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# THE SUPREME COURT AND RACE DISCRIMINATION, 1967-1991: THE VIEW FROM THE MARSHALL PAPERS

MARK V. TUSHNET\*

## I. INTRODUCTION

Lawyers and historians agree that almost everything we need to know about constitutional *law* is found in the Supreme Court's published opinions. Internal Court documents, like Justice Thurgood Marshall's papers, tell us something about the dynamics within the Court but relatively little about constitutional law. The fact that the final published opinion dramatically departs from the initial draft, for example, may be interesting as part of the Supreme Court's history but holds little of interest for the study of constitutional law.<sup>1</sup>

Historians, though, can use internal Court documents to provide a "thicker" description of the Court's conduct than the published opinions alone make possible. In this Article, I argue that the Supreme Court's treatment of race discrimination cases dur-

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1. For example, Justice Rehnquist's first draft in *United States Postal Serv. v. Aikens*, 460 U.S. 711 (1983), attempted to develop a general approach to the Title VII ban on race discrimination in employment that would have distinguished between white-collar and blue-collar positions, giving employers more latitude as to the former. Justice Rehnquist, Draft Opinion (*United States Postal Serv. v. Aikens*) (Dec. 9, 1982), in *Thurgood Marshall Papers*, Library of Congress, box 317, file 5 [hereinafter *Marshall Papers*]. Justice Marshall circulated a dissent stating that such a distinction would be "untenable" and "unwieldy." Justice Marshall, Draft Opinion (*United States Postal Serv. v. Aikens*) (Jan. 11, 1983), *Marshall Papers*, box 317, file 5 at 1 & n.1. Justice Rehnquist's opinion failed to gain a majority, and in March he recirculated what he called an "alternate draft" with an entirely different theory, limiting itself to the facts of the case. Justice Rehnquist, Draft Opinion (*United States Postal Serv. v. Aikens*) (Mar. 13, 1983), *Marshall Papers*, box 317, file 5. That draft became the published opinion. I doubt that any employment discrimination lawyer would find it significant that in 1983 some Justices considered a white-collar/blue-collar distinction before ultimately abandoning it. Perhaps had the information been available in 1984 it might have affected how some arguments were made, but surely not today.

ing Justice Marshall's tenure had two characteristics. The published opinions are sufficient to identify the first: that the period should be divided into two sub-parts, an era focusing on defining violations of the anti-discrimination principle and general remedies for such violations, and an era focusing on affirmative action, a more specific remedy.

Identifying the second characteristic, though, requires an investigation of Justice Marshall's papers. That investigation reveals that the race discrimination cases were *divisive* but not *contentious*.<sup>2</sup> In other words, the Court was frequently quite divided, and fundamentally so, in these cases, but the votes were quite firm, and the losers—ordinarily Justice Marshall and other liberals—accepted their losses without escalating tensions within the Court.<sup>3</sup> The liberal Justices kept the atmosphere friendly because, while recognizing that their opponents were changing race discrimination law somewhat and that the Court's new composition made such changes inevitable, they believed that neither the amount nor the pace of change was too great.

Before developing those two arguments, I should note several limitations of the data on which I rely. First, and most obvious, the information comes from the papers of one of the Court's liberal Justices.<sup>4</sup> During Marshall's tenure, nearly all of the Court's internal documents were circulated to all the chambers. Occasionally, however, Marshall's papers include drafts circulated only to a few Justices. Something similar may have happened among the conservative Justices, but the presently available materials do not establish that fact.

Second, it is important to distinguish between significant information revealed by the internal documents and what should

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2. In this regard, race discrimination cases differed from capital punishment cases, which were both divisive and contentious. Developing that contrast, however, would exceed the scope of this Article.

3. One important qualification should be noted and developed later. Chief Justice Warren Burger was not infrequently inept as a manager of cases within the Court. At times Burger's conduct occasioned tension, but the tension was associated far more with Burger's conduct than with the fact that it occurred specifically in a race discrimination case.

4. Justice William J. Brennan's papers are available with his permission, but I have not consulted them for this Article. They too, of course, come from a liberal Justice.

be regarded as the ordinary "noise" associated with transforming first drafts into published opinions. Most of the time, when the second draft contains changes, even changes suggested by another Justice, the changes are simply noise. The author may have overlooked a point that another Justice thought important enough to include, or a Justice may have put an argument in a way that another Justice thought less clear than it could be.

These changes should not be viewed as highly significant. The risk of doing so is exacerbated when one examines only a single topic as I do in this Article. Only by noticing that quite similar changes occur in tax or admiralty cases can we understand that the changes in the race discrimination cases do not tell us anything important about that class of cases.<sup>5</sup>

Finally, a more complex issue, which I have discussed in more detail elsewhere,<sup>6</sup> concerns the Justices' jurisprudence. Particularly in the 1980s, a fair amount of the Justices' correspondence dealt with suggestions by one Justice to another that some words or phrases in a draft opinion be modified slightly.<sup>7</sup> Those

5. A good example is Melvin Urofsky's fine study of *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). MELVIN I. UROFSKY, *A CONFLICT OF RIGHTS: THE SUPREME COURT AND AFFIRMATIVE ACTION* (1991). Urofsky, who used the Brennan Papers, shows how Justice Brennan's draft opinion received critical comments from Justices O'Connor and Powell. The comments pointed in different directions: O'Connor's comments would have weakened the opinion (from Justice Brennan's point of view), while Powell's could be accommodated in ways that would have strengthened it (again from Brennan's point of view). *Id.* at 163-64. When Justice O'Connor circulated an opinion indicating that she understood Brennan's draft to support her position, Brennan added a footnote disclaiming that point. *Id.* at 165-66. She then withdrew her concurrence in his opinion, and the published opinions reflected the state of the exchange. *Id.* at 166-67. Urofsky does *not* overemphasize the significance of the changes he discusses; they resulted from ordinary discussions within the Court, and the fact that Justice Brennan changed his opinion, first to gain Powell's assent and then to respond to O'Connor, does not tell us anything significant about the Court's treatment of discrimination issues.

6. Mark Tushnet, Thurgood Marshall As Republican Lawyer, Address at the Annual Meeting of the American Society for Legal History, Memphis, Tenn. (Oct. 21, 1993) (copy on file with the *William and Mary Law Review*).

7. For example, Justice Antonin Scalia frequently made what he once called a "suggestion to forestall future litigation." Letter from Justice Scalia to Justice Blackmun (Feb. 19, 1987), Marshall Papers, box 412, file 8. Another more typical example is Scalia's suggestion that the phrase "the employer certainly will know," be changed to "the employer generally will know with tolerable certainty," a change that preserved the possibility that lower courts might, in appropriate cases, recognize

who make such suggestions, and those who take them seriously, have a jurisprudence in which the precise formulations in Supreme Court opinions have significant impact on the arguments lawyers can make and lower court judges can accept. Other Justices, including Marshall, had a more pragmatic jurisprudence in which, as Justice Stevens put it, "the logic of . . . [an] opinion will carry the day in all events."<sup>8</sup> Such Justices believe that the Supreme Court can define in broad terms what the Constitution requires, but the precise meaning of the Court's decisions will be worked out, not among the Justices, but in the lower courts by litigants and judges not always sympathetic to the Court's broad conclusions. To determine whether a change in phrasing is significant or merely noise, we need to understand the jurisprudence of the opinion's drafter and of any Justice to whom the drafter was responding.

## II. THE ERA OF VIOLATION AND REMEDY

When Thurgood Marshall first joined the Court, one era of race discrimination law was about to end. The Court had essentially avoided desegregation cases after announcing its "all deliberate speed" formula in 1955.<sup>9</sup> Its hesitation arose in part from concern over the political limitations on the Court's ability to insist on substantial desegregation in the deep South, and in part from Justice Felix Frankfurter's misplaced belief that the Court could induce desegregation by appealing to the "better"

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an employer's good-faith defense that in fact it did not know. Letter from Justice Scalia to Justice Blackmun (May 8, 1987), Marshall Papers, box 416, file 7. A close relative is Justice Stevens' change, in response to a suggestion from Chief Justice Rehnquist, from a standard calling a burden "virtually insurmountable," Letter from Chief Justice Rehnquist to Justice Stevens (June 1, 1988), Marshall Papers, box 449, file 9, to one calling it "well-nigh insurmountable." *Meyer v. Grant*, 486 U.S. 414 (1988).

8. Letter from Justice Stevens to Justice Marshall (Jan. 3, 1985), Marshall Papers, box 373, file 10. The case was *Ake v. Oklahoma*, 470 U.S. 68 (1985), and Justice Marshall refused to agree with Chief Justice Warren Burger's suggestion that the opinion should be explicitly confined to capital cases. Letter from Chief Justice Burger to Justice Marshall (Dec. 27, 1984), Marshall Papers, box 373, file 10; Letter from Chief Justice Burger to Justice Marshall (Jan. 8, 1985), Marshall Papers, box 373, file 10.

9. *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955).

class of white southerners.<sup>10</sup> In the deep South, however, deliberation meant inaction.

By the late 1960s the Justices had become impatient with the deep South's recalcitrance. They also benefited from a changed political environment: the enactment of major civil rights acts in 1964,<sup>11</sup> 1965,<sup>12</sup> and 1968<sup>13</sup> demonstrated that the nation as a whole now had the political will to support more aggressive action against segregation. The 1964 Civil Rights Act, in particular, gave federal executive officials substantial weapons through the threat of cutting off federal funds for segregated schools.<sup>14</sup>

### A. *The Underlying Ambiguity in the Law*

In *Green v. County School Board*<sup>15</sup> the Court took the first major step toward active school desegregation, invalidating a county's freedom-of-choice desegregation plan that allowed students to choose the school they wished to attend.<sup>16</sup> While the plan was in effect, no white students chose to attend the previously black school, and only fifteen percent of the African-American students chose to attend the previously white schools.<sup>17</sup> Although Justice Hugo Black initially would have upheld the freedom-of-choice plan, eventually the Court unanimously invalidated it.<sup>18</sup>

*Green's* unanimity concealed serious analytic problems that later cases brought into the open. The Court had never really resolved for itself, much less for the lower courts, the meaning of "desegregation." It could mean the elimination of race as the

10. See Mark Tushnet, *What Really Happened in Brown v. Board of Education*, 91 COL. L. REV. 1867, 1925-27 (1991).

11. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 1971 (1988)).

12. The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)).

13. The Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. § 3601 (1988)).

14. 42 U.S.C. § 2000(c) (1988).

15. 391 U.S. 430 (1968).

16. *Id.* at 441.

17. *Id.*

18. BERNARD SCHWARTZ, SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT 59 (1986).

basis for pupil assignments, whether that basis was openly stated or studiously concealed. Or, it could mean the accomplishment of a substantial degree of biracial attendance at public schools.

One main strategy for passive resistance to desegregation involved adoption of pupil assignment policies, which nominally assigned students to schools without regard to race.<sup>19</sup> As implemented, however, these policies were "gerrymanders," accomplishing racial separation without explicitly relying on race. The Justices came to believe that such facially neutral policies were merely facades behind which racial discrimination continued.<sup>20</sup> The question that arose was whether other responses to the Court's rulings were similar facades. *Green* seemed to indicate they were. The Court held that, even though students nominally made individual decisions to attend particular schools, the pattern of results showed that the freedom-of-choice plan perpetuated race discrimination.<sup>21</sup> School boards that had adopted student assignment plans earlier were not complying with the Court's requirements in good faith.

*Green* suggested, though it did not say so openly, that a board could not adopt a freedom-of-choice plan in the good faith belief that it satisfied the Constitution, at least when the result of the plan reproduced the segregated conditions that had existed before 1954.<sup>22</sup> This point could easily be made in the factual setting presented by *Green*: a school district with only two high schools, in which students of both races would have attended both schools in substantial numbers if the school board assigned students to the schools nearest their homes.<sup>23</sup> On this inter-

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19. For a discussion of this strategy, see MARK TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961*, at 242-56 (1994).

20. SCHWARTZ, *supra* note 18, at 53-54.

21. *Green*, 391 U.S. at 441.

22. *Id.* at 440-41. In a footnote, the Court quoted at length from two U.S. Commission on Civil Rights reports. *Id.* at 340 n.5. The quoted material expressed the Commission's views as to why freedom-of-choice plans produced such poor results in integrating public schools. See *id.* The Commission's purported reasons included fear among blacks of white retaliation, improper influence on black families to keep their children out of the all-white schools, and economic pressure exerted on blacks by whites. *Id.* The Court "neither adopt[ed] nor refuse[d] to adopt" the Commission's views. *Id.*

23. See *id.* at 432 ("There is no racial segregation in the county; persons of both

pretation of *Green*, the degree of actual integration was no more than a signal that racial discrimination still affected school board decisions. The Court never said, though, that it relied on the pattern of results to support an inference of bad faith.<sup>24</sup> Perhaps the Justices still recalled Justice Frankfurter's belief that school boards represented the best in the white South and could be nursed along if the Court expressed enough sympathy with their problems. With the Court reluctant to talk openly about bad faith, however, the next step was almost inevitable (and unobservable): a low degree of actual integration became not just a signal, but a demonstration that the constitutional violations continued to occur.

According to *Green*, the freedom-of-choice plan was a "deliberate perpetuation of the unconstitutional dual system."<sup>25</sup> School boards, it said, now had an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."<sup>26</sup> That duty could be satisfied only by a plan that "prove[d] itself in operation."<sup>27</sup>

Justice Black's initial vote in *Green* was probably the first real indication that trouble was afoot within the Court. Black had never believed that white southerners would accept substantial biracial attendance in schools. He only wanted white southerners to demonstrate their adherence to the constitutional antidiscrimination norm by acting in good faith to eliminate race as a basis for public decisions.<sup>28</sup> By blurring the line between using the pattern of results as a basis for inferring a lack of good faith and using the pattern as a basis for an independent determination of unconstitutionality, *Green* posed problems for Black and, it turned out later, for other Justices.

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racess reside throughout.").

24. See *id.* at 438-42.

25. *Id.* at 438.

26. *Id.* at 437-38.

27. *Id.* at 441.

28. See TUSHNET, *supra* note 19, at 192.



*B. The First Signals of Disagreement*

A sensitive reader might observe Black's difficulties emerging in his draft opinion for the Court in a teacher desegregation case. Judge Frank Johnson had been dealing with the desegregation case in Montgomery, Alabama, since 1964.<sup>29</sup> As Justice Black's opinion said, Judge Johnson continually had to prod the school board to desegregate: The board "was constantly sparring for time" while the judge "was constantly urging that no unnecessary delay could be allowed."<sup>30</sup> When the case reached the Supreme Court, the dispute was apparently narrow. Judge Johnson had ordered the board to move toward the goal of having the ratio of white teachers to African-American teachers in each school be substantially the same as the ratio of white teachers to African-American teachers in the school system as a whole.<sup>31</sup> The court of appeals had modified this order, objecting to what it called "fixed mathematical ratios."<sup>32</sup> The Supreme Court reversed, finding that Judge Johnson did not intend to impose a "rigid and inflexible" requirement.<sup>33</sup>

Justice Black's opinion for the Court was filled with praise for the school board. It had shown "a growing recognition . . . of its responsibility to achieve integration as rapidly as practicable."<sup>34</sup> The litigation was, in Black's terms, "an exchange of ideas between judge and school board officials,"<sup>35</sup> and Judge Johnson "from time to time, found it possible to compliment the board on its cooperation with him."<sup>36</sup> The residual differences were, Justice Black wrote, "minor,"<sup>37</sup> and "[i]t is good to be able to decide a case with the feelings we have about this one."<sup>38</sup> Twice in his draft opinion, though, Justice Black went farther than "two of

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29. *United States v. Montgomery Bd. of Educ.*, 395 U.S. 225, 228 (1969).

30. *Id.* at 230-31.

31. *Id.* at 232 (citing *Carr v. Montgomery County Bd. of Educ.*, 289 F. Supp. 647, 654 (M.D. Ala. 1968)).

32. *Id.* at 234.

33. *Id.*

34. *Id.* at 230.

35. *Id.*

36. *Id.*

37. *Id.* at 231.

38. *Id.* at 236.

[his] Brethren"<sup>39</sup> wanted. Initially he wrote that the school board "[had] at all times asserted their purpose to bring about a racially integrated school system,"<sup>40</sup> and that the court of appeals "made forceful arguments against rigid or inflexible orders."<sup>41</sup> The final opinion said only that the board "assert[s]"<sup>42</sup> that purpose, thereby eliminating the suggestion that the board had acted in good faith from 1955 onward. It also said that the court of appeals made "many arguments" against rigid orders.<sup>43</sup> Justice Black was more willing to find good faith, and more nervous about what school boards could be required to do, than were some of his colleagues.

Justice Black's unease rested on uncertainty about what the Court would eventually do about the deep South's recalcitrance. On the surface, the question was merely about timing. The deep South had resisted desegregation forcefully, but the time had come to take action. In 1964, and then later in *Green*, the Court phrased the point this way: "The time for mere 'deliberate speed' has run out."<sup>44</sup> School boards clearly had to do something now,<sup>45</sup> and *Green* specified what that action should be: Boards had to propose plans that "promise[d] realistically to work."<sup>46</sup> Exactly what constituted a plan that "worked," however, remained unclear.

### C. Warren Burger's Impact

The Court's next confrontation with desegregation remedies saw more strains among the Justices, this time caused by Chief Justice Warren Burger's inept handling of the Court's work.<sup>47</sup>

39. Letter from Justice Black to Conference (May 27, 1969), Marshall Papers, Box 56, File 3.

40. Justice Black, Draft Opinion, (United States v. Montgomery Bd. of Educ.) (May 20, 1969), Marshall Papers, box 56, file 3, at 11.

41. *Id.* at 10.

42. *Montgomery*, 395 U.S. at 236.

43. *Id.* at 234.

44. *Griffin v. Prince Edward County*, 377 U.S. 218, 234 (1964). The court repeated this phrase in *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968).

45. *Green*, 391 U.S. at 439-41.

46. *Id.* at 439.

47. The interpretation I offer differs from that promulgated primarily by Bob Woodward and Scott Armstrong, who present Chief Justice Burger as a manipulative

Burger, alone, did not cause an irremediable rift among the Justices, but the changing composition of the Court began to have its effect.

