Fordham Law Review

Volume 61 | Issue 1 Article 2

1992

Symposium: Brown v. Board of Education and Its Legacy: A Tribute to Justice Thurgood Marshall, The Historical Setting of Brown and Its Impact on the Supreme Court's Decision

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THE HISTORICAL SETTING OF *BROWN* AND ITS IMPACT ON THE SUPREME COURT'S DECISION

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Judge Motley provides an insightful overview of the Brown v. Board of Education *decision in an historical context. In addition to analyzing several Supreme Court decisions that preceded* Brown, *Judge Motley focuses on the role of Thurgood Marshall as both a strategist and tactician during this dynamic period in our history. Judge Motley concludes by examining the immediate impact of* Brown *on the civil rights movement in America.*

THE Supreme Court's 1954 decision in *Brown v. Board of Education* ("*Brown I*")[1] holding racial segregation in public education unconstitutional was no ordinary civil action such as we were accustomed to in American jurisprudence. In both its procedural and substantive aspects it was unique. Any attempt to analyze *Brown I*'s substantive legal underpinning or to revisit the Court's "all deliberate speed" remedy of *Brown II*[2] simply dwarfs its overriding historical, social, and political significance in the life of this nation. *Brown I* was first and foremost historic rectification of the Fourteenth Amendment to the Federal Constitution,[3] the objective of which was to confer citizenship status on the newly emancipated slaves and to debar the former slave-holding states from denying to them the same rights which White citizens enjoyed within the states. Specifically, *Brown I* recognized that the social policy of segregation, which received the Supreme Court's judicial blessing in 1896 in *Plessy v. Ferguson*,[4] violated the Fourteenth Amendment's guarantee of equal protection under the law. It also recognized, *sub silentio*, that state-enforced racial segregation was not only a national disgrace, but an international political embarrassment. In retrospect, if it had not been for World War II, which forced the national government to confront and deal with the embarrassment created by segregation at home and in our armed forces abroad, there would not have been a Supreme Court decision as early as 1954 outlawing racial segregation in education. In short, a necessary predicate to ending racial segregation by state governments was a commitment by the national government to establish a new American social policy.

Brown I was preceded by four foundation rulings: 1) *Missouri ex rel.*

1. 347 U.S. 483 (1954).
2. Brown v. Board of Educ., 349 U.S. 294, 301 (1955) (*Brown II*).
3. Section 1 of the Fourteenth Amendment provides in part:

   No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.
4. 163 U.S. 537 (1896).

Gaines v. Canada,[5] which prevented Missouri from sending an African-American student out of the state to receive a law school education which White students received at home;[6] 2) *Sipuel v. Board of Regents of the University of Oklahoma*,[7] which required Oklahoma to afford an African-American woman a legal education within the state—an education that had already been provided to White students;[8] 3) *McLaurin v. Oklahoma State Regents*,[9] which also prohibited Oklahoma from segregating an African-American male within its graduate school of education once it had admitted him;[10] and 4) *Sweatt v. Painter*,[11] wherein the Court, upon comparing the facilities provided for White students at the University of Texas Law School with those provided at a separate law school for African-American citizens, ordered the admission of the plaintiff to the University of Texas Law School.[12]

Each of these pre-*Brown* cases was decided within the "separate but equal" context, although the validity of segregated education, per se, was also being attacked. The student plaintiffs' lawyers, headed by Thurgood Marshall, argued that it was unnecessary for the Court to hold segregation, per se, unconstitutional in order to grant the relief sought because, in each instance, "separate but equal" facilities had not been provided.

In fact, in 1948, during reargument in *Sipuel*, a Supreme Court Justice asked Thurgood Marshall whether he was seeking a ruling on the validity of segregation, per se, rather than on the lack of a "separate but equal" institution, a ground on which Ms. Sipuel had already prevailed. As I recall, Marshall responded in the negative. His answer, however, was not spontaneous. Anticipating the question, Marshall had already discussed this response with his legal staff and mentors. They all agreed that a "yes" answer would be dangerously premature. Marshall reasoned that *Sweatt* was still working its way up through the state court system in Texas. In that case, for the first time, a separate facility had been hastily provided for the plaintiff soon after the lawsuit was filed. Thus, *Sweatt* provided the first opportunity to demonstrate at trial that a facility constructed for African-Americans under the "separate but equal" doctrine was not, in fact, equal.

