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Brown at 50: School Desegregation from Reconstruction to Resegregation

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BROWN AT 50: SCHOOL DESEGREGATION FROM RECONSTRUCTION TO RESEGREGATION

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I. INTRODUCTION

In the 1896 decision, *Plessy v. Ferguson*,[1] the U.S. Supreme Court ruled that African-Americans could be segregated in public accommodations without violating the Fourteenth Amendment of the U.S. Constitution as long as the separate facilities for blacks were equal to those provided for whites.[2] *Plessy* was decided at the end of the Reconstruction era when lynching, violence, and other forms of intimidation were used to impose a regime of white supremacy. The decision provided the legal rationale for the new racial order. By the beginning of the twentieth

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1. 163 U.S. 537 (1896).

2. *Id.* at 552.

century, the equality rights established by the Fourteenth Amendment were, for all practical purposes, nullified in the former Confederate states. In other regions of the nation, public policy and private practices excluded African-Americans from schools, neighborhoods, public accommodations, and all but the most menial occupations.

African-Americans did not acquiesce to these conditions. Shortly after the turn of the century, several organizations were established to promote racial mobility, including the National Association for the Advancement of Colored People (NAACP).[3] In the early 1930s, the NAACP's attorneys devised what became known as the "equalization strategy."[4] This involved filing cases in southern states, demanding the upgrade of schools established for African-American students to make them equal to those reserved for whites. The campaign was premised on the theory that states maintaining schools could not afford dual educational systems that were actually equal and segregation would eventually collapse under its own weight. The first "equalization strategy" case was filed in the mid-1930s. By the early 1950s, when the final equalization cases were decided, *Plessy's* separate but equal rationale had been completely viserated. It was then that the coordinated attack was launched in the six cases that are collectively remembered as *Brown v. Board of Education*.[5]

Brown has long been viewed almost entirely as the product of a progressive U.S. Supreme Court under the leadership of Chief Justice Earl Warren, yet this characterization is misleading. The NAACP's litigation campaign — carefully planned and executed strategy occurring over more than two decades via dozens of cases[6] — compelled a reluctant and often recalcitrant judiciary to abandon the legal fiction on which segregation was premised. Without the NAACP's efforts, *Brown* could not have happened. This article analyzes the development of the legal strategy that led to *Brown*. It also examines the fierce resistance to the implementation of *Brown's* mandate. It concludes with a discussion of the trend toward resegregation and the failure, thus far, to realize *Brown's* promise of racial equality.

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3. National Association for the Advancement of Colored People, Timeline, *at* http://www.naacp.org/about/about_history. html (last visited Apr. 1, 2005).

4. National Association for the Advancement of Colored People, Legal Affairs History [hereinafter Legal Affairs History], *at* http://www.naacp.org/departments/legal/ legal_history.html (last visited Apr. 1, 2005).

5. 347 U.S. 483, 486 (1954).

6. Legal Affairs History, *supra* note 4.

II. THE LEGAL STRATEGY

During the Reconstruction era following the Civil War, three Constitutional Amendments of paramount importance to African-Americans were enacted: the Thirteenth Amendment outlawed slavery;[7] the Fourteenth Amendment granted citizenship to the individuals who had been enslaved prior to the War and guaranteed them equal protection of the laws;[8] and the Fifteenth Amendment prohibited states from interfering with voting rights.[9] For the next few years, African-Americans progressed rapidly. For example, they established households, built schools, and developed business enterprises. African-Americans also assumed leadership roles in their communities. They were elected to offices at the local, state, and national levels.[10]

However, after the Hayes-Tilden Compromise of 1877,[11] a new order was imposed. Lynching, violence, and other forms of intimidation were used to impose white supremacy. The new order received legal sanction with the 1896 decision of *Plessy v. Ferguson*[12] through the establishment of the "separate but equal" doctrine. *Plessy* involved a challenge to a New Orleans ordinance requiring segregation on public transportation systems.[13] As Justice Harlan's dissent made clear, the law's equality assertion was completely disingenuous. "Everyone [knew] that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks as to exclude colored people from the coaches occupied by or assigned to white people."[14]

In the years that followed, an imposed system of racial segregation governed virtually all aspects of the lives of African-Americans; restricting, among other things, where they could live, work, and attend school. Conditions for African-Americans were always separate from, but never equal to, their white counterparts.

In the early 1930s, the NAACP received a $100,000 grant from a philanthropic organization, which it earmarked for a legal campaign to attack segregation laws. Walter White, the newly appointed executive

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7. U.S. CONST. amend. XIII.
8. U.S. CONST. amend. XIV.
9. U.S. CONST. amend. XV.
10. National Association for the Advancement of Colored People, The Long Shadow of Jim Crow: Voter Intimidation and Suppression in America Today [hereinafter The Long Shadow], *available at* http://www.naacp.org/inc/pdf/jimcrow.pdf (last visited Apr. 1, 2005).
11. *Id.*
12. 163 U.S. 537 (1896).
13. *Id.* at 540.
14. *Id.* at 557.

director of the NAACP, hired legal consultant Nathan Margold to prepare a comprehensive analysis of the segregation laws and to develop recommendations on how to challenge them in the courts.[15] Margold later submitted a comprehensive report, concluding that segregation as practiced, did not comply with the separate but equal principle of *Plessy*.[16] The facilities that were provided for African-Americans were never equal to those reserved for whites. One of the many examples of the disparities concerned the deplorable conditions of public schools. Educational resources for black students were, by every objective measure, inferior to those maintained for whites.[17] To remedy this, Margold recommended a series of taxpayer suits against the jurisdictions that practiced segregation.[18]

In 1935 the NAACP hired the Dean of Howard University's law school, Charles H. Houston, to launch the litigation program.[19] A brilliant visionary, Houston joined the Howard faculty not long after graduating from Harvard Law School, where he was the first African-American to serve on the Law Review.[20] In the early 1930s, Houston transformed Howard from a marginal night school to a fully accredited academic institution that became the laboratory for civil rights litigation. He also trained a generation of African-American lawyers who led the civil rights litigation revolution.[21]

Houston agreed with Margold's analysis but disagreed with the recommended strategy of taxpayer suits. Concerned that a premature challenge to *Plessy* might result in a Supreme Court decision reaffirming the separate but equal principle, Houston suggested an indirect approach, the "equalization strategy."[22] Under this approach, the NAACP would file cases arguing that the southern states practicing segregation violated the Fourteenth Amendment by providing inferior facilities for blacks.[23] Houston also recommended that the litigation focus on graduate and

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15. Leland Ware, *Setting the Stage for* Brown*: The Development and Implementation of the NAACP's School Desegregation Campaign, 1930-1950*, 52 MERCER L. REV. 631 (2001).

16. Legal Affairs History, *supra* note 4.

17. *See, e.g.*, JAMES D. ANDERSON, THE EDUCATION OF BLACKS IN THE SOUTH 148-237 (1988).

18. *Margold Report*, Papers of the NAACP, Part 3: The Campaign for Educational Equality, 1913, 1950, Series A. Reel 4, Frames 560-772.

19. GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983); GERALDINE R. SEGAL, IN ANY FIGHT SOME FALL (1975).

20. MCNEIL, *supra* note 19.

21. *Id.*

22. *Id.* at 17.

23. *Id.* at 134-37; *see also* Robert Carter, *In Tribute: Charles Hamilton Houston*, 111 HARV. L. REV. 2149, 2152 (1998).

professional schools where the southern states were most vulnerable. The majority of them had established segregated colleges, but none provided any graduate or professional training for black students.

Houston believed enforcing the equality aspect of the separate but equal doctrine would compel states that operated dual systems to provide educational facilities for black students that were physically and otherwise equal to those maintained for whites. Southern states could not bear the economic burdens of such a system. Thus, under the pressure of litigation, segregation would eventually be abandoned.[24] The NAACP Board of Directors approved Houston's recommended "equaliziation strategy," and the attack was launched by one attorney with a $10,000 budget.[25]

III. THE EQUALIZATION CASES

Houston and his former student, Thurgood Marshall,[26] handled the first "equalization" case, *Pearson v. Murray*.[27] Donald Gaines Murray applied for admission to the University of Maryland's law school and the application was denied solely on the basis of Murray's race.[28] Murray filed a lawsuit in a Maryland state court challenging the university's decision. When the case went to trial, Houston and Marshall presented evidence that proved that the facilities for black students at Maryland's Princess Anne Academy were not equal to those at the University's main campus.

