Fordham Law Review

Volume 61 | Issue 1 Article 4

1992

Symposium: Brown v. Board of Education and Its Legacy: A Tribute to Justice Thurgood Marshall, Public Law Litigation and the Ambiguties of Brown

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PUBLIC LAW LITIGATION AND THE AMBIGUITIES OF *BROWN*

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Professor Tushnet posits that the Supreme Court's concern for gradually carrying out desegregation in the public schools ironically gave rise to "public law litigation"—an aggressive form of judicial review. Specifically, Professor Tushnet argues that the "all deliberate speed" standard, which separated the right from the remedy, enabled the courts to become a more powerful institution in shaping social policy. Throughout his speech, Professor Tushnet provides insight into the thought processes of the Supreme Court justices at the time of the Brown *decision.*

MY co-panelists have offered views of *Brown v. Board of Education*[1] by participants in that historic litigation. I can offer only the more modest perspective of a historian, and will attempt to sketch one part of the story of *Brown*'s importance. As is well-known, the Deep South resisted the Court's decision, through what I call passive resistance—student placement plans that amounted to blatant or subtle evasions of *Brown*'s requirements—massive resistance in Virginia and elsewhere, and violent resistance, most notably in Little Rock, Arkansas. Although it took a long time, eventually the Court reacted to that resistance by demanding that school boards adopt desegregation plans that promised to work.

Brown was two decisions, one on the merits[2] and the other on the remedy.[3] The two decisions, taken together, were suffused with a tension between two competing visions. In one, the Constitution required only that government decisions be taken without regard to race. For example, when Thurgood Marshall was asked about the purported problems that would arise because of differences in ability between African-American and White children, he responded, "Simple. Put the dumb Colored children in with the dumb White children, and put the smart Colored children with the smart White kids."[4] That is, using test performance to assign students to schools would not violate the Constitution—even, presumably, if some of the classrooms that resulted were not racially balanced. According to the Court, this side of *Brown* required only desegregation, not integration.[5] The most significant consequence of this vision in the long run was the validation of neighborhood school policies in circumstances of residential segregation.

Yet, within *Brown* there was an alternative vision in which the Constitution required students of both races to attend the same schools. This vision was expressed when Marshall and the Justices began to discuss

1. 347 U.S. 483 (1954) (*Brown I*).

2. *See id.*

3. *See* Brown v. Board of Educ., 349 U.S. 294 (1955) (*Brown II*).

4. Argument: The Oral Argument Before the Supreme Court in *Brown v. Board of Education Of Topeka*, 1952-55, at 402 (Leon Friedman ed., 1969).

5. *See* Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (per curiam).

whether desegregation would work. For, if all that mattered was eliminating race from government decisions, it is difficult to understand why desegregation, defined in those terms, could not work. To determine whether desegregation was working, the Court began to examine not whether school boards were assigning students to schools without regard to race, but whether the schools were truly integrated.

In the immediate aftermath of *Brown*, southern school systems engaged in a variety of forms of resistance. For example, some school boards developed elaborate schemes of student assignment in which race was not an explicit ground of decision, but which effectively delayed desegregation for years. These schemes amounted to evasions of the desegregation vision of *Brown* because they were subterfuges intended to allow the government to make decisions based on race without saying so and, of course, they were evasions of the integration vision. The Supreme Court tolerated these schemes for some years, denying review in a case from Alabama.[6]

Passive resistance eventually shaded into the form of massive resistance that took place in Virginia. There, the State adopted a series of statutes reallocating power for student assignment from local school boards to a statewide board, effectively removing local boards as defendants in segregation cases, and asserting Eleventh Amendment immunity against suit on behalf of the only remaining defendant, the State. Although a credible but ultimately unpersuasive legal case might have been made to support the passive resistance programs, massive resistance had no such support. It was simply a way to resist *Brown* under the guise of law. Lewis F. Powell, Jr., believed that the legal theory offered to support massive resistance was "simply legal nonsense,"[7] although he refrained from publicizing his views. Finally, of course, there was the violent resistance to *Brown* that culminated in the Little Rock crisis of 1957 to 1958.

