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Symposium: Brown v. Board of Education and Its Legacy: A Tribute to Justice Thurgood Marshall, Panel II, Concluding Remarks

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PANEL II: CONCLUDING REMARKS

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AS I was so intimately involved in trying all aspects of *Milliken*, I would like to begin by sharing my seasoned observations about that case. First, in considering the meaning of *Milliken*, it seems to me that the public message of *Milliken I*[1] and *Milliken II*,[2] in combination, is that racial segregation in metropolitan America is innocent once you get beyond the inner-city boundary: it's no one's fault and it's no one's responsibility. At the same time, the Burger Court bent over backwards to permit an order against a state authority to infuse funds into an inner-city school district proven guilty of de jure segregation. In its own way, *Milliken* can best be understood as a "separate but equal" result for our times.

Second, I want you to think with me about the choices made in the process of this major constitutional litigation. In *Milliken*, we had fifty-seven trial days to make our case in the trial court. At the start of the trial, District Judge Stephen Roth, an immigrant from Hungary, said, "I made it, and I don't understand why Blacks cannot." He invited us out of his courtroom, literally, twice in preliminary motions. Yet, like the justice of the peace that he was, Judge Roth agreed to sit there and hear all the evidence. By the end of that fifty-seven days, he was convinced that the State of Michigan was an integral part of a system of racial ghettoization in which there was an expanding core of Black families in Black neighborhoods always confined within a line separate and distinct from a receding ring of White schools and White neighborhoods.

When it got near the end of the trial, in what has been described as thinking about remedy while hearing the evidence of violation, I recall Judge Roth said, "My God, if I'm going to limit remedy to the boundary of the school district of the City of Detroit, I'll merely be imposing—and giving my imprimatur to—the latest line of containment of segregation."

As it came about, when the case hit the Supreme Court, the remedy that Judge Roth then contemplated, which involved some fifty-four school districts, had been vacated by the court of appeals on procedural grounds. As a result, the *only* issue before the Supreme Court was whether or not Judge Roth's conception of violation was accurate, whether or not even one single Black child would be able to cross that latest line of racial containment.

And yet, as I noted earlier, courts make choices when they hear cases. In *Milliken I*, the majority chose to ignore their opportunity. Instead, the Burger Court's majority opinion proceeds with a recitation of how the district judge was a radical who unilaterally reached out to rope in all

1. Milliken v. Bradley, 418 U.S. 717 (1974).
2. Milliken v. Bradley, 433 U.S. 267 (1977).

of the suburbs through massive cross-district busing, because he did not happen to like the racial composition of majority-Black schools. The majority opinion has no conception of the Court's opportunity to issue a *Brown I* violation ruling for our time by deferring the consideration of remedy for another day. The opportunity was before the Burger Court to find a violation which would have required no remedy at that point in time, which could have permitted a remand for exactly the type of transformative political, judicial, and social result that followed from *Brown II*. Instead, because the Court was so concerned about, let's say, the political ramifications of what it was doing—and I will add, at least in part, because it was so focused on remedial considerations—it never even thought about grasping this opportunity.[3]

Finally, let me share one final irony in *Milliken*. Timing, as some say, is everything. Justice Harry Blackmun was the swing vote in the 5-4 majority in *Milliken II*. Three years later, four years later, and five years later, he was the swing vote that provided the victories for the plaintiffs, not only in the central school district cases from Dayton[4] and Columbus,[5] but also a statewide, cross-district, metropolitan case from Wilmington, Delaware.[6]

Think about Supreme Court Justices. Theirs is not the single case that tests whatever their ideology or judicial philosophy may be against the weight of evidence; rather, it is the series of cases that come before the Justices over a course of years. I ask the question, then, if *Milliken* had only come three years later, where would the law and the national conscience of the country be today with respect to the issues of racial discrimination?

As we close this symposium, I would like you to turn from such speculation about the past in order to think about the future of judicial review in race cases. Think, for a moment, about the possibilities for change if we focus more of our energy, more of our evidence, more of our political debate, and more of our legal argument on the actual violation. Consider the possibilities if we infuse our proof of violation with a greater reach and worry less about the extent of court-ordered remedy. Could this provide a way to continue the debate, as Ted Shaw called it, in order to assure a more open judicial process than that discussed by the second panel?

Do not despair about the potential for such a transformation simply because of the narrowing of the Burger and Rehnquist Courts. After all, in a tribute to Justice Marshall, I think it is appropriate to note that our situation today is far less bleak than was his. Today, there are no laws on the books that exclude anybody by race from jobs, from public accom-

3. *See* Paul Dimond, Beyond Busing (1985) [hereinafter Beyond Busing] for a description of this entire litigation.

4. *See* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977).

5. *See* Columbus Bd. of Educ. v. Panick, 443 U.S. 449 (1979).

6. *See* Delaware State Bd. of Educ. v. Evans, 446 U.S. 923 (1980).

modations, from public facilities, from public schools, from conveyances, from owning property. There are no signs on drinking fountains or bathrooms saying "Whites only."

The Civil Rights Acts of both the first Reconstruction and what is now the second Reconstruction—although how long this second phase will continue may be an issue—are on the books. Although the Congress sometimes has to step back in to give these civil rights laws a broader meaning in the face of a restrictive reading by the Rehnquist Court, the laws still provide avenues of redress.

So, rather than further bemoaning the narrowing of civil rights under the Rehnquist and Burger Courts, I ask you to look forward with me. Let us ask whether we can change the terms of the debate about discrimination as it may still exist in the country.

