

## ROUNDTABLE DISCUSSION

### KNIGHTS AT THE ROUNDTABLE: PANEL REFLECTIONS AND DISCOURSE ON *BROWN I* AND *BROWN II*

#### **Moderator:**

- Dr. Raymond Arsenault, John Hope Franklin Professor of Southern History, University of South Florida.

#### **Panelists:**

- Dr. Jack Bass, Professor of Humanities and Social Sciences, College of Charleston.
- Robert Belton, Professor of Law, Vanderbilt University Law School.
- Dr. John Hope Franklin, James B. Duke Professor Emeritus of History, Duke University.
- Eugene C. Patterson, Editor Emeritus, *St. Petersburg Times*, Former Editor, *The Atlanta Constitution*.
- Dr. James T. Patterson, Professor of History Emeritus, Brown University.
- John Seigenthaler, Founder, The Freedom Forum First Amendment Center, Vanderbilt University.
- Theodore M. Shaw, Director–Counsel and President, NAACP Legal Defense and Education Fund.

**PROFESSOR ARSENAULT:** I would like to welcome all of you to Part 2 of our Symposium. I guess we could call it “*Brown II*,” but that might confuse things.

This is the roundtable section of the day’s proceedings. I guess these are the knights of the roundtable here, or maybe the “usual suspects” might be another way of describing them.

I am very much looking forward to this afternoon and a chance for a more casual discourse among these remarkable panelists. I hope you agree. I don’t know that we’ll ever see anything

quite like this again in Pinellas County—or maybe anywhere else—but I hope we will. It has been an honor and a privilege to be here today—to hear both the historical artifacts<sup>1</sup> and the historians and legal scholars talk about *Brown*.<sup>2</sup>

We imagined this roundtable as not so much a free-for-all as an open discussion, and I'm going to encourage the panelists to jump in at any time. We don't anticipate that every panelist will jump in on every question.

There are so many questions that we can focus on today. The first one that I want to put to the panel is something brought up by Jim Patterson in his remarks,<sup>3</sup> something I think we often forget. While *Brown v. Board* created an opening for a broader desegregation that involved, ultimately, public accommodations and the whole span of human activity, it began with a tight focus on the schools. That was the strategy of the NAACP Legal Defense Fund for many, many years.

I wonder, thinking about it with fifty years of perspective, knowing what we now know, was it a good idea to begin with desegregation of the public schools? Thurgood Marshall and Charles Houston and the others who brainstormed this strategy in the late 1930s certainly thought so. But, would history have been significantly different—would it have been better, less complicated—if the attack on Jim Crow had begun with public accommodations or transit or voting rights or something else?

**PROFESSOR JAMES PATTERSON:** That's a good question. There's a law professor in Virginia named Michael Klarman, who is just coming out with a wonderful book called *From Jim Crow to Civil Rights*.<sup>4</sup> He wrote an article in the most important journal of American historians, called *The Journal of American History*—in 1994, I think it was—which influenced me a lot on this question.<sup>5</sup>

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1. Earlier in the day, Dr. John Hope Franklin referred to himself as “an artifact” when he began his talk.

2. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), *supplemented*, 349 U.S. 294 (1955). Scholars often use the term “*Brown I*” when referring to the 1954 decision and “*Brown II*” when referring to the 1955 decision.

3. James T. Patterson, *Brown v. Bd. of Educ. and the Civil Rights Movement*, 34 *Stetson L. Rev.* 413 (2005).

4. Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford U. Press 2004).

5. Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*,

In the article, he explores what he calls the “backlash thesis.” And the backlash thesis, which he was moderately sympathetic with, at least sympathetic enough to write an article about it—I think he’s backed off of that a little bit—starts with the idea that in the late 1940s and early 1950s there were ongoing efforts in other areas of civil rights activity, such as voting rights. Indeed, in 1944, the Supreme Court, in *Smith versus Allwright*,<sup>6</sup> had ruled against white primaries. Of course, the white South had figured out a way around that.

But there was a history of litigation involving an activism—by Dr. Medgar Evers<sup>7</sup> and others—for voting rights in the 1940s and earlier. There were ongoing efforts for desegregating transportation. Baton Rouge, for instance, did what Montgomery tried to do earlier in the 1950s. There were efforts being made for public accommodations. And the argument of Klarman was that these ongoing things were easier to accomplish—less sensitive.<sup>8</sup> And, indeed, when the Civil Rights Act of 1964 was passed, it turned out that these were much simpler to accomplish. Not perfectly, of course. But progress was much more rapid in these areas—particularly after the Voting Rights Act in 1965—than it ever was in school desegregation, which was, of course, linked. And hence this argument: Why didn’t you start with something that was easier?

The backlash argument goes on to say—hence the term “backlash”—that when the Court enunciated *Brown*, it so infuriated Southern whites—and you mentioned this, Mr. Patterson, Gene—about how difficult it was for Southern governors, because they were dealing with a very popular opinion in the South among whites with regard to schools. Would it not have been easier to have avoided this backlash, which this argument suggests, by slowing down these ongoing efforts? You might have had a different civil rights history, according to some of these people, in which by sometime in the late 1950s or early 1960s, communities

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81 *J. Am. History* 81 (1994).

6. 321 U.S. 649, 661-664 (1944).

7. Medgar Evers was a field secretary for the NAACP who was known for leading sit-ins. He was shot and murdered in front of his family. Robert Mann, *The Walls of Jericho: Lyndon Johnson, Hubert Humphrey, Richard Russell, and the Struggle for Civil Rights* (Harcourt Brace & Co. 1996).

8. Klarman, *supra* n. 5, at 117-118.

and states in some areas—perhaps the upper South—would have moved against desegregation in transportation, in voting. Indeed, in some places—in Tennessee and others—it already was happening in the case of voting, and in public accommodations. So why start with schools?

Well, there were two reasons. First of all, it started way back in the 1930s with the universities and particularly with the law schools, because Marshall understood that judges, having gone to law schools, knew what a good law school was. This was very important. This was, in fact, specifically pointed out by the Court in the *Sweatt versus Painter*<sup>9</sup> case in 1950.<sup>10</sup> Thurgood Marshall absolutely understood that judges would understand this. So they started with higher education and moved down the ladder.

Second, schools and public universities are public institutions. According to the law, it was much harder to go after private segregation even though it involved many public accommodations—hotels, motels, restaurants, whatever.

So, for those reasons, they went the education route. And I think, if you look back on it, they didn't have a whole lot of choice. It made sense. It just looked later as if it might have been the wrong decision in the 1950s.

One final thing. I don't entirely buy the backlash thesis myself, because it seems to me that the Southern white opposition at virtually all efforts of desegregation was quite intense. Worse, yes, against schools than other areas. But still very strong. And I'm doubtful that, without a direct action, the civil rights movement—such as Martin Luther King and others encouraged—would have come crashing as soon as it did.

**MR. SHAW:** Well, I agree with your response, I guess, to Klarman's arguments. I've never thought that the term "backlash" holds a lot of meaning. I think it's been observed that it's just "frontlash." And I think that's right. But, I would add two things.

One is that the litigation that occurred before *Brown* and the activism didn't run across the board. In 1917 there was a Supreme Court case that attacked segregation by municipal ordi-

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9. 339 U.S. 629 (1950).

10. *Id.*

nance in Kentucky which prohibited black folk from living in certain parts of town. That was *Buchanan versus Warley*.<sup>11</sup>

And I think it's important to remember that, by the 1940s, this nation would not even pass an anti-lynching law. That was the context of the times. And there was litigation that led to the Supreme Court's decision in 1948, which struck down racially restrictive covenants.<sup>12</sup> There was all kinds of litigation going on, although it made sense for a number of reasons to focus on public education.

For one thing, if one really wanted to challenge systemic segregation and discrimination and the notion of separate but equal, look at the places where the government would have to spend significant amounts of money to make separate but equal actually equal, and try to force it to do that. That was the strategy which undermined separate but equal, even before the frontal attack was made—as John Hope Franklin talked about earlier—to challenge segregation on its face. That made the most sense in education.

The other thing is, I think, that there is an argument that, when we talk about children—at least in theory—there should have been more sympathy for children, even if they were black, than there might have been for adults. I never quite understood why we make that distinction or those distinctions the way we do in our society. I mean, I like children just as much as the next person. But, we kind of draw distinctions in which we are willing to suffer more damage to adults than we are to children, even when adults need protection. I think that might have been part of the thinking, but I think it was more the handle that public education provided.

Also, keep in mind that the school desegregation cases grew out of the salary equalization cases in the South, when in the late 1930s and early 1940s Charles Houston and his assistant, Thurgood Marshall, traveled throughout the South and documented inequality in teachers' salaries and also the conditions in public schools. It was an obvious target, and it was the right target. It is easy for academics—and it's their job, I suppose—to sit back and

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11. 245 U.S. 60, 70–71 (1917) (describing the ordinance and its reach to “residences, places of abode, or places of public assembly”).

12. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1947).

second-guess these decisions. But I think that it's an academic exercise.

**PROFESSOR FRANKLIN:** So many people have suggested that—or implied that—this is a kind of sickness; the whole segregation thrust is a kind of sickness. I don't think there's an order in which you can treat the sickness; you just have to plunge in and treat it in whatever way you can and as specifically as you can.

I remember so well the impression I got in 1943 when I was teaching summer school at Alabama State College. I grew up in a segregated society. I have seen segregation in every conceivable form. When I was in Montgomery—this was a decade before Martin Luther King even went there—I went down to the liquor store to get something. And I saw what I regard as the ultimate in segregation, which was a line going down the middle of the counter where blacks went on one side and whites on another to order their liquor. A black person ordered the liquor on one side, but he couldn't see the people who ordered the liquor on the other side. There was just a board keeping them apart. Just a board separating them. This was the sickest sort of thing I had ever seen; we were both buying liquor, buying it from a state store, buying it from the same clerk, and the only difference was that they couldn't see me as I was standing there at the counter on one side of the table and they were on the other side. I couldn't see them and they couldn't see me.

I'm saying all that to say that if you've got a society that has this kind of sickness—or whatever you call it—I don't think there's a way that you can say, "Well, I'll treat it—I'll treat it this way and not this way, because this way might hurt somebody or hurt something, or this won't be as painful."

