BROWN V. BOARD OF EDUCATION AND SCHOOL DESEGREGATION: AN ANALYSIS OF SELECTED LITIGATION

by

Lynn T. Brown

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Richard G. Salmon, Co-Chair

M. David Alexander, Co-Chair

Steven M. Janosik

Stephen Parson

Belle S. Wheelan

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(ABSTRACT)

Brown is often regarded among the most monumental decisions ever rendered by the United States Supreme Court. Its legacy includes a body of case law affecting the shape and meaning of school desegregation over the past fifty years. However, school desegregation and the transition of *Brown* from courtroom jurisprudence to a manifestation of equal educational opportunities for African American and other minority students has not been characterized by steady, forward progress. This research project is about *Brown*'s evolutionary transition vis-à-vis public school desegregation law. A comprehensive overview of the *Brown* v. *Board of Education* litigation and its affect on school desegregation is provided. The timeframe for the study primarily covers the years following the *Brown* decisions from 1954 to 2002. However, the study also emphasizes the legal and historical details that led to *Brown*. In addition, a review is included of the June 2003 United States Supreme Court decisions in the University of Michigan cases that addressed affirmative action issues, which is relative to *Brown*.

The body of case law and information associated with *Brown* was immense.[1] Therefore, specific litigation was selected for review and analysis. The basis for litigation selection is discussed in each chapter relative to the section's content. The litigation analysis is addressed from four perspectives: the Historical Perspective: "Separate-But-Equal" Era, the *Brown* Decisions, the Seminal Desegregation Era, and the Contemporary Desegregation Era. Since the research was so extensive, it is beyond the study's scope to exhaust all avenues of school desegregation case law in *Brown*'s progeny.

Brown offered the promise and hope of better educational opportunities for African American children in the United States. In the face of contemporary measures that consistently show achievement for African American children lagging behind that of their white and Asian counterparts, this project was motivated by a desire to explore the course of action, from a legal perspective, that resulted in unfulfilled expectations of *Brown*.

[1] See APPENDIX for partial representation of legal information associated with *Brown*.

DEDICATION

This dissertation is dedicated to the lives and legacies of United States Supreme Court Associate Justice Thurgood Marshall and his mentor, Charles Hamilton Houston, attorney. Thank you for your devotion and commitment. I stand on the foundation of educational opportunities that you helped establish so that I might be able to enjoy and experience the dreams and liberties you pursued so diligently.

My love and appreciation to those that accompanied me on this journey - my late parents, Rogers and Ruby Brown, my sister, Debbie, and my brothers, Alfred and Roger. And to the rest of my family and friends—you are the angels that God placed in my life. Thank you for your love and support.

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Many years ago, I learned a definition of leadership. That definition described leadership as the ability to bring out the best in others. In the spirit of that definition, I wish to acknowledge and express my sincerest appreciation to the members of my committee. Thank you to Dr. Steven Janosik for your substantive feedback. It helped keep me honest. Thank you to Dr. Stephen Parson for your objective perspective as a non-legal scholar. Successful communication with you about the substance of the topic was a sign that I had accomplished my goal. Your role as my "personal" Northern Virginia advisor was an unspoken but invaluable contributor to the success of my endeavors.

From the beginning, I was impressed with the commanding presence of personality, knowledge, and commitment to education and young people demonstrated by the Honorable Belle S. Wheelan. Just as Thurgood Marshall followed the leadership of Charles Hamilton Houston and made immeasurable contributions to his country, I humbly aspire to make a difference in the lives of children by following the example of Dr. Wheelan. I am grateful and honored for your participation in this project.

With a most beholden heart, my gratitude to Dr. M. David Alexander. You shepherded me from the beginning with this venture. Many times along the way, I felt as though I were wandering through a maze. Your knowledge, guidance, and wisdom enabled me to find my way each and every time. You were my sage. Because of your role and skills as a mentor, my direction for future pursuits becomes increasingly clearer with each experience of your encouragement and assistance. I am eternally grateful and indebted to you.

Usually, relationships that develop over time are of the most enduring quality. I will be

forever grateful to Dr. Richard G. Salmon. Over the course of this project, you were my counselor, my rock, my strength, and my teacher. I cherished every word you shared because there was always something of value and given in my best interest. Your never-ending support and constant faith in me were an inspiration.

This work was motivated by a desire to provide students in our present-day schools with something from the shared American heritage. When *Brown* was decided, Dr. Richard G. Salmon, was a male Caucasian, high school junior in Florida. Over the course of this project, he shared stories of what it was like during those times of his youth. Though different from my own story as an African American female born in 1953 and raised in Chicago Illinois, the relationship with Dr. Salmon helped me develop an additional perspective on this research area. That shared experienced is given to schoolchildren everywhere in hopes that their journey can be made better our journey.

In part, the completion of this study and my degree are a credit to the members of my committee as people and educators. I think Charles and Thurgood would have been delighted to know you. Thank you all for your leadership.

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CHAPTER 1

INTRODUCTION

Brown may be the most important political, social, and legal event in America's twentieth-century history. Its greatness lay in the enormity of injustice it condemned, in the entrenched sentiment it challenged, in the immensity of law it created and overthrew.[2]

—J. Harvie Wilkinson III, *From Brown to Bakke*

During the period of transition from the twentieth to the twenty-first century, American public schools found themselves faced with continued challenges in the efforts to equalize access to educational opportunities for African American children. This period of transition was the result of actions that began nearly half a century earlier. On May 17, 1954, the United States Supreme Court rendered its decision in the case of *Brown v. Board of Education*.[3] Reactions to the decision were varied and touched a range of emotions among nearly all citizens of the United States. For some, *Brown* was heralded as the triumph over legal barriers to better educational opportunities for African American children. Wilkinson offered that, "*Brown* promised equality through opportunity."[4] For others, *Brown* threatened to end a way of life, which was protected by the "separate-but-equal" rule of law established in *Plessy v. Ferguson*.[5] From both perspectives, *Brown* meant change.

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[2] J. Harvie Wilkinson III, *From Brown to Bakke The Supreme Court and School Integration: 1954-1978* (New York: Oxford University Press, 1979), 6. The Honorable J. Harvie Wilkinson III is the Chief Judge for the United States Court of Appeals, Fourth Circuit. He was formerly a United States district court judge and law professor at the University of Virginia. Judge Wilkinson served as a law clerk to Lewis F. Powell, United States Supreme Court Justice (1972-1973).

[3] *Brown v. Board of Education***,** 347 U.S. 484 (1954) *(Brown I).* For purposes of clarity, "*Brown"* was used as the generic referent to overall case law established as a result of the rulings in both *Brown I* and *Brown II*, unless otherwise specified. "*Brown I"* was used as the collective reference for the companion cases discussed in chapter 3 and unless otherwise specified. "*Brown II"* was used to refer to *Brown v. Board of Education*, 349 U.S. 294 (1955), the remedy decision for *Brown I*, unless otherwise specified.

[4] Wilkinson, *From Brown to Bakke,* 264.

[5] *Plessy v. Ferguson,* 167 U.S. 537 (1896) (*Plessy*).

In some public schools, "separate-but-equal" laws required or permitted segregation or separation of students based upon race.[6] However, the *Brown* ruling declared educational facilities separated along racial lines to be inherently unequal. The effect of the ruling was to bring about a change in the *status quo* for American public education by prohibiting racially segregated schools. *Desegregation* became a term used in the years ahead to characterize the change.

The declaration that separate education for African American and white students was inherently unequal reflected only part of the Court's business in the *Brown* case. At the heart of the matter were the Fourteenth Amendment and its equal protection of the law and the Fifth Amendment Due Process Clause.[7] Prior to *Brown,* the Supreme Court ruled on higher education litigation[8] that initially dealt with "separate-but-equal" primarily in terms of "tangible" factors, such as school buildings, instructional equipment, and textbooks. Between the first and last of the "separate-but-equal" higher education cases, the Supreme Court's focus began to expand past the "tangible" conditions to include "intangible" factors, such as faculty reputations, institutional prestige, positions held by alumni, and other similar elements. In the higher education cases, the Supreme Court found that "separate-but-equal" was *"unequal"* education. In the *Brown* opinion, the Court went beyond tangible and intangible considerations dealt with in the prior higher education rulings stating that, "we [the justices] must look instead to the effect of segregation

[6] *Brown* dealt with *de jure* (i.e., for the Latin, "as a matter of law") segregation. However, the legal specifics were individual to each case. In the Kansas case, the challenged statute permitted but did not require separate schools for African American and white children in cities with more than 15, 000 residents. (*Brown v. Board of Education*) In the cases from South Carolina, Virginia, and Delaware segregated schools for African American and white students were required by the state constitutions and by statutes. Although the District of Columbia maintained segregated schools, extensive debate took place over whether congressional mandates served as the legal basis for the segregation. No specific statute is cited in the *Bolling v. Sharpe* record; the case was predicated on alleged constitutional violations.

[7] The issue of applicable constitutional amendments is expansively dealt with in chapter 3 of this study.

[8] The higher education litigation was *Missouri ex. rel Gaines v. Canada,* 305 U.S. 337 (1938) (*Gaines*); *Sipuel v. Board of Regents of University of Oklahoma,* 332 U.S. 631 (1948) (*Sipuel*); *Sweatt v. Painter,* 339 U.S. 629 (1950) (*Sweatt*)and*; McLaurin v. Oklahoma State Regents,* 339 U.S. 637 (1950) (*McLaurin*).

itself on public education."[9] In evaluating the effect of segregation on public education, the justices concluded that:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right, which must be made available to all on equal terms. We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of educational opportunities? We believe that it does.[10]

This study looked at the evolution of school desegregation case law between 1954 and 2002. Legal analysis was the research methodology used to conduct this study. Case law provided the material subjected to analysis. Both before and after *Brown*, obstacles and controversy marked the path toward attainment of educational opportunities for African American children. Relative to *Brown*, the issues presented to and decided upon by the courts were often shaped by societal, political, business, economic, or other concerns. There was a "swirl of social and political events affecting it (i.e., the *Brown* decision)."[11] When appropriate, contextual information was used to enhance and clarify the issues associated with *Brown*.

The body of law covered by this study was comprised of selected United States Supreme Court decisions with *Brown* as the progenitor and school desegregation issues at the core. Litigation decided at the level of the highest Court in the land was chosen because of the far-reaching implications of the rulings on educational policies and practices.

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[9] *Brown I*.
[10] Ibid.
[11] Richard Kluger, *Simple Justice* (New York: Random House, 1977), 673.

In 1995, the United States Supreme Court ruled in the case, *Missouri v. Jenkins (Jenkins III)*.[12] Since 1995, the lower courts have continued to rule on issues relative to the desegregation of American public elementary and secondary schools. Due to the extensive body of law on school desegregation in the lower courts, it was prohibitive to include all related litigation in this study. The lower court cases selected for inclusion in this study were chosen for various reasons, such as the points of law raised, relevance to previous desegregation rulings, and potential for direction of future rulings on school desegregation.

In 1954, *Brown* was seen by many as the promise of equal educational opportunities for African American children. At the time, some people believed that public school desegregation would be the means to accomplish that end. The events and dynamics that brought the desegregation of American public schools to the present juncture were complex and occurred over many decades. This study attempted to provide a legal picture of school desegregation case law through its fifty-year evolution.

Statement of the Problem

While the Brown decision declared state-promoted segregation unconstitutional and pronounced any such laws or policies null and void, it did not actually prescribe what formerly segregated school systems must do to attain "de-"segregation, other than ending laws and other practices that promoted segregation. [13]

—David J. Armor, *Forced Justice*

One concept that served as a premise for this study was *Brown* and public school desegregation's relevance to the education of African American children and equal educational opportunities for all students. This was important because education has served as a means to achieve a "successful" American way of life complete with all of its dreams. Unfortunately, since the nation's beginning, access to those dreams and promises for untold numbers of African

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

American students has been affected negatively by the absence of equal educational opportunities denied to them simply because of their race.

Following the *Brown* ruling the country embarked on a new course in its relationship between race and American public schools. The effect of the ruling in the *Brown* case was the official termination of legally sanctioned segregated schools. Desegregation or abolition of the practice of separating students by race in public schools resulted in new issues to be addressed and a continual flow of litigation to American courts. The precedents established by the courts on school desegregation, the body of law accumulated on the matter, and the policies and practices derived from it have significantly affected American public schools across the country during the time span covered by this study.

The years between 1954 and 2002 saw litigation and rulings in American courts on a broad range of school desegregation issues. Interpretations of *Brown* took on various meanings. Within a decade the meanings changed and expanded in the larger political context and in the Supreme Court opinions themselves.[14] "In the 1950s desegregation meant eliminating state-sanctioned policy of separating children solely on the basis of race. By the 1970s desegregation had come to mean racial balance."[15]

Judicially supervised remedial desegregation plans used to eliminate racially separate schools were another factor that created changes to the face of school desegregation over the years. The courts held school authorities accountable for the mandates set forth in the remedial desegregation plans. The judicially decreed plans often included provisions designed to desegregate faculties, eliminate single-race schools, facilitate interracial participation in

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[13] David J. Armor, *Forced Justice: School Desegregation and the Law* (New York: Oxford University Press, 1995), 6.
[14] Jack M. Balkin, ed., *What Brown v. Board of Education Should Have Said* (New York: New York University Press, 2001), 9.

extracurricular activities, and other strategies designed to end racial discrimination and establish unitary school systems.[16] Nevertheless, "by the mid-1980s, educators and policymakers in a number of cities were actively discussing the option of dismantling their desegregation plans."[17] Norfolk City, Virginia, discussed in Chapter 5 of this study, provided a good example of efforts to dismantle desegregation plans.

School desegregation's contemporary period during the 1990s, saw another shift in the climate. "The Supreme Court handed down the first of three resegregation decisions in 1991."[18] The resegregation decisions largely took the place of goals that school desegregation came to symbolize; that is, "rooting out the lingering damage of racial segregation and discrimination, and replaced them with the goals of minimizing judicial involvement in education and restoring power to local and state governments, whatever the consequences."[19] Although school desegregation case law addressed different issues at different times, rulings by the federal courts determined and shaped desegregation practices in American public schools from 1954 to 2002 and likely will continue to do so.

School desegregation as it came before the courts between 1954 and 2002 focused the problem this study seeks to address. The problem as stated by Gary Orfield, Director of the Harvard Project on School Desegregation, is that, "there is considerable confusion about the status of desegregation law but the basic trend is toward dissolution of desegregation orders and

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[15] Raymond Wolters, *The Burden of Brown: Thirty Years of School Desegregation* (Knoxville: The University of Tennessee Press, 1984), 3.

[16] A unitary school system refers to a nonracial system of public education "extending not just to composition of [the] student bod[y] . . . but to every facet of school operations -- faculty, staff, transportation, extracurricular activities and facilities." (*Green v. County School Board of New Kent County*, 391 U.S. 430 (1968*)*. Unitary school system refers to one "within which no person would be effectively excluded from any school because of race or color." (*Alexander v. Holmes County Board of Education*, 396 U.S. (1969).

[17] Gary Orfield and Susan Eaton, *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* (New York: The New Press, 1996), 17.

[18] Ibid., 3. The resegregation decisions were *Board of Education of Oklahoma City Public Schools, Independent School District No. 89 v. Dowell*, 498 U.S. 237 (1991); *Freeman v. Pitts*, 503 U.S. 467 (1992) and; *Jenkins III*.

[19] Ibid., 2-3.

return to patterns of more serious segregation."[20] While the Orfield quote is used to both illustrate the problem and as a point of reference for this study, it additionally points to the complicated and multifaceted nature of the issues for desegregation as related to American public schools. The research inquiry for this study that evolved from Orfield's commentary was, "how did we get from the promise and hope of *Brown*, via desegregated schools, to a confused state on school desegregation case law, dissolved desegregation decrees, and back to segregated schools?"

Orfield identified three issues: (1) confusion about the status of school desegregation law; (2) dissolution of school desegregation orders; and (3) a return to patterns of more serious school segregation. The issues identified by Orfield can be seen as a contrast to the dominant message set forth by the Supreme Court during most of school desegregation's first thirty-seven years between 1954 and 1991. The controlling message communicated by the Court during that period was that racially separate schools were illegal and must be replaced by desegregated, unitary school systems. As this research focused primarily on the evolution of school desegregation law, the study's context for the 1954 to 2002 sojourn was set by the contrast offered by the majority of the pre-1991 Supreme Court rulings on school desegregation and Orfield's summary on the Court's school desegregation rulings between 1991-1995.

At this point, an important clarification must be made regarding the research inquiry as related to the third identified Orfield issue that addressed "resegregated schools." Based on previous research, the issue of racially resegregated schools was seen to be significant enough in its own right as to constitute a separate project for examination. While intrinsically related to this

[20] Gary Orfield, "Schools More Separate: Consequences of a Decade of Resegregation," *Rethinking Schools* 16, no. 1 (2001), 15.

study, the return to patterns of serious school segregation in many areas of the nation, was not part of this study's primary focus.

Significance of the Problem

Public school desegregation, initiated over fifty years ago, has had a profound impact on American schools and students. Although de jure segregation is largely a thing of the past, a problem remains with de facto segregation in public schools.[21]

—Karey A. Vering, "Voluntary Desegregation Measures"

Impact of Desegregation

Race has played and continues to play a role in the quality and quantity of educational services provided students who attend public schools. At the time of *Brown*, the nation was at a pivotal point in its relationship between race and the quest for equal educational opportunities. As we enter the twenty-first century, the nation appears to have come to another pivotal point with regard to the role that public schools will play in addressing the needs of all minorities, including African American children.

Brown brought about transition from racially separate schools to goals for unitary desegregated schools. The 1954 to 2002 period covered in this study was characterized by transitional phases of *Brown*'s evolution including "massive resistance"[22] following the *Brown* decisions. Subsequent transition occurred, as the courts became more adamant and prescriptive in their decisions following the implementation of school desegregation rulings. Another juncture was precipitated by the of school desegregation decisions in the 1990s by the United States Supreme Court. Because of the 1990s decisions, school districts and the lower courts continued to struggle with new standards that resulted from the rulings.

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[21] Karey A. Vering, "Voluntary Desegregation Measures Aimed at Achieving a Diverse Student Body Lose Ground in *Wessman v. Gittens*, 160 F. 3D 790 (1st Cir. 1998)," *Nebraska Law Review* (2002). Available on-line: www.westlaw.com Cite: 79 NELR 485.

[22] "Massive Resistance" refers to a "primarily political movement designed to rally white opposition to *Brown*. [P]art of the movement involved enacting statutes, which the NAACP lawyers had to challenge, to prevent desegregation." In 1955, "massive resistance" started and in 1959 began its eventual end. Mark Tushnet, *Making Civil Rights Law* (New York: Oxford University Press, 1994), 247.

The evolution of school desegregation has significantly affected a broad cross-section of operational concerns for the delivery of educational services. One consideration expressed by school districts and municipalities is the cost of remedies to eliminate school segregation, including on-going litigation. Numerous public school districts have been involved in school desegregation litigation with long, on-going histories; some continuing over decades. "Many urban schools remain involved in some form of court or government intervention to desegregate. Nearly all the plans, whether voluntary or court-ordered, are system-wide and include all grade levels."[23] " While . . . the attitudes of lower court judges, the opposition of parents, and the resegregation of our public schools may indicate that the era of school desegregation is over, in reality a great deal of court-ordered desegregation remains."[24] Given the long history of all school desegregation litigation and the on-going impact of Supreme Court rulings on school desegregation, school desegregation case law is significant for school districts as it relates to the education of all minority students, including African American children, and the provision of equal educational opportunities for all students.

Perspectives on the Status of Desegregation

The focus of this study took its direction, in part, from concerns over confusion about school desegregation case law and dissolution of desegregation orders that became significant during school desegregation's most recent face.

With the passage of time since 1954, school desegregation law and the desegregation of American public schools has grown into an ever-increasingly-complex myriad of enmeshed factors. The result of the complexity has been described as "confusion." Amid the confusion are

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[23] Carol Ascher, "The Changing Face of Racial Isolation and Desegregation in Urban Schools," (New York: ERIC Clearinghouse on Urban Education, 1993) DIGEST, ERIC, EDO-UD-93-5 Available on-line: http://eric-web.tc.columbia.edu/digests.

contentions that previous efforts to desegregate schools are being dismantled by the Supreme Court decisions of the 1990s. There are also, those who submit that this notion is not an accurate representation of the case law governing school desegregation. The differing perspectives provide an insight into the confusion and the debate.

Terminal state of desegregation perspective. Orfield has contented that *Brown* is now honored in theory rather than fact and that its vision has been abandoned.[25] Orfield further contended that the 1990s Supreme Court decisions on school desegregation "reflected a victory of the conservative movement that altered the federal courts and turned the nation from the dream of *Brown* toward accepting a return to segregation."[26]

In her article, "The Future of School Desegregation," Parker set forth a common perception that "the future of court-ordered school desegregation [is defined as] a non-issue: either desegregation cases are dead or, at the very least, the death knell has sounded. . . . Newspapers are full of stories about the end of desegregation, as are law reviews."[27] Ascher set forth a similar sentiment that, "during the past decade much has changed in the nation's demographic and housing patterns, as well as its commitment to school desegregation. Although educators in many cities still work hard to ensure that their schools are as desegregated as possible, others have abandoned the goal of desegregation, arguing that the cities have become too racially segregated to make school integration feasible, or that enforced segregation has only exacerbated white flight."[28] Joondeph contended that, "as the curtain falls on court-ordered desegregation nationwide, the debate over its wisdom as a strategy for overcoming racial

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[24] Wendy Parker, "The Future of School Desegregation," *Northwestern University Law Review* (Summer 2000). Available on-line: www.westlaw.com Cite: 94 NWULR 1157
[25] Orfield and Eaton, *Dismantling Desegregation*, ix-xix.
[26] Ibid.,1.
[27] Parker, "The Future of School Desegregation."
[28] Ascher, "The Changing Face of Racial Isolation and Desegregation in Urban Schools."

inequalities has emerged anew."[29] Joondeph further added that, "the court-ordered desegregation of America's public schools [wa]s nearly over."[30]

Parker identified five contemporary forces [that] seemed to signal an end to school desegregation litigation.

1. The Supreme Court's recent school desegregation decisions have been "deemed reflexively hostile."[31]
2. Lower court judges, presiding over cases entering their second or third decade, appear to suffer "simple exhaustion."[32]
3. More and more African American leaders and parents are curtailing their desegregation litigation on grounds that the remedies are insulting, ineffective, or too burdensome.[33]
4. African American, Asian American, and white parents have successfully challenged race-conscious student assignment policies.[34]
5. Despite decades of school desegregation litigation (or perhaps because of it), the level of segregation in American schools has increased in the 1990s.[35]

Caution on the demise of desegregation perspective. There is, however, another side to the debate on school desegregation. Other voices submit that present school desegregation case law does not suggest an end to the spirit or orientation of *Brown* or the desegregation of

[29] J Bradley W. Joondeph, "Skepticism and School Desegregation," *Washington University Law Quarterly* 76,. 1 (Spring 1998). Available on-line: www.wulaw.wustl.edu/WULQ/76-176-12.html.
[30] Bradley W. Joondeph, "A Second Redemption," *Washington and Lee Law Review* (Winter 1999). Available on-line: www.westlaw.com Cite: 56 WLLR 169.
[31] Parker, "The Future of School Desegregation," quoting Bradley W. Joondeph, "*Missouri v. Jenkins* and the De Facto Abandonment of Court-Enforced Desegregation," *Washington Law Review* (July 1996): Available on-line: www.westlaw.com Cite: 71 WALR 597.
[32] Parker, "The Future of School Desegregation," quoting Chris Hansen, '"Are the Courts Giving Up? Current Issues in School Desegregation," *Emory Law Journal* (Summer 1993): Available on-line: www.westlaw.com Cite: 42 EMORYLJ 863.
[33] Ibid.
[34] Ibid.

American public schools. After setting forth the previously noted common view of school desegregation, Parker discussed her empirical studies on the court-ordered desegregation of 192 school districts. "One [study] analyzed 126 written opinions covering eighty-nine school districts, and the other [study] examined docket sheets concerning court-ordered desegregation for 138 school districts in the Middle Districts of Alabama and Georgia and the Northern District of Mississippi."[36] Parker's analysis of federal district and appellate court written opinions[37] and decisions covered a sixteen-year period from January 15, 1983 to January 15, 1999. This time-period allowed an eight-year pre- and post-comparison of the effect of *Dowell*[38] on school systems seeking unitary status or termination of desegregation decrees by the courts.[39]

The studies by Parker addressed three issues. Those issues were: (1) whether defendants [school districts] are seeking termination of their lawsuits; (2) whether courts are closing cases and; (3) whether the Supreme Court's decision in *Dowell* has affected the answers to the first two questions.[40] Parker found that twenty-eight of the eighty-nine (31%) school districts were involved in unitary status litigation. In six of the twenty-eight cases (21%), the district court first raised the issue rather than the defendant school district. Unitary status was granted to nineteen school districts (68%); fifteen of which (79%) were released from federal court jurisdiction. Overwhelmingly, in sixty-one of the eighty-nine (69%) school districts, the litigation focus was on procedural and remedial issues rather than termination and ninety-seven of the 189 opinions addressed those same issues. In summary, unitary status and termination were small parts of the

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[35] Ibid.
[36] Ibid.
[37] "Written opinion" referred to officially published or electronically available court opinions. Parker, "The Future of School Desegregation."
[38] *Board of Education of Oklahoma City Public Schools, Independent School District No. 89 v. Dowell*, 498 U.S. 237 (1991).
[39] Parker, "The Future of School Desegregation."
[40] Ibid.

courts' and parties' business in school desegregation litigation analyzed by Parker.[41] The findings indicated that *Dowell* appeared to have little discernible effect on school districts seeking or courts granting unitary status.[42] Parker acknowledged that, while, the study numbers were too small for sweeping conclusions, she summarized that, "the studies clearly disprove the perception that school desegregation litigation is coming to an end."[43]

In his article, "Are the Courts Giving Up? Current Issues in School Desegregation," Hansen suggested ways to overcome tendencies inherent in the judicial processes that might help reenergize efforts toward desegregated, quality education for all children. Hansen advocated that plaintiffs' lawyers develop new and creative models of causation based upon the premise that strong showing of causation will make it more difficult for courts to close cases. Another suggestion was for "plaintiffs' lawyers to develop testimony about those jurisdictions in which segregation has been a complete success and cases have been satisfactorily closed."[44] Hansen suggested that lawyers ". . .develop new types of litigation. In one respect, a repackaged desegregation case may be more attractive to a court simply because it is new. It does not carry the weight of years of frustration due to perceived failure."[45]

Need for Clarity on Desegregation Case Law

Attempts to explain court rulings on school desegregation and translate those rulings into practical application strategies for school districts contributed to the debates on the exact status of school desegregation case law. The issues raised and the arguments presented in the debate are compelling. As storied and as complicated as the school desegregation process has been, one fact remains. The history and at least the near future of desegregated American public schools are

[41] Ibid.
[42] Ibid.
[43] Ibid. Parker further indicated that, "despite the five forces noted, and the number of high profile cases dismissed, the vast majority of school litigation continues, with no hint of impending termination."

fundamentally tied to the American judicial system. In the foreseeable years, decisions on school desegregation will continue to come from the courts of the United States. Given that school districts historically have taken, and will likely continue to take, their direction in the coming years from the courts on school desegregation; it then becomes crucial to have a sense of the evolution of school desegregation case law. It will also be important to be able to discern the points of law and turning points in the law with respect to school desegregation.

Purpose of the Study

... it is important to examine the historic role that the federal courts have played in preserving America's racial social order and, recognizing the critical role of education in social advancement, the role that these courts have played in protecting and expanding-but also, and importantly, curtailing and denying-Black's educational opportunities.[46]
—Janell Byrd, "The Federal Courts and Claims of Racial Discrimination in Higher Education"

This study chronicled and analyzed selected cases for the purposes of demonstrating the evolution of school desegregation case law and illustrating changes in the federal courts' direction on public school desegregation. The intent of this examination was to identify key school desegregation litigation, ascertain different points of law addressed in the litigation, determine turning points in the case law, and glean a sense of the present status of desegregation case law.

Research Questions

The emphasis is on the history of the Court in relation to the development of the nation. The theme is that of the Court as both a mirror and a motor-reflecting the development of the society which it serves and helping to move that society in the direction of the dominant jurisprudence of the day. [47]

—Bernard Schwartz, *A History of the Supreme Court*

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[44] Chris Hansen, "Are the Courts Giving Up? Current Issues in School Desegregation."
[45] Ibid.
[46]Janell Byrd, "The Federal Courts and Claims of Racial Discrimination in Higher Education," *The Journal of Negro Education* 69, no. 1/2 (Winter-Spring 2000): 12.

The following research questions guided this study.

1. What has been the evolution of school desegregation case law since the *Brown* decision in 1954?
2. Did court decisions on desegregation in the 1980s and 1990s differ from those in the 1960s and 1970s? If so, how?
3. How do the differing points of law and consequent changing terminology affect the face of desegregation? Have there been turning points in desegregation case law? If so, what were they?
4. What do decisions that are more recent tell about the status of desegregation?

Definition of Terms

Operationalization is the process of developing operational definitions of terms for the research construct. During operationalization, a researcher links the world of ideas to observable reality.[48]

-W. Lawrence Neuman, Social Research Methods

Understanding terminology is key to comprehending the concepts in the court rulings, laws, customs, traditions, and populations of people discussed in this work. The following terms were used in this study.

AFFIRMATIVE ACTION - A set of actions designed to eliminate existing and continuing discrimination, to remedy the lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination.[49]

AFRICAN AMERICAN - The terms, *colored, Negro*, *black,* and *African American*, refers to Americans of African descent and reflects referents used during different historical periods.[50]

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[47] Bernard Schwartz**,** *A History of the Supreme Court* (New York: Oxford University Press, 1993), vii.
[48] W. Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches* (Needham Heights, Mass.: Allyn and Bacon, 1997), 136.
[49] *Black's Law Dictionary*, 7th ed., s.v. *affirmative action.*
[50] All terms cited to in the definition of "African American" were used in authentic literature from the different historical periods covered by this study. Over time, the terms used to refer to Americans of African descent have

AMERICAN PUBLIC SCHOOL - An elementary, middle, or high school established under state law, regulated by the local state authorities in the various political subdivisions, funded in and maintained by public taxation, and open and free to all children of the particular district where the school is located.[51]

AUTHORITY - Primary authority is the law—whether it is found in statutes, regulations, court decisions, or administrative bodies. Secondary authorities are sources, which explain the law. These may be law review articles, scholarly treaties, bar journals, encyclopedias, or practitioner books.[52]

CASE LAW - The collection of reported cases that form the body of law within a given jurisdiction.[53]

DE FACTO SEGREGATION - Segregation constituted a de facto sociological phenomenon. "*De facto*" as taken from legal terminology meant that segregation existed by virtue of reality of behavior incorporated into everyday life. "*De facto* segregation results without purposeful action by government officials; real or actual segregation which occurs concomitant to social and psychological conditions as they exist."[54] *De facto* segregation constituted a sociological phenomenon.

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changed. Often, in the vernacular, the two most recent referent evolutions have been commonly used interchangeably. For example, in an essay on Heman Sweatt, the author, at the suggestion of Thurgood Marshall, interchangeably used the terms "black" and "Negro." See Michael L, Gillette, "Heman Marion Sweatt: Civil Rights Plaintiff," in Alwyn Barr and Robert A. Calvert, eds., *Black Leaders: Texans for Their Times* (Austin: Texas State Historical Association, 1994), 184.

[51] *Black's Law Dictionary*, 7th ed., s.v. *public school*.

[52] Research Methodology-Explanation of Terms, Harvard Law School. Available on-line: www.law.harvard.edu/library/research_guides/research_methods_terms.htm

[53] *Black's Law Dictionary*, 7th ed., s.v. *case law*.

[54] *Barron's Law Dictionary*, 4th ed., s.v. *de facto segregation*.

DE JURE SEGREGATION - These matters set in law are known as "*de jure*" or as a matter of law. "*De jure* segregation refers to segregation directly intended and sanctioned by law or otherwise issuing from an official racial classification."[55]

DESEGREGATION - The abrogation of policies that separate people of different races into different institutions and facilities (such as public schools).[56]

EDUCATION - The process of training and developing the knowledge, skills, mind, character, etc. in an American public school.

EDUCATIONAL OPPORTUNITY - Includes but is not limited to a chance or occasion to attend or participate in classroom, extracurricular, or other offerings under the sanctioned mandates of an American public school.

EQUAL OPPORTUNITY - Practices that do not discriminate on the basis of race, color, religion, sex, or national origin.[57]

ETHNICITY - The term *ethnicity* can be defined as the designation of a population subgroup having a common cultural heritage, as distinguished by customs, characteristics, language, common history, etc.[58]

EXECUTIVE ORDER - An order that is issued by the executive head of a government, such as the President of the United States or a governor of a state, and which has the force of law. An executive order of the President must find support in the Constitution, either in a clause granting the President specific power, or by delegation of power to the President.[59]

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[55] *Barron's Law Dictionary*, 4th ed., s.v. *de jure segregation.*
[56] *Black's Law Dictionary*, 7th ed., s.v. *desegregation*.
[57] *Barron's Law Dictionary*, 4th ed., s.v. *equal opportunity*.
[58] *Webster's New World Dictionary* (Dallas: Zane Publishing, 1995).
[59] *Barron's Law Dictionary*, 4th ed., s.v. *executive order*.

HIGHER EDUCATION - In the literature, the terms "higher education," "graduate school," and "graduate and professional school" were used to refer to educational matters, including litigation, at the post-baccalaureate level.

HOLDING - The legal outcome(s) of the case.[60]

INTEGRATION - The incorporation of different races into existing institutions (such as public schools) for the purpose of reversing the historical effects of racial discrimination.[61]

"JIM CROW" LAWS - A law enacted or purposely interpreted to discriminate against African Americans such as a law requiring separate restrooms for African Americans and whites.[62]

JUDICIAL REVIEW - A court's power to review the actions of other branches or levels of government, esp. the court's power to invalidate legislative and executive actions as being unconstitutional.[63]

JURISPRUDENCE - The study of the general or fundamental elements of a particular legal system as opposed to the practical and concrete details.[64]

MANDATORY AUTHORITY OR MANDATORY PRECEDENT - Whether a statute or regulation is mandatory authority may depend on the facts involved. Mandatory case law may also depend on the identical nature of the facts and legal issues involved as well as the level of the court that issued the opinion. A lower court is required to follow a higher court's ruling on an issue. A higher court is not required to follow the ruling or reasoning of a lower court opinion, although the opinion may be the persuasive authority.[65]

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[60] Christina Kunz et al., *The Process of Legal Research* (New York: Aspen Law and Business, 2000), 114.
[61] *Black's Law Dictionary*, 7th ed., s.v. *integration*.
[62] *Black's Law Dictionary*, 7th ed., s.v. "Jim Crow" *law*.
[63] *Black's Law Dictionary*, 7th ed., s.v. *judicial review*.
[64] *Black's Law Dictionary*, 7th ed., s.v. *jurisprudence*.
[65] Research Methodology-Explanation of Terms, Harvard Law School.

OPINION - A court's written statement explaining its decision in a given case.[66] Typically includes a summary of the facts of the case, the course of the litigation, the court's holding, and its reasoning.[67] Also includes points of law.[68]

PERSUASIVE AUTHORITY - All authority that may be used to convince a court to apply law in a certain direction. Elements to consider are the similarity of key facts and legal issues, the reasoning of the court, and the authority of the issuing body. Decisions of high courts are more persuasive than decisions in lower courts. Arguments set forth in major law reviews are more persuasive than those set forth in bar journals.[69]

RACE - Conventionally defined, *race* is any of the different varieties or populations of human beings distinguished by common physical traits such as hair texture, eyes, skin color, body shape, or other characteristics. Traditionally, the three primary racial divisions were Caucasoid (white), Negroid (black), and Mongoloid (yellow), although many subdivisions of these were also called "races."[70]

Despite the lack of a scientifically valid classification system of grouping people by race, the concept of race requires definition because of its importance to the sociological context to which American public schools belong. This sociological context necessitates a view of "race" from other perspectives such as cultural or political ones. "Race is of course a cultural and political category, hardly a biological category at all except in trivial and highly unstable ways. Struggles between 'races' have, however, created racial stereotypes that then seem to acquire a

[66] *Black's Law Dictionary*, 7th ed., s.v. *opinion*.
[67] Kunz et al., *The Process of Legal Research*, 114.
[68] *Black's Law Dictionary*, 7th ed., s.v. *opinion*.
[69] Research Methodology-Explanation of Terms, Harvard Law School.
[70] *Webster's New World Dictionary*.

life of their own, and themselves become 'causes' so that 'race' comes to signify a set of attitudes and behaviors. It is thus that a pathology is ascribed to a 'race.'"[71]

SEGREGATION - Segregation was a practice of separating people along racial lines. It was required by law in many instances as well as practiced by custom and tradition. In constitutional law, segregation is the maintenance of separate facilities and institutions for people of different races.[72]

Methodology

Legal research is the process of finding the law that governs an activity and materials that explain or analyze that law. . . .The legal system is created over the course of time, and the law in force today is a combination of old and new enactments and decisions.[73]
-Morris Cohen and Kent Olson, Legal Research in a Nutshell

This section describes the legal research methodology used for this study. Critical fact-related steps used to conduct this study were to: (1) gather the facts; (2) analyze the facts; (3) identify the legal issues raised by the facts and; (4) arrange the legal issues in a logical order for research.[74] The framework for the legal analysis used to conduct this study was provided by Wren and Wren. They stated that, "the purpose of researching the law is to ascertain the legal consequences of a specific set of actual or potential facts. It is always the facts of any given situation that suggest indeed, dictate, the issues of law that need to be researched."[75]

This study began with a historical perspective and a conceptualization of what is being studied. From that conceptualization, a framework of case law evolved. Evidence was gathered using varied and numerous sources. The sources were evaluated for relevance, accuracy, and

[71] Martha Howell and Walter Prevenier, *From Reliable Sources: An Introduction to Historical Methods* (Ithaca, N.Y.: Cornell University Press, 2001), 135.
[72] *Barron's Law Dictionary*, 4th ed., s.v. *segregation*.
[73] Morris Cohen and Kent Olson, *Legal Research in a Nutshell* (St. Paul, Minn.: West Group, 2000), 2.
[74] Christopher Wren and Jill Wren, *The Legal Research Manual* (Madison, Wisc.: A-R Editions, 1986), 29.
[75] Ibid., 29.

strength. Information was synthesized, concepts refined, and an explanatory approach was used to interject concepts or themes as they emerged.

Data Collection

Data. "Legal research involves the use of a variety of resources, some created by lawmaking bodies such as courts and legislatures, and others by scholars and practicing lawyers."[76] The information collected for this study consisted first and foremost of school desegregation case law. Selected litigation, mostly from the United States Supreme Court, that dealt with the desegregation of American public schools at the elementary and secondary levels was examined. The cases covered various points of law. Statutes, executive orders, legislative enactments, law review and journal articles, and other appropriate materials augmented the court cases. Court opinions were scrutinized for mandatory authority. Additional information was used to supplement the case law so that a complete portrait can be drawn of the interwoven factors examined in this study.

Sources/authorities of law. The law reviewed in this study was comprised of primary and secondary sources. Primary sources, also referred to as authorities, consist of the law itself, as expressed in constitutions, statutes, court decisions, and administrative regulations and decisions.[77] Secondary sources, which are writings or commentaries about the law found in primary sources such as legal treatises and law review articles, were also examined.[78] Triangulation of secondary sources or the use of several sources to validate a finding was applied to this study wherever possible.

[76] Cohen and Olson, *Legal Research in a Nutshell*, 2.
[77] Wren and Wren, *The Legal Research Manual*, 41.
[78] Ibid., 41.

Study Organization

This study is organized into six chapters.

Chapter 1. Introduction

Chapter 2. Historical Perspective: "Separate-But-Equal" Era

Chapter 3. The *Brown* Decisions and Public School Desegregation

Chapter 4. Seminal Desegregation Era

Chapter 5. Contemporary Desegregation Era

Chapter 6. Research Summary

Researcher Bias

The clearer we are about the theme of our own research, the clearer we become about our own bias. And the clearer we are about our own bias, the more honest and efficient we are likely to be in our own research.[79]

—*Jacques Barzun and Henry Graff*, The Modern Researcher

Impartiality is a dream and honesty a duty. We cannot be impartial, but we can be intellectually honest.

-Gaetano Salvemini

Bias is itself an ambiguous term with varied meanings in research. Barzun and Graff suggested that "bias is an uncontrolled form of interest."[80] In the context here, bias control "relies on the concept of truth and validity."[81] One of the explanations for bias provided by Hammersley and Gomm is "a tendency on the part of researchers to collect data, and/or to interpret and present them, in such a way as to favour false results that are in line with their prejudgments and political or practical commitments."[82]

[79] Jacques Barzun and Henry Graff, *The Modern Researcher* (Fort Worth, Tex.: Harcourt Brace Javonovich College Publishers, 1992) 185.
[80] Ibid., 186.
[81] M. Hammersley and R. Gomm, "Bias in Social Research," *Sociological Research Online* 2, no. 1. Available online: http://www.socresonline.org.uk/socresonline/2/1/2.html
[82] Ibid.

Each person is likely to have his or her own inclinations, proclivities, and predilections on the subject of school desegregation. This researcher claims no exemption from these human frailties, but motivation for this study calls for the researcher to achieve a level of professionalism that keeps bias to a minimum.

This research was conducted to acquaint students of the law and history with how intentions of the Warren Court have fared over fifty years. In addition, it was hoped that this research might, in some way, improve educational opportunities for students. To facilitate the desired outcomes, the study must be seen as credible and has to be free of bias. Every effort was made to present information accurately and within context.

CHAPTER 2

HISTORICAL PERSPECTIVE: "SEPARATE-BUT-EQUAL" ERA

. . . we are of humble opinion that we have the right to enjoy the privileges of free men. But that we do not will appear in many instances, and we beg leave to mention one out of many, and that is of the education of our children which now receive no benefit from the free schools of Boston, which we think is a great grievance, as by wo[e]ful experience we now feel the want of a common education. We, therefore, must fear for our rising offspring to see them in ignorance in a land of gospel light when there is provision made for them as well as others and yet can't enjoy them, and for not other reason can be given this they are black. . . . [83]

—Richard Kluger, *Simple Justice,* quoting from a petition to the state legislature of the Commonwealth of Massachusetts Bay, 1787

The term, "evolution" was used to describe the gradual unfolding process of development and change in the laws that regulate how children of different races will be educated at the public expense. The first research question guiding this study was concerned with the evolution of school desegregation case law since the *Brown I* decision. *Brown* was the culmination of a series of legal battles to secure equal educational opportunities for African American children in nonsegregated schools. *Brown's* evolutionary heritage is derived from legal, historical, social, political, economic, and governmental fibers that wove a tapestry for the relationship between race and American public schools. A multitude of cases could have been selected for inclusion in this study. Justification for their inclusion could have been made on the basis of various rationales, given the enormity of the subject and it tangential aspects. However, for purposes of this study two sets of litigation were selected to represent the beginning of *Brown*'s evolution and were reviewed in this chapter. The first set of cases established the "separate-but-equal" doctrine that *Brown* found in violation of constitutional protections. The second set of cases dealt with higher education litigation that paved the way for *Brown*. The litigation reviewed in this chapter was fundamental to *Brown's* origin, purposes, and form.

[83] Kluger, *Simple Justice,* 76.