Maryland and other southern states had established a scholarship fund for black students to help with the costs of attending graduate schools in other states.[29] Maryland argued that the scholarship fund satisfied the

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24. *See generally* ROBERT COTTROL ET AL., *BROWN V. BOARD OF EDUCATION*: CASTE, CULTURE AND THE CONSTITUTION (2003); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICAS STRUGGLE FOR EQUALITY (1975); MARK TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT 1936-1961 (1994); JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994); JAMES K. PATTERSON, *BROWN VS. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2001); PETER H. IRONS, JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE *BROWN* DECISION (2002).

25. Ware, *supra* note 15, at 641.

26. *See* JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY (1998); *see also* CARL ROWAN, DREAM MAKERS DREAMS BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL 46 (1994); HOWARD BALL, A DEFIANT LIFE: THURGOOD MARSHALL AND THE PERSISTENCE OF RACISM IN AMERICA (1998); MICHAEL DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 48 (1992); ROGER GOLDMAN & DAVID GALLEN, THURGOOD MARSHALL: JUSTICE FOR ALL 25 (1992).

27. 182 A. 590 (Md. 1936).

28. *Id.* at 590.

29. *Id.* at 591.

state's obligation under *Plessy* to provide equal educational opportunities for African-American students.[30] During their examinations of state officials, Houston and Marshall demonstrated that the funds were inadequate to satisfy the educational expenses of the many black students desiring graduate training. At the conclusion of the trial, the judge issued a ruling from the bench ordering the university to admit Murray to the law school's entering class the following semester. The Maryland Supreme Court affirmed that decision.[31]

After the *Murray* decision, a case was filed challenging segregation at the University of Missouri.[32] Lloyd Gaines, a 1935 graduate of Lincoln University in Missouri, applied for admission to the University of Missouri's law school.[33] After the university denied his application, Houston and a Missouri attorney, Sidney Redmond, filed suit against the university in state court.[34] Relying on *Murray*, they argued that Missouri was obligated to offer legal training to black students as it did for whites.[35]

The Missouri courts ruled against Gaines.[36] The Missouri Supreme Court held that the out-of-state scholarships available to African-American students satisfied Missouri's constitutional obligations under *Plessy*.[37] The NAACP appealed this ruling and subsequently secured its first U.S. Supreme Court victory in a desegregation case.[38] The majority of the Court found that the right to equal protection was a "personal one"[39] that could not be satisfied with out-of-state scholarships.[40] The Court held that Missouri had a constitutional duty to provide legal training to African-American students within its borders.[41] The Court reasoned that shifting the responsibility to another state would circumvent that obligation.[42] Thus, the Court ordered Gaines' admission.[43]

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30. *Id.*
31. *Murray*, 182 A. at 590.
32. *See* Gaines v. Canada, 113 S.W.2d 783 (Mo. 1938).
33. MCNEIL, *supra* note 19, at 127.
34. *Id.*
35. *See id.* at 128.
36. *Gaines*, 113 S.W.2d at 791.
37. *Id.*
38. *See* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).
39. *Id.* at 351.
40. *Id.* at 349-52.
41. *Id.* at 351.
42. *Id.* at 349-52.
43. *Gaines*, 305 U.S. at 352.

After the *Gaines* decision in 1938, the NAACP filed a series of teacher salary cases to eliminate racial disparities in compensation.[44] Black teachers were routinely paid far less than their white counterparts for the same work. These cases were successful and solidified support for the organization in the communities where the cases were filed. With the outbreak of World War II in 1941, the NAACP's attention was diverted to other matters, such as defending the rights of African-Americans serving in the military. After the conclusion of the War, however, the focus returned to education, which was fueled by an unprecedented demand for higher education. Thousands of returning soldiers, including African-Americans, enrolled in colleges and universities with the aid of G.I. benefits that underwrote tuition costs.

IV. THE POST-WAR GRADUATE SCHOOL CASES

The first post-war case was filed in Oklahoma. In 1946, the NAACP filed a civil action on behalf of Ada Louise Sipuel against the University of Oklahoma, challenging its policy of excluding African-American students.[45] Thurgood Marshall, who had succeeded Houston as the NAACP's legal director, argued that Oklahoma was obligated to provide legal training to African-American students.[46] After losing at the trial court level,[47] Marshall appealed the decision to the U.S. Supreme Court.[48] The Court held that Oklahoma was obligated to provide legal instruction to black students.[49] State officials responded by renting three rooms in a building across the street from the state capital, hiring some professors, and designating this arrangement the "Negro" law school.[50] The Supreme Court declined the NAACP's challenge to Oklahoma's actions.[51]

Another case was filed in Texas by Heman Marion Sweatt, a postal worker who applied for admission to the University of Texas' law school at Austin.[52] After the university denied Sweatt's application, the NAACP filed suit on his behalf.[53] While the case was pending, Texas, following

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44. MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 77 (1987).

45. Sipuel v. Bd. of Regents, 332 U.S. 631, 632 (1948).

46. *Id.* at 637.

47. Sipuel v. Bd. of Regents, 180 P.2d 135, 144 (Okla. 1947).

48. *Sipuel*, 332 U.S. at 632.

49. *Id.* at 632-33.

50. *Id.*

51. Fisher v. Hurst, 333 U.S. 147, 150 (1948).

52. Sweatt v. Painter, 210 S.W.2d 442, 443 (Tex. 1948).

53. *Id.*

Oklahoma's example, established a "Negro" law school in Houston by renting a few rooms and hiring lawyers to serve as professors.[54] The trial court ruled against Sweatt.[55] While the appeal was pending, the Texas legislature appropriated $100,000 to build a separate law school for African-Americans that was intended to be comparable to the Austin facility.[56]

As *Sweatt* worked its way through the lower courts,[57] the NAACP filed another case in Oklahoma.[58] The plaintiff, George W. McLaurin, was a 68-year-old professor at Oklahoma's black college who applied for admission to the graduate school of education at the University of Oklahoma.[59] Instead of renting rooms and hiring a small staff, as they had done in reaction to the *Sipuel* decision, university officials allowed McLaurin to attend classes with white students but he was required to sit in an alcove behind a sign that read "colored."[60] He was directed to sit at a separate table in the balcony of the library, to eat his lunch at a different time from the other students, and to sit at a separate table in the dining room.[61] The lower court ruled against the NAACP.[62]

Sweatt and *McLaurin* were appealed to the U.S. Supreme Court. The cases were argued consecutively, and the rulings were issued together in 1950.[63] In *Sweatt*, the Court held that physical equality was not enough.[64] The Court said education involved more than bricks and mortar.[65] Certain intangible features, such as prestige, reputation, and the exchange of ideas, were critical in educational settings and could not be replicated at a segregated law school.[66]

McLaurin involved internal segregation. McLaurin attended the same classes and listened to the same lectures as white students, but on a segregated basis.[67] The Court found that the arrangement stigmatized McLaurin and handicapped him in his efforts to pursue an education.[68] In

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54. Sweatt v. Painter, 339 U.S. 629, 632-33 (1950).
55. *Sweatt*, 210 S.W.2d at 443.
56. *Id.* at 447.
57. *Id.* at 443.
58. McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 638 (1950).
59. *Id.*
60. *Id.* at 640.
61. *Id.*
62. *Id.*
63. Sweatt v. Painter, 339 U.S. 629, 638 (1950); *McLaurin*, 339 U.S. at 638.
64. *Sweatt*, 339 U.S. at 635-36.
65. *McLaurin*, 339 U.S. at 640.
66. *Id.* at 641.
67. *Id.* at 639-40.
68. *Id.* at 641.

both *Sweatt* and *McLaurin*, the U.S. Supreme Court finally recognized the stigmatic and other psychological injuries created by segregation, but stopped short of reversing *Plessy*.[69]

V. THE *BROWN* CASES

After the decisions in *Sweatt* and *McLaurin*, the NAACP attorneys decided the foundation for a challenge to *Plessy* had been established and a direct attack was launched. The school desegregation cases consisted of six consolidated challenges involving five separate jurisdictions: *Brown v. Topeka Board of Education*[70] arose in Kansas; *Briggs v. Elliott*[71] involved schools in South Carolina; *Davis v. County School Board of Prince Edward County* challenged segregation in Virginia;[72] *Bolling v. Sharpe*[73] was filed in the District of Columbia challenging segregation in Virgina; and there were two Delaware cases — *Belton v. Gebhart* and *Bulah v. Gebhart*.[74]

