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The Lost *Brown v. Board of Education* Of Immigration Law

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THE LOST *BROWN V. BOARD OF EDUCATION* OF IMMIGRATION LAW*

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This Article proposes that in 1957, the Supreme Court came close to applying Brown v. Board of Education *to immigration law. In* Brown*, the Supreme Court held that school segregation was unconstitutional. Ultimately,* Brown *came to be understood as prohibiting almost all racial classifications. Meanwhile, in a line of cases exemplified by* Chae Chan Ping v. United States *and* Fong Yue Ting v. United States*, the Supreme Court held that Congress enjoyed plenary power to discriminate on any ground, including race, in immigration law. These holdings have never been formally overruled. Immigration, then, is said to be an exception to the general rule of* Brown *and* Bolling v. Sharpe.

In 1957, however, the Supreme Court granted certiorari in United States *ex rel* Lee Kum Hoy v. Murff*, to resolve the question of the permissibility of race discrimination in the immigration context. The case involved a policy under which immigration officials tested the blood of Chinese people immigrating as children of U.S. citizens to determine whether they were related to their claimed parents, but not the blood of similarly situated members of other races. The Second Circuit, over the dissent of Judge Jerome Frank, upheld the discriminatory policy, so the Court had no reason to take the case unless it thought the decision was incorrect. While the Supreme Court ultimately granted the petitioners relief on other grounds, records of the Court and the short per curiam opinion suggest that the Court may have been prepared to hold at least this form of discrimination in immigration unconstitutional.*

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INTRODUCTION

In the late 1950s, the Supreme Court was acutely sensitive to the political consequences of its decision in *Brown v. Board of Education*.[1] Although the implications of *Brown* were vast, the Court elaborated them carefully and cautiously for fear of generating backlash among the general public, opponents of integration, and other branches of government. There was no shortage of segregation laws on the books or cases challenging them. Notably, in spite of many opportunities, it did not invalidate state laws prohibiting interracial marriage until 1967,[2] and in many other instances it avoided decisions that might generate conflict with state governments or potentially undermine the legitimacy of *Brown*.[3]

In 1957, the Court granted review in *United States ex rel. Lee Kum Hoy v. Shaughnessy*,[4] a challenge to an aspect of federal racial segregation. Three children claiming U.S. citizenship asked the Court

1. 347 U.S. 483 (1954).

2. Loving v. Virginia, 388 U.S. 1, 1 (1967). *See generally LOVING V. VIRGINIA* IN A POST-RACIAL WORLD: RETHINKING RACE, SEX, AND MARRIAGE (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012) (discussing both the historical background of *Loving* and the contemporary challenges facing couples in interracial marriages).

3. *See infra* notes 26–33 and accompanying text.

4. 115 F. Supp. 302, 310 (S.D.N.Y. 1953) (granting writ of habeas corpus conditional on further hearing); 123 F. Supp. 674, 678 (S.D.N.Y. 1954) (granting writ conditional on further hearing); 16 F.R.D. 558, 559 (S.D.N.Y. 1954) (denying motion for discovery); 133 F. Supp. 850, 854 (S.D.N.Y. 1955) (granting writ), *rev'd*, 237 F.2d 307, 307 (2d Cir. 1956), *cert. granted*, 352 U.S. 966, *vacated sub nom.* United States *ex rel.* Lee Kum Hoy v. Murff, 355 U.S. 169, 170 (1957) (per curiam).

to decide the permissibility of racial discrimination in federal immigration policy. The Lees objected to the Immigration and Naturalization Service ("INS") policy of using blood tests only in Chinese cases to determine whether people claiming to be children of U.S. citizens for immigration purposes were actually related.[5] Cases from the 1880s and 1890s allowed the federal government to discriminate freely on the basis of race in the context of immigration.[6] But these decisions were from the era of *Plessy v. Ferguson*,[7] upholding segregation,[8] and *Pace v. Alabama*,[9] upholding special punishments for interracial intimacy.[10] Perhaps after *Brown*, these precedents were vulnerable.

There was no critical, compelling reason for the Supreme Court to take the case. Although Judge Edward Dimock of the U.S. District Court for the Southern District of New York found unconstitutional discrimination, the Second Circuit reversed, albeit over a dissent by Judge Jerome Frank.[11] Accordingly, the Court needed neither to protect the operations of a federal agency nor ensure the exclusion of non-citizens. The only reason to hear the appeal was to grant relief to the individuals involved, not typically the role of the Court, or to make a larger legal point.

Whatever the outcome, the Court's decision would be momentous. If the Court struck down the discrimination, it might have meant overruling or limiting decades of precedent, in particular *Chae Chan Ping v. United States*[12] and *Fong Yue Ting v. United States*,[13] which recognized the plenary power of Congress to exclude non-citizens, or to deport them, on the basis of race or any other ground. It also would have called into question racially discriminatory immigration statutes that remained in the U.S. Code and would continue until 1965.[14]

On the other hand, the Court could have upheld racial discrimination as reasonable and rational under the circumstances or held that it was within the exclusive power of federal authorities without judicial review. But if the Court did so in late 1957—the case was argued while the 101st Airborne Division was deployed to

5. *See infra* notes 103, 120 and accompanying text.
6. *See infra* notes 62–66 and accompanying text.
7. 163 U.S. 537 (1896).
8. *Id.* at 551.
9. 106 U.S. 583, 585 (1883).
10. *Id.* at 585.
11. *See infra* Parts II.B–C.
12. 130 U.S. 581 (1889).
13. 149 U.S. 698 (1893).
14. *See infra* Part III.C.

Central High School in Little Rock to protect African-American students attending the formerly all-white school from mob violence[15]—the Court might well have impeached the legitimacy of its own work and made integration more difficult.

In fact, the Court reversed the Second Circuit without reaching the merits.[16] The Court remanded the case for further factfinding, whereupon the United States folded, allowing the three Lee children to remain in the United States.[17] But *Lee Kum Hoy* could have been a landmark. Given the Court's situation at the time, it is extremely unlikely that the Justices would have taken the case to uphold racial discrimination.

Evidence from the case suggests that the Court would not have approved of racial discrimination. One piece of evidence is the set of arguments by the Department of Justice, which never contended that any special constitutional rule applied in the immigration context. To the contrary, in the Supreme Court, the Solicitor General did not deny that the Lees were entitled to equal protection. If the Department of Justice did not request special deference in the context of immigration, then it may well be that the Court would not have given it to them. In addition, surviving papers of the Justices suggest that six members of the Court concluded that racial discrimination in this context was unconstitutional.

Part I of this Article outlines the Court's actions in avoiding confrontation and controversy in the wake of *Brown*. The point is not to suggest that the Court was either wise or not, but to show that the Court was careful and strategic about the appeals it accepted, often declining to review meritorious cases in order to facilitate implementation and acceptance of *Brown*. Part I also outlines the laws discriminating against Asians in immigration and naturalization and the Supreme Court cases upholding them. This body of law was, in principle, inconsistent with *Brown*.

Part II describes the administrative and lower court judicial proceedings in *Lee Kum Hoy*, which started in 1952 and ended in 1957. Part III discusses the action of the Supreme Court and proposes that the Court in 1957 was prepared to hold that the United States could not discriminate on the basis of race, even in the immigration context.

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15. *See infra* note 23–24 and accompanying text.

16. United States *ex rel.* Lee Kum Hoy v. Murff, 355 U.S. 169, 169 (1957) (per curiam).

17. *See infra* note 208 and accompanying text.

I. THE SUPREME COURT'S CASE SELECTION PROBLEM AND ASIAN EXCLUSION

A. The Court's Challenge in Desegregating Public Education

The Supreme Court recognized that deciding and implementing *Brown v. Board of Education*[18] presented problems and challenges far beyond those of an ordinary case. Chief Justice Earl Warren successfully struggled to produce a unanimous decision.[19] He recognized the significance, like other informed observers, of the Court speaking in a single voice because of the controversial nature of the issue.[20] Acutely aware of the political challenges of enforcing the principles of *Brown*,[21] the Court famously issued a remedial decree in *Brown II* that allowed integration with "all deliberate speed" rather than requiring immediate desegregation.[22]

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18. 347 U.S. 483 (1954).

19. RICHARD KLUGER, SIMPLE JUSTICE 682–99 (2004); JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 309–25 (2006). Whether *Brown* was prudently framed remains controversial. *See, e.g.,* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID (Jack M. Balkin ed., 2001). For a persuasive argument that the previous Chief Justice would have also voted to invalidate segregation, see Carlton F.W. Larson, *What if Chief Justice Fred Vinson Had Not Died of a Heart Attack in 1953?: Implications for* Brown *and Beyond*, 45 IND. L. REV. 131, 134 (2011).

20. *See, e.g.*, Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010) ("Consider the extra weight carried by the Court's unanimous opinion in *Brown v. Board of Education*. In that case, all nine Justices signed one opinion making it clear that the Constitution does not tolerate legally enforced segregation in our Nation's schools."); Randall T. Shepard, *The Changing Nature of Judicial Leadership*, 42 IND. L. REV. 767, 768 (2009) ("It was the political savvy of former Governor Warren that managed to produce a unanimous decision. It speaks the obvious to say that the fact that the decision was unanimous made all the difference in the world as respects how *Brown v. Board of Education* would be received by the public and how it would be enforced." (footnote omitted)); *see also* Frank B. Cross & James F. Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 60 EMORY L.J. 407, 465 (2010) ("The number of Justices joining a majority may be considered relevant to its legal authority."); David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 777–78 (2009) ("Even if the Supreme Court does not typically decide cases unanimously and in language that the public can easily understand, it is capable of doing so when the need arises. Consider, for example, the brevity of the Court's opinion in *Brown v. Board of Education*, the straightforward language that it used, and the care that was taken to ensure a unanimous decision." (footnote omitted)). *But see* Sanford Levinson, *Why Didn't the Supreme Court Take My Advice in the* Heller *Case? Some Speculative Responses to an Egocentric Question*, 60 HASTINGS L.J. 1491, 1495–96 n.21 (2009) (observing that the unanimous opinion in *Brown* "notably failed to bring closure to the debate over school segregation").

21. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 453 (2004) ("*Brown II* was plainly shaped by the justices' awareness that their power is limited."); Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1878 (1991).

22. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

After *Brown*, the Supreme Court carefully managed its docket. True, the Court issued its famous decision in *Cooper v. Aaron*,[23] signed by all nine Justices, when, in the fall of 1957, Little Rock, Arkansas authorities refused to integrate Central High School.[24] But state resistance in that instance was so blatant and unprincipled that it "was simply an attempt to relitigate the initial determination;"[25] for the Court to have retreated in Little Rock would have meant abandonment of the Court's project of ending segregation. But in many other instances, the Court engaged in what David Garrow has called "nervous evasion of any further potential confrontations with southern legal norms and southern state courts."[26] It acquiesced when the Georgia Supreme Court refused to implement the Court's finding that a death sentence had been illegally imposed[27] and when the Florida Supreme Court refused to integrate the University of Florida Law School.[28]

In a series of cases, the Court refused to rule on the constitutionality of state anti-miscegenation laws. In *Jackson v. Alabama*[29] in 1954, the Court denied certiorari in a case involving a criminal conviction for miscegenation. In 1956, the Court transparently evaded the same question in *Naim v. Naim*,[30] an appeal of right from the Virginia Supreme Court, on grounds that Herbert Wechsler and Gerald Gunther called "wholly without basis in the law."[31] The Court concluded that discretion was the better part of

23. 358 U.S. 1 (1958).

24. Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641, 1645 (1997); David J. Garrow, *Foreshadowing the Future: 1957 and the United States Black Freedom Struggle*, 62 ARK. L. REV. 1, 16 (2009).

25. Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 79 (1961).

26. David J. Garrow, *Bad Behavior Makes Big Law: Southern Malfeasance and the Expansion of Federal Judicial Power, 1954–1968*, 82 ST. JOHN'S L. REV. 1, 9 (2008).

27. Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority:* Williams v. Georgia *Revisited*, 103 YALE L.J. 1423, 1424 (1994).