By way of background, it was common knowledge in 1948 that the separate educational facilities provided by southern states for African-American students were invariably inferior to those provided for White students. It was also widely known at that time that the only African-Americans in the country who received an education equal to that received by Whites were those who attended the same schools as White

5. 305 U.S. 337 (1938).
6. *See id.* at 352.
7. 332 U.S. 631 (1948).
8. *See id.* at 633.
9. 339 U.S. 637 (1950).
10. *See id.* at 642.
11. 339 U.S. 629 (1950).
12. *See id.* at 635-36.

students. Therefore, if a Texas plaintiff demonstrated this inequality between the two educational systems, he would be entitled to his personal and present constitutional right to immediate admission to the White institution. The underlying rationale of Thurgood Marshall and his associates was that the southern states could not afford to duplicate graduate and professional-level education for its non-White citizens. These states, therefore, would be forced to admit to existing facilities the few non-Whites seeking education at that level.

Thurgood Marshall and his associates believed that once they frayed the pattern of segregation at the graduate level, moving down the educational ladder would be a less onerous task. As early as 1936, in *Pearson v. Murray*,[13] Marshall succeeded in gaining the admission of an African-American to his home state's law school at the University of Maryland Law School without adverse reaction. At that time, Maryland did not provide separate law schools for non-Whites. This approach of filing law suits where states did not provide separate institutions had been jointly developed by Marshall and Charles Houston, Marshall's mentor and the first full-time lawyer for the National Association for the Advancement of Colored People ("NAACP").

The Maryland case was followed in 1938 by the Supreme Court's decision in *Gaines*, the Missouri case. The *Gaines* decision, however, was somewhat of a setback. Although the plaintiff, Lloyd Gaines, prevailed, he was not admitted to the law school in Missouri as expected; nor did the Court order his admission. Instead, the Court simply invalidated Missouri's out-of-state scholarship program for African-American students eligible for graduate and professional school education (which all of the southern states had adopted to avoid integrating their all-White institutions) and left it up to the State of Missouri to decide upon the appropriate course of action.[14] The Court held that Missouri could provide equal protection to its citizens only by supplying equal education within its own borders.[15] Lloyd Gaines disappeared and did not apply for admission after the Court's ruling. Missouri, however, proceeded to build a separate law school for non-Whites at its all-Black Lincoln University.

Other southern states did not give up such programs as a result of the *Gaines* decision. In fact, no southern state followed Missouri's lead by building a separate law school for non-White students—a bad omen for the future. In short, the Supreme Court in *Gaines* lacked the courage to follow *Pearson* and, more importantly, had no incentive to strike down the "separate but equal" doctrine or segregation, per se, as unconstitutional.

In *Plessy v. Ferguson*,[16] an 1896 case involving intrastate travel, the

13. 182 A. 590 (Md. 1936).
14. *See* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 351-52 (1938).
15. *See id.* at 351.
16. 163 U.S. 537 (1896).

Supreme Court affirmed the power of the southern states to provide separate-but-equal railroad facilities for African-Americans within their borders. Consequently, in 1938, no one expected that the required political and legal pressure could be brought to bear on the entrenched and widely accepted *Plessy* doctrine. This was due, in part, to the fact that the African-American minority had no political leverage at that time. Moreover, the NAACP had no litigation treasury, and Charles Houston, William Hastie, and Thurgood Marshall were virtually the only civil rights lawyers in the country.[17]

Three years after the *Gaines* decision, in 1941, America entered World War II. Racial segregation was such an embarrassment to the country, however, that we dared not resurrect our World War I slogan that proclaimed to the world that our entry into the war was "To Make The World Safe For Democracy." Consequently, we fought World War II without this slogan, which our segregated way of life manifestly contradicted. Above all, Hitler was a racist.

