Florida Journal of International Law

Volume 29 | Issue 1 Article 45

2017

The Meaning of "Equal": Evolution of Racial Equality in the United States

Jon L. Mills
University of Florida

THE MEANING OF "EQUAL": EVOLUTION OF RACIAL EQUALITY IN THE UNITED STATES

Jon L. Mills[*]

This story is about the meaning of one word: equality. Although the founding documents of 1776 said "that all men are created equal," "equal" had to be translated time and again, each time getting us closer to its true meaning. In 1954, federal and state governments segregated nearly every part of society: water fountains, public toilets, restaurants, hotels, nightclubs, neighborhoods, railroad cars, buses, and schools. The exclusion of blacks was systematic and profound. Though all of these practices were particularly vivid in the American South, they were by no means exclusive to the South. Slavery, the root of unequal treatment, survived the Civil War that was fought to abolish it. Immediately following the Civil War, during Reconstruction, a country that was purportedly equal under law through the Thirteenth, Fourteenth, and Fifteenth Amendments became progressively more discriminatory.

The focus of this paper is the 1954 U.S. Supreme Court case, *Brown vs. Board of Education*, the spark that reignited the long-time quest for racial equality and that challenged the United States to live up to its constitutionally-expressed principles. The case—and the judges and lawyers who made it happen—changed society and the law. For us, the case provides the quintessential example of how the rule of law can work

* Dean Emeritus, Professor of Law, and Director, Center for Governmental Responsibility, University of Florida Levin College of Law.

in the United States to the benefit of the people. After all, the courts have the final word on the meaning of the Constitution.

All branches of government, all state governments, and all citizens must follow the Constitution. But when the Constitution requires equality, it is the courts that define it. Central to the story of *Brown* is that the Court not only became the agent that changed the meaning of equality in 1954, but that the same Court had in 1896 both sanctioned discrimination and then cemented it in a twisted definition of equality. Therefore, this story does not intend to glorify the *Brown* opinion, but rather to describe the context of the system that allows judicial leadership, and sometimes demands it. Power in the United States is divided: the executive branch has an army; the legislative branch has the power of the purse; the states have sovereignty over all that is not controlled by the federal government; and the U.S. Supreme Court has the Constitution. While *Brown* is a powerful benchmark in the long struggle for equality, it also serves as an example of how the Constitution works in the real world of Presidents, Congress, southern Governors, federal judges, school districts, and school children who actually had to live through the hate and violence of what we who write from a comfortable distance might term "constitutional transition."

I. FROM THE PLANTATION SOUTH TO *PLESSY V. FERGUSON*

Slavery's dominance as the legal and economic core of the South cannot be overestimated. By 1860, the value of slaves as computed at the time was $10 trillion dollars.[1] In the southern states, there were 4 million slaves and 8 million whites.[2] The entire economy was based on the legal determination that slavery was permissible and that slaves were property. In 1857's *Dred Scott v. Sandford*, now considered its worst decision of all time, the U.S. Supreme Court concluded that a person of African descent could not be a U.S. citizen and declared a federal law, which freed slaves who had been brought into non-slavery systems' territories, to be unconstitutional.[3]

In many ways the *Dred Scott* decision galvanized the opposition and heralded the beginning of the end for slavery. Although that house of cards fell in 1865, the core precepts of discrimination did not. Nor did abolishing slavery and declaring a constitutional requirement for equal

1. Samuel H. Williamson & Louis P. Cain, *Measuring Slavery in 2011 Dollars*, MEASURING WORTH.COM, https://www.measuringworth.com/slavery.php [https://perma.cc/U88V-GLSU] (last visited July 25, 2017).

2. Robert Evans, Jr., *The Economics of American Negro Slavery, 1830–1860*, *in* ASPECTS OF LABOR ECONOMICS 186–87 (1962).

3. Dred Scott v. Sandford, 60 U.S. 393, 452 (1857).

treatment reverse a culture of discrimination. Initially, the U.S. government placed federal troops in southern capitals to enforce equality, but in 1877, as part of a deal that gave him the southern support that made him President, Rutherford B. Hayes removed federal troops from the South.[4] That left the southern governments free to reinvigorate discrimination.

As such, in the thirty years between the end of the Civil War and *Plessy v. Ferguson*, the public education system was still deliberately and definitively divided by race. Yet *Plessy*, the landmark case that accepted racial discrimination as constitutional, was not about schools, but rather about racial discrimination on the railroads.