28. WALTER F. MURPHY & C. HERMAN PRITCHETT, COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 606–18 (1961); Lawrence A. Dubin, *Virgil Hawkins: A One-Man Civil Rights Movement*, 51 FLA. L. REV. 913, 930 (1999); Darryl Paulson & Paul Hawkes, *Desegregating the University of Florida Law School:* Virgil Hawkins v. The Florida Board of Control, 12 FLA. ST. U. L. REV. 59, 59 (1984).

29. 72 So. 2d 114 (Ala. Ct. App.), *cert. denied*, 72 So. 2d 116 (Ala.), *cert. denied*, 348 U.S. 888 (1954).

30. 87 S.E.2d 749 (Va. 1955), *vacated and remanded*, 350 U.S. 891 (1955) (per curiam), *adhered to*, 90 S.E.2d 948 (Va. 1956), *denying motion to recall mandate*, 350 U.S. 985 (1956); *see* Richard Delgado, Naim v. Naim, 12 NEV. L.J. 525, 525 (2012).

31. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 12 (1964) (quoting

valor here, and the possibility of a split court, or a great provocation, was worse than allowing objectionable cases to stand.

Alexander Bickel and Gerald Gunther debated the wisdom and legitimacy of the Court's action at the time;[32] Bickel went so far as to "suggest that the great sin of the Vinson years, especially in the many alien cases . . . was the failure of the Court to take imaginative advantage of the choices that were open"[33] to avoid deciding difficult cases. Scholars continue to argue about whether the Court's efforts in this area were wise and legitimate; many claim, for example, that the Court's timidity, rather than giving southern conservatives time to accommodate themselves to integration, emboldened resistance and made things worse,[34] while others disagree.[35]

But whether the Court was politically astute or blundered, there is no real question that the Court faced, and knew it faced, actual or potential adversaries on all sides. The Court, of course, had to

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Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, *in* PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3, 47 (1961)).

32. *Compare* Bickel, *supra* note 25 (supporting the idea of strategic evasion of controversial cases), *with* Gunther, *supra* note 31 (criticizing Bickel's approach as leading to both non-compliance with legal principles and failing to overturn bad results).

33. Bickel, *supra* note 25, at 81.

34. Garrow, *supra* note 26, at 14 (" '[M]assive resistance to school desegregation was not inevitable' had the Supreme Court and the executive branch stood up for *Brown I* more robustly than they did from 1954 to 1956." (quoting John A. Kirk, *Massive Resistance and Minimum Compliance: The Origins of the 1957 Little Rock School Crisis and the Failure of School Desegregation in the South*, *in* MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION 94 (Clive Webb ed., 2005))); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 622–23 (1983); Martha Minow, *Surprising Legacies of* Brown v. Board, 16 WASH. U. J.L. & POL'Y 11, 14–15 (2004) ("Many people viewed the 'all deliberate speed' language of *Brown II* as a signal that encouraged both noncompliance with, and even resistance to, desegregation."); Jordan Steiker, *American Icon: Does It Matter What the Court Said in* Brown*?*, 81 TEX. L. REV. 305, 310 (2002) ("Apart from its failure to clearly conceptualize the 'right' at issue, the Court capitulated to fears of noncompliance in adopting Frankfurter's famous 'all deliberate speed' formulation in *Brown II*. By so doing, the Court might have emboldened resistance to its mandate. Virtually nothing was accomplished in terms of eliminating racial identifiability in the public schools in the decade after *Brown*. Everyone at the Court and in politics generally understood that the various 'obstacles' and 'administration' problems to which *Brown II* deferred were nothing more than euphemisms for Southern unwillingness to end segregative practices.").

35. *See, e.g.*, Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 1013 (1998) ("In pragmatic terms, a strong argument can be made that the *Brown I*/*Brown II* approach was a stunning success, both in its influence on the moral debate in this nation over Jim Crow, and in its pragmatic aspect of permitting a gradual and therefore effective solution to southern segregation."); Paul Finkelman, *The Radicalism of* Brown, 66 U. PITT. L. REV. 35, 37 (2004) ("*Brown* and the civil rights revolution it spawned led to political stalling, massive resistance, and murderous violence. But, it is not unreasonable to imagine that a more forceful remedy in *Brown II* would have led to even more violence. It is also possible that a more forceful opinion in *Brown II* might have led to resistance by the Eisenhower administration.").

consider public opinion in general.[36] Southern members of Congress were committed to finding a way to overturn or evade *Brown,*[37] and many state officials in the South had little interest in complying.[38]

The Court "left enforcement of *Brown* primarily in the hands of southern district judges, all of whom were white and the vast majority of whom thought that *Brown* had been wrongly decided—often egregiously so."[39] Federal district and circuit judges hostile to civil rights seized upon any quasi-plausible legal ground to avoid granting relief to those seeking integration.[40] Some federal courts dealing with desegregation claims refused to allow them to proceed as class actions, threatening "[a] student-by-student approach to desegregation litigation" which "posed enormous difficulties" and could have "nullified *Brown*."[41] Other courts approved desegregation

36. *See, e.g.*, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 9 (5th ed. 2010) ("[T]he mandates of the Supreme Court must be shaped with an eye not only to legal right and wrong, but with an eye to what popular opinion would tolerate."); RICHARD A. POSNER, HOW JUDGES THINK 375 (2008) ("What reins in the Justices . . . is an awareness, conscious or unconscious, that they cannot go 'too far' without inviting reprisals by the other branches of government spurred on by an indignant public. So they pull their punches . . . .").

37. Herbert Brownell, *Civil Rights in the 1950s*, 69 TUL. L. REV. 781, 787 (1995) (discussing the Southern Manifesto, where 110 members of Congress stated, "We pledge ourselves to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution and to prevent the use of force in its implementation").

38. *Id*. ("I asked the attorneys general from the states in the Deep South to meet with me at an off-the-record midnight session. Since they, too, had taken an oath to uphold the Constitution of the United States, I asked for their professional help in eliminating segregation in the schools now that the *Brown* case had been decided. Some expressed sympathy with my enforcement problem but told me that every state attorney general was a potential candidate for governor of his state and that it would be political suicide to make any move favoring desegregation. Without rancor, but firmly, they said that the federal government should not expect any help from them.").

39. Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 HARV. J.L. & GENDER 251, 295 (2009).

40. For example, a three-judge court concluded in 1955:

> Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals.

Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (per curiam). This "famous and influential" decision, Garrow, *supra* note 26, at 31, "set a standard for evasiveness by school districts throughout the South." Goodwin Liu, *"History Will Be Heard": An Appraisal of the Seattle/Louisville Decision*, 2 HARV. L. & POL'Y REV. 53, 63 (2008) (citing KLUGER, *supra* note 19, at 751).

41. David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 680 (2011).

plans integrating one grade per year, meaning that students already attending segregated schools would never experience integration, as only grades behind them became integrated.[42] The Eisenhower administration's attitude towards civil rights was mixed.[43] Accordingly, moving too fast might compromise its willingness to support enforcement.

State courts were, not surprisingly, much worse. Their general attitude is suggested by a unanimous Mississippi Supreme Court decision upholding the conviction of a freedom rider:

> Large numbers of people, in this broad land, are steeped in their customs, practices, mores and traditions. In many instances, their beliefs go as deep or deeper than religion itself. If, in the lapse of time, these principles, sacred to them, shall be disproved, then it may be accepted that truth will prevail. But, until those principles have been tested in the crucible of time, no abject surrender should be expected, much less demanded.[44]

Even the liberal friends of integration sometimes presented problems. Herbert Wechsler believed that *Brown* and related cases "have the best chance of making an enduring contribution to the quality of our society of any that I know in recent years."[45] But he found the Court's decisions insufficiently explained:

> [*Brown*] was firmly focused on state segregation in the public schools, its reasoning accorded import to the nature of the

42. *See* Miller v. Barnes, 328 F.2d 810, 812–14 (5th Cir. 1964); Kelley v. Bd. of Educ., 270 F.2d 209, 209–10 (6th Cir. 1959); Evans v. Buchanan, 172 F. Supp. 508, 508 (D. Del. 1959), *vacated sub nom.* Evans v. Ennis, 281 F.2d 385, 386 (3d Cir. 1961). The Supreme Court rejected this approach in 1965. Rogers v. Paul, 382 U.S. 198, 198–99 (1965) (per curiam).

43. Finkelman, *supra* note 35, at 37–38; Garrow, *supra* note 26, at 22 ("Eisenhower and his administration likewise made almost the least possible use of the new civil rights enforcement tools that the 1957 Act gave the executive branch."); J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667, 675 (2008) (noting the "tepid support of black civil rights under Eisenhower"); Melvin I. Urofsky, *The Supreme Court and Civil Rights Since 1940: Opportunities and Limitations*, 4 BARRY L. REV. 39, 46–47 (2003) ("[T]here is nothing in the record to indicate that Dwight Eisenhower had any commitment to the cause of equal rights for the nation's African-American citizens."); *see also* Kathleen A. Bergin, *Authenticating American Democracy*, 26 PACE L. REV. 397, 425 (2006) ("Just before *Brown* was decided, Eisenhower explained to Chief Justice Warren at a White House dinner that Southern segregationists were not bad people, but that '[a]ll they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big, black bucks.' " (alteration in original) (citation omitted)).

44. Knight v. State, 161 So. 2d 521, 523 (Miss. 1964).

45. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 27 (1959).

> educational process, and its conclusion that separate educational facilities are "inherently unequal."
>
> What shall we think then of the Court's extension of the ruling to other public facilities, such as public transportation, parks, golf courses, bathhouses and beaches, which no one is obliged to use—all by per curiam decisions? That these situations present a weaker case against state segregation is not, of course, what I am saying. I am saying that the question whether it is stronger, weaker, or of equal weight appears to me to call for principled decision.[46]

Brown itself, he concluded, "did not declare, as many wish it had, that the fourteenth amendment forbids all racial lines in legislation," instead it turned on particular facts and consequences to the children involved.[47] The Court, he determined, had not yet articulated "a basis in neutral principles"[48] for the outcome.[49]

Thus, anything the Court did had risks. As Bickel explained, the Court "nearly always has three courses of action open to it: it may strike down legislation as inconsistent with principle; it may legitimate it; or it may do neither."[50] If the Court had decided rather than avoided the miscegenation cases that appeared on its docket after *Brown,* it might have engendered even more fanatical opposition to the Court's rulings.

If, alternatively, the Court upheld anti-miscegenation laws, it would have represented a shocking repudiation of the legitimacy and scope of *Brown* and the other cases; if the Court upheld the discrimination, it would have been a unique ruling, standing alone for decades in either direction.[51] If there is a legitimate reason to prohibit interracial marriage, then whatever that reason is might also apply to education.[52] It might have justified different treatment or different

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46. *Id.* at 22.

47. *Id.* at 32.

48. *Id.* at 34.

49. For a discussion of the "neutral principles" controversy, see generally Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503 (1997).

50. Bickel, *supra* note 25, at 50.

51. *See* Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J., concurring) ("Only two of this Court's modern cases have held the use of racial classifications to be constitutional." (citing Korematsu v. United States, 323 U.S. 214 (1944); Hirabayshi v. United States, 320 U.S. 81 (1943)); *see also* DeFunis v. Odegaard, 416 U.S. 312, 339 (1974) (Douglas, J., dissenting) ("This Court has not sustained a racial classification since the wartime cases of *Korematsu v. United States* and *Hirabayashi v. United States* involving curfews and relocations imposed upon Japanese-Americans." (citations omitted)).

52. *See* Bond v. Tij Fung, 114 So. 332, 334 (Miss. 1927) (holding school segregation was designed to promote harmony by "eliminating close and intimate contact, during the

measures within integrated schools, or at least given aid and comfort to state officials and lower federal court judges opposed to integration. Yet, by denying review, the Court risked appearing weak and unprincipled to friend and foe alike. A decision, particularly by a divided Court, to take any of these paths risked discouraging allies, encouraging enemies, or compromising the legitimacy of earlier unanimous decisions.

