple of votes to affirm *Plessy* and maybe as many as four to reverse, with three Justices somewhat up in the air.

In any event, they decided to have the case re-argued, so they were restored to the docket. And the main question that was presented for re-argument, because in order to have re-argument they had to have an excuse, so they came up with some questions that they wanted the advocates to address, centered around the meaning of the Fourteenth Amendment, what had the framers intended at the time the Fourteenth Amendment was put into effect.

It was at that stage that I arrived at the Court, in July of 1953, before the re-argument. I had been there only a few months. My father had known Chief Justice Vinson, and I had gone in to see the Chief Justice and we had a nice chat and so forth. Shortly thereafter he died. And that occasioned Justice Frankfurter's famous remark that that proved to him that there was indeed a God because Chief Justice Vinson's demise brought on board in a few months Chief Justice Earl Warren. And the whole attitude toward the case really began to change with the arrival of the new Chief Justice.

He received an interim appointment, incidentally, and so he was not confirmed at the time of the re-argument. The re-argument was fascinating, primarily because of the different styles of the various advocates. Thurgood Marshall had a very different style, certainly, from John W. Davis. And some of the others had different styles as well.

Again, after that argument there was no vote. But, as best my Justice, Justice Jackson, could sense the mood of the Court, there was at least one vote to affirm *Plessy*, maybe as many as six to reverse with two people up in the air.

I should go back and tell you that my clerkship with Justice Jackson was a little bit unusual in the sense that he had had two clerks each year before, and the two preceding me included William Rehnquist. So

we overlapped for a few weeks. And he told me that, the Justice told me that I could have the job if I agreed to be the only law clerk, which took me about twenty seconds to decide that issue, and I said, "Yes, sure, I'd do that."

It was quite a job because, although today there are some 8,000 certiorari petitions a year, in those days, while there weren't as many, there were about 5,000, that was an awful lot of memos to write, which I had to do all myself. But I did agree to do that. I was his only clerk. And he was someone who worked very closely with his clerk. What he liked best was someone whom he could get along with and talk with, and he loved politics. He loved gossip. He'd come in on a Saturday and put his feet up on the desk and talk about Mrs. Roosevelt and so forth. And he was a genuinely engaging fellow.

A very interesting person education-wise because he had very little education. He never went to college. He only had the one year of night law school. He read law, which you could do in those days. You could go with a law firm and work in the law office and read law and take the Bar. Great days.

And yet, despite the fact that he had so little formal education, he was one of the best writers ever to sit on the Court. A great stylist. He had a wonderfully natural way of writing. But the law clerk's job was a little bit different in the sense that he didn't know all of the rules of grammar or punctuation. I don't mean he was illiterate in any way, he wrote beautifully, but sometimes you really had to be quite careful to correct a lot of minor mistakes someone would make who had not had a lot of formal training.

So, anyway, it was great fun and very interesting to work with him. And at the same time, even though he had a great sense of humor and was outgoing in some respects, he was also a very private individual in other respects.

I once interviewed the people who had worked with him in the Solicitor General's office when he was Solicitor General, because I was doing an article on him as Solicitor General, and they told me that even the people who'd work on the briefs in a particular case had no idea what he was going to argue when he went in to argue the case. He did not confide in any of them. He did not have a moot court. They didn't know which points he was going to pick up and which he was going to drop. So in that sense he was a reserved man who was private at the same time that he was in other respects quite outgoing. I tell you that just so you'll get a feel of my relationship with him at the time.

Well, after the re-argument, the Justices, as I say, did not have a formal vote. And it was at this time that Justice Jackson, thinking that,

indeed, there were going to be a lot of different opinions, decided to write what he called a concurring opinion himself.

What principally concerned him was that the Court was going to find a scapegoat for what had gone on during all these intervening years from *Plessy* on. That it was going to blame the South, for example, for having maintained segregated schools whereas he thought that it was the Court's fault. The Court had misled everybody. The Court, by approving *Plessy* and approving segregated schools, even though it had withdrawn a step here and a step there, had in itself been responsible for what had taken place. And he was not going to stand for the Court making a scapegoat out of anybody. And he wrote this concurring opinion, which quite candidly was not very good because he was writing it for the wrong reasons. He was mad at a majority opinion that had not even been written. He was assuming things that the Court was going to do which it had not decided to do. And it just was not very well done.

I sat in my office responding to that opinion. It was on a Saturday. And to show you how naive I was at that age and in that day, it never honestly occurred to me even once that anyone in the entire world would see that memo except Justice Jackson, including his secretary. I mean I typed it myself. It was just between me and him. And I was very candid in it, and I in effect told him it really wasn't a very good job, and I criticized it word by word and line by line and with some overall comments that the Dean read last night at dinner.

And the reason he was able to read them is that Richard Kluger, when he wrote *Simple Justice*, went to Justice's family, who turned over his papers to Mr. Kluger, and included in there were the unpublished opinion and my memo. So when Mr. Kluger came in to see me to interview me for his book, I said, "Gee, I'm really sorry, but, you know, because of confidentiality, I can't really tell you much." And he said, "Oh, I don't need much. I've got all your memos. I've got practically everything you ever did at the Court. So I only have a few questions for you."

But, in any event, it was at this time that Justice Jackson had a heart attack. And he went to the hospital and the Chief Justice completed a draft of his *Brown* decision and took it to the hospital. I happened to be there at the time and Jackson asked me to leave and go down the hall, and I did. And he spent a little time with Chief Justice Warren, who left him the draft. And then I came back in and Jackson asked me to go read it. I did and came back. He said, "What do you think?" And I said, "Well, it hasn't got much law in it, but I actually think it's pretty good. It doesn't do any of the things wrong that you were afraid might be done."

I have to tell you that I was not an admirer of everything that Earl Warren did. I thought Earl Warren was actually a very tough man. And his style of judging was not always the one that I had grown up with, watching my father and so forth. But he had a genius, I think, for understanding the quasi-political connotations of that case and what it required. And even looking back today and reading it in the light of everything that's happened, I still think it was a work of genius because it was very simple. It stood on one proposition that is awfully hard to disagree with, that if you take people and divide them solely on the basis of race, you are denigrating the race that you are separating from others. How can you possibly disagree with that? The mere act of taking people and dividing them solely, solely on the basis of race, has to be a denial of equal protection.

So what he did, after all of the work that had been done on the meaning of the Fourteenth Amendment, he just put it to one side and said, well, first of all, we're not really sure exactly what they meant by it; and, secondly, it doesn't make any difference anyway because we have to look at things in today's world. Back at the time of the Fourteenth Amendment, education was hardly even a factor in the South, for example, whereas today it's the single most important thing the government does, so we just have to look at things today. And I really, I was a great admirer of that opinion.

Justice Jackson came back to the Court, although his doctors told him not to, in order to be there on the day that the opinion came down. And that was one of the most emotional days of my life. I was there when Earl Warren began reading the opinion.

When opinions came down in those days, they normally went down a chute to the basement, and the press would be down in the basement and would get copies of it as soon as he started to read. In this case, he started to read and nothing was released, and the press had to race upstairs to hear it. And it was not clear for a while which way the Court was going. And then finally the Chief Justice came to a point in the opinion where he raised the question of whether there was, indeed, a denial of equal protection. And when he said we unanimously hold that there is, the whole courtroom went (intake of breath). There was just a big intake of breath. Because the one thing no one anticipated was that it would be unanimous.

So, in any event, I'll wind this down, but six of us clerks were appointed as a special committee with specific tasks to do. My job was to get maps of various cities in the South and try to show the Court where African Americans, who were called negroes at the time of the *Brown* case, where negroes were actually living, where their schools

were, where whites were living, where their schools were, the extent to which they overlapped, and so forth, so that the Court could get a picture of what was really happening. The map I remember best was of Spartanburg, South Carolina, because I got these great maps that had every house in town, and I was able to put it all together and give a really clear picture of where everybody was living and where they were going to school, which always struck me as rather odd, because, of course, the parties never knew about this special clerk committee, and never had a chance to rebut my map of Spartanburg, South Carolina, which may have been way off the mark. But that's the way it happened.

Justice Jackson then suddenly died. I became an extra law clerk to Justice Frankfurter, a very different kind of Justice to work for, but great fun. And then when Justice Harlan came on the Court as Jackson's replacement, he asked me to stay on as his clerk. Again, a very different and interesting man. So I was there at the time of the decree, when the decree came down, all deliberate speed, and we can talk some if you want to later about the things that went into that.

But, in any event, it was a wonderful experience to see that case develop and the extraordinary things that the Court went through and how the Justices viewed it, viewed the case so differently. A Douglas would look at that case 180 degrees from how a Reed would look at that case. And Earl Warren, the reason he deserves great tribute is not only by the way he drafted that opinion, but also the fact that he was able to convince Reed and some others to make it a unanimous opinion.

*PROFESSOR COLE*: Thank you very much. And I'm sure there are a lot of questions, but we'll get to those after our next speaker, Professor Harbaugh.

*PROFESSOR HARBAUGH*: Thank you Professor Cole, and thank you, Mr. Miles, for your earlier introduction.

I should say in the way of explaining the remarks to follow that when I received a phone call inviting me to participate in this symposium I protested that all I really know about the segregation case is in the 36-page chapter in my biography of John W. Davis. "Oh, don't worry about that Professor," the voice at the other end replied. "They won't have read it!" Thus unencumbered, I decided to concentrate on two topics: First, Davis' intellectual development as a lawyer from his graduation from law school in 1895 until his representation of South Carolina in *Briggs v. Elliot*, one of the five cases in the consolidated school segregation suit, *Brown v. Board of Education, Topeka*. Second, his brief and oral argument in that case.

