

Brown v. Board of Education: Its Continuing Significance

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Introduction

One of the most important decisions that the U.S. Supreme Court has ever rendered is *Brown v. Board of Education of Topeka Kansas*, 1954 (*Brown*).¹ In *Brown* the Supreme Court — the final authority on questions of constitutionality — declared that the segregation of black children from white children in the nation’s public schools is unconstitutional.

Many politicians and scholars criticized the U.S. Supreme Court for its “activist” role in attempting to change society while others applauded the decision.² In order to fully understand the impact of the decision and to comprehend the intensity of the reaction to the decision — by both supporters and detractors — it is necessary to review the unique history of the United States and its impact on racism and prejudice in that country. It is also necessary to review the legal precedents on race and segregation from the *Civil Rights Cases* in 1883 up to *Sweatt v. Painter* in 1950.

I. Historical Context: Segregation in the American South

Racism and prejudice are not unique to the United States. However, discrimination against African-Americans in the United States — the world’s first constitutional democracy — developed out of a history which includes (1) the importation of Africans as slaves to the United States,³ (2) a Civil War (1861-1865) necessitated by the attempt of states in the American South to secede from the United States in order to protect the institution of slavery, and (3) the abolition of slavery in the United States by amendment to the U.S. Constitution. Acceptance

¹ 347 U.S. 483.

² Additional critiques are discussed in section V of this article.

³ The first Negroes landed at Jamestown in 1619. Outlawing slavery depended on each state: Vermont, the first Northern state to abolish by constitution, in 1777, and New Jersey, the last Northern state, in 1804. L. LITWACK, *NORTH OF SLAVERY*, at 3-20 (1961) *quoted* by DERRICK A. BELL, JR., *RACE, RACISM and AMERICAN LAW* (Second Edition, Little Brown) at 8-10 (1980).

of this Amendment was forced upon the Southern states by the victorious North following the Civil War.

This historical backdrop had a huge (a negative) impact on the status of blacks in ordinary daily life in the South. Racial discrimination and segregation was a ubiquitous part of life in the American South.⁴ “On the eve of *Brown*, virtually every facet of life in the South was segregated. ... Beyond public accommodations, schools, and the workplace, everything else was segregated,”⁵ including (1) facilities such as homes for the aged, orphanages, and institutions for juvenile delinquents, and (2) accommodations such as motels, hotels, elevators, restaurants, bars, lunch counters, restrooms and even drinking fountains.

The situation was markedly different in the North where race discrimination was regarded as vicious and where state mandated segregation was almost universally illegal. State legislators enacted laws to reject other forms of discrimination based on race. For example, Minnesota (by act in 1885) prohibited hotels, restaurants, common carriers, and other businesses from denying black people equal access. Penalties for violation of the Act included fines from \$25 to \$100 and jail time of thirty to ninety days. Pennsylvania (by act in 1887) mandated equal access to public transportation, theaters, hotels, restaurants, concerts, and other places. Fines for violation of the Act ranged from \$50 to \$100. New Jersey (by act in 1884) provided fines from \$500 to \$1,000 against similar discrimination. The New Jersey Act also protected the right of blacks to serve on juries and provided up to a \$5,000 fine for any official who refused to call a black person for jury service.⁶ Courts throughout the North enforced these laws.

It was against this historical backdrop of segregation that *Brown* came before the Supreme Court.

II. Legal Context: Pre-*Brown* precedents discussed

Brown was not the first case to come before the U.S. Supreme Court that involved the question of the legality of racial discrimination under the equal protection clause of Fourteenth Amendment.⁷ *Brown* was decidedly different because it virtually overturned the Court’s own early decisions on equal protection and race. To illustrate how *Brown* departed from earlier cases decided by the

⁴ This is not to say that prejudice and racism did not exist in the North, but it was not legal in Northern states.

⁵ Paul Finkelman, “*The Radicalism of Brown*” 66 UNIV. OF PITTSBURGH LAW REV(2004) at 43, 48.