This is a painful situation when you've got this kind of sickness. I just don't believe you can say, "Well, this is the way to approach it. It will be all right this way. But we must not approach it that other way because it won't be all right." I think whatever you can do to turn that society around, turn it over, turn it whatever kind of way, you should do it. I just don't believe that you can sit down at that point and say, "This approach is better than another approach." You have to attack this head-on in whatever way you can.

And, finally, there were people who were very critical of Marshall's decision to go after the schools. I remember so well one woman, a black woman journalist, who ran a column regularly in the *Pittsburgh Courier* in which she attacked the whole approach of trying to do something about segregated schools. She said, "That's terrible. It won't work. You have to do something else." She wasn't nearly as constructive about what you should do as she was about what you shouldn't do.

But I think that this was a considered judgment on the part of Marshall and his colleagues. It was about as good, I think, as any other approach. I'm not sure what would have worked. I'm still not sure what will work. But that was a considered judgment, and I think it as wise at that time as any other.

**PROFESSOR BASS:** I want to add that the earlier cases focused on higher education. There was a series of them, but they were all decided by the Supreme Court under "separate but equal"<sup>13</sup> in terms of the facilities, or the circumstances, that involved a lack of equality. The test of *Sweatt versus Painter* was that the University of Texas law student chose that school by intangible qualities, and that the newly created law school for black students was not the equal of the University of Texas Law School based on those intangible qualities, including its reputation, its library, where its graduates worked, their influence, and so forth.

It seems to me that it was really a natural progression to the public schools, particularly since they wanted to attack the whole concept of separate but equal. That equalization was going to be much more costly would be one key factor in the strategy.

But the other thing I want to add is—and I hope John Hope will talk about this a little bit, because I've heard him in the past—about when Thurgood Marshall came to Clarendon County and what his objective was there.<sup>14</sup> He met with those people. "Those people," meaning the plaintiffs.<sup>15</sup> Just ordinary citizens.

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13. *Plessy v. Ferguson*, 163 U.S. 537 (1896), overruled, *Brown*, 347 U.S. 483.

14. Thurgood Marshall came to Clarendon County, South Carolina to join in the efforts of Reverend Arthur DeLaine, Levi Peterson, and others to reform African-American education. James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* 24 (Oxford University Press 2001).

15. *Briggs v. Elliott*, 103 F. Supp. 920 (E.D.S.C. 1952), *rev'd sub nom.*, *Brown* 347 U.S. 483.

**PROFESSOR BELTON:** Let me make a couple of observations.

One, I do think that in thinking about the backlash thesis we have to make a distinction between the theoretical and the practical. I wear those hats at different times when I think about it. Because in thinking about public interest litigation—and you could put *Brown versus Board of Education* under that label—there's a whole series of practical questions that one has to think about. One is "Should I attempt to change the law with this set of facts? What happens if the case is lost? What's the process of selecting the plaintiff to go with?" Because there were a lot of cases to choose from along that line. As a theoretician—and I think theory is very good sometimes—we don't have to think about those questions.

Now, I base this on my own experience, because about two months after I started with the Legal Defense Fund in 1965, I was given the responsibility of conducting their nationwide litigation campaign for the enforcement of employment litigation law. I thought about some of these questions that were just raised. And the question arose when we lost *Griggs versus Duke Power*.<sup>16</sup> We had a number of cases with facts that were somewhat better than those facts in *Griggs versus Duke Power*. We had other cases that raised other interesting issues. And the question was: which of these cases were we going to push with the resources we had?

We ultimately got a bad decision from the court of appeals in *Griggs versus Duke Power*, and the question there was whether you take this case to the Supreme Court. There were some very smart people who had written Jack Greenberg—who was then the Director—Counsel of the Legal Defense Fund—urging Jack not to take that case to the Supreme Court. And I was maybe the lone person out there pushing Jack to go ahead and move the case and take it to the Supreme Court. Some of the arguments that were made to Jack were: bad facts, wrong case, don't have a full record, and there are better cases in the pipeline.

I will submit to you that some of the same kinds of considerations entered into the decision by the Fund in the first instance, to go with the particular cases that they had.

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16. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).



The other problem, and I will just allude to this, but I do think public-interest voices like the Legal Defense Fund sometimes walk a very tight ethical tightrope. I'll use the example I just gave to illustrate the problem. One of the obligations a lawyer has is to represent the interests of the client zealously, and when a civil rights firm has a bunch of cases out there and you sort of churn the cases and move on, it does make you walk sometimes a very difficult ethical line.

**PROFESSOR FRANKLIN:** Let me just comment on what Jack Bass said. And that is that I have a feeling, if Thurgood and his staff had not been inclined to tackle the problem of public education, a few trips to South Carolina and to other places in the South would have persuaded them that that had to be the next step.

Jack was quite right in pointing out that we already had behind us the *Gaines*<sup>17</sup> case, the *Murray*<sup>18</sup> case, *Sweatt v. Painter*, and other cases—the *McLaurin*<sup>19</sup> case, the *Sipuel*<sup>20</sup> case. The cases that had to do with higher education were behind us. And the courts were taking these steps, some not very good, some halting, some missteps. But they were moving toward some kind of resolution of the problem in higher education. But if they hadn't done that, I think a few trips to South Carolina and other places in the South would have convinced them. I remember so well talking to both Thurgood Marshall and Connie Motley about this, having gone down south and talking with Reverend DeLaine,<sup>21</sup> and having seen how desperate he and his colleagues were to get something done about the schools, and having seen the difference in the schools, and having realized that, if they didn't do something about these schools, we were going to lose another generation of black kids that grew up in abject ignorance, to say nothing

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17. *Mo. ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

18. *Pearson v. Murray*, 182 A. 590 (Md. 1936).

19. *McLaurin v. Okla. St. Regents for Higher Educ.*, 339 U.S. 637 (1950).

20. *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948).

21. Reverend Albert Joseph DeLaine grew up in Clarendon County, South Carolina. He eventually became a teacher in Clarendon County and grew upset at the fact that his children who attended black schools in the county did not have school buses to take them to school. As a result of his distaste for the way African-Americans were being treated, he worked to put together a lawsuit aimed at achieving educational equality between blacks and whites. His efforts eventually culminated in the filing of *Briggs v. Elliott*, one of the five lawsuits that were a part of *Brown v. Board of Education*, *supra* n. 14, at 23–24.

of poverty. And I think that persuaded Thurgood as much as anything else—if he needed persuading—that he had to go forward with this case, to do something about education—public education—of these children. And he saw not only how poor their education was, but how desperate the parents were for their children to get some kind of education. And what Reverend Delaine and the others were going through—being humiliated, being threatened, and finally being run out of town, their homes being burned, that sort of thing—this became an urgent matter. They didn't sit down in New York and say, "Well, now, what should we do? We should do this." It was so urgent, I think, that the answer was there, and they couldn't do anything else than to do what they did.

**MR. EUGENE PATTERSON:** This audience is learned in the law, and you will appreciate the comment that Federal District Judge Horace Ward made in my presence. Horace Ward was a name on the front page of the Southern newspapers for years—for the better part of a decade. He spent time trying to get into the University of Georgia Law School. Each year the university had ways of finding he was totally unqualified. Finally, he gave up. He went to Northwestern and graduated. Now he's on the federal bench. "I spent ten years trying to get into one law school" he said, "and three years trying to get out of another."

The decision to proceed as Thurgood Marshall did with schools, I thought, was a mistake when it first happened back in the 1950s. I said, "This is a mistake, because we've got to persuade a white majority in the South to change itself. We are striking at the most emotional chord in any family; that's its children. This is sure to cause a great resistance to the Supreme Court ruling."

Looking back, I was wrong. Because history shows proceeding through the schools presented not only a chance to save a generation of black kids, as John Hope said—and that's pretty important—but it also struck the South, the poor South, the white South, where it was most vulnerable. They were faced with having to shut down the schools that educated their children or else desegregate. They couldn't duck that. And, of course, as you know, we had all kinds of segregation academies founded by

churches all over the South, and they just didn't work very well.<sup>22</sup> Finally, the hard decision of obeying the Supreme Court and desegregating the schools for all races had to be faced or else give up the education of our children, who were the most precious things we had.

So I think in many ways the NAACP tied the South—the white South—in knots by proceeding through the most emotional path that presented itself, which was the education of the children of both races. I think it was good thinking on their part.

**PROFESSOR JAMES PATTERSON:** Just two quick comments.

Marshall not only had to make the decision to go after schools, he had to make the decision to go after segregation. And this was, as John Hope knows, a considered decision. This wasn't something that was based solely upon his awareness of what DeLaine and the people in South Carolina were doing.<sup>23</sup> There was a lot of opposition within the NAACP and black leaders in the South, many of whom were school teachers, to the decision to go after segregation. What many of them wanted was to continue the path they were on since the 1930s of making the "equal" part of "separate but equal" reality. And, when they decided to go after segregation itself, there were a lot of unhappy people—some of whom recognized that they would lose their jobs if, in fact, they had a unitary system. Many of whom did lose their jobs. It wasn't just a selfish thing; there were a lot of black people who weren't necessarily sure they wanted to send their kids to schools with white kids. So, it was a difficult decision for many of these people.

The second thing is, yes, it's true that striking at schools would prevent another generation of kids from having a lousy education. But, of course and unfortunately, that's what did happen.

**PROFESSOR ARSENAULT:** Before we turn to the next question, I want to throw another wrinkle into this for your consideration. Mr. Klarman's thesis—the backlash thesis—has been a

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22. "Segregation academies" were Southern, private, white-only schools created in an effort to provide an alternative to desegregated public schools. Jeffrey A. Raffle, *Historical Dictionary of School Segregation and Desegregation* 235–236 (Greenwood Press 1998).

23. See *supra* n. 21 and accompanying text (describing Rev. DeLaine's activities).

troubling thing for historians to deal with. I'm working on a book on the Freedom Riders,<sup>24</sup> and I make an argument that there's an ironic twist to this, that if you look at the first *Brown* decision, school desegregation was a failure for a number of years. That failure forced the civil rights movement, the freedom struggle, to reconsider its tactics.