In the *Brown* opinion, the justices spoke of having labored with the "separate-but-equal" doctrine for over half a century prior to *Brown's* appearance before the United States Supreme Court. The justices further elaborated that six cases involving the doctrine and public education had appeared before it, with the most recent cases having arisen from higher education.[84] During the nineteenth century, decisions in two cases, *Roberts v. City of Boston* and *Plessy v. Ferguson*, provided the legal foundation for the "separate-but-equal" doctrine.[85] The *Roberts*' case was cited as the first recorded case on segregated schools and the birthplace of the "separate-but-equal" concept.[86] The United States Supreme Court ruling in the *Plessy* case established "separate-but-equal" as the legal standard for conditions determined on a racial basis. Although *Plessy*'s legal standard was not directly challenged by the six cases referred to by the justices in the *Brown* opinion, the racial discrimination at the heart of the doctrine was also at the heart of those cases.[87] For the reasons cited in this paragraph, *Roberts* and *Plessy* comprise the first set of cases selected for review in this chapter.

The second set of cases selected for review focused on the higher education litigation that served as *Brown's* more immediate precursors. Although the plaintiffs in *Brown* were elementary and secondary students, the rulings in higher education cases laid the groundwork for *Brown.* In the *Brown* opinion, the court spoke to the inequalities of specific educational benefits enjoyed by white students but denied to African American students. The lack of equity in education, based upon race, was advanced as an issue in the higher education cases. While the Supreme Court found it unnecessary to reexamine "separate-but-equal" in order to grant relief in the higher

[84] *Brown.* The six cases were *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899), *Gong Lum v. Rice*, 275 U.S. 78 (1927), *Gaines*, *Sipuel*, *Sweatt*, and *McLaurin.*
[85] *Roberts v. City of Boston*, 5 Mass. 198 (1849) (*Roberts*) and *Plessy.*
[86] Kern, Alexander, and M. David Alexander, *American Public School Law* (Belmont, Calif.: Wadsworth Publishing, 1998), 449.

education litigation, foundational concepts important to *Brown* were established.[88] *Missouri ex. rel. Gaines v. Canada, Sipuel v. Board of Regents of University of Oklahoma, Sweatt v. Painter,* and *McLaurin v. Oklahoma State Regents* were the higher education litigation that comprised the second set of cases reviewed in this chapter.

"Separate-But-Equal" Doctrine

Roberts v. City of Boston

African American citizens of Nantucket Island, Massachusetts petitioned the town school committee in February 1842 to allow their children entry in the island's graded common schools rather than being restricted to the single ungraded segregated school designated for them. During the ensuing years, politics and other factors intervened. Eventually, in 1845, a former sea captain and the richest African American on Nantucket, Absalom F. Boston, on behalf of his daughter, Phebe Ann, petitioned the court to have her admitted to the public schools.[89] The case was filed but did not go to trial. The mantel to challenge the issue in trial court fell to the *Roberts*' case.

For half a century prior to the *Roberts*' case, the city of Boston kept separate schools for its African American children. The African American schoolteachers received the same compensation as their counterparts in the white schools and were to have the same qualifications.[90] In 1845, the Massachusetts legislature enacted legislation that permitted any child unlawfully excluded from public school instruction in the Commonwealth to recover

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[87] While *Plessy* served as the controlling case for segregating school children by race, *Plessy* itself did not address public education. Instead, *Plessy* condoned segregated public transportation systems, if the accommodations and services were "substantially equal."
[88] *Brown.*
[89] J. Morgan Kousser, "The Supremacy of Equal Rights: The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment," *Northwestern University Law Review* (Summer 1988). Available on-line: www.westlaw.com Cite: 82 NWULR 941.
[90] *Roberts.*

damages against the city or town by which such public instruction was supported.[91] In April 1847, Benjamin F. Roberts, an African American printer, attempted to register his daughter Sarah at a Boston common primary school, but a member of the school committee refused her application on grounds that she was an "colored" person.[92] Again in February 1848, Mr. Roberts took Sarah to a common primary school and was able to register her. However, a few weeks later Sarah's admission was rescinded, again based upon race. [93] Mr. Roberts' attempts to have Sarah attend school closer to home became pivotal. The distance, and the ramifications of Sarah's travel to the schools that served minorities, became a key issue in the litigation.[94] Sarah was required to travel past five white schools that were closer to her home before reaching the closer of the two African American schools. The closest white school was 900 hundred feet from her home; and the closest African American school was 2,100 feet.[95]

The attorneys for Benjamin Roberts and Sarah were Charles Sumner, prominent lawyer and anti-slavery activist and Robert Morris Jr., Boston's second African American attorney. On behalf of their clients, the attorneys asked the Common Pleas Court to assess damages against the city for unlawfully excluding Sarah from school as provided for in the 1845 statute.[96] The case moved on appeal from the Pleas Court to the Massachusetts Supreme Judicial Court.[97]

Some of the themes expressed by attorneys in the *Roberts*' case recurred in the years, decades, and century that followed. Charles Sumner argued that, according to the spirit of

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[91] In *Roberts*, referred to as "under statute of 1845, c. 214." See Levy, Leonard and Douglas Jones, eds., *Jim Crow in Boston: The Origin of the Separate But Equal Doctrine* (New York: Da Capo Press, 1974), 261-262 refers to the law as An Act Concerning Public Schools, Commonwealth of Massachusetts, passed March 24, 1845.
[92] *Roberts.*
[93] Kousser, "The Supremacy of Equal Rights."
[94] Levy and Jones, *Jim Crow in Boston*, x-xi. Between 1840 and 1844, petitions were presented to the Boston Grammar School Committee in attempts to change the city's segregated school system. During that time, Boston maintained 117 primary schools, with the Smith School being the only one for African American children.
[95] *Roberts.*
[96] Kousser, "The Supremacy of Equal Rights."
[97] *Roberts.*

American institutions and expressed by the Constitution of Massachusetts, all men without distinction of color or race were equal before the law. Sumner also indicated that continued exclusion of the African American children from the common schools, which were open to white children, was a practical inconvenience to African American children and their parents because of the additional distance traveled to and from school due segregated schooling conditions. Therefore, the separate schools were a violation of equality. He further contended that there was a stigma of caste placed upon African American children because they did not have access to the nearest public school. It was further argued that a school exclusively devoted to one class must differ essentially in spirit and character from the public school authorized by the law, although the same subject matter was taught in both schools.[98] Sumner contended, "they [colored children] ha[d] an equal right with the white children to the general public schools."[99] Sumner argued that segregated schooling did not benefit both races but rather injured both. He reasoned that "segregation created a feeling of degradation in African Americans and prejudice and uncharitableness in whites."[100]

The Massachusetts Supreme Judicial Court's holding was that the plaintiff, *Roberts*, had failed to sufficiently make the case; therefore, the case was dismissed. Further, the Court held that the Boston School Committee had the authority "to arrange, classify, and distribute pupils, in such a manner as they th[ought] best adapted to their general proficiency and welfare."[101] The committee's conclusion that the good of both classes of schools was served by providing separate primary schools for African American and white students was found by the judges to be an honest result of the committee's experience and judgment. Prejudice was an issue advanced

[98] Ibid.
[99] Ibid.
[100] Ibid.
[101] Ibid.

by the plaintiff, Roberts. The justices reasoned that prejudice, if it existed, was not be created by the law and that the law probably could not change it. On the issue of the additional distance that Sarah was required to travel to go to the African American school, the justices found it insufficient to make the law unreasonable or illegal.[102] With its holding in the *Roberts*' case, the Massachusetts Supreme Judicial Court established legal precedent for justification of separate schools based upon race.

"The *Roberts* case, obviously, had a profound influence on the law of the land and on preventing African Americans from attaining their equal rights."[103] The legal significance of *Roberts* resonated in American jurisprudence well beyond 1849. Reasoning from *Roberts* that the stigma of inferiority and degradation attached to the African American schools because of race made the separate schools unequal, found its way to the heart of the *Brown* litigation a century later. The justices' opinion in *Roberts* gave legal legitimacy to the rationale that "while all persons without distinction of age, birth, or color, origin or condition were equal before the law, it was a broad principle."[104] An assumption not made was that individuals had the same civil and political powers, had the same functions, or were subject to the same treatment. Instead, these rights were to be settled and regulated by the law.[105] *Roberts'* was "cited as precedent by a dozen state courts and by the United States Supreme Court on at least three occasions," [106] including the1896 *Plessy* case.

[102] Ibid.
[103] Levy and Jones, *Jim Crow in Boston*, viii.
[104] *Roberts*.
[105] Ibid.

Plessy v. Ferguson

The concept of "separate-but-equal" was born with *Roberts* in 1849. "Separate-but-equal" had fully matured into a doctrine by 1896 and with the *Plessy* decision, it became the legal standard used to judge race-related issues.

Between 1849 and 1896, the landscape of American life experienced drastic and traumatic changes. No aspect of the country was more affected than its legal system during this period. The Civil War (1861-1865) had been fought and Emancipation (1863) had freed the former slaves. The African American race had become an "unrecognized social institution in America" [107] and there was a need to define the status of African Americans in the new order. New laws at every level attempted to provide definition and address the "Negro" issue.

After the war, laws known as the "Black Codes" were passed by southern legislatures. The Black Codes were designed to "restrict the liberties of the newly freed slaves, continue a supply of cheap agricultural labor, and maintain white supremacy."[108] Between 1865 and 1870, Congress passed the Reconstruction Amendments, also known as the Civil War Amendments, to address the rights of former slaves. The Thirteenth Amendment (1865) prohibited slavery and involuntary servitude. The Fourteenth Amendment (1868) granted and protected citizenship rights and privileges, including due process and equal protection of the laws provisions. The Fifteenth Amendment (1870) protected voting rights of former slaves. Additionally, the Civil Rights Act of 1871, was passed, which made it possible for African Americans to pursue litigation, testify in court, make and enforce contracts, and be protected from discriminatory harm caused by state laws or nongovernmental origins.[109]

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[106] Kluger, *Simple Justice*, 76.
[107] Theodore B. Wilson, *The Black Codes of the South* (Tuscaloosa: University of Alabama Press, 1965), 14.
[108] *Black's Law Dictionary*, 7th ed., s.v. *black codes*.
[109] The Civil Rights Act of 1871.

In addition to the amendments, Congress passed the Civil Rights Act of March 1, 1875.[110] The Act provided that "all persons in the United States, regardless of race, color, or any previous condition of servitude, were entitled to full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land, water, theaters, and other places of public amusement; subject only to conditions and limitations imposed by the law."[111] It was a final attempt by Congress to safeguard the rights of African Americans following the Civil War.

The United States Supreme Court declared the Civil Rights Act of 1875 unconstitutional and void when it ruled in the *Civil Rights Cases*.[112] The *Civil Rights Cases* involved five separate cases that were decided together. One of the cases involved a railroad company. In that case, the Court held that the Fourteenth Amendment only banned violation of individual rights by state governments. The Court reasoned that excluding African Americans from public places amounted to invasion of social rights by private individuals, which Congress had no power to regulate.[113] These issues would be relevant in the *Plessy* case. Against the described backdrop, *Plessy* took center stage in the highest court of the land. The ruling in *Plessy*, by the United States Supreme Court, established the doctrine of "separate-but-equal" as the legal standard for racial segregation.

By 1896, when *Plessy* was decided, America had settled into a culture where the lawfulness of segregation was firmly and widely accepted.[114] "Jim Crow" laws, passed throughout the latter part of the nineteenth century, divided the country into "a world of separate

[110] Act Cong. March 1, 1875, 18 Stat. 355, Civil Rights Act of 1875.
[111] Ibid.
[112] *Civil Rights Cases*, 109 U.S. 3 (1883).
[113] Ibid.
[114] Michael W. McConnell, "Originalism and the Desegregation Decisions," *Virginia Law Review* (May 1995). Available on-line:www.westlaw.com Cite: 81 VALR 947.

railroad cars, schools, hospitals, cemeteries, restaurants, and even drinking fountains."[115] Under "Jim Crow" "separate-but-equal" was supposed to be the standard for facilities. Most often, separate facilities proved to be *"unequal,"* which translated to superior facilities marked "Whites Only" and inferior ones labeled "Colored."[116]

The *Plessy* case was an orchestrated response to the 1890 Louisiana Separate Car Act, which required equal but separate accommodations for African Americans and whites on all passenger railways other than street railroads. Seventeen African Americans, members of the American Citizens Equal Rights Association, denounced the legislation, declaring that it violated the tenet "that all men are created equal." Ultimately, a legal strategy was developed to make *Plessy* a test case on the constitutionality of the Separate Car Act. [117]

Homer Plessy was a United States citizen, Louisiana resident, and of mixed heritage, seven-eighths white and one-eighth African American. Plessy's racial makeup became one of the issues raised in the case. It was argued that because Plessy's mixture heritage was not observable, he was entitled to the rights, privileges, and constitutional protections that white citizens of the Unites States had.[118] As part of the protest and legal strategy, Plessy bought a first class ticket on June 7, 1892 and sat in the "whites only" railroad car rather than the "colored" car. Plessy's actions resulted in his arrest for violations of the Separate Car Act.[119]

The core issues in the case were charges that the Louisiana's Separate Car Act violated Homer Plessy's Thirteenth and Fourteenth Amendment rights by requiring racial separation on the railroad cars. It was argued that the law:

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[115] Brook Thomas, ed., *Plessy v. Ferguson A Brief History with Documents* (Boston: Bedford/St. Martin's), 3.
[116] Thomas, *Plessy v. Ferguson A Brief History with Documents*, 3.
[117] Charles A. Lofgren, *The Plessy Case* (New York: Oxford University Press, 1987), 28-29.
[118] *Plessy*.
[119] *Ibid.*

> imposed a badge of servitude by perpetuating the distinction of race and caste among citizens of the United States of both races. . . . the statute in question establishe[d] an insidious distinction and discrimination between citizens of the United States, based on race, which is obnoxious to the fundamental principles of national citizenship, perpetuates involuntary servitude, as regards the colored race, under the merest pretense of promoting the comforts of passengers on railway trains, and in further respects abridges the privileges and immunities of the citizens of the United States, and the rights secured by the Thirteenth and Fourteenth amendments of the federal Constitution.[120]

The United States Supreme Court ruled against Homer Plessy. Justice Henry Billings Brown, a native of Massachusetts, the same state where the *Roberts* case took place, wrote the opinion in the case. The majority of the justices upheld the Separate Car Act as a reasonable "police" measure, or within the police powers of the state.[121]

On the charges of Thirteenth Amendment violations, the Court found no conflict. Justice Brown relied upon a rationale that turned on the "difference between 'distinction' and 'discrimination.'"[122] He reasoned that as long as white men were distinguished from those of other races due to color, a law did not "destroy the legal equality of the two races or reestablish slavery or involuntary servitude"[123] by implying a legal distinction between the white and African American races. The Court further reasoned that the denial of accommodations in inns, public conveyances, and the like imposed no badge of servitude, therefore nullifying claims of

[120] *Ex parte Plessy*, 11 So. 948 La. (1892).
[121] Lofgren, *The Plessy Case*, 3.
[122] Ibid., 176.
[123] Ibid., 176.

Thirteenth Amendment violations.[124] Holdings in the *Civil Rights Cases* were cited as legal precedent for this finding.[125]

On the matter of Fourteenth Amendment concerns, the Court held that the provision was intended to establish equality of the African American and white races before the law. It could not have been intended to abolish distinctions based upon color or to enforce social, as distinguished from political, equality, or a commingling of the races upon terms unsatisfactory to either.[126] In the opinion, Justice Brown found the expansive objectives of the Fourteenth Amendment to be generally consistent with the "separate-but-equal"doctrine.[127]

In *Plessy*, the Court rejected arguments that "separate" constituted "inequality" and found separate schools to be an example of the "police" power of states. The decision in the *Roberts*' case was cited as case and statutory law to support this reasoning.[128] Justice Brown's use of the *Roberts'* decision captured the complexity of the *Plessy* case and reflected the various overtones of its decision. For example, Chief Justice Lemuel Shaw, of the Massachusetts Supreme Judicial Court and the *Roberts* case, was seen as an expert on "police" powers and the association of his name on this pivotal point of contention in the *Plessy* case provided increased credibility to the reasoning in Plessy.[129] Massachusetts was also a northern state closely associated with abolitionist sentiment and its allowance of separate schools made Louisiana appear less prejudiced against African Americans.[130]

In *Plessy*, Justice Brown reasoned that existing case law confirmed the constitutionality of legislatively decreed segregation in transportation. Laws requiring racial segregation were not

[124] *Plessy*.
[125] Ibid.
[126] Ibid.
[127] Lofgren, *The Plessy Case*, 177.
[128] Ibid., 177.
[129] Thomas, *Plessy v. Ferguson*: *A Brief History with Documents*, 32.
[130] Ibid., 32.

found an arbitrary or unreasonable use of legislative authority.[131] The issue of "preponderance of blood" or the mechanics of determining the definition of race, which was used by Plessy as one basis to assert his right to constitutional protections (i.e., seven-eighths white blood and one-eighth African American blood) was determined a matter for the state to decide and not an issue to be litigated before the United States Supreme Court.[132]

Plessy cemented the rising tide of laws that sought to legally institutionalize customs and practices that made the American culture a separate and "unequal" one based upon race. African Americans were sentenced to the "*Plessy* prison"[133] for more than fifty years: a world that was contrary to the words used to describe the doctrine; a world that was separate and "unequal."[134] The decision in *Plessy* was seven-to-one. The lone dissenter in Plessy, Justice John Marshall Harlan, captured the essence of the future in his dissenting opinion by expounding on a color-blind constitution and on a country, that has no caste. The "higher education" cases began the work of trying to realize those sentiments for nation's African American citizens.

"Separate-But-Equal" Higher Education Cases

In the 1930s, the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund set about developing legal strategies to fight racial segregation. The work of the NAACP to combat discrimination and segregation and to win civil rights for African Americans occurred in different arenas. Efforts were made to obtain equal pay for African American workers, abolish segregation in interstate transportation, obtain due

[131] Lofgren, *The Plessy Case,* 177.
[132] *Plessy*
[133] Lofgren, *The Plessy Case,* 3.
[134] Ibid, 4.

process for African American citizens in criminal cases, and various other causes, including the elimination of segregation in public schools.[135]

The NAACP's protracted battle against segregation and racial discrimination involved the talents, energies, contributions, and sacrifices of many people. Two men, Charles Hamilton Houston and Thurgood Marshall, joined the NAACP legal team and were instrumental in this fight. Charles Houston began the work. Thurgood Marshall quickly and enthusiastically joined his mentor, Houston. Seen as an "odd couple"[136] to many, both men became a lifelong crusaders and champions for ending segregation through the judicial process of the United States.

Charles Hamilton Houston was born on September 3, 1895, in Washington, D.C. He was the son of a prominent Washington, D.C. attorney, as well as a graduate of Amherst College and Harvard Law School. Houston was the first African American to edit the *Harvard Law Review.* While pursuing his law doctorate, Houston worked with the law school dean and Professor Felix Frankfurter, who coincidentally was a member of the Warren Court when *Brown* was handed down.[137]

In 1924, Houston began teaching at Howard University's Law School in Washington, D.C.[138] When Houston became dean of the law school in 1929, he moved to institute new rigor and upgrade the program. Houston's transformation of the law school included a philosophy that produced lawyers or "social engineers" that wanted to change society.[139] In 1935, Houston joined the New York NAACP Legal Department. There he set in motion his plan to challenge "Jim Crow" in the courts. Houston's legal theory was built upon confrontation with *Plessy* in that if separate was equal, states had to comply and provide the same educational provisions for

[135] Ralph S. Spritzer, "Thurgood Marshall: A Dedicated Career," *Arizona State Law Journal* (Summer 1994). Available on-line: www.westlaw.com Cite: 26 AZSLJ 353.
[136] Juan Williams, *Thurgood Marshall: American Revolutionary* (New York: Times Books, 1998), 93.
[137] Ibid., 54-55.

African American and white students.[140] The strategy was to ultimately make it too expensive for the South to operate segregated schools.[141]

The contributions made by Thurgood Marshall pursuant to the *Brown* litigation cannot be overstated. His presence, stewardship, and leadership were incalculable in bringing *Brown* to fruition in the United States Supreme Court after two decades of struggle. Thurgood Marshall was born in Baltimore, Maryland, on July 2, 1908. After his graduation, with honors, from Lincoln University, Marshall entered Howard University Law School in 1930. Marshall was in the first class of "social engineering lawyers" under Charles Houston's new order at the school. Marshall graduated from Howard Law School in 1933.[142]

Charles Houston brought Thurgood Marshall to the New York NAACP Office in October 1936 and in 1938, Marshall succeeded Houston as legal counsel for the NAACP. Marshall's tenure at the NAACP lasted twenty-five years. Through Marshall's tireless efforts, imposing presence, enthusiastic support and dedication to ending segregation, shrewd legal skills, and acumen for organizing people and labors, *de jure* segregation in the nation's public schools gradually came to an end. [143] Thurgood Marshall argued thirty-two cases before the United States Supreme Court; he won twenty-nine. On October 23, 1961, Marshall became a United States Court of Appeals Judge for the Second Circuit. Marshall assumed the position of United States Solicitor General[144] on August 24, 1965. He was appointed to the United States Supreme Court

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[138] Tushnet, *Making Civil Rights Law*, 6-7.
[139] Ibid, 6-7.
[140] Mark V. Tushnet, ed., *Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminiscences* (Chicago: Lawrence Hill Books, 2001), 274.
[141] Tushnet, *Making Civil Rights*, 13.
[142] Williams, *Thurgood Marshall: American Revolutionary*, 55.
[143] Tushnet, *Making Civil Rights*, 11-41.
[144] Solicitor General is the person appointed by the President of the United States to assist the Attorney General. The chief courtroom lawyer for the executive branch; argues suits and appeals before the United States Supreme Court. See *Black's Law Dictionary*, 7th ed., s.v. *Solicitor General* and *Barron's Law Dictionary*, 4th ed., s.v. *Solicitor General*.

by President Lyndon Johnson in June 1967 and took the constitutional oath of office on October 2, 1967.[145]

In the southern states, separate schools for African Americans and whites were customarily *unequal*, with African American schools maintaining an inferior condition, although "separate-but-equal" was the legal standard.[146] To override these inequities would ultimately mean a successful challenge to the decision rendered in the *Plessy* case. Nathan Margold, a Jewish attorney hired by the NAACP, advised in his Margold Report (1931) that to do anything less (i.e., challenge to *Plessy*) would be "leaving untouched the very essence of the existing evils of segregation."[147] In discussing the seriousness of the litigation strategy, Margold further advised that, "if we boldly challenge the constitutional validity of segregation if and when accompanied irremediably by discrimination, we can strike directly at the most prolific sources of discrimination."[148]

With the undoing of *Plessy*'s "separate-but-equal" as the cornerstone of the litigation strategy, the logistics of the legal attack on segregation took over two decades to develop and emerge before the final culmination. The approach to obtain the objectives did not begin with a frontal assault on *Plessy*; instead, the NAACP strategy was a two-pronged attack. First, a major strategic decision was made by the plaintiff attorneys to pursue a gradual and low threat desegregation plan; a plan that would reduce the fears of white parents brought about by the

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[145] Williams, *Thurgood Marshall*, Insert.

[146] Constance Baker Motley, "The Historical Setting of *Brown* and Its Impact on the Supreme Courts," *Fordham Law Review* (October 1992). Available on-line:www.westlaw.com
Constance Baker Motley, an African American attorney, was a key assistant to Thurgood Marshall. She began at the NAACP Legal Defense and Educational Fund in 1945. The first case she worked on was *Sweatt*. Constance Motley represented James Meredith in litigation to enter the University of Mississippi. She argued twelve cases before the Supreme Court and won all but one. Constance Baker Motley was a United States district court judge. Constance Baker Motley, *Equal Justice Under Law* (New York: Farrar, Straus and Giroux, 1998).

[147] Mark Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950* (Chapel Hill: University of North Carolina Press, 1988), quoted in Peter Irons, *A People's History of the Supreme Court* (New York: Penguin Books, 1999), 370.

[148] Ibid., 370.

forced association of African American male children with white female children.[149] The less threatening plan would initially address the obvious disparities that existed throughout the nation. It was well documented that *de jure* segregation had always been accompanied by inequality.[150] By forcing states to strictly adhere to "separate-but-equal" doctrine, the NAACP hoped that the financial impact of providing two separate but "equal" institutions would drive "Jim Crow" statutes out of existence.[151]

Second, the leadership of the NAACP was convinced that the public was much less threatened by the desegregation of public higher education than the desegregation of public K-12 schools.[152] Once higher education was successfully desegregated, the NAACP felt that a more peaceful desegregation of K-12 schools could be achieved. There were several advantages to moving initially on higher education to lay the foundation for ending segregation in public K-12 schools.[153] The unfairness of separate practices at the college and university levels could be publicized, and commingling of African Americans and whites at the higher education level would be less threatening to white America than the forced mixing of younger children.[154] It was also thought that a cautious and gradual approach to desegregation would likely cause a less volatile reaction from the white population, primarily in the southern states.

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[149] Irons, *A People's History of the Supreme Court*, 370.
[150] Irons, *A People's History of the Supreme Court*, 372-73; Kevin M. Kruse, "Personal Rights, Public Wrongs: The *Gaines* Case and the Beginnings of the End of Segregation," *Journal of Supreme Court History* 2 (1997): 113-130.
[151] Kevin M. Kruse, "Personal Rights, Public Wrongs: The *Gaines* Case and the Beginnings of the End of Segregation," *Journal of Supreme Court History* 2 (1997): 113-130.
[152] Motley, "The Historical Setting of *Brown.*"
[153] Tushnet, *Making Civil Rights*, 13.
[154] Irons, *A People's History of the Supreme Court*, 370. Reportedly in the Spring 1952, the United States Solicitor General, Philip Perlman, took the position that it was permissible to have mixed race student bodies at the higher education level. However, the integration of K-12 schools was seen as a threat to stability of southern school systems that could lead to open uprisings. Kluger, *Simple Justice*, 558. "According to Perlman's assistant, Philip Elman, Perlman said, 'You can't have little black boys sitting next to little white girls. The country isn't ready for that.'" Tushnet, *Making Civil Rights*, 173 quoting Philip Elman, "The Solicitor General's Office," 825-27.

The NAACP attorneys moved carefully to lay a foundation with four higher education cases that eventually led to the end of segregation in American public K-12 schools. The strategy used in these cases rested, in part, upon earlier higher education victories, including the 1936 *Pearson v. Murray* decision.[155] Thurgood Marshall, with advice, counsel, and supervision by Charles Houston, sued the University of Maryland on behalf of Donald Murray, an African American and graduate of Amherst College. Due solely to his race, Murray was denied admission to the University of Maryland, the only public law school located in the state of Maryland. Writ of mandamus was sought and was based upon charges that the failure to admit Murray constituted denial of equal protection guaranteed by the Fourteenth Amendment. The University of Maryland attempted to resolve the matter by offering to pay Murray's tuition at another institution. The case was litigated, and the Maryland Court of Appeals ruled that the University of Maryland's failure to provide a "substantially equal" educational opportunity for Murray violated his constitutional rights under the Fourteenth Amendment. Further, the court held that because no provisions existed for the establishment of separate schools, the writ of mandamus was affirmed and Murray's admission to the law school was ordered.[156]

Mandamus was the favored recourse of the NAACP in the higher education cases. The use of mandamus forced officials to take positive action (i.e., required the subject universities to admit individuals). By contrast, the use of injunction orders meant the party(s) to stop certain activities.[157]

The legal issues in the *Murray* case proved to be recurrent themes in the pre-*Brown* higher education cases. After successful experiences at the higher education level, the litigation

[155] *Pearson v. Murray,* 182 A. 590 (Md. 1936).
[156] *Pearson v. Murray*.
[157] Kruse, "Personal Rights, Public Wrongs," 115.

unit of the NAACP acted on other higher education cases in order to achieve the ultimate objective of ending segregation in American public schools.

Finding plaintiffs for the legal challenges to undo "separate-but-equal" was not an effortless task. The NAACP sought plaintiffs able to endure the burdens associated with protracted litigation processes and committed to stay with the case(s) through the full course.[158] Although their contributions were immeasurable in securing rights and constitutional liberties, the personalities and details about the people behind the names on the different litigation rarely emerged. Concerns over physical harm to the plaintiff(s) or their family and friends were real considerations. Individuals named in litigation faced "racial hostilities and harassment by whites that saw African Americans involved in the NAACP lawsuits, as troublemakers and racial agitators."[159] The logistics of meetings and court appearances that came with the processes of continued litigation also presented disruption to personal lives and posed a factor for potential plaintiffs. The scrutiny of news media attention transformed ordinary lives to those of public figures, which characteristically found plaintiffs unprepared for the psychological and other pressures associated with the transformation.[160] The higher education plaintiffs had to be "qualified academically for admission to [a] segregated institution . . . once admitted to [the] white school, the [plaintiff] had to attend the institution, compete academically, and endure whatever threats and insults came his way."[161] Despite the challenges, the NAACP persevered with its fight to end segregated schools.

[158] Williams, *Thurgood Marshall*, 175.
[159] Alwyn Barr and Robert A. Clavert, eds., *Black Leaders: Texans for Their Times* (Austin: Texas State Historical Association, 1941), 158.
[160] Ibid., 158.
[161] Ibid., 158.

The four higher education cases, decided by the Supreme Court prior to *Brown* I, were examined in this section. "Each of these pre-*Brown* cases was decided within the 'separate-but-equal' context, although the validity of segregated education, per se, was also being attacked."[162]

***Missouri Ex. Rel Gaines v. Canada*, 305 U.S. 337 (1938)**

Lloyd L.Gaines wanted to go to law school. Gaines was an honor student, senior class president, and 1935 African American graduate of Lincoln University in Missouri. Lincoln University, Missouri's state-supported African American college, had no law school. Gaines applied to the University of Missouri Law School, the white state institution. He was denied admission based on grounds that it was contrary to the laws and public policy of Missouri to admit an African American student to the University of Missouri. The university advised Gaines of his options. One option was that he could attend a law school in an adjacent state and have his tuition paid. Another option was for a law school to be established at Lincoln University.[163]

Rather than accept the options offered by the university, Gaines chose to pursue legal assistance through the NAACP. At issue was the fact that Missouri did not provide African Americans with advantages for higher education that were substantially equal to that offered to white students. White students were offered the opportunity for a legal education within the state of Missouri, while African American students with the same qualifications had to attend a law school outside the state. This was alleged to be in violation of the equal protection of the laws provisions of the Fourteenth Amendment.[164] The NAACP lawyers filed suit seeking a writ of mandamus on Gaines' behalf.

Charles Houston, one of the NAACP counsels, argued successfully that Lincoln University was unequal to the University of Missouri. Differences were established between the

[162] Motley, "The Historical Setting of *Brown.*"
[163] *Gaines*.

two schools in that Lincoln's faculty did not have the same degrees, salaries, building assets, library holdings, and other important considerations, as did the faculty at the University of Missouri. Both the plaintiff and defendant agreed that Gaines was denied admission to the University of Missouri solely on the basis of race. Thus, "equality" became a constitutional mandate for the alternative means of education and a writ of mandamus was ordered to correct the violation of Gaines' constitutional right to educational opportunities equal to that afforded white students.[165]

On December 12, 1938, the United States Supreme Court held that the laws of Missouri had created a privilege for white students that it denied to African Americans because of their race. In addition, providing for tuition payment was not found to remove the discrimination by the state against Gaines. The Court held that Gaines was entitled to be admitted to the University of Missouri's law school in the absence of other and proper provisions for his legal training in the state of Missouri itself.[166]

The Court, however, stopped short of ordering Gaines admitted to the law school.[167] Following the Supreme Court's decision, Missouri exercised its option of establishing a "separate-but-equal" law school for African Americans. It hastily created a law school by converting an old building that was formerly a hair tonic factory and cosmetics school in a lower class St. Louis area. Efforts to create the law school were executed by Lincoln University. In addition to renting building space, four faculty members, a dean from Howard University, and a library consisting of 10,000 books were acquired to establish a law school for African

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[164] *Gaines.*
[165] Kruse, "Personal Rights, Public Wrongs." 117.
[166] *Gaines.*
[167] Motley, *Equal Justice Under Law*, 62.

Americans.[168] The NAACP prepared to file suit on grounds that the "law school for Negroes" was not equal to the one at the University of Missouri and to present Gaines "as a matter of record" for admission to the university. However, Lloyd Gaines had disappeared.[169]

Reportedly, Lloyd Gaines experienced a range of difficulties associated with the notoriety of the litigation.[170] In early 1939, Gaines left his home in St. Louis, Missouri to find work in Kansas City, Missouri. Unable to secure employment there, he traveled to Chicago, Illinois, again in hopes of finding work. In a letter to his mother dated March 4, 1939, Lloyd Gaines wrote of his despair and frustration He lamented over "wish[ing] that [he] were a plain, ordinary man whose name no one recognized."[171] He also told his mother that if she didn't hear from him, he would be "all right." Gaines finally established residency on the south side of Chicago at the house of his fraternity, Alpha Phi Alpha. Reportedly, Gaines put on his coat one night, announced that he was going out to but stamps, and that he would soon be back. "He stepped out the door and vanished into the cold, rainy darkness."[172] Gaines was not heard from again.

The mystery surrounding Gaines' disappearance was never solved. Rumors abounded as to what may have happened to him. Unconcerned attitudes of Gaines' family,[173] theories that he had taken bribe money,[174] rumors that he met with "foul play"[175] or couldn't take the pressure,[176] and that he likely fled to Mexico[177] fueled speculation as to Lloyd Gaines' fate. Aside from his

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[168] Douglas O. Linder, "Before *Brown*: Charles H. Houston and the *Gaines* Case," ((c) 2000) Available on-line: www.law.umkc.edu/faculty/projects/ftrials…/charleshoustonessayF.htm
[169] Kruse, "Personal Rights, Public Wrong," 125-26.
[170] See Williams, *Thurgood Marshall*, 97-98. See Linder, "Before *Brown*: Charles H. Houston and the *Gaines* Case."
[171] Linder, "Before *Brown*: Charles H. Houston and the *Gaines* Case."
[172] Linder, "Before *Brown*: Charles H. Houston and the *Gaines* Case."
[173] Ibid.
[174] See Williams, *Thurgood Marshall*, 98 and Linder, "Before *Brown*: Charles H. Houston and the *Gaines* Case."
[175] See Linder, "Before *Brown*: Charles H. Houston and the *Gaines* Case," regarding the possibility that segregationists or white supremacists may have killed Gaines. See Greenberg, *Crusaders in the Courts*, 63.
[176] Jack Greenberg, *Crusaders in the Courts* (New York: Harper Collins, 1994), 63.
[177] See Linder, "Before *Brown*: Charles H. Houston and the *Gaines* Case," Greenberg, *Crusaders in the Courts*, 63, and Williams, *Thurgood Marshall*, 98.

personal circumstances, Gaines' disappearance made it impossible for the NAACP legal strategy to move into a position to capitalize on the Court's decision in the *Gaines* case.[178] In an interview with the late Carl Rowan, Justice Thurgood Marshall, commented on the Gaines situation saying that he "remember[ed] *Gaines* as one of our greatest victories, but I have never lost the pain of having so many people spend so much time and money on him [i.e., Gaines], only to have him disappear."[179]

***Sipuel v. Board of Regents of University of Oklahoma,* 332 U.S. 631 (1948)**

It would be ten years (1938-48) between the decisions in the first and second pre-*Brown* higher education cases. During this time America had entered and fought in World War II under a slogan, "To Make The World Safe for Democracy."[180] In spite of well-known African American achievements like those of the Tuskegee Airmen,[181] African American troops were forced into separate units and were rarely able to rise above the lowest military ranks.[182] The hypocrisy of American racial segregation while fighting Hitler, a proponent, and practitioner of racism, proved an embarrassment for the country.[183] The NAACP altered its priorities during this period and sought to end segregation in the military through the political process. One outcome of this endeavor was President Franklin D. Roosevelt's authorization in June 1941 of Executive

[178] Kruse, "Personal Rights, Public Wrong," 125-26.
[179] Carl T. Rowan, *Dream Makers, Dream Breakers: The World of Thurgood Marshall* (Boston: Little, Brown, and Company, 1993), 78. See also: Kruse, "Personal Rights, Public Wrong," 126.
[180] Motley, "The Historical Setting of *Brown*."
[181] The Tuskegee Airmen were four all African American World War II squadrons who earned their pilot's wings though the Army Air Force Aviation Cadet program at Tuskegee Institute in Alabama. The first of nine hundred and twenty-six pilots completed the program three months after the bombing at Pearl Harbor. "The Army refused to deploy the Tuskegee pilots outside the United States until 1943." Racial hostility almost led to the recall of one of the squadrons sent to North Africa. "In 1,578 combat missions, the Tuskegee Airmen shot down 111 enemy plans, destroyed 150 others on the ground, and sank a German destroyer." The Airmen ultimately served in Africa, Sicily, Italy, France, Germany, and the Balkans. Among the honors awarded to the Tuskegee Airmen were 100 Distinguished Flying Crosses and three Distinguished Unit Citations, earned by the bomber escort group that did not lose a single United States bomber plane. Susan Altman, *The Encyclopedia of African-American Heritage* (New York: Facts on File, 1997), 253-254.
[182] Motley, "The Historical Setting of *Brown*."
[183] Ibid.

Order 8802, which prohibited government defense contractors from discriminating against African Americans.[184] With executive Order 9981 in July 1948, President Harry S. Truman ordered the desegregation of the United States armed services. After the war, the NAACP resumed its fight in the courts to end segregation in schools when it litigated *Sipuel*.

The higher education case that followed *Gaines* involved Ada Luis Sipuel, an honors graduate of Oklahoma State College for Negroes. In 1946, she applied to the state's law school for whites but was denied admission on the basis of race. Ms. Sipuel was promised that a "substantially equal" law school would be provided. Oklahoma created the law school by apportioning a section of the state capitol building. "Equal" books, faculty, and so on followed the pattern of inequitable provisions for African American and white schools.[185] A writ of mandamus was filed against the Board of Regents of the University of Oklahoma, charging failure to provide a legal education to Sipuel as it did white students and that admission was denied solely on the basis of race.

It took the Court four days to rule on *Sipuel*. The justices held that admission to the University of Oklahoma had been denied to the plaintiff solely on the basis of race. The Court further ruled that the state had failed to provide Ada Sipuel an identical legal education at a state institution as it afforded white applicants. The Court cited *Gaines* and held that Oklahoma must provide a legal education for Ms. Sipuel in conformance with the equal protection clause of the Fourteenth Amendment. The case was remanded back to Oklahoma's state courts with specific instructions.[186]

The task of the state courts was to determine whether the law school established for African Americans was equal to the white law school at the University of Oklahoma. Following

[184] Motley, *Equal Justice Under Law*, 62-63.
[185] Irons, *A People's History of the Supreme Court*, 371.

a series of events, including the presidential election of Harry S. Truman, exhausted Oklahoma officials ultimately forced the admission of Ada Luis Sipuel to the all-white University of Oklahoma law school.[187]

The decision in *Sipuel* reinforced the *Gaines* decision. However, the "separate-but-equal" standard of *Plessy* remained in effect for public higher education and K-12 schools and "substantially equal" schools had to be provided for African Americans and whites.[188] The legal battle to end school segregation continued.

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

The fight to end separate schools proceeded with the *Sweatt* and *McLaurin* cases, which were decided by the Supreme Court on the same day. *McLaurin* was analyzed separately following analysis of *Sweatt*.

By 1945, the NAACP had situated itself for a "direct attack on the validity of segregation statutes as they applied"[189] to higher education. In January 1946, the NAACP continued its litigation strategy to undo segregation in higher education through an association with Heman Marion "Bill" Sweatt, an African American postal worker in Houston, Texas. Sweatt was a graduate of Wiley College, an African American college, in Marshall, Texas. While doing a year of graduate work at the University of Michigan, Sweatt became associates with Lloyd Gaines, who was also a student at the school while waiting for the Supreme Court to rule on his case.[190] In addition to his interest in ending segregation in education, Sweatt was also motivated to work with the NAACP because of his experience with discrimination as a postal worker. The postmaster had a policy that barred African Americans from becoming clerks, which meant that

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[186] *Sipuel*.
[187] Ibid.
[188] Irons, *A People's History of the Supreme Court*, 371-72.
[189] Tushnet, ed., *Thurgood Marshall*, 147.

they also could not become supervisors.[191] Sweatt worked with a lawyer to file a complaint against his postal employer[192] and "challenge the failure of his employer to give him a clerical position."[193] These experiences served as a catalyst for moving Sweatt to pursue law school.[194]

In February, 1946, Sweatt applied to the then all-white University of Texas Law School. He was denied admission solely on the basis of his race and subsequently brought suit through the NAACP.[195] The lawsuit was filed in the district court in Travis County, Texas, where the University of Texas Law School in Austin was located and to which Sweatt had been denied admission. The district court in Texas held that the university had deprived Sweatt of his equal protection of the laws guaranteed by the Fourteenth Amendment, when it denied him admission based upon his race.[196] However, the district court continued the case and gave the all-white law school six months to offer Sweatt a law school education at the "colored Prairie View University" that was "'substantially equal' to the one offered to whites . . . or it would have to admit Sweatt to the white law school at Austin."[197] The Prairie View higher education institution was essentially a "university" in name only. However, under the auspices of Prairie View, some rooms were rented in Houston and two African American lawyers were hired, thereby establishing the law school for African Americans.[198] Although the "law school" lacked a student body, a substantive trained staff, and a library, the Travis County District Court held that the requirement to provide a "substantially equal" law school for Sweatt had been satisfied.[199]

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[190] Williams, *Thurgood Marshall*, 175.
[191] Tushnet, *Making Civil Rights Law*, 126.
[192] Ibid., 126.
[193] Tushnet, *The NAACP's Legal Strategy Against Segregated Education*, 125.
[194] Ibid., 125. See also: Tushnet, *Making Civil Rights Law*, 126.
[195] *Sweatt.*
[196] Ibid.
[197] Kluger, *Simple Justice*, 261.
[198] Ibid., 261.
[199] Ibid., 261.

Sweatt and the NAACP appealed to the Texas Court of Civil Appeals. The state of Texas continued with its efforts to replace the Houston situation and provide a new law school for Sweatt called the Texas State University for Negroes in Austin. The University of Texas law school dean developed plans to situate the African American law school in four basement rooms of an Austin office building and provide part-time faculty members, whose offices would be at the white law school.[200] By the time the African American law school opened, few books had been received at the school and there was no librarian. The African American law school was also not accredited. These provisions were in contrast to those offered at the white University of Texas Law School, which had sixteen full-time and three part-time faculty, some of whom were nationally recognized. There were 850 white students. They enjoyed amenities such as a library containing 65,000 volumes, law review accommodations, and moot court facilities.[201]

On remand, Sweatt and the NAACP returned to the appeals court in Travis County over the issue of equality of educational facilities.[202] In 1948, the appeals court affirmed the circuit court's findings that the newly created law school for African Americans offered "substantially equal" privileges, advantages, and opportunities.[203] The case continued on to the United States Supreme Court. "The *Sweatt* brief filed in February 1950, flatly attacked the constitutionality of segregation."[204] Arguments were included that allowed the issues to be decided in the plaintiffs favor but not necessarily overturn *Plessy*. It was also argued that *Plessy* was not controlling because it dealt with segregation in railroad situations. Further, the brief argued that the previous higher education cases assumed the validity of segregated schools but did not decide the issue.[205]

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[200] *Sweatt.*
[201] Ibid.
[202] *Sweatt.*
[203] Ibid.
[204] Greenberg, *Crusaders in the Courts*, 70.
[205] Ibid., 70.