⁶ Paul Finkelman, *Book Review: “Civil Rights in Historical Context: In Defense of Brown,”* 118 HARVARD LAW REVIEW 981-982 (2005). An additional example comes from Ohio where, in 1884, a new civil rights law was adopted that declared that all its citizens were “equal before the law” and that such a status was “essential to just government.” In 1896 in Ohio, a tough anti-lynching law was passed, which was described as “the most comprehensive measure against mob violence.” *id.* at 983.

Court — even cases in which the Court granted relief to black plaintiffs — I will review the history of pre-*Brown* precedents from the *Civil Rights Cases* (1883), in which the federal law that banned race discrimination in public places, such as inns and theaters, was declared unconstitutional and void through *Sweatt v. Painter* (1950), in which the Court ordered the University of Texas School of Law to admit a black applicant — even though a black law school was available. It was against this legal backdrop, discussed in detail below, that *Brown* came before the Supreme Court.

(1) The Civil Rights Cases, 1883⁸

The “Civil Rights Act” passed by Congress on March 1, 1875 was an attempt by Congress to legislate equal treatment of blacks throughout the nation. The first section of the Act guaranteed that “all persons ... shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement.” The second section provided severe penalties for violation of the Act. “[A]ny person who shall violate the foregoing section” shall be “fined not less than \$500 nor more than \$1,000, or shall be imprisoned not less than 30 days nor more than one year.”

The Civil Rights Cases were the consolidated cases of a number of plaintiffs — inn keepers, theater managers and railroad companies — who had been fined under the “Civil Rights Act” and who brought their cases to the Supreme Court. The plaintiffs asserted that Congress had no power to regulate private actions even though they were racially discriminatory.

In his opinion of the Court which overturned the Civil Rights Act of 1875, Justice Joseph P. Bradley, agreed with the plaintiffs that Congress did not have such sweeping power as provided by the Act over the private sector of society. Justice Bradley stated, “[i]t is state action of a particular character that is prohibited [by the Fourteenth Amendment]. Individual invasion of individual rights is not the subject matter of the amendment. ... It [the Fourteenth Amendment] does not invest congress with power to legislate upon subjects which are within the domain of state legislation. ... It does not authorize congress to create a code of municipal law for the regulation of private rights.”⁹

By this decision, the Supreme Court prevented a Congressional attempt to rid the nation of race discrimination by the private sector.

⁷ The Fourteenth Amendment to the United States constitution was proposed in 1866 and passed by the U.S. Congress in July, 1868. The Amendment provides, in part, that “... *No State* shall ... deny to any person within its jurisdiction the equal protection of the laws.” [emphasis added.] Interpretation of the equal protection clause was left to legislators, subject to review by the U.S. Supreme Court.

⁸ 109 U.S. 3.

⁹ 109 U.S. 3, 11.

(2) *Plessy v. Ferguson*, 1896¹⁰

More than 10 years after the Civil Rights Cases, the Supreme Court was still hesitant to interpret the equal protection clause of the Fourteenth Amendment to prohibit segregation — even when state action was obviously involved.

Homer Plessy, a resident of Louisiana of mixed descent (1/8 black and 7/8 white), entered a passenger train in New Orleans with a paid first-class ticket and took a vacant seat in a coach for passengers of the white race only. Plessy was ordered by the train conductor to vacate the coach and occupy another seat in a coach assigned for persons not of the white race. When Plessy refused to comply with the order, he was forcibly ejected from the coach and arrested for violating the Separate Car Act of Louisiana (passed July 10, 1890). The Act provided “that all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations. ... No person or persons shall be permitted to occupy seats in coaches, other than the ones assigned to them, on account of the race they belong to.” The Act further provided that “any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison”¹¹

The trial judge held that the Separate Car Act did not violate the U.S. Constitution because the state of Louisiana was permitted to regulate railroad companies that operated solely within state boundaries. Homer Plessy was convicted of violating the Act by refusing to leave the car reserved for white passengers. Plessy appealed his conviction, but it was upheld by the Supreme Court of Louisiana. Thereafter, Plessy appealed his case to the U.S. Supreme Court arguing, among other things, that the Separate Car Act violated the equal protection clause of the Fourteenth Amendment.

