ARTICLE: INTRODUCTION: UNIVERSITY OF PITTSBURGH SCHOOL OF LAW BROWN V. BOARD OF EDUCATION SYMPOSIUM*,

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Text

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After entering the United States Army in 1964, I was stationed at Fort Benning, Georgia for training. Being a Black man in the Deep South, I was intimidated due to the stories that I had heard related to segregation. Deplaning in Macon, Georgia, I was surprised to see a signboard that read "Impeach Earl Warren." It was not until several years later, after leaving the military and entering ***law school***, that I was truly able to understand the underpinnings for this impeachment advertisement.

One of the important reasons for the passion that led to the signboard concerning Chief Justice Warren was his decision in the landmark case of ***Brown v. Board of Education***. [1] This most universally recognized decision ever handed down by the Supreme Court of the United States changed America forever. No reputable high ***school*** or college textbook in American history fails to mention this decision as one of those monumental determinations of the High Court. Even today, the ***Brown*** decisions [2] garner spirited debate on the issue of integration and the bitter resistance by many **[*14]** states both in the north and south. It is not possible to overstate the importance of the ***Brown*** decision that has been said to have declared unconstitutional the long- established practice of racial segregation in public ***schools*** under the doctrine of "separate but equal." Over the past fifty-years the ***Brown*** decision has resulted in a flood of commentary, debate, anger, and violence, and while the decision has been retold many times and from numerous perspectives by historians, participants, textbook writers, and others, [3] it is most important at this, the "golden anniversary" of the ***Brown*** decision, that we as a nation evaluate the impact of this decision on society and forecast ways to make educational opportunities available to all citizens.

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* The Brown v. Board of Education Symposium was held at the University of Pittsburgh School of Law on February 6, 2004. The Symposium commemorated the fiftieth anniversary of the landmark Supreme Court decision, and included experts from many different disciplines. Because of the professional diversity of the participants, the Law Review has decided to leave citations in the form most familiar to the author's particular discipline.

1 ***Brown v.*** *Bd. of Educ., 347 U.S. 483 (1954).*

2 There were two ***Brown*** decisions, the second addressing remedies to ***school*** segregation. ***Brown v.*** *Bd. of Educ., 349 U.S. 294 (1955)* [***Brown*** II].

3 For the story of the case, see Richard Kluger, Simple Justice (Alfred A. Knopf, Inc. 1976) (1975). For the aftermath, see Numan ***V.*** Bartley, the Rise of Massive Resistance: Race and Politics in the South During the 1950s (1969); Jennifer L. Hochschild, Thirty Years after ***Brown*** (1985); Raymond Wolters, The Burden of ***Brown***: Thirty Years of ***School*** Desegregation (1984).

In 1899 the Supreme Court decided the case of Cumming ***v***. Richmond County ***Board of Education***. [4] The litigation arose after the all-white Richmond County ***School Board*** closed Ware High ***School***, a segregated, tax-supported, all-black high ***school*** in the City of Augusta, Georgia. The plaintiffs did not seek integration of the Augusta Public ***Schools***. They did not lodge a complaint regarding the separation by race of children in the primary grades. They did not attempt to compel the ***board*** to provide a high ***school*** for blacks. Their demand was for injunctive relief that would force the closing of the white high ***school*** through the withholding of tax support until the black high ***school*** was reopened. This approach succeeded in the trial court but failed in the Georgia Supreme Court. [5] This case was appealed to the Supreme Court of the United States. In an opinion written by Justice John Marshall Harlan, the Justice who had just three years before dissented in Plessy asserting that the Constitution was colorblind, [6] the Supreme Court of the United States sustained the ruling of the Georgia Supreme Court denying the request for injunctive relief. Ware High ***School*** was not reopened. Yes, the Court refused to enjoin the ***school board*** from maintaining a high ***school*** for white children when lack of funds was given as the reason for not having a high ***school*** for black children. Could this be called "separate but equal"?

It is interesting to note that in the Plessy case, the owners of the public transportation providers were hoping for a ruling that would remove the necessity to operate parallel accommodations in transportation for Blacks and **[*15]** Whites. Also, the Plessy decision was not overruled until 1956 in Gayle ***v***. Browder. [7]

The Beginning of Change

It took several years after the ***Brown*** decision until some change resulted in this country relating to the status of Black Americans in ***education***. Yes, the Supreme Court decided the landmark case of ***Brown v. Board of Education*** (***Brown*** I) [8] in 1954, yet vestiges of segregation in ***schools*** exist today. In deciding ***Brown***, the Supreme Court consolidated four separate cases reflecting the protest of legal conditions in South Carolina, Virginia, Delaware and Kansas. [9] In the Delaware state court case, the court found that state- imposed segregation, in and of itself, resulted in black children as a class receiving an ***education*** inferior to that of white children. [10] The court based its conclusion on the testimony of educational, sociological, psychiatric, and anthropological experts who testified that black children were concretely injured by legally sanctioned segregation. [11] The court found that legally sanctioned segregation resulted in mental disturbances, absenteeism, and a lack of interest in ***education***. [12] But Delaware was the only state court to arrive at this decision, while the other state courts involved found in favor of ***school*** segregation.

