THE AUTHORITY OF RACE IN LEGAL DECISIONS: THE DISTRICT COURT OPINIONS OF *BROWN V. BOARD OF EDUCATION*

ERICA FRANKENBERG*

INTRODUCTION

Legal scholarship, indeed the legal system itself, has often argued that the United States Supreme Court merely settles Constitutional principles in a contemporary context. It is a system that argues objectivity and places heavy emphasis on its past decisions in deciding new cases. Yet occasionally, the courts have reversed what had been settled law for many decades. One such instance was *Brown v. Board of Education*, the 1954 landmark school desegregation case, when the Court unanimously invalidated the application of *Plessy v. Ferguson*.[1] Under the holding of *Plessy*, separate public school facilities were considered constitutional as long as they were equal.[2] *Brown* generated a great deal of controversy and resistance among Southern whites, leading to much discussion (popular, political, and scholarly) of the school segregation decisions of the lower federal courts, the institutions subsequently charged with enforcing *Brown*. Most common is a narrative of increasing racial egalitarianism, echoed by the Court most notably in its

* Erica Frankenberg (Ed.D., Harvard University) is an assistant professor in the Department of Education Policy Studies in the College of Education at the Pennsylvania State University. The author wishes to thank Preston Green and Leah Aden for helpful comments on this draft and Evelyn Brooks Higginbotham for comments on an earlier draft. Thanks also to Tiffanie Lewis for her help.

1 Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 494–95 (1954).

2 Plessy v. Ferguson, 163 U.S. 537 (1896).

Loving decision overturning a Virginia law banning interracial marriage.[3] "We have consistently denied the constitutionality of measures which restrict the rights of citizens on the account of race," the Court held just thirteen years after *Brown.*[4]

Although school desegregation decisions concern the racial ideologies and classifications that govern society, legal scholarship rarely focuses on how contemporary understandings about race affected these decisions.[5] This is particularly important at the district court level where much of the social science evidence about the effects of racial discrimination is presented. I argue that, in examining the four district court opinions that were eventually consolidated into *Brown* upon appeal to the U.S. Supreme Court, the influence of new understandings about race on the district court judges was limited. Only one judge, Waties Waring in South Carolina, questioned not only the role that race and racism played in creating a segregated society, but also the very notion of race, in deciding that segregated schools were unconstitutional. Although the plaintiffs in all four cases were represented by NAACP Legal Defense Fund (LDF) lawyers who included social science evidence questioning the "separate but equal" premise of *Plessy* in their constitutional arguments, the degree to which social science infused the judge's opinions 'varied widely from case to case.

In Part I, before analyzing the district court opinions, I review law journals' treatment of race in the years preceding the lower courts' decisions. I next examine the decisions in the four cases: *Davis v. County School Board of Prince Edward County, Virginia*, in Part II; *Brown v. Board of Education of Topeka*, in Part III; *Gebhart v. Belton*, from New Castle County Delaware, in Part IV; and *Briggs v. Elliott*, on appeal from Clarendon County, South Carolina in Part V. Part VI examines the lone dissent in the four cases of Judge Waties Waring in the Clarendon County, South Carolina case. The Article concludes in Part VII.

Our society continues to grapple with racial inequality and segregation in the nation's public schools, and indeed may be undoing much of the progress that came after the *Brown* decision.[6] In addition to judicial questions about the contemporary nature of race and racial classification,[7] as was the case in many of the district court opinions preceding *Brown*, social science still only has limited influence in informing school segregation decisions.[8]

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[3] *See generally* Loving v. Virginia, 388 U.S. 1 (1967).

[4] *Id*. at 11–12.

[5] *See, e.g*., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007). This case is the latest in a long line of cases that demonstrates hostility towards any governmental decision-making that uses racial classifications. For example, Chief Justice Roberts quoted *Adarand*, writing "[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality" *Id*. at 745–46 (internal quotations omitted). Justice Kennedy's controlling opinion does question the racial classifications the school districts employed—suggesting that "white" and "non-white" were "crude racial categories." *Id*. at 786. Neither of these statements, however, question the fundamental concept of race despite more recent social science acceptance that race is socially constructed. *See generally* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994) (arguing that objective categories of race, such as Caucasoid, Negroid, and Mongoloid, are an illusion, but that social constructions of race are very real).