The notion that the Supreme Court was somehow going to deliver equality was dead by the time of the Greensboro sit-ins and Freedom Rides. In other words, it was the failure of school desegregation—the failure of school reform—that intensified the movement. Essentially, it forced the people out into the streets. Without the frustration of the post-*Brown* era, you would not have gotten the same level of direct action and nonviolent struggle that emerged in the early 1960s.

In some ways, the white segregationists did the movement a favor by forcing it to create a movement culture. At the very least, the timing would have been different. So, I think there are ironies within ironies here that we need to consider.

The second question I'd like to pose to the panel has to do with the notion of contingency. This is a hot topic among historians now, the notion of contingent events. For many years we were, I think, very much in love with historical inevitability, an irrepressible development in history, the notion that social forces were driving history and that individual human beings were essentially along for the ride. But, in recent years, we have come to emphasize historical agency, even among oppressed peoples, even people who seemed to be reacting to the powerful and privileged parts of society.

If we look at the *Brown* decision in terms of contingent events, there are at least two important developments worthy of our attention.

The first one is the death of Fred Vinson and the accession of a new Supreme Court Chief Justice at a critical time.

And the other one is the one just alluded to—the decision by the NAACP Legal Defense Fund to abandon the search for equal

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24. Raymond O. Arsenault, *Freedom Riders* (Oxford U. Press forthcoming 2005). See also Raymond O. Arsenault, *You Don't Have to Ride Jim Crow*, 34 Stetson L. Rev. 343 (2005) (excerpting a portion of Dr. Arsenault's forthcoming book).

treatment and attack *Plessy* itself, the separate but equal doctrine that had been in effect since 1896.

Those are two things that didn't have to happen. Certainly Vinson could have lived on, and Marshall and the others could have made a different decision.

It's sometimes dangerous to play these counter-factual games. What if Napoleon had a B-52 at Waterloo? Obviously, it would have been different. But, I think it can be instructive to think about the implications of choices and contingent events that seem to alter the historical equation.

**PROFESSOR JAMES PATTERSON:** Can I get in a famous line which you've all heard? When Vinson died suddenly and unexpectedly—he was not a very old man—in September of 1953, all the justices went out to Kentucky, where he was from, for his funeral. And the story is told that Felix Frankfurter, one of the justices, turned to a clerk at the funeral and said, "This is the first indication I have ever had that there is a God." This gave you a sense as to how divided that Court was under Vinson, and how Vinson himself really had not exercised any forceful or successful leadership.

The Court was deeply divided on a lot of issues. Warren made a huge difference. I'll let others talk about what sort of a man he was. You probably know that he was extraordinarily good with people.

You know, nowadays we always appoint judges to the Supreme Court. Warren had never been a judge. He was an attorney general, a governor, a politician, and he was used to working with people and forging compromises. And he had a good personality. And within a remarkably very short time, some very strong personalities came around to his side. He felt that it was vital that the *Brown* decision be unanimous.

When I say this, it may seem to a lot of people, well, so what? Eight to one or seven to two. He knew it was such a vital and controversial thing that anything short of unanimity might be dangerous. And he succeeded in getting that done.

**PROFESSOR BASS:** I want to speak a little bit on the value of oral history. I was actually practicing it before anyone else, because I didn't know any better. But I interviewed Herbert Brownell on a couple of occasions. Herbert Brownell was Thomas

Dewey's law partner and campaign manager in 1948, and he was Eisenhower's campaign manager in 1952.<sup>25</sup> The 1952 convention was very contested and publicly contentious, primarily between Eisenhower and Senator Robert Taft of Ohio. But Earl Warren was actually also seeking the nomination for a brief period of time. But he pulled out and supported Eisenhower and campaigned actively for him. Brownell became Attorney General, and in the transition period he helped organize the new administration.

And at one point—this is a story Brownell told me—Eisenhower at one point late in the process said, “We haven't done anything for Earl Warren.” So, they were thinking maybe a Cabinet position, Secretary of the Interior, something like that.

So, Brownell made a quiet trip to California and met with Earl Warren. Warren said, well, he really wasn't interested in a Cabinet position. He said he would like a Supreme Court appointment. And Brownell said, “Well, that sounds reasonable.” He brought that back to Eisenhower, and he and Brownell concluded that what they should do was make Warren Solicitor General and get him back into the practice of law a little bit and into the process in an important position.

And then, for Queen Elizabeth's coronation, they asked Warren to go represent the President. He was on the liner crossing the Atlantic Ocean when Fred Vinson died. After Warren returned and Vinson had died, Eisenhower asked Brownell, “You don't think he meant Chief Justice, do you?” And Brownell said, “I don't know.” So this time he made a secret trip to California and asked Warren about that. And Warren said, “First vacancy is first vacancy.” So, Brownell returned to Washington and told that to President Eisenhower. And he shrugged his shoulders and said, “Well, okay.”

So history, more often than not, happens sometimes in politics in the unexpected and ironic.

**PROFESSOR ARSENAULT:** Any others want to comment on Earl Warren? Or about the decision to go after *Plessy* itself? Do you think anybody can imagine the scenario if they had not made

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25. Jack Bass, *Taming the Storm: The Life and Times of Judge Frank M. Johnson, Jr., and the South's Fight over Civil Rights* 78, 81 (Doubleday 1993).

the decision? If Marshall hadn't lost his temper in the story that John Hope told this morning, about the Kentucky case? Anybody think it could have been different? Significantly different?

**PROFESSOR BASS:** Let me just go back to one small thing. Charles Houston wrote a column on a regular basis for *Crisis Magazine of the NAACP*. There's a 1935 column that I happened to have seen at some point in the last few years in which he talked about how the long-range strategy was aimed at both separate and equal. Both components. But, with the legal strategy, you had to go one step at a time. Most of you lawyers understand that. You build an initial case and then build on that case. But that had been in his mind, you know, a couple of decades earlier.

**PROFESSOR ARSENAULT:** Anybody else? John Hope?

**PROFESSOR FRANKLIN:** I was going to say that Marshall was greatly influenced by Houston. Houston was, I think, one of the first to make the decision to go after the segregation problem and not to bother with the separate but equal doctrine. He had seen a lot of this himself. He had seen many of problems with education, about the evasion of equality and so forth. He had come to the conclusion that separate but equal wouldn't do it. That wouldn't do it. And they couldn't be satisfied just settling with *Plessy*, hoping they could get some kind of enforcement for equality. What they needed to do was get *Plessy* overturned. He was certain of that, I think. At least Houston had reached that conclusion. And to the extent to which that influenced Marshall, I cannot say. I know that they were closely associated and Marshall probably was influenced by it. Houston was sort of a tutor and a mentor.

But I think that the decision not to bother with equality—separate equality—but to go after the real goal of complete equality, well, the only way you can have it is if it stays together. That was a decision which Marshall reached. And it was not a terribly popular decision.

I hear people talking a good deal today about the possibility of losing jobs. I'm not certain how many black schoolteachers feared that they would lose their jobs. That's the kind of thing that began eventually, after the decision and after the elimination of the separate schools. There were some other factors, such as the skimming off of the best trained and most effective black

teachers into the so-called white schools. That's a story—an interesting one—that has not been explored to any great extent.

But one of the problems was that if you're going to have integration—integrated schools—you could still be effective in having them unequal by taking the best black teachers and putting them in the so-called white schools. There was a good deal of that going on, too. And that weakened the schools even more. And it made the observers of the period—those who believed in equal schools—more determined than ever to do something about equalizing the opportunities, spreading the talent in all schools, and making certain that the best black teachers didn't merely go to the white schools. That's another way of evading the whole problem. And it was sort of a last-ditch effort to keep the schools that were predominantly black weak by taking their best teachers away from them.

**PROFESSOR JAMES PATTERSON:** The decision by the NAACP to attack segregation directly was made remarkably soon after the Court decided the *Sweatt* and *McLaurin* cases in June of 1950. I haven't done the research on this; maybe others know about this. But my sense is that really encouraged them to think that they could take the next step. Because there really hadn't been many higher education cases, but these two were the most important ones for many years.

The second thing is that this was a gutsy thing. Because, you will recall, when the Court first heard the *Brown* cases—of which there were five<sup>26</sup>—the arguments were in December of 1952. And at that time it was estimated that the Court might very well divide with four justices for overturning *Plessy*, three against, and two undecided. And Frankfurter, recognizing this, was among the people on the Court who suggested that the case be argued again the next December. During this time, John Hope and C. Vann Woodward and others were brought on to do historical research, as John Hope mentioned before. Oral arguments were held an-

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26. *Bolling v. Sharpe*, 347 U.S. 497 (1954), supplemented *sub nom. Brown*, 349 U.S. 294 (district court opinion not published); *Briggs v. Elliott*, 103 F. Supp. 920 (E.D.S.C. 1952), *rev'd sub nom. Brown*, 349 U.S. 294; *Brown v. Bd. of Educ. of Topeka*, 98 F. Supp. 797 (D. Kan. 1951), *rev'd*, 349 U.S. 294 (1955); *Davis v. County Sch. Bd. of Prince Edward County*, 103 F. Supp. 337 (E.D. Va. 1952), *rev'd sub nom. Brown*, 349 U.S. 294; *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952), *aff'd sub nom. Brown*, 349 U.S. 294.



other year later, during which time—fortuitously as it turned out for the Court and for desegregation—Vinson had died. But, it was by no means a sure thing, even in December of 1953.

Now, let's get back to Warren. There were a lot of people on the Court who, although they didn't like segregation, had trouble overturning their own precedents.

**MR. SHAW:** I think the decision to go after separate but equal was out there. You know, the *Plessy* decision was clearly an evil. And it defined the parameters of life for African Americans at that time. So it was there.

My understanding—and, of course, I wasn't there—but my understanding is that the lawyers of the Legal Defense Fund whom I have come to know now and talk to and listen to on many occasions—and I'm talking about Jack Greenberg and Bob Carter and Connie Motley and, you know, at the time Frank Williams and Charlie Black and Bill Coleman and others were brought in—had their sights on *Plessy*. It had to be overturned eventually. And they knew that. The question was one of strategy. How to get to it. How to do it.

And, as I said earlier, the campaign was a brilliant one. It first struck where it was absolutely impossible to make separate equal. In higher education—clearly they couldn't do that. States weren't going to have separate law schools, medical schools, schools for pharmacology, on down the line. They simply could not replicate every school they had for white students, much less make them equal. So, it proved that the idea of separate but equal was bankrupt.