Justice Henry B. Brown, affirming the Louisiana Supreme Court decision against Plessy, delivered the opinion of the court. While conceding that “[t]he object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law,” Justice Brown denied that the Fourteenth Amendment “intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.”¹² Moreover, Justice Brown justified the separation of people based on race stating, “[l]aws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other.”¹³ In short, the Court

¹⁰ 163 U.S. 537.

¹¹ *Quoted* at 163 U.S. 537, 540-541.

¹² 163 U.S. 537, 544.

held that the Fourteenth Amendment did not prohibit distinctions in legislation based upon race, so long as the legislation does not deprive anyone of rights or privileges.

Justice Brown used the acceptance of legally required segregation of public schools to further support his opinion stating, “[t]he most common instance of this [segregation] is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.”¹⁴

Justice Brown further stated, “[i]n determining the question of reasonableness, it [the legislature] is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.”¹⁵

The Court in *Plessy* upheld the status quo in terms of race discrimination. Even though the Court did not use the phrase “separate but equal,” the doctrine — derived from *Plessy* — became the guiding principle in race relations for the next fifty plus years.

(3) *Gaines v. Canada*, 1938¹⁶

Beginning in 1930’s, the U.S. Supreme Court gradually started to overturn state legislation that either required or permitted discrimination based on race. The Court did so by examining more closely the “equal” portion of the “separate but equal” doctrine especially in challenges to discrimination in public colleges and graduate schools.

In *Missouri ex rel. Gaines v. Canada Registrar of the University of Missouri, et al* (1938) Lloyd Gaines, a resident of the State of Missouri, was denied admission to the School of Law of the University of Missouri solely because he was black.

Gaines sought judicial relief asserting, among other things, that the policy of the state of Missouri violated the equal protection clause of the Fourteenth Amendment and therefore the policy was unconstitutional. The Missouri state courts, including the Missouri Supreme Court, denied Gaines’ assertion on the ground that under Missouri law Gaines could be provided funding for tuition at

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 163 U.S. 537, 550-551.

¹⁶ 305 U.S. 337.

a law school in another state¹⁷ in lieu of acceptance at the University of Missouri School of Law.

The U.S. Supreme Court disagreed. Reversing the judgment of the Supreme Court of Missouri, Chief Justice Charles Evans Hughes recognized that “there is no express constitutional provision requiring that the white and negro races be separated for the purpose of higher education.” Despite this fact, Justice Hughes says, “the state court ... held that ... [the State of Missouri] intended to separate the white and negro races.” The State did, however, “fully recognize the obligation of the State to provide negroes with advantages for higher education substantially equal to the advantages afforded to white students,”¹⁸ as required under the “separate but equal” doctrine. The Missouri Supreme Court believed the State fulfilled the “separate but equal” doctrine by providing money for black students to study at colleges outside of the state.

Chief Justice Hughes questioned whether the education provided by the State of Missouri to black law students was “equal” to that provided for white students. He turned to the facts of higher education in Missouri. Lincoln University accommodated black students “on the same basis as the state university for white students,” but Lincoln University did not yet have a law school. Chief Justice Hughes stated the issue: “that instruction in law for negroes is not now afforded by the State, either at Lincoln University or elsewhere within the State, and that the State excludes negroes from the advantages of the law school it has established at the University of Missouri.”¹⁹

The exclusion of black students from legal education in the state while it is available to white students in the same state could by itself constitute a violation of the equal protection clause of the Fourteenth Amendment. However, the state statute provided a remedy for black students, and it was necessary to evaluate the statute in light of the remedy to determine whether the equal protection clause was violated. The remedy was: “the curators shall have the authority to arrange for the attendance of negro residents of the state of Missouri at the university of any adjacent state to take any course or to study any subjects provided for at the state of Missouri ... and to pay the reasonable tuition fees for such attendance”²⁰

Chief Justice Hughes questioned “whether the provision for the legal education in other States of negroes resident in Missouri is sufficient to satisfy the constitutional requirement of equal protection.” He found the remedy lacking:

The basic consideration is not as to what sort of opportunities, other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment

¹⁷ Section 9622 of the Revised Statutes of Missouri (1929). *Quoted* at 305 U.S. 337, 342-43.