Under a procedure that allowed a direct appeal to the U.S. Supreme Court, a special three-judge panel heard the trial in the South Carolina case, *Briggs v. Elliott*.[75] At the outset of the proceedings, the attorneys for South Carolina conceded that the black schools were inferior, but argued that they would soon be equalized.[76] The NAACP's attorneys responded that the state's concession was irrelevant because the challenge was against segregation rather than unequal conditions.[77] During the trial, Marshall, the NAACP's legal director, called witnesses who established two key points: that the black schools were physically unequal[78] and that segregation inflicted severe psychological damage on black students.[79] On June 23, 1952, relying on *Plessy*, the Court ruled that segregation in public schools was permissible as long as the facilities provided were equal.[80] The Court found that the plaintiffs were entitled to an order declaring the

69. *Sweatt*, 339 U.S. at 635; *McLaurin*, 339 U.S. at 641.
70. 98 F. Supp. 797 (D. Kan. 1951).
71. 132 F. Supp. 776, 777 (E.D. S.C. 1955).
72. Davis v. County Sch. Bd. of Prince Edward County, 103 F. Supp. 337 (1952).
73. 347 U.S. 497, 498 (1954).
74. Belton v. Gebhart, 87 A.2d 862, 863 (Del. Ch. 1952).
75. 98 F. Supp. 529, 531 (E.D. S.C. 1951).
76. *Id.*
77. *Id.*
78. *Id.* at 547.
79. *Id.* at 547-48.
80. *Briggs*, 98 F. Supp. at 532.

state's obligation to equalize its schools but they could not prevail on the challenge to segregation itself.[81] That decision was appealed.

While *Briggs* was proceeding at the trial stage, another controversy was brewing in Virginia, which culminated in *Davis County School Board of Prince Edward County*.[82] In April 1952, a group of black students who attended a high school in Prince Edward County, Virginia, organized a strike to protest the deplorable condition of their school.[83] They eventually contacted the NAACP.[84] Richmond-based NAACP attorneys, Oliver Hill and Spottswood Robinson, responded to the students' plea for assistance.[85] The students wanted the school board to construct a new building.[86] Hill and Robinson agreed to help them if the students agreed to serve as plaintiffs in a lawsuit seeking to desegregate, rather than equalize, the County's schools.[87] The NAACP filed a lawsuit that proceeded similarly to *Briggs*.[88] Like in *Briggs*, experts in the *Davis* trial testified about the poor physical condition of the black high school and psychologists described the detrimental effect that segregation had on black students.[89]

In *Davis*, a three-judge panel found that controlling legal precedent amply supported segregated schools.[90] It further stated that segregation was a way of life in Virginia. The district court reasoned that "[s]eparation of white and colored children in the public schools of Virginia has for generations been part of the mores of her people. To have separate schools has been their use and wont."[91]

The District of Columbia case, *Bolling v. Sharpe*,[92] was filed on behalf of a group of black parents led by Gardner Bishop, a Washington, D.C. barber. Like the plaintiffs in *Davis*, the plaintiffs in *Bolling* initially sought to equalize the public school facilities in Washington. Charles Houston agreed to represent them. By the time the case began, Houston's health was failing, so he persuaded the group to ask James Nabrit to represent them. Nabrit undertook the group's representation after he convinced the

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81. *Id.* at 538.

82. *See* Davis v. County Sch. Bd. of Prince Edward County, 103 F. Supp. 337 (E.D. Va. 1952).

83. *See* Kara M. Turner, Both Victories and Victims: Prince Edward County, Virginia, The NAACP, and Brown, 90 VA. L. REV. 1667, 1669 (2004).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 1669-70.

88. *Davis*, 103 F. Supp. at 338-39.

89. *Id.* at 339.

90. *Id.* at 339-40.

91. *Id.*

92. 347 U.S. 497 (1954).

group to challenge segregation directly. *Bolling* differed from the other cases in one significant aspect: As a federal territory, the District of Columbia was not subject to the Fourteenth Amendment, which applies only to state actions. All of the other cases challenged segregation as a violation of the Equal Protection Clause of the Fourteenth Amendment. In *Bolling*, however, the legal challenge alleged violations of the Due Process Clause of the Fifth Amendment.

In 1948, the Topeka, Kansas, branch of the NAACP petitioned the local school board to desegregate the public schools. After two years of inaction, the group contacted the NAACP's headquarters in New York and requested assistance in filing a lawsuit.

There were several plaintiffs in *Brown v. Board of Education*, but in what reflected the prevailing views of gender, the group felt that a male should be the lead plaintiff. As a result, Oliver Brown is one of the best-known names in twentieth century legal history. On February 14, 1951, *Brown*[93] was filed in the federal district court in Kansas.

The racial disparities in Topeka's schools were not as extreme as they were in other locations. For tactical reasons, Robert Carter and the other NAACP attorneys chose not to focus on physical comparisons. They relied almost entirely on evidence relating to the psychological injuries that segregation inflicted on black students. As a consequence, the district court ruled that the qualifications of the teachers and the quality of instruction available at the black schools in Topeka were not inferior to what was provided to white students.[94] However, the district court went on to rule that:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has a sanction of law, for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to restrain the education and mental development of Negro children and to deprive them of the benefits they would receive in a racially integrated school system.[95]

Despite this important factual finding, the district court concluded it was bound by *Plessy's* separate but equal doctrine to rule against the

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93. 98 F. Supp. 797 (1951).
94. *Id.* at 798.
95. *Id.*

plaintiffs.[96] However, the decision was structured in a way that virtually invited the U.S. Supreme Court to re-examine *Plessy*.

Finally, the two cases in Delaware which were combined in one case were *Belton v. Gebhart*[97] and *Bulah v. Gebhart*. In 1950, Howard High School was the only public high school in the entire state of Delaware for black students, and it was located in a black neighborhood in Wilmington.[98] Its aging physical plant stood in marked contrast to the modern, well-equipped white high school in Claymont.[99] In Hockessin, a rural village not far from Wilmington, Sarah Bulah was required to drive her adopted child past the white students' school to a dilapidated, one-room schoolhouse that served black children.

Belton and *Bulah* were originally filed in federal court but the Attorney General had them removed to state court. Thus, the cases were heard by Collins Seitz, a judge in Delaware's Chancery Court, who previously ruled in Louis Redding's favor in *Parker v. University of Delaware*,[100] in which he ordered the desegregation of the University of Delaware. As he had in *Parker*, Judge Seitz personally visited the schools to compare them. In both cases, experts presented extensive testimony concerning the negative effects of segregation.[101] Other evidence confirmed the physical inequality of the schools.[102]

Judge Seitz concluded that he did not have the authority to overturn *Plessy*, but he ruled that the black schools were inferior and, unlike the trial judges in the other cases, Judge Seitz ordered the admission of the black students to the white schools.[103] This was the only case in which the plaintiffs prevailed at the trial court level.[104]

VI. THE U.S. SUPREME COURT ARGUMENTS AND DECISION

On December 9, 1952, the U.S. Supreme Court arguments commenced in the six consolidated school desegregation cases.[105] After two exhausting

96. *Id.* at 800.
97. 87 A.2d 862 (Del. Ch. 1952).
98. *Id.* at 863.
99. *Id.* at 869.
100. 75 A.2d 225 (Del. 1950).
101. *Belton*, 87 A.2d at 864.
102. *Id.* at 866-67, 870.
103. *Id.* at 871.
104. *See* Gebhart v. Belton, 91 A.2d 137 (Del. 1952).
105. ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN VS. BOARD OF EDUCATION OF TOPEKA*, 1952-55, at 11 (Leon Friedman ed., 1969) (giving a transcript of the

days, the arguments concluded on December 11, 1952. Several months later, the U.S. Supreme Court issued an order that set the cases over to the next term for reargument. The Court directed the parties to submit briefs addressing a series of questions concerning congressional intent in adopting the Fourteenth Amendment. Additionally, the Court questioned how a desegregation order might be implemented if one were issued.[106]

The order setting down a second argument was an unusual event. Some of the NAACP attorneys took the order as a positive sign, while others believed that it was an ominous signal. In the end, there was nothing they could do except respond to the Court's questions. To research the original intent of Congress, NAACP's legal director Marshall enlisted John A. Davis, a professor of political science at Lincoln University. Davis obtained the assistance of Horace Mann Bond, President of Lincoln University. C. Vann Woodward, who later became one of the leading authorities on the Reconstruction period, and John Hope Franklin, a distinguished black historian, also assisted with the research. Also, William Coleman, a young African-American attorney, who had graduated first in his class at Harvard and clerked for Supreme Court Justice Felix Frankfurter, coordinated research in the various states.[107]

During the next several months, the attorneys, historians, law professors and others assisting the NAACP attorneys grappled with the research concerning the intent of the framers of the Fourteenth Amendment. They examined records in state archives. There were many long days and nights of exhaustive work. In the end, the researchers were unable to find any unequivocal evidence that directly addressed the court's questions. Eventually, the attorneys settled on the argument that the Fourteenth Amendment was intended to prohibit state-sponsored segregation. They contended that *Plessy* rested on a false premise, and that segregation was intended to perpetuate racial subordination rather than some form of separate equality. Therefore, they argued that the separate but equal doctrine was a pernicious legal fiction used to enforce a regime of white supremacy.