The decision to go after separate-but-equal as a concept almost follows inevitably. To fast-forward to where we are now, I can think about half a dozen cases that are out there now that most people don't really think about that represent, I think, travesties in the tradition of *Dred Scott* and of *Plessy*.

Just a couple quick examples. The Supreme Court's decision that turned away a challenge to systemic racial discrimination in the application of the death penalty, *McCleskey versus Kemp*,<sup>27</sup> is

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27. 481 U.S. 279 (1987) (deciding against a black male who appealed his death sentence on the basis that blacks received capital punishment more frequently than whites). *McCleskey* was the first case to contest the application of the death penalty solely on racial grounds. *Id.*

a shameful decision. So is the Supreme Court's decision in a case coming out of Los Angeles called *Lyons versus City of Los Angeles*,<sup>28</sup> which basically shuts the door to challenges to police practices that are either racially discriminatory or that affect people of color in ways that cut off the ability to reform those practices.

And, finally, as an example—and Bob Belton referred to it earlier today<sup>29</sup>—the *Bakke*<sup>30</sup> case itself, insofar as it establishes a category of discrimination that's known as "societal discrimination,"<sup>31</sup> which basically means discrimination for which no one is responsible and which there is no remedy. There's nothing in our Constitution which demands the creation of a category of societal discrimination that puts off-limits most of the effects of our long history of segregation and discrimination. That part of *Bakke* is a terrible decision that has real effects today.

The reason I'm mentioning these cases is to say they're out there. And, strategically at the Legal Defense Fund, we are always thinking about when and how to attack these cases.

Now, of course, with all due respect—and we do respect the Supreme Court; even if we don't agree with its decisions, the institution we have to respect—there's going to come a time when we're going to go after these cases and challenge them. It may mean that we have to wait until the Court changes somewhat or conditions change somewhat for one reason or another.

The point I'm making is that these cases sit out there as evils, to use simplistic language, that have to be addressed eventually. And I think the same thing was obviously true or even more true with *Plessy*. The question is: When, as a matter of strategic consideration, does it make sense to go after them?

**PROFESSOR ARSENAULT:** Let me pose a related question, one that always ties my students' stomachs in knots when we talk about this in seminar. It has to do with the relationship between *Brown I*, and *Brown II*. *Brown I* was May 17, 1954, and *Brown II*,

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28. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

29. Robert Belton, *Brown as a Work in Progress: Still Seeking Consensus after All These Years*, 34 Stetson L. Rev. 487, 494 (2005).

30. *Regents of the U. of Cal. v. Bakke*, 438 U.S. 265 (1978) (holding, in part, that the school's "special admissions program," which reserved a specific number of seats for "disadvantaged" minority students, was unlawful).

31. See generally *id.* at 296-311 (discussing societal discrimination).

May 31, 1955, just a few months before the Emmett Till lynching. Historians have knocked this around for years: how do we present the relationship between *Brown I* and *Brown II*? How do we see it now? Do we see *Brown II* as a turning back of the original *Brown* decision? As a bit of cowardice? As caution, by beginning the doctrine of “with all deliberate speed”?<sup>32</sup>

Sometimes, *Brown II* is represented as a wise decision that perhaps preempted massive civil unrest or even civil war. But, I wonder how we see this now.

Jack Bass mentioned the importance of oral history. There have been now literally thousands of oral history interviews done with both black and white Southerners, talking about their attitudes in the 1950s and 1960s. We now have information that goes beyond Gallup polls or editorial comments in the press.

I just wonder how we see this now. What options really were open, and how do you see *Brown II*? Should we disassociate it from *Brown I*? Was it a turning back? Was it a terrible mistake?

Thurgood Marshall, of course, was taken off guard by it. He fully expected desegregation to begin with deliberate speed, within a year and a half or so. But, as we said this morning, it ended up taking as long as seventeen years, or even longer and then some. So I wonder: What do we do with *Brown II*?

**PROFESSOR FRANKLIN:** I wish we knew more than we do know about the things leading up to the decision of *Brown II*. I mean, the conversations within the chambers of the judges, the justices themselves. I don't know what kind of deliberations went on, what kind of promises were made, what Warren had to do to purchase the agreement of eight people. Whether he said, “Well, you know, we read this in two ways or three ways. This won't happen overnight.”

When the Court became explicit in May of 1955 with respect to “all deliberate speed,” I can almost hear the brakes screeching, slowing down. Thinking, “Slow down. Don't go so fast.”

“Deliberate speed.” What is “deliberate speed”? I still don't know what it is. After forty-nine-plus years, I still don't know what it is. But, I think that there were enough people, who interpreted it in a way that did slow the process down.

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32. *Brown*, 349 U.S. at 301.

It didn't need much in the way of encouragement to slow it down. There were too many people actively fighting to eliminate it, if not to slow it down to a creep.

So, I don't really know how things would have gone without this position taken by the Court. But it certainly did add aid and comfort, I would say, to those who did not want to see the complete fruition of the objectives in *Brown I*. Therefore, I would say the overall effect is that it did slow things down.

Charles Ogletree's book, *All Deliberate Speed*,<sup>33</sup> addresses some of these matters. He thinks that there was a better opportunity for there to have been a more rapid integration had there not been *Brown II*, and that *Brown II* encouraged a slow process.<sup>34</sup>

**PROFESSOR JAMES PATTERSON:** I'm told that in one of Klarman's other writings that he says the Florida Legislature was in session at the time of *Brown II*, which strikes me as an odd time to be in session. And when they heard it, they all stood up and cheered. Of course, it was a white Legislature. No one doubted that this was the kiss of death for any rapid desegregation of schools, which makes Marshall's reaction all the more surprising. Because, as you said, he had argued for a definite date and a quick one. He didn't get it. Nonetheless, he said, "Well, this is okay. It will work out. We'll get it done." I never quite understood his reasoning at that point.

The third thing I would say—as John Hope mentions—there was some kind of a tacit understanding, I'm sure, within the Court prior to *Brown I*. Not only that the implementation would be put off for a year—which it was, because you know the background to it, you had the argument on the question as to how you would implement it—but also very great fear among all the justices that anything definite would create a lot of problems and conflict and probably violence in the South.

Nobody was more adamant about this than Hugo Black from Alabama. Hugo Black was one of the original four strong opponents of segregation, and right from the beginning he was

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33. Charles J. Ogletree, Jr. *All Deliberate Speed: Reflections on the First Half of the Century of Brown v. Board of Education* (W.W. Norton & Co. 2004).

34. *Id.* at 125.

counted as a vote for *Brown I*, and he was. But as an Alabaman, he said, “Oh, no. Don’t push these guys around.” And his notion was that the original decision, in fact, applied only to the five original plaintiffs. It wasn’t a class action, so anybody who wanted to litigate had to go in one-on-one, which is what “all deliberate speed” is.

And finally, as Jack Bass said, this left the federal district and circuit court judges in the South in a real quandary. What did it mean? Supposing they decided to tell some Southern district “you’ve got to do it now”? You didn’t have a good case, really.

So for all these reasons it was the kiss of death for any quick resolution. However, put yourself back in the minds of people in the 1950s. They did it because they feared violence and worse things happening. That’s why your students undoubtedly are tied up in knots. That was not an easy thing to figure out in 1955.

**PROFESSOR BELTON:** I’d like to add two or three things.

The remedy of this case called for the exercise of equitable discretion, because it’s an equitable remedy. And theoretically, judges do have broad discretion in formulating remedies once a violation has been established. So, at a very theoretical level—and purely theoretical level—the “all deliberate speed” fits into that equitable jurisdiction of the Court.

In exercising that jurisdiction, though, I think there is one valuable criticism even at a theoretical level about what the Court did not do. The Court did not order an immediate remedy for the named plaintiffs in that case. Now, in the higher education cases, as you know, the Court did state that you’ve got to give some immediate relief to the individual plaintiffs. But, the Court made the remedy for the plaintiffs in the *Brown* cases subject to the “all deliberate speed” remedy and order.

I’d like to mention here that I think you get different answers from different disciplines. But, I’d like to mention the emergence in the last ten or fifteen years of another school of thought in the law—critical race jurisprudence. We now have a substantial number of persons of color—I use that term very broadly to include Blacks, Asian Americans, Chicanos, Native Americans—who have been looking at, reexamining, the problem this society faces in trying to come to grips with the cyclical nature of how we have dealt with the issue of race in this society. I say cyclical, and I relate it back to the point made earlier this morning in terms of

the first, second, and third Reconstruction. It is cyclical, peaks and valleys, and they are trying to understand what it is about race that makes our responses so cyclical in nature as opposed to taking us up a turn in a very important way.

That is the background, then, for how the race critics, as we call them sometimes, explain the “all deliberate speed” doctrine. I want to talk about the thinking of Derrick Bell, who is credited with formulating this new school of thought that I find very exciting.<sup>35</sup> Bell was very much involved as a practitioner along with Thurgood Marshall and Connie Motley in the early litigation of these cases. And Bell says we need to look at the history of how we deal with racism in our country.

I think that there are three themes that provide a very powerful explanation for what is going on. The first theme involves, as the point I just mentioned, the cyclical nature in how we approach matters of race. The second theme is one Bell calls “White Self-interest.” That is the argument that you don’t see racial progress in this country unless it’s in the interest of whites. And the third theme that Bell comes up with is what he calls the “principle of involuntary sacrifice.” And that’s where the “all deliberate speed” notion falls into what we’re talking about now. Because the principle of involuntary sacrifice, as Bell explains, is that no remedy is provided in the race cases unless there is some kind of general agreement among whites. And he said that the “all deliberate speed” is illustrative of that explanatory reason, because the Court knew that an immediate remedy would not be acceptable to the whites in the South.

On the other hand, there was some interest among whites in eliminating the separate-but-equal standard of *Plessy v. Ferguson*. So, at least you have a school of thought looking at that through a different lens. A lens through which this problem has not been examined until recently. So, I think there may be some strength to the argument now.

**MR. EUGENE PATTERSON:** In the early 1960s, I received a telephone call from Griffin Bell. This was long before he became Attorney General in the Carter Administration. He was then a

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35. See generally Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* 3, 5 (Basic Books 1992).