B. Race-Based Federal Immigration Policy

Federal immigration policy was fundamentally inconsistent with the principle of *Brown* and *Bolling v. Sharpe*,[53] which recognized an equal protection principle applicable to the federal government in the Due Process Clause of the Fifth Amendment.[54] Beginning in 1882 with the Chinese Exclusion Act,[55] Congress restricted immigration on the basis of race.[56] These laws were clearly based on racial animus. For example, Senator James George of Mississippi made clear the reason he voted to exclude Chinese:

> The Constitution was ordained and established by white men, as they themselves declared in its preamble, "to secure the blessings of liberty to themselves (ourselves) and their (our) posterity," and I cannot doubt that this great pledge thus solemnly given will be as fully redeemed in favor of the white people of the south, should occasion for action arise, as I intend on my part and on their behalf to redeem it this day in favor of the white people of the Pacific States, by my vote to protect them against a degrading and destructive association with the inferior race now threatening to overrun them.[57]

Over time, the exclusion policy extended to members of all Asian races. The laws turned on race, not place of birth or

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hot season of youth, between the white and colored races"), *rev'd as moot sub nom.* Joe Tin Lun v. Bond, 278 U.S. 818 (1929) (per curiam).

53. 347 U.S. 497 (1954) (invalidating racial segregation in District of Columbia schools under the Due Process Clause of the Fifth Amendment).

54. *Id*. at 499–50.

55. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

56. *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 7 (1998) [hereinafter Chin, *Segregation's Last Stronghold*]; Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 281 (1996) [hereinafter Chin, *Revolution*].

57. 13 CONG. REC. 1637–38 (Mar. 6, 1882) (statement of Sen. James George); *see also* Chin, *Segregation's Last Stronghold*, *supra* note 56, at 28–38 (outlining congressional motivation for exclusion).

citizenship.[58] The Supreme Court uniformly upheld these laws. In *Chae Chan Ping v. United States*,[59] the Court approved Congress's decision to invalidate return certificates held by Chinese residents of the United States temporarily abroad. The Court explained that Congress was free to determine that foreign immigration was the equivalent of an invasion:

> If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary.[60]

In *Fong Yue Ting v. United States*,[61] the Court held that Congress could expel Chinese residents, not merely exclude them at the border, "whenever, in its judgment, their removal is necessary or expedient for the public interest."[62]

The Court upheld administrative enforcement of the exclusion laws, even against people claiming to be United States citizens.[63] The Court also upheld a presumption requiring Chinese residents to bear the burden of proving their citizenship or other lawful right to be in the United States.[64] Thus, just as race-consciousness was permitted in the substantive law, it was also allowed in procedure and administration.

Citizenship by naturalization was also restricted by race. Beginning in 1790, Congress limited naturalization to "free white persons."[65] Persons of African nativity or descent were allowed to naturalize in 1870.[66] In a unanimous determination that a person of Japanese ancestry could not naturalize, the Supreme Court described the racial restriction on naturalization as "a rule in force from the

58. *See* Hitai v. INS, 343 F.2d 466, 466–69 (2d Cir. 1965).
59. 130 U.S. 581 (1889).
60. *Id*. at 606.
61. 149 U.S. 698 (1893).
62. *Id*. at 724.
63. United States v. Ju Toy, 198 U.S. 253, 254 (1905).
64. Morrison v. California, 291 U.S. 82, 96 (1934).
65. Chin, *Segregation's Last Stronghold*, *supra* note 56, at 13.
66. *Id.*

beginning of the Government, a part of our history as well as our law, welded into the structure of our national polity by a century of legislative and administrative acts and judicial decisions."[67]

Federal law thus created a category of aliens racially ineligible for citizenship. The Supreme Court upheld discriminatory state laws against this group. In allowing states to prohibit aliens from owning land, the Court explained that classifications against ineligible aliens were legitimate:

> Eligible aliens are free white persons and persons of African nativity or descent. Congress is not trammeled, and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit. But it is not to be supposed that its acts defining eligibility are arbitrary or unsupported by reasonable considerations of public policy. The State properly may assume that the considerations upon which Congress made such classification are substantial and reasonable. Generally speaking, the natives of European countries are eligible. Japanese, Chinese and Malays are not.[68]

The Supreme Court recognized the tension between unlimited federal power over immigration and its modern jurisprudence. In *Galvan v. Press*,[69] a 1954 decision, the Court by Justice Frankfurter upheld deportation for Communist Party membership that was legal when it occurred:

> In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, see *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146, 155, much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens . . . .
>
> But the slate is not clean. As to the extent of the power of Congress under review, there is not merely "a page of history," *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government . . . . [T]hat the formulation of these policies is entrusted exclusively to Congress has become about

67. Ozawa v. United States, 260 U.S. 178, 194 (1922).

68. Terrace v. Thompson, 263 U.S. 197, 220 (1923); *see also* Porterfield v. Webb, 263 U.S. 225, 233 (1923) (upholding restriction on landowning by aliens ineligible for citizenship).

69. 347 U.S. 522 (1954).

> as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.[70]

Galvan was a communist case, not a race case. But in a 1952 concurring opinion in *Harisiades v. Shaughnessy*,[71] one of the "alien cases" that Bickel said the Court should have avoided,[72] Justice Frankfurter insisted that Congress could discriminate based on race.[73]

The courts and Congress largely solved the contradiction of a racially discriminatory policy in a legal system with a growing presumption against racial classifications without major confrontation. In 1948, the Supreme Court held that states could not borrow the federal racial restriction on naturalization and use it for independent state purposes;[74] these decisions were consistent with both the principle of federal supremacy in the area of immigration and the Court's developing disfavor of racial classifications. And several state supreme courts invalidated their anti-Asian alien land laws,[75] avoiding the necessity of a federal determination of the question.

In 1943, Congress began dismantling the Asian exclusion laws themselves by allowing Chinese to immigrate and naturalize.[76] Other

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70. *Id.* at 530–31.

71. 342 U.S. 580 (1952).

72. *See* Bickel, *supra* note 25, at 79.

73. He explained:

> The Court's acknowledgment of the sole responsibility of Congress for these matters has been made possible by Justices whose cultural outlook, whose breadth of view and robust tolerance were not exceeded by those of Jefferson. In their personal views, libertarians like Mr. Justice Holmes and Mr. Justice Brandeis doubtless disapproved of some of these policies, departures as they were from the best traditions of this country and based as they have been in part on discredited racial theories or manipulation of figures in formulating what is known as the quota system. But whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress . . . . [T]he underlying policies of what classes of aliens shall be allowed to enter and what classes of aliens shall be allowed to stay, are for Congress exclusively to determine even though such determination may be deemed to offend American traditions and may, as has been the case, jeopardize peace.

Harisiades, 342 U.S. at 597 (Frankfurter, J., concurring). But this pre-*Brown* case, too, did not actually involve a racial classification. The form of the argument—that even racial discrimination has been approved by the Court and therefore everything else survives judicial review as well—suggests that Justice Frankfurter recognized that racial discrimination was the most extreme and problematic form of discrimination.

74. Oyama v. California, 332 U.S. 633, 647 (1948); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 418 (1948).

75. Sei Fujii v. State, 242 P.2d 617, 630 (Cal. 1952); State v. Oakland, 287 P.2d 39, 39 (Mont. 1955); Namba v. McCourt, 204 P.2d 569, 583 (Or. 1949).

76. Chin, *Revolution*, *supra* note 56, at 282.

Asian racial groups were added, and naturalization was made completely race neutral in the Immigration and Nationality Act of 1952.[77] The 1952 Act allowed all Asian racial groups to immigrate, although they were granted tiny quota numbers, and, unlike all other groups, the quotas were counted on a racial basis rather than based on citizenship or nativity.[78] Also, the 1952 statute imposed a cap of two thousand on all immigrants tracing their ancestry to the Asia-Pacific Triangle area.[79] In 1965, Congress eliminated all racial considerations from immigration law, rendering academic the question of congressional power to discriminate.[80]

Nevertheless, between 1954, when an equal protection claim became very strong, and 1965, when an equal protection claim became moot, the Supreme Court never decided a case explicitly determining whether the federal government continued to have the power it recognized in the 1880s and 1890s, the era of *Plessy*, to discriminate on the basis of race in the immigration context. However, it granted certiorari in one, *United States ex rel. Lee Kum Hoy v. Murff*.[81]

II. ADMINISTRATIVE AND LOWER COURT PROCEEDINGS

On June 17, 1952, Lee Kum Hoy, Lee Kum Cherk, and Lee Moon Wah, a twenty-one-year-old young man, a thirteen-year-old boy, and a twelve-year-old girl respectively, arrived in New York on Trans-Canada Airlines, ending a journey that had begun in Hong Kong.[82] They claimed to be the children of a U.S. citizen, Lee Ha, and his wife, Wong Tew Hee, and therefore to be U.S. citizens themselves.[83] The INS had its doubts. The Lees' legal odyssey would involve three administrative hearings, three trips to the Board of Immigration Appeals ("BIA"), and four published U.S. district court decisions on their petition for habeas corpus, as well as a decision by the U.S. Court of Appeals for the Second Circuit.[84]

77. Immigration and Nationality Act of 1952, ch. 477 § 201(a), 66 Stat. 163, 175 (codified as amended at 8 U.S.C. § 1151 (2006 & supp. IV 2011)).

78. *Id.* § 202(b) (codified as amended at 8 U.S.C. § 1152 (2006)).

79. *Id.* § 202(e) (codified as amended at 8 U.S.C. § 1152 (2006)).

80. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

81. United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 352 U.S. 966 (1957).

82. Record Appendix at 155a, Lee Kum Hoy v. Murff, 355 U.S. 169 (1957) (No. 32) (Decision of Board of Immigration Appeals of May 11, 1953); *id.* at 131a (Board of Special Inquiry Hearing of Aug. 14, 1952).

83. *Id.* at 5a (Petition for Writ of Habeas Corpus).

84. *Id.* at 151a (Board of Special Inquiry) (ordering exclusion), *appeal dismissed*, File No. 0300/423253 (BIA May 11, 1953) (RA 154a), *writ of habeas corpus conditionally granted*, United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 115 F. Supp. 302 (S.D.N.Y.

A. Administrative and District Court Proceedings

The Lees were first examined at a hearing before a Board of Special Inquiry at Ellis Island, which found that "the testimony of the three of [them] and of [their] two witnesses ha[d] been reasonably harmonious and reasonably consistent with the records of the Immigration and Naturalization Service."[85] However, at the request of the INS, the parents and children submitted to blood grouping tests in July and August, 1952. The parents were type A, but Lee Kum Hoy and Lee Moon Wah were type B, and Lee Kum Cherk was type O. This result, according to the INS, "exclude[ed] the possibility of the claimed parentage as to Lee Moon Wah and Lee Kum Hoy."[86] The Lees' attorney requested, was offered, but later declined the opportunity for independent blood tests, instead requesting to cross-examine the author of the learned treatise which was used to explain the results.[87] While Type A parents can have a type O child, and thus Lee Kum Cherk was not excluded, the board found that Lee Kum Cherk's credibility was impeached by the claim that all three children were siblings with the same parents.[88]

But there was a problem with the tests. The results were inconsistent in certain ways between the July 1952 and August 1952 tests.[89] However, the authorities found these inconsistencies insufficient to discount the tests, particularly where the burden was on the applicant to prove entitlement to admission to the United States.[90] Accordingly, on September 18, 1952, the children were ordered excluded by a Board of Special Inquiry.[91] The BIA dismissed their appeal on May 11, 1953.[92]

1953), *ordering exclusion*, *In re* Lee Kim Hoy, No. 0300-423253 (Special Inquiry Officer Dec. 9, 1953) (RA 225a), *appeal dismissed*, File no. 0300-423253 (BIA June 17, 1954), *writ of habeas corpus conditionally granted*, 123 F. Supp. 674 (S.D.N.Y. 1954), *denying motion for discovery*, 16 F.R.D. 558 (S.D.N.Y. 1954), *exclusion ordered*, *In re* Lee Kum Hoy, File No. 0300-423253 (Spec. Inquiry Officer Jan. 18, 1955) (RA 382a), *appeal dismissed*, File No. 0300-423253 (BIA May 5, 1955) (RA 392a), *writ of habeas corpus granted*, 133 F. Supp. 850 (S.D.N.Y. 1955), *rev'd*, 237 F.2d 307 (2d Cir. 1956), *cert. granted*, 352 U.S. 966, *rev'd sub nom*. United States *ex rel.* Lee Kum Hoy v. Murff, 355 U.S. 169.