Among the themes—really sub-themes—are Davis's belief in strict constitutional construction; his flexibility in practice; his attitude toward socio-economic evidence; the different professional values of historians and lawyers; his strategy; and his performance in *Brown*.

Born in Clarksburg, West Virginia, in 1873, John William Davis was the son of one of the town's two leading attorneys. He was nurtured intellectually at Washington & Lee where, so he recalled, Dean of the Law School John Randolph Tucker "filled the dullest student with a perception of the majesty of the law . . . and a sense of the eternal verities by which all law is underlaid." Now, we can pass over the part about the dullest student, for the reference was to Washington and Lee, not Mercer. But we should not glide over the substantive point, the "majesty" of the law and the "eternal verities" that presumably underlay it. That was what John W. Davis got at Washington and Lee; that is what he got from his father, a thunderous legal fundamentalist, when he went into practice with him after his graduation; and that is what he gave his students when he taught at Washington and Lee in 1896-1897. It is also what he believed through life.

John W. Davis went on to become one of the greatest—perhaps the greatest—Solicitor Generals in history from 1913 to 1918. He then succeeded Walter Hines Page as Woodrow Wilson's ambassador to the court of St. James's, where King George V found him to be one of the "most perfect gentlemen" he had ever met. He returned to the United States in 1921 to become a partner in a Wall Street law firm which still bears his name. In 1924 Davis won the Democratic presidential nomination on the 103rd ballot Democratic National Convention, but was overwhelmed by Calvin Coolidge. Afterward, one of his pietistic friends asked him if he had said anything he didn't believe during the campaign. "Oh yes," he replied. "I went around the country telling people I was going to be elected, and I knew I hadn't any more chance than a snowball in Hell."

A decade later Davis became an organizer of the anti-New Deal Liberty League. "I do not know," he explained, "of any shelter whatever in the fundamental law of the land, written or unwritten, express or implied, for many of the activities in which the Federal Government is now engaged." In spite of that belief—cynics might say because of it—he remained an esteemed leader of the bar. As Justice Holmes once said, "Of all the persons who appeared before the Court in my time, there was never anybody more elegant, more clear, more concise or more logical than John W. Davis."

But we've advanced too rapidly chronologically. Let's go back to Davis's presidential address to the West Virginia Bar Association in

1906. It presaged is attack on the New Deal three decades later. He decried the growth of the commerce clause and affirmed his commitment to individual liberties, state and local rights, and strict construction of the Constitution. He debunked the Employers' Liability Act of 1906. He opposed child labor legislation then pending. He denounced President Theodore Roosevelt's expansive view of the Constitution. "Constitutional distortion," said Davis, "is as much a crime as constitutional destruction." (Roosevelt had declared in his first annual message that, "When the Constitution was adopted . . . no human wisdom could foretell the sweeping changes . . . which were to take place at the beginning of the twentieth century. At that time it was accepted as a matter of course that the several states were the proper authorities to regulate . . . the comparatively insignificant and strictly localized corporate bodies of the day . . . . The conditions are now wholly different and wholly different action is called for.")

As Solicitor General, Davis rarely, if ever, let his attachment to stare decisis or abhorrence of judge-made law weaken his argument; nor did he allow his commitment to state and local rights or his moderate racism intrude. As one of his subordinates put it, "The government was his client. That's all."

One of Davis's overlooked cases, if I may indulge in a little historical presentism, was one of the Oklahoma grandfather clause cases of 1915, *United States v. Mosley* [238 U.S. 383 (1915)]. At issue was the refusal of state election officials to report the returns in eleven precincts where Negroes had voted in the congressional election of 1914. "A right to vote," Davis declared in his brief and probably in his oral argument, "entails of necessity the right to have that vote recorded; otherwise the vote is no vote at all . . . . A constitutional guaranty of such significance . . . should not be frittered away by a process of hair-splitting definition."

Two other cases illustrate Davis' socio-economic reach, a crucial biographical point in light of his attack on socio-economic jurisprudence in *Brown* forty years later. In the first, *Wilson v. New* [243 U.S. 332 (1917)], Davis successfully defended President Wilson's decision to avert a nation-wide railroad strike by regulating hours a way that raised wages. Two decades later Davis reflected that "perhaps" that case was "the fountainhead" of the New Deal's "emergency doctrine."

In the second, the first child labor case, *Hammer v. Dagenhart* [247 U.S. 251 (1918)], Davis submitted a brief comparable in its sociological reach to the one the NAACP was to submit in *Brown*. Indeed, Roscoe Pound, Dean of the Harvard Law School and informal dean of social jurisprudence in the nation, pronounced it "full, complete and convinc-

ing." And so it was. A five-page section emphasized that work once regarded as "harmless or beneficial" was now thought to be "immoral and injurious." A thirteen-page section contended that the health of children in competing states was "injuriously affected" by the interstate transportation of child-made goods. Other assertions held that citizens who bought the products of child labor were made "unwilling parties to practices deemed immoral."

Such, then, were some of the highlights of the career of the man whose one time (1910-1913) colleague in Congress, Governor James F. Byrne of South Carolina, conferred with Davis in New York in the summer of 1951. Would Davis, he asked, defend "the southern way of life" against "the politicians in Washington and the Negro agitators," as he elsewhere phrased it, who would desegegrate South Carolina's schools. To the dismay of Davis's daughter and a number of his partners, he took the case.

Never, Davis said again and again, had the precedents been so overwhelmingly on his side. The Fourteenth Amendment did not mention slavery, and Charles Sumner had met rebuff after rebuff in his efforts to drive integration measures through Congress after its ratification. Nevertheless, through more than a century and a half of decision-making, the Supreme Court had managed to adapt the Constitution to the felt needs of the nation. More than once the Court's bolder spirits had generalized openly on the process. Listen to Chief Justice Hughes in 1934: "It was to guard against the narrow . . . conception that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them that Chief Justice John Marshall uttered the memorable warning—'we must never forget that it is a *constitution* we are expounding—a constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs.'"

More directly and immediately important was the steady movement of the Vinson Court against discrimination in housing, transportation, and higher education cases. As Justice Clark later observed, to call Plessy "established doctrine" after those rulings was to deal "with shadows rather than substance." Yet Davis remained sure that the Justices would not eat their words in *Plessy*—the "separate but equal" majority opinion, that is, not Justice Harlan's great dissent, which took judicial notice of what was common knowledge even in that pre-social-science era: "The arbitrary separation of citizens on the basis of race is a badge of servitude wholly inconsistent with . . . the Constitution."

When Thurgood Marshall then submitted a brief glistening with statements by social scientists, Davis threw up his hands in despair. "I can only say that if that sort of 'fluff' can move any court, God save the state!" The eminent legal philosopher, Edmund Cahn, agreed—in part. "I would not have the constitutional rights of Negroes—or other Americans—rest on any such flimsy foundation as some of the scientific demonstrations in these records," he wrote. Not only Justice Harlan, he added, but many others "with responsive consciencies" had recognized that segregation was "psychologically injurious and morally evil" before, during, and after the rise of "separate but equal."

Davis's brief was traditional in form. So often, it averred, had the right of a state to maintain segregated schools been declared by authorities that it should not be regarded as open to challenge. As for the Marshall brief's sociological data, it observed that, in the lower court, Judge Parker had correctly held that sociological testimony related to questions of legislative policy, not constitutional right. It further observed that Kenneth Clark, whose research on black children and black dolls was a feature of the Marshall brief, had also done research which suggested that segregated Southern negroes were somewhat healthier, psychologically speaking, than unsegregated Northern negroes,

Fearful that the experts' testimony might nevertheless swing some of the Court's "wavering brethren" in the hearing in December 1952, Davis roamed far beyond his brief in a forceful effort to persuade the Court that social wisdom, no less than law, was on his side. For ninety years, he declared, a "vast body" of court rulings, wise legislation and learned persons had supported the constitutionality of segregation; manifestly, the policy had been established *under* the Fourteenth Amendment rather than *in violation* of it. He dripped scorn on the social sciences: "I ran across a sentence the other day which . . . described much of the social science as 'fragmentary expertise based on an examined presupposition.'" He dismissed Thurgood Marshall's contention that segregation was "entirely a legislative policy and does not depend on Constitutional rights." He spoke rhetorically of "the great national policy," by which he meant local self-government, underlying the whole question.

But it did not matter. "The esteem of the Court reflected in the faces of each of the Justices" was personal, Paul Wilson, the young Assistant Attorney General of Kansas who had dutifully made that state's argument later wrote; they were witnessing the poignant performance of "a great lawyer at the end of his life speaking, however eloquently, in support of a policy that was no longer tolerable in a free country."

In mid-June 1953, soon after the Court called for re-argument, the attorneys in the Virginia case held a strategy session with Davis in New York. The framers of the Fourteenth Amendment, Davis said, "so clearly understood" that it did not apply to schools that it "is not properly within the judicial power to construe the Amendment so as to abolish segregation." They therefore decided to contend that conditions had not changed since the 1860s, no matter the "speculative" evidence of the social scientists.

They also decided to distinguish the transportation cases by pointing out that "actual discrimination" had existed in them, but not in the school cases "if equal facilities are assumed." They further decided not to consult the Eisenhower people as the administration "seems to be committed to do everything it can to abolish segregation in every form."