Kennedy appointee to the Fifth Circuit Court of Appeals. And he was one of the sort of conservative judges on that Fifth Circuit.

He called me from Alabama one evening, and he was in deep distress. He said, "It isn't right what I'm doing over here. I'm a member of the judiciary, and yet I'm having to be a school superintendent of a rural county in Alabama. And a federal judge should not be put in this position." I said, "Griffin, is the Governor of Alabama going to support the Supreme Court?" He said, "No." I said, "Is the Alabama Legislature falling all over itself to perform its duties?" "They're not," he replied. I said, "The only person left to do it is you."

The Supreme Court legislated *Plessy* out of existence and put separate but equal in its grave. And then it invented the term "all deliberate speed" and left it to the federal judges and the federal judiciary of the South to determine what that speed was. That's what Griffin Bell was doing. He was taking a look at these counties and saying, "All right. It's time." He was enforcing "all deliberate speed," because he was close to the scene.

In retrospect, I think it was necessary for the Supreme Court in *Brown II* to be as mysterious and unspecific as it was, because it gave time to leach off some of the terrible anger in the white South at being forced to confront desegregation of the races. They needed to debate. They needed to argue "how." They had politicians who were leading the chorus of resistance, as you know. And yet it gave time for thoughtful people, thoughtful white people across the South to start thinking for the first time about changing their way of life and to argue about it. It gave time for newspapers to print editorials, columns, and coverage of protests. It gave time for a democratic society to finally come to a conclusion that it had to obey the Supreme Court.

Griffin Bell, before he became a federal judge, was the chief of staff to Governor Ernest Vandiver in the 1950s in Georgia. And through Griffin Bell, Vandiver was persuaded to appoint what was called the Sibley Commission, headed by John Sibley, a fine, old banker from the University of Georgia. He was an understanding man. He was also a lawyer, and he knew he had to obey the Supreme Court. But that was politically not being said in Georgia at the time.

So he appointed a commission, and he took them touring the state like a medicine show. He would set up in a courtroom in

some rural Georgia county and invite all the people to come in and tell him and tell his commission which side they were on, asking, "Do you want to close your schools, or do you want to desegregate?" This was a tremendous safety valve; it let off so much steam. It forced the people to suddenly have to speak in public about this issue. White people. And they suddenly were arguing among themselves. And then Sibley just came on back to Atlanta, issued a report, and went back to banking.

But a great harm had been avoided of people feeling bottled up and unable to express their discontent or express their desire to keep the schools open and do what the law said.

So, that valuable time enabled the South—when it finally came due—to obey those orders from Judge Bell.

**MR. SEIGENTHALER:** It's great just to sit here and listen, because each time there's a different speaker, I have some other recollection of some moment that was meaningful. Just listening to Gene Patterson speak about Griffin Bell—it's unrelated, but it makes a point, I think.

I mentioned earlier the first speech Robert Kennedy made in Athens. In addition to being Vandiver's Chief of Staff, Griffin Bell also had been, in 1960, the chairman of the Democratic Party in Georgia. I well remember in that campaign, after Senator Kennedy made the call to the King family, that there was an explosion of criticism from state chairmen across the South with one exception—Griffin Bell. I remember calling him, and he said, "Well, we could use a little more advance notice down here, but we're still going to carry Georgia. Don't worry about it."

Now, before Robert Kennedy went down to Athens to make that speech, he said to me, "Well, you know, you probably, in fairness, should call Griffin on the telephone and tell him I don't expect him to show up. It's going to be a very tough civil rights speech." And when we arrived that day, there was Griffin sitting on the platform. I always felt that that day he assured himself he was going to get on the Federal Court of Appeals.

At any rate, it does seem to me that Griffin's call to me reflects the sort of thinking that was going on among all the members of that Court and many members of the judiciary, particularly the appellate judiciary, in the circuits throughout the South—certainly on the Fifth. But *Brown I* and *Brown II* mysteriously—the word Gene uses—both fly in the face of what John



Hope Franklin has described as a sickness. In some sense a regional sickness, but in a very real sense a national sickness. It had not only reached the South, it had reached Jim Eastland. Jim Patterson quotes Eastland in his book saying, "What the people of this country must realize is that the white race is a superior race, and the Negro race is an inferior race."<sup>36</sup> That sickness was there. And anybody who thinks that it didn't have an impact on thinking judges who, like Griffin Bell after *Brown I* and after *Brown II*, were saying, "I just want out of this. I'm not prepared to do this. I'm not equipped to do this. I was not trained as a sociologist or as an educator."

And, you know, then there was a whirlwind of violence unleashed across the South. Gradual at first. But then there was an explosion of violent events, a profusion of them. People were being hurt and killed. And the judges were sitting up there in their ivory towers and worrying about how they were going to fix the system. And, more than the educational system, how were they going to fix a society that was suddenly at war with itself?

Gene Patterson is right. I mean, it did take more than a decade of debate and dialogue and discussion and argumentation and maiming and murder before we finally were able to come to grips with the idea that we simply had to follow the Court.

And so my sense of it is that whatever deal-cutting was going on—and no doubt, you're right, there was deal-cutting going on and promises made back and forth—I think in the final analysis they did the best they could with the facts they had and the reality of the reaction of society out there.

**PROFESSOR ARSENAULT:** But, could I suggest something here? I'm just repeating Thurgood Marshall's response to this. That even with *Brown II*, you get this enormous reaction, massive resistance, quite a bit of violence, even without any school desegregation. Marshall's comment was, you know, "We're getting a slice of the loaf, but we're still getting all the violence and the grief." Why not go for the whole loaf? If you're going to get that anyway, even with *Brown II*, why pass this problem off to the next generation? Why not face it as soon as possible? And if it's going to provoke a Civil War, so be it. Attack it just as you would

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36. Patterson, *supra* n. 14, at 5.

a disease. You don't take two aspirin and call the doctor in the morning. You perform rapid surgery. In Marshall's view, the temporizing by the federal government was the worst part of it. *Brown II* backfired, in that it actually discouraged white Southerners from responding favorably to the Court's mandate. Maybe they could have moved toward acceptance of desegregation a decade earlier if the federal government hadn't lowered the pressure.

**MR. SEIGENTHALER:** But, again, people don't act in isolation. What was really going on at the same time as the violence, and even before the violence, were Southern politicians—not just in Congress, but in almost every governor's office and every state legislature—trying to invent ways to circumvent the thrust of the decision. And their position was a word that nobody had heard for decades: “In my hometown, we're going to solve this problem by what's called ‘stair-step’ integration. One class at a time. We'll have higher education in four years, but we won't have four years at once. And we will have first through twelfth in twelve years.”

Well, the first night they desegregated one child in one school, that school was blown off its foundation. And immediately, you know, they reconsidered that. The violence caused society to react negatively and it moved forward.

Those of you who are lawyers and have dealt with judges know this better than I. But I think in cases where—I mean, I think back to the Jehovah's Witness case, *Gobitis*,<sup>37</sup> where a decision really wrought a problem on a religious sect. The Court fished for another way out, and, in three years, literally reversed itself.<sup>38</sup>

And my guess is that all those judges—all those justices—were struggling with themselves every day, saying, “We've done it. And now we've got to find a way to make it work.” And *Brown II* did not make it work. And by the time it didn't, they were getting a whole flood of cases—public accommodations and others—across the board. And, you know, as I say, it's not as if they were

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37. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (holding that requiring public school children to participate in reciting the Pledge of Allegiance is within a state's legislative power and is consistent with the Fourteenth Amendment).

38. *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (overturning *Gobitis* by holding that requiring students to recite the Pledge of Allegiance violates both the First and Fourteenth Amendments).

going to be able to sit there and say, “Well, I think we probably ought to go whole hog and stay whole hog.” And you have to have five of those nine who are willing to go with you if you think that way.

**PROFESSOR BELTON:** I just have one brief comment. I would certainly decline to leave heaven and come back to Earth after the 1954 decision.

**MR. SHAW:** Again, this is an exercise in 20-20 vision. I think we have to acknowledge that the Supreme Court wasn’t even sure that its mandate could be enforced, which created, therefore, a potential Constitutional crisis. That was manifested in Little Rock. There was a question of whether the Court’s order could be enforced. And, of course, the National Guard had to be in Little Rock schools and Central High School for four years. So it’s easy, in looking back forty-seven years after Little Rock to forget not only the threat of violence but the real violence that descended upon school desegregation.

Having said that, I was with Bob Carter<sup>39</sup> recently and some of the other surviving lawyers who worked on *Brown*. Lou Pollak<sup>40</sup> and Jack Weinstein,<sup>41</sup> both federal judges now, and Oliver Hill,<sup>42</sup> who’s 97 years old and still kicking. All of them, except for James Nabrit,<sup>43</sup> were together for an event recently.

And one of the things that Bob Carter said that I just have to share here is, as he looks back to *Brown II*, there’s no question that he, like many African Americans, considered it a betrayal. It

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39. After attending Howard Law School and serving in the Army Air Force, Robert Lee Carter joined the Legal Defense Fund in 1944. He served as a key assistant to Thurgood Marshall, the founder of the Legal Defense Fund. Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality*, 271 (Alfred A. Knopf 2004).

40. Louis H. Pollak worked with Thurgood Marshall at the Legal Defense fund after clerking for Justice Rutledge. Pollak “later serve[d] as dean of Yale and the University of Pennsylvania law schools.” *Id.* at 292.

41. Jack B. Weinstein graduated from Columbia Law School and worked with the Legal Defense Fund before becoming a U.S. District judge in New York. He was also a professor at Columbia Law School. *Id.* at 557.

42. Oliver W. Hill led “the NAACP legal fight in [Virginia] and bec[a]me the first Negro ever to serve on the city council of Richmond.” *Id.* at 128.

43. James Madison Nabrit, Jr. graduated from Northwestern Law School before joining the faculty at Howard Law School and organizing the “first civil-rights law course in the country.” *Id.* at 127.

is the only instance in which he can think of when a constitutional right was pronounced and it didn't have immediate effect. That certainly is true.

So you have a constitutional right that is meaningless for a generation of African-American kids. You talk about the grade-a-year plan. When I first started litigating school desegregation cases, I would look through the records of these old cases that I was working on, and they were second generation. The Legal Defense Fund properly took the position that the grade-a-year proposal was insufficient, because this was a constitutional right to which the students were immediately entitled.