II. SEPARATE BUT EQUAL

In 1890 Louisiana passed the "Separate Car Act," which required that blacks and whites ride in separate rail cars.[5] The law not only sanctioned racial segregation, it *required* it.[6] A group of black, creole, and white New Orleans activists created the Committee of Citizens and resolved to challenge the Act.[7] The Committee recruited Homer Plessy, a man of mixed race but classified by Louisiana law as an "octoroon" (7/8ths European descent and 1/8th African descent), and asked him to challenge the law by sitting in the white car rather than the "colored" car.[8] This bizarre legal categorization seemed to present an ideal challenge based on the language of the Fourteenth Amendment requiring equal treatment of the races, since the Louisiana law textually stated that races be treated differently.[9]

The day Plessy sat in the white car, the railroad company had been notified.[10] When Plessy refused to leave the white car, the railroad company detained him and turned him over to law enforcement.[11] Plessy was later convicted of violating the Separate Car Act.[12] Immediately, Plessy and the Committee of Citizens appealed the ruling. They claimed that the Separate Car Act had deprived Plessy of his Thirteenth and Fourteenth Amendment rights because he was treated unequally under the law of the state.[13] The Louisiana Supreme Court upheld Plessy's

4. Allan Peskin, *Was There a Compromise of 1877?*, 60 J. AM. HIST. 63, 64 (1973).
5. The Louisiana Railway Accommodations Act, 1890 La. Acts 152, 152–54.
6. *Id.*
7. KEITH WELDON MEDLEY, WE AS FREEMEN 117–27 (2003).
8. Plessy v. Ferguson, 163 U.S. 537, 539 (1896).
9. MEDLEY, *supra* note 7, at 200.
10. *Id.* at 139.
11. *Id.* at 139–43.
12. *Plessy*, 163 U.S. at 539.
13. *Id.*

conviction.[14] Eventually the case reached the U.S. Supreme Court, and in a 7–1 decision, the Court upheld the separation of races as a matter of law.[15] The majority opinion by Justice Brown stated:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[16]

Essentially, the Court said that separate facilities were legal as long as conditions were equal. Justice John Marshall Harlan forcefully dissented and said the decision would be viewed with the same derision as *Dred Scott*.[17] Harlan argued that, although the Constitution was color-blind, the majority decision implicitly accepted racial superiority—and inferiority—as a matter of law.[18] Thus, through the voices of seven Supreme Court Justices, the racist practices of the culture received a constitutional stamp of approval.

III. THROUGH THE LOOKING GLASS OF *MARBURY V. MADISON*

In the United States, the Supreme Court has the final decision over constitutional meaning. In 1803 Chief Justice John Marshall established the concept of "judicial review." He stated that the judicial branch and its ultimate court, the Supreme Court, have the authority to review the laws that Congress promulgates and that the Executive enforces for their constitutionality.[19] As history shows, words are important, but it is the authority to interpret that is the ultimate power. As Lewis Carroll wrote:

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
> "The question is," said Alice, "whether you *can* make words mean so many different things."
> "The question is," said Humpty Dumpty, "which is to be master—that's all."[20]

14. *Id.* at 540.
15. *Id.* at 537.
16. *Id.* at 551.
17. *Id.* at 559.
18. *Id.*
19. Marbury v. Madison, 5 U.S. 137, 147–48 (1803).
20. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING

IV. *BROWN V. BOARD OF EDUCATION*—THE COURTS, THE RULE OF LAW, AND REALITY

Brown presents a central character in the drama of reform in the U.S. justice system: the reformer-lawyer. Over the years, the courts frequently focused on landmark decisions and changes in constitutional and cultural policy. Change therefore required lawyers dedicated to those issues in order to be successful. Some lawyers devoted their lives to causes. Some came to the cause based on circumstance, and others had been lifelong crusaders for change. The American legal system both demands and allows the reform lawyer to exist. Since causes such as racial justice are not easily won, lawyers for such causes must craft strategic goals that often require many years of work and losses that outnumber wins. These lawyers have to choose carefully cases that will advance the goals of the overall strategy to achieve racial justice.