Six young associates in Davis's firm then spent the summer researching the legislative history of the Fourteenth Amendment and the Civil Rights Act of 1866. They concluded that Congress had not contemplated abolition of school segregation. Concurrently, the Virginia group reported that substantial evidence existed in twenty-three of the thirty-seven ratifying states that it was not thought at the time that the Amendment had outlawed segregation.

Meanwhile, a group of eminent professional historians, all volunteers for the NAACP, concluded that the Civil Rights Act had actually been amended in committee so as not to abolish legalized segregation. They also found, at first, that the Fourteenth had been passed merely to give constitutional sanction to the provisions of the Civil Rights Act. Declaring that he must have at least a face-saving draw, Marshall sent them back to work. This put them in a cruel dilemma. "I was facing," recalled the constitutional historian, Alfred H. Kelly, "the deadly opposition between my professional integrity . . . and my wishes and hopes with respect to . . . values, of ideals, of policy, of partisanship, and of political objectives." No matter. By separating the Fourteenth Amendment from the Civil Rights Act, Kelly's group made a plausible case—really, I would say, a possible case—that the Fourteenth was intended "to write into the organic law of the United States the principle of absolute and complete equality."

*PROFESSOR HARBAUGH*: Does that finger I see pointing up mean I'm running out of time? How much is left, sir?

*PROFESSOR COLE*: A minute or so.

*PROFESSOR HARBAUGH*: A minute or so!

*PROFESSOR COLE*: Yes.

*PROFESSOR HARBAUGH*: Well, that calls for another Davis story. Once in the 1930s Chief Justice Hughes interrupted Davis late in his argument to tell him that he had one minute and a half. Davis thereupon bowed low in the Castilian manner and said: "Your Honor, I present my minute and a half to the Court." Unsmilingly, Hughes called up the next case.

Now, Professor Cole, I can't afford to be as generous as Mr. Davis. I'm keeping my full minute.

On December 7, 1953, a year after the first hearing, Davis stepped to the bar to challenge Thurgood Marshall's re-argument. At eighty years, reported *Time*, Davis was "a white-maned, majestic figure in immaculate morning attire who looked type-cast for the part . . . . Some of his friends were sorry to hear him, at twilight, singing segregation's old sweet song. But the popularity of a cause rarely cuts any ice with John W. Davis . . . . [H]e has all but faded from popular memory; in his own profession he is a living legend."

The "naked question," Davis began, was whether segregation per se violated the Fourteenth Amendment. He heaped ridicule on the historical "fallacies" in the NAACP briefs and scorned their finding that the evidence of congressional intent was inconclusive. He drew on Claude Bowers's twenty-five-year-old distortion of Reconstruction, *The Tragic Era*, to excoriate Thaddeus Stevens. He denied that the judiciary was empowered to construe the Fourteenth Amendment differently than its framers intended. If the principle of stare decisis were applied, he asserted, it would be impossible to rule against segregation. Then, drawing back a little, he conceded that stare decisis was not always controlling. "But," he went on, his voice vibrant with conviction, "somewhere, sometime, to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance."

Only once had the Court interrupted him. Justice Jackson asked if Congress might not use the "necessary and proper" clause to abolish school segregation in order to promote equality in other fields. Davis replied that to "do what the Amendment did not warrant under guise of enforcing the Amendment would be a contradiction in terms." To Justice Frankfurter he added that "to interpret the Amendment as including something that it does not include . . . is to amend the Amendment"; and that, he emphatically declared, "is beyond the power of the Court."

Davis had "marshaled the facts totally; all that I ever heard of," mused Justice Reed years later. "But there was an inevitability about it all. Mr. Davis was following the accepted concept of law as it was." As the late Alexander Bickel has observed, "No one hearing . . . Davis . . . emphasize how pervasive and how solidly founded the present order was could fail to be sensible to the difficulties encountered in uprooting it." But, he continued, "Mr. Davis was intimating that the existing order was no longer subject to judicial change, that no principle of its alteration could now be announced. This was to deny the essence of the Court's function, and on the basis of no more than an inadmissibly static view of society."

Shattered by what he considered to be the sociological cast of the opinion, Davis tersely told a partner that it was simply "unworthy of the Supreme Court of the United States." Yet, in a sheer act of will, he congratulated Marshall by telephone the afternoon the ruling came down. That autumn, in what was surely the noblest statement of his long career, he wrote one of the Virginia counsels that, "looking at the matter philosophically, perhaps a unanimous opinion was better than a split Court."

*PROFESSOR COLE*: Thank you, Professor Harbaugh. We have some time for questions now before the break of either of the panelists. We already begin to see the complexity here behind this opinion and the human factors. But does anyone have any questions? (Hand raised). Yes.

*QUESTION FROM AUDIENCE*: Mr. Prettyman, between the Justices, was there a common understanding of what all deliberate speed might be?

*MR. PRETTYMAN*: No. The only thing that they understood was, first of all, they could not allow any delay to, in effect, do away with the prior decision on the merits so that they had to order that things get started immediately. But they recognized that it was going to take varying amounts of time, depending upon the jurisdictions, because some jurisdictions were prepared to take action immediately and it would be a matter almost of months to accomplish something, whereas in other jurisdictions they had laws, they had rules and regulations, they had all kinds of groundwork that had to be done to get people ready and so forth. And so what they were trying to say with that phrase and the other phrase that they used was that you don't have any excuses for not doing anything. The fact that you don't like the opinion is not going to

get you out of it. The people on the scene, the district court judges, who had these cases to begin with have got to get started immediately to come up with plans. But having said that, we recognize that there is no rule that we can apply across the board as to when this has to be done. And, therefore, you should do it as soon as you reasonably can, given your local circumstances. I think that's essentially what they had in mind.

I just want to add one thing. It's so interesting, this Footnote 11 that became the huge mark of controversy in the opinion he has referred to here, which cites Ken Clark's studies and the other social studies, was a throwaway. We never paid any attention to it. The Chief I think just told Jerry Gunther or one of his law clerks to add something, add a footnote to his sentence here. Whatever may have been the extent of psychological knowledge at the time of *Plessy* this finding is amply supported by modern authority. That is the finding that segregation of colored children has a detrimental affect upon them. But he really didn't need anything to cite. He was just throwing in something to kind of, you know, bolster it up. It was no big deal at all. And none of the rest of us paid the slightest bit of attention to it. We should note that that was very bad judgment on our part because Ken Clark alone was a matter of great controversy, and these studies apparently in the sociological world were contested, shall we say. And so we were all stunned when that became the focal point of the lay dissent, this Footnote 11, that none of us had paid any attention to at all.

*PROFESSOR COLE*: Tony [Baldwin]?

*TONY BALDWIN*: With the varying views and these days so much made of the politics of Justices, how was it that Earl Warren, as Chief Justice, was able to get a unanimous opinion? What thread did he use to sew the Justices together into a sufficiently cohesive unit to get a unanimous opinion from them?

*MR. PRETTYMAN*: Well, of course, the first thing he did was to write an opinion which was easy to join in the sense that there was not a lot in there that you could fight about. It was very difficult to write something that combatted the basic premise of his opinion. And he didn't put a lot of legal intricacies and he didn't put a lot of history and he didn't put a lot of things that people could attack. He made it very very simple and appealing.

Then he began to proselytize, he would go from chamber to chamber picking off the ones first who were most likely to go along with it and

building from there so that each time he went to a new chamber he could say we now have six. We certainly want to do the best we can. And then he'd have seven, and then he'd go, of course, ending with Reed, who appeared to be the holdout and the person who was definitely going to dissent.

And he simply did a Lyndon Johnson on Reed. He appealed to his sense of duty, to his patriotism, to his love of country, and all the rest, and he made the case that even one person dissenting would be the focal point, throughout the South particularly, of opposition. And that people would jump on that opinion and use it to say this is better reasoned than the majority, and this is where we stand and so forth. And he simply made him understand the vital importance of the unanimous opinion, and Reed gave in.

*TONY BALDWIN*: A follow-up question to that. Did any of the Justices raise the fact of the absence of discussion of legal precedent, the kind of thing that John Davis was particularly convinced would have the opinion go his way?

*MR. PRETTYMAN*: I can't speak for what the other Justices came back with to Chief Justice Warren. I can tell you that Jackson wanted me to make about three suggestions for changes in the opinion, but the reason that Warren rejected them, and rightly so, was that the changes could have applied outside the field of segregation in the public schools. And Warren was determined to make this opinion acceptable, to have it narrowly restricted to the public school area and not imply, even though he knew it was coming, that it was going to affect everything from streetcars to miscegenation.

It's quite interesting that one of the cases in which the Court denied certiorari after *Brown* was a case involving a mixed marriage, which of course later fell, but you see the Court was taking this step by step trying to sell the idea that we're only talking about schools and segregation. We'll worry about the rest of it later. And so I do know that those suggestions were made and Warren turned them down.

I don't know what the other Justices were arguing to him. But in view of the fact that the end opinion was very similar to the draft that he brought to Jackson, my guess is that if they made such suggestions, they were also turned down.

*PROFESSOR COLE*: Yes?

*QUESTION FROM AUDIENCE*: I have a question for Mr. Prettyman. Under the argument there were several organizations that filed amicus curiae briefs and several organizations, including the American Jewish Congress and the American Civil Liberties Union. And my question is how strong of an influence was their briefs on Chief Justice Warren's opinion. And the second question was was it an unusual privilege that the Court grants to these other organizations to file such briefs?

