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SYMPOSIUM PAPERS

INTRODUCTION: *BROWN* IN THE SUPREME COURT

Dennis J. Hutchinson*

May 17, 1954. Almost fifty years ago, the Supreme Court of the United States decided *Brown v. Board of Education*,¹ and held unanimously that in the field of education separate but equal has no place. It did not overrule *Plessy v. Ferguson*,² the 1896 decision holding that Jim Crow laws segregating people on the basis of race in transportation did not violate the equal protection clause.

Twenty-five years ago I interviewed Justice Thurgood Marshall for an article on *Brown*,³ and I asked him how it felt at that moment—high noon in the Supreme Court—when the nine justices came in to announce their decision. He said, “I thought we were going to win, I wasn’t sure we were going to win. I looked at Justice Stanley Reed, and [he] wouldn’t look back at me, so I knew it was going to be unanimous.”⁴

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

2. 163 U.S. 537 (1896).

3. Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 Geo. L.J. 1 (1979)

⁴ Interview with Thurgood Marshall, J., U.S. S. Ct. (Aug. 15, 1979) (interview notes on file with author).

We have later learned that Justice Reed was the last holdout to decision and almost dissented in *Brown*. But Chief Justice Warren, who had just come to the court within the last year, was determined that the decision overturning racial segregation, at least as imposed by the states, was going to be unanimous, and he worked very hard to get Justice Reed to join the opinion. Now, Warren has become famous for that unanimity, but I want to suggest to you that it came at a price.

There are really two *Browns*, and they are symbolized by the two quotations that you have on your programs.⁵ There was the *Brown* in 1954, which declared that in the field of education separate but equal has no place. But the question was how that would be enforced. In some respects the other shoe did not drop until a year and two weeks later, on May 31, 1955, when the court issued its opinion in what has come to be called *Brown II*. Look at the text:

The judgments below are accordingly reversed and 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.

With all deliberate speed. As events quickly proved, certainly here within two or three years, and throughout the South, deliberation quickly overcame speed. And the oxymoron that

⁵ The symposium program contained the following excerpts from the *Brown* opinions:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown I, 347 U.S. at 493.

The judgments below . . . are accordingly reversed and 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.

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

Justice Frankfurter insisted Chief Justice Warren use in that opinion quickly captured the pace at which desegregation would occur.

Indeed by 1964, ten years after the first *Brown* decision, the percentage of black school children who were attending schools with whites in the South was less than two percent. There was no substantial desegregation of public schools in this country until the mid 1960s, and that was only because at that point the Department of Health, Education and Welfare, as it then was, began to use the carrot and stick of federal funding and threatened to, and did in some cases, cut off federal funds to schools that had formerly been segregated and did not desegregate.

So the courts proved remarkably ineffectual in making the shining promise of *Brown I*, as it came to be called, a reality. I want to explore that briefly at this point.

I said that unanimity came at a price. The court since 1948 had been unanimous on questions of segregation and racial discrimination. The year 1948 is really as important as 1954 or 1955. What happened in 1948? It was a presidential election year. Harry Truman was woefully behind in the polls. He had just accepted the report of his President's Committee on Civil Rights, whose establishment was a bold move in the first place, with Congress in the control of Southern conservatives. He ordered the armed forces desegregated on a racial basis, such that the barracks would no longer be white barracks and black barracks, that units would no longer be white units and black units. And he authorized his attorney general to sign a brief in the Supreme Court in the most important case to that point involving racial discrimination after World War II, *Shelley v. Kraemer*,⁶ which involved the question of whether racially restrictive covenants violated the Fourteenth Amendment.⁷

The brief signed by Attorney General Tom Clark in *Shelley v. Kraemer* was the first time in history that an Attorney General of the United States had signed a brief as a friend of the court in a civil rights case. The symbolism was terribly important, and the politics was terribly significant, as Harry Truman knew.

6. 334 U.S. 1 (1948).

7. A racially restrictive covenant is a clause in a deed requiring transfer of that property only to people of a certain race.

There were many black voters in Cleveland, in Chicago, and in Los Angeles. And in the famous upset victory in 1948, Harry Truman benefited enormously from the black vote in those three cities to win in those three states.

When the Supreme Court decided unanimously in *Shelley v. Kraemer* that racially restrictive covenants violated the Fourteenth Amendment, I think there was a sense of a momentum building that the law was finally acknowledging the constitutional evil of Jim Crow. Then in 1950 in a trio of cases, one of which has already been mentioned, the court again decided unanimously that racial segregation first in law schools, the University of Texas Law School,⁸ in graduate schools of education,⁹ and in interstate transportation, although it was only on a statutory ground,¹⁰ was unlawful. The United States itself argued in *Henderson*, the transportation case, that *Plessy v. Ferguson* should be overruled.