The issue in *Alexander v. Holmes County Board of Education*<sup>48</sup> was simply one of timing, not of what sorts of plans boards had to propose. The Court of Appeals for the Fifth Circuit had relied on the 1964 Civil Rights Act to support its desegregation rulings.<sup>49</sup> It endorsed the guidelines developed by the Department of Health, Education, and Welfare (HEW) for determining when federal funds could be denied to school districts, taking them to indicate what the Constitution required as well. In July 1969, the Fifth Circuit ordered HEW to submit desegregation plans for thirty-three Mississippi school districts that were to take effect in September of 1969.<sup>50</sup> The Nixon administration, pursuing its southern strategy, moved to delay the order's effective date.<sup>51</sup> At the end of August the Fifth Circuit agreed, postponing the submission of plans until December.<sup>52</sup> Because it was unlikely that plans submitted in December could be implemented in the middle of a school year, this postponement would have delayed desegregation until September 1970—fifteen years after *Brown II*.

The civil rights plaintiffs asked Justice Black to override the Fifth Circuit's last order restoring the September date.<sup>53</sup> Be-

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and highly political judge, viewed with suspicion by his colleagues. See generally BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* (1979). Chief Justice Burger, of course, had more conservative instincts than many of the Justices on the Court when he arrived, and some of them, at least initially, thought that he was Machiavellian. The Justices rather quickly came to understand that Chief Justice Burger's behavior could best be explained by his inadequacies rather than by imputing political motives to him, although suspicions cropped up again from time to time. Woodward and Armstrong's picture of Chief Justice Burger may be unduly influenced by their reliance on law clerks' accounts. Unlike the Justices, law clerks served for only one term (very rarely two) and tended to see constitutional law in highly political terms. They were unlikely to form the more nuanced evaluations of the Chief Justice that their employers could.

48. 396 U.S. 19 (1969).

49. *Alexander v. Holmes County Bd. of Educ.*, 417 F.2d 852 (5th Cir. 1969).

50. *Id.* at 858.

51. *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 1218, 1219 (Black, Cir. J., 1969).

52. *Id.*

53. *Id.* at 1219.

cause the issue was only one of timing, Justice Black was sympathetic. However, writing as a single Justice, Black refused to overturn the court of appeals' "deplorable" order.<sup>54</sup> He urged the plaintiffs to seek review by the full Court, to "do away with [the 'all deliberate speed' formula] completely."<sup>55</sup>

The Court granted the plaintiffs' petition for review on October 9 and heard argument in the case only two weeks later.<sup>56</sup> After the argument, Justice Black told his colleagues that he had always opposed the "all deliberate speed" formula and would not again endorse it.<sup>57</sup> Black would have insisted on immediate desegregation.<sup>58</sup> Justice Brennan thought that no more than two weeks should be allowed for compliance, with desegregation plans to be submitted immediately,<sup>59</sup> while Justice Harlan would have been even more flexible.<sup>60</sup> These were not large differences, however.

Chief Justice Burger met with Justices Harlan and White to block out an order to be released as soon as possible.<sup>61</sup> He circulated his first draft on October 26, two days after the Court's conference. It began with the comment that "the Attorney General [had] urged" ending segregation before the beginning of the 1970 school year.<sup>62</sup> Its substance gave the court of appeals until mid-November to enter its order regarding "interim relief"<sup>63</sup>—not much sooner than that court's initial December 1 deadline. The deadline for implementation was vague: "at the earliest possible time and date" after the court's action.<sup>64</sup> Burger's cover note said that he had avoided specifying "any 'outside' date"—that is, a statement that the boards should act no later than a specified deadline—"because of the risk that it

54. *Id.* at 1222.

55. *Id.*

56. *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969).

57. SCHWARTZ, *supra* note 18, at 69.

58. *Id.* at 69-70.

59. *Id.* at 70.

60. *Id.* at 69.

61. *See id.* at 70-86 (recounting the Court's deliberations in detail); WOODWARD & ARMSTRONG, *supra* note 47, at 49-50.

62. SCHWARTZ, *supra* note 18, at 71.

63. *Id.*

64. *Id.*

could have overtones which might seem to invite dilatory tactics."<sup>65</sup>

None of Burger's colleagues thought that he had done what they wanted, and most of them started to work on separate draft orders. Justice Harlan objected to the prefatory comment about the Department of Justice, saying, "I think it undesirable to blink the fact that the Government stands in opposition to the central and only issue in the case before us."<sup>66</sup> Justice Brennan's order would have said that "all deliberate speed" is no longer constitutionally permissible," and that the court of appeals should immediately order the necessary steps to achieve immediate termination of any "dual school system based on race or color."<sup>67</sup> Justice Black prepared a dissent because Burger's order "revitalize[d] the doctrine of 'all deliberate speed,'" and it would be "disastrous" to continue "one more day of an unconstitutional dual school system."<sup>68</sup> "The time has passed for 'plans' and promises to desegregate."<sup>69</sup>

Justice Marshall "attempt[ed] [a] compromise," continuing to refer to "interim" relief and requiring only "reasonable means for achieving . . . immediate termination."<sup>70</sup> Marshall's draft, though, was tighter than Burger's, setting an "outside date" of December 31, 1969.<sup>71</sup> Justice Marshall thought that he could extract another concession by substituting a date at year's end, following the traditional winter school vacation, for the requirement for "immediate" desegregation—which his colleagues seemed to think meant desegregation in late October—in exchange for a commitment to *complete* desegregation at a specific date.

On October 27, the Justices met again. Burger had revised his proposed order, which now would require desegregation "forth-

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65. *Id.* at 70.

66. *Id.* at 72.

67. Justice Brennan, Memorandum and Draft Order (Alexander v. Holmes County Bd. of Educ.) (Oct. 28, 1969), Marshall Papers, box 62, file 1, at 2.

68. Justice Black, Draft Opinion (Alexander v. Holmes County Bd. of Educ.) (undated), Marshall Papers, box 62, file 1, at 3-4.

69. *Id.*

70. SCHWARTZ, *supra* note 18, at 76.

71. *Id.*

with"—the term Marshall had urged the Court to adopt when he argued *Brown II* in 1955.<sup>72</sup> He retained his comment on the administration position, though, which bothered the other Justices. He promised to circulate another revision, and he did so late the same afternoon. The Chief Justice was never one to discern subtle differences between his position and those of his colleagues. His cover note said that he had been helped by Justice Marshall's draft, "which was very much like what I had initially submitted."<sup>73</sup> In fact, the proposed order differed significantly from Marshall's. True, it did repudiate "all deliberate speed." And it specified that the schools should "begin to operate as a unitary system"<sup>74</sup> in November. However, it omitted Marshall's trade-off, setting no date for the completion of desegregation. It also continued to obscure the Department of Justice's position by saying that the government had "urged that the Respondent's obligation to desegregate their school systems is immediate and unqualified."<sup>75</sup>

Even worse, Burger failed to appreciate that his colleagues wanted a crisp order, to make it completely clear that the courts would no longer tolerate any further delays. To convey this message, the Justices wanted to issue only an order, with no opinion.<sup>76</sup> As Black stated, "There has already been too much writing and not enough action in this field. Writing breeds more writing, and more disagreements, all of which inevitably delay action."<sup>77</sup> Despite these expressions, Burger circulated a draft opinion with the third revised order.

Burger's sense of the case's importance is suggested by the fact that he proposed to follow the extraordinary procedure in *Cooper v. Aaron*,<sup>78</sup> the Little Rock school desegregation case, in which the Court's opinion listed the names of the participating Justices. He could not have known, of course, that some members of the Court had misgivings about that procedure even in

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72. *Id.* at 76-77.

73. *Id.* at 78.

74. *Id.* at 81.

75. *Id.* at 80.

76. *See id.* at 73.

77. *Id.* at 73-74.

78. 358 U.S. 1 (1958).

*Cooper* itself.<sup>79</sup> His draft opinion was so lame, though, that it could only have confirmed his colleagues' impression that the Chief Justice had what could most charitably be called an inflated sense of his own stature both inside and outside the Court. Despite the fact that his colleagues wanted a clear endorsement of immediate desegregation, Burger would have had them say that "[i]n the circumstances we have no doubt that this will present problems and difficulties"<sup>80</sup> because the desegregation plans were drafted under severe constraints of time and lack of information. The draft opinion also said that the Justices "hope[d]" that the "heavy burdens on pupils and teachers alike will . . . be more than offset by the fulfillment now to some of these pupils of promises long unkept."<sup>81</sup> The concluding sentiment was worth expressing, but the statements about "problems and difficulties"<sup>82</sup> undercut the opinion's rhetorical force; the draft reads as if the Court were being reluctantly dragged to endorse immediate desegregation notwithstanding its problems, rather than as if the Court were finally vindicating fundamental constitutional rights. Justice Brennan read the draft as an attempt by Burger "to save Nixon"<sup>83</sup> from a confrontation with the Court. President Nixon, the draft's tone suggested, had correctly understood how difficult desegregation would be, although perhaps his administration had ultimately come down on the wrong side of a difficult question.

Justice Brennan thought that the draft opinion "obscured" the message that "all deliberate speed" was dead, and Justice Black objected to specifying any dates at all, believing that dates would give lawyers the chance to seek delay beyond the deadline by citing new information not available to the Court and the fact that no one really believed that desegregation would occur by a specific date. The best the Court could do, Black believed, was to use the word "immediate" and leave the rest to the lower courts.<sup>84</sup>

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79. See TUSHNET, *supra* note 19, at 264.

80. SCHWARTZ, *supra* note 18, at 79.

81. *Id.*

82. *Id.*

83. *Id.* at 80.

84. *Id.* at 81-83.

Unhappy with Burger's draft, Justice Brennan circulated a revised order, and Justice Stewart circulated a draft opinion. Brennan thought that the Court should state its message "in the briefest and plainest possible words."<sup>85</sup> His draft order began with a short statement that desegregation according to 'all deliberate speed' is no longer constitutionally permissible. The obligation of every dual school system is to desegregate now.<sup>86</sup> The court of appeals should have "directed that each school system begin immediately to operate as a unitary school system within which no person is to be barred from any school because of race or color."<sup>87</sup> These phrases survived into the final order. Justices Black and Douglas signed on to this draft. Justice Harlan did as well, although he stated that he would have preferred to specify an "outside date" as Marshall had, to prevent "dilatatory tactics."<sup>88</sup>

Justice Stewart's draft opinion said that "further delay . . . will not be tolerated,"<sup>89</sup> and specified an "outside date" of November 15, 1969.<sup>90</sup> Not surprisingly, Harlan indicated that he could join Justice Stewart's opinion. Having counted the votes, Justice Marshall knew that it was "impossible to get unanimity on cut-off dates,"<sup>91</sup> and on that assumption he was willing to join Justice Brennan.

Burger, too, could count. He met with Brennan and basically adopted Brennan's draft, recirculating it under his own name on the afternoon of October 28. In light of all that had occurred, it suggests something about Burger's obtuseness that his cover memorandum stated that the final draft "returns to what I proposed to the Conference except (a) the preamble is altered and (b) the dates are omitted."<sup>92</sup>

Although only a few days had passed since oral arguments, the Justices were now impatient to issue the order. After all,

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85. *Id.* at 82.

86. *Id.*

87. *Id.*

88. *Id.* at 83.

89. *Id.* at 84.

90. *Id.*

91. *Id.*

92. *Id.* at 84-85.



what had divided them was a dispute over just how immediate "immediate" desegregation would have to be, and those who wanted the schools to begin the process right away thought that every day of delay undermined their position. Justice Harlan agreed to the Brennan-Burger revision because the divisions had been reduced to "pure semantics."<sup>93</sup> Both Justices White and Stewart had "substantial misgivings"<sup>94</sup> about the order, taking it to suggest that "all deliberate speed" had been abandoned only to be replaced by the equally defective standard, "as soon as possible."<sup>95</sup> The Court issued the order on October 29.<sup>96</sup>

Two things stand out about the Court's deliberations in *Alexander*. The Justices were divided by differences in their understanding of what it meant to abandon "all deliberate speed" in favor of immediate desegregation. On the surface it seemed as if the differences concerned timing, but underneath they concerned the meaning of desegregation. Justice Black and Chief Justice Burger thought that "immediate desegregation" meant doing *something* right away to eliminate segregated schools. They rejected a cut-off date only in part because they assumed that school boards would begin to do something at the latest date possible, the cut-off date. They also rejected a cut-off date because they knew that when it arrived, plaintiffs would ask what exactly had been done and were confident that by late 1969 the patterns of racial attendance at schools would not differ much from what they were in early 1969, no matter what the school boards had done. Justice Black's misgivings about *Green* meant that he would not be terribly troubled by modest changes in patterns of racial attendance as long as he was sure that the school boards had indeed taken some action in good faith.

In contrast, Chief Justice Burger, not having participated in *Green*, may have taken it quite seriously. Given *Green's* apparent insistence on results, the prospect loomed of saying that the results achieved by "immediate desegregation" were inadequate and that even more aggressive steps to desegregate would be

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93. *Id.* at 85.

94. *Id.*

95. *Id.* at 86.

96. *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969).

necessary. The Chief Justice, with his sensitivity to the Nixon administration's legal and political strategy, could not have been pleased about such prospects.

Justices Harlan and Marshall had the same understanding, but for them the cut-off date was affirmatively desirable precisely because it would force the Court to face the ambiguities inherent in defining desegregation. They believed that the Constitution demanded that school boards fully abandon race-based student assignment and do so in good faith; that is the reason they went along with *Green*. They might eventually have divided over how often a pattern of results demonstrated the existence of bad faith, but in *Alexander* that issue was not before them. A cut-off date meant that "desegregation" had to be completed by a specified date. When that date arrived, the Court would have to decide the meaning of desegregation.<sup>97</sup>

Ever the politician, Justice Brennan sought the middle ground, which in this case meant perpetuating ambiguity. The differences between Brennan and Burger were largely rhetorical: how to convey the sense that the Court really did mean "immediate" desegregation even though it did not know what desegregation really meant. In the charged political atmosphere of 1969, and with the first administration since 1955 asking to slow the desegregation process, rhetoric mattered. Justice Black's expressions of sympathy with the Montgomery School Board a year earlier could not be repeated. Indicating even indirectly that the Court was roughly in line with the Nixon administration's position would have meant that "immediate" really meant "some time soon," and no one except Burger wanted that result.

For all these reasons, the Court's internal discussions of *Alexander* were rather restrained. In part, this restraint resulted from the compressed time-frame. With Justices and clerks churning out one draft in the morning and responding to drafts from other chambers in the afternoon, little time remained to

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97. I believe that Bernard Schwartz misunderstands the Harlan-Marshall position as one that would have given school boards *more* time to desegregate than the Brennan position. SCHWARTZ, *supra* note 18, at 67-87. Rather, Justices Harlan and Marshall understood desegregation to be more limited than the more expansive interpretations of *Green* might suggest, and they believed that desegregation *as they understood it* could be completed rather quickly.

focus on personal relations or feelings. The restraint of the discussion also occurred partly because the Justices were learning about Warren Burger's managerial style. When Burger's cover memoranda repeatedly showed that he failed to understand the other Justices' concerns they began to believe that he was not a Machiavellian manipulator seeking to sneak an endorsement of the Nixon administration's position past his colleagues, but simply lacked the capacity to understand their concerns.

*D. The Emergence—and Submergence—of Real Disagreement*

This pattern was to repeat itself, most notably in *Swann v. Charlotte-Mecklenburg Board of Education*.<sup>98</sup> There the Court unanimously endorsed extensive transportation remedies—busing—in school desegregation.<sup>99</sup> In *Alexander*, a dispute about the timing of desegregation remedies concealed a disagreement about the meaning of “desegregation”; in *Swann*, a dispute about the scope of those remedies concealed the same disagreement.

The problem originated with *Green*. Suppose a board acted in good faith to eliminate race as a criterion for student assignment, for example, by assigning students to the schools nearest their homes. In New Kent County such a policy would have led to substantial integration because residential neighborhoods were well-integrated. What about a neighborhood school policy in a system with substantial residential segregation? The easy solution would have been to find that school boards adopting such policies were not acting in good faith. However, the history of neighborhood school policies was so well established that it would have been a true slap in the face to tell southern school boards that their prior resistance to desegregation now barred them from adopting a neighborhood school policy of a sort that systems throughout the country regarded as educationally sound.

*Green* pointed in two directions. One direction was that results indicated good or bad faith. The other was that results

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98. 402 U.S. 1 (1971).

99. *Id.* at 30.

were the measure of continuing constitutional violations. A Memphis case, *Northcross v. Board of Education*,<sup>100</sup> might have given the Court a chance to choose between these two meanings. The district court in *Northcross* had ordered some additional student assignment remedies.<sup>101</sup> The plaintiffs sought more extensive relief from the court of appeals.<sup>102</sup> That court, however, refused to grant the relief, finding that the city would achieve a "unitary system" in which segregation had been completely eliminated as soon as it complied with the district court's orders.<sup>103</sup> *Alexander*, it said, was therefore inapplicable to Memphis.<sup>104</sup>

When the plaintiffs sought Supreme Court review, the initial vote to grant review was four-to-three.<sup>105</sup> This count was misleading, though, because only Chief Justice Burger really wanted to take the case to clarify *Green's* meaning. Justices Harlan, Stewart, and White were uncertain enough that they waited to see what Justice Brennan might produce. Brennan drafted a proposed *per curiam* opinion that vacated the court of appeals' decision. Adopting a position that would ultimately prove strategically the best the liberals could do as the Court's composition changed, Justice Brennan focused on the district court's finding that the system was still segregated. Substantial evidence supported that finding, he argued, and it should not have been rejected by the court of appeals. With such a finding in hand, *Alexander* remained relevant to Memphis.<sup>106</sup>

Chief Justice Burger concurred in the result, but he was not satisfied because he still believed that the Court should "clear up what seems to be a confusion, genuine or simulated," about the meaning of *Green*.<sup>107</sup> "At some point," he wrote, "we should resolve some of the basic practical problems including whether any particular racial balance must be achieved as a constitution-

100. 397 U.S. 232 (1970).

101. *Id.* at 233.