I do not want to suggest a grand political, or even litigation, strategy in order to give greater public meaning today to Justice Marshall's great victory in *Brown*. Allow me, instead, to suggest a narrower principle. It has three elements:

First, the legal basis for the claim of discrimination must be broad enough to include all racial, ethnic, and gender groups.

We can see the future of the country in the three fastest growing states—Florida, Texas, and California. By the year 2000, the majority of the children in those states are going to be minorities, and the largest minority in each of those states is going to be Hispanic, not African-American.

Second, the legal basis for the claim of discrimination must be deep enough to admit all manner of proof of wrongdoing. It is essential that there be room for evidence of a dominant majority, singling out and marking by caste, a particular minority group for abuse, neglect, or disregard, whether in single acts—no matter how isolated—or in complex patterns—no matter how interwoven. A no-fault theory of discrimination has no moral claim on the conscience of any court or on the country.

Third, the basis for the discrimination claim must be restrained enough to recognize that the first obligation is to plumb the full extent and depth of any such caste wrong, not to evaluate the extent and limits of the courts' remedial powers.

We should concede that the more massive and entrenched the wrong of discrimination, the more important it is for the courts to declare the full extent of that wrong. The courts must also permit the ultimate remedy to be worked out in a political process in which those who are aggrieved will at least have a continuing claim that the declared wrong cannot be remedied in the courts alone.[7]

7. *See generally*, Beyond Busing, *supra* note 3, at 395-96; Paul R. Dimond, *The Anti-Caste Principle—Toward a Constitutional Standard for Review of Race Cases*, 30 Wayne L. Rev. 1 (1983) [hereinafter *Anti-Caste Principle*]; Paul Dimond, *The Judicial Dilemma in Cases of Entrenched Discrimination*, The Urban Lawyer (forthcoming 1992); Gene B.

By now, we should all be mature enough to understand the limits of courts in exercising their countermajoritarian powers and their function of judicial review. I suggest that we ought to think about doing so with respect to remedy—much as the Warren Court did in *Brown II*.

This restrained approach to court-ordered remedies in cases of entrenched discrimination will have one additional benefit. It will encourage the building of political coalitions and affirmative remedies that are sufficiently inclusive as to make irrelevant remedial classification along the lines of the original discrimination.

With respect to remedy, I also think we need to recognize that in a free society empowering real personal choices for individuals is not necessarily inconsistent with remedying even the most entrenched discrimination against minority groups.[8]

In sum, I ask that you consider whether we should seek a rebirth of what I have dubbed elsewhere the "anti-caste principle." I believe this principle undergirds the Fourteenth Amendment as originally interpreted in *Strauder v. West Virginia*[9] and explains and informs *Brown*.[10] The alternative, it seems to me, is to continue with a suspect classification analysis, some kind of modified two-tier approach, in which the only judicially cognizable claims of wrongdoing will be those rare aberrant acts today when somebody makes a mistake and speaks explicitly of race. In fact, the primary cases that will be challenged under this wooden approach to judicial review of racial discrimination will be those in which the majority, for whatever reason, decides that it wishes to try to provide affirmative relief to minorities.

What is the risk of trying the anti-caste principle? Isn't the risk the same as it was in 1896 at the time of the *Plessy v. Ferguson*[11] decision? Couldn't the Rehnquist Court say "There is no longer any caste discrimination in America based on today's facts?"[12] Yet, let us consider what is different about today from 1896. We have the right of free speech guaranteed, and we have the right for all to vote guaranteed. If such an awful judgment emerged from the Rehnquist Court, we would at least have the

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Sperling, Note, *Judicial Right Declaration and Entrenched Discrimination*, 94 Yale L.J. 1741 (1985).

8. *See* Beyond Busing, *supra* note 3, at 395-96; *Anti-Caste Principle*, *supra* note 7, at 45-60.

9. 100 U.S. 303, 307-08 (1880) ("The very fact that colored people are singled out and expressly denied by a statute of all right to participate in the administration of the law, as *jurors*, because of their color . . . is practically a brand upon them, affixed by law, an assertion of their inferiority.").

10. Brown v. Board of Educ., 347 U.S. 483, 494-95 (1954) ("The policy of separating the races is usually interpreted as denoting the inferiority of the Negro group . . . Any language in *Plessy v. Ferguson* contrary to this finding is rejected.").

11. 163 U.S. 537 (1896).

12. *See, e.g.*, Delaware State Bd. of Educ. v. Evans, 446 U.S. 923, 923-28 (1980) (Rehnquist, J., dissenting); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 512-13 (1979) (Rehnquist, J., dissenting).

opportunity to continue the debate in the political arena on terms that involve fundamental right and wrong.

I would like to leave you with this last thought. I submit that the anti-caste principle can empower us to debate, both in the Court and across the country, in this decade and into the next century, whether the second Reconstruction *should* continue. Keeping this dialogue with conscience open is a far worthier legacy of *Brown* and Justice Marshall than allowing a conservative Rehnquist Court to slowly but surely shut the door of the Court, and with it the conscience of the country, to virtually all claims of wrongful discrimination.[13]

13. Several months after the symposium, the Supreme Court issued its ruling in the higher education case arising in Mississippi, United States v. Fordice, 112 S. Ct. 2727 (1992). Although one ruling in a particular case is not dispositive, I am encouraged that a clear majority on the Rehnquist Court found a continuing violation in the dual system of higher education and remanded *without* specific instructions as to remedy so that the parties—within the political process—would confront the unremedied wrong. That this case arose in the context of voluntary choices in higher education (rather than the conditions of mandatory assignments in elementary and secondary schooling), may well have helped the Court to examine the extent of the wrong and to accept the limits of court-ordered remedies more fully. *See generally Anti-Caste Principle*, *supra* note 7, at 45-50.