When the Supreme Court heard the case, the Texas State University for Negroes Law School had opened. Accreditation was in process, five full-time faculty members were employed, and 16,500 volumes were in the library that was managed by a library staff. Practice court and legal aid associations also were available for African American students.[206]

The provisions made for the African American law school might have been viewed differently at an earlier point in time, but in April 1950, when the United States Supreme Court decided *Sweatt* the justices held that "substantial equality" did not exist in the educational opportunities offered at the white and African American law schools. They found the white law school superior in terms of faculty, courses, and specialization offered, number of students, and other tangible factors. Considerations of this sort were the mainstay for demonstrating inequality in earlier cases. But the court went beyond the tangible factors standard and spoke to intangibles that made a law school notable. In the Court's opinion, intangible considerations such as faculty reputations, experience of the administration, alumni positions and influence, traditions, prestige, were also addressed. The justices reasoned that the study of law should not take place in isolation from the individuals and institutions with which it interacts. Chief Justice Vinson, in the opinion, questioned how a decision could be made to attend the African American school in the face of the disparities between the two schools.[207]

The Supreme Court held that the equal protection clause of the Fourteenth Amendment required Heman Sweatt be admitted to the white University of Texas Law School. Although the bar had been elevated in *Sweatt* and the Court moved onto new ground beyond the tangible factors that had come to characterize "substantially equal," it still remained reticent to take on *Plessy*. Thurgood Marshall charged that "separate-but-equal" had been an issue from the

[206] Ibid.
[207] Ibid.

beginning of the case.[208] Although Marshall spoke to the issue of racial segregation in his argument before the justices, the Supreme Court found no need to reexamine *Plessy*. The Court ruled unanimously in *Sweatt. Gaines* and *Sipuel* were cited as precedents.

***McLaurin v. Oklahoma State Regents,* 339 U.S. 637 (1950)**

In 1948, George McLaurin was a retired professor. He was also a man in his sixties who had been a public school teacher for many years. McLaurin held a master's degree and wished to obtain a doctorate in education. To that end, McLaurin applied to the University of Oklahoma, then an all-white higher education institution. McLaurin was African American, and for that reason, his admission to the university was made subject to certain conditions of segregation. This meant that McLaurin was required to sit in a separate anteroom apart from the white students surrounded by a rail with a sign, "Reserved For Colored" posted. He was also assigned a separate table in the mezzanine area of the library, designated a separate table in the cafeteria, and required to eat at a time the white students did not eat. Conditions were later amended somewhat, and McLaurin sat in row of seats specified for African American students, sat at a specified table on the main floor of the library, and could eat in the cafeteria at the same time as white students but he had to eat at a separate table.[209]

Oklahoma laws forbade the maintenance, operation, or teaching at schools attended by African American and white students together.[210] Because of the outcomes in the *Sipuel* and *Gaines* cases, McLaurin was admitted to the university. Eventually, the Oklahoma statues were amended to allow African Americans admission to all white universities. McLaurin was allowed to attend the university but only under the confines of a "separate-but-equal" education. Consistent with the strategy employed in the three cases previously discussed; the NAACP

[208] Tushnet, *Making Civil Rights Law*, 140.
[209] *McLaurin*.

challenged the separate conditions on grounds of the infringement of Fourteenth Amendment rights.

On appeal, the case came before the United States Supreme Court. The Court held that the conditions of McLaurin's university experience deprived him of equal protection of the laws guaranteed by the Fourteenth Amendment. The justices held that the state must provide the same treatment it afforded other students of the state. In its opinion, the Court reasoned that the need for trained leaders was increasing due to the increasing complexity of society. The Court's record seemed to indicate a tone of irony owing to the fact that McLaurin was seeking an advanced degree in education, which by its nature indicated leadership and a trainer of others, qualities that would be needed for the increasingly complex society. The Court spoke to the compromised experiences brought upon persons who would come under George McLaurin's charge due to the unequal education afforded him at the University of Oklahoma.[211]

Turning Point From "Separate-But-Equal" to *Brown*

Sweatt and *McLaurin* were argued before the United States Supreme Court in April 1950 and within two days of each other. Some three months later, on June 5, 1950, the Court rendered its opinions on both cases along with a third transportation segregation case, *Henderson v. United States*.[212] The cases offered a turning point in the legal strategy to undo *Plessy*. Amicus curiae or "friends of the court" briefs were filed in the *Sweatt* and *McLaurin* cases by lawyers concerned with the subject matter. Thomas Emerson and John Frank of Yale Law School filed one such brief and supported Thurgood Marshall's burden of proof by attacking segregation itself. They argued that the Fourteenth Amendment was designed to eliminate all forms of

[210] *McLaurin.*
[211] Ibid.
[212] *Henderson v. United States*, 339 U.S. 816 (1950) (*Henderson*). Tushnet, *Making Civil Rights Law*, 146.

segregation, and that *Plessy*'s assumption of "separate-but-equal" could not overcome the legislation intended to cement the differences between the two races.[213]

Thurgood Marshall (*Sweatt*) and Robert Carter (*McLaurin)*, the attorneys who argued the cases before the Supreme Court, urged the Court to overturn *Plessy*. The inequalities of "separate-but-equal" for African American and white students at the higher education level had been well established. In the *Sweatt* opinion, the Court spoke to both the *Sweatt* and *McLaurin* cases but the justices invoked the principle of judicial restraint, or not engaging in the creation of new law or modifying existing law to resolve a dispute.[214] In the opinion, the justices responded to the attorneys' arguments by stating:

> Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court. We have frequently reiterated that this Court will decide constitutional questions only when necessary to the disposition of the case at hand, and that such decisions will be drawn as narrowly as possible. . . . Because of this traditional reluctance to extend constitutional interpretations to situations or facts, which are not before the Court, much of the excellent research and detailed argument presented in these cases is unnecessary to their disposition.[215]

The higher education cases laid the foundation. With the *Sweatt* opinion, the Court lent an ominous and ambivalent tone through its praise of the attorneys' work but clearly indicated the burden of proof imposed by legal precedent. Enormous issues remained. Racial segregation had been raised as an issue but not resolved. American public elementary and secondary school

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[213] Ibid., 134.
[214] *Black's Law Dictionary*, 7th ed., s.v. *judicial restraint*. Judicial restraint allows the Court the latitude of not deciding upon constitutional questions in advance of the need to do so.
[215] *Sweatt.*

equality of educational opportunity matters had not been the object of overt focus in the cases or for the Court. The time and place would arrive for the dark corners of racial discrimination in American culture, veiled under “separate-but-equal” but exposed in the higher education cases, to come forward in the light of litigation at center stage in the United States Supreme Court under the common name—Brown.

CHAPTER 3

THE BROWN DECISIONS AND

PUBLIC SCHOOL DESEGREGATION

. . .we began to work out this attack on the segregated school system. We talked about it. We did research on it. We studied it. . . . But we were trained, and were part of the program which [Charles Hamilton] Houston called the program of making lawyers social engineers, instead of just somebody going out to make a dollar practicing law.

—Thurgood Marshall, reflecting on his law school days at Howard University.
in Mark Tushnet, *Thurgood Marshall*

The research questions posed in chapter 1 of this study spoke to the evolution, different points of law, and turning points of school desegregation case law since the 1954 *Brown* decision. Chapter 3 dealt with desegregation case law as it was initially shaped by decisions in *Brown I* and its successor *Brown II*. The decision in *Brown I* found the legal concept "separate-but-equal," in violation of guaranteed constitutional protection. *Brown II* dealt with the remedy or redress for wrongdoing found in the Court's holding on *Brown I*. "The two *Brown* opinions, taken as a unit, did in fact launch the desegregation process."[216]

***Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*)**

The Companion Cases

One factor important to undoing "separate-but-equal" was presentation of the "right" cases before the United States Supreme Court. Ultimately, five cases would assume the weight of ending segregation in public schools. Collectively, the cases were companion cases under the formal citation, *Brown v. Board of Education*.[217] The class action lawsuit case came to the

[216] Kluger, *Simple Justice*, 746.
[217] At the time of the *Brown* litigation, the companion cases were called the "school cases." "The School Segregation Cases became known as *Brown* only by accident." The South Carolina case was the first to be appealed but it was remanded back to the trial court. The District of Columbia case was a different in multiple respects. Although, there were various contributing factors, when the list of plaintiffs was alphabetized, Darlene Brown's name appeared first; however, she was a woman. Consequently, "Oliver Brown [father of Linda Brown, who was named as one of the plaintiffs] was listed first because he was a man." Greenberg, *Crusaders in the Courts*, 117. "Years later Linda Brown recalled that her father's name appeared first on the complaint not because his last name was first in

United States Supreme Court from the District of Columbia (*Bolling v. Sharpe*) and the states of Kansas (*Brown et al. v. Board of Education*), South Carolina (*Briggs v. Elliott*), Virginia (*Davis v. Prince Edward County*), and Delaware (*Gebhart v. Belton*).[218] Although a separate decision was rendered in *Bolling*, the cases were heard together by the United States Supreme Court due to the common constitutional issues of racial segregation in American public schools.[219]

The facts and circumstances of all of the cases were different. While they were all concerned with segregation in public schools, each case provided a different perspective on racial discrimination and "separate-but-equal." *Briggs* presented substantial inequality in separate schools with movement toward equitable physical facilities. *Davis* represented an archetypal example of the deeply entrenched roots of segregation in the white South, with questionable equality in its segregated schools and skepticism about the psychological impact aspect of segregation. *Brown* was from Kansas, a border state, and in the case, the lower court found segregation to ultimately mean inequality. *Gebhart* arrived at the Supreme Court via the Delaware State Supreme Court, rather than the federal district courts, as had the other state cases. Similar to the holding in the Kansas case, the Delaware State Supreme Court held that segregation could not result in equality.[220]

Litigation from the states differed and was treated separately from the District of Columbia (*Bolling*) case. The state cases were concerned with alleged violations of the equal protection clause of the Fourteenth Amendment because it was the constitutional provision that

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alphabetical order but rather because he was the only man among the plaintiffs, and a minister to boot." Peter Irons, *Jim Crow's Children* (New York: Penguin Books, 2002), 119.

[218] *Bolling v. Sharpe*, 347 U.S. 497 (1954) (*Bolling*), *Brown et al. v. Board of Education of Topeka, Shawnee County, Kansas et al*., 347 U.S. 483, (1954), *Briggs et al. v. Elliott*, 347 U.S. 483, (1954) (*Briggs*), *Davis et al. v. County School Board of Prince Edward County, VA.*, et al., 347 U.S. 483, (1954) (*Davis*), and *Gebhart et al. v. Belton et al., 347 U.S. 483*, (1954) (*Gebhart*).

[219] Balkin, *What Brown Should Have Said*, 3. See *Brown* and *Bolling*.

[220] Tushnet, *Making Civil Rights Law*,167

applied to the states. Under the amendment, states were required to provide citizens of the United States "equal protection of the laws."

Bolling involved the District of Columbia, which was not a state but a municipality that fell under federal jurisdiction and congressional supervision. *Bolling* arose from allegations of racial discrimination by the federal government owing to public school segregation based on congressional statutes. Because the District of Columbia fell under federal and congressional governance rather than its own state control, this presented thorny legal problems. Constitutional language and historical legacy were some of the formidable barriers for the litigation. As indicated previously, the Fourteenth Amendment carried with it a duty for states to provide its citizens "equal protection of the laws." Although the phrase lacked specific delineation of requirements and therefore had no clear meaning, the obligation for equality was clear. The obligation for equality on the Congress in the commission of its duties and on those entrusted to its governance was lacking in the Constitution. Additionally, application of the Fourteenth Amendment to *Bolling* was problematic because Congress segregated schools in the District of Columbia at the same time it proposed the amendment. The NAACP attorneys solved the matter by pursuing legal recourse under the due process clause of the Fifth Amendment based on rationale that it imposed equality obligations on Congress. It was questionable whether either the Fourteenth Amendment or the due process clause of the Fifth Amendments were sufficient to invalidate a practice that Congress itself had sanctioned on various occasions.[221]

As previously indicated, separate rulings were handed down for *Bolling* and the state cases. Because the cases involved both state and federal jurisdictions, the rulings had the potential for affecting the whole county on the issue of the constitutionality of segregation in public schools.

The companion cases were not the only litigation that had the potential for review on the constitutionality of "separate-but-equal."[222] Nor were the companion cases without difficulties and problematic issues of their own. However, within the purview of their authority, the justices of the United States Supreme Court acted in 1952 to have the cases heard before them. On appeal and under less than usual circumstances, the cases from the states appeared before the United States Supreme Court.[223] Because of the importance of the constitutional question presented, the District of Columbia case appeared on the same venue by writ of certiorari, or order by the Court, without judgment by the Court of Appeals, as was the usual procedure.[224]

Legal Strategy

Change of legal strategy. Once the United States Supreme Court ruled on *Plessy* and "separate-but-equal" was established as the standard, the future task of what would become *Brown* shifted. The magnitude of the task grew from not only contesting the constitutionality of a state law but also to requiring the Court to confront itself. A successful challenge of "separate-but-equal" meant the invalidation of a prior United States Supreme Court ruling—heretofore a rarity.

Invalidating a United States Supreme Court ruling was a formidable and daunting undertaking. It meant that numerous factors had to be in place and work in concert to bring about a change that, by some standards and opinions in the early 1950s, suggested a different outcome to that which occurred in 1954.

First, the legal strategy had to be in place to invalidate "separate-but-equal." As discussed in chapter 2, the cautious, step-by-step legal strategy employed to end segregation in higher

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[221]Ibid., 164.
[222] Robert A. Leflar and Wylie Davis, "Segregation in the Public Schools—1953," *Harvard Law Review* (1954). Available on-line:www.westlaw.com Cite: 67 *Harv. L. Rev.* 377
[223] Tushnet, *Making Civil Rights Law,* 166.

education amounted to progressive erosion of "separate-but-equal" concept. However, the concept remained the standard when the last of the higher education cases was decided in April 1950. After the rulings in the higher education cases, the NAACP legal team decided to utilize a frontal legal strategy that directly attacked segregation in elementary and secondary public schools.[225]

Points of law. Fourteenth (equal protection of the laws clause) and Fifth Amendment (due process clause) violations were central to the points of law raised in *Brown*. Briefs prepared for the 1952 initial argument on the *Brown* desegregation cases concentrated on three points to demonstrate constitutional violations. The "unreasonableness" of racial discrimination was first emphasized. Second, the attorneys focused on the harms of segregation to African American children. Lastly, it was argued that *Plessy* was irrelevant because it involved segregation in transportation and not in education. The arguments rested on findings from the higher education litigation that called attention to the questionable constitutionality of segregation in education. *Brown* addressed segregation in education and therefore was available for inquiry into the constitutional question.[226]

In an argument prepared by the NAACP, the attorneys spoke to the issue of distinctions based on race and color alone. They argued that the Fourteenth Amendment precluded a state from making distinctions based upon race and color alone. The attorneys contended that such distinctions were arbitrary, capricious, and constitutionally not allowable.[227] Their objective for pursuing this line of reasoning was to demonstrate the "unreasonableness" of *Plessy*.[228]

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[224] Balkin, *What Brown Should Have Said*, 226. See *Bolling*.
[225] Spritzer, "Thurgood Marshall."
[226] Tushnet, ed., *Thurgood Marshall*, 18.
[227] Ibid., 21.
[228] Tushnet, *Making Civil Rights Law*, 171.

Speaking on the Court's decision in *Korematsu v. United States*[229] that upheld the internment of Japanese American citizens during World War II, the NAACP argument acknowledged distinctions of racial classification when used as a war measure and when used to "cope with the grave national emergency" that existed at the time of the litigation.[230] Yet, the act of racial classification was described as "odious" and "suspect." The attorneys concluded that even when racial classifications were used during times of national peril, the practice had to be terminated when the peril terminated.[231]

In drawing a connection between *Korematsu* and *Plessy*, the NAACP attorneys argued that the racial segregation of "separate-but-equal" was tantamount to racial distinctions. Further, they said that time had shown "*Plessy* misunderstood equality."[232] The inequality of *Plessy* had been consistently demonstrated in the higher education cases. Therefore, it was unreasonable to view *Plessy* as a vanguard for equality. The argument developed that if selected groups of citizens were singled out and racial distinctions were imposed for purposes of the state, the state was required to "conform to constitutional standards in the use of this authority."[233] Constitutional reasonableness was reached by examination of the state action to determine whether the distinctions were pertinent to a lawful purpose. The attorneys pointed out that the Supreme Court had found violation of the equal protection clause in racial discrimination and restriction "based upon race and color alone in each field of governmental activity where it had been raised."[234]

[229] *Korematsu v. United States*, 323 U.S. 214 (1944) (*Korematsu*).
[230] Tushnet, ed., *Thurgood Marshall,* 21.
[231] Ibid.
[232] Tushnet, *Making Civil Rights Law*, 171.
[233] Tushnet, ed., *Thurgood Marshall,* 21.
[234] Ibid.

More to the point in this line of reasoning was the Court's lack of reliance on a standard of "reasonableness" in its decision on *Korematsu* and the civil rights of a single racial group.[235] Thurgood Marshall cited Justice Black's opinion for the Court on *Korematsu* that indicated:

> . . . all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid social scrutiny. Pressing public necessity may sometimes p[j]ustify the existence of such restrictions; racial antagonism never can.[236]

Admittedly, in deciding the *Korematsu* case the Court relied on "military necessity." However, of paramount importance in this discourse on the use of racial classifications and distinctions based on color and race alone was the legal concept that came to be called "strict scrutiny." "Later cases established that the use of racial classification required what the Court came to call 'strict scrutiny,' but in the early 1950s that doctrine had not been fully developed."[237] "Strict scrutiny"[238] eventually became a major point of law and standard of review for race-based litigation in the evolution of *Brown's* lineage of law.

The NAACP attorneys' second point of contention was the harm of segregation imposed upon African American children. It was argued that limitations, based upon race or color, created a disadvantage for African American children, thereby violating the equal protection clause. This

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[235] Tushnet, *Making Civil Rights Law*, 171.
[236] *Korematsu.*
[237] Tushnet, ed., *Thurgood Marshall*, 18.
[238] *Black's Law Dictionary*, 7th ed., s.v. *strict scrutiny.* "In constitutional law, the standard applied to suspect classifications (such as race) in equal protection analysis and to fundamental rights (such as voting rights) in due process analysis. Under strict scrutiny, the state must establish that it has a compelling [state] interest that justifies and necessitates the law in question." Under compelling state interest, the government interest is balanced against the individual right.

point was supported by social science information showing adverse psychological effects on African American children due to school segregation.[239]

On their third point of *Plessy*'s relevance to education, the NAACP lawyers contended that *Plessy* was not the controlling authority for determining the state's authority to enforce racial segregation in public schools. It was reasoned that controlling authority had been established in the higher education cases. The attorneys contended that equal protection of the laws required all factors of equality relative to educational opportunity be evaluated as the courts had done in the situations surrounding the higher education litigation. The argument pointed out that findings of inequality in the *Sweatt* and *McLaurin* cases were based upon community evaluation of the racially separate schools in their school districts. Similarly, in the companion cases racially segregated schools signified the inferiority of African American children and were seen to have a detrimental effect on the children's educational growth. Therefore, the effect of racial restrictions as applied to education in the *Sweatt* and *McLaurin* cases was argued as controlling authority.[240]

The arguments in the briefs were refined and tailored to the individual cases as presentation before the Supreme Court drew nearer. Points advanced in the briefs served as one perspective in the Court's debate over segregation in public schools. Factors beyond legal arguments advanced by the NAACP attorneys also contributed to the fate of "separate-but-equal." Additional factors included those of counsel opposing the NAACP and considerations of the Supreme Court itself.

Arguments of the States and District of Columbia. Counsel for the states and the District of Columbia also raised legal points in defense of their clients' positions on segregation

[239] Tushnet, ed., *Thurgood Marshall*, 22.

[240] Ibid., 24.

in public schools.[241] John W. Davis[242], arguing for South Carolina, stated the South's case as one of states' rights and the good intentions of his clients to provide equalized schools for all of its children regardless of race or color. He stated the basic question before the Court, "was not whether the Fourteenth Amendment was designed to grant equal protection to the Negro . . . but whether segregation, under terms of equal facilities, was a denial of that pledge."[243] Further, on the subject of Constitutional guarantees of states' rights, the attorneys for the states argued that, "control of internal matters was allocated to state authority, so that education and the running of schools was in the power of individual states and not in the federal government; and separation of powers, in support of the contention that school segregation was an issue for legislatures and not the courts."[244] The states' attorneys did not view the social science evidence presented by the NAACP attorneys as creditable.[245]

Arguments for the defendants relied on legal precedent, pointing out that the Court had upheld "separate-but-equal" seven times.[246] Precedent was also used to establish a historical record of congressional activity that gave credence to separate schools based on race in the District of Columbia. Another argument was that the ruling in *McLaurin* was justified because

[241] Although, John W. Davis was the attorney for the state of South Carolina and the other school systems had their own attorneys, Davis was seen as the spokesperson for the segregationists. Greenberg, *Crusaders in the Courts*, 167. Davis represented South Carolina at the request of his friend and the state's governor, James Byrnes, a former Supreme Court justice. Irons, *Jim Crow's Children*, 141. Davis represented South Carolina free-of-charge. Williams, *Thurgood Marshall*, 214.

[242] John W. Davis was part of the Southern aristocracy and wanted to protect the Southern lifestyle. He had served as a West Virginia congressman, U.S. Solicitor General (under Woodrow Wilson), U.S. Ambassador to England, and 1924 Democratic nominee for president (lost to Coolidge). At the time of the *Brown* arguments, Davis was seventy-nine years old, belonged to a prestigious New York City law firm, and had argued more cases before the Supreme Court than anyone except Daniel Webster. His argument in *Brown* was his one hundred and fortieth before the Supreme Court. Williams, *Thurgood Marshall*, 214. *Brown* was Davis' last argument before the Supreme Court. Kluger, *Simple Justice*, 673. See also Greenberg, *Crusaders in the Courts*, 167. Irons, *Jim Crow's Children*, 140-141.

[243] Kluger, *Simple Justice*, 671.

[244] Greenberg, *Crusaders in the Courts*, 166.

[245] Ibid., 166.

[246] The seven cases were *Plessy*, *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899), *Gong Lum v. Rice*, 275 U.S. 78 (1927), *Gaines, Sipuel, Sweatt, and McLaurin.* Kluger, *Simple Justice*, 671.

Oklahoma had not held to the *Plessy* doctrine and rendered equal treatment for the African American student.[247]

Just as the NAACP attorneys worked ardently to articulate their positions on segregation in public schools, so too did their opposition. The contrast in the points of law addressed by each side was secondary to the interpretations of those points. Both sides used information to support the interpretation that represented its views.

Brown and the Supreme Court

Argument and reargument. Original argument was heard in December 1952 on the companion cases from Kansas, South Carolina, Virginia, Delaware, and the District of Columbia. Attempts to arrive at a decision found the justices divided over the cases. The Supreme Court ordered reargument, directing the attorneys to specifically answer five questions. The questions addressed the original understanding of the Fourteenth Amendment and potential frameworks for remedy, if segregation were found unconstitutional. On the Fourteenth Amendment, the following questions were posed to the attorneys.

> Did its [Fourteenth Amendment] adopters think that it made school segregation unconstitutional automatically? Did they think that it [Fourteenth Amendment] authorized Congress or the courts in the future to hold segregation unconstitutional? Whatever the original understanding, did the courts have the power to hold segregation unconstitutional?[248]

On the issue of remedy, the following questions were posed to the attorneys.

> Would desegregation have to occur immediately?

[247]Ibid., 673.
[248] Tushnet, ed., *Thurgood Marshall,* 35.

What sort of remedial order should the Supreme Court order?[249]

Eventually, the *Brown*, *Briggs*, *Davis*, and *Gebhart* cases were set to appear before the Supreme Court, with *Bolling* added to the docket. Reargument on segregation in public schools in the companion cases was heard in December 1953. Reargument focused heavily on circumstances relative to adoption of the Fourteenth Amendment in 1868. Extensive discussion was dedicated to congressional debate over the amendment's adoption, states' ratification, segregation as it existed circa 1868, and perspectives of the amendment's advocates and detractors at the time of its adoption. In the last analysis, the justices commented in the *Brown* opinion that little of the information presented by the attorneys or gathered through their own research proved conclusive for their purposes in resolving the constitutional issues presented on the Fourteenth Amendment.[250]

The Justices. The NAACP attorneys and their opposing counsel did not have sole possession of strategy in deciding the course for confronting "separate-but-equal." The Supreme Court Justices were well aware of the monumental nature of a decision to bar segregation in the nation's public schools and strategically arrived at their decision in *Brown*.[251] They were also aware of possible consequences and ramifications to this decision.

The manner in which the companion cases appeared and were argued before the Court was strategic and calculated. As the decisions in the higher education cases became more ardent in their admonishment of "separate-but-equal," it became more plausible to think that the Supreme Court was preparing for a head-on confrontation on the issue. The Court watched school segregation cases as they moved through the lower courts. The justices began taking aggressive action to bring the matter before the Court on June 9, 1952, when they voted to hear

[249] Ibid., 35.
[250] *Brown.*

the appeals in two of the companion cases, *Briggs* and *Brown*.[252] With their decisions on when and what cases would come before the Court, the justices in effect began to exercise control over the segregation issue in American public schools.[253]

After original argument in December 1952, the justices were divided on the disposition of the cases. Among the justices, major impediments existed on the basis of constitutional interpretations, historical questions, and remedy as well as the justices' personal philosophies and orientations.

To exacerbate matters and following the initial argument, Chief Justice Fred Vinson died of a heart attack on September 8, 1953. Earl Warren,[254] Governor of California, replaced Vinson. Warren's leadership proved crucial in bringing the justices to a decision on segregation in public schools.

Even before Warren's arrival, the decision to overturn segregation appeared to be nearing reality, but the justices wanted a unanimous ruling if *Plessy* were overruled, which previously proved difficult to achieve.[255] It was believed that unanimity was important to curtailing a potentially cataclysmic reaction, if *Plessy*'s demise came to pass. It was feared that a divided opinion from the Court would lend credence to those seeking to deviate from an overturned

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[251] Spritzer, "Thurgood Marshall."
[252] Tushnet, *Making Civil Rights Law*, 167.
[253] Ibid., 167.
[254] Earl Warren took the oath to become Chief Justice of the United States Supreme Court on October 5, 1953, following his appointment to the position by President Dwight D. Eisenhower. Prior to becoming Chief Justice, Warren was an assistant district attorney, district attorney, and attorney general of California. He was also the 1948 vice presidential nominee under Thomas E. Dewey. The son of Norwegian immigrants, Warren was in his second term as governor of California, when he was named Chief Justice. While characterized as honest, fair-minded, efficient, an adept manager, and good with people, Earl Warren was instrumental to the internment of Japanese-Americans to refugee camps and detention centers during World War II (which he later expressed regret for having done). Warren believed in law and order and in national security. Earl Warren served as Chief Justice of the Supreme Court until June 23, 1969. Kluger, *Simple Justice*, 659-667.
Warren's appointment to the Court came as a result of his support to President Eisenhower in the 1952 presidential elections, when Warren delivered California's delegates to Eisenhower at the 1952 Republican national convention. Greenberg, *Crusaders in the Courts*, 154.
[255] Tushnet, *Making Civil Rights Law*, 169.

Plessy. It was important for the Court to appear unified. Under Warren's leadership, the all-important goal of a unanimous ruling was accomplished.[256]

The Decision

States' cases. The ruling and the Court's opinion in *Brown* were relatively simple and straightforward, given the constitutional questions raised, impact on American public schools, and anticipated reactions in some areas of the country. Chief Justice Warren delivered the Court's opinion.

> We conclude that in the field of public education the doctrine of "separate-but-equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[257]

The Court's holding in *Brown, Briggs, Davis, and Gebhart* resolved the issue for the states.

District of Columbia case. A holding consistent with the states' cases was issued in the *Bolling* case for the District of Columbia. The Court held that racial segregation in the public schools of the District of Columbia was a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.[258]

As in the states' cases**,** Chief Justice Earl Warren delivered the Court's unanimous opinion on the *Bolling* case. The *Bolling* opinion referred to the holding earlier that day in *Brown* (i.e., the states' cases) and cited it as precedent. In the *Bolling* opinion, the Court found that the concepts of "equal protection" (Fourteenth Amendment) and "due process" (Fifth Amendment) both stemmed from the American ideal of fairness, even though that did not imply that the two

[256] Tushnet, *Making Civil Rights Law*, 202.
[257] *Brown.*

phrases were always interchangeable. Reference was made to the need to carefully scrutinize classifications based solely on race and that racial classifications are immediately constitutionally suspect.[259] Further, segregation in public education was not found "reasonably related to any proper governmental objective, thus it imposed a burden of arbitrary deprivation of liberty upon African American children."[260]

The reasoning. *Brown*'s reasoning spoke to determining whether constitutional principles had been denied or violated based upon the development of public education in 1954 and not in 1868 when the Fourteenth Amendment was adopted. The Court lauded education as the most important function performed by state and local governments. With the fundamentals of readiness for public responsibilities, good citizenship, cultural values, preparation for later professional training, and environmental adjustment provided through educational opportunity, a child may be reasonably expected to succeed in life, the justices reasoned. Their reasoning extended to declare that if the state undertook to provide education as a right, the right had to be made available to all on equal terms.[261] Separate facilities did not meet the required obligations of constitutional guarantees for "equal."

***Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*)**

The issue of remedy loomed large in the justices' debates over *Brown,* although *Brown I* left the question of remedy unanswered. The justices separated the issue of relief from the constitutional issues and ordered that the cases be restored to the docket for additional argument. The *Brown I* opinion also referred back to the justices' directives to the attorneys on reargument

[258] *Bolling.*
[259] Ibid.
[260] Ibid.
[261] *Brown.*

questions four and five for suggestion on remedial orders. In April 1955, argument on remedy for *Brown I* took place in *Brown II*.

On May 31, 1955, a decision was rendered on remedy in *Brown II*. The Court remanded all of the cases back to the district courts, except that of Delaware, which went back to the Supreme Court of Delaware. The Supreme Court ordered that at the district court level, proceedings were to be held and that orders and decrees had to be issued to admit the plaintiff parties to public schools on a racially nondiscriminatory basis with "all deliberate speed."[262]

Unlike the higher education cases that involved few litigants and required adjustments for a few people, the *Brown* cases were class action lawsuits involving thousands of students.[263] Logistical and practical considerations for desegregating schools were intimated in the Court's opinion. The justices acknowledged the class action status, wide applicability of the decision, variety in localities, and complex problems created because of the Court's holdings.[264]

With the *Brown II* decision, the Supreme Court directed that the lower courts retain jurisdiction over the cases. The mandate was predicated on concerns that the Supreme Court not make a sweeping proclamation and become involved itself with the detailed supervision of southern desegregation.[265] While accounting for the complexities of implementation, the Court instructed the lower courts to require the defendants to make "prompt and reasonable" starts toward compliance. With regard to the timeliness of implementing the Supreme Court's orders, the defendants were required to show good faith compliance measures at the "earliest practicable date."[266]

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[262] *Brown II.*
[263] Kluger, *Simple Justice*, 686.
[264] *Brown II.*
[265] Kluger, *Simple Justice*, 687.
[266] *Brown II.*

By using the terminology, "all deliberate speed," to set the implementation timeframe, the justices adopted a gradualist approach to school desegregation contrary to the one- year "forthwith" timeframe of implementation that had been offered by the NAACP lawyers.[267] The phrase "all deliberate speed" had been taken from litigation surrounding the separation of Virginia and West Virginia following the Civil War. In that situation, the Court had used the phrase to try and obtain compliance from a state for a decision that the state did not agree with in principle.[268] Acceptance of the gradualist approach was the Court's attempt to find compromise and empathy for the Southern states as the movement began to admit students on a racially nondiscriminatory basis.[269] It was hoped that gradualism would, to some extent, minimize the anticipated reaction to the decision. Gradualism would also provide time to find solutions to some of the practical and logistical concerns. In retrospect, it seems that gradualism met few of these intended goals.[270]

Turning Point from Brown to the Seminal Desegregation Era

In chapter 3, the study moved through a fifty-nine year period from 1896 to 1955. Chapter 3 examined factors that transferred the constitutional bar on racial segregation in public schools. The litigation of *Brown I* and *Brown II* and the supporting information reviewed in the chapter were selected to address the points of law that evolved during the natal period of school desegregation case law. The turning point in the law was when *Brown I* declared that racial segregation in public schools would no longer be judged by the "separate-but-equal" doctrine of *Plessy*. *Brown*'s new test of constitutionality rested upon racial distinctions that resulted in unequal educational opportunities for African American children. Infringements of the equal

[267] Tushnet, *Making Civil Rights Law*, 218-19, 230-31.
[268] Ibid., 230.
[269] Ibid.
[270]Ibid., 219.

protection clause of the Fourteenth Amendment and the due process clause of the Fifth Amendment served as the constitutional bases upon which the *Brown* decision rested.

The principles established in *Brown* set new standards. *Brown I* declared the fundamental principle that racial discrimination in public education was unconstitutional. Federal, state, and local laws that permitted or required segregation or discrimination had to conform to *Brown*'s new standard and eliminate the unconstitutional practices of racial separation and discrimination of students in public schools. *Brown I* was premised on the harms of segregation and the negative impact on African American children. The "harms" premise evolved into the "harm and benefit thesis," which would significantly impact future desegregation decisions by the courts.[271]

Principles of equity shaped the Court's direction in *Brown II*.[272] In the opinion, the justices acknowledged the enormity of the considerations involved with school desegregation and the vast numbers of people impacted by the decisions. The justices charged the local courts that first heard the cases with the oversight responsibility for equity and implementation of the decision because these courts were closer to local concerns and to those affected. The expectation of the Supreme Court was that remedy would proceed with "all deliberate speed."[273]

Judge Constance Baker Motley, assistant attorney to Thurgood Marshall at the NAACP Legal Defense Fund, described the decision as no ordinary civil action that American jurisprudence was accustomed to both in its procedural and substantive aspects.[274] Many consider *Brown* first and foremost a morally based decision aimed at correcting the historical wrongs of racial discrimination and the country's failure to live up to its ideals of equality for all

[271] Armor, *Forced Justice*, 62-65.
[272] Tushnet, ed., *Thurgood Marshall,* 158.
[273] *Brown II*.
[274] Motley, "The Historical Setting of *Brown*."

people.[275] *Brown was* also a departure from traditional principles of American jurisprudence, a departure that would provide ample basis for pointing to *Brown*'s imperfection as a legal act.

Some interpreters of the decision criticized *Brown* for its lack of reliance on historical or legal precedent. In three of the five reargument questions, the justices concentrated on information relative to the Fourteenth Amendment. A school of debate exists around the Fourteenth Amendment issue alone. Alexander Bickel, law clerk to Justice Frankfurter during the 1952 argument, wrote in 1955 on the Original Understanding of the Fourteenth Amendment. He concluded that the Court had avoided the dilemma of resting its decision on the historical record of the Fourteenth Amendment and chose rather to turn on the moral and material state of the country in 1954. Bickel contended that had the Court followed the Original Understanding of the Fourteenth Amendment, it would have had to provide substantive theory to justify finding "separate-but-equal" in constitutional violation.[276]

Writing on the theme of Originalism and the Desegregation Decisions, Michael McConnell leveled the criticism that the *Brown* Court did not properly take into account the historical understanding of the Fourteenth Amendment. McConnell premised that the constitutionality of segregated public education rested on whether education was a "right" and therefore questioned whether segregation and concerns over its "unequal" aspects were appropriate inquiries[277]. He criticized the Court for framing the question that education was "important" rather than evaluating it as a "right," and for applying the desegregation principle only to the "field of public education."[278] McConnell concluded that the *Brown* Court's major

[275] Ibid.
[276] Alexander M. Bickel, "The Original Understanding and the Segregation Decision," *Harvard Law Review* (November 1955). Available on-line: www.westlaw.com Cite: 69 HVLR 1. See also Tushnet, *Making Civil Rights Law*, 203-04.
[277] McConnell, "Originalism and the Desegregation Decisions."
[278] Ibid.

shortcoming was that it adjudicated the litigation in a "historical vacuum and accounted for constitutional law as social policy rather than legal principle."[279]

"Equal protection of the law[s]" contained in the nation's Constitution, survived the exhaustive debates on the Fourteenth Amendment and became a legal staple in future litigation. The Fourteenth Amendment and equal protection of the laws would be recurrent bases upon, which claims of discrimination would be grounded. It would allow a flexible safeguard in the future for those on both sides of *Brown* and for those seeking protection of individual rights.

Contemporary critics of the implementation decision in *Brown II* have claimed that too much flexibility was permitted in allowing the fashioning of remedies to permit desegregation. Other critics claim that not enough flexibility was allowed.[280] In addition, the opinion's brevity and lack and of detail have been cited as shortcomings that eventually contributed to problems and confusion in subsequent attempts at remedy and to future litigation. *Brown II* also did not include a clear or precise definition of the term "*desegregation*," instead using "*nondiscriminatory*" to describe the admittance of nonwhite students to racially non-segregated schools.[281] Another criticism of *Brown II* was that it did not prescribe what school systems must do to attain "*desegregation*."[282]

From the opposite side of the spectrum, *Brown* is hailed for its legal and social influence. Judge Motley characterized *Brown I* as "first and foremost [a] historic rectification of the Fourteenth Amendment to the constitution, the objective of which was to confer citizenship status on the newly emancipated slaves and debar the former slave-holding states from denying

[279] Ibid.
[280] Alexander and Alexander, *School Law,* 456.
[281] Armor, *Forced Justice*, 24.
[282] Ibid., 6.

them the same rights which white citizens enjoyed within the states."[283] In remarks on Thurgood Marshall's career as a justice, Randall Kennedy commented on Marshall's place in history and on *Brown* as, "the campaign he led to delegitimate segregation, the campaign whose great landmark is *Brown v. Board of Education*, [wa]s probably the most effective and influential campaign of social reform litigation in American history."[284]

This chapter began with a quote in which Thurgood Marshall reflected on his law school days at Howard University. Those reflections spoke to his orientation and training as a social engineer lawyer. Randall Kennedy's comment appeared to affirm that under Marshall's leadership, the concept of social reform achieved through litigation was actualized by *Brown* and the desegregation of American public schools, albeit an imperfect achievement.

Brown's impact went beyond American public schools. For decades, its jurisprudence has been the standard for adjudging litigation involving race, discrimination, desegregation, integration, and other legal issues. It was continually cited as legal authority and precedent in rulings that held segregation unconstitutional. *Brown* was followed by other significant rulings of the Court that struck down racial segregation in other areas of American life, including segregated local buses, recreational facilities, lunch counters, and courthouses.[285]

As *Brown* matured, its language, the basis of some of the criticism, and broad interpretations of the decisions led to the nation's courts and ultimately back to the Supreme Court under various citations. School desegregation's case law continued to evolve, usually under contentious, litigious conditions. *Brown's* developmental periods—neonatal, infancy, adolescent, and young adulthood—saw desegregation established in American public schools.

[283] Motley, "The Historical Setting of *Brown*."
[284] Tushnet, ed., *Thurgood Marshall,* x.
[285] Motley, "The Historical Setting of *Brown*."

CHAPTER 4

SEMINAL DESEGREGATION ERA

Whatever the Supreme Court decides, a great many lawsuits will be brought, most of them brought by plaintiffs seeking greater educational privileges for Negroes, some by persons seeking to restrict such privileges. This outpouring of new litigation will result in part from the fact that declarations of basic law even by the Supreme Court are not automatically self-executing throughout the land, in part from the fact that interested parties on both sides of the social-racial conflict will formulate and seek to employ remedies and devices which their opponents will deem to be outside what the Court's pronouncement requires or permits (a matter of interpretation), and in part because nobody will be really satisfied with the Court's decision.[286]

—Robert Leflar and Wylie Davis, "Segregation in Public Schools"

It was *Brown I* that declared "separate-but-equal" in violation of constitutional privileges. A separate issue was the remedy of *Brown II* that provided for the admittance of students on a racially nondiscriminatory basis with all deliberate speed. However, the remedy concept lacked specificity. For many people and institutions, especially in the southern United States, desegregation was a foreign and repugnant commodity exacerbated by total lack of acceptance of the concept when simply reduced to the commingling of African Americans and whites. Even for those with the best of intentions and readiness to move forward with desegregation, the remedy decision's lack of clarity further compounded an already complex situation. As the remedy mandates moved forward, school desegregation, in large part, continued to be defined by case law. Chapter 4 looked at significant contributors to school desegregation as it was established in the nation's public schools. Litigation reviewed in chapter 4 included *Green v. County School Board of New Kent County, Swann v. Charlotte-Mecklenburg Board of Education, Keyes v. Denver, Milliken v. Bradley* (*Milliken I*), and *Milliken v. Bradley* (*Milliken II*).[287]

[286] Leflar and Davis, "Segregation in the Public Schools."

"Freedom-of-choice" plans, unitary status, the "*Green* factors," affirmative duty, and busing were some of the foundational concepts established as outcomes of the litigation reviewed in chapter 4. These concepts defined a period of public school desegregation that covered approximately twenty-three years from the *Green* ruling in 1968 up to but not including a 1991 Supreme Court ruling. Holdings in the cases examined sought to define and structure remedial measures required for compliance with mandates of the *Brown* decisions.[288] Decisions and opinions rendered during this period covered a range of issues, from judicial frustration with continued attempts to thwart compliance with *Brown's* mandates to implementation questions on *Brown II's* remedy.

Although this study concentrated on case law, it would be remiss to overlook the fact that other factors helped shaped public school desegregation. Among those factors were presidential executive orders, statutory law established by legislative bodies, and political, social, and cultural reactions to the decisions. In the latter vein, were the "Massive Resistance" movement and the Civil Rights Act of 1964. Because of their importance to the discussion, chapter 4 included a brief overview of the two topics.

Implementation Delayed

Massive Resistance

Extreme reactions to the *Brown* decisions were expected in some areas of the country, especially in southern states where the *Brown* litigation had been forcefully contested and where the decisions would totally alter the school experience for all concerned. Those extreme reactions were embodied in a movement called "Massive Resistance." The movement opposed the

[287] *Green*, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) (*Swann), Keyes v. Denver*, 413 U.S. 189 (1973) (*Keyes*), *Milliken v. Bradley*, 418 U.S 717 (1974) (*Milliken I*), and *Milliken v. Bradley*, 433 U.S 267 (1977) (*Milliken II*).

Supreme Court's rulings in the *Brown* decisions and created barriers to public school desegregation, in essence maintaining segregation.