The National Association for the Advancement of Colored People (NAACP) had fought against the discrimination laid out in *Plessy* for decades. The NAACP conducted a careful and planned campaign to challenge those state laws that supported racial discrimination. Because of scant resources, the NAACP had to focus on those cases that implicated the Fourteenth Amendment and looked as if they could go up to the U.S. Supreme Court.[21] One of the masterminds of those cases and strategies was the leading lawyer behind the efforts—Thurgood Marshall.

Born in 1908, Marshall attended law school at Howard College after being rejected from the University of Maryland because of his race.[22] At Howard Law School, Marshall teamed up with Dean Charles Houston, a revered lawyer who served as the first Special Counsel to the NAACP.[23] Houston imbued in Marshall the value of using the law as a tool for the marginalized: as Houston would say, "a lawyer is either a social engineer . . . or a parasite on society."[24]

It was Houston who came up with the plan to overturn the separate but unequal doctrine.[25] Houston said there were two ways to challenge segregation. One way, the NAACP would go to the courts and challenge segregation on its face as unconstitutional. The other way would be to enforce the *Plessy* decision to ensure that the states provided equally

---

GLASS 188 (Signet Classic 2000) (second emphasis added).

21. James Poling, *Thurgood Marshall and the 14th Amendment*, *in* REPORTING CIVIL RIGHTS: PART ONE: AMERICAN JOURNALISM 1941–1963, at 141 (Clayborne Carson et al. eds., 2003).

22. JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 12 (2001).

23. GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 84 (1983).

24. *Id.* at 131.

25. *Id.* at 132–36.

valuable schools for black children.[26] Houston believed that by showing that the school systems were still unequal, the *Plessy* decision could be shown to be nothing but a meaningless, racist standard.[27]

Their first test case involved Donald Gaines Murray, an honor graduate from Amherst College, who had also applied to the University of Maryland Law School and been rejected.[28] Marshall successfully argued that the State of Maryland did not provide a comparable law school for blacks; as such, in order to obtain an equal facility, Murray must be admitted to the University of Maryland. Judge Eugene O'Dunne ordered Maryland to admit Mr. Murray.[29] That decision was eventually affirmed by Maryland's highest court.[30]

After this win Marshall became the NAACP's chief legal counsel.[31] In that role Marshall traveled throughout the American South, taking on cases of injustice against black citizens.[32] Marshall would later recount how he would move to a different house every night[33] and would always sleep farthest away from the window. One notable incident occurred in Columbia, Tennessee, where Marshall was defending two black men who had been charged with murder.[34] One night while driving home, sheriff's deputies stopped Marshall and his entourage on a false drunk driving charge.[35] The deputies abducted Marshall and drove him down unpaved roads to the river where another group was waiting near a tree with a rope strung over a high branch.[36] Marshall's friends followed the deputies' car to the river and, when they caught the car, flashed their headlights.[37] The deputies drove Marshall back to the Magistrate Judge's office.[38] Had Marshall's friends not shown up at the river, history would have been very different.

Marshall's fight changed in 1949. That year, he took the case of Harry Briggs, a service station attendant in Clarendon County, South Carolina, who was suing the local school system on behalf of his children.[39] In

26. *Id.*
27. *Id.*
28. Pearson v. Murrary, 182 A. 590, 590 (Md. 1936).
29. *Id.* at 594.
30. *Id.*
31. Poling, *supra* note 21, at 143.
32. *Id.* at 144.
33. *Id.*
34. *Id.* at 153.
35. *Id.*
36. GILBERT KING, DEVIL IN THE GROVE 17 (2012).
37. *Id.* at 18.
38. Poling, *supra* note 21, at 153.
39. *Separate is Not Equal: Brown v. Board of Education, Bitter Resistance: Clarendon County, South Carolina*, p. 3 http://americanhistory.si.edu/brown/history/4-five/clarendon-county-3.html [https://perma.cc/T869-8MKR] (last visited July 28, 2017).