John W. Davis and the other attorneys defending the Southern school boards reached an entirely different conclusion, relying on, among other things, evidence of segregated schools in the District of Columbia when the Fourteenth Amendment was ratified. They were encouraged by the

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arguments in *Brown*); *see also* GREENBERG, *supra* note 24, at 168-75, 189-94; KLUGER, *supra* note 24, at 544-81, 667-78.

106. Brown v. Bd. of Educ., 345 U.S. 972 (1953).

107. KLUGER, *supra* note 24, at 618-46; GREENBERG, *supra* note 24, at 177-89.

court ordered decision for reargument. They believed that the historical record and applicable legal precedent amply supported their position.

After months of anxious waiting, on December 7, 1953, the three days of reargument commenced. This was a dramatic moment in the U.S. Supreme Court's history. Spectators filled the courtroom. The crowd flowed onto the steps outside of the U.S. Supreme Court building. Reporters, attorneys, students, and ordinary citizens wanted to witness what everyone knew would be an historic event. Segregation itself was on trial. The proceedings commenced with the *Briggs* case.

The NAACP's attorneys argued that the Court should apply what would become the "strict scrutiny" doctrine.[108] As Justice Marshall explained in an article published shortly before the Supreme Court arguments:

> It is sometimes said then there is a presumption of unconstitutionality running against governmental action based upon race or color. This may be an overstatement of fact, but certainly this type of governmental action in terms of motivation, purpose, and effect is now subjected to a more searching scrutiny than is ordinarily the case with other kinds of state activity.[109]

Over the next two days, the Court heard arguments from the attorneys representing the parties. The Court recessed on December 9, 1953. On May 17, 1954, in front of a packed courtroom, Chief Justice Earl Warren announced the decision in the school desegregation cases. The opinion in *Brown* is notable, and controversial to some, for its brevity and simplicity. There was no discussion of strict scrutiny or the relevant standard of judicial review. The opinion was written in a straightforward style that could be understood by lay readers. It began with a recitation of the history of the cases from the trials to the arguments in the U.S. Supreme Court.[110] The Court found that the original intent of the framers of the Fourteenth

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108. In *Hirabayshi* and *Korematsu*, the U.S. Supreme Court held that state actions creating racial classifications must be subjected to the most exacting level of judicial scrutiny and held unconstitutional, unless they are narrowly tailored and necessary to achieving a compelling state objective. Hirabayshi v. United States, 320 U.S. 81, 100 (1943); Korematsu v. United States, 323 U.S. 214, 216 (1944). In the now discredited holdings on the merits, the Court found that the wartime internment of Americans of Japanese ancestry based solely on race was justified. *Id.*

109. THURGOOD MARSHALL, THE SUPREME COURT AS PROTECTOR OF CIVIL RIGHTS: EQUAL PROTECTION OF THE LAWS, ANNALS OF AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES 275 (1951), *reprinted in* THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS AND REMINISCENCES (Mark V. Tushnet ed., 2001).

110. Brown v. Bd. of Educ., 347 U.S. 483, 486-89 (1954).

Amendment on the question of segregated schools was not clear.[111] The Court then traced the evolution of the separate but equal doctrine from *Plessy* through *McLaurin*.[112]

After emphasizing the importance of education in a democratic society, the Court stated the issue as whether "segregation of children in public schools solely on the basis of race . . . deprives the children of the minority group of equal educational opportunities."[113] The Court found that it did, and concluded that "[t]o separate [black] children from others of similar age and qualifications generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in ways unlikely ever to be undone."[114] Significantly, the Court held that "[s]eparate educational facilities are inherently unequal."[115]

VII. IMPLEMENTING *BROWN'S* MANDATE

The U.S. Supreme Court's 1954 decision in *Brown* did not address the remedy. The cases were held over and reargued in 1955 to determine the manner in which the Court's decision should be implemented. In the *Brown II* decision, the Court remanded the cases to the trial courts and ordered the school boards to proceed with "all deliberate speed"[116] to develop desegregation plans under the supervision of the local federal courts.[117]

The South's reaction was swift and severe. On March 12, 1956, *The Southern Manifesto* was read into the Congressional Record.[118] This document contained 96 signatures, 19 from the U.S. Senate and 77 from the House of Representatives.[119] The *Manifesto* proclaimed "the Supreme Court of the United States, with no legal basis for such action, undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land."[120] It also alleged that "outside agitators are threatening immediate and revolutionary changes in our public school systems. If done, this is certain to destroy the

111. *Id.* at 489.
112. *Id.*
113. *Id.* at 493.
114. *Id.* at 494.
115. *Brown*, 347 U.S. at 495.
116. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).
117. *Id.*
118. William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483, 494 (2002).
119. *Id.*
120. 102 CONG. REC. 6821 (1956).

system of public education in some of the states."[121] The *Manifesto* concluded with a pledge to "use all lawful means to bring about a reversal of the [*Brown*] decision, which is contrary to the Constitution, and to prevent the use of force in its implementation."[122]

The *Manifesto* set the stage for the South's response to *Brown*. School boards engaged in tactics ranging from passive resistance to outright defiance. Some elected officials took actions that lead to clashes between state and federal authorities. One incident involved school desegregation efforts in Little Rock, Arkansas. On May 20, 1954, the Little Rock School Board issued a policy statement indicating its intent to comply with *Brown*.[123] On May 24, 1955, a federal court in Little Rock approved a plan that anticipated desegregation in stages, to be completed by 1963.[124] In September 1957, nine black students were slated to enroll in Central High School in Little Rock.[125] In September 1957, Arkansas Governor Orval Faubus sent National Guard troops to Central High to prevent the students from enrolling.[126] On September 3rd, the school board petitioned the federal court for a two and one-half year delay in the implementation of the plan.[127] The court refused the board's request and ordered it to proceed with desegregation.[128] On September 4th, National Guard troops blocked the African-American students at the door of Central High School acting on the Governor's order.[129] A local NAACP attorney, Wiley Branton, and the NAACP legal director Marshall, sought relief in the federal court. On September 20th, the court granted the NAACP's request for an injunction to prevent Governor Faubus and the National Guard from interfering with the black students' efforts to enroll in Central High.[130]

On September 23rd, the students entered the school through a side door to avoid a mob of angry whites that had gathered in front of the building and were chanting racist epithets and threatening violence.[131] However, the students were unable to complete the day because rioting broke out on the

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121. *Id.*
122. *Id.*
123. Cooper v. Aaron, 358 U.S. 1, 7-8 (1958).
124. *Id.* at 8.
125. *Id.* at 9.
126. *Id.*
127. *Id.* at 10-11.
128. *Cooper*, 358 U.S. at 11.
129. *Id.*
130. GREENBERG, *supra* note 24, at 228-42 (Greenberg was an attorney at the NAACP's Legal Defense Fund who succeeded Thurgood Marshall as the leader of that organization. Greenberg argued the Delaware *Brown* cases and headed the LDF from 1961-1984).
131. *Cooper*, 358 U.S. at 12.

school grounds.[132] Reports of the confrontation at Little Rock generated international newspaper headlines. Images of white mobs and armed National Guard troops dominated nightly news reports. Television crews filmed scenes showing dozens of angry white adults crowding around young black students, uttering threats, and waving signs protesting the integration.