Massive Resistance started as a Virginia political campaign in 1955 and was similarly replicated in other southern states that shared opposition to the Court's holdings in *Brown I* and *II*.[289] In part, Massive Resistance involved enacting laws designed to counteract *Brown*. Because of the resistance activities, the NAACP attorneys were continually involved in litigation to challenge the laws aimed at circumventing *Brown*. The net effect of the continual litigation strategy was delayed implementation of *Brown II's* remedy, which was the desegregation of public schools.[290]

An aspect of the Massive Resistance movement was the "Southern Manifesto." On March 12, 1956, nineteen senators and eighty-one representatives from the south signed an edict called the "Southern Manifesto." The document declared resistance to *Brown* and advocated the use of all lawful means to maintain segregation.[291] In the Manifesto, states that had already begun resistance movements were commended for their efforts to thwart the directives of *Brown*. The manifesto was predicated upon the belief that *Brown* represented an abuse of judicial power and reflected the Supreme Court's "personal, social, and political views rather than constitutional law."[292] The document went on to accuse the Court of legislating, undermining congressional authority, and encroaching upon rights of the states and the people.[293] The strategy to avoid compliance by those that endorsed the Southern Manifesto was to not desegregate their schools unless a specific ruling requiring compliance was issued, since *Brown* technically applied to the

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[288] Tracy Miller, "Desegregation and the Meaning of Equal Educational Opportunity in Higher Education," *Harvard Civil Rights-Civil Liberties Law Review* (Summer1982). Available: www.westlaw.com Cite: 17 HVCRCLLR 555
[289] Tushnet, *Making Civil Rights Law*, 247.
[290] Ibid.
[291] *Congressional Record*, 102nd Cong. (43), 3948, 4004, March 12, 1956.
[292] Tushnet, *Making Civil Rights Law*, 240 quoting from the Southern Manifesto, *Congressional Record*, 102nd Cong. (43), 3948, 4004, March 12, 1956.

defendants in the case. In addition to the desegregation of public schools, it was anticipated that the *Brown* rulings would be applied to other concerns. Consequently, the group also agreed not to extend *Brown*'s directives to other governmental or municipal concerns.[294]

School closings were one of the tactics used in the Massive Resistance movement. On January 19, 1959, the Virginia Supreme Court declared the practice of closing schools to be in violation of the state's constitution. In a federal court, "Massive Resistance" was also found unconstitutional, on the same date. These events signaled the end of the official Massive Resistance movement to defy *Brown*'s mandates.[295]

Delay-Based Litigation

From 1955 to 1968, local courts and the Supreme Court were engaged with school districts and "delay-based" litigation and their token attempts to desegregate. School districts used geographic zoning, complex pupil placement methods, and "freedom-of-choice" plans as token measures to "desegregate" schools.[296] The theory behind "freedom-of-choice" plans was that they allowed parents and students the option of choosing a school to attend, subject to space availability. In reality, the plans rarely resulted in desegregated schools.[297] Pupil placement methods allowed school officials to place students on a nonracial basis but this method also created little change in the desegregation of schools.

During the "delay" period, the courts sought to speed up compliance with *Brown* mandates. The following cases typified issues of the delay-based litigation period and provide a backdrop for the litigation addressed in this chapter.

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[293] *Congressional Record*, 102nd Cong. (43), 3948, 4004, March 12, 1956.
[294] Todd Gaziano, "The New Massive Resistance," *Policy Review* (May-June 1998). Available Online: www.frontpagemag.com/archives/rcerelations/resist.htm
[295] Tushnet, *Making Civil Rights Law*, 250.
[296] Gaziano, "The New Massive Resistance."
[297] Armor, *Forced Justice*, 24.

***Briggs v. Elliott,* 132 F. Supp. 776 (1955).** In *Briggs v. Elliott,* a federal district court ruled that *Brown II* forbade the state from enforcing segregation and that students had a right to choose the schools they attended. In the *Briggs*' opinion, the lower federal court spoke directly to primary desegregation issues. The lower court clarified that previous rulings by the Supreme Court had not decided that federal courts were to take over or regulate public schools, that states must mix persons of different races in its schools, or deprive students of their right to choose the schools they attended.

The Supreme Court was further cited as having declared that nothing in the Constitution required integration; it did forbid discrimination.[298] The *Briggs*' ruling was used as the basis for claiming that integration was not required for compliance with *Brown II*. However, integration eventually proved a pivotal point in the desegregation movement.

"Freedom-of-choice" plans were used early by southern school districts as a remedial measure to desegregate. The ruling in *Briggs* gave credence to "freedom-of-choice" plans.

Integration and the "freedom-of-choice" plans would be recurrent themes in desegregation litigation that followed. The *Briggs*' decision was not appealed and was cited as precedent by southern lower courts.[299]

***Cooper v. Aaron*, 358 U.S. 1 (1958).** State officials were often the agents who placed their offices, authority, and personage in the path to obstruct compliance with *Brown*. The United States Supreme Court confronted this issue in the case of *Cooper v. Aaron*. The Court held that no agency of the state, officers, or agents by whom its powers were exerted could deny equal protection of the laws to any person within the jurisdiction.[300] Infamous circumstances surrounded the *Cooper v. Aaron* case. Three years after the *Brown* decision, "Little Rock

[298] *Briggs v. Elliott,* 132 F. Supp. 776 (1955)
[299] Armor, *Forced Justice,* 24.

suddenly found itself at the epicenter of this country's first major school desegregation effort."[301] The situation and resistance to school desegregation were so dire that in September 1957, President Dwight Eisenhower ordered federal troops to Little Rock, Arkansas, to escort and protect nine African American students as they entered and desegregated the city's Central High School.[302]

***Griffin v. County School Board of Prince Edward County,* 377 U.S. 218 (1964).** In *Griffin*, the Supreme Court confronted the massive resistance strategy of closing public schools. To avoid desegregation, the public schools of Prince Edward County, Virginia, closed in 1959 and remained closed for five years. Private schools paid for by tax-supported vouchers were established for white students, while African American students were left without educational opportunities due to the closing of public schools. The closing of Prince Edward County Schools led to the *Griffin* litigation. *Griffin* was decided on May 25, 1964. The case derived its history from *Davis,* one of the companion cases in *Brown*. The litigation in *Davis* went back more than a decade to the early 1950s.

The story of the school closings and a classic representation of "Massive Resistance" were told through the occurrences that took place in Farmville, Virginia, the county seat of Prince Edward County. The seeds for the closing of schools in Prince Edward County, Virginia were deeply rooted in the "Jim Crow" culture of segregation, of which separate schools were an innate component. Historically, separate and unequal schools were maintained in the county for African American and white children. Education for African American children was premised on the concept of "vocational skills training." Prior to 1939, there was no accredited high school for

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[300] *Cooper v. Aaron*, 358 U.S. 1 (1958).
[301] *Little Rock School District v. Pulaski County Special School District*, 237 F.Supp.2d 988, 173 Ed. Law Rep. 480 (E.D. Ark. Sep 13, 2002) (*Little Rock*).
[302] Tushnet, *Making Civil Rights Law*, 258. See also *Cooper v. Aaron*.

African American students and secondary education consisted of "extra" grades in the elementary school.[303]

Together with the "Jim Crow" social and cultural norms and minimalist view of education for African Americans children, were funding issues, which provided a safe rationale for "separate-and-unequal schools" and contributed to the perpetuation of a dual system of education.[304] In 1939, new and separate high schools were built for white and African American students. The white school had "gymnasium, cafeteria, locker rooms, infirmary, and an auditorium with fixed seats. Moton [the African American high school] had none of these."[305] Moton High School also was built to serve 180 students. Projected enrollment stood at 167 students to begin the school year in the new building.

Over the years, the student population far exceeded the design capacity of Moton High School. To ease the overcrowding at Moton High School, authorization was granted and during the 1948-49, school year three tar paper buildings were constructed. The tar paper buildings, which were supposed to be temporary structures,[306] were deeply resented in the African American community. Additionally, the tar paper buildings, commonly called "shacks," had become less and less suitable for students' use. Heat was provided by a single wood-burning stove in each building, which caused students nearest to the stove to be hot and those farthest away were cold. The buildings also leaked.[307] By the early 1950s, an increasingly tense situation overall, had became more compounded. The school board wrestled with the logistics of new but separate school construction for both African American and white students. But the inequities of

[303] Bob Smith, *They Closed Their Schools* (Farmville, Virginia: Martha E. Forrester Council of Women, 1996), 14.
[304] Ibid., 14.
[305] Ibid., 14. The white Farmville High School was built after a fire demolished the original structuire. In part, insurance money and Public Works Administration funds were used to pay for construction costs.
[306] Ibid., 14. Virginia statutes placed a five-year limit on these types of buildings. However, there were many of these structures built in the state during the 1930s and early 1940s, which continued to be used beyond the statute of limitations.

the schools and changing times brought the notion of desegregated schools into the scenario and also brought significant events to Farmville and Prince Edward County.

For two weeks, beginning on April 23, 1951, 450 students boycotted Moton High School.[308] A month later, on May 23, 1951, the NAACP sued in federal court in Richmond, Virginia. The school desegregation suit was filed on behalf of 117 Moton High School students, who participated in the strike. Dorothy Davis was a 14 year old ninth grader at Moton High School and was the first plaintiff listed.[309] "The case was titled, *Davis v. County School Board of Prince Edward County*."[310] Ultimately, this *Davis* case became one of the companion cases in *Brown*.

"In April, 1955, a delegation appeared before the Prince Edward Board of Supervisors to ask that no funds be appropriated for integrated schools."[311] The Board of Supervisors, heavily comprised of members who supported "Massive Resistance" efforts, voted to delay authorization for school funding until May 31, 1955, the same date that the *Brown II* decision was to be handed down.[312] Four years later on June 2, 1959, the sentiment not to fund rather than desegregate the public schools moved closer to reality when Board of Supervisors announced its intention not to appropriate money for operation of the public schools.

Between the Fall 1958 and January 1959, the Virginia Supreme Court of Appeals and a federal district court struck down Virginia's "Massive Resistance" laws.[313] Prince Edward County was under federal court decree to desegregate its schools in September 1959. However, Prince Edward County was determined not to operate desegregated schools and on June 3, 1959

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[307] Ibid., 31.
[308] Gerald A. Foster and Vonita Foster, *Silent Trumpets of Justice: Integration's Failure in Prince Edward County* (Hampton, Virginia: U.B. and U.S. Communications Systems, 1993), 5.
[309]Kluger, *Simple Justice*, 759.
[310]Ibid., 478.
[311] Smith, *They Closed Their Schools*, 101.
[312] Ibid., 101.

refused to appropriate money or levy taxes to run schools.[314] The public schools in Prince Edward County did not open in September 1959 but operated throughout the rest of Virginia. Further, the Prince Edward School Foundation, a private organization, was established to operate schools for white students in the county. An offer for private schools was also made to the African American citizens of Prince Edward County but was rejected in favor of a continued fight for desegregated public schools.[315]

The Foundation raised money through private contributions, secured buildings, collected textbooks, equipment, materials, supplies, and other necessities for operation of the private schools. The Foundation operated the private schools for white students solely on private contributions during the 1959-1960 school year. In 1960, the Virginia General Assembly authorized a tuition grant program for students of all races. Tuition grants were available for students to attend nonsectarian private schools or public schools outside the district. The Prince Edward Board of Supervisors also passed a statute that made available additional grant money.[316] The County Board of Supervisors passed an ordinance that allowed up to "twenty-five percent property tax credits for contributions to any nonprofit, nonsectarian private school in the county."[317] All of these initiatives benefited the white students attending schools operated by the Prince Edward School Foundation.

The public schools in Prince Edward County were closed between 1959 and 1964, when the *Griffin* litigation was decided. In the *Griffin* case, the Supreme Court held that the time for "deliberate speed" had run out and that the school children could no longer be denied their constitutional rights to an education equal to that afforded by the public schools in the other parts

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[313] Ibid., 161.
[314] *Griffin*
[315] Ibid.
[316] Ibid.

of the state of Virginia.[318] The language and tone in the *Griffin* opinion appeared to indicate the Court's frustration and impatience with the school system's avoidance of desegregation and its history of racially separate schools.

Moving beyond resistance. The litigation issues and decisions in the *Briggs*, *Aaron*, and *Griffin* cases revealed much about the legal discourse on public school desegregation that occurred during the late 1950s and 1960s. Strategies to resist school desegregation were consistently met with judicial reiteration of the need for timely desegregation efforts and acceleration of school desegregation. Standards for the desegregation of public schools and benchmarks to measure desegregation standards were established by decisions of the focal Supreme Court cases that follow in this chapter.

Transition to Implementation

Civil Rights Act of 1964

> No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.[319]

On July 2, 1964, the Civil Rights Act of 1964 was signed into law. "With the congressional enactment of the Civil Rights Act of 1964, legal segregation in America ended."[320] The Act prohibited racial and other types of discrimination in several areas, one of which was education. The Act also carried the weight of cessation of federal funds where discrimination was in evidence. Provisions in the Act allowed for governmental agencies to intervene in private lawsuits that alleged discrimination based on statues or Fourteenth Amendment infringements.

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[317] Ibid.
[318] Ibid.
[319] 42 U.S.C.A.s 2000d-d-1.
[320] Motley, "The Historical Setting of *Brown.*"

In addition to the strength of the Act's mandates, its arrival brought much-needed support to the movement to end overall discrimination and to further public school desegregation efforts. The Department of Justice's ability to sue for the orderly desegregation of public schools provided relief and a boost to NAACP attorneys who virtually alone had worked toward the goal of ending segregation in public schools since the 1930s. Under the Act's banner, the Department of Justice brought legal action against more than 500 school districts in the decade following the Act's authorization.[321]

In response to the Civil Rights Act of 1964, the Department of Health, Education, and Welfare (HEW) was tasked with developing guidelines for school desegregation. These guidelines were expanded and became more comprehensive over time. HEW also had supervision and authorization power over federal education money. In the ten years following its 1965 charge to render financial penalty, HEW suspended federal education aid to more than 600 school districts involved with racial discrimination.[322]

Enactment of the Civil Rights Act of 1964 brought the executive and legislative branches of the federal government into the efforts to end racial discrimination. This was accomplished through the legislative branch's passage of the Act and executive branch's support via presidential authorization. Entry of the other federal government branches provided the judicial branch or courts a more unified position of authority on the issue. It also meant that the judiciary would not continue to be an isolated vehicle for ending segregation in public schools.[323]

The Civil Rights Act of 1964 was a lengthy document with many provisos. Coverage of it in this study was limited and sought only to provide the reader a sense of the Act's substance. Brevity in coverage of the Civil Rights Act, however, was no indicator of the Act's importance.

[321] Kluger, *Simple Justice*, 759.
[322] Ibid., 759.

Case law and the Civil Rights Act of 1964, with subsequent reauthorizations, proceeded hand-in-hand to shape desegregation in public schools across the country. As this study was concerned with school desegregation case law, it proceeded from that perspective.

Implementation Forthwith

Green v. County School Board of New Kent County, 391 U.S. 430 (1968)

Background and Issues in *Green.* In 1968, the United States Supreme Court rendered its first decision that signaled a change in its doctrine on school desegregation.[324] The decision came in the case of *Green v. County School Board of New Kent County*. At issue in *Green* was whether "freedom-of-choice" plans, which allowed pupils to choose his or her own public school, constituted adequate compliance with the school board's responsibility to develop a students' admissions system on a racially nondiscriminatory basis. With its decision in *Green*, the Court moved away from its stance of forbearance and tolerance as it dealt with resistance to desegregation by southern school districts. The Court shifted to a position that firmly called for desegregation to occur. The Court also moved from language that sought to allow flexibility in the fashioning of desegregation remedies to articulation of more defined and specific requirements for the elimination of dual school systems as required for compliance with *Brown I* and *II*.

In March 1965, an injunction was sought to discontinue the maintenance of a racially segregated school system in New Kent County, Virginia. New Kent County was a small, rural community in eastern Virginia with a population of approximately 4,500 people. The population was relatively evenly divided between African Americans and whites. In New Kent County, there was no segregation in the residential areas nor were there attendance zones for the county's

[323] Wilkinson, *From Brown to Bakke,* 102-4.
[324] Armor, *Forced Justice,* 27.

two schools, which had racially separate student populations; one African American and one white. After the *Brown* decisions, the two schools remained racially segregated under massive resistance statutes. Under these provisions, students were automatically reassigned to the school previously attended unless assigned by the state board following application for assignment. First-time students in the school system were also assigned. By September 1964, no African American student had applied to go to the white school and vice versa.[325]

Five months after suit was filed and to remain eligible for federal education financial aid, the school board of New Kent County, Virginia adopted a "freedom-of-choice" plan for desegregating its public schools.[326] The plan allowed students, except for first and eighth graders, to choose between the two schools. Students who did not choose a school were assigned to the school previously attended. "First and eighth grade students had to affirmatively choose a school. The plan also had to be amended with respect to employment of teachers and staff on a racially nondiscriminatory basis."[327]

Holdings in *Green.* In its opinion, the United States Supreme Court cited provisions of the Civil Rights Act of 1964 along with judicial precedents as basis for its reasoning. The Court found the pattern of racial identification in the school system's separate African American and white schools to be complete. Racial identification was found to exist beyond student body composition and present in every facet of school operations including faculty, staff, transportation, extracurricular activities, and facilities. These additionally identified facets of school system operations, along with student assignment, were henceforth known as the six "*Green* factors."[328]

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[325] *Green.*
[326] Ibid.
[327] Ibid.
[328] Ibid.

Also significant in the *Green* opinion was the Court's lack of tolerance for continued failure to comply with directives of the *Brown* decisions. The amount of time between the *Brown* decisions and the school system's implementation actions was highly relevant to the Court's decision in *Green.* The Court reiterated its understanding, first expressed at the time of *Brown I* and *II*, that transition to unitary status would require time due to complexities of the situations. However, New Kent County's continued maintenance of separate schools fourteen years after *Brown I*'s "all deliberate speed" directive was found unsatisfactory by the Court. In making its decision on the acceptability of the school system's "freedom-of-choice" plans, the Court continued its admonishment by finding relevant the use of the plans as "a first step eleven years after *Brown I* and ten years after *Brown II*."[329] The Court found the school board's action to be a "deliberate perpetuation of an unconstitutional dual system"[330] that only exacerbated the harms of segregation imposed by the unacceptable and excessive delay caused by implementing ineffective desegregation plans. The Court held that time for "deliberate speed" had run out. A desegregation plan that had a realistic chance of working immediately was the new charge set forth by the Court.[331]

In the *Green* opinion, "freedom-of-choice" plans generally were viewed by the Court as an option, although the justices referred to their general experience and found them "ineffective as a tool for desegregation."[332] Several deficiencies of "freedom-of-choice" plans were cited, and their proclivity for perpetuating racially segregated schools was noted. The opinion cited that the greater emphasis was on the obligation to dismantle segregated school systems and to remedy the effects of that segregation. School officials were charged with taking whatever steps necessary to

[329] Ibid.
[330] Ibid.
[331] Ibid.
[332] Ibid.

bring about a unitary, nonracial system in New Kent County, Virginia. Geographic zoning was mentioned as a viable option for New Kent County, since there was no residential segregation.[333]

Significance of *Green*. *Green* was significant to the future of school desegregation. The Court said that time for "all deliberate speed" and "prompt, reasonable starts" had passed. *Green* determined that school authorities had an affirmative duty to take whatever steps necessary to eliminate racial discrimination and establish unitary, nonracial status forthwith. The *Green* decision established that "freedom-of-choice" plans could be a tool for achieving unitary status, but they had to be judged by their effectiveness and could not be the only method used if other more effective options available.[334] It was held that the constitutional requirement was the desegregation of public schools. Desegregation of school systems also had to move beyond student assignment into school operations as identified by the six "*Green* factors." The "*Green* factors" became the evaluation standard for compliance and achievement of unitary status, that is, the change of a school system from dual and racially segregated to one nonracially nondiscriminatory system.

Green established the standard that the most effective means had to be used to achieve desegregation or school systems had to bear the responsibility of explaining why a less effective method was used.[335] *Green* began movement by the judiciary from its previous flexible approach to a more prescriptive, specific method by which school boards could be held accountable.

***Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971)**

During the 1970s, the United States Supreme Court handed down a number of rulings that continued the judicial movement toward elaboration on requirements for compliance with mandates of the *Brown* decisions. The goal remained the elimination of discrimination caused by

[333] Ibid.
[334] Ibid.

state-enforced school segregation that resulted in violated constitutional protections. *Swann* was one of the Court's rulings in the judicial definition and specificity movement that spoke to desegregation strategies commonly at issue for school authorities. *Swann* reiterated the Court's message that dual school systems had to be dismantled, and the decision rendered details on the means to achieve that end.[336]

Background of *Swann*. At the center of this litigation was the Charlotte-Mecklenburg school district, which included the city of Charlotte and surrounding Mecklenburg County, North Carolina. In June 1969, the school system had 8,400 students in 107 schools in a 550 square-mile area. Seventy-one percent of the student population was white and 29 percent was African American. Approximately 87 percent or 21,000 of the African American students attended schools in Charlotte. About 14,000 of those African American students attended 21 schools, that were more than 99 percent African American.[337]

Issues and holdings in *Swann*. The opinion in *Swann* started with justices' summation that the problem in the case was twofold. The justices described one task as defining, for school authorities and the district courts, the scope of duties for implementing *Brown I*, in terms more precise than ever before. The second task was described as the elimination of Charlotte-Mecklenburg's long-established dual school system and its change to a unitary system at once.[338]

Swann revolved around four key problems relative to student assignment. The problems addressed in *Swann* were: (1) the use of racial balance or quotas in a remedial order to correct a previously dual system; (2) determination of whether one race schools had to be eliminated as part of the remedial process of desegregation; (3) determination of whether there were any limits

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[335] Ibid.
[336] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).
[337] Ibid.
[338] Ibid.

on gerrymandering school districts or school zones to correct segregated school systems; and (4) determination as to whether there were any limits on the use of transportation to eliminate state-enforced dual systems.[339]

Racial balance or racial quotas. The United States Supreme Court held that the constitutional requirement to desegregate schools did not mean that every school, in every community had to reflect the overall racial composition of the school system. The Court reaffirmed that its mission was to see to it that school authorities do not exclude, directly or indirectly, any student from any school on the basis of race.[340]

The percentages previously used to describe the Charlotte-Mecklenburg school district (i.e., total student population equaled 71 percent white and 29 percent African American) were also used by the school district to determine the ratio of African American and white students to be included in individual schools. The justices acknowledged that mathematical ratios could be a starting point for initially shaping remedial plans but that they could not be an inflexible requirement.[341] *Green* was referenced as the standard and precedent. The Court stated that a school district's remedial plan or a district court's remedial decree was to be judged by its effectiveness.[342] With this finding, the Court held that "very limited use of use of mathematical ratios was within the equitable remedial discretion of the District Court."[343]

One-race schools. The Court held that school authorities carried the burden of showing that school assignments were "genuinely not discriminatory" when remedial plans designed to convert a previously dual system to a unitary one included some schools that were all or predominately one-race schools. The justices found that a small number of these schools might

[339] Ibid.
[340] Ibid.
[341] Ibid.
[342] Ibid.

be unavoidable. However, in such instances close scrutiny would be required to show that state-enforced school segregation was not still in practice. In addition, school authorities were responsible for showing that the racial composition of schools was "not the result of past or present discriminatory action on their part."[344] Elimination of one-race schools was determined as the priority, and every effort had to be made to achieve desegregation to the maximum extent possible.[345]

On the issue of one-race schools, optional majority-to-minority transfer plans were found useful components of remedial plans. Majority (i.e., white) students willing to transfer to minority (i.e., nonwhite; African American in *Swann*) schools were thought to be an "indispensable remedy . . . to lessen the impact of the state-imposed stigma of segregation."[346] The Court held that space had to be made available in the receiving school and free transportation provided for students desiring a majority-to-minority transfer.[347]

Remedial altering of school attendance zones. On the issue of altered or "gerrymandered" school districts and attendance zones, the Court candidly admitted that this strategy was a primary strategy used by school districts and the federal courts to develop remedial plans for the dismantling of dual systems.[348] Included in gerrymandering were the practices of pairing, clustering, and grouping schools to achieve the transference of majority and minority students so that attendance assignments would result in "desegregated" schools (i.e., white students attending previously all-African American schools and African American students attending previously all-white schools).[349] The Court held that such gerrymandering was within

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[343] Ibid.
[344] Ibid.
[345] Ibid.
[346] Ibid.
[347] Ibid.
[348] Ibid.
[349] Ibid.

the broad remedial powers of a court and could be used as an interim corrective measure. Pairing and grouping of noncontiguous school zones were held to be permissible strategies given the goal of dismantling dual school systems.[350]

The Court found that "race-neutral" assignment plans were not automatically acceptable and could be inadequate for correcting the effects of past school segregation caused by discriminatory school locations or misrepresentative school size to achieve or maintain artificial racial segregation.[351] The Court held that "affirmative action in the form of remedial altering of attendance zones was proper to achieve truly non-discriminatory assignments."[352]

Transportation of students. The Court affirmed the importance of bus transportation to public education and that its use was instrumental to the transformation of school systems from one-room schoolhouses to those with multiple buildings and students. The Court admitted that it had not defined transportation's scope as part of remedial measures and that it could not be defined with precision. The Court held that desegregation plans could not be limited to the walk-in school and that local school districts may be required to use bus transportation as one strategy for school desegregation.[353] Bus transportation was held to be in the equitable powers of the courts. However, in using bus transportation, school districts were required to take into account the travel factors of time and distance so that students' health and welfare, and the integrity of the educational process, were not jeopardized.[354]

Significance of *Swann*. With *Swann*, the Court sought to expound on the duties of school authorities and the scope of the federal courts' powers, under mandates of the Supreme Court, to eliminate racially separate public schools. Throughout the opinion, the Court reaffirmed the

[350] Ibid.
[351] Ibid.
[352] Ibid.
[353] Ibid.

premises, the objectives, and the requirements of the *Brown* decisions. While avowing the difficulties with specific guidelines and the issuance of hard and fast strategies to be applied in every situation, the Court spoke with increased certainty on four issues that had broader applicability beyond the *Swann* decision itself. Racial quotas/racial balance, one-race schools, gerrymandering of school districts and attendance zones, and the use of busing, as addressed in *Swann*, provided additional standards and tools recognized by the Court as acceptable means to accomplish school desegregation.

***Keyes v. Denver*, 413 U.S. 189 (1973)**

Background of *Keyes.* *Keyes* was the first school desegregation case that appeared before the United States Supreme Court from a major city outside of the south.[355] The case arose from Denver, Colorado. Neither the city nor the state had ever "operated public schools under constitutional or statutory provisions which mandated or permitted racial segregation in public education."[356] In addition, other legislative actions, such as housing or zoning ordinances, played no part in the school segregation issues in *Keyes*.[357] In *Keyes*, parents of children in the Denver Public school system alleged in their litigation that the school district alone "manipulat[ed] student attendance zones, school site selection, and neighborhood school policies [that] created or maintained racially or ethnically (or both racially or ethnically) segregated schools throughout the school district."[358]

Issues in *Keyes*. The Court focused on two primary issues in *Keyes*. The first issue revolved around defining a "segregated" school. The second issue the Court considered was whether the correct legal standard had been applied to the case by the lower courts in deciding

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[354] Ibid.
[355] *Keyes v. Denver*.
[356] Ibid.
[357] Ibid.

whether state-imposed segregation in part of a school district could be viewed in isolation from considering the whole district as a dual system.

Holdings in *Keyes*. On the first issue, the Court answered the question of whether African Americans and Hispanos[359] should be considered together in defining a "segregated" school. The justices reaffirmed and applied their previous holdings in other cases on the issue that Hispanos constituted an identifiable class for purposes of the Fourteenth Amendment. They found that the facts of a particular case determined what is or is not a "segregated" school. In the reasoning, two reports by the United States Commission on Civil Rights[360] were cited for their conclusions that African Americans, Hispanos, and American Indians suffered the same "educational inequities, economic and cultural deprivations, and discrimination."[361] The basic findings of the reports were that minority groups, similarly situated as those in *Keyes*, did not obtain the benefits of public education at rate equal to that of their white counterparts.[362] Following this line of reasoning, the Court found that schools with a combined predominance of African Americans and Hispanos were to be included in the group of segregated schools.[363]

On the second issue, the Court found that school authorities had engaged in unlawful segregation by design. The finding of intentional segregation with respect to one segment of the school system became highly relevant as to the intent of segregative behavior relative to other aspects of the school district. Although the Denver school district had not operated as a statutory

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[358] Ibid.
[359] "Hispanos" was the term used in the *Keyes* record and the term used by the Colorado Department of Education to refer to a person of Spanish, Mexican, or Cuban heritage. Colorado Department of Education, Human Relations in Colorado, A Historical Record 203 (1968). In the Southwest, the "Hispanos" [wer]e more commonly referred to as "Chicanos" or "Mexican-Americans." (*Keyes)* "Hispanic" is currently the term used most frequently to refer to the same population.
[360] See United States Commission on Civil Rights, Mexican American Education Study, Report 1, Ethnic Isolation of Mexican Americans in the Public Schools of the Southwest (April 1971). See United States Commission on Civil Rights, Mexican American Educational Series, Report 2, The Unfinished Education (October 1971).
[361] Ibid.
[362] Ibid.
[363] Ibid.

dual system, it was held that one existed by virtue that school authorities engaged in practices that resulted in segregation and discrimination.[364]

In the Denver school district, structured attendance zones and feeder schools based on race, had the effect of keeping schools racially segregated. The building of new schools based on certain size and location criteria, the use of mobile classrooms, student transfer policies, student transportation policies, and racially identifiable assignment of faculty and staff all combined to provide a basis for the Court's findings in *Keyes*. School authorities also had the burden of proof in the *Keyes* case because of the practices engaged in by the school district under their authority. The Court's decision turned on the issue of policy and fairness where race appeared to be a factor.[365]

Transition to Contemporary Desegregation

Milliken v. Bradley, 418 U.S. 717 (1974) (*Milliken I*)

Background and facts. In 1967, race riots erupted in Detroit following a police raid on a nightclub whose customers were African American. As a result of the riots, 43 people were killed, the city suffered $50 million in damages, and seventeen thousand United States army and national guard troops were called into the city to restore order.[366] In the years immediately following the riots, large numbers of Detroit's white population left the city. Coupled with a 1960s decade that saw a declining white population and the loss of white citizens after the riots, Detroit became an increasingly African American city with residential segregation. The white families that remained in the city overwhelmingly enrolled their children in private or parochial schools.[367] Consequently, "in 1970, more than 70 percent of the schools were virtually all-white

[364] Ibid.
[365] Ibid.
[366] Irons, *Jim Crow's Children*, 236.
[367] Ibid., 236-237.

or all-black."[368] In these schools, more than 90 percent of the student body reflected the majority race in the school.[369]

In August 1970, NAACP lawyers filed a lawsuit challenging segregation in the Detroit Public Schools. The plaintiffs were, on behalf of their children, African American parents opposed to the situation and some white parents who believed their children were being "denied an integrated education."[370] The defendants included William Milliken, Michigan's Republican and the boards of education for the city of Detroit and the state of Michigan.[371] At the district court level, Judge Stephen J. Roth heard the case. Judge Roth had been a "prosecuting attorney, state court judge, and Michigan's attorney general before his nomination to the federal bench in 1962 by President John F. Kennedy."[372]

Before issuing a ruling, at the district court level, in *Milliken v. Bradley*, Judge Roth held a number of hearings[373] and reviewed desegregation plans from the plaintiffs and the defendants in the litigation.[374] In June 1972, Judge Roth ruled that "Detroit officials had intentionally segregated the city's schools by building new schools well inside neighborhood boundaries, to keep black and white students in separate schools, rather than placing new schools in areas that would draw students of both races."[375] The judge also found that transfers allowing white students to move from schools in racially transitional areas, thereby escaping predominately African American schools, had been permitted by school authorities.[376] *De jure* segregation was found and a multi-district remedy was ordered. The remedy involved 53 school districts and the

[368] Ibid., 237.
[369] Ibid., 237.
[370] Ibid., 237.
[371] Ibid., 237.
[372] Ibid., 237.
[373] The trial took place between April 6, 1971 and July 22, 1971: a period of 41 trial days. The decision was rendered on September 27, 1971. *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*).
[374] Irons, *Jim Crow's Children*, 237.
[375] Ibid., 237.

busing of 310,000 students across district lines (i.e., white children would be bused from the suburbs to inner city African American schools and African American children would be bused to white suburban schools that had never had African American students). With regard to racial balance, "no school, grade, and classroom in the Detroit metropolitan area would have a racial balance substantially disproportionate to the overall pupil racial composition of the three county area covered by the order."[377] Judge Roth reasoned that school district boundaries were a viable remedy option resting on the fact that state lawmakers had redrawn school district boundary lines to merge rural schools. Further, several school districts under his remedial supervision involved two or three towns. In his opinion, Judge Roth expressed "school district lines are simple matters of political convenience and may not be used to deny constitutional rights."[378] School authorities were found culpable for the situation by allowing the Detroit Public Schools to determine attendance zones and build schools in a manner that resulted in segregation thereby creating an "official" policy.[379]

Judge Roth's multi-district remedy caused an uproar from white suburban parents opposed to busing their children into Detroit's public schools. Claiming that there was no evidence that the suburban districts had caused racial segregation in the Detroit or suburban schools and that they were not part of the original litigation, 44 of the 53 school districts mandated to bus students under Judge Roth's order, appealed to the Sixth Circuit Court of Appeals. In 1973, the Court of Appeals upheld Judge Roth's order and found that policies of the

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[376] Ibid., 237.
[377] Ibid., 238. Irons quoting from Judge Roth's ruling in the Detroit case: *Milliken v. Bradley*, 338 F.Supp. 582 (E.D Mich. 1971; 345 F.Supp. 918 (1972).
[378] Ibid., 238. Irons quoting from Judge Roth's ruling in the Detroit case: *Milliken v. Bradley*, 338 F.Supp. 582 (E.D Mich. 1971; 345 F.Supp. 918 (1972).
[379] Ibid., 238.

Michigan State Board of Education "fostered segregation throughout the Detroit Metropolitan area."[380]

"The stakes in *Milliken* were high, potentially greater than those in *Swann*,"[381] given that remedy in *Swann* involved a single district versus the multi-district remedy of *Milliken*. In advance of *Milliken* going to the Supreme Court, amicus curiae briefs were filed in support of both sides of Judge Roth's decision. The Mexican American Legal Defense and Education Fund supported Roth's decision and the National Suburban League wanted the decision overturned. School authorities in many northern school districts had created attendance zones that in effect separated African American and white students.[382] "If the Supreme Court upheld Judge Roth's order, suburbs would no longer be safe havens for whites."[383] The impact of the *Milliken I* decision went beyond African American children in the failing Detroit Public Schools. It sent a message that poor African American students in the nation's cities could not attend school with large numbers of white children and that large numbers of African American children were not welcomed in suburban classrooms.[384]

Issues in *Milliken I*. In the original litigation, suit was filed on allegations that a Michigan statute[385] caused an unconstitutional interference "with the execution and operation of a voluntary plan of partial high school desegregation, known as the April 7, 1970 Plan."[386] Racial segregation was alleged in the Detroit Public School system based on official policies and actions of "the Governor of Michigan, the Attorney General, the State Board of Education, the

[380] Ibid., 238. Irons quoting from Court of Appeals ruling in the *Milliken* case: 484 F2d 215 (6th Cir. 1973).
[381] Ibid., 239.
[382] Ibid., 239.
[383] Ibid., 239.
[384] Ibid., 249.
[385] Act 48 of the 1970 Legislature. (*Milliken I*).
[386] (*Milliken I*).

State Superintendent of Public Instruction, the Board of Education of the city of Detroit, its, members, the city's and its former superintendent of schools."[387]

Referring to *Swann*'s holdings that the remedial process required equity in correcting constitutional violations by balancing individual and collective interests, the Court addressed allegations of segregation in the Detroit Public Schools. The central issue in *Milliken I* was whether a federal court could impose a multi-district, area-wide remedy where segregation had been found in a single school district (i.e., the Detroit Public Schools) but findings of racially discriminatory constitutional violations were not present for other school districts (i.e., suburban Detroit school districts).[388] In its appearance before the Supreme Court, the *Milliken I* litigation did not claim, nor was it evident, that boundary lines of the suburban Detroit school districts were intended to cause or contribute to racial segregation in the public schools. In addition, there were no findings that the suburban districts engaged in activities that brought about segregation in the other districts. The Court also took issue with the lack of opportunity given the suburban districts to provide evidence or testimony on the multi-district remedy or segregation violations of the neighboring districts.[389]

Holdings in *Milliken I.* The Supreme Court responded to the plaintiffs' case by reducing the matter to a basic issue of whether a desegregation remedy could involve more than a single district. The Court held that, without findings of inter-district constitutional violations or inter-district effects of the harms of segregation, remedy involving multiple districts or as proposed in *Milliken I*, corrective action encompassing a metropolitan area, were not an allowable. The Court based its reasoning upon the historical significance and importance of local control to public

[387] Ibid. The State of Michigan was not listed as a defendant in the litigation. In the opinion, references to the "State" indicate references to the public officials, state and local, through whom the state is alleged to have acted. (*Milliken I*).

[388] (*Milliken I*).

schools. Local autonomy was cited as essential to the "maintenance of community concern and support for local public schools."[390] Logistical issues and serious problems, such as financial and operational matters, that would arise from the proposed creation of the Detroit metropolitan remedy were included in the Court's reasoning for its decision.[391]

On a separate issue involving the racial mix and racial identifiability of the student population, the Court again based its response primarily on the holdings in *Swann.* The Court held that according to the ruling in *Swann*, "desegregation, in the sense of dismantling a dual school system, did not require any particular racial balance in each school, grade, or classroom."[392]

Latitude was provided in the Court's opinion for circumstances where an inter-district remedy could be an appropriate option for consideration. For example, if the acts of segregation in one or more of the districts caused racial segregation in an adjoining district, an inter-district remedy could be considered. Another instance cited for considering inter-district remedy was where school district boundary lines were drawn on the basis of race. "Inter-district remedy would be appropriate to eliminate inter-district segregation directly caused by the constitutional violation. Conversely, without an inter-district violation and inter-district effect, there [would be] no constitutional wrong calling for an inter-district remedy."[393]

The decision in *Milliken I* was five-to-four. "For the first time since the *Brown* decision in 1954, the justices were split on a school case."[394] The spilt decision reflected a conservative tone of the justices appointed to the Supreme Court by Richard Nixon. The *Milliken I* litigation, the framing of the issues in the case by the Court, and the justices' reasoning for their holdings

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[389] Ibid.
[390] Ibid.
[391] Ibid.
[392] Ibid.

earmark *Milliken I* as the dawning of a new era. Transition had also begun on the Supreme Court itself. As the role of the Supreme Court was demonstrated with the *Brown* decisions, the *Milliken* Court would continue to evolve and be a decisive factor during the Contemporary Desegregation Era.

***Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*)**

Background of *Milliken II*. *Milliken II* was the result of seven years of litigation related to *de jure* segregation and the resolution of remedy issues that arose from *Milliken I*. After the United States Supreme Court found the inter-district remedial plan of *Milliken I* excessive, it remanded the case back to the district court so that an appropriate desegregation plan could be developed for the Detroit public school system. Desegregation plans were immediately ordered by and had to be submitted to the district court. A remedial plan was approved by the district court after extensive hearings and upheld by the Court of Appeals of the Sixth Circuit. On matters relative to the propriety of rulings by the lower courts, *Milliken II* appeared before the Supreme Court.[395]

Issues in *Milliken II*. Student assignment plans were the focus of the inter-district desegregation plan in *Milliken I*. The judicially approved desegregation plan of *Milliken II* included educational components "in the areas of reading, in-service teacher training, testing, and counseling,"[396]in addition to student assignment, provisions for magnet schools, and vocational high schools. Further, the lower federal courts had ordered the state to pay one-half

[393] Ibid.
[394] Irons, *Jim Crow's Children*, 241.
[395] *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*).
[396] Ibid.

the additional cost for the educational components of the approved desegregation plan. The state defendants contested this provision on allegations of Eleventh Amendment violations.[397]

In *Milliken II*, the Supreme Court concerned itself with two questions on the remedial powers of the federal district courts in school desegregation cases. The first question was whether district courts could order desegregation plans to include compensatory or remedial programs for students in order to correct the past harms of segregation. The second question was whether a federal court could require state officials to pay partial costs of programs necessary to correct the harms of segregation, where the state was found guilty of discriminatory constitutional violations.[398]

Holdings in *Milliken II*. The Supreme Court held that the district court did not exceed its authority when it approved the desegregation plan for Detroit Public Schools that included educational components, in addition to student assignment strategies. The Court reasoned that it was essential to mandate educational components to remedy the effects of past segregation, facilitate desegregation efforts, and minimize the possibility of resegregation.

The Supreme Court held that the requirement for the state to pay costs associated with the remedial educational plan did not violate Eleventh Amendment protections. State officials were held responsible to pay for their wrongful acts of discrimination.

Significance of *Milliken II*. *Milliken II* firmly declared its obligations to the *Brown* progeny. The decision in *Milliken II* also provided clarity on the Tenth Amendment reserved powers of the states and the Eleventh Amendment judicial powers issues relative to school desegregation.

[397] Ibid.
[398] Ibid.

Language from *Brown II*, on appropriate equitable principles, was the basis for the requirement established in *Milliken II* that federal courts evaluate remedial options on three factors. One factor was that the desegregation remedy had to be determined "by the nature and scope of the discriminatory violation."[399] The second factor required that victims of the discrimination had to be restored to the position that would exist, absent the discrimination. Lastly, in accordance with constitutional safeguards, remedies had to consider local and state concerns for their own governance.[400] In the *Milliken II* opinion, the Court found that these standards were abided in *Milliken II*. In addition to *Brown II*, *Swann* and *Green* were cited among controlling authorities and precedents.

Turning Point from the Seminal Desegregation Era to Contemporary Desegregation

Brown II's fundamental and foremost task was discontinuance of the entrenched exclusion of African American children from schools previously and exclusively attended by white children. The ultimate goal was to transition segregated school systems to unitary nonracial systems of public education.[401] Achieving these outcomes proved a difficult task for many years after the United States Supreme Court rendered its decisions in the *Brown* cases. *Brown*'s mandates were denied and resisted. Executive and legislative supports were needed and used to actualize the intent and mandates that *Brown I* and *II* decreed.

The causes that contributed to *Brown*'s turbulent infancy and childhood were varied. Chapter 4 addressed *Brown*'s coming of age with desegregation taking its place in school districts across the country. Initially, the justices purposely omitted remedy details on how to achieve the *Brown* mandates. The omission was to allow courts and school districts latitude for developing remedial plans to meet their local needs. However, the flexibility intended by this

[399] Ibid.
[400] Ibid.

strategy contributed to difficulties with implementing desegregation in public schools. The litigation discussed in chapter 4 supplied needed specifics and details for shaping remedial desegregation plans.

Chapter 4 examined Seminal Desegregation Era messages through individual litigation used to establish desegregation in American public schools. These individual messages became the foundational concepts and legal precedents upon which countless other desegregation cases would be evaluated and remedial desegregation plans developed. The details and circumstances were different in each case examined and the specific points of law were reviewed within the context of that case's circumstances. The approach used was consistent with the Supreme Court's pronouncement that proper adjudication of desegregation litigation required that holdings and remedies for racial segregation or discrimination be defined within the context of the particulars. Also consistent was the Court's message that no one generic remedial strategy could be applied to all situations to correct past harms where discrimination had been found.

During the Seminal Desegregation Era addressed in chapter 4, the Court was shown to change its disposition from vague and tolerant to allow school authorities the flexibility to devise desegregation remedies that accounted for individual situations, to commanding and specific in its requirements for compliance with *Brown I and II*'s mandates. A reflection of the Court's change was seen in longer opinions that spoke precisely to desegregation strategies. The Supreme Court also elaborated on explicit sentiments in its reasoning for the holdings rendered. One of the Court's messages during the era, was that foot-dragging would no longer be tolerated. Compliance with desegregation had to occur forthwith.

Green emphasized that school authorities must attain "unitary status" or one racially nondiscriminatory school system. The Court ruled that dual or segregated school systems be

[401] *Green.*

dismantled "root and branch." The unanimous decision in *Green* made it clear that, in addition to student assignment, desegregation had to occur with every facet of school operations. Complete remedy had to address racial discrimination in the student body, faculty, staff, transportation, extracurricular activities, and equity in facilities.[402] The Court also held that school authorities had an affirmative duty to eliminate racial discrimination.

Swann presented a number of school desegregation issues. Among those issues were desegregation across city-suburban lines, desegregation with predominately one-race schools, and urban districts with substantial student populations distributed across large geographic areas. These issues became thematic mainstays of continued desegregation litigation.