Clarendon County the black students had to walk as many as eighteen miles round trip to attend school because the school district, although it provided thirty buses for the white schools, did not provide any buses for the black schools.[40] The school district claimed that black citizens did not pay enough in taxes to warrant a bus service. Marshall initially argued the case on equalization grounds, as he had in the past, but Judge J. Waties Waring, a maverick Southern trial judge sitting on the panel, told Marshall to challenge the segregated school system as unconstitutional.[41] In a 2–1 decision, the district court decided against Marshall and ruled that, while the system was unequal, the State of South Carolina should be given the opportunity to equalize the schools.[42] Judge Waring wrote a blistering dissent in which he argued, "the system of segregation in education adopted and practiced in the State of South Carolina must go and must go now. *Segregation is per se inequality*."[43] With this statement, Judge Waring became the first judge in the South to declare that forced segregation was unconstitutional.[44]

Judge Waring is an unusual character for such a first. The son of a Confederate soldier, Waring had never been involved in civil rights efforts.[45] Through the first several years of his judgeship, however, he heard several equal protection challenges brought by black citizens, such as one challenging the unequal pay of black teachers, and found for the plaintiffs.[46] After ruling in 1947 that the South Carolina Democratic Party could not prohibit black participation in its primaries, Judge Waring received an onslaught of death threats.[47] Despite 24-hour security, crosses were burned in his Charleston yard, rocks were thrown through his windows, and nearly all of white Charleston shunned him.[48] Collier's magazine even declared him the most lonesome man in town.[49]

Although the *Briggs* district court decision was a disappointment, Marshall and the NAACP continued their efforts, appealing the decision

---

40. *Separate is Not Equal: Brown v. Board of Education, Bitter Resistance: Clarendon County, South Carolina*, at 2, http://americanhistory.si.edu/brown/history/4-five/clarendon-county-2.html [https://perma.cc/YZ5E-42GR] (last visited July 28, 2017).

41. Robert N. Rosen, *Waring Bravely Moved Ahead of his Time for Racial Justice*, THE POST & COURIER (Apr. 9, 2014).

42. Briggs v. Elliott, 98 F. Supp. 529, 531 (E.D.S.C. 1951).

43. *Id.* at 548 (Waring, J., dissenting).

44. *How the Son of a Confederate Soldier Became a Civil Rights Hero*, CODE SWITCH: RACE AND IDENTITY REMIXED (Apr. 10, 2014, 4:44 PM), http://www.npr.org/sections/codeswitch/2014/04/10/301432659/how-the-son-of-a-confederate-soldier-became-a-civil-rights-hero [https://perma.cc/73CG-XU2W] [hereinafter *Civil Rights Hero*].

45. *Id.*

46. *Id.*

47. *Id.*

48. Samuel Grafton, *The Lonesomest Man in Town*, COLLIER'S WKLY., Apr. 29, 1950, at 20–21; *Civil Rights Hero*, *supra* note 44.

49. Grafton, *supra* note 48.

to the U.S. Supreme Court. In 1953, *Briggs v. Elliott* was consolidated with five others into *Brown v. Board of Education*. Marshall would argue the case on behalf of Briggs.

The NAACP's decision to argue the cases before the U.S. Supreme Court was not met with universal agreement. Many civil rights leaders questioned the wisdom of a confrontational argument in front of the Court, fearing that a loss could make the situation on the ground even worse for black students.[50] But Marshall felt that the time had come for a direct and explicit challenge to the "separate but equal" doctrine.[51]

In response, the South Carolina government enlisted the help of the 1924 Democratic Party Presidential candidate and famed lawyer John W. Davis.[52] Davis had argued over 140 cases before the Supreme Court, at that time more than any other lawyer in history except Daniel Webster and Walter Jones.[53] Davis's main argument rested on the principle of deference: the Justices in Washington, D.C., should not usurp the popular will of the South Carolina legislature and the actions of the state executive.

The Court heard oral arguments but was unable to reach a decision. Four of the Justices (Douglas, Black, Burton, and Minton) had been predisposed to overturn *Plessy*, while two other Justices (Frankfurter and Jackson) were reluctant to overturn *Plessy* outright as it would be considered a form of judicial activism.[54] Two Justices (Chief Justice Vinson and Clark) said that they would rather rely upon the legislatures to change the law.[55] One Justice (Reed) believed that segregation helped the black community.[56] As a delaying tactic to get a majority opinion, Justice Frankfurter asked the parties to reargue the case specifically on whether there was evidence that the framers of the Fourteenth Amendment intended it to outlaw segregation in public schools.[57] Then, four days before the beginning of the new term, Chief Justice Vinson died.[58] President Eisenhower, having promised Governor Earl Warren of California the seat at the Republican Convention, appointed him as the new Chief Justice.[59] Although Warren had supported the integration of schools between white and Mexican-American children, Warren was also the Governor who sent 70,000 Japanese-Americans to internment camps

50. Poling, *supra* note 21, at 149–50.
51. *Id.*
52. PATTERSON, *supra* note 22, at 52.
53. Chad C. Schmucker, *John W. Davis–An Early Advocate of Plain English*, 77 MICH. B.J. 1322 (1998).
54. PATTERSON, *supra* note 52, at 54–56.
55. *Id.*
56. *Id.*
57. *Id.* at 57.
58. *Id.*
59. *Id.* at 60.

during World War II.[60] Marshall and the NAACP were understandably worried about their renewed prospects.