*MR. PRETTYMAN*: No, it was quite common then and it is quite common now for the Court to grant permission for those people, those organizations having a legitimate interest in the result to file amicus briefs. Now, there is a division as to how helpful those briefs are, both in this case and in other cases. I have heard some very eminent Supreme Court advocates say they're not worth anything.

My own view is that they are worth something, not in the detail that they usually bring or in the underlying arguments, but in showing the importance of a case. If, for example, you have a medical case, and the major medical organizations, the American Medical Association and so forth, file a brief, it is helpful. Certainly it is helpful to have the Solicitor General file an amicus brief on your behalf. So I do think that sometimes for various reasons they can prove helpful.

I must say that in this case, as far as I could tell, they had very little, if any, impact at all.

*PROFESSOR COLE*: One more question. Dave [Oedel]?

*DAVE OEDEL*: I wonder if you could comment, if you have any information, about possible differences in the arguments that were made in the 1952 argument and the oral argument of 1953, and was there a sense of perhaps some differences in arguments in the fact that Earl Warren was the Chief Justice in 1953. And was there a sense of pitching the case differently because of his presence. And, also, related to that, what about, was Eisenhower aware of what Warren might do in this case? You kind of alluded to the fact, Mr. Prettyman, that there was a sense of Vinson's demise, and Warren's ascension really would mean something for the case. How much was that common knowledge or was that just sort of scuttlebutt at the Court?

*MR. PRETTYMAN*: I did not hear the 1952 argument. I've only read about it. I think that the 1953, the second, argument was more directed. I think they had a better feel for the kinds of questions they

were going to get and were honing in on things that they thought would matter. And as a matter of fact, I think the arguments got better as they went on generally.

I don't think from all reports that Eisenhower had any idea that Earl Warren was going to turn out, either in this case or most of the others, the way he did anymore than the President realized when he appointed Justice Souter that he was going to turn out to be a strong liberal. Or that Eisenhower thought that Brennan was going to turn out the way he did. Presidents have been fooled repeatedly, thank God.

*PROFESSOR COLE*: A quick question?

*QUESTION FROM AUDIENCE*: Very quickly. Professor Harbaugh, did John Davis get concerned when the Supreme Court asked for re-argument of the cases? Did that give him any pause with respect to his view of the legal precedents?

*PROFESSOR HARBAUGH*: Well, yes and no. As I say, he had expected to win, even then. But, then, it was sent back for re-argument, but the re-argument asked them to examine, really, the history of the Supreme Court, and that's where these historians emerged. And that is why six members of Davis's firm spent the summer, and I don't believe it was air-conditioned at the time, in the New York Public Library researching the history of reconstruction. And Davis's brief, in that instance, was recast and reflected much more on the Fourteenth Amendment than he had originally done in that sense.

But you heard in oral arguments, and there's a great difference between what a man says in oral argument, not necessarily grammatically or substantively, but he has to speak much briefer and so on. So I—that's quite naturally what a historian has to do, just a sum of the statements. And I hope Davis is dismissing these historical judgments. I will read, if I may, then I'll quit, but the statement here on these historians and the like. And this is Mr. Kelly, Professor Kelly, who had headed the professional historians who worked for Marshall and so on.

He said, Kelly said, of the Davis brief: "The brief prepared by him is from a technical historical point of view. This is the brief six men worked all summer on. Every bit as far from a balanced constitutional history of reconstruction as is the NAACP brief." He said, "Mr. Davis's brief was not history, it was advocacy." Yet no one has indicted him for having argued his case adequately for his clients. No doubt he would have been open to a charge of professional dereliction and malpractice had he not argued the case to its limits for his clients. And this is the

matter of the historian versus the attorney, the advocate. And in this case, these historians turned advocate.

*PROFESSOR COLE*: Okay, we'll have a fifteen-minute break. I think there's some refreshments. And then we'll come back and hear our next two speakers.

[SHORT BREAK]

*PROFESSOR COLE*: Let's get started again. If we had to stop now, we would have already had a really interesting analysis and look at *Brown*, but luckily we have some more tape and then two more very interesting speakers on this subject. So we're going to start this session with another piece of the tape of Mr. Hill and then go back to the final two panelists. And we had a little trouble with the sound. Could everybody hear the tape the first time? We've tried to beef it up some. We'll see if it works.

(*Second of Three Video Presentations of Interview With Oliver W. Hill*)

*MS. DAVIS*: Did the opposing counsel ever try and refute that use of that sociological evidence?

*MR. HILL*: Oh, they tried to refute it. And they had psychologists, too. For example, oh, gosh, I forgot his name. He was the head—He was head of the department at Columbia and taught Clark, Kenneth Clark, and Mabel, his wife, in obtaining their doctorates. And he was at that time at the University of Virginia. Oh, he tried to ridicule it, but the evidence was accepted. The Court took notice of it. The psychological evidence was much more effective than their efforts to refute it.

*MS. DAVIS*: In your book you mentioned that in challenging segregation per se one of the things you had to do was convince the Court to view the Constitution as a document that should be interpreted to meet the needs of the people.

*MR. HILL*: Well, we always contended that the Constitution should be used as a limited instrument, and as times changed you needed to view things differently. Things change. That's the reason I say that we need to recognize the fact that there is such a thing as the natural process. There is a natural evolutionary process and change is

inevitable, and it's up to us as human beings to direct that change in the best interests of the common will or common good.

*MS. DAVIS*: *Brown* was consolidated into five cases. The brief submitted originally to the Court in *Brown* was a short brief. It wasn't very long. Are you familiar with that?

*MR. HILL*: Oh sure, I'm familiar. There were five cases. There were five individual briefs in all five of the cases. And then there was the overall situation. And then in the actual argument Thurgood argued the case as a general premise and each one, a lawyer from each individual case, some lawyers from each one of those cases argued the individual cases so far as the factual situations were concerned.

*MS. DAVIS*: And the *Prince Edward* case was one of those cases consolidated, right?

*MR. HILL*: *Brown v. Topeka, Davis v. Prince Edward County.* I forget the lead plaintiff in South Carolina, *Clarington County v. South Carolina.* Those were three cases in all of which the plaintiff had complained and the court had ruled against them. The Delaware case, the court had ruled in favor of the plaintiffs and the defendants were appealing. The District of Columbia case was tried under the Fifth Amendment because the Fourteenth Amendment didn't apply to the District of Columbia because it's not a state. It's as it says, the District of Columbia. But the District of Columbia applied to—That's the legal framework of what was happening.

(*End of Part II Video Presentation*)

*MR. PRETTYMAN*: Can I say just one thing?

*PROFESSOR COLE*: Sure.

*MR. PRETTYMAN*: Can I just add one thing because the last point that he made was such an interesting one? The D.C. case was in many respects the most difficult case, and it was worrying the Justices a lot as to how they were going to decide that case when you didn't have an equal protection clause applicable to the District. And I don't think we ought to overlook that, the fact that they really—by making due process coterminous with equal protection in that case—kind of slid by an awful lot of serious questions and one that gave them a lot of pause.

*PROFESSOR COLE*: Okay, we're going to switch the order just a little bit here, and Mr. Ware will go next. Based on what they're going to say, it works better, I think. So, Mr. Ware.

*MR. WARE*: Thanks. First of all, I'd like to thank you for inviting me to participate in this panel. I'm delighted to be here. I'm also pleased that the topic is viewing *Brown* as an exercise in advocacy because I have always viewed it that way. I believe that the way that Constitutional law is taught in American law schools one gets the impression that *Brown* somehow emanated magically from an enlightened judiciary when, in fact, I view it quite to the contrary as a culmination of a twenty-five-year campaign based on a coordinated legal strategy developed by the NAACP.

And this was a strategy, and the architect was the fellow that Mr. Hill kept referring to as Charlie. Charlie was Charles Hamilton Houston. He was the Dean of Howard Law School in the 1920s. He trained a generation of civil rights lawyers. He was the first African American to serve on the Harvard Law Review. He went back to Washington, trained a generation of lawyers, including Mr. Hill and Thurgood Marshall. Mr. Hill and Thurgood Marshall were number one and number two in the Class of 1933 at Howard. And they were inculcated with this special sense of mission to go out and to challenge the legal foundations of the *Plessy v. Ferguson* doctrine.

The NAACP's legal campaign actually began with a bequest from something called the Garland Fund in about 1929 or so. And the NAACP proposed to use that money to challenge segregation on several fronts: school funding, housing discrimination, jury service, discrimination in transportation, and voter disenfranchisement. And it retained a young Harvard graduate, Nathan Margold, to prepare a report. And this document has become known over the years as the Margold Report, this two hundred-page document which analyzed all of the segregation laws then in existence.

Now, Margold's main conclusion was that segregation coupled with discrimination was unconstitutional even under *Plessy*; that is, things were always separate but they were never equal. And he recommended that the NAACP launch a series of so-called taxpayer suits to challenge segregation because it was coupled with, in his words, discrimination.

So Walter White and others at the NAACP looked around and they decided to hire Charles Houston to launch this effort. And Houston in the early 1930s resigned from his position at Howard, went to New York and decided to lead this effort on what was then a budget of $10,000, and he set about to change American law.

Now, Houston agreed with Margold's overall analysis but he disagreed with his approach. He feared, as Mr. Hill indicated, that a direct challenge to *Plessy* in the 1930s might result in a reaffirmation of *Plessy*. So, instead, they decided to develop what became known as the equalization strategy.