After more than a decade of unemployment, many African-Americans were given a chance, beginning in 1942, to participate in the prosperity that accompanied the war effort pursuant to a campaign for jobs led by the African-American labor leader, A. Philip Randolph. The jobs campaign, which included a planned march on Washington, resulted in President Roosevelt's Executive Order 8802[18] which barred discrimination in government employment and defense industries with government contracts. The NAACP's daring and highly controversial campaign to end segregation in higher education, therefore, was put on the back burner in an effort to spare the national government further embarrassment abroad. Because the war effort had stripped many local campaigns of manpower and financial support, the NAACP focused its efforts on the end of segregation in the Armed Forces. Thurgood Marshall and his staff aided African-American servicemen facing harsh, unequal court martial penalties. As a result, African-American servicemen abroad joined the NAACP, resulting in its highest membership record to date. At this time, Marshall was general counsel of the NAACP as well as chief counsel of its legal arm, the NAACP Legal Defense and Educational Fund.

After the war ended in 1945, the legal attack on segregation in education quickly resumed with the filing of the *Sweatt* case in 1946. A substantial segment of the African-American community feared that such a head-on approach would meet with disaster—a reaffirmation of the "separate but equal" doctrine in the face of steady progress on the political

17. Hastie was Houston's cousin and another Marshall mentor. Both Harvard-educated lawyers with outstanding scholastic records and credentials, Hastie and Houston each won a number of civil rights cases in the Supreme Court. *See* Genna McNeil, Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights 3-11 (1983); Gilbert Ware, William Hastie: Grace Under Pressure 142-174 (1984).

18. Exec. Order No. 8802, 3 C.F.R. 957 (1941).

front in the area of race relations, such as Roosevelt's Executive Order 8802.[19]

During the 1951 trial of the Topeka, Kansas school desegregation case,[20] a totally new theory developed for attacking the validity of segregation, per se, in education. This theory proposed that state-imposed segregation itself had an adverse psychological effect on the ability of African-American children to learn.[21] Kansas permitted, but did not require, large cities to segregate African-American school children. It had only one such city, Topeka, that had a relatively large population of African-Americans. These individuals had moved to Topeka in order to work for the railroad at the turn of the century. Otherwise, Kansas was fairly rural, and segregation there was not generally authorized. In fact, Kansas was admitted to the Union as a free state.

The statute permitting such segregation was limited to the high school level. Dr. Kenneth Clark, a psychologist, and other social scientists developed the psychological evidence that tended to prove that Black children saw themselves as inferior. This evidence reflected the perceptions of Black school children regarding the value of Black dolls and, hence, their own value. The federal district judge in Kansas found as a fact that segregation had an adverse effect on the ability of Black children to learn.[22] The Supreme Court accepted this finding as a basis for its unanimous decision in *Brown I* that segregation violated the Equal Protection Clause of the Fourteenth Amendment.[23] As Chief Justice Earl Warren said, segregation affects the "hearts and minds [of Negro children] in a way unlikely ever to be undone."[24]

This new approach to attacking segregation, per se, in education had been inspired by *Mendez v. Westminister School District*,[25] a 1946 California case that struck down the segregation of Mexican children in California public schools. In *Mendez*, the court held that the school set aside for Mexican-Americans was inferior to the schools attended by White children.[26] Viewed from the community's perception of the situation, the

19. *See id.*

20. *See* Brown v. Board of Educ., 98 F. Supp. 797 (D. Kan. 1951).

21. *See* Brown v. Board of Educ., 347 U.S. 483, 494 n.11 (1954) (*Brown I*).

22. *See id.* at 494.

23. *See id.* at 495.

24. *Id.* at 494. The following passage from Chief Justice Earl Warren's opinion impliedly refers to Clark's psychological evidence: "To separate [grade school and high school children] . . . from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.*

25. 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947).

26. *See id.* at 551. The district court's unequivocally strong language was radically new at the time the decision was issued. According to the court:

> The equal protection of the laws pertaining to the public school system in California is not provided by furnishing in separate schools the same technical facilities, text books and courses of instruction to children of Mexican ancestry that are available to the other public school children regardless of their ancestry. A paramount requisite in the American system of public education is social equal-

court found that, in the judgment of the community, the Mexican-American school was not as good as the school attended by the White children.

