law school in "any adjacent state." In 1938 the Court, speaking through Chief Justice Hughes, held that such a program did not satisfy the federal right of a black to have the "equal opportunity for legal training" in Missouri, and the denial of the right meant he must be admitted to the white law school in Missouri (*Missouri* ex rel. *Gaines* v. *Canada*, 305 U.S. 337, 352). Only Mr. Justice McReynolds and Mr. Justice Butler dissented.

By the forties, cases of racial discrimination were mounting. We held in *Mitchell* v. *United States* (313 U.S. 80) that a black with a first-class ticket who demanded Pullman accommodations on an interstate train could not constitutionally be relegated to second-class accommodations. In *Sipuel* v. *Board of Regents* (332 U.S. 631) we ordered that a black be admitted to Oklahoma's white law school, there being no other legal education offered by the state.

Texas established a separate law school for blacks, but in 1950 we held in *Sweatt* v. *Painter* (339 U.S. 629) that it was not equal to the white law school and that the black who applied must, therefore, be admitted to the white institution. Vinson wrote feelingly in rejecting the claim of Texas that it would constitutionally take care of black law students in a new school recently opened: "Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State" (*Id.* 633).

In *McLaurin* v. *Oklahoma State Regents* (339 U.S. 637), a black seeking a doctorate in education was, under compulsion of our decisions, admitted to Oklahoma's white graduate school but was required "to sit apart at a designated desk in an anteroom adjoining the class room." He was not allowed to use the desks in the "regular reading room" of the library, and was to eat separately and at a different time from other students in the school cafeteria" (*Id.* 640). We held that the imposition of these conditions deprived the black of "his personal and present right to the equal protection of the laws" (*Id.* 642).

The presence of blacks in white schools began to appear in geographical areas that had been completely segregated. In the North and in the West a different pattern had developed and, at least legally, blacks enjoyed full equality in public educational facilities, in parks, on railroads, and the like.

And so the parade of separate but unequal cases mounted in the

Courts. After McReynolds and Butler were gone from the Court, it was quite unanimous in agreeing on what treatment of blacks was not "equal" by the test of *Plessy* v. *Ferguson*. There was some discussion as to whether the "separate but equal" doctrine should not be reconsidered and overruled. Some briefs were urging it but the Court did not move in that direction until 1952. At that time *Brown* v. *Board of Education* (344 U.S. 1) was set for argument with four other cases, each of which seemed, on the records before us, to present dual school systems where the facilities and curricula and teachers were "equal." Thus the continued validity of *Plessy* v. *Ferguson* was presented.

The cases were argued on December 9, 1952. On June 8, 1953, we set them down for reargument and suggested that five questions be argued (345 U.S. 972). When the cases had been argued in December of 1952, only four of us—Minton, Burton, Black and myself—felt that segregation was unconstitutional. Vinson was Chief Justice and he seemed to be firm that *Plessy* v. *Ferguson* should stand, and that the states should be allowed to deal with segregation in their own way and should be given time to make the black schools equal to those of the whites. Justice Reed held that segregation was on its way out and over the years would disappear, and that meanwhile the states should be allowed to handle it in their own way.

Frankfurter's view was that it was not unconstitutional to treat a Negro differently from a white but that the cases should be reargued. Jackson felt that nothing in the Fourteenth Amendment barred segregation and that it "would be bad for the Negroes" to be put in white schools, while Justice Clark said that since we had led the states to believe segregation was lawful, we should let them work out the problem by themselves.

It was clear that if a decision had been reached in the 1952 Term, we would have had five saying that separate but equal schools were constitutional, that separate but unequal schools were not constitutional, and that the remedy was to give the states time to make the two systems of schools equal.

The cases were ordered reargued, and Black and I were greatly relieved when that vote carried. By that time Vinson had died and Earl Warren had taken his place. The new Chief, sensing the deep division in the Court, did not press for a decision but made it clear he thought segregation was unconstitutional.