The equalization strategy consisted of challenging Southern states that practiced segregation to live up to the equalization, the equal part of the *Plessy v. Ferguson* formula. Now, the lawyers knew, and they decided quite deliberately to focus on graduate and professional schools because that was where the South was most vulnerable. Most Southern states had separate and unequal colleges for African Americans, state schools, but none of them had any sort of training facilities for graduate students. So Houston decided to focus, based on the limited funds and other things, on school cases, and in particular on graduate school cases.

Now, the first case was brought by his young brother, Jay, or he was persuaded to work with his young brother, Jay—Thurgood Marshall, who had recently graduated from Howard, plus Thurgood Marshall had an axe to grind with the University of Maryland because he could not go to school there—so he persuaded Houston and Houston finally agreed that he would file suit in a case called *Pearson v. Murray* [182 A. 590 (Md. 1936)]. And Houston and Marshall tried that case, and the record—I don't have time to go through it—but it was a brilliant piece of advocacy. And the Judge ruled from the Bench in Houston and Marshall's favor and ordered Maryland to admit him forthwith. He enrolled and graduated three years later.

The Maryland case, though, was fought out in state court and appealed through the state court to the Maryland Supreme Court, so it only applied in Maryland. So they needed another case. And they were casting about for another case.

Now, I want to emphasize at this point that there was a nationwide network of mainly African American lawyers who had sort of come through Howard under Houston, and they were all associated with the NAACP. They met annually at the National Bar, the Black Bar groups, each summer. It was a very tight knit network of lawyers who were all involved in the struggle.

And one of these lawyers, Sidney Redmond, in Missouri persuaded Houston to bring a suit against the University of Missouri. Lloyd Gaines was the perfect plaintiff. The plaintiffs were all very carefully screened and selected. Lloyd Gaines was an honors graduate at Lincoln University. He applied for and was denied admission to the University of Missouri. Houston drove out and Redmond and Houston tried the case in a Bloom County court and lost, as they expected to, and the

Missouri Supreme Court held that because Missouri supplied so-called out-of-state scholarships for black students that this would satisfy the state's obligation to provide graduate training for black students.

So the case was appealed to the United States Supreme Court, and in 1938 Charles Evan Hughes authored a decision in which he found that the right to equal protection is a personal one which could not be cast off from one state to another and that Missouri had an obligation to provide Gaines with a graduate education and ordered the admission of Gaines.

Now, in one of the strange clip notes of all of this, just before Gaines was to enter, he disappeared and was never heard from again. There were different theories—he was bribed or paid off or he was killed—but the truth of the matter is that nobody knows whatever happened to Lloyd Gaines.

So World War II sort of intervened and it slowed down the education campaign. There were a number of teacher's salary cases. But I guess in World War II the NAACP was somewhat occupied with fighting actions in the military. And there were some other things in which, other areas in which the organization was involved. But at the conclusion of World War II, thousands of veterans were returning from the War armed for the first time with G.I. benefits, and it changed higher education in America forever because for the first time a lot of people had the ability to attend college.

And among these veterans were African Americans who also wanted to attend college, so this brought about the last round of graduate school cases. And one of these was in Oklahoma, a case called *Sipuel v.* [*Board of Regents of University of*] *Oklahoma* [332 U.S. 631 (1948)]. And that involved a young woman, Ada Louise Sipuel, who sought admission to the University of Oklahoma Law School, and her request was denied. And it was appealed to the Supreme Court. The Supreme Court ruled that the State of Oklahoma had an obligation to provide Ms. Sipuel with an education on the same basis as white students.

The State, though, rather than admitting her to the school, responded by hastily developing a segregated law school. And they hired a couple of professors from the law school at the University of Oklahoma, rented a couple of rooms in the State Capital and said, "Well, here is your negro law school." But Marshall, who had handled that case, challenged this arrangement, but the Court declined to take any action.

But there were two other cases, though, one in Texas and another in Oklahoma. The Texas case was *Sweatt v. Painter*. Marshall filed suit in Texas. Herman Marion Sweatt had sought admission to the University of Texas, and was denied. After Marshall filed suit, the State asked for a stay and responded by allocating from the State Legislature

$100,000 to construct a black law school. That was a fair amount of money in the late 1940s. And the trial court allowed the stay and essentially ruled ultimately that the State satisfied its obligation by the construction of this law school. And that ruling was appealed to the Supreme Court.

At about the same time, another case was filed in Oklahoma, *McLaurin v. Oklahoma* [*State Regents for Higher Education*, 339 U.S. 637 (1950)]. This case involved a sixty-eight-year-old professor at the black college in Oklahoma at Langston. Professor McLaurin applied to the Graduate School of Education. This time the State of Oklahoma allowed Professor McLaurin to attend class, but he was in a little roped off section in an ante-room with a little sign that said, "colored section." He had to sit at a separate table in the library. And he had to sit at a separate table in the dining room.

And there was a picture which appeared in newspapers and magazines across the country that shows Dr. McLaurin over in the corner leaning over straining to hear. If there was ever a picture that personified one picture is worth a thousand words, that was it.

So *Sweatt* and *McLaurin* reached the Supreme Court at the same time and they were decided on the same day. And they were, the two were very significant rulings. First of all, in the *Sweatt* case, the Texas case, because of the construction of this law school and the new facilities, the Court assumed physical equality but found that physical equality was not enough. There is more to a legal education than bricks and mortar, and that is the interaction of students, the reputation of the school, the contacts with alumnae. These things the Court found could not be replicated in a segregated school.

Now, *McLaurin* actually involved segregation within the school. Professor McLaurin was hearing the same instruction in the same classrooms, but the Court found, in accordance with the *Brown* decision that this arrangement stigmatized Dr. McLaurin and handicapped him in his ability to pursue his education so that even his physical presence was not enough.

So these two cases together, one assuming physical equality and finding that that was not enough, and the other with actual equality except for the stigma imposed by these segregated arrangements, laid the foundation for *Brown*. And, really, in my view, there was nothing left after the *Sweatt* and *McLaurin* decisions so Thurgood Marshall and his colleagues had meetings. There was a lot of concern. They were still leery about challenging *Plessy* directly, but they decided now is the time. You know, it's now or never. A formal resolution was passed; there

would be no more equalization suits. Henceforth, we will challenge the cases directly.

So the five cases that are remembered now as *Brown v. Board of Education* proceeded on the basis of that foundation, and without that, without that foundation and without the creative lawyering, without the brilliant strategy that Houston developed, and without the patience, and we're talking about 1930 to 1950. That is a long-term strategy involving hundreds of cases, but you can pretty much trace a direct line from the Maryland case to *Sweatt* and finally to *Brown*.

And it is in my view the NAACP's legal strategy, both the development of it and the implementation of it. Because the courts in the 1930s and 1940s, they were not, they were very conservative. They were not out to make great social change. But rather—And the NAACP chipped away at the foundation of *Plessy* in case after case so that the courts were left really with no choice but to rule ultimately that segregation is inherently unequal and, hence, the *Brown* decision.

Thank you.

*PROFESSOR COLE*: Thank you. We have a little more piece of tape to show, but we'll do that after Professor Tushnet's talk.

*PROFESSOR TUSHNET*: Thank you. I'm really pleased to be able to participate in this and also to watch the tape of Oliver Hill, who is a great man. I'm going to talk primarily about Thurgood Marshall's oral advocacy in the *Brown* oral arguments, but I want to begin with two footnotes on things that have come up before and then one advertisement.

The first one involves *Sipuel v. Board of Regents of University of Oklahoma*, which Professor Ware mentioned. I've always thought it was poetic justice that Ada Sipuel Fisher, which was her married name, eventually served as a member of the Board of Regents of the University of Oklahoma.

The second footnote is about Eisenhower and *Brown v. Board of Education*. Eisenhower received a draft of the Justice Department's brief in *Brown*. He actually made some handwritten amendments to it that were incorporated into the final brief. The modifications that Eisenhower made on the brief were not ones that changed the bottom line. He was going to let the Justice Department take the position that Herbert Brownell, the Attorney General, and William Rogers, the Deputy Attorney General, thought was correct. The modifications tuned down some of the opposition to segregation a bit.

I'm going to recount a story that comes from Rogers. It's a story that he told many years after the events, and so one has to be cautious about interpreting it. But it's consistent with what Eisenhower did with the brief.

Rogers said that when the brief was prepared, he brought it over to Eisenhower to look at. Eisenhower read it over. According to Roger's recollection, Eisenhower said, "As I read the brief, you think that segregation is unconstitutional." Rogers replied, "Yes, Mr. President." Eisenhower then said, "I disagree." That is, he said he thought that segregation is constitutional. Rogers didn't respond. Eisenhower continued, "Well, you can tell them," that is, the Supreme Court, "what you think, but if they ask you what I think, you have to tell them that I think segregation is constitutional." Rogers said to him, "Yes, Mr. President, if they ask me, I will tell them that," knowing, of course, that they would never ask him that question.

The advertisement is that I am working on, and in July of this year will publish, a collection called *Thurgood Marshall: Writings, Speeches, Opinions and Reminiscences*. It includes excerpts from the briefs in *Brown v. Board of Education* and the oral arguments in *Brown*. The reminiscences are Marshall's oral history, which he did in 1971. It's really interesting. Although some of the material in the book is not all that exciting, some of it sheds a lot of light on Marshall's view of the world. For example, there's a quite impressive tribute that he gave in 1951 to Raymond Pace Alexander and his wife, Sadie Mosell Alexander, who were pioneering black lawyers in Philadelphia. It's very revealing about Marshall and the Black Bar.