102. *Id.* at 234.

103. *Id.*

104. *Id.*

105. SCHWARTZ, *supra* note 18, at 89. Justice Marshall was disqualified because he had been involved in the case as Solicitor General, and there was one vacancy on the Court because of Justice Abe Fortas' recent resignation. *Id.* at 89-90.

106. *Id.* at 90.

107. *Northcross*, 397 U.S. at 236.

al matter, to what extent school districts and zones may or must be altered and to what extent busing is compelled as a constitutional requirement."<sup>108</sup> As it turned out, his colleagues did not want to resolve those basic questions in *Swann* either.

The Charlotte-Mecklenburg school district was one of the largest in the country as a result of the consolidation of the city and county districts in 1960. In 1965, only token desegregation had occurred in the district. Only a handful of African-American students attended schools with a white majority, and a smaller handful of whites attended black-majority schools. Prodded by local activists and concerned about federal pressure, the school board developed a desegregation plan that would have closed some African-American schools in the county area, created neighborhood school assignments, and allowed "freedom of choice" for students able to provide their own transportation.<sup>109</sup> Federal District Judge J. Braxton Craven approved the plan in 1965, finding that the board had no duty to "increase the mixing of the races" in the school population.<sup>110</sup>

*Green* changed the legal landscape, and the NAACP's lawyers reopened the case in 1968. Although more desegregation had occurred by then, over two-thirds of the system's African-American students attended all-black schools. Relying on the interpretation of *Green* that imposed an affirmative obligation on school boards to eliminate segregation "root and branch," District Judge James McMillan concluded that *Green* required—or, as it turned out, at least allowed him to require—more substantial steps. In 1970 he adopted a proposal initially designed by one of the plaintiffs' experts. The plan involved pairing African-American and white schools, creating attendance zones extending from the city outward to the suburbs and the county, and—as a result—instituting substantial student busing. The aim, Judge McMillan wrote, was to achieve ratios of whites to African-Americans in each school that roughly approximated the ratio in the entire district.<sup>111</sup>

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108. SCHWARTZ, *supra* note 18, at 91.

109. *Id.* at 9, 11.

110. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 243 F. Supp. 667, 670 (W.D.N.C. 1965).

111. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 318 F. Supp. 786, 792

The court of appeals affirmed the portions of Judge McMillan's order dealing with junior high and high schools, but it vacated the portions dealing with elementary schools.<sup>112</sup> According to the court of appeals, the Constitution required district judges to enforce "reasonable way[s] of eliminating all segregation,"<sup>113</sup> but requiring as much busing as Judge McMillan's order required in elementary schools was not reasonable.<sup>114</sup>

The Justices voted unanimously to hear the plaintiffs' challenge to the reversal of the elementary school order, and they stayed the effect of the court of appeals decision. Judge McMillan's order would be implemented while the Court considered *Swann*. The case attracted substantial public attention, and the Court put it on a somewhat accelerated schedule, hearing argument on the Court's first day of oral argument during the 1970 Term.<sup>115</sup>

Bernard Schwartz has provided an extremely detailed account of the maneuvering inside the Court,<sup>116</sup> and I confine my presentation to some highlights. As in *Alexander*, the impetus to question *Green*'s meaning, and therefore the meaning of desegregation, came from the Chief Justice and Justice Black, while the impetus to evade the answer came from Justices Brennan and Stewart.

As he had in *Alexander*, Burger evoked the Court's traditions, this time suggesting that because the case was as important as *Brown*, the Justices should simply discuss it without taking a vote. He was bothered by what seemed to him the "rigidity" of Judge McMillan's use of racial ratios. Justice Black reiterated his view that "[i]t's foolish to think this question will be solved in our own or our children's lifetime."<sup>117</sup> As he consistently had done, Black was resigned to a rule of purely formal nondiscrimination: "there was to be no legal discrimination on account of

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(W.D.N.C. 1970).

112. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 431 F.2d 138, 147 (4th Cir. 1970).

113. *Id.* at 145.

114. *Id.*

115. SCHWARTZ, *supra* note 18, at 92-94.

116. *See id.* at 100-84.

117. *Id.* at 101.

race by any government."<sup>118</sup> A neighborhood school policy did not violate that principle.

To varying degrees, all the other Justices disagreed with these points. As they stated their positions, a consensus apparently emerged. Rigid racial ratios were not required and probably were impermissible. Some one-race schools might remain even in fully desegregated districts. Otherwise, though, district judges had a great deal of discretion in determining what was needed to eliminate segregation. The proper question was whether Judge McMillan's order was within the broad range of discretion that he possessed. They all agreed that it was. There were some differences on the margin: Justice Harlan and recently appointed Justice Harry Blackmun would have preferred an opinion providing some detailed guidance about the proper exercise of discretion; Justice Brennan argued for the interpretation of *Green* requiring substantial integration. Overall, though, the tenor of the discussion was that Judge McMillan had not erred, and that the court of appeals should not have modified his order.

Again Burger's peculiar view of his role impeded the development of an opinion. Although his statements to his colleagues strongly suggested that he disagreed with Judge McMillan, he believed that the Chief Justice should speak for the Court in such an important case. He therefore drafted a "memorandum" to serve as the starting point for a Court opinion. He counseled his colleagues to defer writing separately "until we have exhausted all other efforts to reach a common view."<sup>119</sup> In "emphasiz[ing] the importance of our attempting to reach an accommodation,"<sup>120</sup> and making his draft the starting point, Burger gained some strategic leverage. His colleagues would have to move toward him by suggesting modifications to his draft. Once again, it was easy for his colleagues to suspect Burger's motives, and, once again, his motives were almost certainly not Machiavellian. Rather, he was trying in his fumbling way to play the role he believed a Chief Justice should play.

Burger's draft ended up remanding the case to Judge

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118. *Id.*

119. *Id.* at 113.

120. *Id.*

McMillan, but it was hardly an endorsement of what McMillan had done. For example, Burger narrowly construed *Green*, writing that "some of the problems we now face arise from viewing *Brown I* as imposing a requirement for racial balance, *i.e.*, integration, rather than a prohibition against segregation."<sup>121</sup> Although hardly inaccurate, this statement was a red flag to those who recalled that Judge John Parker's similar statements had fueled southern resistance to *Brown* itself.<sup>122</sup> Prodded by arguments that lower courts could consider the policies pursued by government agencies other than school boards—citing decisions by public housing authorities, for example—in deciding whether the "prohibition against segregation" had been violated, Burger confined his focus to school boards.<sup>123</sup> He would not use desegregation as a tool for larger schemes of social engineering: "The elimination of racial discrimination in public schools is a large enough burden . . . . Too much baggage can break down any vehicle."<sup>124</sup>

Burger then deferred to the trial judge's discretion to order a remedy. Here, too, the tone was grudging: "Populations, pupils or misplaced schools cannot be moved as simply as earth by a bulldozer, or property by corporations."<sup>125</sup> Judge McMillan's order, the draft opinion said, had "strong intimations" that he insisted on "fixed mathematical racial balance."<sup>126</sup> Although racial composition might be "one relevant step," it could not be a rigid requirement. Nor could a district judge insist that all one-race schools be eliminated. District judges could change attendance zones and order busing, but they had to be cautious. These were "not impermissible tool[s]."<sup>127</sup> The aim was to "achieve as nearly as possible that distribution of students and those patterns of assignments that would normally have existed

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121. *Id.* at 114.

122. TUSHNET, *supra* note 19, at 241; Letter from Justice Brennan to Chief Justice Burger (Mar. 8, 1971), Marshall Papers, box 71, file 6, at 5 (Judge Parker's statement "raised so much trouble for so long a time").

123. SCHWARTZ, *supra* note 18, at 114.

124. *Id.*

125. *Id.*

126. *Id.* at 115.

127. *Id.* at 115-16.



had the school authorities not previously practiced discrimination."<sup>128</sup> Exactly how that might be determined was obscure, but "reasonable" determinations by district judges would suffice. On busing, the draft emphasized that "the age of the students"<sup>129</sup> was an important consideration in deciding how much travel time should be required. This emphasis seemed to suggest that the court of appeals was correct in reversing the busing order for elementary students while affirming the order for students in upper schools, but the draft nonetheless remanded the case to Judge McMillan.

The other Justices on the Court disagreed with the tenor of Burger's draft. Justice Harlan had already sent him a draft opinion stating that "racially identifiable school[s]" were inconsistent with *Brown I.*<sup>130</sup> District judges could use "a remedial criterion based on results"<sup>131</sup> to determine whether segregation had been eliminated, and Justice Harlan would explicitly have endorsed "mathematical racial balancing."<sup>132</sup> Justice Douglas responded to the Chief Justice's draft by insisting that it misinterpreted Judge McMillan's order by erroneously understanding it to require "racial balance." Further, Justice Douglas would not ignore discriminatory actions by other government agencies in dealing with segregated schools. Justice Marshall sent Burger a draft opinion saying explicitly at every point that Judge McMillan had not abused his discretion.<sup>133</sup>

Justice Brennan took a stern tone. Burger's draft was, in places, "wrong." It had a negative tone when what was needed was a positive opinion. Brennan pushed for "specific[]" and "positive guidelines."<sup>134</sup> As he had said in conference, the goal was "to achieve substantial integration."<sup>135</sup> In seeking that goal, district courts could "take race into account in assigning pupils," they could use racial ratios as "a goal or rule of thumb," they

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128. *Id.*

129. *Id.*

130. *Id.* at 107.

131. *Id.*

132. *Id.*

133. *Id.* at 118-20.

134. *Id.* at 121.

135. *Id.*

could use all of the techniques Judge McMillan had used, and they should regard busing as "only an incident of the remedial techniques . . . not [to] be viewed as a separate issue."<sup>136</sup>

Justice Stewart expressed "serious reservations" about some parts of Burger's draft, in particular that the draft suggested that a *school board* might not be allowed to seek racial balance in its schools.<sup>137</sup> However, like Burger, he would not have used a school desegregation case to address the effects of housing discrimination. He was less certain than Justices Douglas and Brennan that Judge McMillan had used racial ratios merely as a starting point or rule of thumb. He thought that Judge McMillan might erroneously have believed that it was impermissible to have racially identifiable schools, even those resulting from housing patterns. As Stewart saw it, these were modest qualifications to his overall position that Judge McMillan had been largely correct and Burger's draft too grudging in acknowledging the district judge's remedial powers. The qualifications, though, helped stiffen Burger's resistance on these points as he yielded on others.<sup>138</sup>

Stewart sent Burger his own draft opinion. Although Stewart would not have recognized "a substantive constitutional right to attend a school having any particular racial mixture," once a substantive constitutional violation had been established—as it had been here—the only question was whether the district judge's remedial order was within his discretion.<sup>139</sup> Stewart then shifted his focus and addressed the claim that *Brown* and *Green* required no more than that school boards ignore race in making student assignments. That claim supported pure neighborhood zoning. However, Justice Stewart wrote, "[v]iewed as a remedy for decades of self-imposed segregation, colorblind neighborhood zoning . . . is closely analogous to the 'freedom of choice' plans" in *Green*.<sup>140</sup> Where neighborhood zoning would reproduce the prior pattern of racial separation, it was "not enough to

136. *Id.* at 122.

137. *Id.* at 124; see also Letter from Justice Stewart to Chief Justice Burger (Dec. 14, 1970), Marshall Papers, box 71, file 6.

138. SCHWARTZ, *supra* note 18, at 127-29, 131-36.

139. *Id.* at 125.

140. *Id.* at 126.

meet the affirmative remedial duty of the local board."<sup>141</sup> After examining a list of possible remedies—most of which Judge McMillan had used—Justice Stewart described them as "an appropriate part of . . . the district judge's inventory of means to the end of disestablishing the dual system."<sup>142</sup>

Chief Justice Burger misunderstood the messages that he was receiving. As he stated in the cover memorandum he circulated with a revised draft, he knew that "some points [his colleagues had made] were in conflict with [his] own position."<sup>143</sup> Apparently, he believed that he could solidify what seemed to him support for *his* position by stating it even more clearly, and thereby weaken the position of those who disagreed with him. That belief misinterpreted the comments he had received. Any sensitive reader would have understood that the Justices Burger might have counted on—Harlan and Stewart in particular—were politely but firmly disagreeing with him. The politeness was the form, the disagreements the substance. Burger apparently believed that the disagreements were marginal and that the politeness indicated fundamental agreement on his central points.<sup>144</sup>

Burger's second draft did little to accommodate his critics. He did adopt Stewart's point that school boards could assign students to schools in appropriate ratios "to prepare students to live in a pluralistic society,"<sup>145</sup> but, he wrote, federal courts had "no such roving, at-large powers."<sup>146</sup> Responding to suggestions from Justices Stewart and Brennan, Burger endorsed the use of plans that allowed any student to transfer from a school in which he or she was a member of the majority to one where he

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141. *Id.*

142. *Id.* at 127.

143. *Id.* at 131.

144. *See id.* at 131-36.

145. *Id.* at 133.

146. *Id.* This qualification probably can be best understood as the result of the Chief Justice's style of drafting opinions. Typically his law clerks wrote first drafts. He then would insist upon inserting particular lines that captivated him, even if they did not fit terribly well with the remainder of the opinion. Ordinarily these insertions were relatively unthinking, almost spontaneous, reactions to the drafts, and they would pop into and drop out of opinions without much significance. For a related comment from another Justice on Burger's drafting approach, see Letter from Justice Powell to Chief Justice Burger (Mar. 10, 1979), Marshall Papers, box 223, file 12.

or she would be in the minority. Instead of saying that altering attendance zones was "not an impermissible tool," the new draft called it "a permissible tool."<sup>147</sup> Finally, the opinion would have made a general statement approving busing in appropriate cases. Borrowing a sentence from Justice Stewart, Burger wrote, "[d]esegregation plans cannot be limited to the walk-in school."<sup>148</sup>

Otherwise, the second draft was even more critical of Judge McMillan's order than the first. Early in the draft, it reiterated the statement distinguishing integration from prohibiting segregation and then strengthened it by stating that "the term integration nowhere appears in any opinion dealing with pupil segregation."<sup>149</sup> Burger added new language emphasizing the limits of judicial action under the Constitution:

In policy and program the authority of the political branch—Congress, the states and school authorities—is broader than that of the courts . . . . Much that a majority or even all of this Court might consider desirable and proper lies beyond our power to command and we serve [the] Constitution best if that is our guide.<sup>150</sup>

The opinion continued to assert that desegregation decrees were different from traditional judicial orders.<sup>151</sup>

Burger may have hoped that this draft would gain votes from Justices Black, Stewart, Blackmun, and perhaps Harlan. Justices Brennan and Douglas, however, met with Justice Stewart and persuaded him that Burger's approach was inadequate. Judge McMillan had *not* used rigid mathematical ratios; rather, he used them flexibly, as Stewart believed they could be used. Interpreting Judge McMillan's order to avoid "doctrinaire" adherence to "a rule of 'racial balance,'" Justice Stewart decided that he should vote to approve the order without qualifica-

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147. SCHWARTZ, *supra* note 18, at 135.

148. *Id.*

149. *Id.* at 131. Justice Black's opinion in *Montgomery County* did use this term, but that case was a teacher desegregation case. See *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969).

150. SCHWARTZ, *supra* note 18, at 132.

151. *Id.*

tion.<sup>152</sup> The memorandum that Stewart had sent to Burger two months earlier was recast as a draft dissent. This opinion never surfaced—apparently only Justices Douglas and Brennan received copies—and it need not be examined in detail. It mattered a great deal, though, because without Stewart's agreement it would seem impossible to convert Burger's draft into an opinion for the Court.<sup>153</sup>

According to Schwartz, Burger had learned that Stewart was likely to abandon him. The Chief Justice went to Stewart's chambers and said that he, too, had decided to affirm Judge McMillan fully. According to a clerk, Burger's position left Justice Stewart "completely boxed in": if Burger circulated a draft affirming Judge McMillan, Stewart would have to go along.<sup>154</sup> This statement may overdramatize the situation. When Burger met Stewart, he already knew that Justice Harlan would not join his draft. Harlan had written the Chief Justice that "the district court handled the matter correctly and . . . its judgment should be affirmed . . ." He also criticized Burger's "reasonableness" standard.<sup>155</sup>

Burger's next attempt abandoned the contrast between desegregation cases and other traditional equity cases. The little essay on the courts' role disappeared as easily as it had appeared. The "Parker-like" statement contrasting integration and desegregation disappeared from its place early in the opinion, only to reappear later in Burger's discussion of mathematical ratios. There, Burger wrote that ratios may be "an appropriate starting point in shaping a remedy."<sup>156</sup> A starting point only, though, because "[t]he Constitution, of course, does not command integration; it forbids segregation."<sup>157</sup> No particular racial balance had to be maintained permanently. Busing, the new draft explicitly stated, was "within [the district] court's power to provide equitable relief."<sup>158</sup> The conclusion continued to use the term

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152. *Id.* at 139, 141-42.

153. *Id.* at 139-44.

154. *Id.* at 144.

155. *Id.*

156. *Id.* at 146.

157. *Id.*

158. *Id.* at 147.

"reasonable," but now it explicitly said that "we are unable to conclude that the order of the District Court is not reasonable, feasible and workable."<sup>159</sup>

The bottom line was at last where a clear majority believed that it should be. The question that remained for the rest of the Justices, then, was whether they should worry about the opinion's tone or sign on because the result was a rather clear affirmation of the *power* of district courts to order extensive remedies in segregation cases and a somewhat grudging affirmation of the use of that power in *Swann*. If, as many people believed, *Swann* presented a case at the extreme end of the spectrum of desegregation cases, finding that Judge McMillan's order was not an abuse of his discretion would indicate that similar orders in less extreme cases were even more clearly appropriate. Of course, no one on the Court had seriously contended that district judges *had to* enter orders like McMillan's, a position that is about all that Burger's draft really disapproved.<sup>160</sup>

With the discussions at this point, those who wanted a stronger position nibbled at Burger's opinion. Justice Douglas wanted Burger to remove the passage saying that courts in school desegregation cases should not concern themselves with discriminatory actions by other public agencies, even if those actions affected "disproportionate racial concentrations in some schools."<sup>161</sup> Justice Marshall wanted Burger to remove the related line that one vehicle could carry only so much baggage.<sup>162</sup> Justice Brennan continued to push for more extensive revisions, which would eliminate the "hazard" that a grudging tone might "arrest the trend" in the South toward acquiescence in *Brown*.<sup>163</sup> Burger's draft, according to Brennan, "express[es] a sympathy for these local boards that [he did not] think is warranted. . . . [A]ny tone of sympathy with local boards having to grapple with problems of their own making can only encourage continued in-

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159. *Id.* at 148.

