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Symposium: Brown v. Board of Education and Its Legacy: A Tribute to Justice Thurgood Marshall, Panel I, Concluding Remarks

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PANEL I: CONCLUDING REMARKS

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OUR next panel will explore the limits of *Brown*[1] in the 1970s and 1980s, particularly in the area of segregation and education law. In evaluating the transforming power of *Brown* discussed by the first panel, let us first consider the nature of the basic choices made by courts.

The choices that a court makes in arriving at its constitutional decisions have great and long-standing consequences. For example, in *Plessy v. Ferguson*,[2] the Supreme Court chose to adopt the premise that segregation of the races did not stamp Blacks with a badge of inferiority.[3] Consequently, a spate of Jim Crow laws were enacted by state legislatures[4] and a regime of racial subjugation under the law ensued for generations. *Plessy*, however, had its own limits. Within its limits, of course, was the erroneous premise that state-enforced segregation did not impose a caste label of subjugation on Blacks, a veritable mark of inferiority on the forehead of every African-American.

In focusing on the fate of *Plessy* in *Brown I*, the Warren Court finally chose to reject this segregation standard. In an infrequently quoted, and probably less-remembered line, the Warren Court cited the district court finding that segregation is usually interpreted as denoting the inferiority of the Negro race, and held that "[a]ny language in *Plessy v. Ferguson* contrary to this finding is rejected."[5]

In *Brown I* and *Brown II*, however, there is, at best, an opaque standard for the actual constitutional violation. It is not entirely clear whether it is a type of suspect classification, as in *Bolling v. Sharpe*,[6] where, in essence, the Court stated that there was no rational reason for separating children on the basis of race in schools.[7] In fact, *Brown I* hints that an anti-caste principle should guide the jurisprudence of the courts in future years.[8] In *Brown II*, there is again a hint of a massive constitutional violation. Recognition that an entire system of segregated schooling was at stake, however, is the reason given for the delay in the admission of the named plaintiffs to otherwise Whites-only schools.[9] Moreover, for the next fourteen years the Court steadfastly refused to

1. *See* Brown v. Board of Educ., 349 U.S. 294 (1955) (*Brown II*); Brown v. Board of Educ., 347 U.S. 483 (1954) (*Brown I*).
2. 163 U.S. 537 (1896).
3. *See id.* at 550-51.
4. *See* Paul R. Dimond, The Supreme Court and Judicial Choice 31-59, 105-17 (1989); Paul R. Dimond, *The Anti-Caste Principle—Toward a Constitutional Standard for Review of Race Cases*, 30 Wayne L. Rev. 1, 19-21 (1983).
5. Brown v. Board of Educ., 347 U.S. 483, 494-95 (1954) (*Brown I*).
6. 347 U.S. 497 (1954).
7. *See id.* at 499-500.
8. *See Brown I*, 347 U.S. at 493-95.
9. *See* Brown v. Board of Educ., 349 U.S. 294, 300-01 (1955) (*Brown II*).

PANEL II:
CIVIL RIGHTS AND EDUCATION AFTER *BROWN*