Marshall reargued the case before the Supreme Court and ended his argument by stating:

> So whichever way it is done, the only way that this Court can decide this case in opposition to our position, is that there must be some reason which gives the state the right to make a classification that they can make in regard to nothing else in regard to Negroes, and we submit the only way to arrive at that decision is to find that for some reason Negroes are inferior to all other human beings.[61]

During the interim between the oral argument and the decision, Chief Justice Warren toured several Civil War battlefields.[62] While at Gettysburg, Warren's black chauffeur found an inn where the Chief Justice could spend the night. Upon waking in the morning, Warren came out of the inn to find his chauffeur sleeping in the backseat of the car. Warren asked why the chauffeur had not slept somewhere else and the chauffeur replied that there were not any beds available for him within twenty miles. Warren remembered that, upon hearing this, "I was embarrassed, I was ashamed."[63]

After this experience Warren convened a post-reargument conference with the other Justices. He took control of the conference and said that the only possible justification for segregation was the honest belief in the inferiority among the races.[64] Warren eventually built a coalition for a unanimous opinion and convinced two of the other Justices to drop their separate dissenting opinions.[65] On May 17, 1954, Chief Justice Warren read the opinion to a tense courtroom and declared the "separate but equal" doctrine unconstitutional as it related to education.

V. A CHANGE IS GONNA COME

Although the decision gave a huge win to the NAACP, the Court did not order an immediate overhaul of the school systems. As was reported at the time, "[t]he court's decision allows for a delay of many months—which may turn out to be a year or more—before issuing decrees

60. *Id.* at 59.

61. Thurgood Marshall, *Dismantling Segregation: Brown v. Board of Education*, *in* RIPPLES OF HOPE: GREAT AMERICAN CIVIL RIGHTS SPEECHES 207, 209 (Josh Goffheimer ed., 2003).

62. PATTERSON, *supra* note 52, at xii.

63. *Id.*

64. *Id.* at 64.

65. *Id.* at 64–65.

enforcing its ruling."[66] Warren had led the Justices to a unanimous decision, and Marshall was so confident in the decision that he predicted to the *New York Times* that segregation would end in America within five years.[67] However, leaders in the South were not ready to accept the decision without a fight. In anticipation of such a ruling, Governor James Byrnes of South Carolina had threatened that "if the court decision made segregation impossible, South Carolina would abolish the public school system."[68] Representative James L. Whitten of Mississippi "predicted that white children would now be sent to private school causing a 'lessening impact' in public schools."[69] Former Governor Strom Thurmond, the leader of the Southern Democrats' walkout of the 1948 Democratic Convention, helped write a manifesto and solicited support from ninety-four Congressmen and Senators that pledged resistance to any implementation of the *Brown* decision.[70]

Ultimately the enforcement of the Supreme Court decision was out of the hands of the nine Justices and even out of the hands of Thurgood Marshall. The movement needed new heroes to make constitutional change a reality.

VI. MAKING THE CHANGE—BURNING CROSSES

The legal battleground shifted from comparatively civil Washington, D.C., to the true front lines of the American South. A year after the *Brown* decision, the U.S. Supreme Court issued *Brown II*, the implementation order that called for enforcement of the *Brown* decision to take place in the local federal courts in the South.[71] Unfortunately for these judges, the Supreme Court only gave one vague directive: "with all deliberate speed."[72] The Fifth Circuit Court of Appeals, which had jurisdiction over most of the affected states, became the arena for desegregation implementation.[73] A group of judges on that court, nicknamed "the Fifth Circuit Four," would lead the fight to implement the Supreme Court's mandate to destroy the "separate but equal" standards.