160. *See id.* at 148-49.

161. *Id.* at 149.

162. Letter from Justice Marshall to Chief Justice Burger (Mar. 23, 1971), Marshall Papers, box 711, file 6.

163. SCHWARTZ, *supra* note 18, at 151.

trans[i]gence."<sup>164</sup> Brennan was particularly bothered by Burger's statement contrasting desegregation and integration: "To revive [that contrast] again would I think only rekindle vain hopes."<sup>165</sup> These issues were, as Brennan acknowledged, matters of "tone. . . . But as our experience with 'all deliberate speed' proved, tone is of primary importance."<sup>166</sup> Justice Harlan also objected to matters of detail. He thought that a test seeking to determine the distribution of students that would have existed if segregation had never occurred "cannot offer any real guidance."<sup>167</sup>

Not surprisingly, Burger was more responsive to Harlan's suggestions than to Brennan's. For example, he deleted a phrase describing some of the considerations regarding student assignment policies as "in part a limitation on the extent of bus transportation of students," that Harlan thought might suggest "a presumption against 'bussing' as such."<sup>168</sup> Harlan offered a revised section of the opinion dealing with racial balance. In the course of reorganizing Burger's draft, Harlan dropped the statement about desegregation and integration to which Brennan objected.<sup>169</sup>

At this point, most of the controversy within the Court had ended. Chief Justice Burger still lacked formal agreement on his opinion, but his third draft made it difficult to organize an alternative opinion. By the third draft, much of the grudging tone had been eliminated. Two additional redrafts made largely stylistic changes.<sup>170</sup> The redrafts brought parts of the opinion that had been untouched earlier into rhetorical agreement with the remainder, further solidifying approval of the district court order. For example, the opinion no longer referred to the irrelevance of action by other government agencies; instead it referred to "all the problems of racial prejudice,"<sup>171</sup> which might refer to

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164. *Id.*

165. *Id.* at 152.

166. *Id.*

167. *Id.* at 153.

168. *Id.* at 162.

169. *Id.* at 157-62.

170. *Id.* at 157-71, 179-84.

171. *Id.* at 181.

purely private prejudice beyond the reach of the Constitution. Nonetheless, the "one vehicle" sentence remained in the final draft.<sup>172</sup> With the votes in hand, the Chief Justice refused to delete the suggestion that busing elementary school children was more troublesome than busing older children. As he told Brennan, some of the continuing objections were "just the difference between the way in which two people express the same ideas but others seem to go beyond what at least five are prepared to accept."<sup>173</sup> Burger's memorandum with his sixth and final draft had a beleaguered tone: "I believe I have demonstrated a flexible attitude, even down to using words of others when I saw no real difference and preferred my own."<sup>174</sup> He did not "prefer all of these changes," but wanted a unanimous opinion.<sup>175</sup>

In the end, everyone was tired of the process of negotiating an opinion acceptable to all. Neither the written documents nor Schwartz's account, however, support the conclusion that the Court fought an internal battle over *Swann*. Burger began with a fuzzy set of ideas about busing, which overlapped to some extent with the views of some of his colleagues, but which, to the extent that they had any substance, were rather different from those of the majority. The fuzziness of his thinking led Burger to believe that he could write an opinion for the Court. Then, as his drafts set down the ideas in necessarily more precise terms, Burger discovered the differences between his views and the majority's. Once again, though, the fuzziness helped. As Burger modified his opinion, he could tell himself that he was simply substituting other Justices' words for his own while retaining the same underlying ideas. Most of his colleagues would have been surprised at this characterization of the process. However, precisely because Burger never thought that he was really

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172. See *Swann*, 402 U.S. at 22.

173. Justice Black circulated a proposed dissent, which sharply criticized busing and endorsed neighborhood schools. SCHWARTZ, *supra* note 18, at 178-79. Schwartz plausibly interprets this dissent as "a bargaining ploy," designed to keep Burger from modifying his opinion even further in the direction Brennan continued to press. *Id.* at 179.

174. *Id.* at 180.

175. *Id.* at 182.



changing his position—and perhaps he was not, because he never really had a position to begin with—the division within the Court never became heated.

### *E. Divisions Consolidated*

After Justices Black and Harlan were replaced by Justices Lewis Powell and William Rehnquist, the Court permanently divided on the issue of remedies for past segregation. The new Justices shared Burger's unease with extensive judicial involvement in desegregation. In addition, Powell could bring his experience as chair of the Richmond School Board from 1952 to 1961—the perspective of the white South in the early years after *Brown*—to counter Marshall's experience in attempting to bring about desegregation—the perspective of the African-American South.<sup>176</sup> The most striking feature of the Court's internal deliberations, though, is how uncontentious they were. The justices expressed their views, voted, drafted opinions, and joined one or another side—and that, basically, was that.

As a sign of the rift, the Court's tradition of unanimity in desegregation cases disappeared in *Wright v. Council of Emporia*.<sup>177</sup> The case involved a consolidated city-county district that was two-thirds African-American. Invoking Virginia's school consolidation statutes in 1969, the city sought to separate from the county system. That separation would have increased the African-American percentage in the county system to seventy two percent, while creating a city district that was roughly evenly divided racially.<sup>178</sup> The majority held that the separation of the city and county schools would unconstitutionally interfere with desegregation.<sup>179</sup> The four Justices appointed by President Richard Nixon dissented.<sup>180</sup> The case made so few ripples within the Court, though, that even Woodward and Armstrong do not mention it.

The Denver school case was the Court's first extended con-

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176. WOODWARD & ARMSTRONG, *supra* note 47, at 161.

177. 407 U.S. 451 (1972).

178. *Id.* at 464.

179. *Id.* at 466-67.

180. *Id.* at 471.

frontation with northern segregation.<sup>181</sup> Justice Powell used the case to offer the proposal that the Court should simultaneously condemn *de facto* segregation while sharply curtailing the remedies they could order; he would have extended the courts' reach into the urban North, while making their regulation of school boards much less intrusive. Once again, although there was uncertainty about what Justice Blackmun would do, he eventually joined Justice Brennan's opinion, which treated the Denver case as involving *de jure* segregation and developed an elaborate scheme of shifting burdens of proof to deal with Northern segregation.<sup>182</sup>

Probably the most revealing interactions occurred in a case that made no law at all. In 1972, District Judge Robert Merhige directed that Richmond, Virginia, and its suburbs jointly participate in a desegregation plan that would have involved transporting students across established district lines.<sup>183</sup> Merhige believed that this plan was a natural extension of *Swann*: If neighborhoods were not sacrosanct in the effort to eliminate the vestiges of segregation, why should school district boundaries be?<sup>184</sup> The court of appeals, however, reversed Judge Merhige, and the Supreme Court decided to review the case.

Because of his service on the Richmond School Board, Justice Powell could not sit in the case. When the Justices discussed the case, they were evenly divided. The case arose as the Justices were reviewing the Denver segregation case as well. In that case, Justice Stewart had agreed with Justice Brennan's position, but now Justice Stewart finally "got off the bus," as he put it. Justice Blackmun considered Justice Powell's proposal in the Denver case but eventually decided that Justice Brennan's approach resolved the particular problem without getting into the broader issues associated with *de facto* segregation. In the Richmond case, though, Justice Blackmun thought that Judge Merhige had gone too far.<sup>185</sup>

181. *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973).

182. *Id.* at 190-214; WOODWARD & ARMSTRONG, *supra* note 47, at 262-65, 268.

183. *Bradley v. School Bd.*, 338 F. Supp. 67 (E.D. Va.), *rev'd*, 462 F.2d 1058 (4th Cir. 1972), *aff'd*, 412 U.S. 92 (1973).

184. *See Bradley*, 338 F. Supp. at 79-80.

185. WOODWARD & ARMSTRONG, *supra* note 47, at 266-67.

The Court heard the Richmond case on Monday, April 23, 1973.<sup>186</sup> Ordinarily the Court would have announced its even division quite soon after argument, perhaps as early as April 30. However, in this case, the Justices delayed the announcement because, at the Court's conference, Justice White outlined an approach that "intrigue[d]" Justice Blackmun, and he wanted to see whether White could come up with a persuasive elaboration of the approach.<sup>187</sup> White suggested remanding the case to Judge Merhige, and quickly drafted a proposed opinion.<sup>188</sup> This opinion had three elements. First, it relied heavily on the principle approved in *Swann* that district judges had extremely broad discretion in devising appropriate remedies for prior segregation. Second, it would have found that transportation across existing district lines *could be* an appropriate remedy. All the Justices agreed that cross-district remedies might be appropriate if the city and its suburbs "colluded" in some formal way to maintain segregation (for example, by agreeing that a suburb could annex a part of the city, thereby removing from the city a white residential area that might be part of a city desegregation order). But, White suggested, such remedies might also be ordered even if no formal collusion occurred. Third, the opinion would have held that Judge Merhige erred because he sought to achieve racial balance through his cross-district remedy.<sup>189</sup>

The strategy behind this draft was clear. Justice Blackmun insisted on reversing the particular order Judge Merhige had entered, but perhaps he could be persuaded to approve cross-district remedies in principle. Justice Rehnquist criticized White's approach as relaxing the "collusion" requirement too much,<sup>190</sup> and the Chief Justice wrote that Judge Merhige had "embarked on an 'end run' around *Swann*," seeking to achieve racial balance in the Richmond and suburban schools.<sup>191</sup> That

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186. *Bradley*, 412 U.S. at 92.

187. Letter from Justice Blackmun to Chief Justice Burger (Apr. 25, 1973), Marshall Papers, box 112, file 3.

188. Justice White, Draft Memorandum Opinion (*Bradley v. School Bd.*) (Apr. 30, 1973), Marshall Papers, box 112, file 3.

189. *Id.* at 7.

190. Letter from Justice Rehnquist to Conference (May 3, 1973), Marshall Papers, box 113, file 3.

191. Memorandum from Chief Justice Burger to Conference (May 10, 1973),

was apparently enough to keep Blackmun from joining White. The announcement that the Court was evenly divided was made on May 21, 1973, a month after oral argument.<sup>192</sup>

The Richmond case highlights how the Burger Court dealt with segregation cases: The liberals on the Court made modest efforts to carry their program along, but those efforts failed and no one thought much about them. In some ways, this merely reflected the state of collegial interaction in the late 1970s and into the 1980s. By that time, relatively few true exchanges about cases and proposed opinions occurred. A Justice would circulate a draft, and the notes joining the opinion would roll in. Occasionally a Justice would suggest modest changes in wording, but these changes rarely were significant.

Two cases near the end of the 1970s illustrate this state of affairs. In *Dayton Board of Education v. Brinkman*,<sup>193</sup> a firm majority voted to vacate a court of appeals decision directing the district judge to order more extensive transportation remedies in a northern state case. When Justice Rehnquist circulated his draft, Justice Brennan wrote that he was "disturbed by the tone of [Rehnquist's] opinion," which he found "unnecessarily harsh."<sup>194</sup> Somewhat disingenuously, Brennan said that he would "rather not" write separately, and "probably won't if you can see your way to remove the chastising tone."<sup>195</sup> Rehnquist was not inclined to do so, however, and he politely replied that he would "certainly give" specific suggestions "careful consideration."<sup>196</sup> Brennan responded with "suggestions for softening the vigor of the criticism" of the court of appeals, but, he wrote, he would "certainly understand why you may conclude that I'm asking too much."<sup>197</sup> Justice John Paul Stevens supported Jus-

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Marshall Papers, box 112, file 3.

192. When the Court revisited the issue in *Milliken v. Bradley*, 418 U.S. 717 (1974), Justice Powell participated in a majority that barred interdistrict remedies. Justice Marshall wrote a long, impassioned dissent. *Milliken*, 433 U.S. at 781-815 (Marshall, J., dissenting).

193. 433 U.S. 406 (1977).

194. Letter from Justice Brennan to Justice Rehnquist (June 1, 1977), Marshall Papers, box 193, file 1.

195. *Id.*

196. Letter from Justice Rehnquist to Justice Brennan (June 2, 1977), Marshall Papers, box 193, file 1.

197. Letter from Justice Brennan to Justice Rehnquist (June 3, 1977), Marshall

tice Brennan.<sup>198</sup>

In the end, Rehnquist kept some quite strong criticisms in his opinion; eliminating them, he told his colleagues, would "some-what alter[] the focus of the opinion."<sup>199</sup> The published opinion called one district court conclusion "of questionable validity," and said that the district court's remedy "was certainly not based on an unduly cautious understanding of its authority"; the court of appeals "simply had no warrant in our cases for imposing" a system-wide remedy where only three particular violations were found, and "imposed a remedy . . . entirely out of proportion to the constitutional violations," because it was "vaguely dissatisfied with the limited character" of the district court's remedy.<sup>200</sup>

After all, why should Justice Rehnquist have done much? Justice Stevens concurred, and Justice Brennan concurred in the result. Their separate opinions attempted to map out the findings the lower courts should make to justify the system-wide remedy.<sup>201</sup> Their opinions were functional dissents strategically cast as concurrences. Justice Rehnquist apparently understood that the tone of his opinion had to be stern in order to send a message that might in the end be more important than the precise holding.

Two years earlier, Justice Stevens had tried a similar maneuver to recast an outcome with which he was in basic disagreement. Justice Powell wanted to use a Dallas desegregation case to "rethink[] . . . the role of the federal judiciary in public education."<sup>202</sup> A district court had ordered the city to adopt a desegregation plan that involved substantial student

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Papers, box 193, file 1.

198. Letter from Justice Stevens to Justice Rehnquist (June 3, 1977), Marshall Papers, box 193, file 1.

199. Memorandum from Justice Rehnquist to Conference (June 6, 1977), Marshall Papers, box 193, file 1.

200. *Dayton Bd. of Educ.*, 433 U.S. at 413, 415, 417-18.

201. *See id.* at 421-26. For the opinion after remand, upholding the system-wide remedy on the basis of the findings Justices Stevens and Brennan requested, see *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 529 (1979).

202. Justice Powell, Proposed Dissent from Denial of Certiorari (*Estes v. Metropolitan Branches of the Dallas NAACP*) (Jan. 11, 1979), Marshall Papers, box 245, file 7, at 12.

transportation, although it tried to preserve some aspects of geographical zoning.<sup>203</sup> The court of appeals sent the case back to the district court for a determination of whether it could reduce the "large number of one-race schools" that remained.<sup>204</sup> At first there were not enough votes to hear the city's appeal, but Justice Powell's proposed dissent from denial of review persuaded the Court to hear the case. Powell believed that the orders lower federal courts were entering contributed to "resegregation" as whites fled city school systems undergoing desegregation.<sup>205</sup>

As in a number of desegregation cases, Marshall recused himself from the case because the National Association for the Advancement of Colored People or its branches, former clients, were named plaintiffs.<sup>206</sup> After argument, the Justices were evenly divided. The usual consequence of an even division is an order affirming the lower court. To avoid even the modest implication that four Justices believed the court of appeals correct, however, Chief Justice Burger proposed to dismiss the writ as improvidently granted. That disposition made sense because the court of appeals had not actually directed the elimination of one-race schools, and it was premature to assume that the district court would actually do so.

To head off Justice Powell, Stevens asked whether it was "appropriate to invest a substantial amount of work in the preparation of opinions" when the Court was evenly divided.<sup>207</sup> Again,

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203. *Tasby v. Estes*, 412 F. Supp. 1192, 1196, 1203-07 (N.D. Tex. 1976), *rev'd*, 572 F.2d 1010 (5th Cir. 1978), *cert. granted sub. nom.*, *Estes v. Metropolitan Branches of the NAACP*, 440 U.S. 906 (1979), *cert. dismissed*, 444 U.S. 437 (1980).

204. *Tasby*, 572 F.2d at 1014.

205. Justice Powell, Proposed Dissent From Denial of Certiorari (*Estes v. Metropolitan Branches of the Dallas NAACP*) (Jan. 11, 1979), Marshall Papers, box 245, file 7.

206. In 1984 Marshall changed his position. He told his colleagues that he no longer thought it necessary to disqualify himself in all cases where the NAACP was a party. He had severed his ties with the NAACP decades earlier and was "uninvolved in [its] internal working." As with the relations between a judge and his or her former law firm, "[t]ime therefore ha[d] erased the ties" he previously had with the NAACP. Letter from Justice Marshall to Conference (Oct. 4, 1984), Marshall Papers, box 353, file 9, at 2.

207. Memorandum from Justice Stevens to Conference (Oct. 31, 1979), Marshall Papers, box 245, file 7.

this tactic fooled no one. Even Chief Justice Burger knew what was happening, and he jokingly changed his vote to affirm a court of appeals decision that was wildly inconsistent with the positions he had taken through the 1970s. That way, Burger said, there would be no problem with Powell writing a dissent.<sup>208</sup> In the end, the Court dismissed the writ as improvidently granted,<sup>209</sup> and Powell published a long opinion stating his views, which Justices Stewart and Rehnquist joined.<sup>210</sup>

### *F. Coda*

The Court has not yet definitively resolved a question that arose in *Swann* and, even more, in later northern segregation cases: To what extent may courts in *school* segregation cases rely on *residential* segregation to justify awarding relief? The question has at least two parts. Some residential segregation resulted from governmental actions such as locating segregated public housing projects in white and African-American neighborhoods, thereby perpetuating their racial identifiability.<sup>211</sup> Second, some residential segregation resulted from segregated education itself, as parents selected where to live based on what type of schools were nearby.<sup>212</sup> In the latter case, the law could treat residential segregation itself as a vestige of school segregation. Continued patterns of racial separation in the schools might be the result of residential segregation that was caused by prior school segregation. If school boards have an affirmative duty to eliminate the vestiges of school segregation, they might have to respond to the effects that residential segregation had on schools.