¹⁸ 305 U.S. 337, 344.

¹⁹ 305 U.S. 337, 345.

²⁰ Section 9622 of the Revised Statutes of Missouri (1929).

of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups *within* the State[emphasis added]. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.²¹

Although the decision of the Supreme Court in this case affirmed Gaines' right to be admitted to the School of Law of the University of Missouri, its fundamental logic did not challenge the "separate but equal" doctrine. Rather, as stated above, the Court held "[t]he admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State." The Court accepted the separation of people because of race, as long as the equality of the privileges afforded to each race is maintained. If there had been a law school at Lincoln University of substantially of the same quality as that at the University of Missouri, Gaines would not have been admitted to study law in the School of Law of the University of Missouri.

While the Supreme Court granted Gaines the relief he sought, the Court did so by application of the tangible facts to the "separate but equal" doctrine.

(4) Sweatt v. Painter, 1950²²

Sweatt, a black student in Texas, applied to the University of Texas Law School which is a state-supported law school. His application was rejected solely because he was black, and attendance by blacks at the Law School was forbidden under Texas state law. While the case was pending in the state trial court, the State of Texas started a separate law school for Negroes. Sweatt could have been admitted to that school had he so wished. However, Sweatt refused to attend the newly created law school for blacks and continued the suit.

The State courts, including the Texas Supreme Court, found that the new law school would offer Sweatt "privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas," and did not grant him a relief. The case came before the U.S. Supreme Court on *certiorari*.

Chief Justice Fred M. Vinson reversed the decision of the Texas Supreme

²¹ 305 U.S. 337, 349-50.

²² 339 U.S. 629.

Court. The Supreme Court, once again, focused on the “equal” portion of the “separate but equal” doctrine. Justice Vinson examined the equality between the University of Texas Law School and the newly opening law school for Negroes. This time, however, the Court looked not only at tangible differences between the two schools but also at intangible factors, such as reputation of the school. The Chief Justice compared the two law schools as follows:

The University of Texas Law School ... was staffed by a faculty of sixteen full-time and three part-time professors, some of whom are nationally recognized authorities in their field. Its student body numbered 850. The library contained over 65,000 volumes. Among the other facilities available to the students were a law review, moot court facilities, scholarship funds, and Order of the Coif affiliation. The school’s alumni occupy the most distinguished positions in the private practice of the law and in the public life of the State.

The law school for Negroes which was to have opened in February, 1947, would have had no independent faculty or library. The teaching was to be carried on by four members of the University of Texas Law School faculty, who were to maintain their offices at the University of Texas while teaching at both institutions. Few of the 10,000 volumes ordered for the library had arrived; nor was there any full-time librarian. The school lacked accreditation.²³

From these facts the Chief Justice concluded that Sweatt should be admitted to the University of Texas Law School, not the newly opening law school for blacks:

... [W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. *What is more important* [emphasis added], the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.²⁴

In this case, as in *Gaines*, the U.S. Supreme Court overturned the decision of the State’s highest court. The Court did not question the constitutionality of the “separate but equal” doctrine in either case. But in both *Gaines* and *Sweatt*, the facts showed that the conditions for black students were not equal.

Sweatt went further than *Gaines* because Chief Justice Vinson included the *intangible* factors as well as *tangible* factors when evaluating the equality between the law school for white students and the law school for black students.

Although neither case questioned the constitutionality of the “separate but

²³ 339 U.S. 629, 632-633.

²⁴ 339 U.S. 629, 633-34.

equal” doctrine, it was becoming apparent that a high measure of equality would be required in order for separate to be acceptable.

