

This Week's Citation Classic

CC/NUMBER 31
SEPTEMBER 27, 1

Fiss O M. Racial imbalance in the public schools: the constitutional concepts.
Harvard Law Rev. 78:564-617, 1965.
[Harvard Law School, Cambridge, MA]

This paper provides a framework for analyzing the constitutional issues relating to so-called *de facto* school segregation. It explains why school boards may use racial assignments in order to eliminate the segregation, and why they are sometimes constitutionally forbidden to use geographic criteria as a method of school assignment. [The *Social Sciences Citation Index*® (SSCI)® indicates that this paper has been cited in over 185 publications since 1966.]

Owen M. Fiss
Yale Law School
New Haven, CT 06520

August 3, 1982

"Looking back, I am above all struck by the date: the paper was written in the fall of 1963, and published in January 1965. The date explains the genesis of the paper, the character of the analysis, and maybe even the source of its significance.

"In 1963, the civil rights movement was the most dominant force in American political life and posed the most serious challenge to the legal system. The focus was on the South, and the effort to desegregate schools of that region, but it was becoming increasingly clear that the implications of *Brown v. Board of Education* could not be contained. The movement was beginning to turn to the North and West, and though there were only a few litigated cases at that time, political controversies over school desegregation were raging in most of the major cities of the nation, looking to a judicial settlement.

"It also happened that in 1963 I was a third-year student at the Harvard Law School, enrolled in a seminar on constitutional litigation. The instructor was Paul Freund. It might have seemed, given the political events that I have described and my personal commitments,¹ that northern school desegregation would be an obvious paper topic for that seminar. The process of selecting a topic was com-

plicated, however, by the peculiar intellectual milieu of the Harvard Law School in the early-1960s, which was not hospitable to *Brown* and the developments that it triggered. Conversation was dominated by a famous article by Herbert Wechsler, which attacked *Brown* as 'unprincipled.'² Most constitutional law courses were preoccupied with the case-or-controversy requirement, and other devices for limiting the judicial power. They referred to *Brown* only to demonstrate its problematic character.

"I first presented myself to Freund as a student interested, as best I can remember, in writing a paper on the concept of 'standing' in litigation involving foreign affairs. He looked at me with a measure of disbelief. I wore my passions on my sleeve. He asked what I was truly interested in and in response, almost reading off the headlines of the day's newspapers, I spoke of civil rights and the emerging crisis over northern school desegregation. He told me, as a professor sometimes should, and with the appropriate degree of indirection, that should be the subject of my paper. In the first footnote I expressed my appreciation to Freund for his help in selecting the topic and his support and advice in bringing the paper to fruition; years later, in a brief submitted in a case involving the Cincinnati schools, I was criticized for this expression of gratitude. The lawyer said that I was trying to appropriate Freund's stature in the profession in order to lend a measure of plausibility to what was but a student's dream.

"The paper was an early statement, not just for me (over the past decade I returned to the subject a number of times^{3,7}), but also for the history of school desegregation law, and that might account for some of its rough edges and also for its place in the law. It was written before the Warren Court and *Brown* had been fully accepted into the professional and academic culture as legitimate; before the Supreme Court had elaborated on the substance of *Brown*; before a significant body of case law had been developed on the subject even by the lower courts; before the major civil rights legislation of the 1960s had been enacted; before a literature had been generated on the subject. At a very early point, the article provided a conceptual framework for understanding *Brown* and it identified the path the law must take in order to realize the full promise of that decision. We were on that path until 1974, though the present Supreme Court seems to be leading us in another direction altogether."

1. Fiss O M. A vision of the Constitution. *Harvard Civil Rights-Civil L.* 13:243-6, 1978.
2. Wechsler H. Toward neutral principles of constitutional law. *Harvard Law Rev.* 73:1-35, 1959.
3. Fiss O M. The Charlotte-Mecklenburg case—its significance for northern school desegregation. *Univ. Chicago Law Rev.* 38:697-709, 1971.
4., School desegregation: the uncertain path of the law. *Phil. Publ. Aff.* 4:3-39, 1974.
5., The jurisprudence of busing. *Law Contemp. Prob.* 39:194-216, 1975.
6., Groups and the equal protection clause. *Phil. Publ. Aff.* 5:107-77, 1976.
7., Inappropriateness of the intent test in equal protection cases. *Fed. Rules Decisions* 74:276-81, 1977.