The Supreme Court of the United States, in ***Brown***, marked a drastic break with the indisputable national tradition that was grossly discriminatory and signaled an immense advance in the struggle of Black Americans for full equality in society by way of equality in ***education***. The decision required that states provide equal educational opportunities to both black and white children. The Court found that "[t]o separate [students] from others of similar

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4 *Cumming **v**. Richmond County Bd. of Educ., 175 U.S. 528 (1899).*

5 *Bd. of Educ. **v**. Cumming, 103 Ga. 641 (1898).*

6 *Plessy **v**. Ferguson, 163 U.S. 559 (1896).*

7 ***Gayle v. Browder, 352 U.S. 903 (1956).***

8 ***Brown v**. Bd. of Educ., 347 U.S. 483 (1954).*

9 *Id. at 486.*

10 *Belton **v**. Gebhart, 87 A.2d 862, 865 (Del. Ch. 1952),* aff'd, *91 A.2d 137 (Del. 1952).*

11 Id. at 854.

12 Id.

age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." [13]

Chief Justice Earl Warren read from the bench, "[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is **[*16]** denied the opportunity of an ***education***." [14] Warren warned that "[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." [15]

What was in the hearts and minds of Black Americans when they heard the results of the ***Brown*** case coming from Chief Justice Earl Warren on May 17, 1954? Loren Miller, author of Petitioner, believes that their feelings were best expressed in an old Negro spiritual:

There's a better day a' comin

Fare thee well, fare thee well,

In that great getting' up morning

Fare thee well, fare thee well.

"That great getting up morning" stated in the old Negro spiritual had arrived. Unfortunately, the "morning" was short-lived and Black Americans continue to be disadvantaged as to opportunities in ***education***.

The Remedy

The proposed remedy offered to the Court in ***Brown*** by the NAACP lawyers was to require immediate desegregation of all ***school*** districts. But it seemed that the members of the Court believed, as did President Eisenhower, that this proposal would meet with massive resistance envisioned in the Southern Manifesto and would lead to having the federal government counter by sending in federal officials to supersede local officials. [16]

The remedy typically signals the end of judicial involvement, but with ***school*** desegregation the remedy was the true beginning of the lawsuit. In the second ***Brown v. Board of Education***, [17] the Court's first ***school*** desegregation remedial decision, the Court held that a remedy was to be devised with "all deliberate speed." [18] Justice Hugo Black in 1969 acknowledged that the "all deliberate speed" in ***Brown*** II had "turned out to be only a soft euphemism for delay." [19] Was it realistic for the court to believe that locally elected ***school boards*** would be effective in eliminating racial segregation and dismantle the dual system of "separate and unequal" ***education*** in the United States?

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After the ***Brown*** decision, the country was slow to move forward with desegregation. President Eisenhower refused to support any proposals for ***introduction*** in Congress, or the making of any statements either in opposition or in

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[13] ***Brown***, *347 U.S. at 494.*

[14] *Id. at 493.*

[15] Id.

[16] Herbert Brownell, ***Brown v. Board of Education***: Revisited, 1993 J. of Sup. Ct. Hist. 21, 24.

[17] ***Brown v.*** *Bd. of Educ., 349 U.S. 294 (1955).*

[18] *Id. at 301.*

[19] *Alexander* ***v.*** *Holmes County Bd. of Educ., 396 U.S. 1218, 1219 (1969).*

support of the ***Brown*** decision. Only reluctantly did he dispatch federal troops to Little Rock, Arkansas in 1957 to enforce a lower court order mandating desegregation of all-White Central High ***School***.

During the Kennedy and Johnson Administrations, the President and Congress initiated action and approved legislation that supported the policy of ***school*** desegregation as formulated by the Court. Initially, President Kennedy actively sought to prevent discrimination in ***schools*** through litigation. Under Kennedy's instructions, the Attorney General could request permission from the courts to file amici briefs in ***school*** desegregation litigation. Due to the cumbersomeness and protracted nature of litigation, along with the unrelenting harsh treatment of Blacks, Kennedy asked Congress to authorize the Federal Government to participate more fully in lawsuits designed to end segregation in public ***education***. President Kennedy emphasized the point that for various reasons, the victims of discrimination cannot be expected to bring about the orderly implementation of the Supreme Court decision. But litigation continued as it does even today to desegregate ***schools***.