III. Public Education in the South: How “Equal” is “Separate”

Brown was decided nearly a century after the end of the Civil War and ratification of the 13th, 14th and 15th Amendments to the U.S. Constitution. More than half a century after the Supreme Court enunciated the “separate but equal” doctrine in *Plessy*, segregation was the norm in the American South. Segregated public schools had prevailed in the District of Columbia — the nation’s capital — since the end of the Civil War in 1865. In 1951 seventeen Southern and border States “required” segregation of public schools, and four other states permitted local districts to impose segregation in their schools. A look at statistics concerning public spending for these segregated schools gives a clear picture of the problem with the “separate but equal” doctrine.

In 1940 public spending per pupil in Southern black schools averaged 45% of that in white schools. Notably, in South Carolina, Georgia, and Alabama black schools received funding equal to only 33% of the monies received by white schools. The financial situation of black schools was even worse in Mississippi where public spending for black schools was only 15% of what was spent on white schools. By 1954 (when *Brown* was decided) this sum was being “equalized,” and black schools were receiving 60% of the funding of white schools.²⁵

A few numbers will further illustrate the disparity. In the 1949-50 school year, Clarendon County, South Carolina, “spent \$179 per white child in the public schools; for each black child, they spent \$43 [T]here were then sixty-one black schools, more than half of them ramshackle or plain falling-down shanties that accommodated one or two teachers and their charges, and twelve schools for whites. The total value of the sixty-one black schools attended by 6,531 pupils was officially listed as \$194,575. The value of the white schools, attended by 2,375 youngsters, was put at \$673,850.”²⁶

The inequality of spending might have been sufficient for the *Gaines* Court to determine that the opportunities the state furnished to white students and denied to blacks solely upon the ground of color violated the equal protection clause because the separate schools were not equal. The Supreme Court in *Brown* took the approach of the *Sweatt* Court and looked to intangible factors in determining equality. But the *Brown* Court, as discussed below, took the analysis a step further and found that, because of the intangible factors, separation of children based upon race was inherently unequal when it came to public education.

²⁵ JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (Oxford University Press, 2001) at xvi-xvii.

²⁶ RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY*(First Vintage Books Edition, 2004) at 7-8.

IV. The *Brown* decisions

(1) *Brown v. Board of Education of Topeka, 1954 (Brown)*

The named plaintiff, Linda Brown, was an African-American child who resided in the State of Kansas. She was denied admission to a public school attended by white children because Kansas state law permitted segregation according to race. Linda Brown was forced to attend a school composed only of African-American students. Brown sought the aid of courts arguing that segregation deprived her of the “equal protection of the laws” guaranteed by the Fourteenth Amendment. The State courts upheld the segregation of the public schools under the “separate but equal” doctrine of *Plessy* holding that “equality of treatment [wa]s accorded when the races are provided substantially equal facilities,”²⁷ even though black students were not permitted to go to the same schools attended by white students.

In *Brown*, the U.S. Supreme Court consolidated cases from other states challenging segregation of public schools. Chief Justice Earl Warren stated in the beginning of the opinion of the Court that “[t]hese cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.”²⁸

With regard to the disparity of spending between white schools and black schools, Chief Justice Warren stated, “the Negro and white schools involved have been equalized, or *are being equalized*, [emphasis added] with respect to buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors.”²⁹ Thus, the Court “look[ed] instead to the effect of segregation itself on public education.”³⁰

Chief Justice Warren stated, “[i]n approaching this problem, we cannot turn the clock back to 1868, when the [Fourteenth] Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.”³¹ The Court’s orientation, to the present and the future rather than to the past, is an outstanding feature of the *Brown* decision.

The Chief Justice went on to ask, “[d]oes segregation of children in public schools solely on the basis of race, even though the physical facilities and other

²⁷ 347 U.S. 483, 488.

²⁸ 347 U.S. 483, 487. For the further details of each one of these four cases, see footnote 1 of the decision.

²⁹ 347 U.S. 483, 492.

³⁰ *Id.*

³¹ 347 U.S. 483, 492-493.

‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?”³²

In the unanimous opinion of the Court, Chief Justice Warren cited seven articles from Journals of Social Sciences and Psychology (see footnote 11 of the Court’s opinion) and concluded, “[w]e believe that ... [segregation] does,” [deprive the children of the minority group of equal educational opportunities] because “[t]o separate them 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.”³³

In more or less ten pages of the opinion, the Court overruled the “separate but equal” doctrine as it applied to public education. While not striking down “separate but equal” in other areas of law — such as in public transportation or restaurants — the decision authored by Chief Justice Warren nevertheless undermined the sixty-year tradition and legal status quo of segregation in the American South.³⁴

(2) *Brown v. Board of Education of Topeka, 1955 (Brown II)*³⁵

The Supreme Court’s sweeping rejection of segregation in public schools was a lofty idea. But, rather than require schools to integrate immediately, the Court set the case for further argument the following year. Many supporters of *Brown* felt let down by the Court and thought the wait was a setback for integration of the public schools. In determining to delay, the Court stated:

[T]he consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on ... [implementation of the decision] ... The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae³⁶

The following year, Chief Justice Warren delivered the decision in *Brown II* with explicit terms on how to implement desegregation in the states as well as the role of the courts in the implementation. While stating that “[a]ll provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle [that separate education is inherently unequal],” he conceded that “there remains for consideration the manner in which relief is to be accorded.”³⁷

³² 347 U.S. 483, 493.

³³ 347 U.S. 483, 494-495.

³⁴ Kansas was one of the four non-southern states that had segregation. “Jim Crow” in Topeka, Kansas is described by KLUGER, *supra* note 26, at 375-376.

³⁵ 349 U.S. 294

³⁶ 347 U.S. 483, 495-496.

The Chief Justice further conceded that “[s]chool authorities have the primary responsibility for elucidating, assessing, and solving these problems.”³⁸ But the Court did require “a prompt and reasonable start,” saying, “[w]hile giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling.” However, he also allowed for flexibility in the timing of the implementation of integration, stating, “[o]nce such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner.”³⁹

As to the courts’ role in this implementation, the Chief Justice ordered the lower federal courts “to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.”⁴⁰ He gave the judiciary more responsibility, but also more leeway stating:

[T]he courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.⁴¹

Chief Justice Warren summed up the essence of the opinion when he declared, “the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with *all deliberate speed* the parties to these cases.”⁴² [emphasis added]

In *Brown II*, as in *Brown*, Chief Justice Warren, though limiting the scope of both decisions to public school, repealed the “separate but equal” doctrine and made “*de jure*” (legal) segregation of public schools unconstitutional. This would eventually have an impact on “*de facto*” (actual) segregation which is not mandated or even permitted by law, but which exists nonetheless.

³⁷ 349 U.S. 294, 298.

³⁸ 349 U.S. 294, 299.

³⁹ 349 U.S. 294, 300.

⁴⁰ 349 U.S. 294, 299.

⁴¹ 349 U.S. 294, 300-301.

⁴² 349 U.S. 294, 301.

V. Critiques of *Brown*: Are They Valid?

(1) The Court Did Too Little

As indicated above, many supporters of *Brown* had wanted the Court to act quickly to end the segregation of public schools. The Court did not do so in *Brown* and even *Brown II*, with its “all deliberate speed” requirement, permitted delay in the integration of public schools required by *Brown*. Given the antagonism toward integration, it is not clear that the Court would have been any more successful even if it had attempted to end segregation immediately.

(2) The Court Did Too much

The Court was also criticized for taking the initiative in a nation-wide movement toward desegregation and for attempting to change the discriminatory legal status quo and eventually reform the social structure. This, critics said, was the role of the Congress and not the role of the Court. Perhaps the Court was attempting to reform American society, but it did so within the confines of its role as the final interpreter of the constitutionality of legal segregation.

(3) The Court Did Not Use Proper Precedents

The *Brown* Court did not rely on legal precedents and legal authoritative theories and doctrines — the traditional approach of American courts. Rather, the Court relied upon what some legal scholars considered rather dubious findings of modern psychology. Some scholars disapproved of the use of non-legal authorities as the basis for overturning a legal doctrine. The problem with this criticism is that legislatures do not pass laws in a vacuum. Thus it would be counterproductive for the Court to assess the constitutionality of laws without reference to information from other disciplines.