Events rapidly escalated to a breaking point. On September 25th, President Dwight Eisenhower dispatched federal troops to Little Rock. Eisenhower disagreed with the *Brown* decision and had not offered much support for integration, but he viewed the actions of the Arkansas officials as a challenge to his authority.[133] When heavily armed federal troops arrived in Little Rock in tanks and other military vehicles, the black students were finally allowed to attend classes. On November 27, 1957, Army troops were withdrawn although federalized National Guardsmen remained on duty at Central High School throughout the school year.[134]

The federal court's denial of the request to suspend the operation of the school board's desegregation plan was appealed and affirmed by the Court of Appeals for the Eighth Circuit.[135] That decision was appealed to the U.S. Supreme Court.[136] In an opinion issued on September 29, 1958, the U.S. Supreme Court in *Cooper v. Aaron*[137] reaffirmed *Brown* and strongly condemned the actions of the Arkansas officials.[138] The Court emphasized that Article VI made the U.S. Constitution "the supreme law of the land."[139] The Court found that the actions of Arkansas' governor and state legislature, who claimed that they were not bound by the *Brown* decision, were in direct conflict with the Supremacy Clause of the Constitution.[140] It held that "no state legislature or executive judicial officer can war against the Constitution without violating his undertaking to support it. . . . A governor who asserts a power to nullify a federal court order is similarly constrained."[141] The Court concluded that the "principles announced in [*Brown*] and the obedience of the states to them, according

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132. *Id.*

133. Jack Greenberg, Brown v. Board of Education*: An Axe in the Frozen Sea of Racism*, 48 ST. LOUIS U. L.J. 869, 878 (2004).

134. GREENBERG, *supra* note 24, at 228-42.

135. Aaron v. Cooper, 257 F.2d 33, 40 (8th Cir. 1958).

136. Cooper v. Aaron, 358 U.S. 1 (1958).

137. *Id.*

138. *Id.* at 4.

139. *Id.* at 26.

140. *Id.* at 18.

141. *Cooper*, 358 U.S. at 17-18.

to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us."[142]

Another widely publicized confrontation concerning integration unfolded at the University of Mississippi. In 1961, James Meredith, a Mississippi native and military veteran attempted to enroll at the University of Mississippi.[143] When his application was rejected, Meredith wrote a letter to the NAACP's Legal Defense Fund asking them to file suit seeking to compel his admission to the university.[144] The NAACP agreed, and it dispatched Legal Defense Fund staff attorney Constance Baker Motley to lead the effort.[145] The NAACP lost at the lower court level.[146] The university disingenuously claimed Meredith's application had been denied not because of his race, but because he had failed to submit the required "alumni certificates," which were endorsements from university graduates.[147] This would have been an impossible task for an African-American in Mississippi in 1960. The trial judge accepted this subterfuge.[148] The ruling was appealed to the U.S. Court of Appeals for the Fifth Circuit, where the appellate panel reversed the trial court and ordered Meredith's admission.[149]

Not long after the Fifth Circuit issued its decision, Mississippi Governor Ross Barnett announced his intention to defy the federal court order invoking state sovereignty and "interposition."[150] When Meredith attempted to register for classes at the university, Governor Barnett refused to allow him to enroll.[151] The NAACP and the U.S. Department of Justice, an intervener in the case, filed an application for contempt in the federal proceeding seeking an order to require school officials to obey the ruling requiring Meredith's admission.[152] On September 23rd, Meredith,

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142. *Id.* at 18-19.

143. *See generally* GREENBERG, *supra* note 24, at 318-32; CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW 162-92 (1998).

144. *See* GREENBERG, *supra* note 24, at 318-19; MOTLEY, *supra* note 143, at 162-63.

145. *See* GREENBERG, *supra* note 24, at 318-19; MOTLEY, *supra* note 143, at 162-92 (Motley, now a U.S. District Court Judge, was an attorney with the NAACP's Legal Defense Fund before her appointment to the bench, and was Meredith's lead counsel.).

146. *See* Meredith v. Fair, 199 F. Supp. 754, 757-58 (S.D. Miss. 1961); GREENBERG, *supra* note 24, at 319; MOTLEY, *supra* note 143, at 163-69.

147. *See Meredith*, 199 F. Supp. at 755-56; GREENBERG, *supra* note 24, at 318; MOTLEY, *supra* note 143, at 163.

148. *See Meredith*, 199 F. Supp. at 755-56; GREENBERG, *supra* note 24, at 319; MOTLEY, *supra* note 143, at 169-70.

149. Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962); *see* GREENBERG, *supra* note 24, at 319-20.

150. *See* GREENBERG, *supra* note 24, at 321-22; MOTLEY, *supra* note 143, at 179.

151. *See* GREENBERG, *supra* note 24, at 323.

152. *See id.* at 323; MOTLEY, *supra* note 143, at 179-81.

accompanied by federal marshals, attempted to enter the university.[153] State police and Mississippi's Lieutenant Governor again prevented Meredith from registering.[154] On September 28th, the federal court issued an order holding Governor Barnett in contempt of court.[155]

U.S. Marshals and the Army Corps of Engineers were dispatched to assist Meredith in his efforts to register.[156] Attorney General Robert Kennedy engaged in behind-the-scenes negotiations with Governor Barnett and other Mississippi officials in an effort to head off a violent confrontation.[157] On September 29th, after negotiations failed Pesident John F. Kennedy signed a Proclamation ordering federal troops to Oxford.[158] Subsequently, fourteen hundred federal troops arrived in Oxford and escorted Meredith to a dormitory on the campus.[159] Hundreds of whites gathered on the campus.[160] Gunshots rang out.[161] A French reporter was shot and killed in the fracas.[162] Shotgun pellets injured some of the U.S. Marshals.[163] By 3:00 the next morning, more federal troops arrived.[164] Within a few hours twenty-five hundred armed federal soldiers occupied the campus with tanks and other military vehicles.[165]

For several days, the events at Oxford dominated national news reports.[166] Television crews captured images of the violence, which were broadcast to an international audience.[167] Two weeks after the first riot, Meredith was finally able to register for classes.[168] Federal troops, at times numbering as many as twenty-three thousand, occupied the town of Oxford.[169] The federal troops were gradually withdrawn, and the last five hundred soldiers finally departed when Meredith graduated in 1963.[170]

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153. *See* MOTLEY, *supra* note 143, at 182.

154. *See id.*

155. Meredith v. Fair, 313 F.2d 532 (5th Cir. 1962); *see* GREENBERG, *supra* note 24, at 327-29; MOTLEY, *supra* note 143, at 182.

156. *See* GREENBERG, *supra* note 24, at 330.

157. *See id.* at 329-30.

158. *See id.*

159. *See id.* at 330.

160. *See id.* at 329-30.

161. *See* GREENBERG, *supra* note 24, at 330-31.

162. *See id.* at 330.

163. *See id.*

164. *See id.* at 331.

165. *See id.* at 330-31.

166. *See* GREENBERG, *supra* note 24, at 329-31.

167. *See id.*

168. *See id.*

169. *See id.*

170. *See id.*

Alabama also went to great lengths to avoid integration. A case seeking to desegregate the University of Alabama, *Lucy v. Alabama*,[171] was filed in 1953 and was still pending when the U.S. Supreme Court issued the *Brown* decision in 1954. The NAACP lawyers subsequently reactivated *Lucy*. The trial court ruled in the NAACP's favor[172] and on August 26, 1955, the lower court's decision was affirmed by the Court of Appeals for the Fifth Circuit.[173] When the plaintiff, Autherine Lucy, registered for classes in 1956, a riot broke out on the campus.[174] As a result, the university's trustees removed Lucy from the campus.[175] The NAACP subsequently sued to compel the trustees to allow Lucy to attend classes.[176] The court ruled that the university had not disobeyed the court's order to allow Lucy to attend the university.[177] The NAACP's efforts were frustrated when that ruling was affirmed by the Court of Appeals for the Fifth Circuit.[178]

In 1963, another suit was brought against the University of Alabama on behalf of two African-American students.[179] Post-*Meredith*, Alabama officials knew that resistance would be futile.[180] Governor George Wallace reached an understanding with the U.S. Justice Department.[181] Having pledged to take a stand "at the schoolhouse door" to block the students' admission, Governor Wallace was allowed to proceed with his pretense of blocking the door and then stepping aside when the students and the federal troops accompanying them arrived.[182] Wallace's staged resistance made national news and propelled his political career, which was based largely on his outspoken opposition to school desegregation.[183]

In the late 1960s, the U.S. Supreme Court issued decisions that were intended to put an end to the South's massive resistance. In *Griffin v. County School Board of Prince Edward County*,[184] a case in which the school district involved in the original *Brown* cases had closed all of its