66. Robert J. Donovan, *Supreme Court, 9–0, Bans Segregation in Schools*, N.Y. HERALD-TRIB., May 13, 1954.

67. PATTERSON, *supra* note 63, at 71.

68. Donovan, *supra* note 66.

69. *Id.* Representative Whitten's prediction would unfortunately come to pass as states like Mississippi established parallel white school systems called "Academies" that, through state exemptions, were allowed to effectively continue segregation.

70. PATTERSON, *supra* note 52, at 98.

71. Brown v. Bd. of Educ., 349 U.S. 294, 299, 301 (1955).

72. *Id.* at 301.

73. The Fifth Circuit had jurisdiction over appellate federal cases in Alabama, Florida, Georgia, Louisiana, Mississippi, Texas, and the Panama Canal Zone.

Chief Judge Elbert Tuttle of Georgia led the group. Born in California, Tuttle grew up in Hawaii and attended a multiracial Punaho school.[74] He later went on to admirably serve in both World War I and II, and began a thriving law practice in Atlanta, Georgia.[75] While on the Fifth Circuit, Tuttle's military bearing allows him to command attention in the courtroom.[76]

Judge John Wisdom bolstered Tuttle's leadership with his professorial scholarship.[77] A member of New Orleans aristocracy, Wisdom, who had also served in World War II, gave the moral imperatives and goals of the Fifth Circuit an eloquent and reasoned voice.[78] Beyond even the Civil Rights cases, Wisdom went on to become one of the country's most cited appellate judges.[79] Rounding out the Fifth Circuit Four were John Brown, a successful admiralty lawyer and Republican leader from Houston whose attitudes on race were shaped by the evidence presented to him in court; and Richard Rives, an Alabama Democrat who lost many old friends because of his stances with the Fifth Circuit Four.[80]

In addition to the Fifth Circuit Four, Judge Frank Johnson of the Middle District of Alabama filled out the core of judges who implemented the *Brown* standard. Johnson came from a proud Republican family.[81] His ancestors and community seceded from Alabama after Alabama seceded from the Union in 1861 and eventually fought a mini-war with Confederate raiders.[82] After serving in World War II and earning the Purple Heart and Bronze Star, Johnson worked as U.S. Attorney for the Middle District of Alabama and was then appointed as a judge in the same District in 1955.[83] At the time of his appointment, Johnson was the youngest federal judge in the country.[84] A stoic and independent personality, Johnson faced the questions of segregation according to the legal precepts established in *Brown*.[85]

Only months after his appointment to the bench, Johnson sat with Judge Rives on a special three-judge district court panel to decide *Browder v. Gayle*, or the Montgomery Bus Boycott.[86] After Rosa Parks's

74. JACK BASS, UNLIKELY HEROES 32 (1990).
75. *Id.* at 32–33.
76. *Id.* at 39.
77. *Id.* at 41.
78. *Id.* at 46–48.
79. *Id.* at 52.
80. *Id.* at 24.
81. *Id.* at 66.
82. *Id.*
83. *Id.* at 67.
84. *Id.*
85. *Id.* at 68–69.
86. *Id.* at 68.

heroic disobedience of bus segregation in Montgomery, Alabama, the NAACP decided to challenge the constitutionality of that segregation system in federal court.[87] As the Supreme Court had not spoken about the constitutionality of state segregation laws on bus travel, the judges had no direct precedent.[88] Johnson was the first to argue in conference that under *Brown*, the "separate but equal" doctrine was as unconstitutional in bus transportation as it was in school segregation and thus the bus system violated the equal protection clause.[89] The third judge on the panel, Judge Seybourn Lynne, believed that the U.S. Supreme Court needed to explicitly overrule the doctrine as it applied to bus systems.[90] Rives, however, agreed with Johnson and decided to write the opinion himself.

In *Browder*, Rives noted that the "separate but equal" doctrine was first developed in a Massachusetts state court decision concerning public schools.[91] He reasoned that since the doctrine had been repudiated in the area wherein it first developed, then *Plessy* also had been implicitly overruled and that "statutes and ordinances requiring segregation of the white and colored races on the motor buses . . . violate the due process and equal protection of the law clauses of the Fourteenth Amendment to the Constitution of the United States."[92] Armed with the decision, the Montgomery Bus boycott continued with renewed vigor and enabled a new leader, Reverend Martin Luther King, Jr., to rise to national prominence.[93]

Both Judges Johnson and Rives received significant reprisals from the community.[94] Angry phone calls in the night forced Johnson to get an unlisted number in order to sleep.[95] Johnson regularly found burning crosses in his front yard. One night a bomb destroyed part of Johnson's mother's home.[96] Johnson always believed the bomb was meant for him, as the house was listed under "Mrs. Frank M. Johnson, Sr."[97] Johnson's son, who eventually committed suicide, was tormented by his father's decisions.[98] But Johnson noted that, as an outsider, the ostracism never bothered him.