Now, I want to talk about Marshall's oral advocacy in *Brown*. As we've heard, there were three arguments in *Brown*. In the interview with Oliver Hill, Tanya Davis mentioned that the first brief was quite short. What's striking about that brief to me is the legal theory of the brief. Today we think of equal protection as divided between strict scrutiny, which happens when you have racial classifications involved, and reasonableness or rationality review.

Marshall's opening brief in *Brown v. Board of Education* is completely a reasonableness brief. The standard is that states can make reasonable classifications. But, classification on the basis of race is unreasonable. The notion of strict scrutiny was introduced in *Korematsu* [*v. United States*, 323 U.S. 214 (1944)], the Japanese interment case, and it's mentioned in passing in the brief, but the focus in the brief is on reasonableness.

After the first round of oral arguments, as Mr. Prettyman said, the Court never took a vote. There is some controversy about how to

interpret the documents, but I'll give you my interpretation. If there had been a vote right after the argument, there would have been five, or perhaps only four votes to find segregation unconstitutional, two votes to uphold *Plessy* and *Ferguson*, and Frankfurter and Jackson extremely ambivalent and really reluctant to vote.

Both of them were convinced that segregation was terrible policy, but both had concerns about how you could translate that judgment into a legally defensible conclusion. If they had been forced to vote, they would have voted to strike down segregation. That would have meant, in my view, seven votes after the first argument. Under those circumstances, I'm pretty sure that Fred Vinson would have voted with the majority leaving it at eight to one. Stanley Reed would not have gone along at the first round.

But it would have taken leadership to reach that position, and the only leadership that was occurring at the time was being provided by Frankfurter, who wanted to delay, who wanted time to figure out how he could defend the policy position that he wanted to take.

In order to justify the re-argument, they had to come up with an excuse, which was embodied in five questions, three of which were devoted to the history and two of which were devoted to the appropriate remedy if the Court found segregation unconstitutional. They had the re-argument, and of course found segregation unconstitutional. Then there is a third argument on remedy.

I'm going to focus most of my comments on things that Marshall said in the second and third arguments, which I think are more revealing then the first argument, although some came up a bit in the first argument.

I want to begin by quoting something from Phillip Ellman, who was working at the Justice Department at the time of the argument in *Brown v. Board of Education* and simultaneously communicating with Felix Frankfurter about the position the Justice Department was going to take. It's an indication of the way the world operated then.

Ellman concluded an oral history recollection of the argument by saying, "Thurgood Marshall could have stood up there and recited *Mary Had a Little Lamb* and the result would have been exactly the same." And at some fundamental level that's right. The oral advocacy did not have, as far as I can tell, any significant direct influence on the Justices' decisions.

What that meant was that the oral arguments sometimes had a very peculiar character to them. Let me give you two examples of that. In the second argument on the merits, there's a discussion between Frankfurter and Marshall about the Delaware case. As Oliver Hill said,

in the Delaware case the plaintiffs had prevailed. But what had happened there was that Collin Seitz, the Chancellor in the case, said, "Look, the law is separate but equal. The facilities here are clearly not equal. You could go two ways on the remedy for a violation of separate but equal. You could order equality or you could order desegregation." Seitz said, "I've got to order desegregation because they're not going to be able to equalize the facilities in the next year. Of course, if they do equalize the facilities in the next year, then under the rule of separate but equal the kids can be separated again."

Well, Frankfurter went through an exchange with Marshall saying, "Look, you have to disagree with Chancellor Seitz, because, after all, he said separate but equal was the law and you think separate but equal is not the law." This was a completely pointless exchange. No matter what the outcome of the case was going to be, whether Marshall had to disagree with Seitz was really not very relevant. Marshall handled the questions with grace, saying, "You know, he was certainly wrong, that separate but equal was wrong, was the law, but, after all, he was following what you folks had said, and you can change that. But he was right about desegregation being the correct remedy."

In the second argument, Marshall, as Professor Harbaugh said, was faced with a fairly difficult task. As the reports had come in over the summer on the NAACP side, the lawyers got more and more discouraged. They just were not getting anything helpful from these reports. Marshall had to figure out some way to present the oral argument in a way that would not force him to acknowledge the weakness of the historical material. He started out by saying, "Well, let me talk about your cases." After he did that for a while, Jackson said, "Well, you know, we didn't ask you to argue about our cases. We know what our cases are." That put Marshall off his stride for a while.

But, again, in terms of Elman's observations, what Marshall had to say did not matter much; and, indeed, the briefing on the history on the issue really didn't matter because over the summer not only had Davis's lawyers been looking for history, and Marshall's subordinates been looking for history, but so had Alexander Bickel inside the Supreme Court. Bickel was working as Frankfurter's law clerk.

He produced a memorandum that was circulated before the reargument which satisfied Frankfurter's concerns that they didn't have to worry about the history. So by the time Marshall got up to argue about the history, nobody basically cared about it anymore, so there he was.

Given that, what can we learn from Marshall's oral advocacy in *Brown*? I want to make really three points here.

The first is that as you read Marshall's oral arguments, you can see him saying things that you could understand as in some ways an appeal outside the Court, not to the Justices. They are lines that I am sure he used in speeches all over the country. I want to defer the conclusion on this for just a moment.

The example that strikes me is something that I have always found extremely powerful in reading the arguments. Marshall said at one point, "Those same kids in Virginia and South Carolina—and I have seen it—they play in the streets together, they play on the farms together, they go down the road together, they separate to go to school, they come out of school and play ball together. They have to be separated in school. There is some magic to it." School somehow makes it impossible for them to be together. I find that a very effective line and image about what the problem with segregation was, and I'm sure he used it quite effectively, again, as I said, outside the Court.

What it demonstrates about his oral advocacy is the relationship he had with the Court. After all, these arguments were not being broadcast or disseminated in any obvious way. He was talking with the Justices as one common sense person to another. And he was able to do that because of his skills as an advocate. He didn't have to treat them as different from, or more exalted, than he. He was just engaging in a conversation with them. And at some fundamental level I think his ability to do that was a component of his advocacy. He was saying, basically, that African Americans and whites are not different. He conveys the message, I'm not different from you. I'm just talking to you the way anybody would talk to you. I believe that that had to have some effect on the way the Justices thought about the appropriate social relations between African Americans and whites.

The second thing you can see in his oral advocacy is that it illuminates the mind set of both him and of the times: What is it that he, as an African American legal leader, thought; what was the kind of thing that made sense to people in this environment at the time—"this environment" being the general legal environment. Here the example that I find most interesting comes from a portion of the argument on remedy in which Marshall's position is basically, just have neighborhood schools, or just redraw the lines. It's not a big deal. Definitionally there are enough schools in the South for the total of the African American kids and the white kids, you know, because they've been going to schools. You just have to sort them into different schools. You can do that on a neighborhood basis.

But, he said, "Sometimes people say, 'Well, a neighborhood basis may not be such a good idea. We might want to sort kids out on the basis of

ability.'" And Marshall said, "When they say that what they're really saying is, 'Look, you know, the African-American kids aren't as smart as the white kids. So if we sorted them on the basis of ability, we'd still have segregated schools. Or, we're trying to accomplish sorting on the basis of ability by segregating.'"

Marshall said at this point, "Look, I don't understand this. Sorting on the basis of ability, if you want to do that, that's fine. Give them tests." And then he said, "Put the dumb colored children in with the dumb white children, and put the smart colored children with the smart white children—that is no problem." It's very interesting to me that he was perfectly comfortable in formulating his position in that way.

Now, finally, I want to talk about Marshall's advocacy as advocacy. Here I want to focus on the remedy argument. The problem for the Court at the remedy stage was that it was transparently obvious that you could order essentially immediate desegregation without administrative difficulty. You just had to redraw boundary lines and have neighborhood schools. Again, there was some tinkering that you would have to do. As Mr. Prettyman did, you had to redraw the lines, and you'd have to assign teachers to the schools. But that was effectively a trivial problem.

Marshall's position was, "Look, if all you're concerned about is administrative stuff, it'll take you six months to a year. The remedy argument occurred in April 1955. Give them until September. They can deal with the administrative stuff." Or, at the outside, at one point Marshall suggested, "September 1956 would be a permissible deadline." But, he said, "You should have full and complete desegregation by September of 1956 if all you're concerned about is this administrative stuff."

But, of course, the Justices knew that they weren't really concerned about merely administrative stuff. What they were concerned about was resistance, that the deep South, at least, was not going to go along. They had to figure out some way that they could gracefully acknowledge the possibility of resistance without saying that it was permissible. The all deliberate speed formulation was the way they did that.

The remedy opinion says, of course disagreement with the opinion can't justify delay. But the reason for the all deliberate speed formulation was that there was going to be resistance.

So that's the problem. I think everybody understood that that was what the problem was, that there was going to be resistance and yet you couldn't acknowledge it. The only that that you could acknowledge was administrative problems, but that made an immediate remedy of six months to a year and a half perfectly feasible.

Well, what happened in the oral argument? First of all, the Southern Attorneys General, who were all invited to participate in the remedy argument, got up and a fair number of them said, in essence, "We're not going to comply with the order. It's just not going to happen in Alabama." And some of them were almost explicit about it. Other are less explicit, but got the message across.