The *Swann* opinion clearly stated that the "constant theme and thrust of every holding between *Brown I*"[403] and the case in point was a reaffirmation that state-enforced segregation of the races in public schools violated constitutional protections. Further, the *Swann* opinion reaffirmed that the remedy for such constitutional violations was the dismantling of dual school systems. *Brown II* called for principles of equity to guide compliance efforts for the dismantling of dual school systems. The call was repeated in the *Swann* decision.[404] The basic fairness inherent in equity that would define the scope and limits of the courts' remedial powers was to be determined by "substance not semantics."[405]

In the *Swann* opinion, the justices pointed to the belief that school authorities in the litigation and others similarly situated would eventually achieve unitary status as required by *Green* and *Alexander v. Holmes,*[406] which mandated the immediate termination of dual school systems and the establishment of unitary systems. The Court retreated from words such as

[402] Ibid.
[403] *Swann*.
[404] Ibid.
[405] Ibid.

"*workable*," "*effective*," "*realistic*," and "*feasible*," relying on the equity requirement of *Brown II*. Allowing for schools and communities that demonstrated potential for future change, *Swann* concluded with the declaration that no constitutional requirement existed for an annual adjustment of student body racial compositions once the affirmative duty to desegregate had been accomplished and racial discrimination had ended.[407] Federal court intervention in desegregation was to be limited to future problems or actions by school authorities or state agents that resulted in alteration of school racial compositions and had the effect of racial discrimination.

In the *Swann* opinion, the construction of new schools and the closing of old ones were discussed. School location decisions were accepted as having long-term consequences. A two-way gravitational pull between people and schools was used to describe the importance of school locations. The connection between school locations and patterns of residential development in metropolitan areas and the composition of inner city neighborhoods was cited as critical to the status of racially segregated schools. History had demonstrated that school location decisions were powerful weapons for "creating and maintaining state-segregated school systems."[408] The Court warned that school authorities and district courts were responsible for assuring that school construction and school closings did not serve to perpetuate or reestablish dual systems.[409]

Keyes brought the issue of school segregation beyond heretofore traditional southern boundaries. In the *Keyes* opinion, *Brown*, *Green*, *Swann*, and other desegregation precedents were applied and used to explain the obligations incumbent upon school authorities in their responsibility to eliminate Denver's dual system of education. *Keyes* was relevant to many

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[406] *Alexander v. Holmes*.
[407] *Swann*.
[408] Ibid.
[409] Ibid.

northern and urban districts in that Denver never had statutory mandates to operate dual systems, but it had maintained schools with racially segregated and identifiable school populations. *Keyes* affirmed the expanding nature of desegregation by denoting the status of Hispano students and the permissibility of combining minority populations.

In chapter 3, the justices' role in the *Brown* decisions was discussed as an integral factor to the creation of school desegregation case law. *Keyes* provided an indication of the monumental role that the Court would again play in the continuing evolution of school desegregation case law.

In his dissenting opinion on *Keyes*, Justice William H. Rehnquist cited *Briggs*' interpretation that the constitutional requirement to correct the violations caused by school segregation did not mandate integration but that it did forbid discrimination. Justice Rehnquist contested the *Keyes* majority's use of "evidentiary presumption to extend *Green* to northern schools."[410] He further dissented on grounds that *Green* called for racial balance in public schools in contrast to *Brown's* requirement for the elimination of racial standards.[411] The *Keyes*' majority opinion responded to Rehnquist that *Green* had previously answered this interpretation of *Briggs* by stating that an affirmative duty existed for school authorities to convert to unitary systems and eliminate segregation "root and branch," if racial discrimination existed.[412] It was striking to observe Justice Rehnquist's 1973 dissent, which harkened back to a 1955 lower court reasoning that had been used to allow foot-dragging on compliance with *Brown*'s mandates. *Keyes* also was a fractured decision that revealed the mindset of the Supreme Court during the Contemporary Desegregation Era covered in chapter 5.

[410] Kermit L. Hall, ed., *The Oxford Guide to United States Supreme Court Decisions* (New York: Oxford University Press, 1999), 150.
[411] Ibid., 150
[412] *Keyes.*

Keyes was decided nineteen years after *Brown I*. During the intervening years, the issue of school desegregation was ever present in the courts and the litigation came from a broad cross-section of the nation. Large, complex urban school districts had joined southern school systems as both struggled in a new era over the issue of desegregation and American public schools. In addition to African Americans, *Keyes* illustrated the inclusion of other racial and ethnic groups on the issue of discrimination and school desegregation.

Milliken I, although decided thirteen months after *Keyes*, presented like a time capsule version of public school desegregation. The long and complex opinion contained what seemed to have become an obligatory iteration in desegregation cases on the premise of *Brown*. Whereas the affirmation to *Brown* traditionally occurred in the beginning of the opinion, *Milliken*'s commitment was embedded in extensive information on the roots of the case and its rise to the Supreme Court. Contained in the information was a microcosm of what public school desegregation case law had collected in the twenty years between *Brown I* in 1954 and *Milliken I* in 1974.

The issue of desegregation in northern schools districts that *Keyes* brought to the forefront burgeoned into a proliferation of tangents in *Milliken I*. *Keyes* and *Swann* had involved single school districts in remedial plans to correct the harms of segregation. *Milliken I* involved the consolidation of fifty-four independent school districts into a super school district as a proposed remedy to address segregation findings in a single district.[413] Ultimately, the ruling in *Milliken I* established conditions for physical school district boundaries relevant to remedial desegregation plans. *Milliken I* set the parameter for remedial desegregation measures at the boundary line of an individual school district.[414] The import of the *Milliken I* decision can be

[413] *Milliken I.*
[414] Hall, ed., *The Oxford Guide*, 191.

illustrated by the fact that for the first time since the 1954 *Brown* decision, "the Supreme Court refused to endorse a desegregation remedy sought by the NAACP."[415]

Milliken I was also significant for its dissenting opinions. Four of the nine Supreme Court justices dissented in *Milliken I*. Mr. Justice William Douglas, Mr. Justice Byron White, and Mr. Justice Thurgood Marshall filed separate dissenting opinions. All of the dissenting justices joined in each of the dissenting opinions. Among the dissenting responses to the majority's reasoning on local control was an assertion that school district boundaries were not fixed and unchangeable. It was contended that restructuring might be required to meet constitutional obligations and that parents and students could participate in the control of newly created districts. Disagreement with the majority's holdings was also based on the belief that deliberate segregative acts and their effects would go unremedied. The disagreement rested on objections to the majority view that creation of an effective remedy (i.e., an inter-district remedy) would pose undue administrative inconvenience to the state. It was argued that the State of Michigan had protected itself from obligations to provide effective desegregation remedies through the power given its local districts.[416] Justice Marshall voiced concern that a remedy limited only to Detroit would not desegregate its public schools. His vehement dissent carried overtones of the long-term personal connection he had with desegregation, as he reflected that " desegregation [was] not and was never expected to be an easy task."[417] He warned the Court "after twenty years of small, often difficult steps toward that great end [desegregation], the Court today t[ook] a giant step backward."[418]

[415] Ibid., 191.
[416] *Milliken I.*
[417] Ibid.
[418] Ibid.

Following the consternation evoked by the decision and opinions in *Milliken I*, *Milliken II* served as guidepost for a return to more familiar and expansive desegregation guidelines. "Possibly the most definitive application of the various means of remediation [was] given in *Milliken II* in which the U.S. Supreme Court set out guidelines that must govern lower court consideration of remedial options."[419] *Milliken II* reaffirmed standards established by hallmark school desegregation case law such as those found in *Brown I* and *II*, *Green*, *Swann*, and *United States v. Montgomery County*[420]. *Milliken II* also further established the power and authority of the federal courts in fashioning desegregation decrees. The holdings in *Milliken II* said that the federal courts' use of remedial educational programs to correct past discrimination had to be guided by principles of equity. Remedies could not exceed that which was necessary to correct the constitutional violation or past consequences of segregated schools. Compensatory remedy was found within the scope of authority for the district courts. The Supreme Court held that compensatory remedies ordered by federal courts did not violate Eleventh Amendment constitutional provisions on judicial powers or Tenth Amendment reservation of states' powers.[421]

The Supreme Court's holdings discussed in chapter 4 and the provisions of the Civil Rights Act of 1964 played critical roles in the standard of review used to decide subsequent school desegregation litigation. As school desegregation continued to evolve, standards established during the Seminal Desegregation Era would be reexamined. The reexaminations formed the groundwork for desegregation's next face, the Contemporary Desegregation Era, the subject of chapter 5.

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[419] Kern, Alexander, and M. David Alexander, *The Law of Schools, Students, and Teachers in a Nutshell*, 2d ed. (St. Paul, Minn.: West Publishing, 1995), 218.
[420] *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969)
[421] *Milliken II.*

CHAPTER 5

CONTEMPORARY DESEGREGATION ERA

In the Brown v. Board of Education, 349 U.S. 294 (1955) (Brown II), the Supreme Court's first school desegregation remedial decision, the court held that defendants and district courts were to devise a remedy with 'all deliberate speed' rather than 'immediately,' the timeframe for most remedial decisions and that jurisdiction over the suit would remain after the remedy was ordered. This approach guaranteed continued judicial involvement to ensure that defendants eliminated the legacy of 'dual' school systems (one for white children and another for minority children) and converted to 'unitary' school systems. The Supreme Court left open the question of how and when jurisdiction would end.[422]

—Wendy Parker, "The Future of School Desegregation"

The quote used to introduce chapter 5 was selected as a commentary on *Brown II* as a remedy decision. In addition, the statement captured ramifications of *Brown II* over the long–term, such as prolonged judicial involvement, elimination of *de jure* school segregation, establishment of unitary school systems, and an unanswered question on the termination of judicial oversight of public school desegregation. The quote also captured the essence of the period referred to in this research as the "Contemporary Desegregation Era," which began for this study in 1991 with the Supreme Court decision in *Oklahoma City Public Schools, v. Dowell*.[423] For purposes of this study, the Contemporary Desegregation Era was examined from the 1991 *Dowell* decision through a ruling on September 13, 2002, by the United States District Court, Eastern District of Arkansas, Little Rock Division in the litigation, *Little Rock School District v. Pulaski County Special School District*.[424]

Time and circumstance often dictate a departure from the norm and constitute a condition called "change." Time and circumstance converged to bring about the rulings in *Brown I* and *II*.

[422] Parker, "The Future of School Desegregation."
[423] *Board of Education of Oklahoma City Public Schools, Independent School District No. 89 v. Dowell* 498 U.S. 237.
[424] *Little Rock.*

When the rulings were handed down, the justices of the Supreme Court knew that the practice of segregation in public schools would be prohibited and that to a considerable extent circumstances would determine how segregation in the public schools would come to an end. After strong resistance, the mandates to end school segregation were painstakingly implemented over an extended period of time. “Desegregated” schools eventually became a part of the American educational experience. But the emergence of desegregated schools was not a static condition. Change was a continual element in public school desegregation brought about by time, circumstances, and evolving case law.

The cases reviewed in chapter 5 saw the nature of conventional desegregation litigation and customary jurisprudence on school desegregation change during the period of Contemporary Desegregation. Important turning points in the law were also established during the period. Holdings by the United States Supreme Court and lower federal courts, summarized in chapter 5, were characterized by concepts of *de jure* segregation, unitary status, and resegregation. During the Contemporary Desegregation period, these concepts were dominant legal issues and highly relevant to compliance with mandates of the *Brown* decisions and to the litigation reviewed in this chapter.

Dowell, *Freeman v. Pitts*, *Jenkins III* were the focal Supreme Court cases analyzed in chapter 5.[425] The rulings in these cases were significant for their holdings on *de jure* segregation, unitary status, and resegregation. Limitations on continued judicial oversight of school districts under desegregation decrees, emphasis on local control of school matters, and new standards for determining unitary status and, consequently, the termination of judicial oversight were some of the notable milestones on the legal landscape during the Contemporary Desegregation period.

[425] *Freeman and Jenkins III*.

Beyond the evolution of school desegregation law, this study also sought to look at what more recent court decisions reveal about the status of school desegregation. For this purpose, lower court rulings in *Jenkins by Jenkins, Belk v. Charlotte-Mecklenburg,* and *Little Rock School District v. Pulaski County Special School District,* were reviewed to obtain an insight into the nature of recent school desegregation litigation.[426] The three lower court cases were selected primarily for their focus on the issue of "unitary status." Additionally, the lower court cases were reviewed because they were successor litigation to prior Supreme Court rulings that established points of law and standards for school desegregation case law itself. To extend this reasoning, the purpose of examining the selected lower court rulings was to investigate how the courts were adjudicating school desegregation litigation under school desegregation's case law from earlier periods and according to interpretations of the more recent Supreme Court standards set forth during the Contemporary Desegregation Era. Because of the diverse nature of school desegregation law, the term "*status*" referred specifically to the litigation and standards examined in this study. This study does not provide for a complete status on the whole of school desegregation law.

Moving Toward Contemporary Desegregation

The United States Supreme Court

The "Warren Court," of the *Brown* decisions remained in force until Chief Justice Earl Warren's retirement from the Supreme Court in 1969. Appointed by President Richard M. Nixon, Warren Earl Burger succeeded Earl Warren as chief justice that same year.[427] Following

[426] *Jenkins by Jenkins v. State of Missouri,* 122 F. 3d 588 (8th Cir. 1997), *Belk v. Charlotte-Mecklenburg Board of Education, 269 F. 3d 305 (4th Cir. 2001).*

[427] Due to political missteps by President Lyndon Johnson and Chief Justice Earl Warren, Richard Nixon selected the Chief Justice rather than President Johnson. "Nixon hoped and expected that Warren Burger would preside over the dismantling of the Warren Court's liberal edifice. The great irony of Burger's seventeen years as Chief Justice [wa]s that he did little more than chip the marble of its sturdy walls. . . . 'the counter-revolution that wasn't.'" Irons, *A People's History of the Supreme Court,* 423-424.

Chief Justice Burger's ascension to the position, the Supreme Court's course on public school desegregation throughout the 1970s remained relatively consistent with its course in the 1950s and 1960s.[428] However, the justices on the Supreme Court were not an unchanging body, and the composition of the Court continued to change over time. New faces brought different philosophies, ideologies, and conventions with regard to constitutional and other legal interpretations.

In 1972, President Richard Nixon appointed William Hubbs Rehnquist to the Court as an associate justice. Justice Rehnquist assumed the position of Chief Justice of the Supreme Court in 1986, following appointment to the post by President Ronald Reagan. Justice Rehnquist was cited as having stated during an interview that he saw his purpose on the Court as having to counteract decisions of the Warren Court. "Long before he joined the Supreme Court, William Rehnquist proclaimed his wish to dismantle the judicial legacy of the Warren Court."[429] He was quoted as stating a belief that during the era of the Warren Court there were excesses in terms of constitutional adjudication. He was also cited as having further stated that he felt it was time for the "boat to lean the other way" (i.e., to the more conservative right).[430] "As the Constitution entered its third century, the Supreme Court was headed by a man who argued that *Plessy* was right and Roe[431] was wrong."[432]

In chapter 4, reference was made to the emerging transition role of the Court in the *Keyes* decision. Justice William Rehnquist provided a glimpse into a different mindset on school desegregation in his dissent from the majority ruling in *Keyes.* At the outset of his dissenting opinion, Justice Rehnquist indicated that, in his view, there were differing interpretations

[428] Schwartz**,** *A History of the Supreme Court*, 322-26.
[429] Irons, *A People's History of the Supreme Court*, 465.
[430] Ibid., 365 quoting from *N.Y. Times*, Feb. 28, 1988, 4 at1 and *N.Y. Times*, Mar. 3, 1985, Magazine, at 33.
[431] *Roe v. Wade*, 410 U.S. 113 (1973).

between "classic *de jure* segregation" and the plaintiff claims in *Keyes*.[433] This distinction weighed heavily in the adjudication of school desegregation cases during the Contemporary Desegregation period. Rehnquist continued his arguments on grounds that manipulation of attendance zones would not necessarily result in denial of equal protection. He also argued that the proof required to substantiate the allegations in *Keyes* was different from demonstrated segregation as required by *Brown.* The *Green* decision was characterized by Justice Rehnquist as a "drastic extension of *Brown.*"[434]

Essentially, Justice Rehnquist's thesis rested on points of contention, between *de jure* segregation as addressed in *Brown* and that of *Green*'s affirmative duty to integrate (i.e., racial mixing). The holdings in *Keyes* and segregative intent when compared to segregation by statutes or ordinances were described by Justice Rehnquist as a long leap in constitutional law.[435] This narrower view of *Brown's* heritage shaped the Court's decision-making during the Contemporary Desegregation period reviewed in Chapter 5.

The *Keyes* and *Milliken I* decisions provided signals on the Court's potential new directions in school desegregation case law. In some ways, *Milliken I* was also the culmination of an equally divided court (Justice Lewis Powell did not participate), in another litigation, that could not come to closure over a similar issue of school district mergers to achieve desegregation in the case.[436] In that case, *School Board of Richmond v. State Board of Education*, the equally divided court "was unable to decide whether a district court could require the merger of three

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[432] Irons, *A People's History of the Supreme Court*, 464.
[433] Plaintiffs in *Keyes* made allegations that Denver's schools were segregated. Unlike previous litigation, Denver's public schools were never operated under constitutional or statutory provisions that mandated or permitted racial segregation in public education. Constitutional or statutory requirement constituted the legal definition of *de jure* segregation. *Brown I* addressed *de jure* or legally required segregation *Keyes.*
[434] Rehnquist's dissent. (*Keyes*.)
[435] Ibid.
[436] Hall, ed., *The Oxford Guide*, 190. *School Board of Richmond v. State Board of Education*, 412 U.S. 92 (1973).

school districts in order to eliminate racial segregation in one."[437] The following year, a bitterly divided Supreme Court ruled on *Milliken I.*

Milliken I's five-to-four vote revealed fractures in the Court over school district boundary lines and remedial plans. "[The] single vote division and margin to reverse Judge Roth reflected the right-wing stamp that Richard Nixon placed on the Court during his first term as president."[438] During the 1968 presidential campaign, Nixon indicated that "instant integration" and "extremists" were synonymous. In 1971 President Nixon appointed Lewis F. Powell Jr. and William H. Rehnquist to the Court. Both rendered their first votes on the Court in *Milliken I.* Both justices hostility to the type of order issued by Judge Roth's was well-known.[439] "Their clear opposition to judicial orders in school cases had been instrumental in Nixon's decision to add Powell and Rehnquist to the Court."[440] In addition to Powell and Rehnquist' conservative stance on school desegregation and three years before *Milliken I,* Chief Justice Warren Burger made clear in the *Swann* opinion that remedies like busing in a single district could only be warranted after proven infringements of the constitution.[441] "Burger was upset that district judges [like Roth in *Milliken*] had not heeded his warning [in the *Swann* opinion], and he exercised his prerogative as Chief to assign the *Milliken* opinion to himself."[442]

The glimpses into the judiciary's transition were accompanied by other activities that lead to a change in the Court's tenor on school desegregation. Presidents who campaigned on promises of a more conservative judiciary and weaker civil rights policies appointed several associate justices during the 1970s and 1980s. The movement toward a more conservative view from the Court climaxed in 1991with the appointment of Clarence Thomas, an ultra

[437] Ibid., 190.
[438] Irons, *Jim Crow's Children,* 241.
[439] Ibid., 241.
[440] Ibid., 241.

conservative, to associate justice.[443] President Ronald Reagan named Thomas, "to begin dismantling enforcement activities in the civil rights office at the Education Department." [444] With William Rehnquist's ascension to chief justice and the appointment of right-wing associate justices, the interpretation seen in *Keyes* came to characterize the Court's disposition on desegregation issues during the Contemporary Desegregation period.[445] Chief Justice Rehnquist was a member of the new majority view, which held a conservative leaning more in line with his dissent in *Keyes*.[446]

Significantly, the beginning of the Contemporary Desegregation Era, with noticeably more conservative decisions, saw the departure of Justice Thurgood Marshall, on whose shoulders the fight to end segregation in public schools rested for six decades. On June 27, 1991, the Supreme Court handed down a decision in *Payne v. Tennessee*.[447] It was also the day Thurgood Marshall announced his retirement from the United States Supreme Court. In *Payne,* the Court decided that it was not unconstitutional for a jury to consider a victim's impact statement when deciding on the imposition of the death penalty. In *Payne,* Marshall gave one of his most vehement dissents. He registered his anger with the Court itself and charged that "power, not reason, had become the currency of the Court."[448] Thurgood Marshall retired from the Court on October 1, 1991.[449] The fight to end public school segregation and obtain equal educational opportunities for African American children lost one of its truest and most vigilant supporters and crusaders.

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[441] Ibid., 241.
[442] Ibid., 241.
[443] Orfield and Eaton, *Dismantling Desegregation,* 6.
[444] Ibid., 4.
[445] Schwartz**,** *A History of the Supreme Court,* 367-73.
[446] Hall, ed., *The Oxford Guide*, 150.
[447] *Payne v. Tennessee*, 501 U.S. 808 (1991).
[448] *Payne*.
[449] Tushnet, ed., *Thurgood Marshall,* xv-xvi.

***Riddick v. School Board of City of Norfolk*, 784 F. 2d 521 (4th Cir. 1986)**

Transition to a potential new order was seen in *Riddick v. School Board of City of Norfolk*.[450] The ruling in *Riddick* was significant because "in 1984, the decision[451] made the Norfolk, Virginia school district the first in the nation to receive permission from a federal court to dismantle its busing-desegregation plan."[452] It was also important to note that following the decision, Norfolk Public Schools embarked upon a series of school reform efforts designed to aid ten mostly African American "neighborhood schools" that were a point of contention in the litigation. The issue of population shifts that resulted in schools becoming "resegregated," Norfolk's decision to halt desegregation efforts, a return to some racially identifiable schools, and school reform efforts following the *Riddick* decision merited a through examination of the case.[453] Although the case was important to public school desegregation case law, the writ of certiorari, or permission for the case to be heard before the United States Supreme Court, was denied.[454]

Facts. Like most school desegregation litigation, the *Riddick* case traced its history back over a long period of time; in this instance back to 1956. In 1970, the federal district court held that Norfolk City's school board operated a dual school system based on race. Remedial action was required and in 1971 a desegregation plan was ordered and implemented. Pairing and clustering of schools and cross-town busing were used to desegregate the Norfolk Public Schools. In 1975, the district court held that Norfolk had attained "unitary status." The court

[450] *Riddick v. School Board of City of Norfolk*, 784 F. 2d 521 (4th Cir. 1986) (*Riddick*).
[451] *Riddick by Riddick v. School Board of City of Norfolk*, 627 F.Supp.814 (E.D. Va 1984).
[452] David M. Engstrom, "Post-Brown Politics, Whole School Reform, and the Case of Norfolk, Virginia," *Stanford Law and Policy Review* (Winter 2001) Available online: www.westlaw.com Cite: 12 STNLPR 163
[453] Engstrom, "Post-Brown Politics."
[454] *Paul Riddick Jr., et al. v. School Board of City of Norfolk et al.*, 479 U.S. 938 (1986).

based its findings upon review of annual reports submitted to the courts by the Norfolk school board.[455]

No action occurred in the case between 1975, when court supervision ended due to the school district's attainment of unitary status, and 1983, when desegregation litigation was reinstated. At the time court supervision was terminated, the Norfolk Public Schools were found to have satisfied its affirmative duty to desegregate. However, it continued cross-town busing. In 1983, the busing plan was modified to eliminate elementary school students due to declining white student enrollment. Efforts to desegregate elementary students continued under a pupil assignment plan that used geographic zones. A class action suit was filed to challenge the proposed pupil assignment plan.[456]

Between 1970 and the mid-1980s, the overall population of the city of Norfolk, Virginia declined. School enrollment dropped along with the general population decrease. However, the racial makeup of the school system experienced a more drastic change. For the 1969-70 school year, the white student population comprised 57 percent; the African American student population was 43 percent. By the 1980-81 school year, the student population figures reversed, with more than 42 percent white students and approximately 57 percent African American students. Also significant was the fact that overall the white student population dropped by 52 percent, although the overall white population dropped only 24 percent. The decrease in the overall student population led to the closing of seventeen elementary schools, mostly in predominately African American neighborhoods.[457]

Another factor contributing to the school situation in Norfolk was the use of the 70 percent to 30 percent figure to determine if a school was racially identifiable as African

[455] *Riddick.*
[456] Ibid.

American. In 1977, one elementary school was more than 70 percent African American. In 1981, seven elementary schools had achieved that status. The decreased white student enrollment and a drastic drop in parental involvement led to the convening of a committee to examine the possibility of reduced cross-town busing.[458] Dr. David Armor, a consultant on Norfolk Public Schools' desegregation issues, concluded that mandatory busing had led to the "white flight"[459] and contributed to resegregation of the school system.[460]

In February 1983, the school district adopted a remedial plan that did not include busing for elementary students. Elementary schools were configured as neighborhood schools with single attendance zones gerrymandered to achieve maximum racial integration. In addition, the junior high schools were fully integrated. Maximum and minimum African American/white student ratios were used in the plan. A majority-minority transfer option and multi-cultural programs were also included in the plan.[461]

Issues. A class action suit was brought on behalf of African American school children, against the Norfolk School Board on grounds that the proposed plan for neighborhood elementary schools was intentionally discriminatory. The plaintiffs further argued that the court erred in declaring the school system unitary and in its holding that the plaintiffs bore the burden of proof to show discriminatory intent on the part of the school board. Finally, the plaintiffs argued that the school board had violated racial criteria of the Fourteenth Amendment.[462]

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[457] Ibid.
[458] Ibid.
[459] "White Flight" is the phenomenon by which white citizens, in response to school integration activities in the city, leave urban city neighborhoods and move to the suburbs. The effect of this phenomenon results in decreased white student population in the city schools thereby causing an adverse impact on efforts to desegregate public schools. See Irons, *Jim Crow's Children*, 38, 197, 236, and 277. See Armor, *Forced Justice*, 174-80.
[460] *Riddick.*
[461] Ibid.
[462] Ibid.

Holdings of the court. The United States Court of Appeals, Fourth Circuit, decided that the principle issue was, "what effect d[id] the finding that Norfolk's school system [was] unitary have upon the prosecution of a constitutional challenge to the proposed neighborhood school assignment plan?"[463] The issue was further analyzed by the court to address procedures for the governance of student assignment plans for a district with a history of *de jure* segregation that had been declared rid of the vestiges of segregation. Continued judicial oversight given a unitary declaration and judicial supervision to prevent desegregation absent a showing of intent to discriminate were also questions that the court of appeals sought to address in the *Riddick* case.[464]

The court of appeals upheld the finding of the district court that Norfolk Public Schools had achieved unitary status. The school district was found to have met affirmative duty requirements to desegregate both the student population and the faculty and staff requirements of the *Green* factors. It was held that geographic factors and demographic changes that occurred after good faith efforts to eliminate the vestiges of segregation and the achievement of those efforts that resulted in the elimination of the past vestiges of segregation could not undo the attainment of unitary status. No intent to discriminate through the use of the student assignment plan was found by the court.[465]

Relative to the declining white population was the concept of "white flight." On the subject of "white flight," the court stated that "white flight" could not be used to evade or resist a duty to desegregate. The court ruled that because Norfolk was not operating a dual school system, the argument regarding "white flight" was not applicable. Although the proposed student assignment plan created several African American schools, there was no finding of

[463] Ibid.
[464] Ibid.

discriminatory intent.[466] The court of appeals found Norfolk Public Schools' neighborhood assignment plan a reasonable attempt to keep a stable, integrated school system in the face of "white flight." The court clarified that the ruling was limited to school systems that had succeeded in eliminating all vestiges of *de jure* segregation.

Definitive Supreme Court Decisions of the Contemporary Desegregation Period

The 1991, 1992, and 1995 Supreme Court decisions analyzed in chapter 5 were rendered under Chief Justice William Rehnquist, who presided over the Court throughout the Contemporary Desegregation Era. The litigation selected from this period was referred to in the literature as an indicative of new direction in school desegregation case law.[467] Fundamentally, adjudication of the litigation revealed a primary focus on unitary status. *De jure* segregation and resegregation considerations were also points addressed by the Court in the selected cases.

***Board of Education of Oklahoma City Public Schools, Independent School District No. 89 v. Dowell,* 498 U.S. 237 (1991)**

Facts. Litigation to end *de jure* segregation was brought against the Board of Education of Oklahoma City Public Schools in 1961 by African American students and their parents. In 1963, a federal court found that Oklahoma City had intentionally segregated its schools and housing, resulting in a dual school system. In 1965, the city's attempts to desegregate its schools were found ineffective, essentially because school segregation was found inextricably tied to housing segregation. Decades later, the school desegregation litigation continued in the form of the *Dowell* case under review. The culmination of the litigation occurred with a ruling in *Dowell* by the United States Supreme Court on January 15, 1991.

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[465] Ibid.
[466] Ibid.
[467] Hall, ed., *The Oxford Guide*. 226. Thomas Baker wrote contributing entry on *Dowell*.

In 1972, a district court order placed the Oklahoma City Public Schools under a desegregation plan. The school district was declared to have attained "unitary status" in 1977, and a court order terminated the case. In 1985, the school district instituted a Student Reassignment Plan (SRP)[468] that resulted in a return to primarily one-race schools for some formerly desegregated schools. The situation prompted a motion for previous litigation to be reopened on grounds that the school district had not attained unitary status and was returning to a segregated school system. This sequence of events led to a series of litigation. Ultimately, the United States District Court for the Western District of Oklahoma dissolved the decree. Following remand and reversal by the Court of Appeals for the Tenth Circuit, certiorari was granted by the Supreme Court.[469]

Issues. The Supreme Court confronted several issues in the *Dowell* case. The first was whether the respondents could contest the 1987 district court order dissolving the desegregation decree. Terms and conditions for the dissolution of desegregation decrees became the primary issue in *Dowell*. Questions regarding the test and considerations for dissolving a desegregation decree were addressed in order to obtain resolution in the matter. The Court also dealt with the question of whether "grievous wrongs evoked by new and unforeseen conditions"[470] could be the basis for modifying or dissolving an injunction; specific to *Dowell*, a desegregation decree.[471]

Holdings. On the issue of the respondents' right to contest the 1987 district court ruling that dissolved the desegregation decree, the Court found that a 1977 court order did not dissolve the desegregation decree. In addition, the Court ruled that the district court's unitary finding was

[468] The SRP relied on neighborhood assignment for students K-4 beginning in the 1985-86 school year. Busing continued for students in grades 5-12. Students could transfer from schools where they would be in the majority to ones where they would be a minority. Faculty and staff integration were retained with an "equity officer" appointed. (*Dowell*)
[469] *Dowell.*
[470] *United States v. Swift and Company et.al*., 286 U.S. 119 (1932).
[471] Ibid.

too ambiguous to prevent the respondents from challenging future actions by the board of education. Ambiguity of the term "*unitary*" sparked a discourse by the Supreme Court.[472] Due to concerns about the lack of clarity on the definition of "unitary" and Fourteenth Amendment constitutional requirements the for equal protection of the laws, the Court held that the school board was entitled to a precise statement of its obligations under a desegregation decree.[473]

On the question of grievous wrongs and amended desegregation decrees, the Supreme Court held that the school district was not required to show "grievous wrong evoked by new and or unforeseen circumstances" in order to have a desegregation decree dissolved. The Court based its finding on legal tenets that federal court decrees had to directly address and relate to infractions against the Constitution. The tenets were found to place an inherent limit on federal judicial authority to use federal-court decrees. Appropriate use of the decrees was called for to address situations that were either caused by or a result of constitutional violations. Findings that the school district was operating in compliance with requirements of the equal protection clause of the Fourteenth Amendment and the improbability that the school district would return to violating the Constitution were deemed an evaluation standard for dissolving desegregation decrees.[474] The Court regarded such findings as an indication of achievement of remedial plan objectives.

The justices continued to elaborate on the appropriate use of federal-court decrees through a reminder that *Brown's* mandates for federal supervision of local school systems was to be used as a temporary measure to remedy past discrimination. Reference was also made to *Brown's* recognition of local control as an important concern. This concern was reflected in the flexibility allowed school districts to fashion desegregation remedies. The Supreme Court

[472] Ibid.
[473] Ibid.

reasoned that local control and temporary judicial oversight were considered provisions in *Brown*'s mandates to allow for complexities arising from the transition of segregated schools to a system of public education free of racial discrimination. In the opinion, the meaning of "temporariness" for judicial oversight appeared to be underscored by the Court's emphasis on local control.[475]

Building upon stated *Brown* mandates, the *Dowell* opinion continued its reasoning on the basis for dissolving desegregation orders. The Court moved to indicate that dissolution of a desegregation decree after a school district had complied for a reasonable period recognized the role and importance of local control in school matters. The Court found relevant the school district's compliance with previous desegregation court orders. Good faith compliance efforts by school authorities were found a controlling consideration in the case.

The Court answered the question of whether *de jure* segregation had been eliminated to the extent practicable by moving beyond student assignments to examination of the other "*Green* factors" as well. Mandates imposed by *Green* and *Swann* to eliminate vestiges of past discrimination were found satisfied in the *Dowell* case.

The Dissent. The decision in *Dowell* was five-to-three. Justice David Souter did not participate in the consideration or decision in the case. Justice Thurgood Marshall dissented from the majority opinion and was joined by Justices Harry Blackmun and John Paul Stevens.[476] Their dissent warranted examination because it provided an insight into the debate about the direction of public school desegregation in the Contemporary Desegregation Era.

In the opening sentences of the dissent, objection was raised to the basic premises of the majority opinion. Issues were raised on the longevity and history of segregation in the Oklahoma

[474] Ibid.
[475] Ibid.

City Public Schools. These historical issues served as the foundation for the dissenting argument that racial discrimination was so entrenched in the school system that it could not have eliminated the vestiges of *de jure* segregation to the extent practicable given the amount of time under the remedial plan. A key point for the dissenters was that Oklahoma City Public Schools operated under legal dual school systems for sixty-five years. The dissenters found the constitutional offense exacerbated by the fact that eighteen years after *Brown* found segregated schools unconstitutional, a federal court had to intervene and require the Oklahoma City public school system to implement a remedial plan to desegregate its schools. By contrast, the school system operated under injunction to desegregate its schools for only thirteen years.[477]

The 1985 Student Reassignment Plan included some schools that were racially identifiable.[478] In the dissenting opinion, the proposed reemergence of one-race schools was seen a "vestige" of segregated schools and another suggestion that thirteen years was insufficient time for the district to rid itself of the vestiges of segregation, given its long history of constitutional violations. They objected on the basis that racially identifiable schools did not meet *Brown*'s holding that separate schools were inherently unequal and that separate schools conveyed a message of inferiority and stigmatization for African American children. The contention was that affirmative duty required that racially identifiable schools be eliminated through all feasible means. The dissenters contended that as long the "vestige" of the harm of segregation found impermissible in *Brown I* continued and there were feasible means to eliminate the condition of one-race schools, the school desegregation decree could not be dissolved. [479]

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[476] Ibid.
[477] Dissenting opinion. (*Dowell*)
[478] Under the SRP, eleven of sixty-four elementary schools would be greater than 90 percent African American, twenty-two would be greater than 90 percent white plus other minorities, and 31 percent would be racially mixed. (*Dowell*.)
[479] Reference made to court of appeals findings that feasible steps could be taken to avoid one-race schools. (*Dowell*)

Additional points raised in the dissenting opinion follow.

1. Apparent was the unflagging resistance to judicial efforts by the board of education for Oklahoma City Public Schools to dismantle the dual education system as related to the lifting of the desegregation decree.
2. Racially restrictive covenants supported state and local laws that resulted in segregated residential patterns in Oklahoma City. Exploitation of the residential segregation created by the situation consequently resulted in segregated schools.
3. Transfer policies served to perpetuate and encourage segregated schools. This included reasoning that there was failure to promote integration at new schools. Pupil assignments that coincided with residential segregation preserved and augmented existing residential segregation. Reciprocal effect of the racial composition of neighborhoods and schools; each contributed to the other's segregated or integrated status.
4. The effects of dissolving a desegregation decree needed to be anticipated by the court.
5. Absence of magnet schools in the SRP suggested untapped potential for changed attitudes toward desegregated schools. [480]

Significance of *Dowell.* *Dowell* was considered the most significant school desegregation ruling by the Supreme Court in twenty years. The messages in *Dowell* provided direction for school districts seeking to end long-standing judicial oversight of school desegregation.[481] *Dowell* came before the Supreme Court against a backdrop of confusion, unanswered questions, and at an evolutionary stage of public school desegregation, that confronted increasingly

[480] *Dowell.*
[481] Martha D. McCarthy, "Elusive Unitary Status," *West's Education Law Reporter* (October 1991). Available on-line: www.westlaw.com Cite: 69 WELR 9

complex issues.[482] In the majority opinion, the Court spoke to the confusion and complexity of issues. The majority opinion also indicated that petition for certiorari was granted to resolve a conflict with the standard laid down by the present *Dowell* case when ruled upon at the court of appeals level and with *Riddick and Pasadena Board of Education v. Spangler*.[483]

The Supreme Court held in *Spangler* that the district court exceeded its remedial authority by requiring annual readjustment of school attendance zones when changes in the racial makeup of schools were caused by demographic shifts.[484] In the *Pasadena v. Spangler* litigation, the petitioners sought relief, in January 1974, from a desegregation plan approved by the District Court on March 10, 1970. Relief from the approved remedial plan was sought in four areas: (1) modification of plan that would eliminate requirement for no school in the district to have a majority of minority students; (2) dissolution of the District Court's injunction for the district to have schools that had "no majority of any minority"; (3) terminate jurisdiction of the District Court over supervision of the school district's remedial plan and compliance efforts[485]; and (4) approval of a proposed modified remedial plan.[486]

On the matter of the injunctive relief, the issue was complicated by ambiguous meaning of the language "no majority of any minority," which prompted different understandings of the decree by the District Court and the parties.[487] In fact, the United States Supreme Court said in *Spangler* that the ambiguity gave credence to the claim that modifications to the plan were

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[482] Richard Vacca and H.C. Hudgins, Jr., "The Supreme Court Charts a New Course for School Desegregation in the 1990s: *Dowell*'s Pivotal Position," *West's Education Law Reporter* (September 1992). Available on-line: www.westlaw.com Cite: 75 WELR 981

[483] *Dowell.*

[484] *Pasadena Board of Education v. Spangler*, 427 U.S. 424 (1976).

[485] On January 23, 1970, the District Court held that the Pasadena City Board of Education committed violations of the Fourteenth Amendment through its educational policies and practices. A remedial desegregation plan was ordered that addressed student assignments, assignment of staff, construction and location of school facilities, and other "*Green* factors" considerations. The District Court retained oversight jurisdiction of the remedial plan. (*Pasadena Board of Education v. Spangler).*

[486] *Spangler.*

[487] Ibid.

needed. The Supreme Court heavily emphasized the need for compliance with injunctive decrees, outlined penalties that could be imposed for failure to comply, and indicated that even when modifications to the injunctive decree are needed, compliance remains mandatory until action is properly channeled to and resolved by the court that has the authority to make such decisions.[488]

In *Pasadena v. Spangler*, the Supreme Court found that the school district's remedial plan did provide for admission of students on a non-racial basis. The population shifts in the school district were found "normal" and not the result of any segregative actions on the part of the school district. On the issue of population shifts and resting on *Swann*, the Court found that "this case comes squarely within the sort of situation foreseen in *Swann*."[489] The Court went further with its interpretation of *Swann* by speaking to an issue in *Pasadena v. Spangler* that annual adjustments for the racial composition of students in schools were not required once the affirmative duty has been satisfied to eliminate the racial discrimination.[490] The District Court was found to have exceeded its authority be requiring the school district to make annual adjustments to attendance zones.

On the matter of terminated jurisdiction of the District Court over supervision of the school district's remedial plan, the Court did not address unitary status. The Supreme Court indicated the possibility that unitary status may not have been totally achieved, suggesting that the issue was not "ripe" for consideration. *Pasadena v. Spangler* was remanded back to the Court of Appeals for the purpose of reconsidering its decisions taking into account the Supreme Court's holding in the case.[491]

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[488] Ibid.
[489] Ibid.
[490] Ibid. See *Swann.*
[491] *Spangler*.

While *Pasadena v. Spangler*, turned on questions related to compliance with the remedial desegregation plan and was decided with directions that lead back to proper execution, modification, and compliance with the remedial decree and desegregation plan, *Dowell* did not evidence the shortcomings of *Pasadena v. Spangler* in this regard. To the contrary, the *Dowell* decision turned, in part, on the issue of good faith compliance efforts toward meeting the required mandates of the decree and plan.[492] Good faith compliance factors proved an integral component of the dissolution of desegregation orders. The Court also spoke to the importance of the time of adherence to a remedial desegregation plan by stating:

> [d]issolving a desegregation decree after local authorities have operated in compliance with it for a reasonable time period of time properly recognizes that 'necessary concern for important values of local control public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.'[493]

The Court made it clear that a school district's compliance was "obviously relevant" to decisions on whether to modify or dissolve school desegregation decrees. In addition, the majority opinion cited the fact that the Oklahoma City Public Schools had complied with the decree from 1972 to 1985; a period of 13 years. In *Dowell*, the Supreme Court appeared to see strengths where *Pasadena v. Spangler* was problematic and appeared to be a direct response to the latter case. *Dowell* was remanded back to the district court for further proceedings and determination as to whether the school district was entitled to have the desegregation decree terminated.[494]

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[492] *Dowell*.
[493] Ibid.
[494] Ibid.

Dowell provided an important contribution to school desegregation case law in clarifying that "*unitary*" was not a precise term and elaborating on the concept. In *Dowell*, the Supreme Court recognized that lower courts had used the term "*dual*" to denote a school system that had engaged in intentional racial segregation of students and "*unitary*" to describe a school system that had been brought into compliance with constitutional requirements.[495] It was important to note that implicit in the "*unitary*" description was the element of judicially supervised remedial desegregation plans as the means by which constitutional compliance was obtained. On the point of terminology, the Supreme Court made it abundantly clear in *Dowell* that neither "*unitary*" or "*dual*" were terms contained in the United States Constitution.[496]

Holdings in *Dowell* affirmed the authority and discretion of lower court judges to adjudicate school desegregation matters. With *Dowell*, the Supreme Court underscored the belief that school desegregation was a local control concern. Consistent with the emphasis on local control was the message that desegregation decrees were not intended to operate in perpetuity but rather were intended as temporary measures to remedy past discrimination.

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

Facts. African American students and their parents sued the DeKalb County, Georgia school system and in 1969 the school district came under a remedial plan to end *de jure* segregation. The court oversaw implementation of the plan. In 1986, the school district sought to have the system declared unitary and the litigation dismissed.[497]

Issues. The primary issue in *Freeman* was whether courts could relinquish control and supervision over matters where a school district has been in compliance with some but not all of

[495] Ibid.
[496] Ibid.
[497] *Freeman.*

a desegregation decree.[498] Holding consistent with its ruling in *Dowell*, the Court found the issue of compliance, including duration and degree, with the desegregation decree *c*ritical to its evaluation of the request for termination of court supervision. Further, in making its determination on unitary status, the Court cited the standard set forth in *Green* that, "proper resolution of any desegregation case turns on a careful assessment of the facts" [499] and assessed the DeKalb County, Georgia, School System (DCSS) for compliance with the six "*Green* factors."[500] Based on assessment of the *Green* factors and overall evaluation of desegregation decree compliance-related issues, the Supreme Court rendered its holdings in the second case of this study's trilogy that established standards for withdrawal of court supervision in school desegregation litigation and for the Contemporary Desegregation Era.