85. *Id.* at 149a (Board of Special Inquiry Hearing of Aug. 14, 1952).

86. *Id.* at 150a.

87. *Id*. at 133a, 143a.

88. *Id*. at 150a.

89. *Id*. at 156a–58a (Decision of Board of Immigration Appeals of May 11, 1953). Namely, as to Rh factor and MN typing, which were aspects of blood examined for identification purposes before the development of DNA testing. *Id.*

90. *Id*. at 158a–60a.

91. *Id*. at 151a–52a (Board of Special Inquiry Hearing Commencing Aug. 14, 1952).

92. *Id*. at 154a (Decision of Board of Immigration Appeals Commencing May 11, 1953).

Benjamin Gim, a recent Columbia Law School graduate, took over their case.[93] On July 10, 1953, Lee Ha signed a petition for a writ of habeas corpus on behalf of his alleged children, who by then, he said, had been held for over a year on Ellis Island.[94] He argued that the Board of Special Inquiry had acted arbitrarily in ordering exclusion "based solely on admittedly conflicting and inaccurate blood tests conducted by unidentified persons whose qualifications to conduct such tests were undetermined."[95] He also argued that blood testing was not "authorized by statute or any rule or regulation" and that the authorities "ha[d] proceeded and [were] proceeding contrary to law and the Constitution of the United States by requiring Chinese persons applying for admission to the United States and their parents to submit to blood tests while imposing no such condition for applicants of other races."[96] Gim insisted that "the suspicious attitude of the Immigration Service toward Chinese applicants ha[d] led in many cases to unjustified exclusions, discriminatory procedures toward Chinese persons, and overreaching of authority in imposing unconstitutional conditions upon persons of Chinese ancestry who attempt[ed] to claim their birthright of citizenship."[97]

The petition was assigned to Judge Edward Dimock,[98] who found that he was "presented with a case where everything but the reports of blood grouping tests of two of the relators indicate[d] that they [were] the children of an identified American citizen and his wife but where the reports ha[d] been given conclusive effect to the contrary."[99] Given the importance of the blood evidence, he ruled

93. Mr. Gim started law school at Utah, but the dean told him he did not have a "Chinaman's chance" of successfully practicing law in that state. He was the first Asian Pacific-American president of the American Immigration Lawyers' Association, and, reportedly, his Supreme Court argument in *Lee Kum Hoy* was the first by an American of his race. *Benjamin Gim: A Great Life Remembered*, AILA INFONET (Jan. 26, 2010), http://www.aila.org/content/default.aspx?docid=31090; *Benjamin Gim '49*, COLUM. L. SCH. MAG. (Jan. 16, 2010), http://www.law.columbia.edu/magazine/54690/benjamin-gim-49.

94. Record Appendix at 6a, *Lee Kum Hoy*, 355 U.S. 169 (No. 32) (Petition for Writ of Habeas Corpus) ("[S]uch restraint and imprisonment of children of such tender years is cruel and inhuman and seriously impairs their physical and mental well being.").

95. *Id.* at 7a.

96. *Id.* at 9a–10a (Amendment to Petition for Writ of Habeas Corpus).

97. *Id.* at 33a (Traverse to Return).

98. Edward Jordan Dimock, a graduate of Yale College and Harvard Law School lectured at Yale during World War II and was appointed to the U.S. District Court for the Southern District of New York by President Truman in 1951. *See History of the Federal Judiciary*, FED. JUD. CTR., http://www.fjc.gov/servlet/nGetInfo?jid=623&cid=999&ctype=na&instate=na (last visited May. 10, 2013).

99. United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 115 F. Supp. 302, 303 (S.D.N.Y. 1953). The United States was represented by U.S. Attorney J. Edward Lumbard, later judge of the Second Circuit, and Assistant U.S. Attorney Harold R. Tyler,

that the denial of the opportunity to cross-examine those who did the blood testing "infect[ed] the hearing with the degree of unfairness which amounts to a denial of due process of law. In effect, relators were confronted with pieces of paper purporting to give test results and yet were not afforded an opportunity to examine beyond the face of these pieces of paper . . . ."[100] Judge Dimock was concerned with the experience of the examiner, the techniques used, and the circumstances of the test:

> Even had the two reports been consistent with each other and attested by the full signature of a physician skilled in the particular art, I think that due process would still have required that relators have an opportunity to cross-examine him. The reports in this case, however, cry out for cross-examination, [given the inconsistencies of the results].[101]

But neither Gim nor the Lees ever sought, or accepted INS offers of, new blood tests. They were critical of the procedure by which the blood tests were taken, but it did not appear that they thought new tests would produce helpful evidence. After another round of administrative hearings, on August 31, 1954, Judge Dimock issued an opinion concluding that "[s]o far as quantum of the evidence is concerned, there was before the Board of Special Inquiry and the Board of Immigration Appeals, if we include the blood test testimony, more than that minimum necessary to render their conclusion safe against attack as reached without due process of law."[102] The BIA had ruled against the Lees on June 17, 1954,[103] in part because they declined the opportunity to have their blood retested;[104] "nonproduction of evidence within the power of one party to produce, permits the inference that its tenor is unfavorable."[105] Accordingly, the question of the accuracy of the blood tests faded in importance in favor of the question of whether it was constitutional to use them.

Jr., later U.S. District Judge, and named partner of Patterson, Belknap, Webb & Tyler. *Id.*; *see* Nick Ravo, *J. Edward Lumbard Jr., 97, Judge and Prosecutor, Is Dead*, N.Y. TIMES, June 7, 1999, at B9; Wolfgang Saxon, *Harold Tyler, 83, Lawyer and Former Federal Judge, Dies*, N.Y. TIMES, May 27, 2005, at C15.

100. *Lee Kum Hoy*, 115 F. Supp. at 308.

101. *Id.*

102. United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 123 F. Supp. 674, 675 (S.D.N.Y. 1954).

103. Record Appendix at 239a, United States *ex rel.* Lee Kum Hoy v. Murff, 355 U.S. 169, 170 (1957) (No. 32) (per curiam) (Decision of Board of Immigration Appeals Commencing June 17, 1954).

104. *Id.* at 264a.

105. *Id.* at 273a.

A third administrative hearing revealed two documents suggesting a policy of discrimination. A letter from the Public Health Service dated May 8, 1952, bore the subject heading "Blood-Type testing on Request of Immigration and Naturalization Service." It stated: "The Immigration and Naturalization Service has a request from the American Consul in Hong Kong for the blood typing of certain United States citizens of Chinese descent who are claimed as parents by foreign-born applicants for United States passports."[106]

In addition, INS attorney-advisor Lester Friedman testified about the contents of INS Operation Instructions, although he refused to disclose the documents themselves or their precise language.[107] He stated:

> While the early directives did mention the use of blood tests specifically in Chinese visa petition cases and applications for certificates of citizenship, those instructions at no time made the use of blood tests exclusive as the Chinese and at no time precluded the use of blood tests as to any other persons.[108]

Also, doctors testified that they performed blood tests exclusively on Chinese. Dr. Leon N. Sussman, a hematologist who was under contract with the INS, conducted three hundred blood tests for the Service, all on persons of Chinese extraction.[109] George F. Cameron, Medical Director of the U.S. Public Health Service, was in charge of the facility where the Lees' blood was tested in July and August of 1952. He testified that in May, 1952, the Public Health Service was asked to test the blood of certain Chinese seeking immigration benefits at the request of the State Department.[110] Dr. Cameron estimated that two hundred Chinese persons and no members of other races had been tested in his facilities.[111]

In a sort of non-denial denial, INS attorney Lester Friedman insisted there was no discrimination. He claimed:

> For many years wide-spread frauds have existed in attempting to bring children into the United States from China as the claimed issue of American citizens. Since birth and marriage records are almost unknown in China, the claimed relationship has depended in almost every case upon the credibility of the

106. *Id.* at 315a (Reopened Hearing Before Special Inquiry Officer Commencing Oct. 28, 1954).
107. *Id.* at 321a.
108. *Id.* at 326a.
109. *Id.* at 179a (Reopened Board of Sepcial Inquiry Hearing Commencing Nov. 5, 1953).
110. *Id.* at 211a.
111. *Id.* at 212a.

> alleged parent and the application for admission. However, even extensive examination of such persons has frequently failed to uncover a suspected fraud.[112]

This seemed to be justification for discrimination rather than a claim that it did not exist. Nevertheless, administrative authorities rejected the evidence of discrimination. The Special Inquiry Officer acknowledged "that such blood grouping tests have been requested principally in Chinese cases, [but] these relators have not been singled out" because "such tests are uniformly now requested of all applicants for admission who are similarly situated, without documentary evidence of any kind and whose right to admission to the United States is dependent on a claimed relationship which could otherwise be established only by oral testimony."[113] That is, the fact that blood tests were applied on a race-neutral basis by 1955, after a lawsuit was filed, meant that they were not applied discriminatorily in 1952.

The BIA also rejected the discrimination claim on slightly different grounds:

> It is our belief that the issue of racial discrimination is not properly in this case. When a case involves a question of whether or not members of a minority group in the United States shall vote or go to certain schools or be employed in certain jobs, and the allegation is that they are being prevented from voting, schooling or employment because of their race, then the question of racial discrimination is an issue. This is not such a case. There is only one question here, that of identity—"Is this child the offspring of the claimed father?" there is no question of race involved . . . . We cannot hold that merely because claimants are nonwhite it is not necessary for them to offer adequate proof to substantiate their claims of citizenship.[114]

As to the claim of discrimination, the fact that doctors Sussman and Cameron had only been asked to test Chinese persons was not dispositive; the Board seemed to assume good faith:

> It might also be pointed out parenthetically that even if only persons of Chinese descent were so examined at all times in the past, this is not done on the basis of discrimination, most assuredly, but is only done as one of many means of checking

112. *Id.* at 14a (Return to Writ of Habeas Corpus).
113. *Id.* at 15a.
114. *Id.* at 268a (Decision of Board of Immigration Appeals of June 17, 1954).

> the accuracy of information furnished to the Immigration Service to make a proper, fair and equitable determination.[115]

But the denials of discrimination were not persuasive. One problem for the United States was that the race-neutral explanation kept shifting. Initially, the United States claimed that blood tests were used with "all persons attempting to enter the United States without birth certificates and similar documents."[116] In response, the Lees showed examples of "cases where Chinese persons were blood tested notwithstanding the fact that they had birth certificates."[117]

The INS then offered a more elaborate explanation. Absence of a birth certificate "was only one of the many criteria for determining whether a blood test was needed in a particular case."[118] The United States claimed that in many cases, blood tests were unnecessary. In typical non-Chinese cases, the children were born in an "American colony" abroad, where births were registered and the parents known to the consulate, or the births could be verified by documentary records and statements of friends and neighbors. However, many Chinese were born in areas "where no birth or marriage certificates were kept, and, most important of all, the claimed area of birth was inaccessible to the Consul and hence where he could not conduct any investigation as to the circumstances of the child's birth."[119] Consular inquiry became particularly difficult after the 1949 Chinese Communist revolution. This inaccessibility, claimed the government, was the most important criterion.[120] A skeptical Judge Dimock discounted this line of argument because the rationales had changed. He observed that key witnesses and government affidavits filed earlier in the case made "no mention at all of this 'most important' criterion."[121] It seemed to be an explanation conjured up only because the first argument had been refuted.