Rives, on the other hand, was from central Alabama. Local law organizations pushed Rives out; when he and his wife sat at Presbyterian

87. *Id.*
88. *Id.*
89. *Id.* at 69.
90. *Id.*
91. Browder v. Gayle, 142 F. Supp. 707, 716 (M.D. Ala. 1956).
92. *Id.* at 717.
93. BASS, *supra* note 74, at 75–76.
94. *Id.* at 79.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*

services, nearby parishioners would stand up and sit elsewhere.[99] One morning when Rives and his wife visited the grave of their son, they found the site littered with garbage and the tombstone painted red.[100] Rives decided, out of respect for his son, never to report the incident to law enforcement or the press.[101]

If Judges Johnson and Rives fired the first shot across the bow in *Browder*, then Judge Wisdom's decision in *United States v. Jefferson County Board of Education* sank the "separate but equal" ship. Despite dozens of positive court decisions and the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, less than one percent of black children in Mississippi, Alabama, and Louisiana attended school with white students.[102] Faculty desegregation had not even begun in those states.

Seeing that recalcitrant local school districts, complacent district judges, and plotting legislatures had effectively adopted an obstructionist strategy to *Brown*, Wisdom decided to create a model school desegregation order based on the federal guidelines developed by the Department of Health, Education, and Welfare.[103] By doing so, Wisdom incorporated the executive branch as part of the desegregation effort.[104] Additionally, Wisdom ensured that one standard would be applied throughout the South and engineered a system that disallowed inconsistent interpretations by local judges.[105] Ultimately, Wisdom said that the standard must be "a bona fide unitary system where schools are not white schools or Negro schools—just schools."[106] He imposed an affirmative duty on the local school boards to achieve that unitary system and concluded his opinion by stating that the time for postponing *Brown*'s implementation had passed: "[t]he clock has ticked the last tick for tokenism and delay in the name of 'deliberate speed.'"[107]

With *Jefferson*, Judge Wisdom brought the *Brown* decision to its logical conclusion when he stated that "the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination."[108] The success of the *Jefferson* decision and the affirmative duty could be seen by the 1970s, when a higher percentage of black students attended integrated schools in the South than

99. *Id.* at 80.
100. *Id.* at 79.
101. *Id.*
102. *Id.* at 299.
103. United States v. Jefferson Cty. Bd. of Educ., 372 F.2d 836, 853, 854 (5th Cir. 1966).
104. *Id.* at 856.
105. *Id.* at 846, 859.
106. *Id.* at 890.
107. *Id*. at 896.
108. *Id*. at 876.

in any other part of the United States.[109]

VII. CONCLUSION

Although the Declaration of Independence states "that all men are created equal," it took nearly 200 years for the U.S. justice system to officially conclude that separate treatment of the races could not be equal.

As an American preacher once said, "I do not pretend to understand the moral universe, the arc is a long one . . . [b]ut from what I see I am sure it bends toward justice."[110] Just how long justice needs varies. And obtaining justice is often a grueling struggle. For the struggle for racial equality to continue to bend toward justice, there must be courageous individuals and independent judges who allow justice to triumph.

The road to equality required Thurgood Marshall to take difficult cases at great personal and professional risk. It required Earl Warren to change views and old ideas with the certain knowledge that he would be ridiculed. It required judges like the Fifth Circuit Four and Frank Johnson to make principled decisions against the popular will of their own communities. This change was possible because of the commitment to an independent judiciary and the rule of law, and because of the desire to fully realize the doctrine of equality.

109. Gary Orfield et al., *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future*, The Civil Rights Project, at 4 (May 15, 2014), *available at* https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf [https://perma.cc/N5D8-UZUV].

110. THEODORE PARKER, *Of Justice and the Conscience*, *in* TEN SERMONS OF RELIGION 84–85 (1853).

Left Blank Intentionally

Left Blank Intentionally

Left Blank Intentionally

Left Blank Intentionally