(4) The Decision Caused Violence in the South and Slowed Down Civil Rights

Another criticism was that the decision brought about extremely radical reactions in some Southern states and set back civil rights. Some Critics argued that “[w]ithout *Brown*, negotiation might have continued to produce gradual change without inciting white violence,” or that the decision led to unnecessary violence by “inspir[ing] southern whites to try to destroy the NAACP [National Association for the Advancement of Colored People].”⁴³ Even assuming that *Brown* caused violence in the South, it is unfair to criticize the U.S. Supreme Court or the decision unless the Court delivered the opinion in order to incite violence in the country. However, the intention of the Court in *Brown* was not to cause violence, but to undo a longstanding injustice and to avoid future harm.

⁴³ MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (Oxford Univ. Pr., 2004) at 442 and 468.

The *Brown* decisions may not even have led to any increase in violence in the South. "It is not clear ... how much of the violence was caused by *Brown* or even by school desegregation orders. The closest thing to a truly violent response to school desegregation occurred in Little Rock. But no one was killed in Little Rock, and there was not really much violence. Troops were called out, the city was 'occupied,' and desegregation took place.... [T]he violence was quite limited and stands in dramatic contrast to the violence in other parts of the South against the civil rights movement and against calls for integration that did not involve the public elementary and secondary schools."⁴⁴ In terms of violence, "the opposition to *Brown* was for the most part quite nonviolent,"⁴⁵ and the most common way to defy the law "was to delay, defy, massively resist, and evade the law.... The Southern states were prepared to fight a long-running battle against school desegregation in the district courts and in school boards."⁴⁶

Conclusion: the Passage of Time Has Not Diminished the Importance of *Brown*

Perhaps the Supreme Court could have used *Brown* to specifically attack segregation in other spheres beside public education. Possibly the Court could have required integration of public schools without any delay at all. But the failure of the Court to do either of these things does not diminish the significance of *Brown* and *Brown II*. Though it may have seemed slow at first, the moral message of the opinion, authored by Chief Justice Warren, triggered a change in the social structure of the entire nation.

Ten years after the decision, Congress passed the Civil Rights Act of 1964. The next year, they passed the Voting Act of 1965, and in 1968, Congress passed the Open Housing Act. These Acts, taken together, eliminated "*de jure*" segregation

⁴⁴ Finkelman, *supra* note 6 at 1011 (2005).

⁴⁵ *Id.* at 1012.

⁴⁶ *Id.* The short summary of what happened in Little Rock is that "the Arkansas state legislature passed a state constitutional amendment registering opposition to the desegregation decisions and enacted legislation 'relieving school children from compulsory attendance at racially mixed schools.' Since school was to begin in the fall of 1957 under a desegregation plan designed by the Little Rock School Board, the Governor of Arkansas, Orval Faubus, sent units of the Arkansas National Guard to Central High School in Little Rock and placed it 'off limits' to black students. Crowds gathered and violence was threatened. The school board sought postponement of *Brown* implementation because of 'extreme public hostility.' In *Cooper v. Aaron* (358 U.S. 1: 1958), the Court unanimously found the situation 'directly traceable' to provocative actions by state officials and rejected the request to postpone." RALPH C. CHANDLER, RICHARD A. ENSLEN, PETER G. RENSTROM, THE CONSTITUTIONAL LAW DICTIONARY, Vol. 1 (ABC-CLIO, 1985), at 328-29. The U.S. Supreme Court, in *Alexander v. Holmes County Board of Education* (396 U.S. 19: 1969), ordering the Board of Education unitary school systems "at once," ended the "all deliberate speed" of *Brown II*, which gave the Board of Education some flexible time.

everywhere in the country. Although it would take many years, the end of “*de jure*” segregation marked the beginning of the end of “*de facto*” segregation as well.