In connection with its decision in *Brown I*, the Supreme Court ordered a number of unusual procedural steps. For instance, in 1952, before the first argument, the Supreme Court issued a writ of certiorari before judgment to the Court of Appeals for the District of Columbia in order to hear a case involving segregation in a public school under federal jurisdiction.[27] Moreover, in 1953, after the first argument in the five combined school desegregation cases then before it, the Court ordered the cases reargued and briefed with respect to both the several substantive issues and the relief to which the plaintiffs would be entitled.[28] It consolidated the five cases for reargument in its 1953 order, including the Delaware case in which the highest court of Delaware had outlawed segregation in Delaware's public schools, as well as the cases from Virginia and South Carolina.[29]

In retrospect, it now seems clear that the members of the Supreme Court, in reaching their decision in *Brown I*, were undoubtedly influenced by the fact that, in 1948, President Truman ordered an end to segregation in the nation's Armed Forces, the foremost symbol of our home-grown racism.[30] As noted above, Truman's actions reversed long-standing national policy with respect to our Armed Forces that predated the Supreme Court's 1896 decision approving racial segregation.[31] Although African-Americans apparently fought in integrated situations in the Revolutionary War, those who volunteered to fight in the Civil War were segregated in separate units.[32] Thereafter, the Army remained segregated until 1948.

Thus, by 1952, national policy with respect to racial segregation had changed significantly. The nation's capitol, Washington D.C., was quietly beginning to desegregate with respect to privately owned places of public accommodation such as theaters, restaurants and hotels, though schools remained segregated. Restaurants in public buildings were either quietly desegregated or had never instituted the policy. Congress, in fact, legislatively controlled Washington, D.C. and could have outlawed seg-

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ity. It must be open to all children by unified school association regardless of lineage.

Id. at 549.

The court further stated that "[i]t is also established by the record that the methods of segregation prevalent in the defendant school districts foster antagonisms in the children and suggest inferiority among them where none exists." *Id.*

27. *See* Bolling v. Sharpe, 347 U.S. 497, 498 (1954).

28. *See* Brown v. Board of Educ., 345 U.S. 972, 972-73 (1953).

29. *See id.* at 972.

30. Exec. Order No. 9981, 3 C.F.R 722 (1943-1948).

31. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

32. *See* Howard J. Jones, *Letters in Protest of Race Prejudice in the Army during the American Civil War, in* XLI The Journal of Negro History 97, 97-98 (Lorraine A. Williams ed., 1976).

regated schooling. It chose not to do so, however, for obvious political reasons. Without a commitment by the federal government to end segregation in the Armed Forces and in the District of Columbia, segregation in southern states would not have abated. The opposition simply would have pointed to the national government as the maker of public policy.

A critical aspect of the Court's opinion in *Brown I* was its unanimity. In reaching its truly historic decision, Chief Justice Earl Warren wrote an uncharacteristically straightforward opinion that simply turned the Court's attention to the future, while never revisiting or analyzing the constitutional injustice of the past century wrought by *Plessy*. In fact, the Court never even mentioned *Plessy*'s disingenuous holding that racial segregation in intrastate transportation did not denote the inferiority of African-Americans. In *Gayle v. Browder*,[33] the Montgomery bus boycott case, the Court finally overruled *Plessy* without so much as a hearing or opinion. The Court simply cited *Brown I* in its affirmance of the lower federal court's opinion banning segregation on local buses.[34]

The majority in *Plessy* knew full-well that racial segregation in transportation was a state-imposed badge of servitude, as Justice Harlan's dissent in *Plessy* indicates.[35] In retrospect, it appears that the Court in *Plessy* was trying to remove from the federal forum responsibility for protecting the rights of former slaves by approving the "separate but equal" fiction. In its decision, the *Plessy* Court apparently hoped to put a cap on a century of national turmoil and division over the race question in the American community.

Plessy's most devastating result, however, was its reaffirmation of a majority of the population's belief in the inherent inferiority of African-Americans. Many schools and other institutions in the North that had accepted African-Americans after the Civil War pursuant to their duty under Reconstruction, subsequently abandoned their private affirmative action programs after the Court decided *Plessy*.[36] Thus, *Plessy*'s impact on American social history was not limited to street cars. The forty year period from 1896 to 1936 was, perhaps, the bleakest in our long struggle for racial equality.