Looking back, only with hindsight, one grade per year would have turned out to have been a pretty good deal. But there was no way of knowing that. And, as a matter of principle, it was not the correct position to take at the time.

So I think, looking back—again, we have a mishmash of realities—all of it was true. It was true that the South wasn't going to lay down and desegregate right away. And, in fact, in some ways, for many people in the South it never has.

And outside of the South also. It's just not a Southern problem. Think of the massive withdrawal of many white students from public school systems. Even today, even though we don't acknowledge it in a lot of ways, I think deep inside most of us know.

It reminds me of a conversation I had with a young man from Wales a few years ago. I was going back to the University of Michigan, and we shared a car from the airport. We were talking about his experience in Michigan as somebody from outside the United States. He said that the thing he was most surprised about was the way that race still played out in American society. He said, "It's like a Civil War that you Americans hold under your breath." That's even true today. So, God knows it was true in 1955 and 1957.

So, yes, it was a betrayal. Perhaps it was a necessary betrayal at the time. It doesn't make me or other African Americans feel any better about it, and certainly those whose rights were denied. But what it does to me, ultimately, is display how deeply entrenched this issue of race is and has always been in American society.

**MR. SEIGENTHALER:** I want to mention—just very briefly—another personal experience.

By September 1961, the violence was still there but the political rhetoric was changing. The next July, Burke Marshall and I were assigned by the Attorney General to visit the three cities in the South where desegregation occurred. We went to New Orleans, Memphis, and Dallas. We met with the mayors and leaders of the counties, along with some members of the state legislatures. There was one lesson: "We're not Little Rock. We don't want to be Little Rock. We plan to go forward." And there was an economic factor that was part of that dialogue that Gene Patterson says went on. "We don't want to be a part of it. Don't send us troops. Don't send us marshals. We can mind our own business." And I must say, those three school systems desegregated that fall of 1961 peacefully and without any real opposition. And it was elementary school all the way through high school.

**MR. EUGENE PATTERSON:** But, of course, in Little Rock and in Oxford, Mississippi, you had to send in the United States' power—troops to stop resistance. And so the time that was bought by *Brown II*, worked its way slowly through, as John Seigenthaler says, to an economic basis in the South. Look at Atlanta. We kept the peace there, and it's become a major city. The businessmen knew that. Knew it was coming. It was also the hometown of Martin Luther King, Jr. That's something that we haven't mentioned here yet.

The time that was bought by *Brown II* also gave black Americans in the South the time to get mad, to get angry enough to take to the streets. And they did. And Martin King, God bless him, kept it nonviolent, which was his secret, the great secret of his movement. Because it persuaded many white Southerners and a vast majority of American citizens to empower the Congress and empower President Johnson with the votes to pass the Public Accommodations Act in 1964. And to pass the Voting Rights Act in 1965. It ratified the basic *Brown* decision into an end to separate but equal under the law in Southern states. And it was done.

So that time was put to good use, I think.

**PROFESSOR BELTON:** One of the things that has always amazed me, and I don't have an answer to it, is comparing school desegregation to several of the other titles under the Civil Rights Act of 1964 when we get to this question of "all deliberate speed."

Title II of the Civil Rights Act of 1964 prohibits discrimination in places of public accommodation, like hotels and restaurants. There were several years of litigation under Title II, and there's very little public-accommodation litigation today. Very little took place after those first several years of Title II. And I think one answer—one flippant answer—somebody gave today was the fact that while there were a couple years of litigation under Title II, *Brown versus Board of Education* litigation is still going on and so is Title VII litigation. And, you ask the question, "Why the difference?" Somebody said the difference between vertical and horizontal integration can explain it, but I never cease to be amazed by the fact that the school segregation cases are still going on all this time. Title VII cases are going on all this time. But Title II? There's no litigation. And there's no "all deliberate speed" in connection with that.

**PROFESSOR ARSENAULT:** Let me ask a question that piggy-backs on what Gene Patterson just said. Because I think it returns us perhaps to something we were talking about this morning, something that Ted Shaw mentioned a couple of times.

Here I'm thinking of the perspective of the SNCC<sup>44</sup> kids: John Lewis, Diane Nash, Jim Bevel, Bernard Lafayette, the whole crowd out in Nashville, and others. They talked many times about the problem of a movement being led by lawyers and being interpreted by lawyers. They obviously were very impatient. They wanted freedom now. They certainly weren't going to wait for "all deliberate speed." They were going to push and push and push. We've got a large gathering of lawyers here, and we've tended to endorse the legal perspective that there's a deeper reality than the waffling decision made in *Brown II*, that by taking the lead in the *Brown* decision and making a decision that Congress was unwilling to make, and the Executive Branch was unwilling to make the Supreme Court set the stage for the Civil Rights Movement of the 1960s. I wonder what you think about that. This is the question so many historians and legal scholars wrestle with, about giving proper due to the *Brown* decision and to the direct-action movement and the connection between them and whether this is kind of a natural progression. Even though the *Brown* decision is

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44. SNCC is the Student Nonviolent Coordinating Committee.

a milestone, the civil rights revolution may have been won or lost in the streets.

Or was it won through the Voting Rights Act of 1965, which created a new democratic ethos that brought about the major changes in the South?

When historians look back at this a century from now, what do you think they're going to emphasize? The movement culture in the streets? Or what happened in the Justice Department or the Supreme Court? Obviously, at some level, they will need to talk about all of these things. We're fifty years out. But, we need to start making some judgments about this.

**PROFESSOR BASS:** Here's what I hope historians 100 years from now will look back at. Consider the influence of the civil rights movement on the courts beginning with *Brown* and the lower federal courts and their struggles to define how to proceed in their process of filling out—fleshing out—the bare bones of *Brown* with the civil rights movement itself and the activity in the streets. That was very, very important.

And the role of the press in all of this, particularly the early days of television, and sort of translating to the public what was going on into a huge morality play that people saw in their living rooms. That presidents saw, witnessed. That we witnessed. Also, a very big factor that sometimes gets overlooked, I think, is just the tremendous courage shown by ordinary black people in all of this.

Judge Elbert Tuttle once told me he thought that the old Fifth Circuit Court of Appeals—which stretched from Savannah to El Paso, 1,600 miles across six former states of the Confederacy—he said, “I think we really were, you know, an outstanding civil rights court.” Judge Tuttle usually spoke in understatement. And he said, “And I think we largely have to thank our black plaintiffs for this.” I think that recognition was very important. Judges don't bring these cases, you know. Lawyers argue them, but they've got to have plaintiffs. And the plaintiffs were the ones who were really the most susceptible to the retaliation that did take place.

Let me deal briefly with the second point. You had the Fifth Circuit, which at that time included Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas. But you also had the Fourth Circuit, which covered both Carolinas and Virginia among its

states. That's nine of the eleven states of the Confederacy. Tennessee and Arkansas were in other circuit courts of appeal. One of the earliest important decisions came with the Clarendon County case,<sup>45</sup> which was a Fourth Circuit case. That's where Judge John Parker said that what the Supreme Court had ruled in *Brown* was not an insistence on integration but an end of discrimination.<sup>46</sup> Judge Parker was from North Carolina. Some of his former lawyer colleagues in North Carolina looked very progressive for a while, because North Carolina began with the pupil-placement law. So they would, in effect, cream off the top black students in that state and say, "Well, we've desegregated. We've ended discrimination." And so you had a very, very extremely limited form. The Fifth Circuit grappled with that for a long time until Judge John Minor Wisdom, in the *Jefferson* case,<sup>47</sup> came directly to grips with that and confronted the *Briggs* victim, and, in fact, overturned it. Judge Wisdom said,

The unmalleable fact transcending in importance the harm to individual Negro children is that the separate school system was an integral element in the Southern State's general program to restrict Negroes as a class from participation in the life of the community, the affairs of the State, and the mainstream of American life: Negroes must keep their place. . . . Adequate redress therefore calls for much more than allowing a few Negro children to attend formerly white schools; it calls for . . . the organized undoing of the effects of past segregation.<sup>48</sup>

And he used similar language in that same opinion when he talked about affirmative duties and the Constitution being both colorblind and color-conscious.<sup>49</sup>

**PROFESSOR BELTON:** Let me share an observation that grows out of the question raised about direct action. Perhaps the historians can provide some insight on the problem better than lawyers, but the thing that strikes me when I think back on the situation at the time that the *Brown* campaign was underway, I cannot think of any conduct that was taking place during that

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45. *Briggs v. Elliot*, 132 F. Supp. 776 (E.D.S.C. 1955).

46. *Id.* at 777.

47. *U.S. v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966).

48. *Id.* at 866.

49. *Id.* at 876.



period of time that is analogous to the civil rights demonstrations of the 1960s. But, picking up with the civil rights demonstrations of the 1960s, I am struck by how much comes out of, in a very positive kind of way, blacks and whites, for example, sitting down as reasonable persons at the table to discuss matters of race, and something in terms of a plan emerges from those discussions.

Now, I want to contrast that model to the results that we've seen that come out of some of these direct action, nonviolent campaigns. I think those activities have a causal relationship in terms of the enactment of some of the civil rights legislation in the 1960s. When I look at that development and think about the women's movement, again you have some direct actions in some respect that yield some positive results.<sup>50</sup> I think there are other illustrations along that line, for direct action tends to produce some results that are not forthcoming out of reasonable persons sitting down at the table trying to solve those issues. I'm amazed by that. One of these days maybe the historians are going to shed some light on that for lawyers.

**PROFESSOR ARSENAULT:** Believe me, almost the entire corpus of civil rights literature now deals with that question.

John Hope, do you want to jump in?

**PROFESSOR FRANKLIN:** Well, I merely want to say that if *Brown II* was set for a period of time during which hopefully there would be a revolution, then I wonder how long *Brown II* will last? And how long you have to observe that?

I am really wondering whether we can go on for an indefinite period of time without running the risk of going back to where we were.

