Fordham Law Review

Volume 61 | Issue 1 Article 1

1992

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

William Michael Treanor

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

Cover Page Footnote

Associate Professor of Law, Fordham University. I would like to thank Russell Pearce for his comments on an earlier draft of this introduction and Mary Daly and Bruce Green, my co-organizers, for "Brown v. Board of Education and its Legacy: A Tribute to Justice Marshall," for their help in putting this symposium together. I would also like to thank Fordham Law School and the Stein Institute of Law and Ethics for their generous sponsorship of this program.

FORDHAM LAW REVIEW
VOLUME 61
1992-1993

PAGES IN THIS VOLUME
ARE NOT NUMBERED CONSECUTIVELY

THIS VOLUME CONTAINS A COLLOQUIUM ISSUE
THAT IS NUMBERED SEPARATELY

ISSUES 1-5
1992-1993
PAGES 1 TO 1262

ISSUE 6: COLLOQUIUM
1993
PAGES S1 TO S380

FORDHAM LAW REVIEW

VOLUME LXI OCTOBER 1992 NUMBER 1

CONTENTS

SYMPOSIUM

BROWN V. BOARD OF EDUCATION AND ITS LEGACY: A TRIBUTE TO JUSTICE THURGOOD MARSHALL

ARTICLE

ESSAY

NOTES

FORDHAM LAW REVIEW

VOLUME LXI NOVEMBER 1992 NUMBER 2

CONTENTS

ESSAYS

ARTICLE

NOTES

FORDHAM LAW REVIEW

VOLUME LXI DECEMBER 1992 NUMBER 3

CONTENTS

ARTICLES

ESSAY

NOTE

BOOK REVIEW

FORDHAM LAW REVIEW

VOLUME LXI MARCH 1993 NUMBER 4

CONTENTS

ARTICLES

ESSAYS

NOTES

FORDHAM LAW REVIEW

VOLUME LXI APRIL 1993 NUMBER 5

CONTENTS

ARTICLE

ESSAYS

SYMPOSIUM

THE PRIVACY RIGHTS OF RAPE VICTIMS IN THE MEDIA AND THE LAW

NOTES

COMMENT

FORDHAM LAW REVIEW

VOLUME LXI MAY 1993 NUMBER 6

CONTENTS

COLLOQUIUM

NOTES

INTRODUCTORY REMARKS

*WILLIAM MICHAEL TREANOR**

THIS issue of the *Fordham Law Review* presents Fordham Law School's tribute to one of the giants of American law and American history on the occasion of his retirement from the Supreme Court. Justice Thurgood Marshall is, I believe, the single most important lawyer of this century, both for his contribution as an advocate and for his contribution as a jurist. Because he decided to make the law his career and because of the way in which he pursued that career, the United States today is a remarkably different place than it was in 1933 when he began practice, and ours is a far more just society.

Justice Marshall made history repeatedly—as Chief Counsel of the NAACP Legal Defense Fund, as Judge of the United States Court of Appeals for the Second Circuit, as Solicitor General, and, of course, as Supreme Court Justice. But perhaps his most important contribution was his victory in the case of *Brown v. Board of Education*.[1]

On March 24, 1992, Fordham Law School and the Stein Institute of Law and Ethics paid tribute to Justice Marshall by hosting a program exploring the significance of this case. That program, entitled "*Brown v. Board of Education* and its Legacy," brought together a remarkable group of leading jurists, scholars, and civil rights litigators to discuss the significance of *Brown* and the past and future of civil rights in this country. The presentations of the panelists (revised for publication) are gathered here.

Brown was the capstone of Justice Marshall's campaign at the NAACP Legal Defense Fund to combat and eradicate state-sponsored segregation. There were, of course, two Supreme Court decisions in *Brown*. In the first decision, in 1954, Chief Justice Warren, on behalf of a unanimous Court, ruled that "[s]eparate educational facilities are inherently unequal."[2] While it established the constitutional right to equal education in bold terms, the first decision, commonly referred to as *Brown I*, left open the question of what was the remedy for the violation of that right. The following year, in *Brown II*, the Court fashioned a remedy that left the right largely unrealized; rejecting Marshall's request to fix a date for the end to segregation,[3] it unanimously directed the district courts "to admit [the parties] to public schools on a racially nondis-

* Associate Professor of Law, Fordham University. I would like to thank Russell Pearce for his comments on an earlier draft of this introduction and Mary Daly and Bruce Green, my co-organizers, for "*Brown v. Board of Education* and its Legacy: A Tribute to Justice Marshall," for their help in putting this symposium together. I would also like to thank Fordham Law School and the Stein Institute of Law and Ethics for their generous sponsorship of this program.