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208. Memorandum from Chief Justice Burger to Conference (Nov. 2, 1979), Marshall Papers, box 245, file 7 ("Since [Justice Powell] has a strong desire to write his views, I will change my vote to affirm, making 5-3 to affirm (as of now!).").

209. *Estes v. Metropolitan Branches of the Dallas NAACP*, 444 U.S. 437 (1980).

210. *Id.* at 438.

211. See, e.g., Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1331-32 (1991) ("A determination that residential segregation is unconnected to state action . . . conflicts with the realities of history.").

212. See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 202 (1973) (noting that location of schools may influence patterns of residential development and composition of inner city neighborhoods).

That issue lurked in a case decided during Justice Marshall's final term on the Court. The Court's main concern in *Board of Education v. Dowell*<sup>213</sup> was the standard for determining when a district court could end its supervision of a school desegregation case.<sup>214</sup> The court of appeals had applied a stringent standard, allowing termination of the decree only if continuing it would be a "grievous wrong."<sup>215</sup> After the conference discussion of the case, it was clear that a majority of the Justices wanted to reverse the court of appeals.<sup>216</sup> Beyond that, however, things were less clear. Some wanted to signal that it should be relatively easy for district courts to terminate decrees;<sup>217</sup> others wanted to specify a clear standard for termination;<sup>218</sup> still others thought that situations varied so much that it would be unwise to provide much specific guidance to lower courts.<sup>219</sup>

Chief Justice Rehnquist drafted an opinion that, he said, "decides only one of the principal questions," holding that the court of appeals' standard was too stringent and remanding the case for further consideration.<sup>220</sup> The draft included a footnote referring to residential segregation's effects on school segregation, but the footnote simply directed the lower courts to consider that question anew on remand.<sup>221</sup> Justice White urged Rehnquist "to say expressly that on remand, residential segregation should not be treated as a vestige of the prior illegally segregated school system."<sup>222</sup> Justice Sandra Day O'Connor immediately protest-

213. 498 U.S. 237 (1991).

214. *Id.* at 240.

215. *Dowell v. Board of Educ.*, 890 F.2d 1483, 1490 (10th Cir. 1989) (quoting *United States v. Swift*, 286 U.S. 106, 119 (1932)), *rev'd sub nom.*, *Board of Educ. v. Dowell*, 498 U.S. 237 (1991).

216. Letter from Chief Justice Rehnquist to Conference (Nov. 16, 1990), Marshall Papers, box 529, file 4.

217. *See id.*

218. Letter from Justice White to Chief Justice Rehnquist (Dec. 4, 1990), Marshall Papers, box 529, file 4.

219. Letter from Justice O'Connor to Chief Justice Rehnquist (Dec. 4, 1990), Marshall Papers, box 529, file 4.

220. *See* Letter from Chief Justice Rehnquist to Conference, *supra* note 216.

221. Chief Justice Rehnquist, Draft Opinion (*Board of Educ. v. Dowell*) (Nov. 16, 1990), Marshall Papers, box 529, file 4, at 11 n.2.

222. Letter from Justice White to Chief Justice Rehnquist (Dec. 4, 1990), Marshall Papers, box 529, file 4.



ed: "I cannot go along with anything that even remotely suggests the resolution" of the residential segregation issue.<sup>223</sup> As she saw it, even Rehnquist's footnote "sends unwarranted signals" on the question, but "[u]nfortunately we do not appear to have a Court for any particular solution."<sup>224</sup> Rehnquist spoke with O'Connor and then told White that he planned to leave the footnote as it was, "not saying anything more about it."<sup>225</sup>

Justice O'Connor's militance in this exchange is striking. As Rehnquist pointed out, she was one of the five Justices who had voted to reverse the court of appeals over three dissents.<sup>226</sup> She seems to have been concerned that resolving the residential segregation question would have taken the Court too far down the road too quickly. In contrast, a more gradual movement, in a succession of cases, might be more acceptable.<sup>227</sup>

The contrast between large and gradual changes in the law may best explain the absence of contention over desegregation cases in the 1970s and 1980s. As long as the Court moved slowly, even though from the liberals' point of view it was in the wrong direction, raising the stakes within the Court would have been unproductive. The votes to change the law were there, and as the failed effort to shift Justice Blackmun's vote in the Richmond case demonstrates, the votes were unlikely to disappear. Under those circumstances, the Court's liberals could do no more than keep the pace of change moderate. Converting division into contention would not have helped.

### III. THE ERA OF AFFIRMATIVE ACTION

#### A. *The Court's Analytic Problems with Affirmative Action*

The question of affirmative action emerged almost naturally

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223. Letter from Justice O'Connor to Chief Justice Rehnquist (Dec. 4, 1990), Marshall Papers, box 529, file 4.

224. *Id.*

225. Letter from Chief Justice Rehnquist to Justice White (Dec. 13, 1990), Marshall Papers, box 529, file 4.

226. *Id.* Justice Souter did not participate in the decision because the case had been argued a week before he took his seat on the Court.

227. It is hard to avoid the suggestion that Justice O'Connor's position here resonates with the tone of the celebrated joint opinion in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

from the Court's confrontation with desegregation remedies. In *Swann*, Justice Stewart's first response to Chief Justice Warren Burger's initial draft opposing busing was to express dismay that the draft "purport[s] not to decide the constitutionality of 'a school authority decision that as a matter of sound educational policy schools should be racially balanced . . . .' I think it is important to state that such a school board decision would be wholly constitutional."<sup>228</sup> The Court's final opinion adopted Stewart's position, saying that "[s]chool authorities . . . might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students . . . ."<sup>229</sup>

In the terms used in current law, this statement implied that public agencies could make race-conscious decisions, because otherwise, a school board could not ensure that the prescribed ratio would be met at each school. There is an instructive contrast here with the Court's rejection of the proposition that the Constitution mandates only desegregation, not integration. To its proponents, that proposition meant that governments could *not* take race into account in their decisions in any way. *Brown* gained its force, in their view, from the moral proposition that race was totally irrelevant to any decisions governments make.

When it rejected that view, however, the Court did not mean that the Constitution required integration. At the start of the Court's confrontation with modern segregation problems, advocates offered the Court two positions: either the Constitution required only desegregation or it required integration. *Swann* demonstrated that there was an intermediate position: the Constitution might bar race-conscious decisions that disadvantage African-Americans, and it might not require governments to make such decisions to overcome prior discrimination, but it certainly allowed them to do so.<sup>230</sup>

The Court's ready acceptance of affirmative action in *Swann* rapidly disappeared, perhaps in part because the school context

228. SCHWARTZ, *supra* note 18, at 124.

229. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

230. *Id.* at 18 ("To do this as an educational policy is within the broad discretionary powers of school authorities . . . .").

misled some Justices about the costs of affirmative action. When affirmative action issues arose in contexts where the resources to be distributed were obviously limited—in higher education and employment—these Justices began to worry that affirmative action programs unfairly distributed those resources on a racial basis.<sup>231</sup> Similar distributional questions lurked in elementary and secondary school cases, but somehow the allocation of children to schools did not seem quite the same, perhaps because no matter *where* the children were sent, each ended up in a school operated by the school board. Affirmative action programs in higher education excluded some whites from a university, forcing them to abandon their aspirations or at least seek education elsewhere, while affirmative action programs in employment meant that some whites had less access to more attractive jobs. Whether or not these distinctions made analytic sense, they seem to have affected those Justices who became increasingly troubled by affirmative action programs.

Agreement about affirmative action disappeared for another reason. Everyone on the Court in 1971, including those who found affirmative action permissible, agreed that race-conscious decisions were problematic.<sup>232</sup> Given the nation's history, how could they not? Virtually every form of race discrimination, including segregated education itself, had been defended in part on the ground that it was the best program to advance African-American interests. Skepticism about the new affirmative action programs was inevitable, especially when contrasted with the programs in the past, in which the claims about advancing African-American interests were simply false.

Justifiable skepticism created an analytic problem on which the Court's internal discussions focused. During the 1970s and 1980s, equal protection cases were generally a focus of serious controversy within the Court, in part because the Justices were divided over whether to adopt a two-tier analysis or a three-tier analysis.<sup>233</sup> Under the two-tier analysis, the Court used two

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231. See generally Haywood Burns, *The Activism Is Not Affirmative*, in *THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT* 95, 103-06 (Herman Schwartz ed., 1987).

232. See generally *infra* text accompanying notes 251-81.

233. See, e.g., *Craig v. Boren*, 429 U.S. 190, 210 n.\* (1976) (Powell, J., concurring)

standards to evaluate legislation. Strict scrutiny would invalidate a law unless it served what the Court called a "compelling state interest" and did so in the way least intrusive on other constitutional values. The second standard would uphold a statute if it were a rational approach to addressing a social problem. The three-tier analysis inserted an intermediate level, which gave more flexibility to legislatures to devise affirmative action programs and to courts to determine whether those programs were constitutional.<sup>234</sup>

Affirmative action programs caused several analytical problems. The cases before the era of affirmative action seemed to say that government decisions based on race ought to receive the highest degree of scrutiny. That view would imply that affirmative action programs almost inevitably were unconstitutional. Some Justices were not bothered by that conclusion, but others were. One natural analytical move would be to refine the prior cases. Instead of saying that race-conscious decisions triggered strict scrutiny, the Court could state that only prior cases involving race-conscious government action that subordinated African-Americans triggered strict scrutiny. Some other standard would apply to race-conscious decisions that did not subordinate minorities.

However, within the two-tier system, that analytical move implied that affirmative action programs would be upheld if they were rational. Such a holding would imply that all affirmative action programs were constitutional, given the Court's statements about the meaning of rationality. Not even Justice Marshall took that view. Rather, the Justices who approved of affirmative action programs agreed that some but not all such programs were constitutional. However, this approach meant that they could do what they wanted only by abandoning the two-tier system in favor of a three-tier system in which affirmative action programs received intermediate scrutiny. The difficulty

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(acknowledging that "[t]here are valid reasons for dissatisfaction with the 'two tier' approach that has been prominent in the Court's [equal protection] decisions in the past decade").

234. See generally *Fullilove v. Klutznick*, 448 U.S. 517-22 (1980) (Marshall, J. concurring) (discussing rationale behind three tier review in affirmative action cases); Marshall Papers, box 165, file 8.

remained that several Justices who endorsed some affirmative action programs—Justice Powell and Chief Justice Burger in particular—had forcefully rejected the three-tier approach in other equal protection cases. Their struggle to develop an analysis that they found satisfactory dominated the Court's first two extended confrontations with affirmative action.

*B. Justice Powell in Bakke*

Allan Bakke's 1973 application to the medical school at the Davis campus of the University of California produced the Court's first set of opinions on affirmative action.<sup>235</sup> The medical school had opened only five years earlier.<sup>236</sup> In 1973 it operated a two-track admissions system.<sup>237</sup> White applicants were rejected if their grade point averages fell below 2.5; those with better grades were rated on a 500-point scale.<sup>238</sup> Applications from members of minority groups, in contrast, were considered by a separate student-faculty committee that did not use an automatic cut-off.<sup>239</sup> The medical school committed itself to admitting sixteen minority applicants in each class of one hundred.<sup>240</sup> The California Supreme Court found the Davis program unconstitutional because it "denie[d] admission to some white applicants solely because of their race."<sup>241</sup> Race-conscious decisions might be constitutional, but only if they survived "rigid scrutiny."<sup>242</sup> Because the program was inflexible and unnecessary, the state supreme court said, it was not justified.<sup>243</sup>

The university appealed to the United States Supreme Court. Justice Brennan thought that the case was a bad vehicle for deciding whether affirmative action was unconstitutional.<sup>244</sup>

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235. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 276 (1978).

236. *Id.* at 272.

237. *Id.* at 272-73.

238. *Id.* at 273-74.

239. *Id.* at 273-75.

240. *Id.* at 275.

241. *Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152, 1161 (Cal. 1976), *aff'd* 438 U.S. 265 (1978).

242. *Id.* at 1165-66.

243. *Id.* at 1172.

244. BERNARD SCHWARTZ, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT* 41 (1988).

Because the school set aside sixteen seats for minorities, it showed that it used the sort of "rigid mathematical quota" that nearly all the Justices in *Swann* found problematic. Justices Brennan, Marshall, and Blackmun voted against granting review, but they were joined only by Chief Justice Burger,<sup>245</sup> who was, as usual, unenthusiastic about getting the Court involved in contentious public issues before it became necessary.

As Bernard Schwartz has shown, Justice Brennan focused on two issues in preparing for the *Bakke* argument: Was it constitutionally permissible for a university to take race into account at all in its admission decisions, and, "should heightened standard or rationality be applied?"<sup>246</sup> Brennan noted that he "lean[ed] to the rationality standard . . ."<sup>247</sup> As he saw it, affirmative action programs should be upheld because they met a "need for effective social policies promoting racial justice in a society beset by deep-rooted racial inequities."<sup>248</sup>

As it happened, though, the Justices never had a full-scale, face-to-face discussion of the constitutional issues in *Bakke* before they began to draft their opinions. The conference discussion immediately after the oral argument focused on an issue that had arisen late in the case: whether the affirmative action program was inconsistent with a federal civil rights statute, Title VI of the 1964 Civil Rights Act.<sup>249</sup> Although some Justices expressed their views on that question, most of the discussion addressed whether the Court should schedule a new argument, or at least ask for additional briefs, dealing solely with the statutory question. In the end, a majority voted to request more briefs.<sup>250</sup>

Before the briefs were received, Chief Justice Burger and Justice Rehnquist circulated memoranda indicating their "tentative" views.<sup>251</sup> Burger wanted to affirm the state court's decision, but

245. *Id.* at 42.

246. *Id.* at 44.

247. *Id.*

248. *Id.*

249. *See id.* at 56-62.

250. *Id.* at 62.

251. Letter from Chief Justice Burger to Conference (Oct. 21, 1977) Marshall Papers, box 204, file 3, at 1, reprinted in SCHWARTZ, *supra* note 244, at 167.

"without putting the states . . . in a straitjacket . . . ." <sup>252</sup> The university was trying "to accomplish a number of commendable, long-range objectives," but had used "one of the more extreme methods of securing those objectives." <sup>253</sup> Burger was concerned, though, with the "tactical consideration of how best to structure and shape a result so as to confine its impact and yet make it clear that the Court intends to leave states free to serve as 'laboratories' for experimenting with less rigid exclusionary methods . . . ." <sup>254</sup> He stated that he was "uneasy with the 'slogans' that have evolved in equal protection analysis," but was inclined to "give the very closest look possible—essentially 'strict scrutiny'—to any state action based on race." <sup>255</sup> Burger thought that it was "superficial and problematic" to assert that merely claiming a benign purpose should lower the level of scrutiny. Doing so, he wrote, "proceeds on the dubious assumption that minorities are readily indentifiable [sic] 'blocs' which in some way function as units . . . ." <sup>256</sup>

The Chief Justice did not think that the university's "sound and desirable objectives" justified its "rigid" program, <sup>257</sup> and he wanted the Court to "encourage efforts and experimental programs to redefine admissions criteria . . . keeping in mind only the limited constraint imposed by a narrow affirmance here—that race *alone* can never be a permissible basis for excluding an applicant." <sup>258</sup> Nonetheless, Burger's insistence on "strict scrutiny" might have made it difficult to preserve the flexibility he wanted the states to have. He suggested that some alternatives would "account fully for the individual capabilities of each minority applicant," <sup>259</sup> but he did not explain why a system that took race into account at all would survive strict scrutiny. Justice White already had circulated a memorandum, which he hand-delivered to Justice Marshall, saying that race-

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252. *Id.*

253. *Id.* at 1-2, reprinted in SCHWARTZ, *supra* note 244, at 167-68.

254. *Id.*

255. *Id.* at 2, reprinted in SCHWARTZ, *supra* note 244, at 168.

256. *Id.* at 3, reprinted in SCHWARTZ, *supra* note 244, at 169.

257. *Id.*

258. *Id.* at 4, reprinted in SCHWARTZ, *supra* note 244, at 170.

259. *Id.*

sensitive programs "in the end would often make race the determinative factor in administering a seemingly neutral set of qualifications."<sup>260</sup> Burger agreed that this result was a serious concern, but was "optimistic" that it could be handled. He wanted to defer the Court's consideration of that question until it had some alternative before it. "If it is to take years to work out a rational solution of the current problem," Burger concluded, "so be it. That is what we are paid for."<sup>261</sup>

The tension here may indicate that Burger had not decided how to work his views into an opinion. The tension persisted throughout the Court's deliberation and surfaced most notably in Justice Powell's opinion. This tension suggests the broader problem that the Justices really were ambivalent about either endorsing affirmative action completely or placing severe limits on it but were committed to an analytical framework, the two-tier system, that made intermediate positions difficult to develop.

Two weeks later, Justice Rehnquist circulated a "stream of consciousness" memorandum.<sup>262</sup> He began by saying that the Davis policy was "as difficult to sustain" as any affirmative action program could be because the university "[made] no bones" about relying solely on race.<sup>263</sup> He also said, "difference in treatment of individuals based on their race or ethnic origin is at the bull's eye of the target at which [the equal protection claim] was aimed."<sup>264</sup> He agreed that "legislators consider racial or ethnic factors in voting on bills," but that was different from making race "the determining factor in whether an individual receives a benefit . . . ."<sup>265</sup> He thought that the Davis program "clearly"<sup>266</sup> satisfied the rational-basis standard, but believed that such a standard could be applied only if "whites who

260. Letter from Justice White to Conference (Oct. 13, 1977), Marshall Papers, box 204, file 3.

261. Letter from Chief Justice Burger to Conference, *supra* note 251, at 6, *reprinted in* SCHWARTZ, *supra* note 244, at 172.

262. Memorandum from Justice Rehnquist to Conference (Nov. 11, 1977), *reprinted in* SCHWARTZ, *supra* note 244, at 175.

263. *Id.* at 1, *reprinted in* SCHWARTZ, *supra* note 244, at 176.

264. *Id.* at 2, *reprinted in* SCHWARTZ, *supra* note 244, at 177.

265. *Id.* at 3-4, *reprinted in* SCHWARTZ, *supra* note 244, at 178-79.