The Court responded with its own "deliberate speed"[8] to these challenges. When confronted directly in the Little Rock case, it defended federal supremacy.[9] Passive and massive resistance persisted for nearly a decade before the Court intervened. Eventually, however, the Court reacted to resistance by demanding that school boards adopt desegregation plans that "promise[d] realistically to work, and . . . to work *now*."[10] In taking this course, the Court finally chose between the desegregationist and the integrationist vision implicit in *Brown*, deciding to enforce the latter.[11]

6. *See* Shuttlesworth v. Birmingham Bd. of Educ., 358 U.S. 101, 101 (1958) (per curiam).

7. James W. Ely, Jr., The Crisis of Conservative Virginia: The Byrd Organization and the Politics of Massive Resistance 40-42 (1976).

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

9. *See* Cooper v. Aaron, 358 U.S. 1, 18-19 (1958).

10. Green v. County Sch. Bd., 391 U.S. 430, 439 (1968).

11. *See id.* at 437.

Having adopted the integrationist vision, however, the Court, and particularly the lower federal courts, discovered that getting plans to work was not easy. Once the Court directed lower courts to achieve real integration, those courts began to supervise the operation of schools more aggressively. After subsequently gaining experience in supervising important bureaucratic institutions in the school setting, the lower courts began extending their supervision to other institutions similarly regulated by the Constitution. The outcome was what Professor Abram Chayes called "public law litigation," the most characteristic feature of the modern federal courts.[12]

Modern public law litigation is widely regarded as a particularly aggressive or activist form of judicial review. Paradoxically, though, it had its origins in the Court's concern over proceeding too aggressively with respect to desegregation. Specifically, Justice Frankfurter believed that since overturning segregation was such a major step, the Court ought to proceed cautiously.[13] Ironically, in following Frankfurter's advice to proceed cautiously, and acting in what Frankfurter certainly regarded as a restrained manner, the Court actually set the lower federal courts on a path that ultimately produced public law litigation.

Prior to *Brown*, the Court routinely treated constitutional rights as "present and personal."[14] A litigant who established injury from a constitutional violation was entitled to a remedy offering relief from the injury, such as damages, or, of more relevance here, an injunction immediately ameliorating the unconstitutional injury. The Court invoked that "present and personal" concept when it held segregation in universities unconstitutional.[15] I believe most of the Justices understood that invalidating university segregation would start them down the road leading to the invalidation of segregation of elementary and secondary schools, as they did in *Brown*. Justice Tom Clark, for example, concluded a memorandum to his colleagues by explaining his vote against segregation at the University of Texas: "How will I vote when the . . . grammar school cases arise? I do not know. . . . [But, if] some say this undermines *Plessy [v. Ferguson]* then let it fall as have many Nineteenth Century oracles."[16]

Yet, even at the beginning of the desegregation road, the Court knew

12. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1303-04 (1976).

13. See Mark Tushnet, with Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 Colum. L. Rev. 1867, 1872-75 (1991), for a more detailed development of the argument that follows.

14. *See, e.g.*, Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 351 (1938) (holding that a state was obligated to furnish, within its borders, legal educational facilities for African-Americans "substantially equal" to those afforded to its White citizens).

15. *See* Sweatt v. Painter, 339 U.S. 629, 635-36 (1950).

16. Tushnet, with Lezin, *supra* note 13, at 1891-92 (quoting Dennis J. Hutchinson, *Unanimity and Desegregation: Decision Making in the Supreme Court, 1948-1958*, 68 Geo. L.J. 1, 90 (1979)). It is possible to read Clark's memorandum as indicating some uncertainty about the conclusion for elementary and secondary schools, but I believe it is

that it would not invoke the "present and personal" concept. The Court's concern was resistance. The Justices believed that the federal courts could pull off immediate desegregation of universities, but also believed that elementary and secondary school segregation was so deeply embedded in the southern social system that it could be eliminated only gradually.

The question of gradualism preoccupied the Court for the several years it considered *Brown*; it was not an issue that emerged only after the Court had issued its opinion on the merits. The cases were argued three times, and in all three the parties discussed the issue of remedy in detail. "Discussed," though, is a somewhat misleading term. The lawyers for the National Association for the Advancement of Colored People ("NAACP"), led by Thurgood Marshall, hammered at the "present and personal" point. I doubt they truly believed that the Court would, in fact, enter an order directing immediate desegregation. Rather, they were playing the cards they had, trying to push the Court as far as it was willing to go. The "present and personal" doctrine was established law, followed consistently, and, the lawyers argued, there was no reason for *Brown* to depart from it.