[6] GARY ORFIELD, UCLA CIVIL RIGHTS PROJECT, REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE 3 (2009) (reporting that fifty-five years after the *Brown* decision, schools in the United States are more segregated than ever); *see also Parents Involved*, 551 U.S. at 803.

[7] Adam Liptak, *Sotomayor Reflects on First Years on Court*, N. Y. TIMES, Feb. 1, 2011, at A17 (expressing Justice Sotomayor's skepticism at Chief Justice Roberts "simple" view of race and colorblindness).

[8] *See generally* Erica Frankenberg & Liliana M. Garces, *The Use of Social Science Evidence in* Parents

I. RACE IN CONTEMPORARY LAW JOURNALS

Before turning to an examination of the district court decisions, I first review how legal journal articles wrote about race in the early 20th century. These prominent journals are the most likely contemporary sources to have been read by judges and to have influenced their thinking. Law professor Herbert Hovenkamp argues that social science knowledge can affect judges in two ways: (1) by formally presenting generally agreed upon facts on point to the case at hand,[9] and (2) by being part of the way judges understand or have internalized accepted facts and science.[10] Leading law journals in the decades prior to the school segregation cases discussed the growing importance of social science as a means of illuminating legal problems. These articles made frequent references to social science's understandings about race and the effect of racial discrimination in society. Felix Frankfurter wrote one such article in the early 1930s.[11] At the time of the article's publication, Frankfurter was a professor at Harvard Law School. He was subsequently appointed to the Supreme Court and was a Justice on the Court at the time of *Brown*. In this article, Frankfurter suggested that social science could give lawyers and judges new information and contextualize prior knowledge in a new perspective.[12] In reviewing a newly published encyclopedia of social sciences, he specifically cited Franz Boas' article on anthropology as perhaps being more helpful than a "technically legal article."[13] By 1911, Boas had begun to show that the physical traits of Negroes that differed from those of whites were not inheritable, but due to environmental causes, which attacked previously held notions of "scientific racism" that assumed physical characteristics differ predictably by race.[14] A *Yale Law Journal* review of Boas' 1928 *Anthropology and Modern Life* discussed at some length his argument for the complexity of humans and the likelihood that racial purity did not exist and lauded the application of anthropology to the study of contemporary problems.[15] The work of Gunnar Myrdal, who differed from Boas in focusing on the role of race in American society as opposed to the concept of race itself, was also cited often in law reviews, particularly those articles directly questioning the constitutionality of segregation in education.[16]

Involved *and* Meredith*: Implications for Researchers and Schools,* 46 LOUISVILLE L. REV. 703 (2008) (analyzing the use and misuse of social science evidence in the five opinions in the *Parents Involved* decision).

[9] One such brief was filed with the Supreme Court by a handful of prominent social scientists when the *Brown* cases were heard by the Court. *See* Robert L. Carter et al., *The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement*, J. OF NEGRO EDUC. 68 (1953). Most notably, psychological research about race by Kenneth Clark of the City College of New York was summarized in this brief and in the subsequent decision in *Brown*. *Brown*, 347 U.S. at 494 n.11.

[10] *See* Herbert Hovenkamp, *Social Science and Segregation before* Brown, 1985 DUKE L.J. 624, 627 (1985). Hovenkamp reviewed the advances in social science knowledge about race from the first decade of the twentieth century and argued that the Supreme Court's decisions for the fifty-year period after *Plessy* "closely tracked prevailing scientific opinion on race." *Id*. at 664.

[11] Felix Frankfurter, Book Review, 44 HARV. L. REV. 137, 147–48 (1931).

[12] *Id*. at 148.

[13] *Id.*

[14] Franz Boas, *The Instability of Human Types*, *in* THE IDEA OF RACE 84, 84–88 (Robert Bernasconi & Tommy Lott eds., 2000).

[15] Donald Slesinger, *Book Review*, 38 YALE L. J. 690, 694–96 (1928–29).

[16] *See, e.g.*, Note, *Constitutionality of Educational Segregation*, 17 GEO. WASH. L. REV. 208, 210 n.13 (1949); Note, *Segregation in Public Schools – A Violation of "Equal Protection of the Laws,"* 56 YALE L. J. 1059, 1061 (1947).