B. The District Court Grants Habeas Corpus

Judge Dimock's views of the law were clear; there was no justification for discrimination. In a preliminary decision, he concluded:

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115. *Id.* at 232a (Decision of Special Inquiry Officer of Dec. 9, 1953).
116. United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 133 F. Supp. 850, 852 (S.D.N.Y. 1955).
117. *Id.*
118. *Id.* (internal quotation marks omitted).
119. *Id.*
120. *Id.* at 853.
121. *Id.*

> It makes no difference that the complaint of the Chinese is against a failure to go to the full extent of the law in the case of a non-Chinese rather than against going beyond the law in the case of Chinese. A minority could be as effectively persecuted by enforcing a law against them alone as by acting against them without warrant of law.[122]

This is a critical point. If the constitutional prohibition against discriminatory law enforcement is to have independent operation as a legal doctrine, it must protect wrongdoers. This is because those who can demonstrate innocence do not need the aid of the principle or any other defense to prevail.

"Racial discrimination is abhorrent to our institutions," Judge Dimock explained.[123] He cited classic domestic discrimination precedents, *Yick Wo v. Hopkins*,[124] invalidating discrimination against Chinese in enforcement of laundry ordinances in San Francisco;[125] *Hirabayashi v. United States*,[126] upholding a race-based curfew against Japanese Americans during World War II, but containing influential dicta opposing racial discrimination;[127] and *Bolling v. Sharpe*,[128] the companion to *Brown* holding that the United States could not segregate schools because the Fifth Amendment Due Process Clause had an equal protection component.[129] In 1955, based on all of the evidence introduced at the administrative hearings, he granted the writ:

> It has become so clear that the policy of the Immigration Authorities is to apply blood tests to all Chinese and to no whites that even the presumption of administrative finality will not support a determination to the contrary. The Government has been unable to point to a single instance where a white person has been subjected to a blood test or a Chinese excused from one.[130]

Judge Dimock concluded that the claims of parentage may indeed have been false, but

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122. United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 123 F. Supp. 674, 678 (S.D.N.Y. 1954).
123. *Id.*
124. 118 U.S. 356 (1886).
125. *Id.* at 374.
126. 320 U.S. 81 (1943).
127. *Id.* at 100, 105.
128. 347 U.S. 497 (1954).
129. *Id.* at 500.
130. United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 133 F. Supp. 850, 852 (S.D.N.Y. 1955).

> [m]embers of the white race in exactly the same position [were] admitted. The Chinese and white persons thus differently treated constitute[d] a single class but for their color. The Chinese of this class [were] excluded and the whites admitted. That constitute[d] a deliberate strict enforcement of the immigration laws in the case of Chinese and a deliberate loose one in the case of whites . . . . [S]uch a practice violates the constitution.[131]

For this proposition, Judge Dimock cited *Brown v. Board of Education.*[132]

There were two final arguments for the United States. In a pair of cases the Second Circuit approved blood testing of Chinese born in China, as the Lees had been, because of the difficulty of investigation.[133] But, Judge Dimock explained, "The fact that they could have been lawfully excluded under a practice of requiring blood tests of all Chinese born in China and of no others is immaterial. That was not the practice under which they were excluded and which they are now attacking."[134]

In addition, the United States moved for reargument based on an affidavit showing that Chinese had been admitted without testing before the May, 1952 letter enlisting the Public Health Service to participate in blood testing of Chinese, and that Whites had been tested in 1955 and later, after the lawsuit had been filed. This request was denied.[135]

C. The Second Circuit Reverses

A year later, in 1956, the Second Circuit reversed, two to one.[136] The opinion by Judge Carroll C. Hincks for himself and Chief Judge Charles E. Clark concluded that the evidence of discrimination was unpersuasive, essentially accepting the INS arguments: "It is true that in the 1952–1953 period there was evidence of 500 actual cases in which Chinese had been tested and no evidence of blood testing in any non-Chinese case or of Chinese admitted without blood testing."[137] However, they thought that the best explanation for that

131. *Id.*

132. *Id.* (citing Brown v. Bd. of Educ. 347 U.S. 483 (1954)).

133. *Id.* (citing Lue Chow Kon v. Brownell, 220 F.2d 187 (2d Cir. 1955); United States *ex rel.* Dong Wing Ott v. Shaughnessy, 220 F.2d 537 (2d Cir. 1955)).

134. *Id.*

135. United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 237 F.2d 307, 311 n.3 (2d Cir. 1956).

136. *Id.* at 307. All three judges agreed that the Lees' appeal, challenging the right of the INS to test blood at all, was meritless. *Id.*

137. *Id.* at 311.

was that "the blood test technique first became known to investigators chiefly concerned with Chinese cases who were actuated to use it not because of racial prejudice but by a proper police motive for their aid in the solution of difficult cases."[138] The idea seems to have been that the practice grew organically in a particular unit, which coincidentally dealt with Chinese.

Echoing the INS and the BIA, the majority noted that while the INS directives "did mention the use of blood tests specifically in Chinese visa petition cases and applications for certificates of citizenship, those instructions at no time directed the use of blood tests exclusively in Chinese cases and at no time precluded the use of blood tests in non-Chinese cases."[139] It emphasized that current regulations were framed neutrally as to race and nationality,[140] and noted that the United States had tried to submit evidence in the trial court after the completion of the hearing indicating that white people had been tested in 1955, years after the incident at issue had occurred.[141] But of course, evidence of non-discriminatory policies in 1955, after a thorough search of INS files, implied that when the conduct actually occurred the policy had been different.

The court offered two potentially explosive rationales for its decision. First, the court noted that "there was no evidence that in any other particular cases the particular investigating officer or Special Inquiry Officer involved was actuated by racial prejudice either in requesting blood tests or in processing the case without blood tests."[142]

Second, perhaps recognizing that the statistics made this argument difficult, the court suggested that it might not be enough that individual officers and agents discriminated; the policy had to be, somehow, adopted by the agency itself:

> And even if, contrary to our view, occasional prejudice on the part of individual officers of the Service were deemed proved by inference arising from the preponderance of Chinese cases among those blood tested, it does not follow that the officers responsible for the policies of the Service had consciously, in 1952, adopted a discriminatory policy.[143]

138. *Id.*
139. *Id.* at 309.
140. *Id.*
141. *Id.* at 311 n.3.
142. *Id.* at 312.
143. *Id.*

Taken together, the court established an impossible test. In the face of evidence of actual discrimination, evidently a plaintiff must also prove improper motives at least on the part of the agency itself, and also perhaps on the part of the particular officers carrying out the law. In the face of uniform enforcement on the basis of race, if the absence of evidence of a discriminatory motive by particular actors were sufficient to defeat a claim, then discrimination would be almost impossible to prove; a denial would be enough to win.

Judge Jerome Frank dissented. "Judge Dimock seems to me to show, unanswerably, that we have here an unconstitutional administration of a valid statute."[144] Judge Frank emphasized that Judge Dimock showed "how the government, in the several stages of the hearings before him, kept shifting its position in a way which warranted his distrust of its protestations of an absence of discrimination."[145] Judge Frank acknowledged that "[a]t first glance it might seem absurd that the blood test evidence should be disregarded, inasmuch as it demonstrates that the relators are not citizens."[146] Echoing Judge Dimock's ruling, Judge Frank said that disregarding the evidence was required by *Yick Wo v. Hopkins*, which applied to the federal government because of *Bolling v. Sharpe*.[147] Judge Frank, like Judge Dimock, applied no special doctrines to the case because it involved immigration.

III. *LEE KUM HOY* IN THE SUPREME COURT

A. Briefs and Law Clerk Memoranda

Attorneys Benjamin Gim and Edward J. Ennis petitioned for certiorari raising three claims.[148] The first was the question of unconstitutional discrimination.[149] The second was whether INS blood testing was authorized in the absence of a statute.[150] The third was whether the children were denied due process of law because of the "use of inaccurate and conflicting blood tests."[151] The papers of the Justices show that Justice Douglas, Chief Justice Earl Warren, and Justices Hugo Black, William Brennan and Felix Frankfurter voted to

144. *Id.* at 313 (Frank, J., dissenting).
145. *Id.*
146. *Id.* at 315.
147. Brief for Respondent at 36, United States *ex rel.* Lee Kum Hoy v. Murff, 355 U.S. 169 (1957) (per curiam) (No. 32).
148. Petition for Writ of Certiorari at 2, *Lee Kum Hoy*, 355 U.S. 169 (No. 32).
149. *Id.*
150. *Id.*
151. *Id.*

grant certiorari on January 14, 1957,[152] limiting the grant to "the question of whether there was unconstitutional discrimination against petitioners by the use of blood tests in determination of their application for entry to this country."[153]

The certiorari memo written by Chief Justice Warren's clerk outlined the issues in the case. "The Government took shifting positions at various stages of this case as to the justification for the earlier practice."[154] A seemingly critical point was the standard applied by the Second Circuit:

> I think the CA majority used improper tests in assaying the claim of discrimination. The CA found the following factors significant, though each has been rejected by this Court in testing for Negro discrimination:
>
> a. No showing of conscious racial prejudice by any particular officer. But cf. *Hernandez v. Texas*, 347 U.S. 475, 482.
>
> b. No showing of adoption of a racially discriminatory practice at the policy level. But cf. *Avery v. Georgia*, 345 U.S. 559, 562–63.
>
> c. No established proof of discrimination on the whole record . . . . That is, the CA recognized that there was in fact an "apparent discrimination," but ruled it legally not discrimination by applying the above legal standards, which required some person to have a conscious racial motive or policy.[155]

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152. *See* Docket Sheet, United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 352 U.S. 966 (1957) (No. 545) (renumbered No. 32, 1957 term) (Library of Congress, William O. Douglas Papers, Box 1173). It is doubtful that the civil rights issue had receded too far from the minds of the Justices. For example, in November, 1956, they had summarily affirmed an order vindicating the Montgomery Bus Boycott, determining that segregation in public transportation violated equal protection. *See* Browder v. Gayle, 142 F. Supp. 707, 717 (M.D. Ala. 1956), *aff'd*, 352 U.S. 903 (1956).

153. *Lee Kum Hoy*, 352 U.S. at 966.

154. Certiorari Memorandum at 5, *Lee Kum Hoy*, 352 U.S. 966 (No. 545) (renumbered No. 32, 1957 Term) (Library of Congress, Earl Warren Papers, Box 180).

155. *Id.* at 5–6. The Second Circuit's rationale was essentially the argument advanced by the United States at oral argument, that "race discrimination" meant "unconstitutional race discrimination" not merely treating people differently because of their race:

> I am prepared to, to admit the fact that, at the time these children applied, they were given blood tests which, in all likelihood, would not have been required of them had they been children coming from western Europe. And I am also prepared to accept the proposition that at this period of time the Immigration Service, as a matter or practice, applied these blood tests to Chinese, to persons of Chinese extraction generally, applying for admission as citizens, even though they did not make these tests with respect to applicants of other races. But I do not

> It seems to me that the case falls within the notable rule of *Yick Wo v. Hopkins*, 118 U.S. 356 . . . .[156]

Significantly, the memorandum neither questioned the full applicability of ordinary equal protection precedents nor hinted that a special constitutional rule applied to immigration cases. To the contrary, the memo explained:

> Applying an administrative rule strictly on a racial basis, even if justified in the majority of cases, is contrary to the fundamental concepts of our society, as well as an affront to the many cases in which this Court has struck down racial distinctions, from *Yick Wo* to *Bolling v. Sharpe*.[157]

Finally, the memorandum acknowledged the relationship of this case to the project of recognizing African American civil rights:

> I hesitate to recommend a grant only for this reason: The Court might ultimately rule that the special difficulties of checking Chinese cases in the absence of consular representation there, etc., justified use of the blood test in Chinese cases alone. Such a ruling could be picked up by Southern jurisdictions as support for a policy of special police moves against Negroes, "because we know Negroes are prone to commit crime," and so on.[158]

The Lees' brief on the merits rejected the grounds articulated by the Second Circuit. Regarding the absence of evidence of discriminatory motive, the brief insisted that "racial discrimination once established cannot be condoned because of failure to prove that the officials involved were consciously motivated by an odious racial prejudice rather than by some more socially palatable motive."[159] Instead, "if the individual aggrieved proves that persons of one race are subject to discriminatory treatment he is not required to go further and prove an evil state of mind of the Government officials involved."[160]

> believe that this means that there was necessarily an unconstitutional, a race discrimination practiced against the Chinese.