266. *Id.* at 6, *reprinted in* SCHWARTZ, *supra* note 244, at 181.



are in the majority may not assert a claim for denial of equal protection," a position he found "quite unsatisfying."<sup>267</sup> That argument "confuse[d] the substance of the prohibition with the reason for placing the prohibition in the Constitution."<sup>268</sup> The Equal Protection Clause may have been included because of its drafters' concern about discrimination against African-Americans, but "the language they chose is a good deal more general . . . ."<sup>269</sup> To satisfy the strict scrutiny requirement, "most of the proffered non-race goals, such as more doctors in the ghetto" were insufficient.<sup>270</sup> And other goals, "although phrased in non-racial terms, are, at heart, very clearly predicated at least in part on the idea that racial characteristics are, in and of themselves, socially significant and permissible bases for governmental action."<sup>271</sup> But, Rehnquist wrote, the Constitution means that "for governmental purposes nobody 'has' anything simply by virtue of their race."<sup>272</sup> Finally, he found "unacceptable" the idea that "past societal discrimination justifies these affirmative action programs"<sup>273</sup> because "the right not to be discriminated against is personal to the individual, and, in this case, Bakke's right to equal protection of the laws cannot be denied him simply because at some other place or at some other time minority group members have been discriminated against."<sup>274</sup> The broad racial category did not "fit" the subcategory of those who had been discriminated against because of race. "[J]ust because it is easier to identify blacks than people who have suffered discrimination on account of race, the state should not be excused from making a more individualized determination."<sup>275</sup>

Rehnquist had "no doubt" that programs seeking out "culturally deprived [or] disadvantaged" people would be valid, and he agreed that universities could "recruit heavily among minority

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267. *Id.* at 7, reprinted in SCHWARTZ, *supra* note 244, at 182.

268. *Id.* at 9, reprinted in SCHWARTZ, *supra* note 244, at 184.

269. *Id.* at 7, reprinted in SCHWARTZ, *supra* note 244, at 182.

270. *Id.* at 12, reprinted in SCHWARTZ, *supra* note 244, at 187.

271. *Id.* at 13, reprinted in SCHWARTZ, *supra* note 244, at 188.

272. *Id.*

273. *Id.* at 14, reprinted in SCHWARTZ, *supra* note 244, at 189.

274. *Id.* at 14-15, reprinted in SCHWARTZ, *supra* note 244, at 189-90.

275. *Id.* at 16, reprinted in SCHWARTZ, *supra* note 244, at 191.

students . . . .<sup>276</sup> On an issue that Justice White had raised, Rehnquist did not think the Court had to decide whether race could be "used as one of a number of factors," but he noted that his analysis would make it "difficult . . . to allow express consideration of race as a substantial factor at all."<sup>277</sup> Burger's letter indicated a desire to allow some affirmative action programs, even as it stated that strict scrutiny had to be applied. Rehnquist's memorandum expressed no such desire, and showed that it would be difficult for Burger to invoke the two-tier analysis while allowing some forms of affirmative action.

With Justices Brennan, White, and Marshall firmly committed to upholding the Davis program, the votes of Justices Powell and Blackmun were crucial. Shortly after the Court received the additional briefs on Title VI, Justice Powell circulated a memorandum dealing only with the constitutional question. Bernard Schwartz notes that Justice Powell's memorandum "was virtually identical" to the opinion he published.<sup>278</sup> The "crucial battle," Powell wrote, is "over the proper scope of judicial review."<sup>279</sup> Because the Davis program used "a line drawn on the basis of race,"<sup>280</sup> strict scrutiny had to be applied because "racial and ethnic classifications . . . are odious."<sup>281</sup>

In reviewing the nation's racial and ethnic history, Powell argued that many minority groups had "to overcome the prejudices not of a monolithic majority, but of a 'majority' composed of various minority groups."<sup>282</sup> Indeed, "[t]he concepts of 'majority' and 'minority' necessarily reflect temporary judgments and political arrangements. . . . [T]he white 'majority' itself is composed of various minority groups, each of which can lay claim to a history of prior discrimination at the hands of the state and private individuals."<sup>283</sup> Marshall reacted strongly to this

276. *Id.* at 18, reprinted in SCHWARTZ, *supra* note 244, at 193.

277. *Id.*

278. SCHWARTZ, *supra* note 244, at 81.

279. *Id.* at 82.

280. *Id.*

281. *Id.* at 82-83.

282. Memorandum & Draft Opinion from Justice Powell to Conference (Nov. 22, 1977) at 6, reprinted in SCHWARTZ, *supra* note 244, at 203.

283. *Id.* at 8-9, reprinted in SCHWARTZ, *supra* note 244, at 205-06.

thought, scrawling "Kennedy was President" on his copy of a later draft making the same point.<sup>284</sup> Powell, however, observed that the Court could not use a standard that would make its analysis "vary with the ebb and flow of political forces."<sup>285</sup> Constitutional principles could not be applied consistently if they depended on "shifting political and social judgments."<sup>286</sup>

Accordingly, for Powell, "[t]here [was] no principled basis for deciding which groups [would] merit 'heightened judicial solicitude' and which [groups would] not."<sup>287</sup> Further, "it [might] not always be clear that a so-called preference [was] in fact benign."<sup>288</sup> Some members of a group might be harmed "in order to advance the group's general interest."<sup>289</sup> Again Marshall disagreed, writing "[w]hat about veterans preferences" on his copy.<sup>290</sup> In any event, Powell noted, "there is no warrant in the Constitution for forcing innocent persons" like Bakke "to bear the burdens of redressing grievances not of their making."<sup>291</sup>

With strict scrutiny as the standard, Powell asked whether the Davis program was justified. Governments could try to "ameliorat[e] . . . the disabling effects of past discrimination," but they could not rely on "societal discrimination," which according to Powell was "a concept of injury that may be ageless in its reach into the past."<sup>292</sup> Only if specific findings of past discrimination were made could the university attempt to overcome its effects.<sup>293</sup>

Powell did find "the attainment of a diverse student body" to be a permissible goal, because students with particular back-

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284. Justice Powell, Draft Opinion (Regents of Univ. of Cal. v. Bakke) (May 9, 1978), Marshall Papers, box 203, file 7, at 22.

285. Justice Powell, Draft Opinion (Regents of Univ. of Cal. v. Bakke) (Nov. 22, 1977) at 10, *reprinted in* SCHWARTZ, *supra* note 244, at 207.

286. *Id.*

287. *Id.* at 9, *reprinted in* SCHWARTZ, *supra* note 244, at 206.

288. *Id.*

289. *Id.*

290. Justice Powell, Draft Opinion (Regents of Univ. of Cal. v. Bakke) (May 9, 1978), Marshall Papers, box 203, file 7, at 26.

291. Justice Powell, Draft Opinion (Regents of Univ. of Cal. v. Bakke) (Nov. 22, 1977) at 9-10, *reprinted in* SCHWARTZ, *supra* note 244, at 206-07.

292. *Id.* at 18, *reprinted in* SCHWARTZ, *supra* note 244, at 215.

293. *Id.*

grounds may bring "experiences, outlooks and ideas that enrich the training of its student body."<sup>294</sup> Focusing solely on race, however, did not serve that goal. Quoting a Harvard admissions policy, Powell observed that race was but one of many factors that added a "plus" in a particular applicant's file.<sup>295</sup>

Powell attempted to address White's observation that treating race as a "plus" inevitably meant that race would sometimes be dispositive by asserting that only good faith administration of the plan would be required.<sup>296</sup> This assertion, however, misunderstood White's point. White did not mean that universities would use Harvard-type systems as a disguise for *policies* that were based solely on race. Rather, White meant that when race was a "plus" in one person's file, a candidate who, except for the plus, had an identical file would be denied admission solely because of race. Given Powell's emphasis on individual rights, it is hard to see why a Harvard-type system really overcame Powell's objections to the Davis program.

According to Bernard Schwartz, Justice Brennan wrote a memorandum attempting "to persuade Powell" to uphold the Davis program.<sup>297</sup> If persuading Powell was Brennan's aim, he failed, for Powell's final opinion differed only in structure, not in content, from his initial draft. More likely, however, Brennan had a different concern. The Court was to discuss *Bakke* again on December 9.<sup>298</sup> By late November, all the drafts circulating among the Justices came out *against* the Davis program. To ensure that the December discussion would have some paper laying out the argument *in favor* of the program, Brennan circulated his own views.<sup>299</sup>

Brennan's memorandum began with a statement addressing what had emerged as the central issue, whether an affirmative action program that took race into account was constitutional. For him, the Court "long ago crossed that bridge in cases that

294. *Id.* at 20-21, reprinted in SCHWARTZ, *supra* note 244, at 217-19.

295. *Id.* at 24, reprinted in SCHWARTZ, *supra* note 244, at 221.

296. *Id.* at 25, reprinted in SCHWARTZ, *supra* note 244, at 222.

297. SCHWARTZ, *supra* note 244, at 87.

298. *Id.* at 93-94.

299. Memorandum from Justice Brennan to Conference (Nov. 23, 1977), reprinted in SCHWARTZ, *supra* note 244, at 227-44.

approved race-sensitive policies."<sup>300</sup> Further, the NAACP Legal Defense Fund brief demonstrated that "to read the Fourteenth Amendment to state an abstract principle of color-blindness," as Rehnquist and Powell asserted, was "itself to be blind to history."<sup>301</sup> Rather, states could "pursue the goal of racial pluralism . . . in order to afford minorities full participation in the broader society."<sup>302</sup> That so few minority physicians had been admitted to Davis before it began its program showed that it was entitled to adopt the program "to achieve the participation of minorities in the profession as an end in itself."<sup>303</sup>

Brennan then addressed the means Davis chose to pursue the goal of minority participation. Its program was clearly not "a governmental slur of whites." He considered Davis' purposes: bi-racial association in medical school to "decrease the degree to which whites think of blacks, not as people, but as a race, and thus the degree to which blacks think of themselves as inferior," and a desire to provide minority role-models.<sup>304</sup> Brennan invoked his twenty-one years on the Court to point out the element missing in *Bakke*—stigma or invidiousness. The principle that emerged from the cases, Brennan said, was that "government may not, on account of race, insult or demean a human being by stereotyping his or her capacities, integrity, or worth as an individual."<sup>305</sup> Although "Bakke, like thousands of other applicants who fail of admission, was not admitted to medical school . . . he was never stereotyped as an incompetent, or pinned with a badge of inferiority because he is white."<sup>306</sup>

With this background, Brennan asserted that "under any standard of . . . review other than one requiring absolute color-blindness," Davis's program was constitutional.<sup>307</sup> Any alternatives towards achieving greater integration of the medical school

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300. *Id.* at 2, reprinted in SCHWARTZ, *supra* note 244, at 228.

301. *Id.*

302. *Id.*

303. *Id.* at 4, reprinted in SCHWARTZ, *supra* note 244, at 230.

304. *Id.* at 5, reprinted in SCHWARTZ, *supra* note 244, at 231.

305. *Id.* at 7, reprinted in SCHWARTZ, *supra* note 244, at 233.

306. *Id.* at 9, reprinted in SCHWARTZ, *supra* note 244, at 235.

307. *Id.* at 10, reprinted in SCHWARTZ, *supra* note 244, at 236.

were "fanciful."<sup>308</sup> A pure merit-based system, Brennan assumed, "would achieve significant integration," but medical schools had not yet devised such a system.<sup>309</sup> For example, social scientific evidence showed that "formal, cognitive predictors of academic success understate minority applicants' ability to perform well vis-a-vis white applicants."<sup>310</sup> Picking up Burger's theme, Brennan wrote that he "would not abort . . . experiments and hamstringing the efforts of educators to develop sound admissions programs."<sup>311</sup> After having made "certain that particular whites [were] not unfairly singled out to their unique disadvantage," the Court should ask only whether Davis' policy was "reasonable and considered . . . in light of the alternatives available and the opportunities that it [left] open for whites."<sup>312</sup>

Finally, Brennan agreed with White that the Court was "de-luding" itself if it thought there was "a meaningful, judicially enforceable distinction" between programs that set aside a specific "number of places for *qualified minorities* and a process that accomplishe[d] the same end by taking race into account."<sup>313</sup> Admissions decisions were inevitably subjective, and "[h]ow much weight a faculty admissions committee decide[d] to allow the factor of race [would] almost certainly depend on how many minority applicants should be admitted."<sup>314</sup>

With these memoranda in hand, the Court considered *Bakke* on December 9. Justice Blackmun's position remained unclear; he could not attend the conference because he was recovering from surgery and had not devoted much attention to the additional briefs or the memoranda he had received. Two developments occurred during the discussion. Justice Stewart asserted that because "[n]o state agency can take race into account," the Davis program was unconstitutional.<sup>315</sup> For the first time, it was clear that a majority favored ordering Davis to abandon its

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308. *Id.*

309. *Id.*

310. *Id.* at 11, reprinted in SCHWARTZ, *supra* note 244, at 237.

311. *Id.* at 13, reprinted in SCHWARTZ, *supra* note 244, at 239.

312. *Id.* at 14, reprinted in SCHWARTZ, *supra* note 244, at 240.

313. *Id.* at 15, reprinted in SCHWARTZ, *supra* note 244, at 241.

314. *Id.* at 15-16, reprinted in SCHWARTZ, *supra* note 244, at 241-42.

315. SCHWARTZ, *supra* note 244, at 95.

program. The second development was the confirmation that four votes existed for the proposition that affirmative action programs that took race into account were constitutional. Justice Brennan persuaded Powell that the state supreme court's opinion held that race could never be taken into account. As a result, Powell agreed that the case should be affirmed in part—holding the Davis program unconstitutional—and reversed in part—allowing Davis to develop an alternative Harvard-type program. By ensuring that the disposition would include a partial reversal, Brennan was able to assert some control over the “spin” the decision would receive when announced. He could stress in his opinion that a majority actually approved some affirmative action programs, and he could take some satisfaction in believing, with Justice White, that programs taking race into account were functionally identical to apparently more rigid programs like Davis’.<sup>316</sup>

After the conference, Justice Stevens provoked a flurry of memoranda by arguing that Brennan and Powell had misinterpreted the state supreme court's judgment.<sup>317</sup> Although the California court's opinion spoke more broadly, the judgment itself only barred Davis from “considering [Bakke's] race or the race of any other applicant in passing upon his application for admission.”<sup>318</sup> As Stevens accurately noted, the court's opinion rather clearly did not bar Davis from taking race into account in some redesigned affirmative action program. Brennan and White wanted to guarantee that the Court's judgment was not a flat affirmance of the state supreme court's decision, and they circulated elaborate memoranda trying to explain why that court's judgment really did require some form of reversal.<sup>319</sup> The technical points they made—in response, it should be noted, to Stevens' technical point—carried little weight. What mattered was Powell's desire to obtain approval of Harvard-type programs

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316. For a general discussion of the December 9 conference, see *id.* at 93-98.

317. *Id.* at 100-01.

318. Revised Letter from Justice Stevens to Justice Brennan (Dec. 12, 1977), Marshall Papers, box 204, file 3.

319. See Memorandum from Justice White to Conference (Dec. 12, 1977), Marshall Papers, box 204, file 3; Memorandum from Justice Brennan to Conference (Dec. 13, 1977), Marshall Papers, box 204, file 2.

"in the unlikely but welcome event that a consensus develop[ed] for allowing the competitive consideration of race as an element."<sup>320</sup> The only question that remained was exactly how to achieve this consensus. The easiest way was to ignore Stevens's technical point, which is what the majority favoring allowing states to take race into account did. Otherwise, as Justice Powell stated a few weeks later, the Court "would merely perpetuate the confusion and doubt that . . . exist[ed]."<sup>321</sup>

By the end of December it was clear that there were at least five votes to strike down Davis' program, and four to state expressly that programs taking race into account were constitutional. Whether there would be five votes for the latter proposition depended on Justice Blackmun.<sup>322</sup> He gave no signals about his views for several months. The Court's senior Justices, concerned in large part with expediting the Court's work, tried to pressure Blackmun, with no success. Bernard Schwartz describes several outbursts by Blackmun at what Blackmun regarded as unjustified criticism for holding up the Court's work. It is worth noting, however, that Blackmun's reactions had no impact on the outcome; instead Brennan, and perhaps other Justices, came to appreciate more clearly "the enormous strain" Blackmun was under as a result of his surgery and his efforts to carry a full load of Court work.<sup>323</sup>

Justice Marshall rarely took part in any personal efforts to affect outcomes. However, he too became impatient. In late March he started work on a separate opinion in *Bakke*. Ordinarily Marshall told his law clerks the points he wanted to make, leaving them to draft an opinion. Marshall cared so much about *Bakke* that he blocked out the opinion himself. His handwritten draft expresses his impatience, perhaps less with Blackmun than with all his colleagues for their obtuseness.

320. SCHWARTZ, *supra* note 244, at 105.

321. *Id.* at 112.

322. *Id.* at 120.

323. *Id.* at 123-27. Schwartz speculates that Brennan was reluctant to prod Blackmun too forcefully, fearing that Blackmun would vote out of irritation against allowing race to be taken into account. *Id.* at 123. The more plausible interpretation is simply that people got impatient because the Court's work was moving along too slowly.



I repeat, for next to the last time, the decision in this case depends on whether you consider the action . . . as "*admitting*" certain students or as "*excluding*" certain other students. Toward one end we see "complete equality" . . . . Toward the other end we see "quotas" "Constitution is color blind" etc. Take your choice.

We should have known we would get to this point. We are up to it. Do we really mean it.<sup>324</sup>

Marshall's impatience came through again when he wrote, "so many real good Americans often say: 'Segregation and racial discrimination are bad, should be condemned and must stop—but—move a Negro in a house next to mine—well, that is something different.'"<sup>325</sup> For Marshall, the analogy seemed so clear that he did not need to spell it out, nor could he have done so: His colleagues were willing to endorse desegregation when it did not affect them, but when it came closer to home—in the universities that they and their children attended—they balked.