1. 349 U.S. 294 (1955) (*Brown II*); 347 U.S. 483 (1954) (*Brown I*).

2. *Brown I*, 347 U.S. at 495.

3. *See* Richard Kluger, Simple Justice 941 (1975).

criminatory basis with all deliberate speed."[4]

Together, the decisions in *Brown* were, at the same time, both revolutionary and conservative. They were revolutionary because they dramatically changed the law and the life of the people in this country;[5] yet, they were conservative because that change was effected by the actions of lawfully constituted authority. The decisions were controversial at the time, and their jurisprudential underpinnings remain controversial today.

Perhaps the most famous critique of the jurisprudence of *Brown* is Professor Herbert Wechsler's 1959 essay *Toward Neutral Principles of Law*, in which he contended that the decision was unprincipled and contrary to basic tenets of constitutional government.[6] More recently, Professor Charles Lawrence and others have said that the Court in *Brown I* missed the real wrong. By focusing on the psychological harms of segregation, the Court missed the fact that the real harm of segregation is that it stigmatizes and subordinates African-Americans. It has additionally been argued that because the Court got the right wrong in *Brown I*, the Supreme Court in the 1970s and 1980s was able to retreat from its commitment to civil rights.[7]

Just as the right has been attacked, so has the remedy. The limited remedy of *Brown II*—and in particular the "all deliberate speed" formulation—did not promptly vindicate the rights of African-Americans. In fact, ten years after *Brown*, only two percent of Black children in the South attended desegregated schools.[8]

These two themes, the transformation that *Brown* created and the limits of that transformation, are the focus of the first panel of the tribute, "*Brown* and the Transformation of the Constitution."

The first contribution is from one of the legends of the civil rights movement, Judge Constance Baker Motley. Judge Motley participated in all of the major education cases during her two decades with the Legal Defense Fund, including both *Brown I* and *Brown II*, in which she was one of the attorneys who wrote the briefs that the Legal Defense Fund submitted to the Supreme Court. Speaking from the vantage point of a participant, Judge Motley places *Brown* in the context of the earlier civil rights cases that eroded the force of *Plessy v. Ferguson*,[9] and assesses the impact of the *Brown* decision. In the second piece, Professor Mark

4. *Brown II*, 349 U.S. at 301.

5. For discussions of the way in which *Brown* transformed the civil rights movement, see Kluger, *supra* note 3, at 946-60; Gene B. Sperling, *Does the Supreme Court Matter?*, Am. Prospect, Winter 1991, at 91-92.

6. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 31-35 (1959).

7. *See* Charles Lawrence, *"One More River to Cross"— Recognizing the Real Injury in* Brown*: A Prerequisite to Shaping New Remedies, in* Shades of *Brown*: New Perspectives on School Desegregation 49 (Derrick A. Bell ed., 1980).

8. *See* Cass R. Sunstein, *Constitutional Politics and the Conservative Court*, Am. Prospect, Apr. 1990, at 51, 59.

9. 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

Tushnet, speaking from the vantage point of historian and legal scholar, probes the gap between *Brown I*'s right and *Brown II*'s remedy, and concludes that the "all deliberate speed" formulation ultimately, and ironically, contributed to the rise of judicial activism and modern public law litigation. The final member of the panel is Judge Louis Pollak, a longtime advisor to the NAACP Legal Defense Fund, one of the attorneys who wrote the brief in *Brown II*, and author of the article, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler.*[10] Although then-Professor Pollak disagreed with the Court's reasoning, that article provided one of the most important defenses of the constitutional legitimacy of the holding in *Brown*. In his contribution here, Judge Pollak discusses the generative power of *Brown*'s commitment to the principle of equality, a power that he sees manifested in the Supreme Court's jurisprudence of the next quarter-century, and even in the jurisprudence of foreign countries.

The second panel, "Civil Rights in Education after *Brown*," focuses on a specific aspect of *Brown*'s legacy: the on-going campaign to end school segregation. The members of the panel are four attorneys who played an important and distinguished role in litigating post-*Brown* civil rights cases. Each writer's discussion focuses on one or two of the education cases on which he worked and the lessons that can be drawn from those experiences.

The cases that are the subject of this second panel are, for the most part, a second generation of segregation cases—second generation not merely in terms of chronology, but also second generation in terms of the type of case. The focus is no longer primarily, as it was in the years immediately following *Brown*, on the South, although it remains in the South as well. These are cases in which educational segregation is inextricably linked to segregation in housing, and in which segregation in housing is a product of White flight as much as it is a product of segregation within the town or the city.