Transcript of Oral Argument at 7–8, *Lee Kum Hoy*, 352 U.S. 966 (No. 545) (renumbered No. 32, 1957 term).

156. Certiorari Memorandum, *supra* note 154, at 5–6.

157. *Id.* at 6–7.

158. *Id.* Justice Burton's certiorari memorandum recommended denial, but it did not rely on any special principles of immigration law. *See* Certiorari Memorandum at 5, *Lee Kum Hoy*, 352 U.S. 966 (No. 545) (renumbered No. 32, 1957 Term) (Library of Congress, Harold Burton Papers, Box 295, folder 16).

159. Brief for Petitioners at 21, United States *ex rel*. Lee Kum Hoy v. Murff, 355 U.S. 169 (1957) (No. 32).

160. *Id*. at 21.

The Brief for the United States did not rely on *Chae Chan Ping*, *Fong Yue Ting*, or any cases articulating special powers of the federal government in the immigration area. Indeed, the Solicitor General acknowledged:

> Undoubtedly, even though the Fifth Amendment has no equal protection clause, grossly discriminatory legislation or grossly discriminatory administrative action, especially if predicated on racial grounds, would violate due process. *Bolling v. Sharpe*, 347 U.S. 497, 499, *Hirabayashi v. United States*, 320 U.S. 81, 100; *Steele v. L. & N.R. Co.*, 323 U.S. 192, 202; *Hurd v. Hodge*, 334 U.S. 24, 30, *Thiel v. Southern Pacific Co.*, 328 U.S. 217.[161]

Even in the immigration context, the Solicitor General recognized that the antidiscrimination principle restrained federal power.

This did not mean, of course, that the Solicitor General conceded that the Lees were entitled to prevail: "But there was no discrimination on racial grounds, as such, in this instance. The use of blood-testing techniques first developed in Chinese cases in the Hong Kong area because the problem was concentrated there."[162] This was no different, said the United States, than medical testing for particular diseases of people coming from places where those diseases are prevalent.[163]

The government's fallback argument was not that racial discrimination was irrelevant or within the power of the United States, but that the exclusionary rule should not be applied to the blood evidence even if unconstitutionally obtained.

> This is not a case where persons of Chinese descent, although qualified as American citizens, were denied entry on an arbitrary basis. It is a case where non-qualified Chinese were denied entry on the basis of evidence whose invalidity arises at most only from the fact that similar techniques were not employed against others.[164]

Chief Justice Warren's bench memorandum was written by Jon O. Newman, currently the Senior Judge of the U.S. Court of Appeals

161. Brief for Respondent, *supra* note 147, at 21.

162. *Id.*; *see also id.* at 10 ("While such tests have been requested principally in cases involving Chinese, that is because of the fact that it is in those cases that documentary evidence is lacking and not because of discrimination against Chinese.").

163. *Id.* at 38–39.

164. *Id.* at 42.

for the Second Circuit.[165] His analysis treated the case as presenting ordinary equal protection problems:

> The question thus becomes may government action be predicated on the basis of race when the fact of race provides a good index of some other factor on which government action may be taken . . . . The same problem would arise if a state or town were to take some government action against Negroes, predicated on a demonstrated high correlation (or at least a correlation higher than for whites) of the fact of race with some fact relating to commission of crime, or disease, etc. it may be that the equal protection clause should mean that no identification based on race is allowable unless the very fact of race itself is an allowable basis for government action (as in the case of fixing quotas as to entering aliens). But absent such a situation, the fact of race should not be the basis of government action simply because this fact bears a high correlation to another fact (not otherwise identifiable) on which the state may act. This case really does not pose the difficult question because here the fact to which race is correlated, lack of proof of citizenship, is easily identifiable without relying on race. Since this is so, the use of race should be barred.[166]

The bench memorandum prepared by Justice Burton's clerk was to the same effect, citing domestic constitutional precedents on the question of the permissibility of discrimination[167] and concluding that there was unconstitutional discrimination.[168]

A remarkable feature of the case was the generation of extra-record evidence by the United States. The United States filed an extra-record memorandum in the Supreme Court, *The Problem of Fraud at Hong Kong*, prepared by Consul General Everett F. Drumright, dated December 9, 1955, and relied upon it heavily in its

165. *Circuit Judges' Biographical Information*, U.S. CT. APPEALS FOR SECOND CIRCUIT, http://www.ca2.uscourts.gov/judgesbio.htm (last visited May 10, 2013).

166. Bench Memorandum at 9–10, United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 352 U.S. 966 (1957) (No. 545) (renumbered No. 32, 1957 Term) (Library of Congress, Earl Warren Papers, Box 180).

167. Bench Memorandum at 2, *Lee Kum Hoy*, 352 U.S. 966 (No. 545) (renumbered No. 32, 1957 Term) (Library of Congress, Harold Burton Papers, Box 295, folder 16) (citing Hernandez v. Texas, 347 U.S. 475 (1954); Avery v. Georgia, 345 U.S. 559 (1953)); *id.* at 4 (citing United States v. Petrillo, 332 U.S. 1 (1947); Hirabayashi v. United States, 320 U.S. 81 (1943)).

168. *Id.* at 7 ("In conclusion, I agree with Petrs that the government has discriminated. They have been more stringent in passing on Chinese claims than other claims. The statistics make out the discrimination. The government has failed to demonstrate a reasonable classification justifying the difference in treatment between Chinese and non-Chinese.").

brief.[169] The Lees moved to strike the report;[170] this motion does not appear to have been ruled upon.

The United States also relied extensively on two law journal articles, *Blood Test Evidence in Detecting False Claims of Citizenship*,[171] and *Chinese Immigration and Blood Tests*,[172] which had been co-authored by three people: Dr. Leon Sussman, a hematologist who was one of the two physicians who testified in the administrative hearings; Sidney B. Schatkin, a lawyer who briefly represented the Lees in an administrative proceeding and evidently did not feel that that fact limited his ability to write an article stating that the tests used on his clients were appropriate;[173] and Dorris Yarbrough, an immigration inspector involved in the case. Given that the articles are largely tendentious collections of cases, it is hard to see what value they add to what a lawyer could have argued in a brief. And given that the articles were of interest solely to lawyers in the Department of Justice, the articles' publication at all is strange—unless the sole purpose was to create authority for purposes of litigation. The unusual factual development suggests some level of anxiety on the part of the United States.

B. Conference and Decision

The case was conferenced on November 22, 1957.[174] If any of the Justices had read the November 21 *Washington Post and Times Herald*, they would have seen a story reporting that charges were dropped against fourteen people arrested in disturbances in Little Rock, and that Arkansas Representative Brooks Hays planned to introduce a bill in Congress to delay integration.[175] Again, it was impossible for them to ignore the broader context of their decision.

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169. Brief for Respondent, *supra* note 147, at 19–20 n.4 (describing Report and Brief's reliance on it).

170. Petitioner's Motion to Strike and Reply Brief at 1–2, United States *ex rel.* Lee Kum Hoy v. Murff, 355 U.S. 169 (1957) (No. 32).

171. Sidney B. Schatkin, Leon N. Sussman & Dorris E. Yarbrough, *Blood Test Evidence in Detecting False Claims of Citizenship*, 3 CRIM. L. REV. 45 (1956).

172. Sidney B. Schatkin, Leon N. Sussman & Dorris E. Yarbrough, *Chinese Immigration and Blood Tests*, 2 CRIM. L. REV. 44 (1955).

173. Schatkin, Sussman & Yarbrough, *supra* note 171, at 51 (explaining, after discussing Judge Dimock's opinion granting writ, that "[t]he special conditions existing in the field of Chinese immigration . . . would seem to justify the imposition of special requirements").

174. Conference Notes, Nov. 22, 1957, *Lee Kum Hoy*, 352 U.S. 966 (No. 545) (renumbered No. 32, 1957 Term) (Library of Congress, William O. Douglas Papers, Box 1183).

175. *See 14 Cleared in Little Rock Disorders; Hays Plans Bill to Delay Integration*, WASH. POST & TIMES HERALD, Nov. 21, 1957, at A2. The previous day, it was reported that all Army troops would leave the state by November 27, but the federalized Arkansas

Justice Douglas's conference notes are as follows:

> CJ [Chief Justice Warren] clear discrimination admitted by US—reversal
>
> Black—reverses—discrimination at that time—subsequent change does not change the consequences
>
> FF [Felix Frankfurter]—Favor
>
> HHB [Harold B. Burton] reverses with doubts
>
> TC [Tom Clark] Practice has been corrected—willing to remand on Q reliability of the physicians' evidence
>
> JMH [John M. Harlan] No invidious discrimination votes reason for testing the Chinese
>
> WJB [William J. Brennan] Case of discrimination made out [unintelligible] what to do on the remand
>
> CEW [Charles E. Whittaker] agrees with TC—but if necessary to meet discrimination he thinks there was[176]

The conference notes of Chief Justice Warren[177] and Justice Burton are to the same effect; they show Black, Brennan, Douglas, Warren, and Whittaker voting for reversal, Burton as voting for reversal with a question mark, and Clark, Harlan, and Frankfurter as question marks.[178]

These votes are largely consistent with the voting patterns of Black, Brennan, Douglas, and Warren. Douglas was a reliable vote for immigrants and naturalized citizens, regularly dissenting in their favor.[179] Further, Justice Douglas plus two or three of Chief Justice

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National Guard would remain. *See* Richard Lyons, *Army Troops Quit Little Rock Nov. 27; 900 Arkansas Guardsmen to Stay*, WASH. POST & TIMES HERALD, Nov. 20, 1957, at A2.

176. Conference Notes, Nov. 22, 1957, *supra* note 174.

177. The Chief Justice indicated only votes without reasons. *See* Docket Sheet, *supra* note 152.

178. *See* Notes, *Lee Kum Hoy*, 352 U.S. 966 (No. 545) (renumbered No. 32, 1957 Term) (Library of Congress, Harold Burton Papers, Box 295, folder 16) (noting "#32" and "11/22/57").

179. *See* Boutilier v. INS, 387 U.S. 118, 125 (1967) (Douglas, J., dissenting); Berenyi v. INS, 385 U.S. 630, 638 (1967) (Douglas, J., dissenting); Montana v. Kennedy, 366 U.S. 308, 315 (1961) (Douglas, J., dissenting); Costello v. United States, 365 U.S. 265, 288 (1961) (Douglas, J., dissenting); Lehmann v. United States *ex rel.* Carson, 353 U.S. 685, 690 (1957) (Black, J., joined by Douglas, J., dissenting); Rabang v. Boyd, 353 U.S. 427, 433 (1957) (Douglas, J., dissenting); United States *ex rel.* Hintopoulos v. Shaughnessy, 353 U.S. 72, 79 (1957) (Douglas, J., dissenting); Galvan v. Press, 347 U.S. 522, 533 (1954) (Douglas, J., dissenting); *id.* (Black, J., joined by Douglas, J., dissenting); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 216 (1953) (Black, J., joined by Douglas, J., dissenting); Harisiades v. Shaughnessy, 342 U.S. 580, 598 (1952) (Douglas, J., dissenting); Ludecke v. Watkins, 335 U.S. 160, 184 (1948) (Douglas, J., dissenting).

Warren, Justice Black, and Justice Brennan dissented together at least a dozen times in immigration and naturalization-related cases between 1956 and 1960, always in favor of the individual.[180]

Harlan, at least according to Douglas's notes, was inclined to affirm, but Warren and Burton indicate no definitive votes for affirmance. Justice Frankfurter's "favor" in Douglas's notes is mysterious, although his vote for certiorari coupled with his hesitation to encourage or incite the South makes it doubtful that he would have voted for certiorari anticipating affirmance. Justice Clark's support for a non-merits determination does not indicate what he would have done had he been forced to choose.