On December 12, 1953, at the first Conference after the second argument, Warren suggested that the cases be discussed informally and no vote be taken. He didn't want the Conference to split up into two opposed groups. Warren's approach to the problem and his discussions in Conference were conciliatory; not those of an advocate trying to convince recalcitrant judges. Frankfurter maintained the position that history supported the conclusions in *Plessy* that segregation was constitutional. Reed thought segregation was constitutional, and Jackson thought the issue was "political" and beyond judicial competence. Tom Clark was of the opinion that violence would follow if the Court ordered desegregation of the schools, but that while history sanctioned segregation, he would vote to abolish it if the matter was handled delicately.

It was suggested and decided that the new Chief Justice try his hand at this opinion. Opinions are usually typed by the Justice's office and sent to the printer in the basement, and then two or more printed copies are circulated to each of the other Justices' offices. This time we suggested that the Chief Justice's opinion not be circulated but that it be given to each individual Justice privately so that each could express his doubts and uncertainties before a formal opinion was circulated. When circulations are made formally there is always the possibility of a leak, and it was felt we should take the time needed to come up with an opinion that reflected the true opinion of the Court. With these thoughts in mind Chief Justice Warren personally handed to each of us one copy of his first draft of his opinion.

The four of us who had stood against *Plessy* v. *Ferguson* the first time these landmark cases were argued transmitted our approval of his opinion to him either orally or by a written note. With Warren we were in the majority, but a five-to-four decision was the last thing any of us wanted. It would not be a decisive decision historically. It would make the issue a political football and would make the filling of the next vacancy on the Court a Roman holiday.

As the days passed, Warren's position immensely impressed Frankfurter. The essence of Frankfurter's position seemed to be that if a practical politician like Warren, who had been governor of California for eleven years, thought we should overrule the 1896 opinion, why should a professor object? The fact that a worldly and wise man like Warren would stake his reputation on this issue not only impressed

Frankfurter but seemed to have a like influence on Reed and Clark. Clark followed shortly, Reed finally came around somewhat doubtfully, and only Jackson was left. Jackson had had a heart attack and was convalescing in the hospital, where Warren went to see him. I don't know what happened in the hospital room, but Warren returned to the Court triumphant. Jackson had said to count him in, which made the opinion unanimous. We could present a solid front to the country, and it was a brilliant diplomatic process which Warren had engineered.

The storm broke on May 17, 1954, the day the decision in *Brown* v. *Board of Education* was initially announced (347 U.S. 483).

The opinion, though unanimous, did not represent that solidity which unanimity implies. The first worries were expressed in the remedies to be decreed, the terms of the judgment to be entered. So we put down for reargument the question of relief (*Id.* 500). *Brown* was reargued April 11–14, 1955, and decided on May 31, 1955 (349 U.S. 294). We emphasized that the federal courts should require the local boards to "make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling" (*Id.* 300). We recognized that additional time might be needed "arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and a revision of local laws and regulations which may be necessary in solving the foregoing problems" (*Id.* 300–301). We remanded the cases to the District Courts to move "with all deliberate speed" (*Id.* 301).

That phrase was put in because of Frankfurter's persuasion. He pointed out that it was an old equity expression, that Holmes as state judge had used it, that it expressed the tolerance and yet firmness which was required. (I later did research on the use of that phrase and I think Frankfurter overstated its history.) Some, including Black and me, were opposed, but everyone eventually acquiesced.

That phrase became a signal for delay. In Arkansas a District Court approved a desegregation program and then suspended the initiation of the program for two and a half years in order that new Arkansas laws, promoted by Governor Orville Faubus, could be challenged and tested in the courts. The Court of Appeals reversed the District Court, and in September of 1958 we affirmed the Court of Appeals (*Cooper* v. *Aaron*, 358 U.S. 1).