There has been overwhelming statistical and sociological evidence that in the years since ***Brown*** very little progress has been made to truly integrate society. [20] The promise of ***Brown*** and the opportunities for Blacks that followed the decision were short-lived. Economic decline, combined with a shift in white attitudes in the mid-1970s, closed many of the doors which had previously been opened for Blacks. [21] As Jaynes and Williams reported, "[t]he greatest economic gains for blacks occurred in the 1940s and 1960s. Since the **[*18]** early 1970s, the economic status of blacks relative to whites has, on average, stagnated or deteriorated." [22]

In the 1990s federal courts were still hearing desegregation cases. Three cases were taken to the Supreme Court concerning the termination of desegregation litigation. In 1991, in ***Board of Education v***. Dowell, [23] the Supreme Court explained for the first time when a ***school*** desegregation case may end. It returned to the same issue the following year. When it decided Freeman ***v***. Pitts, [24] the Court had undergone a major political and ideological shift and consequently declared that formerly segregated, dual ***school*** districts could be released from federal court supervision upon a demonstration of good faith compliance with a desegregation decree where the "vestiges of past discrimination [have] been eliminated to the extent practicable." [25] Lastly, it considered a defendant's request for termination in 1995 in Missouri ***v***. Jenkins [26] and would not permit a regional district plan to desegregate ***schools*** unless that segregation transgressed the ***boards*** of the regional districts. [27] This holding reinforced the

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[20] For an expanded discussion of the statistical data supporting the conclusion that Blacks have made little progress in American society since the ***Brown*** decision, see Alex M. Johnson, Jr., Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties, *1992 U. Ill. L. Rev. 1043, 1046-54.* More recently a Harvard Study has shown that our ***schools*** are more segregated today than they have been in the past thirty years. Michael Dobbs, U.S. ***School*** Segregation Now at '69 Level, Wash. Post, Jan. 18, 2004, at A10.

[21] This change in attitudes and the subsequent decline in advancement opportunities for Blacks is well illustrated by two Supreme Court decisions that addressed affirmative action. The decisions in *Regents of the **University** of California **v**. Bakke, 438 U.S. 265 (1978),* and *DeFunis **v**. Odegaard, 416 U.S. 312 (1974),* caused a fear of litigation among college admissions ***boards*** that resulted in defensive admissions practice inconsistent with aggressive affirmative action programs. See Anthony J. Scanlon, The History and Culture of Affirmative Action, 1988 BYU L. Rev. 343, 355.

[22] National Research Council, A Common Destiny: Blacks and American Society 6 (Gerald David Jaynes & Robin M. Williams, Jr. eds., 1989).

[23] *Bd. of Educ. **v**. Dowell, 498 U.S. 237 (1991).*

[24] *Freeman **v**. Pitts, 503 U.S. 467 (1992).*

[25] *Id. at 498* (quoting *Dowell, 498 U.S. at 249-50).*

[26] *Missouri **v**. Jenkins, 515 U.S. 70 (1995).*

[27] *Id. at 109.*

statement in Freeman ***v***. Pitts: "Where resegragation is a product not of state action but of private choices, it does not have constitutional implications. [28] Taken together, the three cases clearly indicate the Supreme Court's frustration with the long pendency of ***school*** desegregation litigation, but not with the inefficacy of court-ordered remedies. [29]

The Future

Education plays an important part in preparing individuals for their role in life. ***Schools*** are unique as social agencies for the maximum development of each individual's intellectual, moral, emotional and physical potential. Although the family plays an important role in this process, ***schools*** remain the primary socializing influence outside the family. There is general agreement, therefore, that in attempting to diminish and eventually abolish the academic disadvantages of black and other ethnic minority children, it is both practical **[*19]** and logical to work through the ***schools***. One way to do this is to insure that the mandate of ***Brown*** is accomplished to bring opportunities for equality in ***education*** to all American citizens.

Thus, this is the purpose of the ***Brown*** ***v***. ***Board of Education*** ***Symposium***: to bring together educators from many fields, lawyers, administrators, litigators, and the community, to evaluate the future of ***Brown***. We must remember that after the ***Brown*** decision federal troops had to be brought in to integrate Little Rock ***schools*** in 1957, James E. Meredith needed federal marshals in order to enter the ***University*** of Mississippi in 1962, and Alabama Governor George Wallace made his historic "stand in the ***school*** house door" in 1963. With a history of hundreds of years of segregation, it may well take more than fifty years to bring about the change that ***Brown*** mandated.

The German philosopher George Wilhelm Hegel once said that the only thing people and governments learn from history is that people and governments do not learn from history. These words seem to be especially true as they relate to the plight of Black Americans in the desegregation of ***schools***. Linda ***Brown***, whose parents fought to have ***schools*** integrated on her behalf in the ***Brown*** case, had to fight the same battle to have her grandson attend an integrated ***school***. A recent Harvard study has shown that our ***schools*** are more segregated now than they have been in the past thirty years. [30]

Rev. William Sloane Coffin, as pastor of the Riverside Church in New York City, once said in a sermon: "I used to be an incurable optimist, but now I'm cured." We should not be pessimistic or "cured" but remember and find comfort in the words of the anthem of James Weldon & J. Rosamond Johnson:

Sing a song full of the faith that the dark past has taught us;

sing a song full of the hope that the present has brought us;

facing the rising sun of our new day begun, let us march on,

till victory is won.

We should also find encouragement in the words of Maya Angelou in her poem "Still I Rise":

Out of the huts of history's shame, I rise

Up from a past that's rooted in pain, I rise.

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[28] *Pitts, 503 U.S. at 496.*

[29] Wendy Parker, The Future of ***School*** Desegregation, *94 NW U. L. Rev. 1157, 1163 (2000).*

[30] Dobbs, supra note 20.

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