Marshall got up to rebut, and he was this really big and impressive guy, and he was just unbelievably indignant. He just communicated that he couldn't believe that any responsible legal officer could say to the Justices of the Supreme Court that they were not going to comply with an order from the Supreme Court.

What this did was heighten the dilemma for the Court. It made clear to the Justices that however much they wanted to avoid confronting the question of resistance, fundamentally they couldn't do that. Fundamentally they were going to have to think about the problem of resistance. It put the problem to them with incredible dramatic force.

The second thing Marshall did, in a very long exchange with Frankfurter, was to refuse to budge from what I've been calling immediate desegregation, what they were calling desegregation forthwith, which Marshall made clear meant complete and effective desegregation within six months to eighteen months of the decree. "Yes, there might be some administrative problems," he kept saying, "but, look it's not a big deal. It's just redrawing district lines and reassigning teachers."

There's a related point. Nobody ever pointed out that there were enough schools and enough teachers. Of course, some of those schools were really terrible schools because they were the schools blacks had been attending, and no white people were going to want to send their kids to these schools, notwithstanding the façade of separate but equal.

And, even worse from white parents' point of view, there were enough teachers in the aggregate. After all, there had been teachers for black kids and there had been teachers for white kids. But white parents were not going to be happy about having their kids taught by African American teachers. There was a moment in which Marshall said, "There are no problems with the African American teachers. In fact, they are more qualified than the white teachers. Many of them have Master's degrees because their employment opportunities were so limited that they got better educations, and they have been teaching their African American kids."

"So the administrative stuff is just not a big deal," Marshall said. And he kept saying it. And it seems to me he did effectively communicate that if the only thing you're openly willing to acknowledge as relevant

are these administrative problems, the only kind of relief that you can fairly order is an immediate desegregation order.

This was very effective oral advocacy in the sense that it held the Justices' feet to the fire. He was not going to concede to them that desegregation could be gradual in any meaningful sense. He just wasn't going to do it. Of course, having held their feet to the fire, Marshall ended up with the all deliberate speed formulation, that is, a gradualistic formula ultimately predicated on the awareness that there would be resistance, notwithstanding the statement that opposition can't justify delay.

There was effective advocacy in one sense. It didn't accomplish the goal Marshall wanted to accomplish, which was immediate desegregation if, in fact, he thought that was a realistically achievable result, which I'm not sure he did. And in some sense that's what Elman is getting at with the *Mary Had A Little Lamb* line.

What was happening inside the Court was not significantly affected by what the lawyers were saying to the Justices as advocates except insofar as people like Marshall and Davis brought home to the Justices that this was not going to be a problem that they could easily resolve. Now, that's an important contribution of oral advocacy. It's just not winning the case with an argument.

*PROFESSOR COLE*: Thank you very much. We will now go back and look at a brief excerpt from the tape that we meant to show before we answer your questions. So if we can run the tape on Oliver Hill and get his take on this.

(*Third of Three Video Presentations of Interview With Oliver W. Hill*)

*MS. DAVIS*: Can we get your view of how the Constitution should be read?

*MR. HILL*: Well, what should be taken into consideration in determining whether or not two schools are equal.

*MS. DAVIS*: And how did that help you in the next cases when you argued?

*MR. HILL*: Well, when Justice Vinson recognized the qualities of a first-class school, it was obvious he had to come to the conclusion that this one room, one teacher school that they set up was unequal. And, so, it was—being unequal it was unconstitutional. So we were

positive we could show a showing of inequality when they realized the system was unequal and that the practice itself was unconstitutional.

See, like I told you, I don't remember if I told you or not, but in one case I was arguing before the Fourth Circuit, I pointed out that while we weren't contesting the constitutionality of it right now at that particular time, but if you built two schools with identical plans, with identical materials, and equipped them with identical equipment and teachers of comparable quality, one black and one white—I think I said negroes in those days, though—negroes and whites, I would say they weren't equal. And the reason for it is because there were so many intangible things that occurred in a community of, in the white community, that did not occur in the black community; and, therefore, those things were of great value in educating a child or a person.

I realize so many things happened. When I was elected to the City Council, a whole lot of things happened to me that I wasn't familiar with, and I wasn't that ignorant.

*MS. DAVIS*: What other legal strategies did you come across with your litigation and fight to end segregation?

*MR. HILL*: Well, we started with our main game plan which showed the inequality of the separate system, and we stuck with that.

*MS. DAVIS*: Now, when the Court came back and asked five questions—

*MR. HILL*: Yes. Well, that was about the history, and I don't think they even considered it. As a matter of fact, of course, my contention was that regardless of what they did it violated the Fourteenth Amendment even though it was the same group of people.

*MS. DAVIS*: How were you guys able to use—When the Court came back and asked the five questions about the history and the Fourteenth Amendment—

*MR. HILL*: We contended that there was no conclusive evidence one way or the other. It just happened. But as I say, even if they went farther than that, irrespective of that, even if they did it intentionally, it was still unconstitutional just because it was the same people that didn't give it any constitutionality. So they finally realized that it was a pure waste of time, what the historical facts were.

*MS. DAVIS*: And at some point the Justice Department filed an amicus brief in support?

*MR. HILL*: Yes.

*MS. DAVIS*: What did you feel about that?

*MR. HILL*: We were happy to have the government on our side. I can't remember now some of the differences between them.

*MS. DAVIS*: That maybe that the government wanted the states to be able to have their own time to implement desegregation?

*MR. HILL*: Is that what they proposed?

*MS. DAVIS*: Yes, that was one of the differences.

*MR. HILL*: Well, yes, I know we opposed that. At least we didn't accept it.

*MS. DAVIS*: What affect did the political atmosphere at the time have on your litigation strategy?

*MR. HILL*: Oh, well, it didn't help us any. I mean we were just—If we could have taken the case up during the Truman Administration, see, Eisenhower was the President by the time it got to the decision, and he was a segregationist. He publicly stated that the Court made a mistake. So we didn't have a support that we'd have had. Eisenhower refused to use troops to force desegregation. Eisenhower made it public that he was going to oppose the situation, and Eisenhower begged him and did everything and invited him up to the White House and practically got down on his knees and asked him not to do it. And so consequently we went right along. And so consequently, then, Eisenhower had to use Federal troops to overcome it because a question of the sovereignty of the United States was at stake.

*MS. DAVIS*: In one of the books that I read, Spot Robinson was a very meticulous brief writer.

*MR. HILL*: Yes.

*MS. DAVIS*: Is he the one who mainly wrote the brief? What do you know about that?

*MR. HILL*: Well, this brief was a—let me put it this way. It was a composite deal of several people writing on the brief. I guess the overall person was Lauren Reynolds. Spot was a very good brief writer, and he was also very meticulous. There's no question about that. He was meticulous about everything.

*MS. DAVIS*: How do you think the arguments in the *Brown* case changed the face of litigation?

*MR. HILL*: Well, so far as I was concerned, of course I thought the people on the outside were much more affected than the opponents. In my point of view we had the better side to argue. And, of course, John Davis, you know, had a great reputation, you know. He argued for the opponents overall. I thought he was very ineffective as far as his argument was concerned. They had another lawyer, a different guy from South Carolina, that was much more effective so far as making the oral argument than John Davis.

*MS. DAVIS*: Do you remember John Davis's argument?

*MR. HILL*: Do you mean the details of it?

*MS. DAVIS*: Or just the general—

*MR. HILL*: I remember it generally. My general reaction to it, that's all I can remember.

*MS. DAVIS*: Justice Vinson died at some point during the litigation, right?

*MR. HILL*: Yes.

*MS. DAVIS*: What impact did that have?

*MR. HILL*: Well, the Court couldn't make up its mind. And they had decided to have the case re-argued. That's when they brought in all this historical stuff. But he died during that year, so then Warren was appointed in his place. But, he was on the other side so far as, he

was all for—according to the information we subsequently obtained, he was not convinced that he should overrule *Plessy*.

*MS. DAVIS*: Is there anything else you'd like to leave us with about the *Brown v. Board of Education* litigation strategy?

*MR. HILL*: No. The only thing I can say is there isn't any question in my mind but that the strategy was the correct procedure based on what we ran into after twenty-two years of litigation.

*MS. DAVIS*: Do you think the Court's decision in *Brown II* saying that desegregation should happen in all deliberate speed, do you think that that kind of made the impact of *Brown v. Board of Education* not as firm?

*MR. HILL*: Well, yes, there's no question about it. It was a mistake. I had the opportunity to talk with Warren twice after, and he recognized the fact that they made a mistake. But, you see, you've got to bear in mind all along, the whole deal was trying to satisfy the seven.

*MS. DAVIS*: How would you respond, Mr. Hill, to the argument today that the decision in *Brown v. Board of Education* was a prime example of judicial over-reaching.

*MR. HILL*: That's nonsense. All they did was correct an over-reaching. Listen, the Fourteenth Amendment starts off, "All persons born or naturalized in the United States . . . are citizens of the United States." That's the first sentence. They totally ignored that. The Fourteenth Amendment also provided for equality, equal protection under the laws. How can you set me aside and deny me an opportunity to participate in the mainstream of the country and not be denied equal protection? I mean even here recently, this year, I was before the American Bar Association and they gave me their highest honor. And in my remarks, I pointed out that we still had a long way to go.

(*End of Part II Video Presentation*)

*PROFESSOR COLE*: Okay. We're at the end of the symposium. We have some time for questions for any of our speakers, so who has a question? Yes?