Marshall thought the Court was presented a case "with a lousy record and [a] poorly reasoned lower court opinion."<sup>326</sup> In deciding, Marshall "address[ed] the question of whether Negroes [had] 'arrived' or other variations of 'the Constitution is color-blind.'"<sup>327</sup> Here he was acerbic:

Remember, that statement was in the dissenting opinion in *Plessy*. Had it been in the majority we would not be faced with the problem in 1977. We are not yet all equals. As to this country being a melting pot—either the Negro did not get in the pot or he did not get melted down.<sup>328</sup>

He pointed out that the Court itself was part of the problem—it had never had an African-American "officer of . . . [the] Court," and had hired "only three Negro law clerks."<sup>329</sup>

Marshall's clerks reshaped the notes, retaining many of

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324. Justice Marshall, Draft Opinion (Regents of the Univ. of Cal. v. Bakke), Marshall Papers, box 204, file 2, at 1.

325. *Id.* at 1-2.

326. *Id.* at 2.

327. *Id.* at 3.

328. *Id.*

329. *Id.* at 4.

Marshall's comments. The point about *Plessy* was sharpened: "We are . . . not yet all equals, in large part because of the refusal of the *Plessy* Court to adopt the principle of color-blindness. It would be cruelest irony for this Court to adopt the dissent in *Plessy* now."<sup>330</sup>

For all of Brennan's efforts, it appears to have been Marshall's opinion that most affected Blackmun.<sup>331</sup> Three weeks after Marshall's opinion was circulated, Blackmun sent his own memorandum.<sup>332</sup> In typical Blackmun fashion, it had numbered paragraphs, the last of which stated that, "[t]here [was] much to be said for Thurgood's 'cruelest irony' approach."<sup>333</sup> His memorandum began with some "[g]eneral [c]onsiderations," which, like Marshall's, were some diffuse observations that indicated Blackmun's mood as he approached the case. Citing statistics about minority group professionals, Blackmun wrote:

If ways are not found to remedy this situation, the Country can *never* achieve its professed goal of a society that is not race conscious. . . . [He] hope[d] that the time soon [would] come when an "affirmative action" program [was] unnecessary, . . . [but] we must reach a stage of maturity, beyond any transitional inequality, where action along this line is no longer necessary. Then persons may be regarded as persons, and past discrimination will be an ugly feature of history that has been overcome.<sup>334</sup>

Blackmun thought it

somewhat ironic [to be] so convulsed and deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact that institutions of higher learning for many years have given conceded preferences up to a point to the skilled athlete . . . and to those having con-

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330. SCHWARTZ, *supra* note 244, at 129.

331. According to Schwartz, Brennan was concerned that "Marshall's underlying theory was 'Goddamnit, you owe us,' and he feared that theory would not be persuasive to Justice Blackmun." *Id.*

332. Memorandum from Justice Blackmun to Conference (May 1, 1978), *reprinted in* SCHWARTZ, *supra* note 244, at 247-59.

333. *Id.* at 12, *reprinted in* SCHWARTZ, *supra* note 244, at 258.

334. *Id.* at 2, *reprinted in* SCHWARTZ, *supra* note 244, at 248.

nections with celebrities and the famous.<sup>335</sup>

Blackmun insisted that the Justices understand that "[t]his is not an ideal world. . . . [W]e live in a real world," and the decision must reflect reality.<sup>336</sup> Rehnquist's position, in contrast, sought "idealistic equality."<sup>337</sup> Blackmun observed that Alexander Bickel's criticisms of affirmative action

speak of the idealistic and have great appeal. But I say, once more, that this is not an ideal world, yet. And, of course, his position is—and I hope I offend no one, for I do not mean to do so—the "accepted" Jewish approach. . . . They understandably want "pure" equality and are willing to take their chances with it, knowing that they have the inherent ability to excel and live with it successfully.<sup>338</sup>

For Blackmun, "[a]n admissions policy that has an awareness of race as an element seem[ed] . . . to be the only possible and realistic means of achieving the . . . goal" of a non-race conscious society.<sup>339</sup> Taking a modest position, Blackmun wrote that the state supreme court's judgment "did not prevent" the Court from "decid[ing] whether race can ever be a permissible consideration."<sup>340</sup> Powell's attack on Davis's "blatant quota system" was "effective[]," but Blackmun believed that "the line between the Harvard program and the Davis program [was] a thin one. . . . At worst, one could say that under the Harvard program one [might] accomplish covertly what Davis [did] openly."<sup>341</sup> In the end, he believed that "the Davis program [was] within constitutional bounds, though perhaps barely so."<sup>342</sup>

With Blackmun's vote, the case was essentially over. Burger and Brennan worked out a formal assignment of the case to Powell, to announce the Court's judgment and to provide what Powell called a "roadmap" explaining what the different majori-

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335. *Id.* at 4-5, reprinted in SCHWARTZ, *supra* note 244, at 250-51.

336. *Id.* at 2, reprinted in SCHWARTZ, *supra* note 244, at 248.

337. *Id.* at 8, reprinted in SCHWARTZ, *supra* note 244, at 254.

338. *Id.* at 11-12, reprinted in SCHWARTZ, *supra* note 244, at 257-58.

339. *Id.* at 5, reprinted in SCHWARTZ, *supra* note 244, at 251.

340. *Id.* at 7-8, reprinted in SCHWARTZ, *supra* note 244, at 253-54.

341. *Id.* at 10, reprinted in SCHWARTZ, *supra* note 244, at 256.

342. *Id.* at 10-11, reprinted in SCHWARTZ, *supra* note 244, at 256-57.

ties held. Brennan drafted the opinion that later appeared as his partial dissent and which Justices White, Marshall, and Blackmun quickly joined. They also prepared their own shorter opinions. Powell rather genially took exception to a statement in Brennan's opinion describing the "central meaning" of the judgment to be "[g]overnment may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice."<sup>343</sup> This statement, Powell thought, went "somewhat beyond" the actual holding, although it might be a fair statement of the holding's implications.<sup>344</sup> Even more genially, Powell sent a note to his colleagues with the draft of the statement he proposed to use in announcing the Court's judgment stating, "As I am a 'chief with no 'indians,' I should be in the rear rank, not up front!"<sup>345</sup>

Powell was genial in part, of course, because that was his nature. He was also genial, however, because the Court's divisions in *Bakke* never became contentious. The Justices stated their positions—or, in Blackmun's case, did not state a position for a long time—and that pretty much was that. The Court's deliberations in subsequent affirmative action cases had the same character.

### C. Chief Justice Burger in *Fullilove*

According to one of Justice Marshall's law clerks, *Fullilove v. Klutznick*<sup>346</sup> was "more important than *Bakke*, since [it] involve[d] an affirmative action plan developed by Congress."<sup>347</sup> In *Fullilove*, the Court upheld the constitutionality of a program in which ten percent of the federal funds for public works projects had to be allocated for services supplied by businesses owned by members of minority groups.<sup>348</sup>

Throughout the Court's deliberations, Chief Justice Burger

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343. SCHWARTZ, *supra* note 244, at 137.

344. *Id.* at 140.

345. *Id.* at 141.

346. 448 U.S. 448 (1980).

347. Philip Frickey, Bench Memo (*Fullilove v. Kreps*), Marshall Papers, box 239, file 9, at 1.

348. *Fullilove*, 448 U.S. at 492.

restated the view he expressed in *Bakke* that "slogans" were unhelpful in resolving the case.<sup>349</sup> His statement to the conference emphasized the fact that Congress was the decision-maker. The Court had to show "deference to Congress."<sup>350</sup> Although some aspects of Congress' list of minority groups troubled Burger, he did not think that Congress had to make "explicit finding[s]" about discrimination against "Indians and blacks."<sup>351</sup> Justice Powell, in contrast, "want[ed] definitive findings," but he thought that the "record" in *Fullilove* was "adequate": Although Congress had not held hearings on the particular bill at issue in *Fullilove*, the need for a set-aside program had been expressed repeatedly in other congressional proceedings.<sup>352</sup>

Because the case was so important, the Chief Justice assigned the opinion to himself. Although the Court heard argument in late November 1979, Burger's draft opinion was not circulated until late May 1980.<sup>353</sup> Its basic structure survived in the published opinion, but it was not an opinion for the Court. Burger's draft can best be understood as an extended description of the federal statute, presented to show that Congress' decision made sense, but without containing much conventional legal analysis. The draft described prior cases, pointed out parallels to *Fullilove*, and left readers to make the necessary connections.

On June 4, 1980, Justices Brennan and Marshall sent Justices White and Blackmun a draft letter they proposed to send to Burger. The letter expressed concern that the diffuse legal analysis in Burger's draft did not define the constitutional limits on Congress' spending power. In their view, the opinion should have said that when Congress employed racial categories "to accomplish the important objective of remedying past discrimination," its methods "must be narrowly tailored to the achievement of that goal."<sup>354</sup> In light of *Bakke*, this statement meant

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349. Memorandum from Chief Justice Burger to Conference (June 18, 1980) Marshall Papers, box 248, file 8; Memorandum from Chief Justice Burger to Conference (June 9, 1980), Marshall Papers, box 248, file 8.

350. SCHWARTZ, *supra* note 244, at 158.

351. *Id.*

352. *Id.* at 159.

353. Chief Justice Burger, Draft Opinion (*Fullilove v. Klutznick*) (May 30, 1980), Marshall Papers, box 248, file 8.

354. Draft Letter from Justices Brennan and Marshall to Chief Justice Burger

that the test was intermediate scrutiny.

After the letter was sent and circulated to the other Justices, Justice Powell countered by insisting that the test should be strict scrutiny.<sup>355</sup> Justice Blackmun then indicated that he too was "somewhat troubled" by the absence in the Burger draft of a well-defined standard of review.<sup>356</sup> The Chief Justice replied to his critics on both sides, "I do not share the passion expressed by some for stating 'tests.' The test is the Constitution."<sup>357</sup> Nonetheless, on June 16 he circulated a revision, incorporating some of Brennan and Marshall's suggestions, but also including a disclaimer:

Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees. Some have characterized such examination as a "test;" it is not essential that these standards of review be characterized as one degree or another in the hierarchy [sic] of judicial analysis. What is essential is that any enactment of Congress which employs racial or ethnic criteria receives probing examination. This case . . . has received . . . that kind of examination . . . .<sup>358</sup>

Justices Brennan and Marshall said they appreciated Burger's revisions, but that they objected to the disclaimer. They told their colleagues that they planned to circulate a concurring opinion "that articulate[d their] view of the correct standard and [that] explain[ed] how that standard [was] implicit in the analysis" applied to *Fullilove*.<sup>359</sup> At this point Burger lost patience. "[I]t seems to me there is a 'tempest in a saucer' aspect as to terms," he wrote his colleagues.<sup>360</sup> "I frankly believe that

(June 4, 1980), Marshall Papers, box 248, file 8.

355. Letter from Justice Powell to Chief Justice Burger (June 5, 1980), Marshall Papers, box 248, file 8.

356. Letter from Justice Blackmun to Chief Justice Burger (June 9, 1980), Marshall Papers, box 248, file 8.

357. Letter from Chief Justice Burger to Conference (June 9, 1980), Marshall Papers, box 248, file 8.

358. Chief Justice Burger, Draft Opinion (*Fullilove v. Klutznick*) (June 16, 1980), Marshall Papers, box 248, file 8, at 39.

359. Letter from Justices Brennan and Marshall to Chief Justice Burger (June 17, 1980), Marshall Papers, box 248, file 8.

360. Letter from Chief Justice Burger to Conference (June 18, 1980), Marshall Pa-

terms," he wrote his colleagues.<sup>360</sup> "I frankly believe that adopting a magic 'word-test' is a serious error and I will neither write nor join in these 'litmus' approaches."<sup>361</sup> He also insisted that his opinion speak for itself: "I am not prepared to subscribe to a Court opinion that is undermined by concurring opinions which undertake to say that the author of the Court opinion adopts a particular test."<sup>362</sup> Moreover, on June 20 the Chief Justice strengthened the disclaimer, revising the opinion to state: "This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in" *Bakke*.<sup>363</sup>

Justice Marshall got the point, and circulated an opinion concurring in the result, which Justices Brennan and Blackmun joined.<sup>364</sup> Justice Powell, in contrast, wrote separately but concurred in Burger's opinion, observing that he would have preferred the lead opinion to "articulate judicial standards of review in conventional terms," but joining it because he viewed it "as substantially in accord" with his own views.<sup>365</sup>

For lawyers, *Fullilove* was important because it was more generous about set-asides adopted by Congress than *Bakke* had been about set-asides adopted by states. Most striking about the Court's internal discussions, though, is that a solid majority of six quickly agreed on the result, and no one wavered. Further, no one expressed suspicion that the Chief Justice had taken the opinion intending to write it in a way that would cast doubt on the majority's commitment to its result. Justices Marshall and Brennan would have reached that result by applying intermediate scrutiny,<sup>366</sup> while Justice Powell did so by applying a stricter standard.<sup>367</sup> Under the circumstances, Burger's inclination to paper over the disagreement by refusing to be explicit about a

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360. Letter from Chief Justice Burger to Conference (June 18, 1980), Marshall Papers, box 248, file 8.

361. *Id.*

362. *Id.*

363. Letter from Chief Justice Burger to Conference (June 20, 1980), Marshall Papers, box 248, file 8.

364. Justice Marshall, First Printed Draft Opinion (*Fullilove v. Klutznick*) (June 24, 1980), Marshall Papers, box 248, file 7.

365. *Fullilove*, 448 U.S. at 495-96 (Powell, J., concurring).

366. *Id.* at 519 (Marshall, J., concurring).

367. *Id.* at 515 (Powell, J., concurring).

review were primarily concerned not with legal doctrine, but with the signals that the Court sent to lower courts and to the public about what it believed was constitutionally permissible. Invoking a strict standard preserved the two-tier structure that promised to limit the judicial role in evaluating legislation. Using such a standard, even in the course of upholding a racial categorization as Justice Powell would have done, would signal that the result was extraordinary. From Powell's perspective, Burger's diffuse opinion threatened to undermine the clarity of the two-tier structure.<sup>368</sup> In contrast, Justices Marshall and Brennan were committed to a three-tier analysis and did whatever possible to advance that cause.<sup>369</sup> They cared about the issue because the intermediate tier gave courts more latitude to overturn legislation.<sup>370</sup>

As they saw it, the two-tier structure made it too easy for judges to say that, although they believed that a statute was seriously unwise, it was not irrational.<sup>371</sup> The three-tier structure gave such judges another means by which to find such statutes unconstitutional and deprived them of an easy rhetorical "out" by deferring to legislative judgment.<sup>372</sup>

A detailed description of the internal divisions over standards of review is beyond the scope of this Article, but a quick overview may provide a framework within which the discussions in *Fullilove* can be better understood. In 1976 the Justices engaged in a long and, as they saw it, painful dispute over the precise phrasing of the minimal rationality standard.<sup>373</sup> *Massachusetts Board of Retirement v. Murgia*<sup>374</sup> involved a challenge to a mandatory retirement program as unconstitutional age discrimination. All the Justices except Marshall agreed that the statute was constitutional and that the appropriate standard was mini-

368. See *id.* at 495-96 (Powell, J., concurring).

369. See *id.* at 519 (Marshall J., concurring).

370. See *id.* ("[B]ecause a racial classification ostensibly designed for remedial purposes is susceptible to misuse, it may be justified only by showing 'an important and articulated purpose for its use.'").

371. See *id.* at 518-22.

372. See *id.*

373. For a documented record of the exchange between the Justices regarding the dispute over the minimum rationality standard, see Marshall Papers, box 165, file 8.

374. 427 U.S. 307 (1976).



mal rationality.<sup>375</sup> Justice Brennan drafted an opinion to which Justice Rehnquist took serious exception.<sup>376</sup> Rehnquist persuaded his conservative colleagues that Brennan's draft defined *minimum rationality* in a way that would give lower courts too much leeway to strike down legislation they thought unwise.<sup>377</sup> Eventually Brennan lost his majority, and Justice Powell took over the opinion.<sup>378</sup> His own effort to provide a definition, though, was criticized almost as severely, and in the end the decision did not do much in the way of "defining" the standard.<sup>379</sup> As Powell noted a few years later when the Court revisited the minimal rationality standard in *United States Railroad Retirement Board v. Fritz*,<sup>380</sup> his "effort in *Murgia* to formulate a rational basis standard to which we all could subscribe" got "caught in a 'cross-fire.'"<sup>381</sup> Moreover, in yet another iteration in *City of Cleburne v. Cleburne Living Center*,<sup>382</sup> when Justice White attempted to offer a precise definition of the two-tier structure, Justice Powell objected.<sup>383</sup> Justice White's draft opinion would have held that the court of appeals mistakenly treated the mentally retarded as a "quasi-suspect class."<sup>384</sup> In White's view, the proper model was the two-tier structure, and he would have remanded the case for the lower courts to consider whether the city's action satisfied the less strict minimum rationality requirement.<sup>385</sup>

In contrast, Justice Powell believed that the city had failed to

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375. See Justice Marshall, First Draft Opinion (dissenting) (Massachusetts Bd. of Retirement v. Murgia) (Apr. 1, 1976), Marshall Papers, box 165, file 8, at 1.

376. Letter from Justice Rehnquist to Justice Brennan (Jan. 30, 1976), Marshall Papers, box 165, file 8.

377. *Id.* at 1.

378. Memorandum from Justice Powell to Conference (May 19, 1976), Marshall Papers, box 165, file 8.

379. For a documented record of the exchange regarding Justice Powell's definition, see Marshall Papers, box 165, file 8.

380. 449 U.S. 166 (1980).

381. Letter from Justice Powell to Justice Rehnquist (Nov. 10, 1980), Marshall Papers, box 268, file 6, at 1.

382. 473 U.S. 432 (1985).

383. Letter from Justice Powell to Justice White (June 5, 1985), Marshall Papers, box 371, file 11.

384. Justice White, Draft Opinion, (*City of Cleburne v. Cleburne Living Ctr.*) (May 29, 1985), Marshall Papers, box 371, file 11, at 8.