In 1957 some blacks were admitted to a high school in Little Rock, Arkansas. Local police removed them and Eisenhower sent federal troops to enforce the Court decree—and properly so. It is the duty of the President to "take care that the laws be faithfully executed" (Article II, Sect. 3 of the Constitution). Court decrees are of course part of "the laws." As a result of Eisenhower's order to move troops to Little Rock, eight black children attended the white high school for one school year (358 U.S. 12). But in 1958, on petition of the school board, the District Court—finding that "chaos, bedlam, and turmoil" had existed at this high school—changed the order approving the delay of the board's desegregation plan for two and a half years. It was that order the Court of Appeals reversed and we disapproved in *Cooper* v. *Aaron.* It was the governor and legislature of Arkansas that had created "violent resistance" to desegregation (*Id.* 15). "Thus law and order are not here to be preserved by depriving the Negro children of their Constitutional rights" (*Id.* 16).

Article VI of the Constitution makes the Constitution the "supreme law of the land" (*Id.* 18). Law and order are important. But it is not Faubus or Wallace or Nixon "law and order" but "constitutional law and order" that must be maintained.

Many areas in the North and East and West had segregated school systems, though not statutory dual systems. When it is shown that school authorities have installed a systematic program of segregation, the case is no different than a "dual system" so far as remedies are concerned. That appeared to be the case in Denver, which, we concluded in 1973, had used the "neighborhood school" concept as a manipulative device to encourage segregation (*Keyes* v. *School District No. 1, Denver, Colo.,* 413 U.S. 189). We remanded the case for full findings on these issues, and if the prima facie case shown by the black and Chicano minorities was made out, our direction was "all-out desegregation of the core city schools" (*Id.* 214).

All sorts of subterfuges were adopted. "Freedom of choice" was adopted in Virginia to block dismantling of a dual school system, and in 1968 we disapproved it (*Green* v. *County School Board,* 391 U.S. 430). Arkansas had a similar plan, which we also disapproved (*Raney* v. *Board of Education,* 391 U.S. 443). Mississippi used a plan giving a student the right freely to transfer to a school of his choice, zone residents having priority and no bus service being provided. After a year, all black elementary schools were all black, and only token transfers of blacks to

white schools had been made. Fourteen years to come up with that plan was not using "all deliberate speed" (*Monroe* v. *Board of Commissioners,* 391 U.S. 450).

Not only did local authorities impede progress, but the decree, of course, bound only those states which were parties to the action. While most of them moved promptly, other states that had the same problem and that were advised that the segregated way of life was unconstitutional delayed and did nothing about the dismantling process.

The federal district judges faced with the problem of granting decrees which would result in the dismantling of dual school systems almost always resorted to busing as a remedy. Busing had been used prior to *Brown* as one means of preserving a dual school system. Thus many blacks were bused for miles to get them into a black school and to deprive them of attending the neighborhood school which was either all white or mixed.

Out West, where I come from, busing was not used to handle any racial problem; it was used extensively in small towns which otherwise would have been able to afford only a one-room school house in which students often would be crowded together from the first to the eighth grade. As the consolidated school movement gained momentum, local resources were pooled, and superior facilities were constructed and faculties assembled. Buses were used to bring the students to this better school. The youngsters who grew up in Goose Prairie, Washington, for example, would travel forty-eight miles in the morning to the school way down in the valley in Naches, and then back those forty-eight miles at night.

In the more recent cases involving *Brown,* busing was commonly used as the device best suited to putting an end to the dual school system. Many parents were upset that their children had to travel long distances. It was not an ideal solution, but in terms of coercion in the effort to dismantle the dual school system, it was effective.

But even with the busing, the dismantling process went very slowly. The problem kept coming back that usually the local school boards were predominantly white. Moreover, the school boards were resolved to keep the education of blacks at an inferior level. There were many competent black teachers, but the segregated way of life had so infected the nation that superior faculties which were 100 percent black were hard to find.

Ideally, a decree ordering that the inferior school buildings be razed and that new school buildings be erected in areas that would attract both whites and blacks would seem to have been a better remedy. But that would have been an expensive decree to supervise and administer, involving the raising of money locally for that purpose.