We've had some considerable resegregation of our schools, and we've had some remarkable manifestations of racism in its rawest forms within the last few years. I think that, at one time or another, sooner than later, we are going to have to face up to the problem of how we are going to equalize our society. And it might hurt some people's feelings that they've been doing this for X number of years, but please give them time. You know, "don't

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50. See Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 Vand. L. Rev. 657, 665 (April 1996) (discussing several direct actions by the women's suffrage movement that eventually led to women's voting rights).

rush us.” That sort of thing. I am simply getting tired of that kind of approach to the problem.

When I was chairman on the President’s Advisory Board on Race,<sup>51</sup> I learned a great deal. And I learned that we were not really as far along this road of decent living as I had hoped we would be. The very first weekend of the Board’s appointment, there was a very scathing attack on us by Ward Connerly and Newt Gingrich in the *New York Times* saying that it wasn’t necessary, that this committee that the President appointed was a bad committee anyway, that we were not qualified, and so forth.<sup>52</sup> And, for the next fifteen months, that was the attitude the newspapers took toward us.

I must say to the former president of the American Society of Newspaper Editors and our presses that the communication issue was probably the most hostile in 1997 and 1998. The newspapers and television. Here we are in 2004 talking about something that we sought to set straight in 1954 and we didn’t. We had “all deliberate speed” to set it straight, and we didn’t. I don’t know what it’s going to take. It’s not that I’m not pleased with the advances we’ve made. We have so many advances yet to make, and we have so far to go. And we have these people who still say, “Don’t rush. You know, just take it easy. It will be all right. Just be patient.”

I’ve been patient. My patience is finished. I’m not patient anymore. It’s not that I don’t see the long range of history, and it’s not that I don’t see that it takes time to change. But, these are the smartest animals on the face of the Earth—human beings. You can train dogs to do something and they’ll do it; we can’t even train human beings to be decent toward each other. How do we do it? Give them fifty more years and perhaps they will be willing to have public schools that are equal in every respect? A hundred years? What is it? I don’t know. And I’m not patient.

**PROFESSOR ARSENAULT:** I’d just like to say in regard to that, there was a session at the Organization of American Histo-

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51. To encourage a national discussion about race, President Clinton initiated The President’s Advisory Board on Race in 1997, appointing John Hope Franklin as the chair. Louis Schiavone, *Clinton Names Advisory Board on Race*, <http://www.cnn.com/ALLPOLITICS/1997/06/12/email/panel> (June 12, 1997).

52. Newt Gingrich & Ward Connerly, *Face the Failure of Racial Preferences*, N.Y. Times D15 (June 15, 1997).

rians meeting about a year and a half ago in Washington. Connie Curry<sup>53</sup> is an old movement veteran. She's devoted her whole life to the movement, and she's now become a documentary filmmaker and made a film on Sunflower County, Mississippi<sup>54</sup>—James Eastland's old county. The film focused on Mae Bertha Carter, a woman who dedicated her life to the desegregation effort in that county.

Most of the leading civil rights historians in the country were in the room to see the first cut of the film. I'm not sure what they were expecting, but it sucked the breath out of everyone. It was so depressing to see the sacrifices that the Carter family had made and then to see what her hometown of Drew, Mississippi, is like today. I don't think any of us, even those of us who do this for a living, expected to see so little progress. Now, what happened in Drew may not be a completely representative story. But, the fact that it could happen anywhere is something that I think we're all still trying to process.

I wonder if we can take just a moment for the panel to say a little more about how they see the situation today. How hopeful or pessimistic or proud or angry are you about the situation now?

**MR. EUGENE PATTERSON:** I agree with John Hope. It's hard to be patient. But, it also is necessary, regarding *Brown* and what's happened, to recognize that the segregation laws have vanished from the books of the Southern states. Segregation is no longer the law, as a result of this vast democratic action that we've seen across these decades. There is some resegregation of the schools. And frequently, John Hope, it's the desire of black people, the black parent, to go back to neighborhood schools. But you see the key thing is they don't have to anymore. The law doesn't make them. So they can make their own decision. That's the key. We no longer have laws enforcing segregation on a race of American people. I don't know how it's going to shake down.

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53. Constance "Connie" Curry is an activist, award-winning writer, and former member of SNCC. Civil Rights Movement Veterans, *Constance Curry*, [http://www.crmvet.org/select/Veterans Roll Call, select Constance Curry](http://www.crmvet.org/select/Veterans%20Roll%20Call/select%20Constance%20Curry) (last modified Sept. 9, 2004).

54. Curry's film, *The Intolerable Burden*, won the John O'Connor Film Award in January 2004. *Id.* The film is based on Curry's book, *Silver Rights* (Algonquin Books 1995), which won several accolades, including the Lillian Smith Book Award. *Id.*

I think the courts have done their job. The 101st Airborne Division has done its job. The federal judiciary has just about done its job of implementing *Brown*.

But the problem remains, as John Hope says, and we all know it. We see it every day. We are a lot more integrated than we were fifty years ago, but we are not yet a nation dedicated to equal treatment of each other. I think it comes back, in a sense, to Klarman at this point. When are we going to grow up as a people and accept the fact that we need to love our neighbor? Accept that the dream Martin Luther King had was that we would judge each other on character, not color? That dream remains for us to make true.

Now, I'm eighty years old. I've had my century. But you've got a century here, and that's your problem. It's far from solved.

**MR. SHAW:** I agree that this is a question of hearts and minds, ultimately. But I also sometime ago personally decided that I'm not doing missionary work.

I disagree with you respectfully, Gene Patterson, to the extent that I believe that the federal courts' work should not yet be done, or at least that they should be playing a different role. I said earlier today that the age of mandatory-school-desegregation orders and massive busing for desegregation purposes has passed. And it has. We're not going back there. But, I want to state very clearly that the federal courts are not neutral bystanders in what happens with respect to the legacy of *Brown*. The federal courts have been packed over the last twenty-five years in a very deliberate way with judges who have a certain ideological bend.

Jack Bass's book talks about the Fifth Circuit and its history and role. When I started practicing law, that circuit was still intact in its old form, though it was towards the end of its days. We get accused by the radical conservatives—we at the Legal Defense Fund—of wanting liberal judges. And they point to liberal judges. I defy anybody to show me more than a handful of liberal federal judges on the bench today. I can point to maybe half a dozen of them. But I defy you to tell me where the others are.

And if you hear an edge in my voice, it's not that I want to see the federal bench all packed with so-called liberal judges. It's because we have a federal judiciary that has a "right" and a "center" and no "left" these days. I can remember appearing before a few liberal judges when I started practicing law. That seems good

when it first happens to you, if you're litigating on behalf of civil rights plaintiffs. But, my experience taught me that those weren't necessarily the judges that I wanted. I took them. And I'd take them back today. But those are the judges in some respects whose decisions might be reversed for one reason or another. I found that I ultimately like to be before fair-minded, open-minded, conservative, or somewhat neutral judges. I don't mind people who are instinctively or intellectually conservative. I do mind ideological conservatives.

But, I found that the judges who came to the cases skeptically, even moderately hostile, but were fair-minded and open, and heard the evidence, and ultimately ruled when we presented the evidence and it was not adequately refuted—those were the judges I liked the best.

I say all of this to say that there's a federal bench today that I don't think fits that description, for the most part. And the issues today are not mandatory desegregation. The issues today are whether it is legal and constitutional to even voluntarily do anything about racial inequality and, in this instance, school desegregation. The federal courts haven't been relieved of that responsibility in my view, but I'm not sure they're going in the right direction.

As to whether I am optimistic or not? Hopeful? I choose to be hopeful. And I think that that's the way we have to approach hope, because there may be all kinds of reasons to despair. We have a lot of reasons to be grateful and to congratulate ourselves about the progress we've made in the last fifty years. But, given where we are these days in terms of the ideological wars in the judiciary and elsewhere, there are a lot of reasons not to be hopeful. But, I think we have to choose to be hopeful, because to do anything else is to lay down and the other side wins. And I refuse to do that.

So that's where I am on these issues. I think we should understand that the work is not done, and I don't think the judiciary is relieved of its obligation to make sure, at least, that the opportunity for voluntary desegregation and other efforts to remedy racial inequality remains open and available.

**PROFESSOR BASS:** I would like to make a couple of observations. One is the recent appointment of Judge Pickering from Mississippi to the Fifth Circuit Court of Appeals.<sup>55</sup> My interpretation is that it was a clear and present announcement that the Republican Southern strategy is alive and well.

And the second part of it is dealing with this larger question. I agree with almost everything you just said about the federal judiciary today. But, there were a couple of points on this. One is that the election is going to be very important. The next President of the United States likely will not only fill vacancies on the district courts and the courts of appeal, but he's likely to have more than one appointment to the U.S. Supreme Court. Since we don't know who is going to be elected in November, that's the great unknown.

I'm not much impressed with the tendency of some historians to make "what if" questions: "Suppose this had happened in this election." I'm much more interested in—and I hope historians in 100 years will take a long look at—what did happen and why it happened and how it happened, because I think those are the important questions.

The judges on that old Fifth Circuit did have a major impact in changing the law, really, in implementing *Brown* and expanding it into a broad mandate for racial justice. And then the Supreme Court changed and began to cut back. It would nip here and snip there and slice here and slash there and treat it parallel to what the Supreme Court really did do into the late part of the 19th century in terms of the civil rights amendments.

So the question is what direction will the federal judiciary go? And that depends upon the appointments. The judiciary is independent after they're appointed, but the appointments themselves are not independent. And I think that's just one of the great, most important things to look for.

**MR. SHAW:** Could I just make one quick comment?

The appointment of Judge Pickering happened the day after the President went to Atlanta to lay a wreath on the tomb of Mar-

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55. President George W. Bush appointed Charles W. Pickering, Sr., to the Fifth Circuit on January 16, 2004, by using his constitutionally allocated recess-appointment power. Office of the Press Secretary, *Statement by the President*, <http://www.whitehouse.gov/news/releases/2004/01/20040116-19.html> (January 16, 2004).

tin Luther King, Jr. I thought that those two actions taken together explain exactly what “compassionate conservatism” means. As an old-time basketball player, it simply means fake left, go right.

**PROFESSOR JAMES PATTERSON:** I’m certainly not trying to argue, but what I’m about to say is that the Court does matter. It’s a major issue in this election. It has been a major issue going back at least to the 1980s. By the time George H.W. Bush left the White House, all the federal appeals courts had Republican majorities. Clinton turned that around a little bit. But, it can be turned around again, and it has been. So it matters.