171. Lucy v. Adams, 134 F. Supp. 235 (N.D. Ala. 1955).
172. *See id.* at 239.
173. Adams v. Lucy, 228 F.2d 619, 619-20 (5th Cir. 1955) (per curiam).
174. *See* GREENBERG, *supra* note 24, at 225-26; MOTLEY, *supra* note 143, at 122.
175. *See* GREENBERG, *supra* note 24, at 226; MOTLEY, *supra* note 143, at 122.
176. *See* MOTLEY, *supra* note 143, at 122-24.
177. *See* GREENBERG, *supra* note 24, at 226; MOTLEY, *supra* note 143, at 122-24.
178. Adams v. Lucy, 228 F.2d at 619-20; *see* MOTLEY, *supra* note 143, at 124.
179. *See* GREENBERG, *supra* note 24, at 338.
180. *See id.* at 338-39.
181. *See id.*
182. *See id.* at 338-40.
183. *See id.* at 340.
184. 377 U.S. 218 (1964).

schools to avoid desegregation,[185] Justice Hugo Black concluded that "[t]here has been entirely too much deliberation and not enough speed in enforcing the constitutional rights which we held in *Brown*."[186] The Court ordered Prince Edward County to reopen its schools.[187]

In *Alexander v. Holmes County Board of Education*,[188] the Court ruled that the "continued operation of segregated schools under a standard allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible . . . the obligation of every school district is to terminate dual school systems at once and operate now and hereafter only unitary schools."[189]

In *Green v. County School Board of New Kent County*,[190] the Court held that states that maintained segregated schools had an affirmative duty to eradicate all vestiges of the formerly segregated system "root and branch," and that school boards were obligated to bear the burden of proving compliance with the new standard.[191]

Finally, in *Swann v. Charlotte-Mecklenburg Board of Education*,[192] the U.S. Supreme Court endorsed busing as a means of achieving racial balance in schools.[193]

VIII. DEMOGRAPHICS AND DESEGREGATION

In the South, particularly in rural areas, school desegregation commenced after *Green*. In districts where there were only one or two high schools, the white and black high schools simply merged with all students attending a single, racially integrated school. In urban areas, however, demographic patterns made school desegregation far more difficult.[194] Beginning in the years during and after World War I, African-Americans migrated in large numbers from rural areas in the South to urban communities in the North and Midwest.[195] In 1940, seventy-seven

185. *See id.* at 220-22.
186. *Id.* at 229.
187. *See id.* at 233-34.
188. 396 U.S. 19 (1969).
189. *Id.* at 20.
190. 391 U.S. 430 (1968).
191. *See id.* at 438-42.
192. 402 U.S. 1 (1971).
193. *See id.* at 29-31.
194. NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT MIGRATION AND HOW IT CHANGED AMERICA 6 (1991).
195. *Id.*

percent of African-Americans resided in southern states.[196] From 1910 to 1970 six and one-half million African-Americans relocated from the South to the North.[197] Lured by the availability of employment opportunities in factories that paid far more than they could earn performing farm labor in the South, African-Americans also sought to avoid the oppressive conditions that existed in the South, where violence, lynching, and other forms of intimidation were commonplace.[198]

During the years that African-American families were moving north, whites were relocating from central city neighborhoods to the surrounding suburbs.[199] This trend accelerated exponentially during the post-World War II era, when the federal government heavily subsidized homeownership with Federal Housing Administration and Veteran's Administration mortgage programs.[200] African-Americans, however, were locked out of suburban areas as a result of racially restrictive covenants[201] and other discriminatory practices. The federal government perpetuated residential segregation by requiring racially restrictive covenants on properties financed by government-insured mortgages.[202] Local governments intentionally located subsidized housing in all black or all white neighborhoods to maintain segregation.[203] Exclusionary zoning practices prohibited the construction of subsidized and multifamily housing in many suburban communities.[204] By the late 1960s, cities in

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196. *Id.*

197. *Id.*

198. LEON F. LITWAK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW (1999).

199. *See generally* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 11-32, 39-41 (1995).

200. *See id.*

201. An early reaction to the influx of African-Americans was the enactment of ordinances prohibiting them from occupying property except in designated locations. These laws were challenged and declared unconstitutional in *Buchanan v. Warley*, which held that such ordinances violated the Fourteenth Amendment. Buchanan v. Warley, 245 U.S. 60, 82 (1917). After *Buchanan,* property owners resorted to private covenants to maintain segregated neighborhoods. The covenants were deed restrictions that prevented homeowners from conveying their property to racial and religious minorities. During the 1930s and 1940s, the NAACP mounted a litigation campaign against restrictive covenants that culminated with the 1948 decision in *Shelley v. Kraemer* which held that lawsuits seeking to enforce discriminatory covenants constituted state action that violated the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S. 1, 23 (1948); *see* Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases,* 67 WASH. U. L.Q. 737, 738 (1989).

202. OLIVER & SHAPIRO, *supra* note 199, at 11-32, 39-41.

203. *See id.*

204. *See id.*

Northern and Midwestern industrial centers became increasingly black, while surrounding suburbs were virtually all white.[205]

The impact of residential segregation on school desegregation was the focus of *Milliken v. Bradley*,[206] a case involving schools in Detroit, Michigan. The plaintiffs in *Milliken* attempted to address residential segregation by including the suburban school districts surrounding Detroit in a metropolitan desegregation plan.[207] As a consequence of racially segregated housing patterns and "white flight" to suburban communities, the schools in Detroit were rapidly shifting to predominately black populations.[208] At the same time, enrollments in suburban districts were nearly all white.[209] They argued that racial balance could not be achieved without including the suburban districts in the desegregation plan.[210] In an opinion authored by Chief Justice Warren Burger, the Supreme Court held that suburban school districts could not be required to participate in court-ordered desegregation plans unless it could be proven that their actions contributed to segregation in the jurisdiction in which the case arose.[211] There could be no busing across district lines without a showing of an inter-district violation. With limited exceptions, suburban districts were effectively insulated from the desegregation process.

Over the next few years, school desegregation proceeded slowly with courts relying heavily on intra-district busing to achieve racial balance.[212] During the same period, residential segregation in inner city areas increased substantially despite the anti-discrimination provisions of the Fair Housing Act of 1968.[213]

However, in the early 1990s, the U.S. Supreme Court's desegregation jurisprudence took a dramatic shift. The decisions in *Board of Education v. Dowell*,[214] *Freeman v. Pitts*,[215] and *Missouri v. Jenkins*[216] created a much lower standard for finding that a school system has achieved "unitary

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205. *See id.*
206. 418 U.S. 717 (1974).
207. *See id.* at 721-36.
208. *See id.*
209. *See id.*
210. *See id.*
211. *Milliken*, 418 U.S. at 746-52.
212. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 60-61(1993).
213. *See id.*
214. 498 U.S. 237 (1991).
215. 503 U.S. 467 (1992).
216. 515 U.S. 70 (1995).

status," the ultimate goal of desegregation efforts.[217] Under *Green*, school districts were required to completely eradicate *all* remnants of the segregated system "root and branch." The new standard requires only a showing of good faith compliance with the original desegregation decree and the elimination of most lingering vestiges.[218] If student populations reflect segregated housing patterns, school officials are not held responsible.[219] The new standard obligates courts to hold that the desegregation requirement has been satisfied, even though most urban school populations are largely black and Latino as a result of the persistence of segregated housing patterns.[220]

The 2000 Census reveals that extremely high levels of residential segregation persist.[221] Researchers' definitions of residential integration vary but, depending on the yardstick used, somewhere between 9 and 19 percent of America's neighborhoods are integrated.[222] This means that between 81 and 91 percent of Americans live in segregated communities. This is not a consequence of private choice. Studies show that on average, one in five African-Americans seeking housing can expect to encounter some form of discrimination.[223] Hundreds of complaints are filed each year with the federal, state, and local fair housing enforcement agencies. An

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217. *See Jenkins*, 515 U.S. at 83-89; *Freeman*, 503 U.S. at 498-99; *Dowell*, 498 U.S. at 249-50.

218. *See Jenkins*, 515 U.S. at 83-89; *Freeman*, 503 U.S. at 498-99; *Dowell*, 498 U.S. at 249-50.

219. *See generally Jenkins*, 515 U.S. at 70; *Freeman*, 503 U.S. at 467; *Dowell*, 498 U.S. at 237.