385. *Id.* at 13.

provide any justification for its denial of a special use permit for a group home for the mentally retarded.<sup>386</sup> Its action therefore failed the minimal rationality requirement. To Justice Powell, that failure meant that the Court did not have to decide whether the mentally retarded fell into some intermediate category.<sup>387</sup> Justice Rehnquist immediately responded that, although he could go along with applying the rationality test, the opinion should not "punt" on the issue of whether intermediate scrutiny was appropriate.<sup>388</sup> Justice White then played a strong card, saying that, although he could write an opinion reaching Justice Powell's result, he would not write an opinion that did not discuss the standard of review. The opinion therefore would have to be reassigned.<sup>389</sup> Because the Court was near the end of its Term, that was that; White had his way.<sup>390</sup>

Although these discussions of equal protection theory were certainly divisive, they were certainly not contentious. As I have suggested, the reasons for the divisions were largely theoretical, in an academic and pejorative sense. The outcomes of the cases in the Supreme Court were never in doubt. The doctrinal implications for closely related cases would have been equally clear, or obscure, no matter what standard of review the Court adopted. What divided the Justices appears to have been a disagreement about whether to adopt a two-tier or three-tier structure. That issue seems to have mattered to them because of what the alternatives might have suggested to lower courts: a sense of constraint under the two-tier structure or a sense of greater possibility under the three-tier structure. In this instance, surely Chief Justice Burger's instinct in *Fullilove* was right: It is better to write a diffuse opinion reaching a result on which all agreed than to attempt a false precision that divided the majority.

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386. Letter from Justice Powell to Justice White (June 5, 1985), Marshall Papers, box 371, file 11 ("It has submitted no justification for treating the mentally retarded as comparable—for zoning purposes—to the insane, alcoholics and drug addicts.").

387. *Id.*

388. Letter from Justice Rehnquist to Justice White (June 5, 1985), Marshall Papers, box 371, file 11.

389. Letter from Justice White to Justice Powell (June 6, 1985), Marshall Papers, box 371, file 11.

390. See Letter from Justice Powell to Justice White (June 7, 1985), Marshall papers, box 371, file 11.

Chief Justice Burger's instinct in *Fullilove* was right: It is better to write a diffuse opinion reaching a result on which all agreed than to attempt a false precision that divided the majority.

#### *D. Working Out the Contours of Affirmative Action*

The Justices probably understood that *Bakke* was only their first confrontation with the issue of affirmative action. The fact that Justice Powell spoke only for himself and nonetheless defined "the law" that emerged from *Bakke* is symptomatic of the Court's groping for a position on affirmative action.<sup>391</sup> Over the next fifteen years the Justices gradually developed a set of distinctions—between court-ordered and voluntary affirmative action programs and among programs with effects on hiring, promotion, and discharge—that made sense to them.<sup>392</sup> Here too, the Court was divided but largely harmonious.<sup>393</sup>

One dimension of disagreement surfaced first in *Franks v. Bowman Transportation Co.*<sup>394</sup> The Court held that district courts ordinarily should award seniority retroactive to the date of an individual's job application, once they found that an employer had violated the federal statutory ban on employment discrimination.<sup>395</sup> Doing so would usually place the plaintiffs higher on the seniority list than some other employees, who in turn might be laid off earlier than they would have been if the plaintiffs did not get seniority relief.<sup>396</sup> The inequity of that result concerned Justice Powell.<sup>397</sup> He believed seniority relief affected the rights of "innocent employees," who might not have had any involvement with the employer's discriminatory policies.<sup>398</sup> In response, Justice Brennan pointed out that the plaintiffs, who had been discriminated against, were surely

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391. See *Bakke*, 438 U.S. 265, 267-68 (1978); see also UROFSKY, *supra* note 5, at 45.

392. See generally UROFSKY, *supra* note 5, at 39-55, 103-16 (discussing the Court's development of its position on affirmative action programs).

393. *Id.*

394. 424 U.S. 747 (1976).

395. *Id.* at 767-68, 779-80.

396. *Id.* at 767.

397. *Id.* at 782 (Powell, J., concurring in part and dissenting in part).

398. *Id.* at 788-89.

equally innocent.<sup>399</sup> As Justice Powell stated, "[t]his case is becoming a bit like a 'shuttlecock,' but I certainly don't want Bill Brennan to have the last 'hit.'"<sup>400</sup> Justice Marshall tried to calm the waters, pointing out that the case was narrower than many: "In this case we deal only with identifiable individuals who actually applied for jobs and were discriminated against . . . and leave for another day the knotty problems of quotas, non-identifiable discriminatees, and discrimination claimed by those who were deterred from ever applying for jobs."<sup>401</sup>

Powell eventually gained a majority for his view that the impact of affirmative action on layoffs was a central concern. In *Wygant v. Jackson Board of Education*,<sup>402</sup> the Court invalidated an affirmative action program that attempted to preserve the gains made under earlier affirmative action efforts by requiring that some white teachers be laid off before African-American teachers with less seniority.<sup>403</sup> The issue of the appropriate standard of review, so important in *Fullilove*, resurfaced in *Wygant*. As in *Fullilove*, the conference discussion showed a majority in favor of striking down the affirmative action program, but division among the majority on the standard of review.<sup>404</sup> Because of this division, Justice Powell's first draft obscured the standard of review.<sup>405</sup> Justice Marshall circulated a proposed dissent, which sharply criticized Powell for "[p]laying no heed to the significant division on the Court with respect to a standard of review."<sup>406</sup> In a personal note, Justice Brennan told Mar-

399. See Memorandum from Justice Brennan to Conference (Jan. 29, 1976), Marshall Papers, box 162, file 5, at 3 ("[T]he effect of the presumption is to divvy up the burden between innocent white employees and *equally innocent* victims of racial discrimination.").

400. Memorandum from Justice Powell to Conference (Feb. 12, 1976), Marshall Papers, box 162, file 5, at 1.

401. Memorandum from Justice Marshall to Conference (Feb. 16, 1976), Marshall Papers, box 162, file 5, at 2.

402. 476 U.S. 267 (1986).

403. *Id.* at 283-84.

404. See Letter from Justice Brennan to Justices Marshall, Blackmun, and Stevens (Nov. 20, 1985), Marshall Papers, box 387, file 1.

405. See Justice Powell, Draft Opinion (*Wygant v. Jackson Bd. of Educ.*) (Dec. 13, 1985), Marshall Papers, box 387, file 1.

406. Justice Marshall, Draft Opinion (*Wygant v. Jackson Bd. of Educ.*) (Feb. 5, 1986), Marshall Papers, box 387, file 1, at 7.

shall that his "superb dissent . . . ought to change some votes."<sup>407</sup>

In one sense, it did change votes. Justice Powell could not gain five votes for his opinion, and he circulated a revision more than two months later in which he included an extended discussion of the standard of review.<sup>408</sup> That discussion was enough to persuade Justice O'Connor to join most of the opinion, but Justice White still refused to join it. The resulting plurality opinion left the law uncertain.<sup>409</sup> As one of Marshall's clerks stated a few years later, in a memorandum on *City of Richmond v. J.A. Croson Co.*,<sup>410</sup> "it is hard to tell whether the . . . [court of appeals] has 'misread' *Wygant*, since nobody knows what that opinion stands for now that Justice Powell has retired."<sup>411</sup>

What it stood for, though, was that the Constitution placed limits on the effects affirmative action could have on what Justice Powell called "innocent parties."<sup>412</sup> Justice Powell expressed that view when, with the opinions in *Wygant* still circulating, he voted to uphold an affirmative action plan in *Local 28 of the Sheet Metal Workers' National Ass'n v. EEOC*.<sup>413</sup> In that case, a district court found that the union had discriminated against African-Americans in admission to the union, and the court imposed a quite rigid numerical membership "goal" as a remedy.<sup>414</sup> Justice Powell thought that the record reflected "gross discrimination . . . and, importantly for [him], unlike *Wygant*, there [was] nothing before [the Court] to suggest that individual union members will have to be laid off."<sup>415</sup>

*Local 28* differed from *Wygant* in another dimension that the

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407. Letter from Justice Brennan to Justice Marshall (Feb. 6, 1986), Marshall Papers, box 387, file 1.

408. Justice Powell, Draft Opinion (*Wygant v. Jackson Bd. of Educ.*) (Apr. 14, 1986), Marshall Papers, box 387, file 1, at 8-9.

409. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 269 (1986).

410. 488 U.S. 469 (1989).

411. Carol Steiker, Bench Memo (*City of Richmond v. J.A. Croson Co.*), Marshall Papers, box 429, file 4.

412. *Wygant*, 476 U.S. at 282.

413. 478 U.S. 421 (1986).

414. *Id.* at 431-32.

415. Letter from Justice Powell to Chief Justice Burger (Mar. 6, 1986), Marshall Papers, box 390, file 1; see also *Local 28*, 478 U.S. at 488 (Powell, J., concurring).

Justices regarded as significant. It involved a court-ordered affirmative action program.<sup>416</sup> The distinction between court-ordered plans and voluntary plans first surfaced in *McDonald v. Santa Fe Trail Transportation Co.*<sup>417</sup> Two white employees who were fired for stealing alleged that they had been discriminated against because an African-American co-employee charged with the same offense had not been fired. The lower courts dismissed their claim, holding that whites could not invoke the civil rights laws against racial discrimination.<sup>418</sup> The Supreme Court unanimously disagreed in an opinion written by Justice Marshall.<sup>419</sup>

The implications of the case for challenges to affirmative action programs were clear; had *McDonald* come out differently, whites would have no vehicle by which to challenge such programs. Justice Marshall's opinion contained a footnote "emphasiz[ing] that we do not consider here the permissibility of [affirmative action] . . . program[s], whether judicially required or otherwise prompted."<sup>420</sup> Justice Stevens wrote that, in his opinion, "we are kidding ourselves . . . to the [extent] that you disavow consideration of a voluntary affirmative action program. I agree that a judicially required program would not be covered, but the reasoning in the text will surely support the typical reverse discrimination claim, which any quota system will stimulate."<sup>421</sup> Marshall disagreed, denying that "a program which a judge can lawfully require is necessarily illegal without a judge's order."<sup>422</sup>

The distinction became crucial in *Local Number 93, International Ass'n of Firefighters v. City of Cleveland*,<sup>423</sup> decided the same day as *Local 28*. The case involved an affirmative action program dealing with promotions, adopted as part of a consent

416. *Local 28*, 478 U.S. at 426.

417. 427 U.S. 273 (1976).

418. *Id.* at 276-77.

419. *Id.* at 274.

420. *Id.* at 281 n.8.

421. Letter from Justice Stevens to Justice Marshall (June 14, 1976), Marshall Papers, box 171, file 13.

422. Letter from Justice Marshall to Justice Stevens (June 15, 1976), Marshall Papers, box 171, file 13.

423. 478 U.S. 501 (1986).

decree.<sup>424</sup> Because it involved promotions, it fell between the hiring preferences in *Local 28*, which Powell believed would not "burden[]" whites "directly, if at all,"<sup>425</sup> and the lay-off preferences in *Wygant*, because some whites might be adversely affected by affirmative action in promotions.

Here the key votes were from Justices Powell and O'Connor. At the conference the outcome was not entirely clear, and Chief Justice Burger retained some hope that he would get a majority to hold the promotion preferences unconstitutional. Justices O'Connor and Powell, though, found it crucial that the program in *Local 93* involved a court order, even a consent decree: "There is a difference," Justice Powell wrote, "between the approval by a court of an agreement between the parties, and an order of a court that is contested by the employer."<sup>426</sup> As Powell understood the record, this case did not involve a sweetheart deal in which the employer simply rolled over and accepted the employees' challenges. He remained uncertain about the proper result, however, because he found the record unclear on whether "non-minority members of the union will be discriminated against in promotions."<sup>427</sup>

After the Chief Justice decided that he had to vote to reverse the court of appeals' approval of the program, Justice Brennan took on the opinion himself.<sup>428</sup> Justice Powell was uncomfortable with Brennan's draft and urged Brennan to make extensive revisions.<sup>429</sup> He wanted Brennan to emphasize that the case involved only the interpretation of federal statutes, not the Constitution.<sup>430</sup> He also found inadequate Brennan's treatment of precedents concerning a court's ability to order relief beyond what a statute required in the absence of a court order.<sup>431</sup>

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424. *Id.* at 506.

425. *Local 28*, 478 U.S. at 488.

426. Letter from Justice Powell to Chief Justice Burger (Mar. 6, 1986), Marshall Papers, box 392, file 4.

427. *Id.*

428. Memorandum from Chief Justice Burger to Conference (Mar. 10, 1986), Marshall Papers, box 392, file 4.

429. Letter from Justice Powell to Justice Brennan (June 20, 1986), Marshall Papers, box 392, file 4.

430. *Id.*

431. *Id.*

Brennan accepted the first set of suggestions but resisted the second. However, when it appeared that he could not get the crucial votes needed from Justices Powell and O'Connor, he modified his opinion again,<sup>432</sup> and Justices Powell and O'Connor immediately joined.<sup>433</sup>

When the Court upheld a judicial order requiring one-for-one promotions of whites and African-Americans in the Alabama state police, Justice Brennan again wrote the lead opinion.<sup>434</sup> To secure Justice Powell's vote, Brennan relied heavily on Powell's opinions in *Wygant* and *Local 28*. The effect, as Justice Stevens stated, was to suggest that *Wygant's* strict approach "should be applied in reviewing a judicial decree entered in response to a proven violation of law."<sup>435</sup> Stevens thought, in contrast, that "[v]oluntary race-conscious decisions by employers . . . [we]re presumptively unlawful."<sup>436</sup> Relying on *Swann*, Justice Stevens said that "[t]he burden of demonstrating that the relief granted by the district court is excessive rests squarely on the law violator—not on the victim of the wrongdoing."<sup>437</sup>

As the law of affirmative action developed, apparently the inside story is that there is no real inside story. The discussions within the Court simply identify the lines that the Justices wrote into the law in their published opinions. Of course there were disagreements, both between majority and dissenters and within the majorities. There also were disputes over how much one or another aspect of a particular case ought to be emphasized. Finally, there were occasional "strategic" votes and draft opinions, as in the Alabama police case, where a Justice may have shaped an opinion to obtain votes rather than to express his or her most deeply held views. In the end, nothing went on inside the Court that the published opinions do not fairly reflect.

432. Justice Brennan, Third and Fourth Revised Drafts (*Local 93 v. City of Cleveland*) (June 22, 26, 1986), Marshall Papers, box 392, file 4.

433. Letter from Justice Powell to Justice Brennan (June 26, 1986), Marshall Papers, box 392, file 3; Letter from Justice O'Connor to Justice Brennan (June 26, 1986), Marshall Papers, box 392, file 3.

434. *United States v. Paradise*, 480 U.S. 149 (1987).

435. Letter from Justice Stevens to Justice Brennan (Dec. 12, 1986), Marshall Papers, box 415, file 1.

436. *Id.*

437. *Id.*



*E. Coda*

The Court's divisions over the standard of review to apply to affirmative action seemed to end in *Croson*. Five Justices agreed that affirmative action programs had to meet the stringent standards of strict scrutiny.<sup>438</sup> Or so it seemed.

A year later the Court decided *Metro Broadcasting Inc. v. FCC*.<sup>439</sup> The conference discussion revealed a narrow majority to uphold a program mandated by Congress, giving preference in awarding broadcast licenses to minority firms. Justice White, who had joined the plurality opinion in *Croson*, voted to uphold the program. Justice Brennan wrote the opinion. In light of *Croson*, he believed it necessary to write an opinion applying strict scrutiny to the program.<sup>440</sup> When Justice White received the draft opinion, though, he told Justice Brennan that he did not believe it appropriate to use strict scrutiny in evaluating federal affirmative action programs. In his view, *Fullilove* rather than *Croson* was the key case.

Surprised but pleased by Justice White's position, Justice Brennan immediately began rewriting the draft opinion.<sup>441</sup> The revisions were, as Justice O'Connor put it, "surprisingly extensive."<sup>442</sup> Instead of strict scrutiny, the test was to be a version of intermediate scrutiny drawn from the *Fullilove* opinions by Burger and Marshall. The law of affirmative action remained as unsettled at the end of Marshall's tenure as it had been when the question first arose.

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438. Justice Scalia refused to join the portions of Justice O'Connor's plurality opinion that suggested some ways to satisfy strict scrutiny that he believed would uphold affirmative action programs too frequently. See *Croson*, 488 U.S. at 520 (Scalia, J., concurring).

439. 497 U.S. 547 (1990).

440. Justice Brennan, Draft Opinion (*Metro Broadcasting v. FCC*), Marshall Papers, box 508, file 8.

441. Justice Brennan, Revised Draft Opinion (*Metro Broadcasting v. FCC*) (June 15, 1990), Marshall Papers, box 508, file 9.

442. Letter from Justice O'Connor to Conference (June 18, 1990), Marshall Papers, box 508, file 9.

## IV. CONCLUSION

Justice Marshall's papers demonstrate that the Court's published opinions provide rather good indications of the Justices' concerns in race discrimination cases. Perhaps in some instances it would take a particularly well-informed scholar of constitutional *law* to discern the residues of internal discussions in the published opinions.<sup>443</sup> Particularly in cases that the Justices understood to be the first in a long series that they would have to decide, at times the published opinions concealed divisions that surfaced as the line of cases developed. On the whole, however, the Justices tended to state positions to their colleagues in "tentative" opinions, and then to modify those positions only slightly, ordinarily in essentially stylistic ways, as the Court's deliberations continued. In short, on issues of race discrimination there seems to have been little collegial *interchange* among the Justices during Marshall's tenure. As Justice Powell stated in a memorandum in *Bakke*, the Court's conference discussions were "usual[ly] truncated."<sup>444</sup> The fact that Chief Justice Burger personally approached Justice Powell three times in *Bakke*, trying to persuade Powell to abandon his approval of Harvard-type programs that took race into account, and failed three times, says something about Burger's persuasive abilities, but it also shows that the interactions that mattered were those recorded on paper.<sup>445</sup>

The material presented in this Article may contribute to an emerging picture of the modern Supreme Court as bureaucratic rather than collegial, and perhaps may similarly help modify our understanding of the Court's operation. It ought not, however, change our understanding of constitutional law.

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443. I hope to explore that question in an essay on *Plyler v. Doe*, 457 U.S. 202 (1982), and its treatment in my earlier essay, Mark V. Tushnet, *The Optimist's Tale*, 132 U. PA. L. REV. 1257 (1984).

444. SCHWARTZ, *supra* note 244, at 110.

445. *Id.* at 118.