So you had a cascading set of cases decided unanimously striking down Jim Crow in one place after another. And that takes us to *Brown*, the public school cases. *Brown* is really five cases from various parts of the country, the District of Columbia, Delaware, South Carolina, Virginia, Kansas, all involving state-imposed or permitted racial segregation in the public schools.

The case was first argued in 1952, and the Court could not reach a resolution. They were stymied. There was a division within the Court. Some wanted *Plessy* overruled, others weren't sure that the Court either had the authority or should go forward with overruling *Plessy*, and so they failed to reach a decision. They ordered the case reargued the following fall, the fall of 1953. And over the summer Chief Justice Vinson, who had been one of the more reluctant justices about overruling *Plessy*, died. Justice Frankfurter told his law clerk at the time, "This is the first indication I have ever had that there is a God."¹¹

With Vinson off the Court and Warren installed as Chief Justice, it became much easier for the Court to unite one more time, and this time to declare that in the field of education

8. *Sweatt v. Painter*, 339 U.S. 629 (1950).

9. *McLaurin v. Okla. St. Regents*, 339 U.S. 637 (1950).

10. *Henderson v. U.S.*, 339 U.S. 816 (1950).

11. Richard Kluger, *Simple Justice* 676 (Vintage 1997).

separate but equal had no place. But the unanimity was achieved by separating the right from the remedy. The Court still couldn't decide what sort of order to issue to the school districts. Should they demand that there be instantaneous desegregation in all those states where it was practiced, whether compelled or permitted by law? Should they set some sort of time line? Or should they leave it entirely open-ended?

The case was argued for a third time. But by then we had a new administration in Washington, D.C. Harry Truman was out, Dwight Eisenhower was in. The Eisenhower administration was much less aggressive in the pursuit of protecting civil rights than the Truman administration had been. Indeed, while *Brown* was pending President Eisenhower invited Earl Warren, the new Chief Justice, to dinner at the White House, and as they were leaving after the meal he said, "These are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big overgrown Negroes."¹² This was not someone who was going to aggressively enforce anything that the Supreme Court decided. And to be perfectly fair the mechanisms weren't really in place in the Department of Justice to do so. Remember that the civil rights division of the Justice Department was not established until 1957. It was part of the Civil Rights Bill, the Civil Rights Act, as it became, in 1957. There was a civil rights section in the criminal division, but it was extremely small and largely devoted to prosecuting questions of vote fraud. So there really was no mechanism in place. But even if there had been, it's not clear that Eisenhower would have pushed at all for school desegregation.

I think this tragedy is captured in a conversation that I had with Justice Marshall in 1979, when I was researching the paper. The first quotation that you have in your program is one that sings to the moral best in all of us. And the second quotation temporizes and equivocates. And I asked Justice Marshall, now in retrospect looking back twenty-five years, how he looked at *Brown*, and this is what he said:

¹² Earl Warren, *The Memoirs of Chief Justice Earl Warren* 291 (Doubleday & Co., Inc. 1977).

In 1954 I was delirious. What a victory! I thought I was the smartest lawyer in the entire world. In 1955, I was shattered. They gave us *nothing* and they told *us* to work for it. I thought I was the dumbest Negro in the United States.¹³

So the sense of *Brown* offering great promise but failing to provide the mechanism for delivery is one that has haunted the entire career of the case. But *Brown* has been much more than that. It has been a symbol for the capacity of courts to ensure justice. It has been a symbol outside of courts to those who press for racial equality, social equality, and social justice.

It has also been a symbol, as has been debated more recently, of the incapacity of the courts to change social norms. Part of the reason for these various views of *Brown* is that the first paragraph that you have in your program and the first opinion in *Brown* really talk more in moral terms than in legal or theoretical terms. The case can be said to stand for any number of things. It can be said to stand for racial equality in all social circumstances that the government touches. It can be said to stand for non-discrimination, a color-blind constitution such as is advocated by the first Justice John Marshall Harlan in his dissent in *Plessy v. Ferguson*, and is now argued for by that other great nineteenth century liberal, Antonin Scalia. It's exactly the same thing, a color-blind constitution.

So whatever *Brown* has delivered, it has produced a ringing ambiguity as to what it at bottom it stands for, but it also has meant so much more, and that we will be exploring today.



13. Dennis J. Hutchinson, *A Century of Social Reform: The Judicial Role*, 4 Green Bag 2d 157, 168 (2001).