But I think we should look back to President Johnson’s famous speech at Howard University in 1965, when he recognized that the Civil Rights Law of 1964 and the Voting Rights Law of 1965 had, as Gene just pointed out a few minutes ago, pretty well guaranteed blacks real equality under the law.<sup>56</sup> This isn’t to say there didn’t continue to be and doesn’t continue to be discrimination. It does say it was against the law. What Johnson was trying to say on that occasion was that the next frontier is social and economic. That’s the one that’s a very tough nut to crack in any society, including our own.

I’ll just give you a couple of statistics at the end, because I’m writing another book on the recent period.

If you look at the social and economic events of the 1990s, there are one or two that are very encouraging for African Americans and one that’s deeply discouraging. The one that’s very encouraging has to do with the thriving economy from 1993 to 2001, during which time the poverty rate among black households, which had been around thirty-one to thirty-five percent ever since the 1960s, dropped to twenty-one percent. In seven years. The ratio of black-to-white earnings almost never changed. By the way, traditionally, the white poverty rate had been around one-third of the black poverty rate. Same ratio with unemployment rates, at least since 1980.

There was a great improvement in the late 1990s. Amazing. Unprecedented. Very encouraging. If you think of the ordinary

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56. The speech, titled “To Fulfill These Rights,” has been referred to as a call for measures that are similar to today’s affirmative action measures. Kluger, *supra* n. 39, at 758–759.

lives of people, they're much more concerned about how they live than what a court does.

The second thing I would say is that the ratio of black-to-white earnings in 1970 was around fifty percent, and by 2000 it was around seventy percent. You can ask: Is the glass half full, or is it half empty? Relative deprivation is a frightening thing, particularly in a society which is as rights- and entitlement-conscious as ours has become.

I'm not saying this is something that is wonderful. I am saying there's been a really dramatic change in fundamental economic relationships over the past ten and twenty years, and especially over the last ten years. I don't have a fully researched number, but we're much closer in 2001 than we were in 1993.

The discouraging statistic is in schools. If you look at *Brown versus Board of Education* simply from the relatively narrow focus of the decision itself, which was to do something about education, I would have to say that *Brown versus Board of Education* has been, for the most part, a failure. This can be seen not only in the desegregation process. The peak, according to the Harvard Civil Rights Project, of desegregation of schools was in the late 1980s—1986 is the year that is given.<sup>57</sup> Much of this happened in the early and mid 1970s, with slight improvement up until the 1980s. At that point, forty-three percent of black public school students went to so-called majority white schools,<sup>58</sup> which is a common definition of a desegregated school, although not the only one you can use. Now it's closer to thirty percent.<sup>59</sup>

If you believe, as I do, that integrated schools are a good thing not because of psychological reasons or because children necessarily learn better or worse in a white context—they don't, I think, necessarily do so—but because of what Orlando Patterson calls “informal education”,<sup>60</sup> which is becoming part of the major-

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57. Erika Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts*, [http://www.civilrightsproject.harvard.edu/research/deseg/reseg\\_schools02.php](http://www.civilrightsproject.harvard.edu/research/deseg/reseg_schools02.php) (Aug. 8, 2002).

58. See Patterson, *supra* n. 15, at 229 (adapting statistics from Gary Orfield & John Yun, *Resegregation in American Schools* (available at [http://www.civilrightsproject.harvard.edu/research/deseg/reseg\\_schools99.php](http://www.civilrightsproject.harvard.edu/research/deseg/reseg_schools99.php) (June 1999)).

59. *Id.*

60. Orlando Patterson is “a leading scholar on race relations” who believes that there has been impressive progress toward “social, political, and cultural inclusion” in the past fifty years due to increased contact between blacks and whites. *Id.* at 193.



ity world, understanding the networks, having access to them. That's very important. To let that slide is a very serious business.

Add to this the really discouraging information about test scores. You can argue until you're blue in the face about the pros and cons of SATs. But, it's not just SATs; virtually all of these kinds of tests in recent years have shown a widening of the gap. This is a very serious business.

How can the next generation of black kids do better if they are not able to do well in school? What is wrong with the schools? Or is there nothing wrong with the schools? These are very, very profound issues. We spend twice as much per student in real inflation adjusted dollars in the United States today in public schools as we did in the 1970s. But, the scores haven't shown any improvement and the gap has widened.

So you've got the best of times. You've got the worst of times. Part of this reflects a very real class schism within the black community. And this is America today. This is my answer to your question: Where are we now?

**PROFESSOR BELTON:** Let me make a couple of observations.

One is the mere fact that I have mixed feelings about where we are right now. I started out many years ago as a civil rights activist with the Court. I believed that race did not matter, should not matter. I'm not there anymore.

Secondly, the mere fact that we have laws on the books doesn't mean that we have moved in the direction that we should move. And I say that based on the point I made this morning.

If you take a look at the civil rights laws, we had the Thirteenth, Fourteenth, and Fifteenth Amendments on the books immediately after the Civil War. And almost 150 years later we're still trying to figure out what those laws mean in terms of equality and discrimination. So the mere fact—and I disagree with Gene on this point—the mere fact that we have laws on the books that say you shall not discriminate is not even half of the story, if you will. That's one problem that I have in terms of what we do with the laws that we have on the books. And it gets back to the other point I made in my remarks of the simpleton nature of how we deal with race in our society.

The second point I'm going to make—and these are questions that do trouble me very deeply—is this: do we want a society in which race does not matter? How heavy a price would we have to

pay? I'm talking primarily from the black perspective now. How heavy a price would we have to pay if we have a society in which race does not matter under any set of circumstances? In other words, do we want a cookie-cutter society where everybody looks the same, does the same, thinks the same along that line and there is no recognition of the distinct contributions that the different groups and races in our society bring to the table? I think one of the fundamental foundations on which this society is established is that no group would be required to give up its distinctive nature, if you will, in order to join the party of the United States.

**MR. SEIGENTHALER:** As always and ever, I think the wisdom of John Hope Franklin is compelling, and the impatience of John Hope Franklin should be contagious and infectious because we are fifty years from 1954. And it is still a society that struggles, that struggles with race and struggles with discrimination beyond race. What he said about the media is true. The myth is not just that there is a liberal activist federal court. There is not. And that court packing, of course, as Ted Shaw has said, has gone on with calculation for two decades or more now with brief inlands in which there has been a different sort of process for selecting judges.

But, overall, the judges I know who are my friends and who are on the federal court say that those who have come in during this packing process are not just conservative. They often are Neanderthals. They're often fundamentalists. They're often ideologues. And they are most often conservative.

And as far as what John Hope says about the media, both Gene and I would agree that the second myth is the liberal media. I mean, there has not been for sometime a media that was on the cutting edge of progressive change. As Gene and I look at the American Society of Newspaper Editors, we find that it has abandoned its goal set for the year 2000—to make our newsrooms reflect the diversity of our society. It's an organization still committed to diversity, but that goal has been given up and new goals have been set out.

And so when we look for hope fifty years later, we know that there is still discrimination. It involves race. It involves those who are gay. In a very real sense, discrimination against Arab Americans, loyal citizens. We're inevitably going to have a struggle over what has been done to them since 9/11.

I would not want you to think that I am less impatient than you are[, Dr. Franklin].

Much of what I have said today has been very personal. I'd like to close with a very personal story that came to my mind as I was listening to John Hope Franklin talk about impatience.

I am a doting grandfather. I have one grandchild who is six years old, Jack Seigenthaler. He is the third John Seigenthaler, but for purposes of identification he's called Jack. It is my job when I'm visiting him at his home in Connecticut in the evening to read to him.

He was in kindergarten last year. The kindergarten class had two black children in it. I asked my daughter-in-law how that was going; how Jack got along with Spencer and Erin. And she said, "It hasn't come up. We haven't discussed it with him. We expect it will, and we hope we'll be able to make him understand."

And the next night, the very next night, Thanksgiving, I was ready to read to him. And his father said to me, "Long day, long night, long day tomorrow. One story tonight, Gram. One story, Jack. Read one story." And I read one chapter of Harry Potter, at the end of which Jack said, "Gram, Dad told you that you could read one story. But you could tell me another story."

I said, "Jack, I'll be glad to tell you another story. But it will have to be quick. What is the story you want to hear?"

And he said, "I want to hear about the time you were hurt in Montgomery."

And I said, "Jack, how did you hear about that?"

And he said, "We watched a docudrama." He called it a docudrama. "Mom and Dad and I watched a docudrama. And I saw it. And I asked them about it. And they told me to ask you."

I said, "Very quick story, Jack. A long time ago in Montgomery, Alabama, there were some mean, angry, hostile white people who did not want black people to ride the bus. And the black people tried to ride the bus. And those white people beat them up and put them in the hospital. And they beat me up and put me in the hospital.

But," I said, "Jack, it was not serious. In a few days, we were out of the hospital. And everybody was able after that to ride on the bus. And so it's a story with a happy ending."

And Jack said, after a pause, thoughtfully, "Gram, are you black?" And it took my breath away. And I thought, first of all,

I've betrayed my daughter-in-law who said, "We'll answer the question when it comes." And, beyond that, I thought "What am I going to say to him?"

And I said, "Well, Jack, it really doesn't matter, does it?"

When I got home, I wrote him a letter. And I said, "I don't know when you'll read this or when it will be meaningful. You're six years old. I'm seventy-six. I told you that it really doesn't matter, but it really does. I can only hope, Jack, that by the time you're seventy-six, it really won't matter anymore."

I tell that story because I want to say to him and to all of you that I am also impatient. Discrimination is alive and well in this society. And I say to those of you who are so much younger: if Jack's not going to have to wait until he's seventy-six, it's going to have to be up to people like you—lawyers and educators—and people like young Jack.

**PROFESSOR ARSENAULT:** We have arrived at 4:00 with all deliberate speed. Maybe not at the Promised Land, but at the end of our Symposium.

I want to thank the audience for its patience. I'm so sorry that we didn't get to a question-and-answer period. That's one result of convening what must be one of the most remarkable civil rights panels ever assembled anywhere. I just feel privileged to have been here today. I don't know that we'll see anything like this again. But I want to thank the panel for an extraordinary day. And, if you would, please join me in thanking them.