Holdings. On the issue of incremental withdrawal of judicial oversight for desegregation decrees and partial compliance, the Supreme Court held that a federal court in a school desegregation case had the discretion to order an incremental or partial withdrawal of its supervision and control. The Court reasoned that the purpose of judicial oversight of remedial decrees was to ensure correction of constitutional violations. Once constitutional violations had been corrected, local and state control of school systems had to be restored. Partial relinquishment of judicial control, as warranted by the facts of the case, was found significant to restoring local control. As indicated in *Dowell*, the Court reasoned that partial relinquishment of judicial control signaled achievement of remedial interventions as temporary measure mandates.[501]

[498] Ibid.
[499] *Freeman*. See *Green*.
[500] *Freeman*.
[501] Ibid.

Significance of *Freeman.* The issue of incremental withdrawal of judicial oversight from desegregation decrees served to distinguish *Freeman* as a noteworthy Supreme Court decision.[502] The Court instructed that incremental withdrawal of judicial supervision be exercised in a manner consistent with the purposes and objectives of its equitable power. This was consistent with *Brown's* directive that principles of equity guide remedial activities to correct constitutional violations caused by racial segregation in schools.[503]

In adjudicating cases where partial withdrawal was an option, the Supreme Court directed district courts to consider factors that came to be known as the three-part "Freeman Test."[504] The factors for consideration of partial withdrawal of court-ordered supervision over remedial desegregation plans were:

1. whether full and satisfactory compliance had occurred in the area(s) where supervision would be withdrawn;
2. whether retention of judicial control was necessary or practicable to obtaining compliance with the decree in other facets of the school system; and
3. whether the school system evidenced good faith and its record of compliance with the desegregation decree and remedial plan.[505]

Good faith efforts toward the whole desegregation decree and correcting constitutional infractions that precipitated judicial intervention were found key considerations for lower court incremental withdrawal decisions.[506]

The *Freeman* opinion contained important commentary on racial balancing and resegregation. *Swann* was reaffirmed, and it was held that racial balancing was not an objective

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[502] Patricia D. Green, "School Desegregation: Progress or Regression? *Freeman v. Pitts*, 112 S.Ct. 1430 (1992)," *Mississippi College Law Review* (Spring 1993). Available on-line: www.westlaw.com Cite: 13 MSCLR 439
[503] *Freeman.*
[504] *Jenkins III.*

unto itself but a remedy for *de jure* segregation constitutional infractions. Once the *de jure* violation was remediated, there was no requirement to remedy racial balance caused by demographic factors. The Court held that if resegregation was caused by private choices rather than state action, there were no constitutional violations. Continuous and massive demographic shifts were determined to be outside the authority and parameters of the federal courts. The Court reasoned that attempts to infuse judicial oversight into school desegregation issues based on population shifts would result in ongoing, never-ending court involvement in alleged *de jure* segregation. Judicial remedies were found not to be the answer for school segregation arising from residential segregation.[507]

Freeman was an eight-to-zero decision by the Court.[508] As demonstrated in *Brown*, the clear majority vote itself provided additional credence to the holdings. The Court emphasized that the authority of the courts in school desegregation matters was derived from the constitutional authority that precipitated judicial intervention and the objectives that gave rise to the remedial decree. Resting upon that constitutional authority, *Freeman* left little doubt that the lower courts could move to lessen the extent of judicial involvement in public school desegregation. *Freeman* also suggested inherent difficulties with applying past rulings of the Court to contemporary situations.[509]

***Missouri v. Jenkins*, 515 U.S. 70 (1995) (*Jenkins III*)**

Background and facts. The case involved the Kansas City, Missouri School District (KCMSD) and the State of Missouri. Litigation had been ongoing for eighteen years when *Jenkins III* came before the Supreme Court. *Jenkins III* was the third in a trilogy of lawsuits that

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[505] *Freeman*
[506] Ibid.
[507] Ibid.
[508] Justice Thomas took no part in the consideration or decision of the Court. (*Freeman.)*

were initiated by the State of Missouri and appeared before the United States Supreme Court on the merits.[510] The desegregation plan implemented by the district court was described as the most ambitious and expensive remedial program in the history of school desegregation. [511] The plan included quality education programs, magnet schools, and salary increases. The State of Missouri was responsible for the majority of costs associated with the remedial plans in this long-standing school desegregation case.

In *Missouri v. Jenkins by Agyei* (*Jenkins I*)[512], the school board, KCMSD, and children of two school board members sued the state and other defendants. At the district court level, the litigation began in 1977 and the suit alleged that "the state, surrounding suburban school districts, and various federal agencies had caused and perpetuated a system of racially segregated schools in the Kansas City metropolitan area."[513] Suit also was filed against the state by the KCMSD on grounds that it failed to eliminate the vestiges of its previously segregated school system.[514] The case eventually went to the Supreme Court and was decided on June 19, 1989. The central issue in the case was attorneys' fees. The Supreme Court held that attorneys' fees under the Civil Rights Attorney's Fees Award Act were to be based on market rates for services rendered. In addition, appropriate adjustment due to delay in payment was found within the parameters of the Act. The Court also held similarly on the issue of payment for paralegals, law clerks, and recent law school graduates.[515]

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[509] Green, "School Desegregation."
[510] Rachel E. Berry, "*Missouri v. Jenkins*," *Race and Ethnic Ancestry Law Digest* (Spring 1996). Available on-line: www.westlaw.com Cite: 2 REALDIG 79. The three cases in the trilogy were: *Missouri v. Jenkins by Agyel*, 491 U.S. 274 (1989) (litigation pertaining to attorneys fees); *Missouri v. Jenkins*, 495 U.S. 33 (1990) (*Jenkins II*) (litigation pertaining to school system's desegregation plan); and *Missouri v. Jenkins*, 515 U.S. 70 (1995) (*Jenkins III*) (present litigation under review pertaining to school system's desegregation plan). There were inconsistencies in the literature on the numbering of these cases (i.e., which case was numbered *Jenkins I*, *Jenkins II*, and so on).
[511] *Jenkins III*.
[512] *Missouri v. Jenkins by Agyei*, 491 U.S. 274 (1989) (*Jenkins I*).
[513] Ibid.
[514] Ibid.
[515] Ibid.

In *Jenkins III*'s predecessor, *Missouri v. Jenkins* (*Jenkins II*),[516] the Supreme Court confronted the issue of property taxes ordered as part of a remedial action by the district court judge. "The United States District Court for the Western District of Missouri imposed an increase in the property taxes levied by the Kansas City, Missouri School District to ensure funding for the desegregation of KCMSD's public schools."[517] In response to this action, the state, county, and taxpayers filed suit arguing that the district court did not have the authority to raise local property taxes. On April 18, 1990, the United States Supreme Court issued a unanimous decision in *Jenkins II*. The Supreme Court held that the district court exceeded its authority by imposing a tax increase.[518] However, the Court also held that it was within "the district court's equitable and constitutional privilege to authorize or require KCMSD to levy property taxes at a rate adequate to fund the desegregation remedy."[519] The ruling also meant that "federal courts could require school districts to levy taxes in excess of limits set by state statute in order to fund school desegregation plans."[520] In *Jenkins II*, the scope of the remedial order did not having standing and was outside the approved certiorari. However, in *Jenkins III* challenge to the scope of the remedial order was not precluded by *Jenkins II*. The scope of the remedial order was a centerpiece of the *Jenkins III* litigation.

In 1985, the district court issued its first remedial decree and ordered the "elimination of all vestiges of state-imposed segregation."[521] Twenty-five schools within KCMSD were found to have 90 percent or more African American students. The district court ordered a wide range of quality education programs, including full-day kindergarten, expanded summer school, tutoring, and early childhood development for all students in the KCMSD school district. Class size was

[516] *Missouri v. Jenkins*, 495 U.S. 33 (1990) (*Jenkins II*).
[517] Ibid.
[518] Ibid.
[519] Ibid.

ordered reduced so that the district could be restored to the AAA rating, the highest classification by the state board of education. It was important to reduce class size and increase individual attention for purposes of remedying vestiges of past segregation. Through an "Effective Schools Program, " considerable annual cash awards were given to 68 KCMSD schools, which included 25 racially identifiable schools. The costs of the programs eventually exceeded $220 million dollars.[522]

The district court wanted to desegregate the school system. Given the school district's majority African American student population, this meant considering using the surrounding suburbs for desegregation. However, this was not a viable option because no inter-district constitutional violations were found. The district court hoped that attainment of AAA status, improvements made through the quality education programs, and other aspects of the desegregation plan would attract non-minority students from the surrounding suburban school districts.[523] The desire to obtain and retain high quality teachers, administrators, and other school personnel termed, "*desegregative attractiveness,*" lead to across the board salary increases as part of remedial efforts to "improve educational opportunities and reduce racial isolation."[524]

In November 1986, comprehensive magnet programs and capital improvement plans were approved by the district court on the rationale that the efforts would attract non-minority students from the suburbs. The state and KCMSD were held jointly liable for funding the initiatives. Initial capital improvements cost $37 million dollars. Additional efforts aimed at making KCMSD schools comparable to suburban schools for the purposes of removing the vestiges of segregation and attracting non-minority students into the school district continued. By

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[520] Ibid.
[521] *Jenkins III.*
[522] Ibid.
[523] Ibid.

1990, the district court had ordered $260 million in capital improvements. By the time *Jenkins III* was before the Supreme Court, total capital improvement costs were over $540 million dollars.[525]

The remedial plan ordered by the district court included salary increases for almost all of the KCMSD instructional and non-instructional staff. The salary provisions had cost over $200 million when the Supreme Court heard *Jenkins III*. Annual desegregation costs were at a $200 million level.[526]

Issues. When *Jenkins III* came before the United States Supreme Court, the purpose was to review decisions of the lower courts. Essentially, the State of Missouri "challenged the scope of the district court's remedial authority."[527] More specifically, the State of Missouri challenged the district court's authority to order salary increases for almost all-instructional and non-instructional personnel as part of the remedial desegregation plan for the Kansas City, Missouri School District. The state contended that the order was beyond the district court's remedial authority. Another issue of contention for the state was whether the district court could continue to require the school system to finance remedial quality education programs because student achievement levels were at or below national levels. The state also contended that, under *Freeman*, it had partial unitary status due to the quality educational programs in place. The lower courts adjudicated these issues and certiorari was granted based on the importance of the issues.[528] A primary consideration in the granting of certiorari in *Jenkins III* was the district court's manner of funding the desegregation remedy.

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[524] Ibid.
[525] Ibid.
[526] Ibid.
[527] Ibid.
[528] Ibid.

The United States Supreme Court said the primary issues were: (1) whether the orders to increase salaries for almost all of the school system's instructional and non-instructional personnel exceeded the remedial authority of the district court; and (2) whether the district court erred when it declined to grant partial unitary status based upon student achievement tests scores that did not rise to an unspecified level.[529]

Holdings. The Supreme Court held that the district court exceeded its broad remedial powers when it implemented magnet programs for attracting non-minority students to KCMSD. Resting on *Milliken I,* the Court indicated that the approach used by the district court constituted the development of a remedy that indirectly achieved what could not be done directly in a remedial order, which was the inter-district transfer of students in the absence of inter-district constitutional violation.[530]

The Supreme Court held that salary increases ordered by the district court as part of the remedial plan's "desegregative attractiveness" component were beyond the district court's remedial scope of authority. It was deemed that the remedy was not acceptably permissible to correct past *de jure* segregation.[531]

On the issue of using improved student achievement test scores to determine partial unitary status, the Supreme Court held that this strategy was not acceptable. Whether students were performing at or below national norms was determined not to be the appropriate test for determining unitary status. The three part *Freeman* test was cited as the appropriate measure to evaluate attainment of unitary status.[532]

[529] Ibid.
[530] Ibid.
[531] Ibid.
[532] Ibid.

In deciding *Jenkins III,* the Supreme Court remanded the case back to the district court with instructions to apply the three-part Freeman Test. The Court said the ultimate inquiry was whether the school district had complied in good faith since the decree was ordered and whether the vestiges of segregation had been eliminated to the extent practicable.

Significance of *Jenkins III*. The United States Supreme Court reached a five-to-four decision in *Jenkins III.* Primary precepts established in *Dowell* and *Freeman* were repeated in *Jenkins III,* including reiteration of standards for unitary status declaration. The ultimate inquiry involving good faith compliance, the elimination of the vestiges of segregation, and the three-part Freeman test was reaffirmed in *Jenkins III*.

The *Jenkins III* majority opinion summarized that the State of Missouri had challenged the remedial authority of the district court. In response, the justices said that an analysis of the challenge had to turn on the proper mechanisms for restoring the victims of discrimination to a position that would have been enjoyed had not the discrimination occurred. In addition, constitutional compliance required return of the school system to state and local control.[533] However, the Court was sharply divided on the decision. Chief Justice Rehnquist delivered the opinion of the Court. Four other conservative justices joined him on the majority opinion, two of who filed concurring opinions. Four of the justices filed a dissenting opinion, including one who filed an individual dissent.

The reasoning given in the majority opinion for addressing issues in *Jenkins III* was particularly noteworthy. The Court moved beyond the immediate scope of authority issue in the case as related to the across-the-board salary increases into a broader "permissible" scope of the district court's remedial authority. This move was a major point of contention between the majority and minority opinions. The majority opinion contended that in order to determine the

specific issue, it was necessary to have an understanding of the district court's permissible scope of authority. The dissenters argued that the decision to review the district court's scope of authority was unfair and imprudent.[534]

In determining the permissible scope of remedial authority, which was applied in the *Jenkins III* holdings, the majority opinion cited and built upon limits established in *Swann*, *Milliken I*, and *Milliken II*.[535] Language from *Swann* stated that the elimination of racial discrimination should not be impeded by efforts to achieve broader purposes beyond the permissible sanction of school authorities. Language from *Milliken I* added the limitation that remedial decrees, which used inter-district remedies absent inter-district constitutional violations, exceeded the authority of a district court. *Milliken II* added a three-part framework to guide school districts in their remedial authority.[536] The litany of limitations continued with a reminder of *Green's* holdings on *Brown* that judicial supervision was intended as a temporary measure. Based on limitations summarized and identified in *Jenkins III*, remedial authority parameters for district courts were established and solidified.[537]

The Lower Courts Interpret and Operate Under Contemporary Desegregation Supreme Court Decisions

In this study, *Dowell* marked the beginning of the Contemporary Desegregation Era. Writing on *Dowell*, Thomas Baker, Texas Tech University law professor, commented that the decision "signal[ed] a whole new body of case law establishing procedures for ending [desegregation] lawsuits and the federal judiciary's involvement in school desegregation

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[533] Ibid.
[534] Ibid.
[535] Berry, "*Missouri v. Jenkins*."
[536] Desegregation decrees must be: (1) determined by the nature and scope of the constitutional violation; (2) remedial in nature, that is, restore victims to a state enjoyed if discrimination were not present; and (3) in accord with constitutional requirements to take into account state and local authority interests for managing their own affairs. (*Milliken II)*

issues."[538] Supreme Court decisions reviewed in the Contemporary Desegregation Era of this study established limitations on the remedial powers of district courts in school desegregation litigation. In addition, the period saw decisions by the Supreme Court that defined circumstances for partial or complete withdrawal of judicial oversight in school desegregation cases.[539] Further, the *Dowell, Freeman,* and *Jenkins III* decisions established precedents and demonstrated a shift in philosophy and approach. The limitations proscribed upon the lower courts in the Contemporary Desegregation Era contrasted with the previous Seminal Desegregation Era, which saw an increase of strategies approved by the Supreme Court to achieve the elimination of segregation in schools and the vestiges of past discrimination.

Thomas Baker's comment on *Dowell* was made in reference to the context that at the time of the *Dowell* decision, "there [we]re more than five hundred school desegregation cases pending in federal courts nationwide, some for more than thirty years."[540] The comment and the context provided a focal point description for school desegregation matters during the Contemporary Desegregation Era. Just as Baker's comment suggested that an avenue might exist to end the litigation and judicial involvement with school desegregation, another perspective held that school desegregation was unfinished business. Writing on *Jenkins III*, Jose Anderson, assistant professor of law at the University of Baltimore School of Law, stated "that by weakening the power of the federal courts to order aggressive remedies, the Supreme Court had . . . abandon[ed] its commitment to desegregating public schools."[541] Litigation and judicial involvement with school desegregation continued after *Jenkins III*.

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[537] *Milliken II.*
[538] Hall, ed., *The Oxford Guide*. 226. Thomas Baker wrote contributing entry on *Dowell*.
[539] Berry, "*Missouri v. Jenkins.*"
[540] Hall, ed., *The Oxford Guide*. 226. Thomas Baker on *Dowell*.
[541] Jose Anderson, "Perspectives on *Missouri v. Jenkins*: Abandoning the Unfinished Business of Public School Desegregation 'With All Deliberate Speed,'" *Howard Law Journal* (Spring 1996). Available on-line: www.westlaw.com Cite: 39 HOWLJ 693

Jenkins III, decided in 1995, was the last time the United States Supreme Court ruled on public school desegregation. It was not the last time that the subject was adjudicated in the lower courts. Three cases focused on "unitary status" issues were reviewed in this section.[542] The three cases examined in the current section evolved from litigation in Supreme Court decisions reviewed previously in this study. It was believed that a review of lower court litigation arising and evolving from past landmark school desegregation decisions would provide an insight into the manifestation of history into the present. It was hoped that an examination of *Brown*'s most recent progeny would provide perspective on attainment of *Brown*'s objectives and dilemmas experienced in its fifty-year history.

One of the stated objectives for this study was to determine what more recent court decisions told about the status of school desegregation. The lower court decisions reviewed in this section, The Lower Courts Operate and Interpret Under Contemporary Desegregation Supreme Court Decisions, spoke to the stated objective on the status of school desegregation law.

The first lower court case reviewed in this section was *Jenkins by Jenkins*.[543] It was decided on August 12, 1997, a little more than two years after the last Supreme Court decision on public school desegregation was rendered. The litigation was the successor to *Jenkins III.* In this study, earlier analysis of *Jenkins III* revealed that holdings in the case made significant contributions to school desegregation law during the Contemporary Desegregation Era.

Belk v. Charlotte-Mecklenburg Board of Education was the second case reviewed in this section.[544] It was decided on September 21, 2001. This litigation derived from *Swann*, one of the

[542] An important caveat for the litigation reviewed in this section is that its relevancy is for school desegregation litigation focused on similar issues.
[543] *Jenkins by Jenkins*.
[544] *Belk*.

most cited and controlling authorities in school desegregation case law. The decision in *Belk v. Charlotte-Mecklenburg* came thirty years after the precedent-setting *Swann* decision on April 20, 1971.

The last case examined in this section was *Little Rock School District v. Pulaski County Special School District*.[545] It was decided in the United States District Court, Eastern District of Arkansas, Little Rock Division on September 13, 2002. The present *Little Rock* case was the most recent in the lineage of school desegregation litigation stemming from *Cooper v. Aaron*, which was decided by the United States Supreme Court on September 29, 1958. The *Cooper v. Aaron* litigation was briefly reviewed in chapter 4. The contentious nature of the litigation and circumstances surrounding the case were discussed.

***Jenkins by Jenkins v. State of Missouri,* 122 F. 3d. 588 (8th Cir 1997)**

Facts. In 1997, *Jenkins by Jenkins* was the most recent school desegregation litigation involving the public schools of Kansas City, Missouri, progeny that commenced twenty years earlier in 1977. Previous litigation in this lineage appeared before the Supreme Court on three occasions. *Jenkins III*, which was reviewed in the Definitive Supreme Court Decisions of the Contemporary Desegregation Era section of this study, was the immediate predecessor to the present case. The Honorable Russell Clark, Senior Judge, United States District Court for the Western District of Missouri, presided over the twenty period of the litigation.[546]

On April 26, 1996, less than a year after the Supreme Court's decision in *Jenkins III,*[547] the State of Missouri filed a motion to have the Kansas City, Missouri School District declared unitary, desegregation decrees dissolved, and judicial supervision terminated. On May 21, 1996,

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[545] *Little Rock.*
[546] *Jenkins by Jenkins.*
[547] Floyd Delon and Charles Russo, "The Implementation of *Missouri v. Jenkins*: The New Missouri Compromise?" *West's Education Law Reporter* (June 1998). Available on-line: www.westlaw.com Cite: 125 WELR 263

less than a month after the motion was filed, the state and KCMSD agreed that the State of Missouri would pay the school district $320 million over three years to address desegregation decree requirements. After fulfilling the payment obligation, the state of Missouri would be released from additional obligations of the desegregation litigation.[548]

In January 1997, the district court considered extensive testimony and documentary evidence. The district court denied the motion for unitary status but approved the financial agreement between the state and the school district. The Jenkins Class[549] appealed the ruling on the financial agreement, and the state of Missouri appealed the ruling on the denial of unitary status.[550] The Eighth Circuit Court of Appeals heard the case on appeal.

Issues. The central issues in *Jenkins by Jenkins* revolved around determination of unitary status for KCMSD and approval of a transition plan and settlement agreement between the State of Missouri and the school district.

Holdings. In *Jenkins by Jenkins,* the Eighth Circuit Court of Appeals applied the ultimate inquiry measure of good faith compliance with prior desegregation decrees to determine if the vestiges of past discrimination had been eliminated to the extent practicable. Under scrutiny of this measure, the court of appeals chided the State of Missouri for its interpretation of responsibility in desegregation decrees and related matters as limited to funding, and not extending to implementation of the programs. In evaluating "good faith," the judges recalled that proposals by the Jenkins Class and the KCMSD school district were accepted, while the State of Missouri's plan was rejected as inadequate. Admonishment continued with reference to Missouri's emphasis on the amount of money spent on remedial efforts, even though physical plants in the school district were found in literally rotted condition. Expanding on this line of

[548] *Jenkins by Jenkins.*
[549] "Jenkins Class" referred to litigants opposing the State of Missouri.

reasoning, the court of appeals referred to the lingering effects of inferior education precipitated by the state-compelled dual systems of education. Corrections of the constitutional violations were found by the court of appeals to require extensive financial expenditures. Based on the re-creation of the State of Missouri's involvement with the KCMSD, the court of appeals called into question Missouri's "good faith commitment" to the whole of the court's decree and to correcting the constitutional violations that prompted the initial judicial intervention.[551]

Justice Souter's dissent in *Jenkins III* previously called Missouri's good faith into question. He cited the district court's finding that Missouri had not taken one affirmative step to aid the desegregation plan. Additional references in the opinion supported the Court's conclusion that the State of Missouri had not remedied the vestiges of segregation to the extent practicable.[552]

Following its analysis of the ultimate inquiry of "good faith," the Court of Appeals moved to decide an issue of whether reduction in student achievement by minority students, attributable to prior *de jure* segregation, had been remedied to the extent practicable. In *Jenkins by Jenkins*, the state carried the burden of proof to show that it had not caused the achievement gap. The court of appeals found that the state failed to carry its burden and held that the disparity in achievement for minority students was the result of prior constitutional violations owing to *de jure* segregation, which had not been eliminated to the extent practicable. It was found that vestiges of the dual school system remained.[553]

The court of appeals' reasoning rested on precedents in *Jenkins III* and *Dowell*, which were used to indicate that the state and KCMSD were entitled to a "precise statement of

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[550] *Jenkins by Jenkins.*
[551] Ibid.
[552] Ibid.
[553] Ibid.

obligations under the desegregation decree."[554] The ruling on student achievement turned on this point, in that it was necessary to identify the incremental effect of segregation on student achievement. Based on evidence presented to the court of appeals, a figure was determined to indicate a "race effect" that reliably and accurately identified the incremental portion of student achievement attributable to prior *de jure* discrimination. The court of appeals concluded that the figure translated to a mandate to reduce the achievement gap within three years. This led to the conclusion that the school district had not achieved unitary status regarding the quality of education.[555]

The State of Missouri took issue with the district court's findings of denied unitary status in five of the six *Green* factors. The district court declared unitary status for KCSMD with regard to one *Green* factor, extra-curricular activities. The court of appeals declined unitary status on racial balance in student assignments until the effects of changes in student enrollment could be determined. Unitary status in transportation was denied because of its close tie to student assignment. On the facilities factor, unitary status could not be granted due to unfinished court-ordered renovations. Lastly, the court of appeals did not grant unitary status with regard to faculty and staff assignments. In applying and interpreting *Freeman* to *Jenkins by Jenkins*, the Court of Appeals stated, "[w]here the district court has reason to retain supervision over an area to aid its jurisdiction over unfinished business, *Freeman* certainly does not require the court to declare partial unitariness."[556] Holdings of the district court were affirmed by the court of appeals.[557]

[554] Ibid.
[555] Ibid.
[556] Ibid. See *Freeman*.
[557] Ibid.

Although concerned that the agreement between the two constitutional violators, the State of Missouri and KCSMD, allowed one of the violators to be released from further obligations based upon financial payment, the court of appeals upheld the district court's approval of the agreement. The courts of appeals reasoned that unitary status could be accomplished in two to three years. The holding was also based on reasoning that the district court exercised its continuing equitable authority to devise and implement a remedy in the case.[558] Further, the Court of Appeals rested on interpretation of *Jenkins III* quoting, "the Supreme Court's directive in *Jenkins III* [was] that the district court 'should consider that the State's role with respect to the quality education programs ha[d] been limited to the funding, not the implementation of those programs.'"[559] Again resting on *Freeman*, the Court of Appeals held that, determination of "unitary status does not require total elimination of the vestiges of discrimination, including the achievement gap, but focuses on whether those vestiges have 'been eliminated to the extent practicable.'"[560]

Successor litigation to the case under review. *Jenkins by Jenkins v. State of Missouri*, 158 F.3d (8th Cir 1998) was related and follow-up litigation to the present case under review. Financial constraints had arisen and were impacting the settlement agreement between the State of Missouri and KCMSD referenced in the *Jenkins by Jenkins* case. A separate appeal arising from the lower court decision in this case went before the Eighth District Court of Appeals and was decided on October 19, 1998. The court of appeals dealt with funding for school construction projects and found the issue was not "ripe" (i.e., not ready for consideration by the Court of Appeals). Impacting on this holding was the expectation that legislation would result in additional revenues for the KCMSD school district. The outcome of the follow-up litigation was

[558] Ibid.
[559] Ibid.

also contingent on final settlement in another school desegregation case in the state. The court of appeals held that it was not the court's duty to insure funding for the district, and denied that a financial vestige had to be remedied.[561]

***Belk v. Charlotte-Mecklenburg,* 269 F.3d 305 (4th Cir. 2001)**

Facts. Original school desegregation litigation began in 1965, and in 1969 the district court ordered a school desegregation plan. Throughout its early history, the litigation was known the name as "*Swann*." In 1971, the United States Supreme Court ruled on *Swann* and held that the *Charlotte-Mecklenburg* operated a dual school system in violation of the Constitution. The *Swann* opinion approved several landmark remedial strategies and gave broad remedial authority to the district court.[562] The present *Belk v. Charlotte-Mecklenburg* case was the most recent litigation arising from that history.

In *Belk v. Charlotte-Mecklenburg,* a white student sued the Charlotte-Mecklenburg school district on the basis of reverse discrimination after the school district had operated under a court-ordered remedial plan for twenty years. The plaintiff, William Capacchione, contended that Christina, his daughter (the white student at the center of the litigation) had been unconstitutionally denied participation in the magnet school program based upon race.[563]

The allegations of reverse discrimination and the crux of the charges stemmed from magnet school provisions in a 1992 desegregation plan that was implemented without prior court approval. Conditions in the plan indicated that in order to achieve racial balance, students would be selected for the magnet program through an African American and non-African American lottery. If unfilled, vacant magnet seats were usually left empty. Christina was initially placed on

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[560] Ibid.
[561] *Jenkins by Jenkins v. State of Missouri,* 158 F.3d (8th Cir 1998).
[562] *Swann.*
[563] *Belk v. Charlotte-Mecklenburg,* 269 F.3d 305 (4th Cir. 2001).

a waiting list but was eventually denied admission "as a school benefit to everyone."[564] In the circumstances of the *Belk* case, spaces were available for the program. Christina's denial of admission to the magnet program allegedly constituted inflexible quotas that went beyond previous court orders and the Constitution. It was not argued that race should not be considered as a factor in admissions.[565]

Issues. In 1999, the district court found that the Charlotte-Mecklenburg school district had eliminated the vestiges of past discrimination to the extent practicable and declared unitary status. However, allegations of reverse discrimination challenged the finding of unitary status. The alleged racial discrimination brought into question whether the magnet school program denied white children educational opportunities solely because of their race.[566]

Holdings. The Fourth Circuit Court of Appeals affirmed the district court's holding that the Charlotte-Mecklenburg school district had achieved unitary status. On the issue of reverse discrimination, the appeals court also held that the school board "did not forfeit its immunity when the quota system was adopted and used in expanded magnet programs."[567] "The appellate court held that the school district's use of race was an appropriate response to the desegregation orders and therefore found that the school district was immune from liability for using race in its magnet school admissions process while those orders remained in effect."[568] This holding turned on good faith exhibited by the school board in its compliance with the whole intent, directives, and requirements of the desegregation decree.

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[564] Ibid.
[565] Ibid.
[566] Ibid.
[567] Ibid.
[568] John W. Borkowski, Alexander E. Dreier, and Maya R. Kobersy, "The 2001-2002 Term of the United States Supreme Court and Its Impact on Public Schools," *West Education Law Reporter* (September 12, 2002) Available on-line: www.westlaw.com Cite: 167 WELR 1

Significance of *Belk v. Charlotte-Mecklenburg*. A significant aspect of the *Belk v. Charlotte-Mecklenburg* case was illustrated in the quote used to introduce chapter 1. In that quote, J. Harvie Wilkinson III referred to the immense body of law created and overthrown by the *Brown* decisions.[569] The present case exemplified a tangential part of the legacy and progeny of *Brown*.

Belk v. Charlotte-Mecklenburg arose from allegations of reverse discrimination and the use of inflexible quotas, but the decision turned on remedial plans and unitary status considerations.[570] Reverse discrimination refers to the preferential treatment of minorities in a way that adversely affects members of the majority group.[571] Quotas involved the assignment of a proportional share to a person or group.[572] Issues around reverse discrimination and quotas were addressed in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).[573] *Bakke* came before the Supreme Court on the circumstance that, a white male was denied admission to the Medical School at the University of California at Davis. Bakke consequently challenged the legality of the medical school's special admissions program, which reserved seats for "disadvantaged minority students." Bakke alleged that the special admissions program operated to exclude him on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment, a provision of the California Constitution, and § 601 of Title VI of the Civil Rights Act of 1964.[574] In the *Bakke* decision, quotas were held illegal.[575]

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[569] Wilkinson, *From Brown to Bakke.*
[570] *Belk*.
[571] *Black's Law Dictionary*, 7th ed., s.v. *reverse discrimination*.
[572] *Black's Law Dictionary*, 7th ed., s.v. *quota*.
[573] Cheryl Brown Henderson, "The Legacy of *Brown* Forty-Six Years Later," *Readings in Equal Education* (1997). Cheryl Brown Henderson is the youngest child of the late Rev. Oliver L. Brown. The first plaintiff in *Brown v. Board of Education* was Rev. Brown, on behalf of his daughter, Linda.
[574] *Regents of the University of California v. Bakke***,** 438 U.S. 265 (1978*) (Bakke).* In that the Medical School at the University of California at Davis received federal funds and was an agency of the state, Title VI had standing. Title VI provides that no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause of the Fourteenth Amendment or the Fifth Amendment. Title VI proscribes only those

Bakke derived its heritage from *Brown's* legacy.[576] *Brown* and *Bakke* developed separate but oftentimes-related bodies of law. Both were concerned with race as it related to policies in educational settings. *Brown* concerned racial discrimination in K-12 education and subsequently as race was an issue in court-ordered desegregation remedies. *Bakke* concerned the use of race as a preferential factor in higher education. After the *Bakke* decision, race-conscious policies were largely based on the diversity rationale held in the *Bakke* opinion by Supreme Court Justice Lewis F. Powell.[577] In announcing the judgement of the Court, Justice Powell indicated that the attainment of a diverse student body was a constitutionally permissible goal for higher education. The body of law associated with Bakke applied to voluntary programs and policies, remedial or non-remedial in nature.[578] Significant in the *Belk* case was the crossover of issues between *Brown* and *Bakke* and the convergence of both bodies of law.

The convergence of reverse discrimination allegations and *Brown's* evolutionary school desegregation case law as seen in *Belk* were enormously important. Magnet schools, with a race-conscious component, became a core component of many school districts' desegregation plans. Remedial desegregation plans for school districts that contained race-conscious component(s) were challenged in the courts on various points of law. Although reverse discrimination was not a focal point of this study, it was important to note that *Belk's* convergence of reverse

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racial classifications that would violate the Equal Protection Clause if employed by a state or its agencies. Purpose of Title VI is to stop federal funds to entities that violate prohibited racial discrimination rooted in the constitution. (*Bakke*). Title VI itself prohibits intentional discrimination. However, most funding agencies have regulations implementing that prohibit recipient practices that have the effect of discrimination on the basis of race, color, or national origin. (Title VI of the Civil Rights Act of 1964 42 U.S.C. § 2000d et.seq.).

[575] Ibid.

[576] Henderson, "The Legacy of *Brown* Forty-Six Years Later."

[577] *Bakke.*

[578] Harvard University, "Constitutional Requirements for Race-Conscious Policies in K-12 Education" (Cambridge, Mass.: The Civil Rights Project, 2001).

discrimination and school desegregation case law and the crossover of issues became a consuming focus for litigation in various arenas during the Contemporary Desegregation Era.[579]

The *Belk* case was significant for its application of judicially established tests and points of law for determining unitary status necessary in order to decide allegations of reverse discrimination. In its adjudication, the court of appeals methodically analyzed the *Green* factors, the *Dowell* ultimate inquiry of good faith compliance, and considerations from *Freeman.*

An important parallel was observed between the *Belk* opinion and this study. The opinion presented a textbook illustration of school desegregation case law. In elaborating on their reasoning, the judges began establishing points of law and precedents with *Plessy*. The opinion subsequently moved through litigation that included *Gaines*, the *Brown* decisions, *Briggs v. Elliott, Swann, Green. Milliken I, Riddick*, and others.

***Little Rock School District v. Pulaski County Special School District,* 237 F.Supp.2d 988, 173 Ed. Law Rep. 490 (E.D.Ark. Sep 13, 2002).**

Facts. *Little Rock School District (LRSD) v. Pulaski County Special School District* (PCSSD) traced its history to original *Aaron v. Cooper* litigation brought in 1956. [580] In that case, African American plaintiffs sued to desegregate the Little Rock School District in the state of Arkansas. "Little Rock became the first great legal battleground in the long struggle to desegregate this country's public school system[s], a distinction that has left lasting wounds in [the] community."[581]

In 1966, a freedom-of-choice desegregation plan was approved by the Eighth Circuit Court and remained in place until the close of the 1968-69 school year. Due to segregated

[579] Steve France, "Recess for Diversity? Parents Challenge Race-Based Magnet School Policies," *American Bar Association Journal* (March 1999). Available on-line: www.westlaw.com Cite: 85-MAR A.B.A.J. 30
[580] *Cooper v. Aaron*, discussed in chapter 3 of this study, was subsequent litigation to *Aaron v. Cooper*.
[581] *Little Rock.*

housing patterns that resulted in some racially identifiable schools, the district court found the plan unsuccessful in meeting *Brown's* mandates. Litigation again ensued and subsequent desegregation plans were put in place. In the 1972-73 school year, all schools and grade levels were racially balanced in the Little Rock School District.[582]

Cause for the present *Little Rock* litigation began on July 19, 1982, when a district court judge entered a memorandum and order[583] in support of an immediate declaration of unitary status for the LRSD. The judge found LRSD "operat[ed] as a completely unitary desegregated school system"[584] and found: "no evidence of vestiges of past discrimination in policies or practices; that LRSD had done an admirable job of desegregation; and nine years of desegregation decree compliance by the LRSD."[585] However, there were concerns as to the school district's ability to remain desegregated due to increased African American student enrollment and decreased white student enrollment. Issues arose over disparities in African American-white student ratios, busing, financial constraints, and other concerns.[586]

The declining white student population led to twelve paired neighborhood schools, of which four were virtually all-African American schools. Protracted litigation and remedial activity continued. Issues addressed in the on-going legal battle included inter-district violations, the effects of inter-district violations, and inter-district remedy to correct the violations.[587]

In 1985, the Eighth Circuit Court affirmed findings of inter-district violations by LRSD, PCSSD, and the North Little Rock School District (NLRSD). The case was *not* remanded back to the district court for development of a remedial decree, as was the normal course. The Eighth

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[582] Ibid.
[583] Judge William R. Overton, Memorandum and Order, July 9, 1982.
[584] *Little Rock.*
[585] Ibid.
[586] Ibid.
[586] Ibid
[587] Ibid.

Circuit Court outlined its own inter-district remedy that allowed the three school districts to remain autonomous, and the principles specified in the majority opinion were incorporated into desegregation plans for each of the districts.[588]

Following implementation and multiple revisions to the desegregation plan, the three school districts "(i.e., LRSD, PCSSD, and NLRSD), Joshua,[589] the State of Arkansas, and the Arkansas Department of Education (ADE) agreed in 1989 to a global settlement on all aspects of the case."[590] The settlement was reached after long and difficult negotiations. Following some unusual circumstances, appeal to the Eighth Circuit Court, and remand back to the district court with the direction to approve the revised negotiated terms, the 1990 Settlement Agreement and Four Settlement Plans were authorized on December 12, 1990.[591]

Between 1991 and 1996, the three individual school districts operated under their respective desegregation plans and the Inter-district Settlement Plan. The district court and the Office of Desegregation Monitoring supervised implementation of the plans. Terms of the settlement agreement allowed plan revisions, as long as changes did not substantively alter the agreement.[592]

In 1996, the district court and parties to the agreement realized that LRSD would not achieve some of its desegregation obligations under the 1990 Settlement Agreement regardless

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[588] Ibid.
[589] "Joshua" was the collective name that referred to the all African American group of students in the Pulaski County public schools engaged in litigation opposing the school district(s). Joshua was the name of the lead parent, Mrs. Lorene Joshua, in the litigation. The terms "*Joshua*" and "*Joshua Intervenors,*" were used interchangeably. (*Little Rock*)
[590] *Little Rock.*
[591] The agreement and plans detailed provisions for the State of Arkansas and the Arkansas Department of Education with respect to funding and implementation of a separate plan for each of the three school districts and the Inter-district Settlement Plan. "Among other things, the state agreed to pay the three school districts a total of not more than $129,750,000. All of the parties agreed to release all claims against each other and to dismiss th[e] case, with prejudice, as to each party." Also, final settlement of the case awarded $3,150,000 for Joshua's attorneys' fees. In addition to the funding concerns, detailed desegregation obligations for the three school districts were included in the plans**.** (*Little Rock*)
[592] Ibid.

of the school district's best efforts.[593] Again, the plan was revised, to such an extent that the district court considered it a new consent decree that was henceforth called the "Revised Plan." On April 10, 1998, the Revised Plan was approved by the district court. The Revised Plan included specific procedures and a schedule by which LRSD could achieve unitary status. There were no appeals to the approved Revised Plan, and it became a final consent decree.[594]

On March 15, 2001, the Little Rock School District filed an order requesting that LRSD be declared a "unitary school district in all aspects of its school operations." On June 25, 2001, the Joshua Intervenors filed opposition action based on allegations that LRSD was not in "substantial compliance" with some components of the plan and that the district had failed to act in good faith with the desegregation decree. On March 15, 2002, LRSD filed a motion for immediate declaration of unitary status. Again, Joshua filed a response that challenged the motion. Evidentiary hearings were completed in July 2002. A decision was rendered by the district court on September 13, 2002.[595]

Issues. The issue in the case was whether the Little Rock School District had achieved unitary status in all aspects of its school operations.

Holdings. The dispute in the litigation to have LRSD declared a unitary school district centered on the Revised Plan, which described obligations for desegregation of the Little Rock School District. "The determination of LRSD's request for unitary status turn[ed] on whether Joshua h[ad] maintained their burden of proof, by a preponderance of the evidence, that LRSD h[ad] failed to substantially comply with the following obligations imposed on it under the

[593] On March 11, 1996, the district court denied a motion to dismiss filed by LRSD. The court chided LRSD for what it described as "frequent indifference or outright recalcitrance toward its commitments and slow implementation of many aspects of the agreement." The Court went further indicting a need for continued judicial monitoring, even if LRSD had acted in 'good faith' over the years, given the complexities and logistics involved. (*Little Rock*)
[594] Ibid.
[595] Ibid.

Revised Plan: (1) good faith; (2) student discipline; (3) academic achievement of African American students; (4) extracurricular activities; (5) advanced placement courses; and (6) guidance counseling."[596] In addition to academic and programmatic concerns, the Revised Plan also included provisions for raising compliance issues, procedures for seeking unitary status, and an evaluation standard referred to as "substantial compliance." Pursuant to requirements of the Revised Plan, the court evaluated LRSD for desegregation decree compliance.[597]

On the required inquiry of "good faith," the district court found that since the 1990 Settlement Agreement, LRSD "had established a good record of acting in good faith to implement and comply with its desegregation obligations under the various settlement plans and to operate the Little Rock School District in compliance with the Constitution."[598] The court credited LRSD with voluntarily implementing strategies, beyond minimum "*Green* factor" requirements, aimed at improved school desegregation. Additionally, the court indicated that LRSD could be trusted to follow the Constitution in the future.[599]

On the issue of student discipline, the judge assigned to the case, Judge William R. Wilson, Jr., ruled that "the Revised Plan did *not* require LRSD to reduce or eliminate the racial disparity in the percentage of suspensions and expulsions between African American and other students."[600] The judge indicated that the Joshua Intervenors failed to sustain their burden of proof to show that after the plan's implementation, "systematic discriminatory treatment by teachers and administrators caused a disproportionate number of African American students to be suspended."[601]

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[596] All indicated obligations contained multiple provisos, except for the good faith obligation, which contained one. (*Little Rock*)
[597] Ibid.
[598] Ibid.
[599] Ibid.
[600] Ibid.
[601] Ibid.

On the issues of extracurricular activities, advanced placement courses, and guidance counseling, the judge held that LRSD had "substantially complied" with its obligations under respective provisions of the Revised Plan.[602] In the Memorandum Opinion of the Court, detailed legal analysis and discussion were devoted to the extracurricular activities, advanced placement courses, and guidance counseling issues.

Discussion on academic achievement began with provisions in the Revised Plan for LRSD to "implement programs, policies, and/or procedures designed to improve and remediate the academic achievement of African American students. . . . ."[603] Ultimately, the issue translated into elimination of an achievement gap between white and African American students in the school district. On the issue of academic achievement, the judge ruled that, under Revised Plan, LRSD was *not* required to "eliminate the achievement gap between African American and white students before it could be released from federal court supervision."[604] Referencing other desegregation litigation, the judge concluded that in order for an achievement gap to preclude a finding of unitary status, it must be demonstrated that the achievement gap was the result of *de jure* segregation. The judge acknowledged the achievement gap as a nationwide phenomenon, attributable to many causal and contributory factors.[605]

In *Little Rock*, the primary issue before the court was unitary status. On this issue, the judge declared the Little Rock School District "unitary" in the areas of: (1) good faith; (2) student discipline; (3) extracurricular activities; (4) advanced placement; and (5) guidance counseling. These areas were judged in "substantial compliance." In addition, the court held

[602] Ibid.
[603] Provisions in the Revised Plan as referenced in *Little Rock.*
[604] *Little Rock.*
[605] Ibid.