But the votes of Justices Harlan, Frankfurter, and Clark in another case, *Rusk v. Cort*,[181] hint that they might have approved of the testing of Chinese. In *Cort*, Justice Stewart, joined by Chief Justice Warren and Justices Black, Brennan, and Douglas, voted that people overseas could seek a declaration of citizenship in federal court notwithstanding language in the Immigration and Nationality Act of 1952 that seemed to grant judicial determinations only to those in the United States or in United States custody.[182] Justice Harlan, joined by Frankfurter and Clark, dissented, explaining that the 1952 law was motivated by problems with false claims of citizenship by Chinese; their opinion is consistent with the conclusion that special treatment of Chinese claimants to citizenship is reasonable.[183]

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180. The four Justices dissented together (although not always in the same opinion) in eight cases. *See* Polites v. United States, 364 U.S. 426, 437 (1960) (Brennan, J., joined by Warren, C.J., Black & Douglas, JJ., dissenting); Schilling v. Rogers, 363 U.S. 666, 677 (1960) (Brennan, J., joined by Warren, C.J., Black & Douglas, JJ., dissenting); Flemming v. Nestor, 363 U.S. 603, 621 (1960) (Black, J., dissenting); *id*. at 628 (Douglas, J., dissenting); *id*. at 634 (Brennan, J., joined by Warren, C.J., and Douglas, J., dissenting); Kimm v. Rosenberg, 363 U.S. 405, 408 (1960) (Douglas, J., joined by Warren, C.J., and Black, J., dissenting); *id*. at 411 (Brennan, J., joined by Warren, C.J., and Douglas, J., dissenting); Niukkanen v. McAlexander, 362 U.S. 390, 391 (1960) (Douglas, J., joined by Warren, C.J., Black & Brennan, JJ., dissenting); Rogers v. Quan, 357 U.S. 193, 196 (1958) (noting dissent of Warren, C.J., and Black, Douglas, & Brennan, JJ.); Leng May Ma v. Barber, 357 U.S. 185, 190 (1958) (Douglas, J., joined by Warren, C.J., Black & Brennan, JJ., dissenting). In two others, Justice Douglas was joined by two of his stalwart colleagues. *See* Tak Shan Fong v. United States, 359 U.S. 102, 107 (1959) (noting dissent by Warren, C.J., and Black & Douglas, JJ.); United States v. Cores, 356 U.S. 405, 410 (1958) (Douglas, J., joined by Black, J., and Warren, C.J., dissenting). In two more cases, the group was joined by other Justices. *See* Perez v. Brownell, 356 U.S. 44, 62 (1958) (Warren C.J., joined by Black, Douglas, & Whittaker, JJ., dissenting); Jay v. Boyd, 351 U.S. 345, 361 (1956) (Warren, C.J., dissenting); *id*. at 362 (Black, J., dissenting); *id*. at 370 (Frankfurter, J., dissenting); *id*. at 374 (Douglas, J., dissenting).

181. 369 U.S. 367 (1962).

182. *Id.* at 379–80.

183. The dissent stated:

The Court disposed of *Lee Kum Hoy* in a per curiam opinion written by Justice Tom Clark, ruling that the apparent inaccuracy of the blood grouping reports warranted a new hearing "so that new, accurate blood grouping tests [could] be made under appropriate circumstances, and that relevant evidence [could] be received as offered on the issues involved. The excludability of petitioners remain[ed] to be determined upon those proceedings."[184]

With regard to the discrimination claim, the Court held:

> [Given] the representation in the Solicitor General's argument . . . that the blood grouping test requirement here involved is presently and has been for some time applied without discrimination in every case, irrespective of race, whenever deemed necessary, and in view of our remand of the case, we need not now pass upon the claim of unconstitutional discrimination.[185]

That is, there was no longer an important public question, and the Lees had a chance to prevail without the necessity of determining whether the old practice applied to them was constitutional. Accordingly, the Court chose to forego an opportunity to explain and apply *Brown* and *Bolling v. Sharpe* and determine whether and when racial classifications in immigration were constitutional. Notably, the

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> Commencing soon after the close of World War II, and perhaps in part as a result of the then recent repeal of the Chinese Exclusion Act and continuing Communist successes in China, a large number of suits were filed in the federal courts by Chinese citizenship claimants. These carried in their wake consequences . . . principally of three kinds. *First*, there was an increase in the volume of fraudulent entries into this country; many Chinese who had obtained certificates of identity incident to the institution of a declaratory judgment citizenship action would abandon the suit upon arrival here and disappear into the stream of the population. *Second*, the courts experienced difficulty in adjudicating "derivative" citizenship claims without the claimants having been first exposed to normal immigration screening; such claims were often based on the assertion that the claimant was the foreign-born child of an American citizen who had temporarily returned to China, an assertion frequently difficult to disprove. *Third*, the federal court dockets became cluttered with these suits.

Id. at 390 (Harlan, J., dissenting).

184. United States *ex rel.* Lee Kum Hoy v. Murff, 355 U.S. 169, 170 (1957) (per curiam).

185. *Id.* (internal quotation marks omitted). An earlier draft version of the per curiam decision stated: "However, our disposition of the case is without prejudice to the right of petitioners to renew their claim of discrimination in the application of such tests if it appears on remand that such a practice then exists." Draft Circulated Nov. 29, 1957, United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 352 U.S. 966 (1957) (No. 545) (renumbered No. 32, 1957 Term) (Library of Congress, William O. Douglas Papers, Box 1183). Neither formulation goes beyond the Court's grant of certiorari; that is, they recognize the claim and deem it open, but fail to hint at the outcome.

Court did not decide the question on which they had granted certiorari, instead disposing of the case on one of the questions presented by the petitioners that they had refused to review.

C. Why Did the Court Do What It Did?

The Supreme Court's decision in *Lee Kum Hoy* is obscure, last cited by a federal court in 1960, even then in a footnote.[186] But if the Court had not evaded the merits, the decision could well have been a blockbuster. If the Court had reversed, it might have marked the beginning of a new era of constitutional immigration law, putting Asians and immigrants at the center of the Court's civil rights revolution. Alternatively, if the Court had affirmed, holding that the law could recognize that some races were more inclined to certain kinds of criminality than others, that might have been a landmark of another sort.

This Part attempts to explain the result. Advancing reasons for the Court's decision necessarily requires some speculation. One thing that is fairly clear is that the reasons offered in the opinion cannot be the whole story.

The Court ordered new blood tests, but it cannot have granted certiorari simply because of a perceived defect in the administrative proceeding. Most fundamentally, there was no real question that the A-B-O results were accurate. While there were errors and discrepancies with respect to certain aspects of the tests, even sympathetic jurists concluded that they led to an accurate result. Judge Frank voted to grant relief not because the blood tests might have been inaccurate, but in spite of the fact that they were correct: "the blood test evidence . . . demonstrates that relators are not citizens."[187] Judge Dimock, who ordered a full hearing on the circumstances of the blood testing and ultimately granted relief, also concluded that the evidence was satisfactory.[188]

Critically, as Judge Dimock noted[189] and the United States pointedly mentioned in its opposition to certiorari[190] and its brief on

186. Wong Kwok Sui v. Boyd, 285 F.2d 572, 575 n.5 (9th Cir. 1960).

187. United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 237 F.2d 307, 315 (2d Cir. 1956) (Frank, J., dissenting).

188. United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 123 F. Supp. 674, 675 (S.D.N.Y. 1954) ("So far as quantum of the evidence is concerned, there was . . . if we include the blood test testimony, more than that minimum necessary to render their conclusion safe against attack as reached without due process of law.").

189. *Id.* at 675 ("They declined to avail themselves of the opportunity to present the results of further blood tests."); United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 115 F. Supp. 302, 306 (S.D.N.Y. 1953).

the merits,[191] the Lees had been offered and refused opportunities for re-testing of their blood. The children were in custody on Ellis Island for years; if blood tests would have helped establish that the relationships really did exist as claimed, logic suggests that they would have taken blood tests.

As a legal matter, precedent indicated that failure to produce evidence could reasonably be held against them in an administrative proceeding.[192] Other reasons that this ground of decision is doubtful include the fact that mere error correction is generally not the role of the Court, and erroneous admission of evidence was, at the time, apparently not a basis for habeas corpus relief.[193]

Nor was it reasonable for the Court to avoid the merits because of the "representation in the Solicitor General's argument" that the blood testing policy was now applied on a race-neutral basis.[194] While true, the fact that INS practices had changed was clear in the Second Circuit decision before certiorari was granted. The Second Circuit noted:

> [S]ome time in 1954, all of those instructions [in force at the time the Lees were tested] were rescinded and all current instructions concerning the investigation techniques with respect to cases wherein blood tests are deemed essential or necessary do not directly or indirectly refer to any racial or nationality group but predicate the requirement on the nature of the case and the issue of paternity or the relationship which is involved.[195]

The United States, in its opposition to certiorari, pointed out this change, noting that "[s]uch tests now are uniformly requested of all

190. Brief for the Respondent in Opposition at 4, 6, United States *ex rel.* Lee Kum Hoy v. Murff, 355 U.S. 169 (1957) (No. 32).

191. Brief for the Respondent, *supra* note 147, at 3–4.

192. *See* United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 154 (1923) ("There was strong reason why he should have asserted citizenship, if there was any basis in fact for such a contention. Under these circumstances his failure to claim that he was a citizen and his refusal to testify on this subject had a tendency to prove that he was an alien."); *see also* Interstate Circuit v. United States, 306 U.S. 208, 226 (1939) ("Silence then becomes evidence of the most convincing character.").

193. *See, e.g.*, Bridges v. Wixon, 326 U.S. 135, 149 (1945) ("In these *habeas corpus* proceedings we do not review the evidence beyond ascertaining that there is some evidence to support the deportation order." (citing United States *ex rel.* Vajtauer v. Commissioner, 273 U.S. 103, 106 (1927))); United States *ex rel.* Tisi v. Tod, 264 U.S. 131, 134 (1924) (holding that after a fair hearing, "mere error, even if it consists in finding an essential fact without adequate supporting evidence, is not a denial of due process of law" on habeas corpus claims).

194. *Lee Kum Hoy*, 355 U.S. at 170.

195. United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 237 F.2d 307, 309 (2d Cir. 1956).

applicants for admission who come here without documentary evidence of any kind and claim derivative citizenship on the basis of oral testimony."[196] The Second Circuit noted that the United States had submitted a list of sixty white persons tested in 1955.[197] Judge Frank apparently agreed that since the challenge arose, "blood tests have been applied without discrimination."[198] The Lees' brief did not deny that the policy had changed; they merely insisted that it was irrelevant, since the relevant question was the policy at the time of the challenged action in the case.[199] If the Solicitor General's representation at oral argument that the policy was being applied on a race-neutral basis was enough to relieve the Court of the necessity of deciding the question of the constitutionality of discrimination, then it should also have been enough for the Court to deny certiorari in the first place.[200]

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196. Brief for the Respondent in Opposition, *supra* note 190, at 10; *see also id.* at 33 ("Since 1953, and continuing to date, the State Department has authorized its consulates throughout the world to utilize blood-testing where deemed necessary to solve doubtful issues of paternity and identity, regardless of the applicant's race.").

197. *Lee Kum Hoy*, 237 F.2d at 311 n.3 ("[A]t a later period an increasing number of non-Chinese were blood tested.").

198. *Id.* at 315 (Frank, J., dissenting).

199. Petitioner's Motion to Strike and Reply Brief, *supra* note 170, at 4 ("This belated blood testing of some non-Chinese cannot retroactively absolve from judicial condemnation of discrimination the practice of blood testing all Chinese, including petitioners, and no one but Chinese for over two and a half years.").

200. In *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70 (1955), the Court, by Justice Frankfurter, dismissed a writ of certiorari as improvidently granted in a case challenging racial segregation in a cemetery because the state enacted a law prohibiting the practice after the case arose. *Id.* at 76–77. The Court dismissed the writ even though it had already affirmed the decision below, allowing the discrimination, by an equally divided court. Rice v. Sioux City Mem'l Park Cemetery, Inc., 348 U.S. 880, 880 (1954) (per curiam). The Court explained:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.