*QUESTION FROM AUDIENCE*: Do we have insight into the details of what the Justices feared might happen had they adopted an order for desegregation forthwith?

*PROFESSOR COLE*: Any of the panel? Let me repeat that for the overflow room. The question is, "Do we have any insight as to what went on in the Justices' minds, concerns they would have had if they had ordered desegregation forthwith instead of using the all deliberate speed formula?"

*PROFESSOR TUSHNET*: I think the answer is no, with one qualification. I think a lot of the discussion occurred in a sort of code because if you're a Justice of the Supreme Court it's psychologically hard to say simultaneously that you're going to issue an order while knowing people are going to disobey it. It's just really hard to acknowledge that fact openly.

The qualification, though, is that in the course of the desegregation litigation, Justice Black said to his colleagues that this is going to mean the end of liberalism in the South for a couple of generations. So at some level at least he, a former Senator, understood some of the political implications of what they were doing. And that statement was made in connection with the remedy order, although I think it referred more to the underlying opinion.

*MR. PRETTYMAN*: I think it was a little bit more serious than that. You've made a number of references to resistance, but it wasn't just resistance that they were concerned about. Resistance implying that they would do nothing. There was talk about blood in the streets. Both the law clerks and the Justices were concerned that this opinion would cause riots and worse. And both the decision to put over the issue of the decree and the with all deliberate speed language was a partial attempt to mute that possibility. And I think certainly to use the language that you've suggested, whether they were right or wrong I think would not have sat well with them because they would have thought that that, indeed, might have caused a much more serious eruption than occurred.

*PROFESSOR COLE*: Any other questions? Yes?

*QUESTION FROM AUDIENCE*: Just to follow up on the Bickel memo, I wondered if Mr. Prettyman—the Bickel memo that Professor Tushnet mentioned—do you have a recollection of seeing that yourself?

*MR. PRETTYMAN*: Oh, yes.

*QUESTION FROM AUDIENCE*: And the effect, and how that—You worked for Justice Frankfurter right about that time yourself?

*MR. PRETTYMAN*: Yes.

*QUESTION FROM AUDIENCE*: Can you give us some insight as to his, what was persuasive to him about that kind of weakest oral argument? Frankfurter is well-known as a very, you know, sharp scholar type Justice.

*MR. PRETTYMAN*: Well, reference has been made to the fact that the advocates brought home to the Court the fact, gave them an excuse, if you will, to avoid the implications of the Fourteenth Amendment, but you've got to remember that within the Court itself the law clerks were doing the same thing, unbeknownst to the advocates, and the Bickel memo being a prime example.

The Court could not ignore the Fourteenth Amendment, particularly since it had specifically asked questions about it. But at the same time, it was not going to discuss the fact that the schools, for example, in the District of Columbia had been segregated by law after the Amendment, and several other unfortunate facts. So what they needed, if you will, was an excuse to ignore the Fourteenth Amendment, and they came up with those few sentences which did away with it and simply said largely based on both the research that you've mentioned and the Bickel memo that what the framers intended was not clear.

I mean I have to say that this is hardly a triumph of judicial consideration the way you normally think about judges going about making decisions. They had a very practical problem in front of them. They knew how they were going to come out in the case. And they had to deal with certain difficulties. And that's how they dealt with that one.

*PROFESSOR WARE*: Mr. Prettyman, did you follow Rehnquist as a clerk to Jackson?

*MR. PRETTYMAN*: Yes.

*PROFESSOR WARE*: Did you ever see the Rehnquist memo?

*MR. PRETTYMAN*: Not until it surfaced later.

*PROFESSOR WARE*: Would you tell us what you thought about it, what your thoughts were?

*MR. PRETTYMAN*: No.

*PROFESSOR COLE*: It didn't play any role, I guess, in Jackson's thinking?

*MR. PRETTYMAN*: No, I don't think so.

*PROFESSOR COLE*: We all know what the Rehnquist memo was. It is a famous memo written by Rehnquist as a law clerk to Justice Jackson arguing to reaffirm *Plessy*, that we should not integrate the schools or desegregate the schools. And he got in some political difficulty years later because of that memo and tried to say, well, it really wasn't his idea, that Justice Jackson had asked him to write it up that way. And there was quite a bit of controversy about whether that was the truth or not. But I guess it was prior to your joining the Court and not an active part of the decision, as I take it, that Jackson made.

*MR. PRETTYMAN*: That's right.

*PROFESSOR COLE*: Any other questions? Yes?

*QUESTION FROM AUDIENCE*: In terms of the advocacy that Professor Ware talked about in how the NAACP formulated the different kinds of strategy, how has that changed constitutional litigation afterwards? I mean was that the first time we saw a group sort of compose a strategy to hit the country in different places, and has it been duplicated again?

*PROFESSOR COLE*: The question is, "How did the NAACP's strategy that was effective in this case impact later strategies in terms of a group going across the country raising lawsuits in various areas and I guess bringing it up to the current day?"

*PROFESSOR WARE*: Well, as far as I know, that was the first time that a coordinated, broad-based litigation came down of that nature and a successful campaign was conducted. But it did serve as the inspiration to all sorts of other subsequent movements, particularly in the 1960s and 1970s. The Legal Services Corporation, the environmental movement, and groups even today continue to use litigation as a tool to

bring about change. So it's served as a model, if you will, for public interest litigation in the 1950s and 1960s and even today. So it's a model that has been adopted and followed by many.

*PROFESSOR COLE*: A question that I have, my sense would be that if there had been a dissent or two it wouldn't have changed the way that *Brown* played out over the next thirty, forty years, and I'm curious what the panelists think about that. Do you think the unanimity was crucial in this whole scenario?

*MR. PRETTYMAN*: I happen to. I think even a single dissent would have—Of course you can argue that *Brown* in the very area that it's directed toward, school segregation, did not have that much impact if you're looking at the way the schools are today in many areas. But it had, believe me, a tremendous impact in all kinds of areas—it would take us a half hour to list them all—outside of the schools. And I think that there would have been much more resistance if the resistors had been able to latch on to even one well-reasoned opinion on the other side.

*PROFESSOR WARE*: I would say that, first of all, I asked Robert Carter about this, and none of the lawyers anticipated the degree of resistance to *Brown*, and I think none of the Judges as well. And I don't think they thought that. Thurgood Marshall kept saying freedom by 1963, and they thought it would take a short, a much shorter—so they didn't anticipate, you know, the continuing difficulties with school desegregation. You know, it did have a broader affect on the law. So I'm not sure had the, you know, I don't know. It's sort of a hypothetical question. But I'm not sure if an order, you know, to desegregate immediately or within one year, I can't—I guess what I'm saying is I can't imagine anymore resistance than things like the Little Rock confrontation or the confrontation in Mississippi. I can't imagine what more violence, what more turmoil could have occurred than that which occurred. So I'm just not sure. I do believe, though, that the compromise of all deliberate speed, to go slow, give them time, I'm sure that the Court itself almost acknowledges was not, was at least problematic if not just wrong.

*PROFESSOR COLE*: One more question.

*QUESTION FROM AUDIENCE*: This is for Professor Tushnet. You almost seem to be suggesting that to, as a matter of a lesson in advocacy when you're talking about Thurgood Marshall's stress on let's

get it done now to advocates to be careful what you would argue for. Do you think that that advocacy by Marshall pushed the Court to talk about speed and all deliberate speed, or do you think that as you read that advocacy in the context of the dialogue with the Court and with subsequent events; albeit, hindsight is always 20/20, that *Brown II* and the resulting discussion of remedy in *Brown II* might have been better served if Marshall had been less intrangent on that argument?

*PROFESSOR TUSHNET*: That's a good question. The question is whether Marshall's advocacy might have created more difficulties at the remedy stage than if he had been less intrangent as I described him to be. I'm inclined to think that he had the right strategy there.

You have to understand my response in light of the fact that I'm not a great admirer of Frankfurther. I think Frankfurter, in particular, was looking for an easy way out of the problem. And if Marshall had said, a gradual remedy is fine with us, Frankfurter would have been relieved and would have seen that as an easy way out. And it wasn't. It wouldn't have been an easy way out of the problem.

And what Marshall did, appropriately, was to insist to Frankfurter that there really was no easy way out, that Frankfurter's conscience couldn't be salved by the all deliberate speed formulation. Now, you know, that explanation is on the level of individual Justices and how they feel about their jobs. But my view is that Frankfurter ought to have been made uncomfortable about the all deliberate speed formulation even if he was going to accept it. And that's what Marshall's advocacy did. It made him uncomfortable.

*PROFESSOR COLE*: Okay. We've been really celebrating, I guess, an almost fifty years or fifty-year plus strategy that changed the face of this country through constitutional litigation. Jim Parker, a first-year student, an older first-year student that's a great guy, if you haven't met him, look for him, told me at the break—he was a former school master—that Clarington County, South Carolina, which Oliver Hill mentioned, is still one hundred percent segregated schools. There is no, according to his fairly recent information, there is no desegregation.

And you can't live in Macon, Georgia for long without knowing there are powerful forces still at work fifty years later to reshape the mandate of *Brown* back toward the white power kind of structure. So the need for effective advocacy really is on both sides, but I'm thinking of the side to implement *Brown*, is still present and will be present for you in your lives as lawyers.

But this is really an interesting look back at a crucial period that started this ball rolling. I appreciate you all coming, and I certainly appreciate our panelists, who did an absolutely wonderful job, and we'll end it now.

(*Symposium Concluded*)

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