220. *See generally* LEWIS MUMFORD CTR., ETHNIC DIVERSITY GROWS, NEIGHBORHOOD INTEGRATION LAGS BEHIND (Dec. 18, 2001), *available at* http://mumford1.dyndns.org/cen2000/report.html (last visited Mar. 14, 2005). One frequently used measure is an index of dissimilarity. *Id.* Dissimilarity studies compare the geographic distribution of different racial groups using census tracts as the units of measure. *Id.* The index indicates the percentage of members of a particular racial group that would have to move to another census tract to achieve an even distribution of each group in proportion to their representation in the general population. *Id.* Communities are considered integrated when the dissimilarity index is lower than .33, moderately segregated when the index is between .33 and .66, and highly segregated when the index is above .66. *Id.* Researchers at the Lewis Mumford Center found that almost half of the top 50 metropolitan areas in the United States are highly segregated. LEWIS MUMFORD CTR., *supra*. The remaining half is moderately segregated. *Id.* None were within the range of what social scientists would consider to be integrated. *Id.*

221. *Id.*

222. SHERYLL CASHIN, THE FAILURE OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 42 (2004).

223. *See* MARGERY AUSTIN TURNER ET AL., DEP'T OF HOUSING & URBAN DEVELOPMENT, DISCRIMINATION IN METROPOLITAN HOUSING MARKETS (2000), *available at* http://www.huduser.org/publications/hsgfin/hds.html (last visited Mar. 14, 2005).

unknown number of individuals who are the victims of discriminatory treatment do not file complaints, because they are not aware that discrimination has occurred. This happens because most of the discrimination that occurs now is subtle or completely hidden.

One tactic is known as "steering," a practice in which realtors show homes to African-Americans in black areas while white purchasers are directed to white neighborhoods.[224] Data disclosed by lending institutions showed that African-Americans' applications for mortgages are rejected far more frequently than those of whites with comparable incomes and credit histories.[225] Hispanics fare somewhat better than blacks, but not as well as whites.[226] In some cities, blacks who purchase homes in predominantly black neighborhoods are not able to purchase homeowner's insurance from mainstream companies.[227] At every level of a typical real estate transaction, African-Americans and other minorities are likely to receive treatment that is less favorable than similarly situated whites.

The assumption that underlies the return to neighborhood schools is that housing patterns reflect the location preferences of individual families and any segregation that results is a product of private choice. Contrary to this belief, however, African-Americans and nonwhite Hispanics have not had the range of housing choices available to whites with comparable incomes and credit histories.[228] Their options are limited by an array of discriminatory practices in the nation's housing markets.[229] This unlawful conduct perpetuates the residential segregation that began in the Jim Crow era when public policies and private practices kept blacks out of white neighborhoods. The end of busing and the return to neighborhood schools means that schools will be as segregated as the communities in which they are located. Public schools have been resegregating steadily since the 1990s, when *Dowell, Freeman* and *Jenkins* were decided.[230] Therefore,

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224. Zuch v. Hussey, 366 F. Supp. 553, 556-57 (E.D. Mich. 1973) (steering involves actions by real estate brokers or agents intended to influence the choice of a prospective home buyer on racial basis).

225. *See* U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, WHAT WE KNOW ABOUT MORTGAGE LENDING DISCRIMINATION IN AMERICA [hereinafter WHAT WE KNOW], *available at* http://www.huduser.org/publications/fairhsg/ lending.html (last visited Mar. 14, 2005); U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, CURBING PREDATORY HOME MORTGAGE LENDING: A JOINT REPORT (June 2000) [hereinafter A JOINT REPORT], *available at* http://www.huduser.org/ publications/hsgfin/curbing.html (last visited Mar. 14, 2005).

226. *See* WHAT WE KNOW, *supra* note 225; A JOINT REPORT, *supra* note 225.

227. *See* WHAT WE KNOW, *supra* note 225; A JOINT REPORT, *supra* note 225.

228. *See* WHAT WE KNOW, *supra* note 225; A JOINT REPORT, *supra* note 225.

229. *See* WHAT WE KNOW, *supra* note 225; A JOINT REPORT, *supra* note 225.

230. *See generally* GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* (1996); LEWIS MUMFORD CTR., CHOOSING

housing discrimination has effectively thwarted school desegregation. Black students in many of America's inner cities are as segregated now as their grandparents were in the pre-*Brown* era.[231]

IX. REASSESSING *BROWN'S* LEGACY

The *Brown* decision has long been controversial in academic circles. A few years after the case was decided, Professor Herbert Wechsler, a prominent legal scholar, published a critique in which he argued that the findings of psychological harm that were central to *Brown* undermined its credibility as a case supported by solid legal analysis and reasoning.[232] In *Toward Neutral Principles of Constitutional Law*, Wechsler argued that *Brown* was not decided on the facts presented, but on the Court's conclusion that segregation denied equal rights for African-Americans.[233] Wechsler believed that the critical but unresolved legal issue in *Brown* involved the associational right of whites.[234] Wechsler stated that "if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant."[235] Wechsler concluded that there was no neutral legal principle which supported the Court's ruling in *Brown*.[236]

In 1958, a distinguished and widely respected jurist, Learned Hand, criticized the *Brown* decision in a lecture delivered at Harvard University.[237] Hand argued that the Warren Court's activism undermined the political process by substituting the Court's judgments for the will of the people.[238] Hand believed that judicial review "should be confined to occasions when the statute or order was outside the grant of power to the grantee, and should not include a review of how the power has been exercised."[239]

SEGREGATION: RACIAL IMBALANCE IN AMERICAN PUBLIC SCHOOLS, 1990-2000 (Jan. 18, 2002) [hereinafter CHOOSING SEGREGATION], *available at* http://mumford1.dyndns.org/cen2000/report.html (last visited Mar. 14, 2005).

231. *See generally* ORFIELD & EATON, *supra* note 230; CHOOSING SEGREGATION, *supra* note 230.

232. *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1-5 (1959).

233. *See id.* at 32-33.

234. *See id.* at 34-35.

235. *Id.* at 34.

236. *Id.* at 34-35.

237. *See generally* LEARNED HAND, THE BILL OF RIGHTS (1958).

238. *See generally id.*

239. *See generally id.*

Philip Elman was Justice Felix Frankfurter's law clerk and an attorney in the Solicitor General's Office from 1944 to 1961.[240] Elman handled several Supreme Court civil rights cases and contributed to the Solicitor General's brief in *Brown*.[241] In an interview published in the *Harvard Law Review*, Elman claimed that the NAACP won *Brown* despite making "the wrong arguments at the wrong time in the wrong cases."[242] Elman asserted that *Brown* would have come out the same way had Marshall stood up and recited, "Mary had a little lamb."[243]

More recently, in *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy*, Professor James T. Patterson examined the history of the NAACP's struggle against segregated schools, Southern whites' resistance to desegregation efforts, the busing controversy, and the mixed views of racial progress in the decades after *Brown*.[244] Patterson pointed to the trend toward resegregation, the persistent achievement gap between black and white students, and the mood of pessimism among many African-Americans as *Brown's* disappointing legacy.[245]

In *From Jim Crow to Civil Rights: The Supreme Court and Racial Equality*,[246] Professor Michael Klarman examined the impact of the U.S. Supreme Court's decisions on race relations. Klarman concluded that *Brown* radicalized the political climate in the South, which led to the era of massive resistance orchestrated by segregationist politicians.[247] The reaction resulted in violent confrontations like those in Little Rock and Oxford.[248] Klarman argued that change would have resulted without *Brown* in a more gradual manner but in ways that would have had wider acceptance among southern whites.[249]

Some of *Brown's* most outspoken critics are on the left wing of the ideological perspective. Professor Derrick Bell has long been critical of

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240. Philip Elman & Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 817 n.a1 (1987).

241. *See generally id.*

242. *Id.* at 837.

243. *Id.* at 852.

244. *See generally* JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2001).

245. *See id.* at 206-23.

246. *See generally* MICHAEL J. KLARMAN, FROM *JIM CROW* TO CIVIL RIGHTS: THE SUPREME COURT AND RACIAL EQUALITY (2004).

247. *See id.* at 443-68.