The lawyers for the states were in a rhetorical bind. As everyone did, they knew that the only reason to delay desegregation was the possibility of resistance. They also knew, however, that it was not a good argumentative strategy to tell the Justices that southerners were likely to resist the Court's interpretation of the Constitution. These lawyers occasionally mentioned administrative problems, but everybody knew that "administrative problems," properly understood, simply meant coming up with different lists of student assignments—a task that school boards could accomplish over a weekend. The lawyers for the school boards, therefore, danced around the question of resistance, saying instead that desegregation had to be gradual because of administrative or other unspecified problems. When they occasionally slipped and revealed that the real issue was resistance, the Justices and the NAACP's lawyers, particularly Marshall, jumped on them.

Inside the Court, too, the Justices faced the tension between being honest about their concerns for resistance and admitting that people might not go along with what they said. In my view, Justices Black and Douglas offered the most sensible solution: require immediate desegregation, in the sense that every child who applied to attend a desegregated school with room for him or her would have to be admitted, knowing full well that where resistance was likely to be strongest, few parents would subject their children to the inevitable ordeal. That way, Black and Douglas believed, the Court could continue to adhere to its traditional commitment to the "present and personal" concept, would not compromise on

more easily read as indicating that Clark understood, and was not dismayed by, where the university cases led.

fundamental issues of principle, and yet would not really force massive, immediate changes in southern practices.

Unfortunately for Black and Douglas, the other Justices did not understand "immediate desegregation" in the same way. The misunderstanding arose, in part, because Black and Douglas were taking a rather subtle position in circumstances where subtlety was not highly valued. It also arose, in part, because of the on-going personality conflict between them and Justice Frankfurter, who could not tolerate the prospect of having little influence on the outcome in *Brown*. Justice Frankfurter thought that the Black-Douglas position was suicidal, in part because he did not understand that Black and Douglas expected desegregation to occur gradually.

In my view, though, Frankfurter was driven by more personal concerns. As the Court considered the desegregation cases, Frankfurter found that his ally, Robert Jackson, kept insisting that a decision to overrule *Plessy v. Ferguson*[17] would be a political decision. Frankfurter, in contrast, needed to see such a decision as legal rather than political. In addition, he had to see that he made an important contribution to the outcome in *Brown*. Frankfurter struggled for a while, and he came to focus on devising a gradualist remedy, which he was able to frame as a legal question rather than a political one: given the "present and personal" concept, what resources were available in law to authorize a gradualist remedy? With Earl Warren on the Court, the substance of the outcome was certain, and Frankfurter could contribute little to making the decision unanimous. What he could contribute was the formula for gradualism—which is why he was so upset at Black and Douglas. Not only were they wrong, they threatened to read Frankfurter out of the internal history of *Brown*.

In the end, of course, Frankfurter prevailed. The "all deliberate speed" formula he devised had an important impact on future developments. It implied that relief could be delayed and might not ever come to the individual litigants. But, as the Court saw it, because the group to which the litigant belonged would ultimately benefit from desegregation, no matter how delayed, constitutional restrictions on government power would be honored in the end. Frankfurter was disappointed when the South resisted anyway, and persisted in hoping that the good White people of the South would turn against demagogues like Orval Faubus. He should have known better.

And, his innovation, "all deliberate speed," when coupled with southern resistance, transformed constitutional law. "All deliberate speed" disconnected the right violated from the remedy. It made the Constitution a mere instrument to accomplish socially valuable ends, not a commitment to the immediate vindication of fundamental—present and personal—rights. Moreover, it encouraged the federal courts to see

17. 163 U.S. 537 (1896).

themselves as managers of programs of social transformation, programs embedded in what the courts understood to be the requirements of the Constitution.

Thus, when the South resisted and made the desegregationist vision in *Brown* seem unrealistic, the lower courts, aided by the Supreme Court, shifted to *Brown*'s integrationist vision. Accordingly, the ambiguity of *Brown*, the southern resistance to the "all deliberate speed" formula, and the reconceptualization of the relation between right and remedy all combined to make judicial intervention a particularly powerful engine in the daily affairs of government. Frankfurter's restraint, in short, licensed the very activism that he feared.