"that LRSD c[ould] be trusted to operate in th[ese] five areas in a constitutional fashion, without the need for continu[ed] federal court supervision."[606]

On the sixth challenged area, academic achievement, the court did not grant unitary status. Judicial supervision and monitoring were continued. The court found that "LRSD had *not* 'substantially complied' with its obligations under the Revised Plan, which was the academic achievement of African American students."[607] The court gave specific instructions for the school district to follow in order to meet its obligations to annually assess academic programs and determine whether those programs resulted in improved academic achievement for African American students. Among the judge's directives were requirements that LRSD continue, through December 31, 2003, to assess Revised Plan programs with respect to achievement of the academic progress of African American students. LRSD was required to file a report on or before March 15, 2004 that documented compliance with obligations indicated by the court and with the Revised Plan.[608]

Going beyond the six specifically challenged areas that were at the center of the litigation, the judge addressed unitary status in another aspect of LRSD's operations. Since Joshua did not challenge student assignment, the judge held that the school district was unitary with regard to student assignment. In the final analysis, the Little Rock School District was granted partial unitary status in all aspects of its operations under the Revised Plan, except in the area of academic achievement.[609]

Significance of *Little Rock School District v. Pulaski County Special School District.*

The discussion on student discipline, advanced placement, and academic achievement issues was

[606] Ibid.
[607] Ibid.
[608] Ibid.
[609] Ibid.

significant in the *Little Rock* case. Owing to their role in the desegregation plan, these topics received more meritorious consideration than seen in other desegregation cases visited in this study. As observed in this Little Rock case, consideration of topics such as academic achievement rested and turned on: (1) their role and function as prescribed in the remedial desegregation plan; and (2) the fact that the issue resulted from prior *de jure* segregation.[610]

The "substantial compliance" provision in the Revised Plan was used to evaluate LRSD's adherence with desegregation decree requirements. Part of the dispute in the case arose from disagreement between LRSD and Joshua over the definition of the term, "*substantial compliance*," which was not defined in the Revised Plan. In the Controlling Principles of Law section of the Memorandum Opinion of the Court, the judge spoke to the "substantial compliance" rule. After recognizing each party's interpretation of the term, the judge set forth the court's interpretation of the rule and consequently the meaning used to decide the issues.

Cody v. Hillard was cited as precedent for the "substantial compliance" rule. The judge stated holdings on the rule and summarized:

> in order to determine if a party is in 'substantial compliance' with a consent decree, the trial court must examine whether any of the alleged violations of the consent decree 'were serious enough to constitute substantial *non*compliance' and 'to cast doubt on the defendants' future compliance with the Constitution.[611]

The judge established that based upon the rule, a requirement existed for a "substantial compliance" examination of LRSD in the six areas of decree conformity challenged by Joshua.

For purposes of this study, the significance of the "substantial compliance" standard was that it emanated from *Cody*, which was a decision by the Eighth Circuit Court in a South Dakota

[610] Ibid.
[611] Ibid. and *Cody v. Hillard,* 139 F. 3d 1197 (8th Cir. 1998*).*

prison reform case rather than the United States Supreme Court. Until the current section, this study predominately focused on Supreme Court decisions that formed standards by, which school desegregation cases were adjudicated. While Supreme Court decisions are controlling, holdings of other lower courts in the same jurisdiction are abided and establish additional adjudication standards under the principle of "*stare decisis*."[612] The important point demonstrated through the "substantial compliance" rule used in the LRSD case was that lower court school desegregation cases are adjudged by both Supreme Court holdings and holdings in the appropriate hierarchy of the lower courts.

Before addressing the "substantial compliance" issue, the judge devoted a section of the Memorandum Opinion to the aforementioned Controlling Principles of Law that governed the case. The section primarily spoke to Supreme Court decisions as applied to the *Little Rock* case. The principles of law section dealt with the legally controlling standards and began with *Green*'s requirement of affirmative duty for former dual school systems to convert to unitary status. Further, the requirement meant evaluation of the school system using the "*Green* factors" to determine if unitary status had been achieved. But the court did not end with the well-established obligations of *Green.* The court turned to *Dowell* and *Freeman* for their expansion on *Green. Dowell*'s expansion on *Green* contributed that, in addition to careful analysis of the "*Green* factors," good faith compliance with the desegregation decree had to be evidenced in order to find on unitary status.[613]

Next, the Court applied holdings from *Freeman* that the "*Green* factors" did not have to be a rigid framework when partial relinquishment was under consideration. The district court

612 *Stare decisis* means "let the decision stand." It is generally binding on cases that have the same or substantially the same factual situations. The rule of "*stare decisis*" is rigidly adhered to by lower courts when following decisions by higher courts in the same jurisdiction. Alexander and Alexander, *American Public School Law*, 7.
[613] Ibid.

judge in the present Little Rock case acknowledged *Freeman*'s recognition of discretionary latitude over how rigidly to follow *Green*, which was deemed allowable through the district court's exercise of its "equitable discretion" authority.[614] The judge spoke to the fact that, in addition to the "*Green* factors," the Supreme Court in *Freeman* also considered "an additional factor: the quality of education being offered to white and African American students with specific emphasis on programs designed to improve the academic achievement of African American students."[615] On this point, the judge concluded that by considering the additional factor, the Supreme Court recognized that the "*Green* factors" were not the only determinate for the vestiges of *de jure* segregation. Further, the conclusion noted that while circumstances of the case determined other factors to consider, establishment of a causal link between each additional factor and prior *de jure* segregation was imperative to adjudicating litigation. Additionally, the judge cited the "*Freeman* test" to evaluate satisfactory decree compliance and as the benchmark for continued judicial control and demonstration of good faith commitment.[616]

The judge in the Little Rock case succinctly stated that with *Freeman*, the Supreme Court moved the test for unitary status away from *Green*'s "affirmative duty to eliminate racial discrimination root and branch" to a "more easily achievable standard of eliminating the vestiges of *de jure* segregation 'to the extent practicable.'" Elaborating on the change in standard, the judge offered that basis for the Supreme Court's change rested on two points: (1) that federal supervision of school districts could not eliminate racial discrimination and (2) duration of federal supervision over a school district should have reasonable limitations.[617]

[614] Ibid.
[615] Ibid.
[616] Ibid.
[617] Ibid.

Holdings of the Supreme Court in *Jenkins III* were next applied to *Little Rock.* Significant to this application and interpretation was the judge's summation that *Dowell, Freeman,* and *Jenkins III* represented a gradual change in the direction of school desegregation cases. The judge summarized the current standard as a requirement to "only assess whether everything 'practicable' h[ad] been done to eliminate the vestiges of the prior discrimination and further, [that] the Court may grant unitary status in incremental stages."[618]

Green, Dowell, Freeman, and *Jenkins III* were not the only precedents cited by Judge Wilson in the case. Additional holdings in other litigation were cited to support the points of laws and precedents used by the judge to decide *Little Rock.* Along with the "substantial compliance" provision, the precedents stood as controlling authorities for school desegregation law.

Having established the controlling principles of law, the judge moved to evaluate the particular facts of the case. On its face, *Little Rock* appeared to represent quintessential school desegregation litigation. However, Judge Wilson pointed out that he repeatedly emphasized in the opinion that the present Little Rock litigation was *not* a typical school desegregation case. On this point, the burden of proof issue was significant.

In typical school desegregation cases, school authorities and school districts have been the defendants and have borne the burden of proof on matters of alleged constitutional violations. However, Clay Fendley, attorney for the Little Rock School District, indicated that a unique circumstance of the *Little Rock* litigation was that the school system filed the action and was itself the plaintiff.[619] The judge spoke to the significance of this point in the opinion. Citing

[618] Ibid.

[619] In a telephone conversation with Clay Fendley on September 12, 2002, he pointed out that heretofore, it was unusual for the school district to be the plaintiffs and initiating the litigation. Because of this sequence of actions, the Joshua Intevenors became the defendants, also an atypical occurrence.

precedent as Judge Wilson established that once a school district has been found a "constitutional violator," it had the burden of proof to show that it was in compliance with each *Green* factor and was entitled to unitary status.[620] The judge pointed out that in the *Little Rock* case, "LRSD h[ad]never been adjudicated to be a *"constitutional violator."* The judge referenced the fact that LRSD voluntarily filed the action as plaintiff and was the prevailing party in the case in every sense.[621]

Interestingly, the judge admonished LRSD for reticence to make its own decisions, with regard to possible courses of action for the school system, based on the Constitution, applicable case law, and its best professional judgement. The admonition was prompted by LRSD's request for the judge to issue what would have been tantamount to an advisory opinion on what the school district should do regarding its school assignment plan for the 2003-04 school year. Given that the LRSD had been found unitary on this point, the judge viewed the request as confusing and concluded that the decision should be made without direction from the court and by the school district since "unitary status" meant that it was no longer under court supervision on this issue. The judge chided the district and stated that it "had been in the federal nest for so long that it was reluctant to use its wings."[622]

Contemporary Desegregation: Precedents, Turning Points, and Points of Law

The litigation reviewed in chapter 5 focused on issues related to dissolution of desegregation decrees and unitary status. The facts in each case shaped the adjudication and resulting decisions. *De jure* segregation and resegregation were recurrent themes.

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[620] *Jenkins v. State of Missouri*, 216 F.3d 720, 725 (8th Cir. 2000).

[621] LRSD voluntarily filed as plaintiff against PCSSD, NLRSD, the State of Arkansas, and Arkansas Department of Education to force consolidation of the three Pulaski County School Districts. A further objective of the LRSD action was to require the state and ADE to pay for their role in causing many of the inter-district effects that resulted in LRSD becoming a predominately African American school district while PCSSD and NLRSD remained predominately white school districts. (*Little Rock*)
Little Rock.

Though *Riddick* was a lower court decision, it proved a roadmap for what followed in the Supreme Court during the Contemporary Desegregation Era. Rulings by the Court in *Dowell*, *Freeman,* and *Jenkins III* communicated that mandates of the *Brown* decisions would be judged using standards in addition to and different from earlier periods of school desegregation's jurisprudence. From the high Court, the message was clear that judicial involvement in school desegregation was not intended to continue in perpetuity. The Court also affirmed the discretionary latitude and authority of federal judges on school desegregation matters. Rulings that allowed for dissolution of desegregation decrees and/or partial or full unitary status supported both messages and facilitated actions by the lower courts to return public schools districts under judicial orders and supervision back to local control.

The following summaries were provided as a lens on primary judiciary concerns of the Contemporary Desegregation Era. It seemed imperative to examine concepts central to points raised in *Dowell*, *Freeman,* and *Jenkins III,* given that subsequent lower court decisions on school desegregation issues turned and had the potential to continue to turn, on those points until subsequent Supreme Court decision(s) rendered them obsolete.

De Jure Segregation, Unitary Status, and Resegregation

De Jure Segregation

Mandates for *de jure* segregation. The objective of *Brown I* and *II* was that school districts, once segregated by law, had to take all necessary steps to eliminate the vestiges of the unconstitutional *de jure* system. This requirement was to ensure the abolition of *de jure* or legal segregation, which wronged and imposed the stigma of inferiority upon African American students, and thereby creating a constitutional violation. *Green* affirmed and expanded the obligations imposed by *Brown*. In *Green*, the Court held that the duty of former *de jure* school

districts was to take whatever steps necessary to convert to a unitary system in which racial discrimination was eliminated root and branch.[623] These mandates were consistently cited and repeated in school desegregation rulings by the courts.

***De jure* segregation revisited.** During the Contemporary Desegregation period, the distinction between *de jure* and *de facto* segregation was an important consideration. The distinction was not a primary concern in school desegregation's early period following the *Brown* decisions.[624] In *Keyes*, the Supreme Court offered that purpose and intent served to distinguish *de jure* from *de facto* segregation.[625] The concept of *de jure* segregation was clarified to indicate a "policy or practice that *intends* to segregate by race (discriminatory intent) and that has a significant segregative *effect*."[626] With the issue of "discriminatory intent," the Supreme Court sought to clarify *de jure* from *de facto* segregation in cases without explicit segregation laws.[627] "If school authorities practice purposeful segregation, then a *de jure* condition exists, and the school district will be required to take affirmative measures to correct racial imbalance in the schools."[628]

In *Freeman*, the Court put *de jure* segregation into context when racial balance and decree compliance matters were adjudicated. Having cited *Green* as the controlling authority, the Court reiterated that proper resolution of desegregation cases turned on careful assessment of the facts. In most cases, as in *Freeman*, the issue was the extent of compliance with a school desegregation decree. The justices decreed that it was essential to begin evaluation of the degree of racial imbalance in a school district by comparing the proportion of majority to minority students in individual schools with the racial proportions in the whole district. This basis of

[623] *Freeman.*
[624] Armor, *Forced Justice*, 20.
[625] Alexander and Alexander, *American Public School Law*, 463.
[626] Armor, *Forced Justice*, 21-22.

comparison was labeled "fundamental" to desegregation matters because "*de jure* racial exclusion was the means and end policy objectives that were driven by denigration and hostility toward the disfavored race."[629]

Freeman emphasized that remedies for the vestiges of segregation must have a causal link to the *de jure* violation being remedied. The Court indicated in its reasoning that population changes did not necessarily equate to real or substantial *de jure* violations. A cautionary note was given in the *Freeman* opinion that as *de jure* infractions became increasingly removed by time and as population changes occurred, racial imbalance would less likely be a vestige of *de jure* segregation. "Good faith" compliance with a desegregation decree by school districts was seen as having the potential to likely compromise the causal link between current conditions and past violations of *de jure* segregation.[630]

Unitary Status

An important contribution was made in the *Dowell* case on "unitary status," a central concept in the Contemporary Desegregation Era. The *Dowell* opinion elaborated on the inconsistent use of the term "*unitary*" by the courts. Also cited in the opinion were examples of different usages and definitions of the term.

One interpretation given for "unitary" was a school district that had completely remedied all vestiges of past discrimination. This definition meant that a school district had met the mandates of *Brown II* and *Green.* The Supreme Court cited another use of "unitary" to describe a school district that had desegregated, regardless of whether it was the result of a court-ordered desegregation plan. The significance of this definition was that a school district could be

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[627] Ibid., 20.
[628] Alexander and Alexander, *American Public School Law*, 463.
[629] *Freeman.*
[630] Ibid.

considered “unitary” but still has vestiges of past discrimination. Distinctions were acknowledged between “unitary school district” and achievement of “unitary status.” The Court explained that a “unitary school district” was one that had not operated segregated school for several years as required by *Green* and *Swann*. It further explained that in order to achieve “unitary status,” all vestiges of prior discrimination had to be eliminated. The findings in *Dowell* established judicial direction for proper adjudication of unitary status issues.[631]

In *Dowell*, the Supreme Court also made a point of discussing the role of terminology such as “*dual*” and “*unitary*” relative to constitutional appropriateness, although pointedly declaring that the United States Constitution did not use these terms. The importance of such terms was found in their relationship to constitutional requirements like those in the Fourteenth Amendment to provide equal protection of the laws. The Court indicated that the need to make the terms more precise or create subclasses within the terms themselves was not an issue that had to be addressed in the *Dowell* case.[632] In *Jenkins III*, the Supreme Court cited *Freeman* when it referenced the appropriate test for achievement of partial unitary status determinations.[633]

“Good faith.” The determination of a school district's attainment of complete or partial unitary status turns in large part on its “good faith” compliance with the desegregation decree. In *Brown II*, the defendant school districts were required to show “good faith” compliance measures at the “earliest practicable date.”[634] *Dowell* imparted the importance of “good faith” and found the benchmark to be controlling in unitary deliberations. The Supreme Court declared in *Freeman* and *Jenkins III* that “the ultimate inquiry is whether the constitutional violator has

[631] *Dowell.*
[632] See analysis of “*unitary*” in the *Significance of Dowell* section of this chapter.
[633] *Jenkins III.*
[634] *Brown* II

complied in good faith with the decree since it was entered, and whether the vestiges of discrimination have been eliminated to the extent practicable."[635]

In a discussion on the *Freeman* decision, Patricia Green spoke to the evolving importance of "good faith" as a factor in remedial school desegregation decisions, particularly those concerned with potential findings of unitary status. She pointed out that "good faith" had become a consistent tenet on the issue of dissolving desegregation decrees, and its reference in *Freeman* provided the third occasion on which the Supreme Court cited it as a requirement. "Good faith" was cited in *Green* as a necessary component to judging the effectiveness of freedom-of-choice plans and in *Dowell* as a measure for compliance with remedial plan requirements. In her discussion on "good faith," Green indicated that a positive finding in this regard was imperative to increase the likelihood that a district would be found unitary. This measurement standard was held important because the evaluation rested on the intent rather than the effectiveness of the school district's practices to rid itself of the discriminatory conditions and vestiges of past segregation.[636]

Resegregation

Historically, a customary practice in American public schools was the assignment of students to schools nearest to their homes. As a rule of thumb, most school districts continue to have this practice, at least as a goal. Although the concept was not unilaterally implemented during the era of separate schools and African American students were often forced to travel further distances than necessary, the concept of neighborhood schools was a mainstay in assigning pupils to schools. Student assignment to neighborhood schools created an issue for

[635] Ibid.
[636]Green, "School Desegregation" quoting Martha D. McCarthy, "Elusive Unitary Status," *West's Education Law Reporter* (October 1991). Available on-line: www.westlaw.com Cite: 69 WELR 9

desegregation in that a relationship between housing patterns and segregation proved incompatible with the objectives of schools without racially identifiable populations.[637]

Resegregation issues manifested and impacted desegregation decree concerns. Resegregation itself was concerned with population changes and demographic shifts. Population alterations were usually found to co-exist between the overall citizenry of an area and the student makeup of a school district.[638]

The *Freeman* opinion squarely confronted the matter of resegregation. Speaking relative to the relationship between housing choices and racially unbalanced schools, the Supreme Court found the following on resegregation.

> Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require on-going and never-ending supervision by the courts of schools districts simply because they were once *de jure* segregated. Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies.[639]

The Court continued its reasoning on the relationship between housing patterns and segregated schools. While the Court acknowledged past wrongs to the African American race as a part of history, it found that it could not overstate its consequences through legal responsibility. Vestiges of segregation were found to be matters of the law, but a causal link to *de jure* segregation might not be established in the face of demographic changes.

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[637] Armor, *Forced Justice,* 5.
[638] *Freeman.*

Insights and Reflections on Contemporary Desegregation

In *Little Rock,* local control sentiments and the reasoning expressed by Judge Wilson, represented one dominant school of thought on contemporary school desegregation. Through legal analysis, the litigation reviewed in chapter 5 revealed a focus on judicial authority limitations and parameters for the dissolution of court-ordered remedial desegregation decrees. The standards established by the Supreme Court offered definition but no unanimity of opinion on these standards. Contrasting views to the majority opinions were offered in dissenting opinions. As seen in previous eras, standards set by the courts are subject to on-going application, scrutiny, and interpretation. The same held true during the Contemporary Desegregation Era.

During the Contemporary Desegregation period, the majority's reasoning and In the dissenting opinion on *Dowell,* Justice Thurgood Marshall raised the issue of the limited number of years a school district was under a desegregation decree in light of a long history of discrimination and segregation in the school district. Suggesting agreement with the notion and that the issue was "when" and not "if" decrees could be dissolved, Justice Marshall offered that the "standard for dissolution of a school district must reflect the central aim of our school desegregation precedents."[640] The desegregation precedents Marshall referred to were *Brown I, Green,* and *Swann*. Discussion on the proposed standard continued on the basis that one-race schools equated with separate educational facilities, which were unconstitutional and imposed the stigma of inferiority. Appropriate remedy was said to mean that all feasible steps had to be taken to eliminate racially identifiable schools. In addition, Justice Marshall advocated that a

[639] Ibid.
[640] *Jenkins III.*

desegregation decree could not be lifted as long as the conditions likely to cause the stigmatic injury remained.[641]

Justice Marshall was impassioned in his contention that the acceptance of "racially identifiable" schools during the Contemporary Desegregation Era was a return to the stigmatic injury condition referred to in *Brown*. He expressed that in his view, "a standard for dissolution of a desegregation decree must take into account the unique harm associated with a system of racially identifiable schools and must expressly demand the elimination of such schools."[642] Again, Justice Marshall's reasoning on his proposed standards for decree dissolution emanated directly from *Brown* and Supreme Court decisions most closely aligned with it. As one of the architects of *Brown* and overseers of desegregation, Marshall was described having provided an "inherent conclusion," given his association with the subject.[643]

Allowing for arguments on specific points of law, another opposing perspective to the majority's reasoning during the Contemporary Desegregation Era, was represented in Justice Ruth Bader Ginsburg's dissenting opinion in *Jenkins III*. Taking exception to remedial programs that had been in place for seven years, Justice Ginsburg responded with the history of racial discrimination in education. "But compared to more than two centuries of firmly entrenched official discrimination, the experience with the desegregation remedies ordered by the District Court has been evanescent."[644] Justice Ginsburg referred to the long-standing history of segregation in Missouri and declared that limiting school desegregation efforts was action

[641] Ibid.
[642] Marshall's dissent in *Dowell.*
[643] *Jenkins III*
[644] Ibid.

occurring "too swift and too soon."[645] Justice Ginsburg's commentary closely aligned with Justice Marshall's sentiments.

The litigation in *Jenkins by Jenkins*, *Belk*, and *Little Rock* offered an opportunity to visit and compare successor cases to their respective and previous progeny of Supreme Court decisions on school desegregation. Rather than turning solely on their progenitors, each case was scrutinized under the global body of school desegregation law. As the period of Contemporary Desegregation appeared to become more "rooted," judicial analyses in the final three of cases of this study reflected the standards and thinking characteristic of the period.

There were interesting parallels in the lower court cases reviewed from the Contemporary Desegregation period. All three of the cases had long-standing histories of school desegregation litigation, but the particulars of each case determined their respective adjudication. Similarly in the three cases, requirements and conditions of the remedial desegregation decrees, in large part, shaped the basis for decision-making related to issues related to unitary status and dissolution of desegregation decrees and. Moving beyond the "*Green* factors," provisions in school district desegregation plans allowed the issue of disparity in student achievement based on students' race to be addressed in the litigation and adjudicated in the courts. Both *Jenkins by Jenkins* and *Little Rock* dealt with racial disparities in academic achievement and turned on the issue of their relative and appropriate inclusion and structure in the desegregation plan itself.

Additionally, provisions in remedial desegregation plans provided the basis for continued school desegregation litigation. Large monetary settlements were seen as factors that facilitated desegregation obligations and the release of school districts from further school desegregation responsibilities. Again, *Jenkins by Jenkins* and *Little Rock* provided an insight into monetary and financial aspects as related to termination of judicial supervision for court-ordered school

desegregation. On another point, *Belk* addressed remedial desegregation plans that included race-conscious policies that ultimately proved the turning consideration. These examples of student achievement, monetary and financial factors, and the use of race-conscious policies underscored and illustrated the pivotal importance of provisions contained in remedial desegregation plans for school districts.

Jenkins by Jenkins was decided in 1997. Holdings in the case denied unitary status in four of the five areas evaluated. Although good-faith considerations were closely scrutinized, *Green* weighed heavily and was the overwhelming controlling authority.

Following *Jenkins by Jenkins* four years later, in 2001, *Belk* presented a different face from its notable progenitor, *Swann*. *Belk* represented the convoluted nature of school desegregation case law by focusing on race-conscious policies as related to unitary status. Unitary status was affirmed for the school district and the race-conscious policies were not found violative.

In 2002, *Little Rock* was decided. Unitary status was determined for the school district in five of six areas before the Court. Although, the Contemporary Desegregation Supreme Court rulings were controlling, consideration was given to other applicable standards. The consideration standards prior to the Contemporary Desegregation standards appeared to be cursory and obligatory. *Dowell* and *Freeman* appeared to be the dominant turning points of law.

With regard to drawing some conclusions on the Contemporary Desegregation period, perhaps most significant, was the judge's approach to and analysis of school desegregation case law in *Little Rock*. This was noteworthy because on January 3, 2002, United States District Judge William R. Wilson, Jr. was newly and randomly assigned to the case along with the Honorable

Joe Thomas Ray, U.S. Magistrate Judge. Judge Wilson succeeded United States Chief District Judge Susan Webber Wright, who had presided over the case for the previous eleven years.[646]

In the opinion, Judge Wilson lamented on the time spent during an eight-month period in which he worked to educate himself on the significant rulings and agreements that shaped the twenty-year old Little Rock school desegregation case. In addition, the judge spoke to the laborious process of studying and learning the "ground-slide load of cases to gain an understanding of the evolution of school desegregation litigation during the last five decades and grasp[ing] the issues a court must resolve in deciding whether a school district ha[d] achieved unitary status."[647] Reflecting on the experience, Judge Wilson commented that "desegregation cases [wer]e invariably complex, involve[d] difficult-to-understand jargon, and frequently generate[d] book-length decisions, with seemingly obligatory concurring and dissenting opinions."[648] Although there was an impression that school desegregation law was not Judge Wilson's area of expertise, his assessment on the subject reflected conclusions of this research. Judge Wilson continued his astute observations with an appraisal of public school desegregation's heaviest burden—its past. He stated:

> the issue of desegregation goes to the heart of the Fourteenth Amendment's promise of "equal protection" and the dark soul of what was, in many parts of the country in the

[646] Judge William R. Wilson's profile listed expertise in torts, evidence, trial advocacy, and product liability. He was born in Little Rock, Arkansas, on December 18, 1939, and was first admitted to the Arkansas Bar in 1965. Available: www.westlaw.com Search U.S. Judges/Court. Judge Wilson's relationship to the present Little Rock case was addressed in an *Order Denying Motion for Hearing Regarding Relevance of 28 U.S.C. 455 to the Present Proceedings*, dated October 29, 2002. After the ruling on unitary status, a motion was filed by the Joshua Intervenors on October 25, 2002, on two issues. One of the issues raised in the motion sought to have Judge Wilson recuse himself from the case. The motion was based on grounds that in 1987 Judge Wilson represented Judge Henry Woods, who was presiding judge in the Little Rock case at the time. Judge Wilson denied the request to recuse himself on grounds that his participation in the mandamus matter at issue was brief and did not involve any of the issues in the present case in any way. See *Little Rock School District v. Pulaski County Special School District, Order Denying Motion for Hearing Regarding Relevance of 28 U.S.C. 455 to the Present Proceedings*, October 29, 2002. Available on-line: www.westlaw.com Westlaw cite only: 2002 WL 31465311 (Note: Not reported in F.Supp. 2d, E.D. Ark., 2002.)

[647] *Little Rock.*

1950s, a *de jure* segregated public school system that only grudgingly gave ground to integration—after most school districts had exhausted all available means of delay.[649]

The Memorandum of Opinion in the *Little Rock* case was 174 pages long. Contained in those pages was the history of the latest Little Rock litigation, which reflected the weight of one community's struggle to live with the legacy of *Brown* and desegregate its schools. In developing his knowledge base of school desegregation case law and in order to properly adjudicate the case, Wilson acknowledged a seemingly ethical obligation to "review the long and winding path trod by LRSD in carrying out its constitutional duty, under *Brown I* and its progeny, to rid the Little Rock school system to the extent practicable, of the vestiges of *de jure* segregation."[650]

Judge Wilson placed his comments in the context of an acknowledged appreciation for the deeply held passions and beliefs aroused in communities, litigants, lawyers, and judges affected by unremitting school desegregation litigation in the years since the *Brown* decision.[651] In his concluding remarks, Judge Wilson cited sentiments similar to his own from the *Keyes v. Congress of Hispanic Educators*, 902 F. Supp. 1274, 1037 (D. Colo. 1995) and the *Belk* case examined earlier in this study. From *Keyes v. Congress of Hispanic Educators,* the judge offered that instead of using the courts as an adversarial system to "accomplish institutional reform," the Supreme Court, through their most recent school desegregation opinions, placed the emphasis on "the people and the democratic process to determine and provide for the general welfare."[652] In this instance, the general welfare was education. Similarly, from the *Belk* case the judge offered that the difficult task of public schools—to meet the unlimited educational needs of students with

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[648] Ibid.
[649] Ibid.
[650] Ibid.
[651] Ibid.

limited resources—was better accomplished through communities than the courts.[653] Simply, the judge declared that it was time for substantial control of the Little Rock School District to be returned to the citizens of the community.[654]

The Contemporary Desegregation Era offered guidelines to end judicial oversight of school districts under court-ordered remedial decrees. The provisions established in *Dowell, Freeman,* and *Jenkins III* appeared to follow a pattern similar to those established in *Green, Swann*, and so on, although the two groups of controlling precedents sought diametrically opposed objectives; that is utilization of strategies to further desegregation efforts versus termination of safeguards to protect school desegregation processes.

The cross and crux of this study were about diametric variables, not only for the Contemporary Desegregation Era, but also for the whole of this research project. Those variables are embodied in the opposing forces of racial discrimination and the goal of equality of educational opportunity for all students. In the literature, a theme as shown in the Leahy quote, "racism and prejudice continue to be a major problem in our country,"[655] often emerged as a concluding commentary on the subject of *Brown v. Board of Education* and school desegregation. The fight to tear down racism and prejudice served as a catalyst and energy source that moved efforts for sixteen years to bring *Brown* to the United States Supreme Court. The same problem and fight have been a part of *Brown's* sojourn for fifty years. No decision by any court in the Contemporary Desegregation Era or throughout the research appeared to end the dichotomy between racial discrimination and the goal of equality of educational opportunity, at the heart of *Brown*.

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[652] Ibid.
[653] Ibid.
[654] Mary Leahy, "School Desegregation and Prejudice in the United States," Available on-line: www.yale.edu/ynhti/curriculum/units/1988.01.03.x.html

CHAPTER 6

RESEARCH SUMMARY

Any attempt to analyze Brown I's substantive legal underpinning or to revisit the Court's "all deliberate speed" remedy of Brown II simply dwarfs its overriding historical, social, and political significance in the life of this nation.[656]

—The Honorable Constance Baker Motley, "The Historical Setting of Brown and Its Impact on the Supreme Courts"

The United States Supreme Court rendered its first decision involving the unlawfulness of racial segregation in 1873 in the case of *Railroad Company v. Brown*. A unanimous ruling by the Court held that cars of a commuter railway had to be desegregated on grounds that segregated facilities were inherently unequal.[657] Segregation was found to constitute a violation of constitutional privilege. The *Railroad v. Brown* ruling was suppressed in debates over the Civil Rights Act of 1875. The Act was declared unconstitutional by the Supreme Court's ruling in the *Civil Right Cases.* Amid conflicting principles and the social, political, and cultural issues of the time surrounding segregation, *Railroad v. Brown* moved into historical and legal obscurity.[658]

With *Roberts* in 1849, the recorded history of segregation and education litigation preceded *Railroad v. Brown* by more than twenty years. Litigation after *Railroad v. Brown* that involved segregation and carried the name "Brown" would not slip into obscurity. Instead, later litigation known as *Brown v. Board of Education*, the focal subject of this study, became a prominent part of American history and a centerpiece of American jurisprudence. The declaration in *Brown I* that "separate-but-equal" was inherently unequal and had no place in the field of public education reflected a change in the legal standard for segregation and racial

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[656] Motley, "The Historical Setting of *Brown*."
[657] *Railroad Company v. Brown*, 84 U.S. 445 (1873).
[658] McConnell, "Originalism and the Desegregation Decisions."

discrimination in American public schools. Mandates for compliance with *Brown* effected action on the concept of desegregation, which defined a new benchmark for the role of race in American public schools.

Chapter 6 presented findings and conclusions on the information gathered over the course of this study. Throughout the study, points of law and turning points in the law were used to trace the evolution of school desegregation case law since the *Brown* decision in 1954. This study traced the evolutionary development of case law that governed the desegregation of American public schools through examination of: (1) differences between court decisions of the 1980s and 1990s and those of the 1960s and 1970s; (2) differing points and turning points in the law and changes in terminology; and (3) recent court decisions that provided an indication on the status of public school desegregation. In addition, this study covered litigation that served as *Brown*'s historical and legal foundation.

Study Findings

The Nature and Adjudication of School Desegregation Litigation

Proper adjudication. Between 1954 and 2002, the rhetoric, issues, and strategies surrounding public school desegregation litigation varied. However, consistencies were found in the disposition of cases examined in the research. This study found that the first requirement for proper adjudication and resolution of school desegregation litigation was the careful assessment and evaluation of the facts in the case. Once the facts were analyzed and evaluated, issue(s) were derived. The Courts subsequently applied precedents, tests, controlling authorities, and so on to the facts and issues, which resulted in rulings and holdings. The reasoning in the opinions of the Supreme Court and the lower federal courts provided insight and direction on rulings.

Bases of Litigation. From the "Separate-but-Equal" Era through the Seminal Desegregation Era, primarily African American parents and students brought lawsuits against school districts on allegations of racial discrimination and denial of legal protections and/or rights. During the 1950s and 1960s, the courts addressed litigation that sought to resist implementation or provide less than the measure intended by *Brown*'s mandates. From the 1968 *Green* decision to the year 2002, this study saw litigation that began to increasingly focus on remedial plan provisions and matters related to desegregation plan compliance.

The 1986 *Riddick* case presented an example of transitional litigation between the Seminal Desegregation and Contemporary Desegregation Eras in the evolution of school desegregation case law. In the *Riddick* case, Norfolk Public Schools sought to dissolve desegregation decrees and end judicial oversight of public school desegregation through declaration of "unitary status." Litigation examined after *Riddick* and during the Contemporary Desegregation period showed that school districts sought "unitary status" declarations on various grounds. In chapter 5, each of the three lower court cases studied were found to present individual situations, deal with issues specific to each case, and be ruled upon from the distinct perspective of the courts involved.[659] Although the lower court cases received individualized treatment, the courts invariably applied the standards, in part or total, set forth in the Supreme Court decisions of the Contemporary Desegregation period. While the three lower court cases focused on unitary status and some similarities were seen, a generic pattern or strategy for seeking unitary status was not observed in the cases examined.

Burden of Proof. This study found that the burden of proof in public school desegregation cases was by a "preponderance of the evidence." Until the 1990s' Contemporary Desegregation period, school districts were overwhelmingly the defendants in school

desegregation litigation and usually bore the burden of proof. In school desegregation's Contemporary Desegregation Era, the *Jenkins by Jenkins* and the *Little Rock* cases presented examples of plaintiff school districts bringing school desegregation litigation to the courts. The burden of proof in school district-initiated action was found to rest on the specific issue(s) in the case. Generally, plaintiff school districts or defendant students and parents bore the burden of proof as dictated by requirements of the remedial decree and associated desegregation plan.

Also significant to the burden of proof consideration was the "intent versus effect" standard established during the Contemporary Desegregation Era. "Intent" usually tends to be more intangible and difficult to prove. Whereas, effect tends to be more concrete and observable similar to the concept of "discriminatory conditions" addressed in *Brown*. Elimination of discriminatory conditions and vestiges of segregation were mandatory to compliance with *Brown* and to correcting constitutionally offensive violations.[660] Under scrutiny and by definition, "effect" and "conditions" can be more easily identified as observable and tangible elements and therefore more easily addressed than "intent." Given these considerations, the ability to obtain specificity appears compromised under the "intent" standard. Ironically, one of the major criticisms of *Brown* was its lack of specificity. Therefore, it seems that the "intent versus effect" standard would serve to continue the established difficulties in addressing mandates of *Brown*.

Terminology. Some terms like *de jure segregation* and *dual school systems* remained consistent throughout the study. However, it must be stated that definitions and terminology were observed to be among the most difficult challenges for school desegregation litigation and its adjudication. At the forefront of this challenge was translating the "elimination of racially separate schools" into "desegregated schools." Essentially, defining what constituted a

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[659] The *Jenkins by Jenkins*, *Belk*, and *Little Rock* litigation focused on unitary status.
[660] Green, "School Desegregation" quoting Martha D. McCarthy, "Elusive Unitary Status."

desegregated school consumed the attention of the Courts and shaped litigation examined in this study. This finding was supported by Armor. He stated, "the most critical definition in a school desegregation case is what constitutes a desegregated student body at each school because that definition ultimately determines the number of students who have to change schools."[661] Armor expanded on this point by discussing faculty desegregation, which also meant movement of people. The task of people movement and the logistics to accomplish this end were outgrowths of attempts to define "desegregated schools" and also contributed to central issues in school desegregation litigation during the Seminal Desegregation Era.

This study found changes in terminology and more significantly a change in focus as terminology changed. To illustrate changed terminology, *Brown* submitted terms such as "*equal educational opportunities"* and the "*harms of segregation"* to demonstrate the constitutionally violative condition presented by racially separate schools. As the Courts began to move toward evaluating school districts' efforts to eliminate dual school systems, different terms drew attention. For example, in the *Green* decision terms such as the "*Green factors"* and "*affirmative duty"* presented the operative focus for compliance with *Brown* mandates.

With regard to a change in focus as terminology changed, it was common to find that language, as seen in its initial appearance in an opinion, evolved under scrutiny of subsequent analysis and interpretation. Resulting from this metamorphic process was the transition of language into terminology that represented specific, more substantive concepts, meaning, and/or intent than when first used. Evolutionary terminology appeared consistently over the course of the study.[662] One example of evolved terminology was observed in terms used relative to the timeframe for implementation of *Brown*'s mandates. The terms "*all deliberate speed*," "*prompt,*

[661] Armor, *Forced Justice*, 158.
[662] See Considerations for Legal Study, Interpretation section of this study for further discussion.

reasonable start," and "*forthwith*" were used to indicate the speed of transition to unitary school systems. Although "*forthwith*" singularly communicated immediacy of action, the courts appeared to continually be engaged with school districts over the amount of time taken by school districts to move forward with school desegregation.

Long history and on-going nature of litigation. This study found that school desegregation litigation often went back years, even decades. The lower court litigation reviewed in the last section of chapter 5 revealed an average litigation history length of thirty-four years.[663] In this study, multiple appearances before the United States Supreme Court were commonly observed in litigation with long, on-going histories.

Considerations for Legal Study

Over the course of this study, two considerations emerged as integral to understanding the material and the subject covered. Although identification of two factors, interpretation and contextual, admittedly was an oversimplification, they were important realities necessary to understanding complexities of "the law."

Interpretation. In some instances, interpretation of rulings, concepts contained in the opinions, and so on were observed to be as significant as the original holdings themselves. Language that may have appeared initially as a few words or sentences eventually became full-fledged guiding principles based upon interpretation in subsequent applications. For example, the phrase "*good faith*" as it appeared in *Brown* and *Green*, evolved into a pivotal consideration for unitary status determination during the Contemporary Desegregation period.[664] Another example was represented in the *Freeman* opinion. *Freeman* identified several factors as necessary considerations for decision-making in cases where withdrawal of judicial oversight was an issue.

[663] *Jenkins by Jenkins* = 20 years; *Belk* = 36 years; Little Rock = 46 years. Average = 34 years.
[664] See treatment of "good faith," in *Dowell*, *Freeman,* and *Jenkins III***.**

In subsequent court opinions, the identified factors were treated expansively and referred to as the "*Freeman* Test."

Contextual. Though court rulings appeared objective, court opinions were observed to be more contextual. Opinions reflected conditions leading to the time of the decision, such as the history of the litigation and other germane circumstantial concerns. For example, during the Seminal Desegregation Era, court opinions frequently reflected frustration over resistance to school desegregation and compliance avoidance with mandates of *Brown*.[665]

Precedents, Turning Points, and Controlling Authorities

Roberts gave birth to the legal concept of "separate-but-equal," the first point of law identified in this study. Prior to the United States Supreme Court's decision in *Brown v. Board of Education*, "separate-but-equal" was the defining point of law. Numerous cases in the study examined the evolution of the "separate-but-equal" concept and its erosion as legal precedent. The 1954 decision in *Brown* established a new standard and point of law that found racially separate public schools unconstitutional. This study found implications and ramifications of *Brown I* and *II* under scrutiny through to the year 2002.[666]

Throughout this study's review of school desegregation litigation, many cases were consistently cited as precedent. Among those, a few emerged as the controlling authorities for school desegregation case law. *Brown* was most significant, cited and established as the standard and controlling authority for the elimination of segregation in public schools and racially separate schools. *Brown*'s requirement to eliminate segregation in public schools led to practical application issues for public school desegregation. On the issue of practical application, *Green* and *Swann* emerged as benchmark decisions of the Seminal Desegregation Era. *Green's*

[665] See *Green* as an example.
[666] Examination of literature and litigation beyond 2002 found that scrutiny of *Brown* continued.

significance rested in its broad scope on requirements for desegregation and the elimination of racial discrimination in American public schools.[667] *Swann's* significance was in its remedial findings on busing, racial balancing, racially identifiable schools, and other key points. [668]

Following *Brown I* and *II*, holdings in *Green* were found to have the most significant impact on the shape of school desegregation in the post-*Brown* years. *Green* imposed an affirmative duty on school boards to convert to unitary systems in which racial discrimination was to be eliminated "root and branch." The Supreme Court also identified the "*Green* factors," which were used to evaluate school district actions to eliminate segregation and dual school systems. *Green* reflected greater obligations and accountability for ending the vestiges of segregation.

In the litigation examined from the Contemporary Desegregation Era, the emphasis was found to shift from practical application to dissolution of desegregation decrees and judicial oversight. In addition, *Green*'s requirements were observed to: (1) be interpreted differently; (2) carry less weight, at times; and (3) be subjugated to the Supreme Court decisions of the 1990s. Essentially, *Green*'s controlling authority status was found compromised during the period. During school desegregation's most recent contemporary face, *Dowell, Freeman,* and *Jenkins III* emerged as controlling authorities and precedents in school desegregation litigation. Focus was partial or full unitary status finding and termination of judicial involvement.

Closing Commentary

Throughout this document various quotations were used at the beginning of different sections to reflect the aspect of *Brown* to which that section was devoted. Taken together, the quotes partially represented the cross-dimensional nature of *Brown*. The first opening quote of

[667] See *Green***.**
[668] See *Swann*.

chapter 6 by Judge Constance Baker Motley captured the overall conclusion on *Brown v. Board of Education* for this researcher. Simply put, Judge Motley said that any attempt to reduce *Brown* to single or simple parameters overwhelmingly minimized its monumental nature and value. Consistent with Judge Motley's assessment, Liebman spoke to *Brown*'s continued presence upon American education in an article on the relativity of the desegregation decision to the No Child Left Behind Act of 2001 (NCLB). Liebman described *Brown* by stating:

> In declaring state-mandated segregation of the races in schools unconstitutional, *Brown* v. *Board of Education* transformed American schools and established the judiciary as a principal protector of the constitutional rights of minorities bereft of political defense. In the manner of all fundamental Supreme Court decisions, *Brown* may be considered a 'soft' constitutional amendment or a quasi-national consent decree. A central premise was that, in the words of one current commentator, 'public education is a privilege of American citizenship.' This conclusion followed from the principle 'of equality of membership in the civil community,' in the words of another.[669]

The fact that the *Brown* decision has continued to stimulate discussion and debate on a wide spectrum of issues for five decades speaks to *Brown*'s greatness. With *Brown,* the elements necessary for change converged, at a single place in time. The convergence of elements surrounding *Brown* led to an attack on and officially ended one of the worst examples of man's inhumanity to man. In addition to its moral, humanitarian, cultural, and institutional significance, *Brown* was a United States Supreme Court decision that established legal precedent against racial discrimination not just for public schools but for other areas of American life as well. Additionally, *Brown* concerned education and its legacy includes a coeval and synchronous

framework with the development of present-day "best educational practices." Commonly found in remedial desegregation plans are strategies for full-day kindergarten, expanded summer school, tutoring, emphasis on early childhood development, reduced class size, and others.[670]

At its conceptual stage, this dissertation was about race and American public education. For many reasons, this study evolved into a discourse on *Brown* and school desegregation case law for American public schools. The literature pointed to the inescapable connection between the final study and the original research subjects considered.[671] While the *Brown* Supreme Court decision made great strides toward eliminating *de jure* segregation from our schools, the elimination of racial discrimination and racial disparities in education has continued to be a formidable, and thus far insurmountable, task for American public schools and for the society as a whole.[672]

A major choice was made between two possible points of focus for this study. One option was to concentrate on race-conscious litigation and associated policies arising from elementary and secondary schools. The other option was investigate *Brown* and school desegregation case law. The latter option was selected and demonstrated through this research project. The choice proved to be the better one. The research process of this study forced an immersion into the foundational litigation and other information at the core of both topic options considered. The researcher comes away from this study with a sense of solid grounding on segregation and desegregation relative to American public elementary and secondary schools. As a result of the project, the researcher feels more prepared to delve further into related topics such as race-

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[669] James S. Liebman and Charles F. Sabel, "What Are the Likely Impacts of the Accountability Movement on Minority Children? The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda," *North Carolina Law Review* (May 2003), 2. Available on-line: www.westlaw.com Cite: 81 NCLR 1703.
[670] *Jenkins III.*
[671] Literature referred to the cases, law review articles, books, and other materials used in this study.

conscious litigation, race-conscious school district policies, resegregation issues, affirmative action and so on, with a more comprehensive perspective and greater understanding of legal complexities.