248. *See id.*

249. *See id.*

civil rights lawyers' tactics in school desegregation cases.[250] In *Silent Covenants*, Bell took his criticisms a step further when he argued that *Brown* was wrongly decided.[251] Bell claimed that African-American students would have fared better had the U.S. Supreme Court reaffirmed *Plessy* in *Brown* and ordered the states to equalize the black and white schools.[252] Had the Court done so, Bell argued, black students would have received instruction in facilities that were physically on par with white schools with equal financial and other resources and parents would have participated in governance by serving on school boards.[253] Bell suggested that high-quality instruction in an all black environment would be preferable to what has happened to black students in the years that followed the *Brown* decision.[254]

There may be merit to some of the arguments made by *Brown's* critics, but most of the blame has been misdirected. The graduate school cases leading up to *Brown* pursued an equalization strategy. The cases filed against universities argued the black and white schools should be equalized, but stopped short of a direct challenge to *Plessy's* separate but equal rationale. After a series of victories in the U.S. Supreme Court, a direct challenge was finally launched in *Brown*. The premise of the equalization strategy was factual: black and white schools were separate but not equal; and the facilities and other resources in black schools were demonstrably inferior to those in white schools.

The strategy evolved in *Sweatt* and *McLaurin* when the NAACP attorneys persuaded the Supreme Court to recognize that racial isolation inhibited black students' ability to learn. Therefore, even if the black and white schools were physically and otherwise equal, the educational experience would not be the same. In the *Brown* cases, Dr. Kenneth Clark and other expert witnesses described the stigmatic injuries that segregation inflicted. The U.S. Supreme Court's critical finding in *Brown* "that separating black children from others of similar age and qualification generates a feeling of inferiority"[255] was correct.

The difficulties with school desegregation resulted from the ways in which *Brown* was interpreted, its faulty implementation, and the

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250. *See, e.g.*, Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

251. *See generally* DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 130-37 (2004).

252. *See id.*

253. *See id.*

254. *See id.*

255. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

persistence of high levels of residential segregation. School desegregation has been measured almost entirely in terms of racial balance in individual schools rather that the quality of instruction provided to black students. Busing has been the principal means of achieving racial balance. The reliance on bussing sends a mixed message. Black students are bused from their inner city neighborhoods, and they are bused from "bad" schools to "good" schools in the suburbs. Neglect and lack of resources reflected in inner city neighborhoods are not the same as inherent inferiority, but the distinction is not always clear to everyone. An implicit message of black inferiority can be an unintended consequence.

Conditions for black students in racially mixed schools are not always good. Despite changes in racial composition, suburban schools have not altered their instructional methods to accommodate the attitudes, perspectives, and cultural references of African-American students. School curricula reflect a traditional, Eurocentric paradigm that implicitly devalues the contributions of African-Americans.[256] Black children are expected to assimilate values and perspectives that sometimes conflict with their personal backgrounds and experiences.

Brown reflected an assimilationist vision of America. Under the classic model of immigrant assimilation, the expectation was that after arriving in the United States, immigrant groups of subordinate status would change and become more like the culturally dominant group over successive generations. The descendants of immigrants were deemed fully assimilated when they fit into the main stream of the dominant society without encountering prejudice or discrimination as a result of their ethnic or cultural ancestry. Success in educational institutions and elsewhere requires African-Americans to assimilate standards, attitudes, and behaviors that may be awkward and foreign to them, but normal and acceptable to the majority community. "Code switching" is one means of adapting, but it requires African-Americans to become cultural chameleons. At work or at school, speech patterns, clothing styles and body language allow blacks to fit into the dominant culture. At home and in other settings, many blacks revert to the dress, speech patterns, and other cultural norms of the communities in which they reside. Not all blacks are willing or able to code switch. "Keeping it real," resistance to "acting white," and other more extreme forms of oppositional behavior are reflections of this trend.

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256. *See* Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813, 814-17 (1993).

By characterizing the effects of segregation as damaging to only to black students, *Brown* reinforced stereotypes of black inferiority. White schools were deemed valuable; black institutions were inferior. *Brown* was interpreted to require a one-way assimilation of blacks into white institutions, instead of changing those institutions in ways that would make them open and welcoming environments for everyone. This has led some African-Americans to reject integrationism.[257] For instance, there are affluent, all black suburbs in areas in several cities.[258] Examples of this trend can be found in neighborhoods in or around Atlanta, Georgia and Washington, D.C.[259] In these communities black professionals and entrepreneurs reside in luxurious homes.[260] For them, proximity to whites is not necessary to their well-being.

Professor Sheryll Cashin describes this trend as "integration exhaustion."[261] However, separatist sentiments among African-Americans are not entirely voluntary. Some of it is attributable to deterrence. Many blacks do not want to be isolated as the "only one" in areas without a critical mass of other blacks. They do not want to be the victims of racial profiling while driving home from work; nor do they wish for their children to attend schools in environments that are not welcoming and nurturing. Whites with comparable incomes and educational backgrounds do not have these concerns.

Private and charter schools featuring afrocentric curricula and single-sex schools for black males reflect the separatist sentiment.[262] Some of this represents a nostalgic view of a time when black teachers in segregated schools nurtured their students, stressed academic excellence, and performed admirably with the limited resources that were available. Pre-*Brown* enclaves of black excellence, such as the District of Columbia's Dunbar High School,[263] were rare then and cannot be replicated today. Instead, today's inner city students suffer from high levels of concentrated poverty, institutional neglect, and extreme isolation.

Racism has not abated. It has merely become more covert, more indirect, and less conscious, but no less effective in generating

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257. CASHIN, *supra* note 222.

258. *See generally* Mary Jo Wiggins, *Race, Class, and Suburbia: The Modern Black Suburb as a "Race-Making Situation,"* 35 U. MICH. J.L. REFORM 749 (2002).

259. *See generally id.* (Examining suburbanization patterns in Prince George's County, Maryland and south DeKalb, Georgia).

260. *See generally id.*

261. CASHIN, *supra* note 222.

262. *See* Brown, *supra* note 256, at 849-52.

263. *See generally* MARY GIBSON HUNDLEY, THE DUNBAR STORY (1967); CONSTANCE GREEN, THE SECRET CITY: A HISTORY OF RACE RELATIONS IN THE NATION'S CAPITAL 185, 290 (1967).

disadvantage for persons of color. It reasserts itself in coded forms that create disproportionately negative outcomes for African-Americans and other people of color. The critical issues now concern the quality of instruction that minority students receive in public schools and attitudes of those who teach them. There are substantial and persistent performance disparities between black and white students no matter where their schools are located.[264] The average test scores and educational attainment levels for black students are far below white averages.[265] The focus must remain on eliminating this achievement gap. Public institutions must be held to their obligation to provide the same quality of instruction to all students, rather than acting on unconscious and often explicit assumptions about the learning abilities of black students.

X. CONCLUSION

The U.S. Supreme Court's decision in *Brown v. Board of Education*[266] was probably the most important ruling of the twentieth century. One of the most remarkable aspects of *Brown* was the success of the individuals who made it possible. A small group of under-resourced attorneys prevailed against formidable opponents.[267] When Charles Houston joined the NAACP in 1935, he commenced the legal campaign without a staff and with a budget of ten thousand dollars. With little more than vision and his remarkable legal skills, Houston set out to change the prevailing legal order. In the 1930s and 1940s, there were no provisions for awarding attorney fees to prevailing parties. The African-Americans attorneys who served as the NAACP's cooperating attorneys lived and worked in segregated communities, and they often handled civil rights cases without compensation. Rarely have so few accomplished as much with such limited resources.

The significance of *Brown* cannot be underestimated, but the efforts to implement the U.S. Supreme Court's mandate have been thwarted by decades of delay and shifting demographics. After a generation of progress, an increasingly conservative U.S. Supreme Court has

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264. *See generally* David J. Armor, *Desegregation and Academic Achievement*, *in* SCHOOL DESEGREGATION IN THE 21ST CENTURY 147-87 (Christine H. Rossell et al. eds., 2002). While there have been some gains, decades of school desegregation has failed to make a substantial impact on the academic performance disparities between black and white students, even in racially balanced schools. *See generally id.*

265. *See generally id.*

266. 347 U.S. 483 (1954).

267. *See generally* GREENBERG, *supra* note 24.

consistently viewed civil rights cases with reluctance and skepticism. With limited exceptions, the Court has ruled against civil rights claimants for more than a decade. A change in direction is unlikely under the Court's current composition. Despite this discouraging trend, conditions in 2004 are not what they were in 1954. Equality has not been achieved, but the circumstances of most African-Americans are considerably better now than they were in the years before *Brown* was decided. We can celebrate *Brown* while recognizing that fifty years later its promise of racial equality has not been fulfilled.