When the Supreme Court decided *Brown I* in 1954, no one expected a unanimous decision. As we now realize, however, unanimity was absolutely necessary to the implementation of *Brown I*, the Supreme Court's most controversial decision at that time. In another unprecedented procedural move, the Supreme Court, after *Brown I*, ordered reargument of the remedy to be provided to the plaintiffs in the *Brown* consolidated cases. Specifically, the "all deliberate speed" remedy enunciated by

33. 352 U.S. 903 (1956).

34. *See id.* at 903.

35. *See* Plessy v. Ferguson, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting).

36. The class yearbooks at Exeter Academy, Exeter, New Hampshire, prior to 1896 and thereafter to 1960 are reflective of the lack of African-Americans in traditionally White institutions.

Brown II seems to have been dictated by the class action nature of the cases. All prior school desegregation cases before the Supreme Court had been suits by individual plaintiffs at the college or graduate level, with each plaintiff asserting his personal and present constitutional right to admission to a White institution.

The realities embraced by the decision also dictated its remedy. The remedy was apparently designed to placate the White resistance which pleaded unreadiness. The "all deliberate speed" brake on school desegregation, however, had no such effect. Federal troops were finally required to enforce the new law of the land in Arkansas and Mississippi, and were ready to do so in Alabama before George Wallace stepped aside from the schoolhouse door. The Court finally put an end to "all deliberate speed" jurisprudence in 1964 in *Griffin v. School Board of Prince Edward County*,[37] thereby withdrawing support for recalcitrant federal district judges and school officials. The opposition, consisting now mainly of hard-core White racists, has never given up.

One result of *Brown I* that had not been anticipated was its psychological impact on African-American communities around the South. This psychological effect manifested itself in a grass-roots anti-segregation revolt that took everyone by surprise in Montgomery, Alabama in 1956 with the bus boycott initiated by Rosa Park's refusal to move to the back of the bus. These communities understood that dismantling the segregated school system would take time and would even be resisted by some elements in the African-American communities themselves who benefitted from segregation. Many African-American communities initiated efforts to bring down racial segregation in local transportation, department store lunch counters, and in municipal government generally. They targeted "Jim Crow" institutions that all African-American adults frequented on a daily basis and, unlike the experience of school desegregation, met no resistance to change from the African-American community.[38]

In the decade following *Brown I*, the Supreme Court, in a series of equally historic decisions, struck down racial segregation in all other areas of American public life, including southern courthouses.[39] The

37. 377 U.S. 218, 234 (1964).

38. While many African-American teachers feared loss of jobs, these same fears were not shared by local bus riders, department store lunch counter enthusiasts and interstate travelers.

39. *See, e.g.*, Johnson v. Virginia, 373 U.S. 61, 62 (1963) (courthouses); Watson v. City of Memphis, 373 U.S. 526, 539 (1963) (public parks, playgrounds); Turner v. City of Memphis, 369 U.S. 350, 353 (1962) (per curiam) (municipally owned airport restaurant); Burton v. Wilmington Parking Authority, 365 U.S. 715, 717 (1961) (municipally owned parking lot restaurant); Holmes v. City of Atlanta, 350 U.S. 879, 879 (1955) (per curiam) (public golf courses); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971, 971 (1954) (per curiam) (municipally owned amphitheater); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959, 967-68 (4th Cir. 1963) (hospitals), *cert. denied*, 376 U.S. 938 (1964); Dawson v. Mayor of Baltimore, 220 F.2d 386, 387 (4th Cir.) (public beaches), *aff'd per curiam*, 350 U.S. 877 (1955).

Court seemed to realize that desegregated schools could not coexist with segregated local buses, recreational facilities, and lunch counters. Once *Brown* had put a hole into the dam of segregation, even the Supreme Court's "all deliberate speed" doctrine could not hold back the dawn of a new day.[40] With congressional enactment of the Civil Rights Act of 1964,[41] legal segregation in America died. This is *Brown*'s legacy.

40. *See* Joseph B. Robison, *Protection of Associations from Compulsory Disclosure of Membership*, 58 Colum. L. Rev. 614, 615 (1958).

41. *See* Pub. L. 88-352, title II, §§ 201-07, 78 Stat. 243, 243-45 (1964) (codified at 42 U.S.C. §§ 2000a to 2000a-6 (1988)).