Coming from a special education background, this researcher observed parallels between the evolution of school desegregation case law and special education case law. Special education had its legal origins in important court decisions and federal legislation entitled the Education for All Handicapped Children Act, which was signed into law on November 29, 1975. The field of special education continued to evolve from additional legislation and case law.[673] This researcher began teaching special education students in September 1975. After eighteen years, this researcher left the field of special education for two primary reasons, one of which was an observation that the field was moving further and further away from its conceptual soul. The same observation could be made on the subject of this study. Similarly, the legacies of special education and *Brown* continued to grow and be reshaped until discussion on the frustration of managing each overshadowed the original focus.

There has been extensive debate in the contemporary literature on the status of public school desegregation case law since the *Dowell*, *Freeman*, and *Jenkins III* decisions, including discussion on the possibility of *Brown* being overturned. While tenets expressed in *Brown* became important points of law, the legal crux of the decision was about the racial discrimination of *Plessy*'s "separate-but-equal" doctrine. In response to that catalyst, the United States Supreme Court said that in the field of public education the doctrine of "separate-but-equal" had no place and that separate educational facilities were inherently unequal. Those words captured the moral

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[672] Green, "School Desegregation: Progress or Regression?" See also, Green, "School Desegregation: Progress or Regression?" quoting Irving G. Hendrick, "Stare Decisis, Federalism, and Judicial Self-Restraint: Concepts Perpetuating the Separate but Equal Doctrine in Public Education, 1849 – 1954" 12 J.L. &ED. 561, 584 (1983).
[673] Alexander and Alexander, *American Public School Law*, 396.

impetus behind *Brown* to correct a great human injustice and constitutional violation. The decision achieved these goals. If nothing else survives, that part of *Brown* can never be wrong.

Beyond *Brown*'s legal cross remains the dilemma that Thurgood Marshall, Earl Warren, the associate justices of the Supreme Court, and others knew in 1954. The dilemma was the condition of the hearts and minds of some American citizens. That condition could not and would not tolerate the racial equality necessary to effect equal educational opportunities and the banishment of stigmatic injury caused by racial discrimination upon African American and other minority students. This dilemma, along with the pragmatic concerns of public school desegregation, has continued to impact *Brown*'s effect for the last half-century.

On December 2, 2002, the United States Supreme Court announced its decision to hear *Gratz v. Bollinger* and *Grutter v. Bollinger* litigation from the University of Michigan.[674] At issue was whether the university's undergraduate and law school race-conscious admissions procedures, designed to achieve racial and ethnic diversity, illegally discriminated against white applicants. The subject was directly relevant to *Brown*'s legacy.

The Supreme Court's decisions on race-based admissions policies in the University of Michigan litigation offered possible insights into the future and continued impact on American public schools by *Brown*. Potential implications for practical application in public schools arise from the fact that for many years race-concious policies and practices had been a vital component in many remedial public school desegregation plans. Prior to the Michigan law school ruling, serious messages during the late 1990s, came from some lower court rulings that

[674]*Gratz v. Bollinger,* 539 U.S. 244 (2003). University of Michigan litigation involving race-based admissions policies at the undergraduate level. See also *Gratz v. Bollinger,*183 F.R.D. 209 (E.D. Mich. Jul 07, 1998), 277 F.3d 803 (6th Cir.(Mich) Oct 19, 2001), 309 F3d. 329, (6th Cir.(Mich) Nov 16, 2001), *cert. granted* 71 U.S.L.W. 3154, 71 U.S.L.W. 3379, 71 U.S.L.W. 3387 (U.S. Dec 02, 202) (No. 02-241).
Grutter v. Bollinger, 539 U.S. 306 (2003). University of Michigan litigation involving race-based admissions policies at the law school. See *Grutter v. Bollinger,* 137 F. Supp.2d 821 (E.D. Mich. Mar 27, 2001), 247 F.3d 361

disavowed the use of race-conscious policies in admissions for students to K-12 public school programs. The University of Michigan law school ruling offered direction on narrowly tailored race-conscious admissions policies that were constitutionally compliant. It is therefore conceiveable that public school systems may use the ruling to guide the development of new or reshaped race-conscious policies that could be used to rectify disparate, unequal educational opportunities, based upon race.

Research Updates

A Study on School Desegregation and District Court Judges

In chaper 1, an empirical study by Parker was cited and the findings reported on decisions and written opinions in court-ordered school desegregation litigation. Parker conducted an additional study on federal district court opinions arising from school desegregation litigation from June 1, 1992 to June 1, 2002 and the findings were reported in May 2003.[675] As seen in the earlier study, Parker's more recent research was found directly relevant to this study. Given that the foundation of this study was built, in part, upon Parker's work, it was deemed imperative to include findings on the more recent study in the Research Updates section of this project.

Analysis by Parker of eighty-four district court decisions that involved desegregation in fifty-three school districts found the following four points: (1) defendants win when they are sued for traditional school desegregation issues; (2) defendants lose on significant issues only when their race-conscious student assignment policies are challenged or when defendants oppose

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(6th Cir.(Mich) Apr 05, 2001), 288 F3d. 732, (6th Cir.(Mich) May 14, 2002), *cert. granted* 71 U.S.L.W. 3154, 71 U.S.L.W. 3379, 71 U.S.L.W. 3387 (U.S. Dec 02, 2002) (No. 02-241).

[675] Wendy Parker, "The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges," *North Carolina Law Review* (May 2003). Available on-line: www.westlaw.com Cite: 81 NCLR 1623. This study "examine[d] all published or electronically available federal district court opinions concerning school desegregation from June 1, 1992 to June 1, 2002." Part I of the article examined the current role of the district court judges. Part II argued that the judges had relinquished more power than necessary as indicated by standards developed by the Supreme Court. In addition, Part II also reported on two Alabama judges who had brought about the end of school

each other; (3) parties often settle; and (4) the process of school desegregation cases further minimizes the role of the judiciary.[676] Other findings indictated minimal judicial involvement, including the scope of the issues to be considered or the goals of the litigation, in settlement agreements between the parties. District courts were found increasingly less interested in the affirmative duty to ensure effective remediation or desegregate.

Parker's study conclusions submitted that district court judges have ceded a great deal of control over the process and outcomes of school desegregation lawsuits to the defendants. Parker reported that district courts have relinquished more power than the Supreme Court decisions of the 1990s suggested. The district courts were found to hold to direction by the Supreme Court to return school districts to local control but failed to throughly address elimination of vestiges of desegregation as required. Consequently, lingering segregation was found accepted by the district courts.[677] Consistent with findings from Parker's other study,[678] fatigue from efforts to desegregate was determined as a contributing factor.

However, Parker cited two Alabama judges who were exceptions and took unique, proactives approaches to bring about meaningful change for students by holding steadfastly to the Supreme Court's jurisprudence on school desegregation. In response to on-going school desegregation litigation that began in 1993, with little or no recent activity, and involved numerous Alabama school districts, the two judges began in 1997 to issue decrees with strong compliance mandates. School districts were required to make examinations and detail provisions for transition to unitary status. The consent decrees went beyond school desegregation mandates of the "*Green* factors" and moved into areas that included school administration, tracking and

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desegregation lawsuits after through and successful desegregation efforts. (Parker, "The Decline of Judicial Decisionmaking," 42-43).

[676] Ibid., 44.

[677] Ibid., 43.

ability grouping, special education, gifted and talented education, discipline, and other areas that *Freeman* found were permissible for examination.[679] Parker found that, "for the promise of eventual dismissal, the school districts were willing to implement a wide range of programs designed to address disparities in education."[680] In these instances, remedial plans were beginning to end and the school districts were declared as having attained full unitary status.

Findings in the Alabama examples were particulary germane and support conclusions of this study that findings for "unitary status" could be tied to school desegregation remedial plans. In the Little Rock case presented in chapter 5, the Court was found to rule on unitary status based on compliance with specifications enumerated in the remedial plans. Student achievement issues, among other concerns, were evaluated based upon prescribed measures in the remedial plan.

The Supreme Court Rules on the University of Michigan Litigation

As a matter of update to the original and formal period in which this research study was conducted, holdings of the United States Supreme Court in the aforemention University of Michigan cases were included in this document. On Monday, June 23, 2003, the Court rendered decisions in *Grutter v. Bollinger*, arising from the law school and *Gratz v. Bollinger*, which involved undergraduate admissions policies. Both cases concerned the use of race in admissions policies at the University of Michigan. In separate rulings, the Supreme Court handed down holdings in one case that supported the use of race in university admissions and nullified a race-conscious policy in the other.

Summarily, establishment of parameters for race-policies emerged from holdings in the Michigan cases. Collectively, the two decisions offered ground rules for the use of race in higher

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[678] Refers to Parker's study, "The Future of School Desegregation."
[679] Parker, "The Decline of Judicial Decisionmaking," 51.
[680] Ibid.

education admissions policies while avoiding infringement upon constitutional rights of the individual.

The rulings in the Michigan cases were monumental with standing commensurate with that of their forefathers, *Brown* and *Bakke*. Relative to the *Grutter* case, banner headlines in newspapers confirmed that the "Court Preserve[d] Affirmative Action."[681] Although *Grutter* and *Gratz* were higher education litigation and not K-12 (i.e., elementary and secondary) public school desegregation litigation, the cases were relevant to the subject matter of this study and traceable to the *Brown* legacy. Additionally, the inextricable link between higher education and K-12 desegregation case law, demonstrated in this study, was reaffirmed.

***Grutter v. Bollinger* - Race-Conscious Admissions Policy Survives "Strict Scrutiny."**

Certiorari was granted by the Supreme Court in *Grutter v. Bollinger* to resolve "disagreement of [the] Courts of Appeals on a question of national importance: whether diversity [wa]s a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admissions to public universities?"[682] *Bakke* was cited as the legal precedent that last dealt with the use of race in public higher education twenty-five years earlier. It was also noted in the opinion that *Bakke* was a splintered decision with the justices holding 4-to-4 on both sides of the issue and the deciding vote rendered by Justice Lewis Powell. In Justice Powell's announcement for the *Bakke* Court, the foundation for race-conscious policies was laid.

On the issue of race-based policies, the Court clarified in *Grutter v. Bollinger* that it [had] "never held that the only governmental use of race that c[ould] survive strict scrutiny [wa]s

[681] All headlines are from newspapers dated 24 July 2003, the day after the Supreme Court's decision. "Race Matters: Court Preserves Affirmative Action," *The Wall Street Journal*. "Affirmative Action for Diversity," *The Washington Post.* "JUSTICES BACK AFFIRMATIVE ACTION BY 5 TO 4, BUT WIDER VOTE BANS A RACIAL POINT SYSTEM," *The New York Times*. "Court upholds use of race in university admissions," *USA Today*. "Court upholds affirmative action," *The Baltimore Sun*. "Split decision for choice-by-race," *The Washington Times*. "Affirmative action wins court's OK," *The Montgomery News-Post*.
[682] *Grutter v. Bollinger*.

remedying past discrimination, which courts had upheld as a legitimate reason to use race-conscious policies."[683] In *Grutter*, satisfying the "strict scrutiny test" was required to pass constitutional muster in order for the university's law school admissions policy to be permissible. Beyond the twenty-five year historical context, since Justice Powell first sanctioned the use of race to achieve diverse student bodies in higher education institutions, the 2003 Supreme Court made clear its expectation that in another twenty-five years, the use of race, as adjudicated in the Michigan cases, should no longer be needed.[684] Upon a foundation of constitutional safeguards, affirmation, elaboration, and consistency with the Court's previous holdings in *Bakke* and other germane rulings, Justice Sandra Day O'Connor set forth parameters for the use of race in university admissions policies in the opinion for the Court.[685] Justice O'Connor also addressed the broad-based support for the law school's position on having a diverse student body. In addition to expert studies, American businesses and the United States military lauded the benefits and necessity of diversity in order to fulfill their specific missions. Describing the fundamental value of education in maintaining our American society, the Court borrowed precepts from *Brown* that education was the "very foundation of good citizenship." A contribution was also taken from *Sweatt v. Painter* citing that universities, especially law schools, provide the training ground for our national leaders.[686]

By a 5-to-4 decision in the *Grutter v. Bollinger* law school case, the Supreme Court upheld the use race as a factor in the university's law school admissions procedures. "The United

[683]Ibid.
[684]Ibid.
[685] Ibid.
[686] In discussing law schools as the training ground for national leaders, the Court referenced data. "Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. . . . The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges." (*Grutter v. Bollinger*)

States Supreme Court, Justice Sandra [Day] O'Conner held that: (1) [the] law school had a compelling interest in attaining a diverse student body; and (2) [the] admission's program was narrowly tailored to serve its compelling interest in obtaining the educational benefits that flow from a diverse student body, and thus did not violate the Equal Protection Clause [of the Fourteenth Amendment]."[687]

The importance of the question on the use of race in public higher education lay in the diversity rationale advanced by Justice Powell in the *Bakke* case. The Court cited that Powell's rationale had "served as the touchstone for constitutional analysis of race-conscious policies admissions policies."[688] Further, it was noted that public and private universities had modeled their admissions policies based upon Powell's view of permissible race-conscious policies since *Bakke*. In its holding, the Court likened the Michigan Law School's admissions program to the Harvard Plan,[689] which was endorsed by Justice Powell. The permissibility of the Michigan and Harvard plans, while they gave some attention to numbers were found "not to transform a flexible admissions system into rigid quotas."[690]

In the *Grutter v. Bollinger* decision, the Court affirmed and advanced Powell's rationale that student body diversity could be a compelling state interest justifying the use of race. The Court's reasoning rested in its (i.e., the Court) long tradition of deference, to a point, for a university's academic decisions, within constitutional[ly] prescribed limits." More specifically, the Court's reasoning was rooted in First Amendment academic freedom liberties that have been the hallowed hallmark which allows higher education multi-faceted autonomy to fulfill its

[687] *Grutter v. Bollinger*.
[688] Ibid.
[689] "While rejecting a quota system, Justice Powell endorsed an admissions program such as the one adopted by Harvard College, which states that race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." (*Grutter*) See also *Bakke*.
[690] Ibid.

missions. Among those liberties, the Court invoked "the freedom of the university to make its own judgements as to education [which] includes the selection of its student body."[691]

In *Grutter*, the Court held that the law school had a compelling interest in attaining a diverse student body. The Court found that the goal to obtain a "critical mass" of academically qualified and broadly diverse students was acceptable in light of the educational benefits that the diversity was designed to achieve. Cross-racial understanding, breaking down of racial stereotypes, and better understanding among people of different races were lauded as substantial educational benefits of the law school's admission policy that was aimed at obtaining a "critical mass." The policy was also held narrowly tailored to satisfy the strict scrutiny test in that it allowed consideration of individuals and used race in a flexible, nonmechanical way. The law school's admission policy allowed race to be considered as a "plus" factor without protecting the individual from comparison with other candidates for seats in the program. While the Court acknowledged that some attention to numbers was appropriate, such as tracking of the racial and ethnic composition of classes, the university's monitoring did not translate to an unconstitutional rigid quota system. "The importance of . . . individualized consideration in the context of a race-conscious admissions policy [wa]s paramount"[692] to the Court's holdings in *Grutter*.[693]

***Gratz v. Bollinger* - Race-Conscious Admissions Policy Violates Constitution.**

Certiorari was granted by the Supreme Court to determine whether the University of Michigan's undergraduate admission's policy violated the Equal Protection Clause of the Fourteenth Amendment or Title VI of the Civil Rights Act of 1964. By a 6-to-3 vote in the undergraduate admissions case, "the Supreme Court, [Chief] Justice Rehnquist, held that: (1) petitioners ha[d] standing to seek declaratory and injunctive relief; (2) [the] university's current

[691] Ibid.
[692] Ibid.

freshman admissions policy violated [the] Equal Protection Clause because its use of race was not narrowly tailored to achieve respondent's asserted compelling state interest in diversity; and that Title VI and § 1981 were also violated by the policy."[694] The shortcoming of the undergraduate adnissions policy was its failure to provide substantive individual consideration of each applicant when considering race among the diversity factors.

The Cross and the Crux - *Brown*'s Legacy and Burden

In Justice Ruth Bader Ginsburg's concurring opinion in *Grutter*, she reiterated the Court's recollection of the Michigan cases' lineage to *Bakke* and *Brown*. The lineage trace provided an affirmation for this study's illustrated connection between two of *Brown's* divergent progeny into school desegregation and race-concious areas of case law. Another conclusion of this study was also affirmed by the Court's decision in the two Michigan cases. That conclusion was that it is the facts the decide the case. In contrast to the affirmation of the use of race in the law school case, the undergraduate race-concious policy was found in constitutional violation.

At the heart of the Court's affirmation of the use of race in admissions, appeared to lie a kindred sentiment to that found in *Brown*. The important message was that inclusion in the mainstream of American life is a must for the United States. Michigan's "policy aspires to 'achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of it's parts.'"[695] Similarly, in *Brown*, the Court held that "segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive[d] the children of the minority group of educational opportunities."[696] Justice Ginsburg's concurring opinion did not neglect to

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[693] Ibid.
[694] *Gratz v. Bollinger.*
[695] Ibid.
[696] *Brown.*

acknowledge this country's everpresent legacy and burden of racial discrimination to which *Brown*'s spirit spoke. Justice Ginsburg wrote, "it is well-documented that conscious and unconsious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals."[697]

Eleanor Clift, Newsweek Magazine, provided an analogy for the ruling in the Michigan law school case. She likened the decision to an:

> "antitrust [decision] against the monopoly that whites have had in elite schools and other places. Maybe some day we won't need it [affirmative action] but Sandra Day O'Connor herself is there because of affirmative action. President Reagan wanted to have a woman on the Supreme Court. He only looked at women and if you ask her [Sandra Day O'Connor] if she got her position as a result of affirmative action, she will say "yes" without hesitation. Look at the people who weighed in on the side of affirmative action - the military service academies, the Fortune 500 companies, ..."[698]

Brown has served as a mirror for the culture of this nation. It is possible that Justice O'Connor's postulate that in twenty-five years race-conscious policies will not be needed. If Justice O'Connor's message is a prophetic one that comes to pass and race no longer matters, then we as a people will have accomplished that which was espoused in our 1776 Declaration of Independence. Such an accomplishment would serve the nation well as an example on how to solve prodigious issues, created over extensive durations, yet brought to successful ends. In this

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[697] *Grutter v. Bollinger.*

[698] Eleanor Clift, *Newsweek*, *The McLaughlin Hour*, June 28, 2003. In 1981, President Ronald Reagan appointed the first woman to the Court, Justice Sandra Day O'Connor, thereby fulfilling a presidential campaign promise to do so. Justice O'Connor graduated with honors from Stanford Law School in 1952. She was a California county attorney and private practice attorney in Arizona. Justice O'Connor was involved in Arizona Republican politics and served in that state's senate for six years and state judicial office for six years before moving onto the Supreme Court. Irons, *A People's History of the Supreme Court*, 464-465.

case, actualizing the ideal that all men are created equal in seventy-five years, after taking over 300 years to create real, systemic, and pervasive inequality.

It is interesting to note that the name "Brown" has been a notable marker in this research project, from the first United States Supreme Court decision in 1873 involving segregation litigation to the 2003 rulings by the Supreme Court. Perhaps, a future sign that closure has been drawn on racial discrimination, a fundamental bug-a-boo for this nation, will be seen under a common name—Brown.

Recommendations for Further Study

This research focused on a specific strand of school desegregation law that was defined by the litigation selected for review in the study.[699] On the subject of public school desegregation, different issues present wholly separate topics of inquiry unto themselves. The areas recommended for further study are seen as directly relevant to the school desegregation law examined in this study and their review would enhance overall knowledge of the subject.

Resegregation of Public Schools

Orfield's study, Schools More Separate: Consequences of a Decade of Resegregation, demonstrated that public schools became significantly more segregated during the 1990s. Significant gains to integrate African American students into mostly white public schools in the South between 1964 and 1988 markedly declined during the 1990s. Increasingly, African American students have been attending majority African American schools. The same pattern was found for Hispanic students. Wealthy suburban schools are usually white while poor, urban school districts tend to have African American and Hispanic student populations.[700] "The year 2004 will be the fiftieth anniversary of *Brown v. Board of Education*, and American schools will

[699] The specific strand examined in this study focused on K-12 American public schools.

mark that occasion with increasing racial segregation and gross inequality."[701] *Brown* declared separate schools inherently unequal.[702] Research into the contradictions between the contemporary profile of American public schools and *Brown*'s mandates is warranted and pertinent.

Stigmatic Injury

In the *Dowell* opinion, the justices lamented over their focus in *Brown* on stigmatic injury caused by segregated schools. Additionally, Justice Thurgood Marshall raised the point of stigmatic injury as the reason for continued efforts to desegregate schools in the interest of fully actualizing *Brown*'s intents.

"*Stigmatic injury*" was rooted in *Brown*'s recognition that racially separate schools caused harm to African American children. The issue of stigmatic injury has been used as reasoning to meet *Brown*'s mandate to end all vestiges of school segregation. In *Dowell*, the Court explained that the concept of stigma provided guidance as to what conditions had to be eliminated to make a determination on whether a remedial desegregation decree had fulfilled obligations for constitutional compliance. The majority opinion in *Dowell* declared that, since *Brown*, its jurisprudence had been guided by motives to remedy and avoid recurrence of stigmatizing injury. It was said that this standard was used to determine the effectiveness of proposed desegregation remedies.[703]

Vestiges of Segregation

In *Milliken I* and *Dowell*, Justice Thurgood Marshall argued that racially identifiable schools were vestiges of segregation. Justice Anton Scalia declared in *Freeman* that no

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[700] Erwin Chemerinsky, "The Segregation and Resegregation of American Public Education: The Court's Role," *North Carolina Law Review* (May 2003). Available on-line: www.westlaw.com Cite: 81 NCLR 1597.
[701] Ibid., 2.
[702] Ibid., 2.

determination had been made to recognize the condition of "vestige" or "remnant" of past discrimination. The declaration was made after Justice Scalia's finding that the sole question for school desegregation litigation was remedy for past violations.[704] The *Freeman* decision indicated that the vestiges of segregation might be subtle and intangible but that they are the concern of the law as long as they are real enough to have a link to *de jure* violations being remedied.[705] Examination of the "vestiges of segregation" or "vestiges of past discrimination" would enhance understanding of school desegregation case law given that: (1) the concept of vestiges lacked specificity; (2) the Supreme Court discussed the relativity of "vestiges" becoming more remote with the passage of time; and (3) subtle, intangible "vestiges" must be linked causally to *de jure* segregation.

Examination of Dissenting Opinions in Selected School Desegregation Litigation

While this study analyzed selected litigation, an inextricable interplay with historical data emerged throughout the research. A goal of historical research is to glean from past experiences that which may be applicable to present or future undertakings, thereby creating positive contributions. Although the majority opinions set forth legal precedent and served as the standard for proper adjudication, dissenting opinions, at times, provided the reasoning for future points of law that performed the same legal function years later. Past instances, such as, Justice John Marshall Harlan's dissent in *Plessy* and Justice William Rehnquist's dissent in *Keyes* exemplified the value of historical consideration of dissenting opinions. Thus, it would be prudent to examine dissents from Supreme Court decisions in school desegregation cases of the Contemporary Desegregation Era. The goal in examining dissents would be to identify possible future points of law or turning points for public school desegregation case law.

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[703] *Dowell.*
[704] *Freeman.*

School System Finance, Funding Formulas, and School Desegregation

As the twentieth century moved toward its close and the full realization of the goals and promises of *Brown* not only appeared elusive but regressing from earlier gains, the literature on *Brown* and school desegregation spoke to causality for considerations such as resegregation and lack of achievement for minority students, particularly African American and Hispanic students. The Contemporary Era Supreme Court decisions, altough different from school desegregation decisions in the first thirty-plus years, received extensive analysis and scrutiny in the literature. Increasingly, attention was devoted to the subject of school finance and funding policies and practices. Speaking on the inequalities of school funding mechanisms, Jonathan Kozol stated that:

> The nation is hardly 'indivisible' where education is concerned. It is at least two nations, quite methodically divided, with a fair amount of liberty for some, no liberty that justifies the word for others, and justice—in the sense of playing on a nearly even playing field—only for those kids whose parents can afford to purchase it.[706]

Often, the literature was found to link desegregation, resegregation, and school funding issues together. Framing the discussion on this issue, Chemerinsky stated that, "in a series of decisions in the 1970's, the [Supreme] Court ensured separate and unequal schools by preventing interdistrict remedies, refusing to find that inequities in school funding [we]re unconstitutional, and ma[de] it difficult to prove a constitutional violation in northern *de facto* segregated school systems."[707] Woven into the discourse on these linked issues were the *Brown* decision and its

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[705] Ibid.
[706] Jonathan Kozol, *Savage Inequalities: Children in America's Schools* (New York: Harper Collins Publishers, 1992), 212. See also Jonathan Kozol, *Savage Inequalities: Children in America's Schools* (New York: Harper Collins Publishers, 1992), 212, quoted in Quentin A. Palfrey, "The State Judiciary's Role in Fulfilling Brown's Promise," *Michigan Journal of Race and Law* (2002). Available on-line:www.westlaw.com Cite: 8MIJRL 1
[707] Chemerinsky, "The Segregation and Resegregation of American Public Education: The Courts' Role."

progeny and the Supreme Court decision in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973), which dealt the Texas state school finance system.

San Antonio v. Rodriguez was a class action suit brought on behalf of poor Mexican American students in the San Antonio Texas Independent School District. The litigation was based on allegations that poor families living in the district had low property taxes bases, which therefore favored the more affluent because the Texas system of financing schools relied on local property taxation. Fourteenth Amendment equal protection violations were alleged because of the differences in per pupil expenditures, between the more affluent and poorer communities, that were the result of revenues generated from higher assessed properties in the more affluent areas.[708] The questions the Court sought to answer were whether: (1) the Texas system of financing schools created a disadvantaged suspect class; and (2) an implicit or explicit fundamental constitutional right was involved that required the strict scrutiny standard of judgment.[709]

The Supreme Court ruled against the complaints and provided significant holdings in the opinion. In response to the argument that the poorer children were receiving a lesser education compared to the more affluent children, the Court held that the "Equal Protection Clause does not require absolute equality or precisely equal advantages,[710] based on reasoning that the quality of education cannot be absolutely determined by the amount of money spent." No violation of the Fourteenth Amendment equal protection clause was found.

On the question of whether the poor students constituted a suspect class; therefore entitling it to the strictest protection, the Court found that no suspect class existed. The finding

[708] *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973).
[709] Ibid.
[710] Ibid.

turned on the reasoning that no absolute definition of "poor" had been presented by the complainants. No discrimination was found against "any definable class of 'poor' people."[711]

On the issue of implicit or explicit fundamental constitutional right, the Court held that, "education . . .is not among the rights afforded explicit protection under the Federal Consitution. Nor do we find any basis for saying it is implicitly protected."[712] On this point, the Court cited language from *Brown* indicating that education is an important state and local function.

San Antonio was a strong and significant United States Supreme Court decision. Palfrey spoke specifically with his declaration that almost fifty years after *Brown* and almost thirty years after *San Antonio*[713], "American schools remain racially separate and radically unequal in both per pupil expenditures and student performance."[714] This research project was about *Brown* but the contributions of the *San Antonio v. Rodriguez* litigation and the Supreme Court's holdings in the case are important to the tenor of conversation in the Contemporary Desegregation Era and to comprehensive understanding of educational opportunities for economically disadvantaged students in general, which often translates to minority students in particular. "In other words, the existing patterns of income distribution and residential segregation make it almost impossible to disentangle the problems of race and poverty in American schools."[715]

Equal Educational Opportunities

The *Brown* decision decreed that segregation deprived minority children of equal educational opportunities. For many, "equal educational opportunities" embodied a goal of the *Brown* decision. While the term was frequently used, a comprehensive examination would enhance understanding another dimension of *Brown*.

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[711] Ibid.
[712] Ibid.
[713] Quentin A. Palfrey, "The State Judiciary's Role in Fulfilling Brown's Promise," *Michigan Journal of Race and Law* (2002). Available on-line:www.westlaw.com Cite: 8MIJRL 1

The Composition of the Supreme Court and Its Impact on American Jurisprudence

Throughout this study, the membership of the Unites States Supreme Court has significantly impacted American jurisprudence. That impact not only determines the form and substance of day-to-day life in this nation but indeed upon the course of history itself. The high Court is a powerful institution that exhibits its might in many ways. It alone decides what cases it will hear and sets direction and determines the parameters of authority for the lower courts. The United States Supreme Court establishes the constitutional and legal basis for the country's laws.

As demonstrated in *Brown* itself, the arrival of one man, Chief Justice Earl Warren, turned the tide and changed the direction forever the role of race in this country. So too, did Chief Justice William Rehnquist, although in the opposite direction from Earl Warren. Given the role the Court was observed to play during the whole of this study, subsequent inquiry into the justices that served on the Court and analysis to determine the justices that ruled on the individual cases studied would be beneficial to this research area.

[714] Ibid.
[715] Orfield and Eaton, *Dismantling Desegregation*, 56.

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Pasadena Board of Education v. Sprangler, 427 U.S. 424 (1976).

Paul Riddick Jr., et al. v. School Board of City of Norfolk et al., 479 U.S. 938 (1986).

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Roberts v. City of Boston, 5 Mass. 198 (1849).

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

School Board of Richmond v. State Board of Education, 412 U.S. 92 (1973).

Sipuel v. Board of Regents of University of Oklahoma, 332 U.S. 631 (1948).

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

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

United States v. Montgomery County Board of Education, 395 U.S. 225 (1969).

United States v. Swift and Company et. al., 286 U.S. 119 (1932).

APPENDIX

Litigation and Other Mandates Relevant to the Desegregation of American Public Schools

I. Segregated Schools

A. Segregated/Separate Schools Litigation

1. *Roberts v. City of Boston,* 5 Mass. 198 (1849).
2. *People ex rel. Workman v. Detroit Board of Education,* 18 Mich. 400 (1869).
3. *State ex rel. Garnes v. McCann,* 21 Ohio St. 198 (1871).
4. *Ward v. Flood,* 48 Cal. 36 (1874) .
5. *Cory v. Carter,* 48 Ind. 327 (1874).
6. *People ex rel. King v. Gallagher,* 93 N.Y. 438 (1883).
7. *Dawson v. Lee,* 83 Ky. 49 (1884).
8. *Lehew v. Brummell,* 15 S.W. 765 (1891).

B. Other Race-Based Cases

1. *Dred Scott v. Sandford,* 60 U.S. 393 (1856).
2. *Railroad Company v. Brown,* 84 U.S. 445 (1873).
3. *Civil Rights Cases,* 109 U.S. 3 (1883).

C. Civil War and Reconstruction

1. The Reconstruction Amendments
2. "Jim Crow" Laws
3. Black Codes

D. "Separate-But-Equal" Established

1. *Plessy v. Ferguson,* 167 U.S. 537 (1896).
2. Separate-but-Equal Reinforced
   (a) *Cummings v. Richmond County Board of Education,* 175 U.S. 528 (1899).
   (b) *Gong Lum v. Rice,* 275 U.S. 78 (1927).

II. Segregated Schools Found Unconstitutional

A. Pre-Brown v. Board of Education and the Higher Education Cases: Separate and Unequal Revealed

1. *Pearson v. Murray,* 182 A. 590 (Md. 1936).
2. *Missouri ex rel Gaines v. Canada,* 305 U.S. 337 (1938).
3. *Sipuel v. Board of Regents of University of Oklahoma,* 332 U.S. 631 (1948).
4. *Sweatt v. Painter,* 339 U.S. 629 (1950).
5. *McLaurin v. Oklahoma,* 339 U.S. 637 (1950).

B. ***Brown v. Board of Education,* 347 U.S. 483 (1954) (*Brown I*).**

C. **The Companion Cases**

1. *Brown v. Board of Education of Topeka, Shawnee County, County, Kansas et.al.,* 98 F. Supp.797 (1951).
2. *Davis et al., v. County School Board of Prince Edward County, VA. et.al.,* 103 F.Supp. 337 (1952).
3. *Briggs et.al., v. Elliott et.al,* 103 F. Supp. 920 (1952).
4. *Belton et al. & Bulah et al. v.Gebhart et al.,* 91 A.2d 137 (1952).
5. *Bolling et al. v. Sharpe et al.,* 74 S.Ct. 693 (1953).

D. ***Brown v. Board of Education,* 349 U.S. 294 (1955) (*Brown II*).**

E. **Massive Resistance**

1. *Briggs v. Elliott,* 132 F. Supp. 776 (1955).
2. *Cooper v. Aaron,* 358 U.S. 1 (1958).
3. *Griffin v. County School Board,* 377 U.S. 218 (1964).

III. Notable Contributors to the Termination of Segregation

A. Executive Order 8802 (June 1941) - President Franklin D. Roosevelt
(Equal employment opportunities in regard to defense contracts.)

B. Executive Order 9981 (July 1948) - President Harry S. Truman
(Desegregation of the United States armed services.)

C. Executive Order 10479 (1953) - President Dwight D. Eisenhower
(Established committee to receive discrimination complaints against government contractors but no enforcement authority.)

D. Executive Order 10925 (March 1961) - President John F. Kennedy
(Established committee on Equal Employment Opportunity; government contractors required to have nondiscriminatory clauses covering race, color, creed, and national origin.)

E. Executive Order 11246 (September 1965) - President Lyndon B. Johnson
(Federal contractors required to take affirmative action in hiring; sex and religion added to protected categories)

F. Civil Rights Act of 1964; Title VII of the Civil Rights Act of 1964

G. Voting Rights Act of 1965

IV. Public School (K-12) Desegregation Litigation

A. *Goss v. Board of Education,* 373 U.S. 683 (1963).

B. *Bradley v. School Board of Richmond,* 382 U.S. 103 (1965).

C. *Green v. County School Board,* 391 U.S. 430 (1968).

D. *Alexander v. Holmes,* 306 U.S. 19 (1969).

E. *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971).

F. *Keyes v. Denver School District No 1,* 413 U.S. 189 (1973).

G. *Pasadena Board of Education v. Sprangler,* 427 U.S. 424 (1976).

H. *Milliken v. Bradley,* 418 U.S 717 (1974) (*Milliken I*).

I. *Milliken v. Bradley,* 433 U.S. 267 (1977) (*Milliken II*).

J. *Riddick v. School Board of the City of Norfolk, Virginia,* 784 F.2d 521 (4th Cir. 1986).

K. *Board of Education of Oklahoma v. Dowell,* 498 U.S. 237 (1991).

L. *Freeman v. Pitts,* 503 U.S. 467 (1992).

M. *Missouri v. Jenkins,* 515 U.S. 70 (1995) *(Jenkins III*).

N. *Jenkins by Jenkins v. State of Missouri,* 122 F. 3d. 588 (8th Cir. 1997).

O. *Belk v. Charlotte-Mecklenburg Board of Education,* 233 F3d. (4th Cir. 2000).

P. *Belk v. Charlotte-Mecklenburg Board of Education,* 269 F.3d 305 (4th Cir. 2001).

Q. *Little Rock School District v. Pulaski County Special School District,* 237 F.Supp.2d 988, 173 Ed. Law Rep. 480 (E.D. Ark. Sep 13, 2002).

IV. Higher Education and Race-Conscious Litigation

A. *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978).

B. *U.S. v. Fordice,* 505 U.S. 717 (1992).

C. *Hopwood v. State of Texas,* 78 F. 3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996).

D. *Boston's Children First v. City of Boston*, 62 F. Supp.2d 247, (1st Cir.(MA) 1999).

E. *Tuttle v. Arlington County School Board*, 195 F.3d 698, (4th Cir. 1999), cert. Dismissed, 529 U.S. 1050 (2000).

F. *Eisenberg v. Montgomery County Public Schools*, 197 F. 3d 123 (4th Cir.), cert. denied, 529 U.S. 1019 (2000).

G. *Johnson v. University of Georgia*, 2001 WL 967756, 106 F. Supp. 2d 1362 (S.D. Ga. 2000).

H. *Hunter v. Regents of the University of California*, 190 F. 3d 1061 (9th Cir. 1999), cert. Denied, 121 S. Ct. 186 (2000).

I. *Smith v. University of Washington Law School*, 233 F. 3d 1188 (9th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3593 (U.S. May 29, 2001) (No. 00-1341).

J. *Gratz v. Bollinger*, 539 U.S. 244 (2003), 135 F. Supp.2d 790 (E.D. Mich. 2001).

K. *Grutter v. Bollinger*, 539 U.S. 306 (2003), 247 F. 3d 631 (6th Cir.) (2001).

VITA

LYNN T. BROWN
13525 Hamlet Square Court
Germantown, Maryland 20874
(301) 916-5518

EDUCATION

2004 Virginia Polytechnic Institute and State University
Dissertation: *Brown v. Board of Education* and School Desegregation: An Analysis of Selected Litigation

1982 Northeastern Illinois University
Educational Administrative and Supervisory Certification

1979 Northeastern Illinois University
Master of Arts in Special Education with emphasis in Learning Disabilities

1975 Northern Illinois University
Bachelor of Science in Communication Disorders with emphasis in Speech Pathology

CAREER ACHIEVEMENTS

As Coordinator of Accountability Initiatives:

Serves as assistant to the director and is responsible for the overall facilitation and coordination of day-to-day operations for the Office of Shared Accountability (OSA). The primary function of OSA is to provide information and analyses that support continuous improvement in the academic and operational services of the school system. Provides support to staff in the six different OSA units: (1) applied research (2) internal audit (3) policy and procedures (4) program evaluation (5) student testing, and (6) quality assurance and compliance, which includes central records management. Responsible for development and regular monitoring of the OSA budget. Responsible for review of reports, including program evaluation, that becomes official school system reporting documents.

As Human Resources Specialist:

Responsible for recruitment, interviewing, processing and contracting of professional personnel. Areas of staffing responsibilities included early childhood, elementary, English for Speakers of Other Languages (ESOL), general and instrumental music, reading specialist, physical education, health education, and athletic directors. Lead panel interviews for promotional positions including principalships, Title 1 instructional specialists, directors, and others. Served as human resources' liaison for Montgomery County Public Schools' university partnerships in ESOL with George Washington University and Trinity College and for elementary educators with Johns Hopkins University. Conducted investigations of contracted and substitute teachers. Initiated forms and processes to improve human resources' work functions that included Creditable Experience Information form, On-Site Recruitment form, revisions to Teacher Interview form, revised Budgeted Position Professional/Support Transaction Sheet, and others.

As Supervisor of Special Education:

Supervised and evaluated special education teachers. Responsible for programs and services primarily at the middle and high school levels. Participated on the Educational Specifications Planning Committee for a new middle school. Participated on the Graduation Requirements Committee for exit criteria from Maryland High Schools. Worked with non-public, juvenile rehabilitation, vocational training programs, and adult services for the disabled. Participated in out-of-state consortium teacher recruitment.

Developed and implemented Transition Services model for students with disabilities. Received recognition from the Maryland State Department of Education for transition model. Redesigned and implemented a monitoring and consultation model of inclusion services for students with disabilities in regular education classes. Developed, implemented, and monitored inclusion/mainstream programs for students with disabilities. Responsible for on-going staff development and training.

As Client Advocate:

Researched and prepared cases for presentation to staff attorneys for adjudication or other appropriate disposition. Acted to mediate and resolve disputes involving disabled persons. Worked to secure services for clients. Caseload issues included, but were not limited to, special education, accessibility, discrimination in employment and housing, and the overall provision of services to persons with disabilities. Client population included the mentally ill and students and adults with disabilities.

As Principal:

Responsible for management and supervision of professional and support personnel. Developed curriculum guides appropriate to the population serviced. Designed and implemented instructional programs. Conducted staff training programs. Developed parent support group. Organized teacher resource materials center.

Developed and presented annual operating budget. Served on collective bargaining team for management. Developed school operational procedures and participated in policy development at the organizational level. Secured supplement grant funding from independent foundations to provide school improvements. Served on various pilot teams, projects, and community outreach activities. Secured services for students from community health providers, state and local social service agencies.

As Speech Therapist, Classroom Teacher, and Learning Disabilities Resource Teacher:

Provided instruction to students, aged 3 through 21 years, with a wide range of disabilities.

EMPLOYMENT CHRONOLOGY

2003 - Present	Coordinator of Accountability Initiatives, Office of Shared Accountability Montgomery County Public Schools Rockville, Maryland
2002 - 2003	Human Resources Specialist Montgomery County Public Schools Rockville, Maryland
2001 - 2002	Professional leave from Montgomery County Public Schools for doctoral degree requirements
1993 - 2001	Human Resources Specialist Montgomery County Public Schools Rockville, Maryland
1988 - 1993	Supervisor of Special Education Charles County Public Schools LaPlata, Maryland
1987 - 1988	Client Advocate Commonwealth of Virginia – Department for Rights of the Disabled Falls Church, Virginia
1987 - 1987	Learning Disabilities Resource Teacher, Blair Middle School Norfolk Public Schools Norfolk, Virginia
1979 - 1986	Principal, Austin Special School Chicago, Illinois
1978 - 1979	Speech Therapist, Austin Special School Chicago, Illinois
1975 - 1978	Speech Therapist and Classroom Teacher, McKinley Developmental School Chicago, Illinois

SELECTED PRESENTATIONS

Brown v. Board of Education and School Desegregation: The Chronicle, The Cross, and The Crux
Human Resources and Affirmative Action
Diversity and Blended Cultures
Multicultural Education and Teaching Strategies: Multiple Intelligences
Secondary Special Education: Rural Transition Programming
Speech Pathology for Classroom Teachers

SELECTED ADDITIONAL PROFESSIONAL TRAINING

Re-segregation and Affirmative Action
Budget Development for Supervisors
Special Education Law
One Minute Manager Training Seminar
Coaching and Counseling the Problem Employee
Management Development
Leadership Effectiveness Training
John Marshall Law School – Law Program for Community Developers and Social Workers

SELECTED VOLUNTEER AFFILIATIONS

Johns Hopkins University Transition Services Advisory Board, Baltimore, Maryland
Benefits Resource Network Advisory Council, Baltimore, Maryland
Board of Directors for Handicapped and Retarded Citizens, Inc., Waldorf, Maryland
School Board Member for St. Catherine & St. Lucy School, Oak Park, Illinois
Chicago Board of Education – Educational Diagnostic Services Center North Advisory Council, Chicago, Illinois