Rice, 349 U.S. at 74. The Court applied such reasoning in this case to avoid hearing the case on the merits:

> Had the statute been properly brought to our attention and the case thereby put into proper focus, the case would have assumed such an isolated significance that it would hardly have been brought here in the first instance. . . . On the one hand, we should hesitate to pass judgment on Iowa for unconstitutional action, were such to be found, when it has already rectified any possible error. On the other hand, we should not unnecessarily discourage such remedial action by possible condonation of this isolated incident.

Id. at 76–77 (footnote omitted). For criticism of the reasoning of this case, see Robert Braucher, *Foreword*, 69 HARV. L. REV. 120, 124–26 (1955), and Michael E. Solimine & Rafael Gely, *The Supreme Court and the DIG*: *An Empirical and Institutional Analysis*,

Perhaps the best explanation for the result was that at oral argument Benjamin Gim gave the Court a way out. He emphasized in his initial argument and rebuttal that there were problems with the blood tests.[201] The Justices questioned him and John Davis for the government at some length on the reliability of the tests.[202] While Davis emphasized that the Lees had been offered the chance for independent testing, he could not remember the statements of the doctors who testified below. Gim drove home the point that the doctors had testified that the inconsistency of the results meant they were not reliable.[203] Gim probably made the point to leave open the possibility that the children were related to their claimed parents, in hopes of making the Court feel better about ruling in their favor. But his point, as made clear in his papers, was that the blood tests should be ignored,[204] not that they should be re-done.

The parties thus may have given the Court an attractive option. By vacating the Second Circuit's decision, they deprived it of precedential value,[205] solving the problem noted by Chief Justice Warren's clerks of the lower court's erroneous explication of what was necessary for an equal protection violation.[206]

A remand held out the theoretical possibility that the Lees would prevail below, in which case the litigation would end. Alternatively, if the new blood tests came out the same as the old ones, they would have taken place under race-neutral conditions. This would have presented the Court with a different legal question. Yet, the per curiam disposition made clear to the parties and all the world that the Court had not rejected "the claim of unconstitutional discrimination"[207] on the merits; it was still potentially viable if the Lees did not win on some other basis. This might have been a broad

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2005 WIS. L. REV. 1421, 1456–58. *See generally* Kitty Rogers, Comment, *Integrating the City of the Dead: The Integration of Cemeteries and the Evolution of Property Law, 1900–1969*, 56 ALA. L. REV. 1153 (2005) (discussing the role of *Rice* in the integration of American cemeteries).

201. Transcript of Oral Argument, *supra* note 155, at 1, 15.

202. *Id.* at 6–8.

203. *Id.* at 15–16.

204. *See* Petition for Writ of Certiorari, *supra* note 148, at 15 ("In view of the completely unreliable character of the blood tests in this case there was no substantial evidence to sustain the determination against the petitioners.").

205. *See, e.g.*, Cnty. of L.A. v. Davis, 440 U.S. 625, 634 n.6 (1979) ("Of necessity our decision 'vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect . . . .' " (quoting O'Connor v. Donaldson, 422 U.S. 563, 578 n.2 (1975))). *See generally* Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143 (2006) (discussing the practical and legal effects of vacated opinions).

206. *See supra* notes 154–56 and accompanying text.

207. United States *ex rel.* Lee Kum Hoy v. Murff, 355 U.S. 169, 169 (1957) (per curiam).

signal to the United States that settlement would simplify the matter substantially.[208]

Vacating without reaching the merits avoided a potential dissent from one or more of Clark, Frankfurter, and Harlan. But a dissent, particularly from several Justices—theoretically four if Burton's "reverse with doubts" flipped—could have incited and inspired further resistance to integration in other contexts. A dissent also would have been unique in this era; since *Brown*, the Court had successfully struggled to maintain unanimity in race cases;[209] "[b]etween *Brown* and *Bolling* in 1954 and *Cooper v. Aaron*[210] in 1958, the Court continued to speak with one voice in cases involving racial segregation, with one minor exception."[211] Importantly, it was not only the Justices that were least enthusiastic about eliminating segregation who strove for unanimity; Warren, Douglas, and Black, for example, declined to dissent in *Naim v. Naim* and the other cases where reasonable but potentially incendiary applications of *Brown* were presented to the Court. Evidently, for them, too, unanimity was more important than making a principled point that would not affect the outcome of the case.

If, by the time of argument, the Court had a way to avoid reaching the merits, there remains the question of what the Justices had in mind when they took the case. For at least a couple of reasons, Warren, Black, Brennan, Douglas, and Frankfurter almost certainly did not take the case in the first instance with the idea that they would vote to affirm. For the first four, that would have been inconsistent

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208. Indeed, that is what seems to have happened. In a 1990 interview, Mr. Gim reported, on remand, "[T]he government confessed error . . . . [s]o my clients were freed. They're grown, married, one died. They probably have grandchildren by now." Edith Cohen, *Benjamin Gim, Founder of Chinatown Firm*, N.Y. L.J., Feb. 5, 1990, at 2.

209. As Professor Dickson explained:

> Per curiam, summary judgments offered the Court three major advantages in striking down certain Southern racial practices: they provided at least the appearance of unanimity, protected individual Justices from being singled out for abuse or recrimination, and allowed the Court to overturn objectionable racial policies without explaining or justifying its actions. This approach followed Justice Black's philosophy that when it came to race cases, "the less we say, the better off we are."

Dickson, *supra* note 27, at 1472–73 (footnote omitted).

210. 358 U.S. 1 (1958) (ordering public school integration in Little Rock, Arkansas); *see supra* notes 24–25.

211. Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court*, *1948-1958*, 68 GEO. L.J. 1, 3 (1979) (footnotes omitted). The exception was *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955), which is discussed *supra* note 200.

with their pro-immigrant decisions in other cases.[212] For Frankfurter, it at least would have been an unnecessary, self-inflicted wound. While technically race discrimination in immigration can be distinguished from race discrimination in the domestic context, for the Court to treat it as substantively reasonable in one context indicates that it might well be reasonable in other, similar contexts, or as a general matter. This would have generated arguments on the part of segregationists,[213] and it would have emphasized the hypocrisy of the United States, discriminating itself as it scolded the states for discriminating. Further, given that the Lees lost below and that the government's policy had changed, it is hard to see why the Court would go out of its way to affirm the validity of racial discrimination as an abstract question. If, for whatever reason, they concluded the decision below was valid, they could have left it undisturbed. The Justices must have thought the Court would dispose of the case some way other than unvarnished affirmance.

Perhaps the Justices planned to decide in favor of the Lees on the ground that administrative agencies could not discriminate on the basis of race without statutory authorization, leaving undecided the question of whether Congress could authorize such discrimination.[214] Indeed, in a case argued by Benjamin Gim in 1966, the Second Circuit reached that result, finding that administrative action would be an "abuse of discretion if it . . . rested on an impermissible basis such as an invidious discrimination against a particular race or group, or . . . on other 'considerations that Congress could not have intended to make relevant.' "[215]

While this outcome would have been conceivable, the United States did not argue for this result. More fundamentally, given that Congress did make Chinese race relevant to the immigration system in 1952, when the Lees were tested, and in 1957, when the case was before the Court, it is hard to see how the Court, in fairness, could have based the decision on the counterfactual idea that Congress

212. *See* sources cited *supra* notes 179–80.

213. *Cf.* Orleans Parish Sch. Bd. v. Bush, 242 F.2d 156, 163 (5th Cir. 1957) ("[Rejecting argument for segregation based on the] alleged disparity between the two races as to intelligence ratings, school progress, incidence of certain diseases, and percentage of illegitimate births, in all of which statistical studies one race shows up to poor advantage. This represents an effort to justify a classification of students by race on the grounds that one race possesses a higher percentage of undesirable traits, attributes or conditions.").

214. Thus, in *Ex parte Endo*, 323 U.S. 283 (1944), the Court invalidated the internment of concededly loyal Japanese Americans as a matter of statutory interpretation, saying it had not been authorized by Congress. *Id.* at 302–04.

215. Wong Wing Hang v. INS, 360 F.2d 715, 719 (2d Cir. 1966) (quoting United States *ex rel.* Kaloudis v. Shaughnessy, 180 F.2d 489, 491 (2d Cir. 1950)).

created and expected the INS to administer a race-neutral immigration law.

Perhaps the Justices thought from the beginning that they would find some way to achieve a non-merits vacatur. But this approach would have been risky. They could not have known that Gim's argument would give them a way to avoid the merits; he might have insisted that his only legal claim was the violation of equal protection upon which the Court granted review. And in other cases, when the Court did not wish to reach the merits, they denied review, rather than accepting discretionary review and then finding a way to rid themselves of difficult cases.[216]

If affirmance and creative avoidance of the merits seem unlikely reasons to have granted certiorari, that leaves only the possibility of reversal. There is no compelling reason that the liberal Justices could not have voted for certiorari with the idea of holding racial discrimination in enforcement unconstitutional. Invalidating a federal classification was unlikely to create enforcement problems; the United States would not engage in massive resistance or refuse to obey the Court's mandate. Immigration authorities had already made the blood-testing policy race neutral. Accordingly, invalidating it would not have interfered with an ongoing program, or conflicted with an executive policy judgment. In terms of practical effect, only the Lees themselves might have benefited from the decision; because the case went on so long, everyone else affected by the discriminatory testing was likely to have been admitted or excluded long before. The Court had already held that the erroneous admission of a few immigrants would not stand in the way of upholding constitutional procedures.[217]

In addition, the same geo-political considerations which led the United States to support desegregation[218] had led to winding down discrimination in the immigration and naturalization laws in a number of bills between 1943 and 1952;[219] in 1957, the Court surely could see

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216. *See* sources cited *supra* notes 29–31.

217. The Court's willingness to permit erroneous admission in service of higher values is exemplified by *Kwock Jan Fat v. White*, 253 U.S. 454 (1920): "It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country." *Id.* at 464.

218. *See generally* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) (arguing that the federal government sought desegregation in *Brown*, in part, to combat Soviet propaganda, promote democracy, and increase the international reputation of the United States).

219. *See supra* notes 76–80.

the general direction of federal policy. By 1965, Congress would establish complete race-neutrality in U.S. immigration policy.[220]

For these reasons, a majority of the Court, in voting to grant certiorari, might well have regarded *Lee Kum Hoy* as an easy and unproblematic case to uphold race neutrality in the law. With little disruption to ongoing programs or impact on large numbers of people,[221] the Court could reject racial discrimination in immigration, affirm *Brown* and *Bolling* and suggest their general applicability and support the political branches in a direction they were already heading on their own. It is hard to understand why the Court granted certiorari in the case if this were not the most probable outcome.

CONCLUSION

In the 1950s, the federal government as well as the states practiced racial discrimination in various contexts. Cases in which the federal classification was actually invalidated were vanishingly small.[222] But in *Lee Kum Hoy*, the Court seemed prepared to do so. The most compelling evidence for that conclusion is that they took the case when they did not have to; it was neither a mandatory appeal nor a petition from the United States. The Court was brave and pragmatic: brave because it was willing to take the case and potentially embarrass the United States by reversing and pragmatic because it resolved the case with justice and without unnecessary confrontation.

Lee Kum Hoy is an instance where the passive virtues of Professor Bickel may have worked. It may be that the Court here gave a signal to the United States, both in this case and with regard to the general issue. Within the decade, the United States resolved the problem on its own, by eliminating racial considerations from immigration law.

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220. *See supra* notes 74–78.

221. Even if the case led to the elimination of racial classifications in immigration, the Court might well have given the affected jurisdiction time to implement the decision, as it did in *Brown II*. That is, it might well not have ordered the admission of thousands of immigrants.

222. *See* Richard A. Primus, Bolling *Alone*, 104 COLUM. L. REV. 975, 990 (2004) ("Despite the extension of equal protection to cover the federal government [in *Bolling*], there are virtually no reported cases in which a court holds a federal law or other federal action unconstitutional on the grounds that it discriminates against a racial minority group.").