In 1972, eighteen years after our *Brown* decision, Virginia was still impeding the dismantling of its dual school system by establishing a new school (*Wright* v. *City of Emporia* (407 U.S. 451), and North Carolina was making a like effort (*United States* v. *Scotland Neck City,* 407 U.S. 484). While we struck down both schemes, they were both five-to-four decisions. Further division of the Court appeared in *Bradley* v. *State Board of Education of Virginia* (462 F 2d 1058), which we affirmed by an equally divided Court (412 U.S. 92), Mr. Justice Lewis F. Powell taking no part. The affirmance meant that the District Court was barred from uniting three school districts in a desegregation school plan in order to prevent the blacks in Richmond from being locked into a permanently black school, the end product of one dual school system.

A state ban on busing for and in school desegregation was held invalid in 1971 in *North Carolina State Board of Education* v. *Swann* (402 U.S. 43). Busing was a conventional means of implementing plans of desegregation which we approved the same year in *Swann* v. *Charlotte-Mecklenburg Board of Education* (402 U.S. 1, 30). Busing was not an issue on which the Court was in contention. The Court divided on the issue of the use of two or more school districts in metropolitan areas as the framework for a desegregation school plan. The practice first appeared in the Bradley case in 1973, in which we divided four to four. That fracture grew in 1974 in the Detroit school case, *Milliken* v. *Bradley* (418 U.S. 717), where the suburban area had the resources and the sophistication to command excellent schools, while the disadvantaged residents of the Detroit inner city did not.

Milliken, taken together with *San Antonio Independent School District* v. *Rodriguez* (411 U.S. 1) of 1973 is a great setback for school desegregation in metropolitan areas. *Rodriguez* involved a Texas scheme whereby each school district financed itself, the state sharing none of the costs—which meant that a school district with a ghetto had fewer funds for education than a plush white suburban area! *Rodriguez* was a five-to-four decision, holding that there was no violation of the Equal

Protection Clause of the Fourteenth Amendment when a state made poor school districts pay their own way. White, Douglas, Brennan and Marshall dissented.

That decision, coupled with *Milliken,* brought school desegregation to a halt in metropolitan areas where (as Richmond and Detroit illustrated) the ghetto core of the cities is black or some other racial minority, and the surrounding suburbs, in separate districts, white.

But even beyond the problems of *Swann* and *Rodriguez* was the controversy raised in another case, in 1974. It had become common practice for some graduate schools, law schools and bar associations to keep the entrance requirements high for whites but to admit blacks who might apply with lesser credentials. The question was extensively argued in *DeFunis* v. *Odegaard* (416 U.S. 312), which came out of the University of Washington Law School. The reasoning was that black people were at such a disadvantage in the educational system in American that they needed some concessions if we were to have black lawyers and judges, black dentists and doctors. Some argued that the Court should adopt a pro rata system: if a community was half black and half white, half of the entering class for a law school or medical school should be black also. This same argument was extended to bar associations. That seemed to me to be a wholly un-American practice, quite inconsistent with equal protection. It would promote aristocracy in this country —not an aristocracy of wealth or an aristocracy of race, but an aristocracy of talent, the best talents being recognized in all minority groups and each entitled to take his or her place at the top. I wrote out my views in *DeFunis,* but the Court did not rule on the case. Believing the case had become moot, it dismissed the issue. But, I felt the Court would have to revisit *DeFunis* in the future and decide which is the right path, for it is a constantly recurring question. The later Bakke and Weber cases, of course, were in the same area.

I feel that if blacks or any other minority are poorly prepared for the legal profession but are nevertheless admitted, the situation of the minorities will worsen. Many law schools admit blacks even though their credentials are not up to par, and this leads to the following tragedy: the black student graduates, enters the job market and is hired, perhaps as a law clerk. It is soon apparent, in these instances, that he cannot research a problem, or prepare a relevant memo, or draft a contract or a will. Years pass and he goes on from one law firm to