The problems posed by these cases are more complex, but the underlying issues remain largely the same as they were in *Brown*. What is the nature of the constitutional rights involved? What kind of remedy is appropriate for those rights? What is the relationship between the rights articulated by courts and the remedies that they require to be followed? What is the relation between judicial enunciation of rights and remedies and popular support for civil rights? To these questions, however, a new one is added: Does the more complex nature of the segregation involved necessitate a different kind of remedy?

The first panelist, Mr. Conrad Harper, a member of the NAACP Legal Defense and Educational Fund's staff from 1965 to 1970, discusses *Harkless v. Sweeny Independent School District*,[11] a case which played an

10. 108 U. Pa. L. Rev. 1 (1959).
11. 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971).

important role in the eventually successful challenge to *Monroe v. Pape*'s[12] bar to civil rights suits against municipalities. Mr. Harper argues that the case illustrates how the Legal Defense Fund successfully combated hostile precedent. Professor Drew Days, a former Assistant Attorney General for Civil Rights and First Assistant Counsel for the NAACP Legal Defense Fund, offers the Hillsborough County, Florida school desegregation case[13] as an example of how integregation can be successfully achieved. In a dramatically different tone, Judge Nathaniel Jones, NAACP General Counsel for a decade, discusses *Milliken v. Bradley*.[14] *Milliken* was the critical case in the attempt to apply the principles enunciated in *Brown* to Northern schools, and, Judge Jones eloquently declares, the Supreme Court's decision in *Milliken I* was a "watershed" event in the retreat from the Court's commitment to racial equality. The final panelist whose comments are presented here is Professor Theodore Shaw. Professor Shaw was a trial attorney in the Civil Rights Division of the Department of Justice, Assistant Counsel and Director of the Education Docket for the NAACP's Legal Defense Fund, and Western Regional Counsel for the Legal Defense Fund. He discusses *Missouri v. Jenkins*[15] and *Dowell v. Board of Education.*[16] Professor Shaw uses these cases as evidence of the complexity of the school desegregation issue, of the difficulties that those who hope to carry on in the tradition of Justice Marshall must confront, and of the importance of carrying on that tradition.

The closing remarks come from the program's moderator, Mr. Paul Dimond, a distinguished scholar and former Director of the National Lawyers' Committee for Civil Rights under Law. Mr. Dimond suggests that an "anticaste" principle informs the Supreme Court's decision in *Brown* and argues for its revival. Returning to the theme of the difference between the right and the remedy in *Brown*, Mr. Dimond defends the appropriateness of separating right and remedy. He argues that the combination of the enunciation of broad constitutional principles and the use of constrained judicial remedies acknowledges limitations on judicial power while permitting coalition building.

Taken together, the two panels illustrate the many dimensions of *Brown*'s legacy. The panelists' comments demonstrate that the promise of *Brown* remains and may well long remain unfulfilled. But the weight of their remarks is to mark and celebrate a triumph. The comments show the way in which the decision's support for the principle of racial equality empowered the civil rights movement and shaped subsequent

12. 365 U.S. 167 (1961), *overruled by* Monell v. Department of Social Servs., 436 U.S. 658 (1978), *and overruled by* Ingraham v. Wright, 430 U.S. 651 (1977).

13. *See* Mannings v. Board of Pub. Instruction, 306 F. Supp. 497 (M.D. Fla. 1969), *rev'd*, 427 F.2d 874 (5th Cir. 1970).

14. 433 U.S. 267 (1977) (*Milliken II*); 418 U.S. 717 (1974) (*Milliken I*).

15. 495 U.S. 33 (1990).

16. 396 U.S. 269 (1969).

constitutional and legal developments on a host of fronts, and they show how *Brown* set an aspirational standard against which subsequent developments would be tested.

Strikingly, the remarks of the panelists also bear witness to the incomparable significance of the career of Justice Thurgood Marshall. The panelists discuss Justice Marshall in many different contexts. They speak of him as a colleague, as a Supreme Court Justice, as a hero. Regardless of how they know him, the common thread is that he touched their lives. Although in different ways, each of the panelists has been a fighter for the cause of racial justice and equality. In that struggle, each of the panelists was clearly inspired and challenged by Thurgood Marshall. It is this ability to challenge and inspire countless men and women—just as much as it is his role in personally shaping the law—that constitutes Thurgood Marshall's legacy.

PANEL I:
BROWN AND THE TRANSFORMATION OF THE CONSTITUTION