In these legal publications, there also was specific discussion of how the new social science knowledge of race invalidated *Plessy*. For example, a Note in the *Yale Law Journal*, commenting on the *Mendez v. Westminster* case[17] stated that "[m]odern sociological and psychological studies lend much support to the District Court's views" that schools should be open to all children regardless of race or ethnicity.[18] The author of the unsigned Note declared that "[e]very authority on psychology and sociology" agrees that segregation injured students and cited a variety of contemporary social science evidence to expand upon this point.[19]

Contemporary law journals in the years preceding the consideration of the school segregation cases discussed ways in which new understanding about race might challenge legal precedent. I next examine whether these scientific ideas influenced the four lower federal courts that considered challenges to segregated K-12 schools in the early 1950s.

II. THE INFLUENCE OF PAST IDEAS AND CUSTOMS ABOUT RACE: PRINCE EDWARD COUNTY, VIRGINIA

In a short, unanimous opinion, a three-judge court in Prince Edward County, Virginia rejected black plaintiffs' arguments that segregation deprived them of their constitutional rights.[20] The court decided that they could not determine factually whether the plaintiffs' evidence, offered by "[e]minent educators, anthropologies, psychologists and psychiatrists," was more persuasive than the defendants' "equally distinguished and qualified educationists and leaders in the other fields."[21] Instead, they held that there was ample legal precedent to determine the constitutionality of segregation in schools.[22] Ironically, after stating that they could not distinguish which of the two parties presented stronger social science testimony, the opinion still relied more on outdated ideas and customs about race embedded in Virginia's history to legitimize segregated schools than it did on legal precedent.[23]

While the opinion discusses the history of segregation in Virginia, it contains little discussion of the concept of race or the role of racial discrimination in Virginian society. In fact, the judges used the long history of racial separation in Virginia as further reason why the separation of white and black students was reasonable.[24] The judges wrote,

> It indisputably appears from the evidence that the separation provision rests neither upon prejudice, nor caprice, nor upon any other measureless foundation. Rather the proof is that it declares one of the ways of life in Virginia.

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[17] Mendez v. Westminster Sch. Dist. of Orange Cnty., 161 F.2d 774, 777 (9th Cir. 1947) (questioning the validity of *Plessy* in a California district that segregated Mexican-American students).

[18] Note, *Segregation in Public Schools*, *supra* note 16, at 1060.

[19] *Id*. at 1061.

[20] Davis v. County Sch. Bd. of Prince Edward Cnty., 103 F. Supp. 337, 337–38, 340–41 (E.D.Va. 1952).

[21] *Id*. at 338.

[22] *Id*. at 339.

[23] *Id*.

[24] *See id*. at 339–40. "Reasonable" was a term used by the *Plessy* majority. Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896). Part of the Justices' rationale in *Plessy* was based on their belief that racial distinctions were reasonable and would invariably be made—even though they also reserved the right of each state to determine who was colored. Thus, this "invariable" distinction, in reality, actually differed by state. *Id*.

> Separation of white and colored 'children' in the public schools of Virginia has for generations been a part of the mores of her people.[25]

The court cited two arguments to support this declaration. First, the judges recited the history of clauses in Virginia law providing for the provision of public education beginning in the years following the Civil War through 1950, but only if white and "colored" students were educated in separate schools.[26] They attributed significance to these rules, noting that the school segregation clauses were "the only racial segregation direction contained in the constitution of Virginia."[27] Second, the judges argued that school segregation had "begotten greater opportunities for the Negro" while involuntarily eliminating segregated schools would harm public education and students of both races.[28] The court supported this argument primarily by relying on the testimony of the president of the University of Virginia, because they "believe him [to be] delicately sensible of the customs, minds, and the temper of both races in Virginia."[29] The unnamed president offered a "candid and knowledgeable discussion of the problem," namely that segregated schools were "[s]o ingrained and wrought in the texture of [the public's] life" that to end this practice would diminish public interest in, and their financial support of, schools.[30] His belief that support for school systems would wane if the practice of segregation were to be ended by the courts had particular resonance for the judges who pointed out that a considerable majority of the residents were white. The court concluded that this was a "reasonable basis" to continue the practice of school segregation.[31]

The decision did not cite any legal precedent or social science evidence in the section of the opinion explaining how segregation was a way of life in Virginia, which is indicative itself of implicit ideas about the role of race in their society. Yet, the court found that school segregation had not hurt students of either race and was seemingly most concerned about the potential harm of ending the long-accepted custom of separating students by race.[32] In so doing, the judges dismissed the question of whether segregated schools violated the Fourteenth Amendment. Their opinion was similar to, and repeatedly cited, the *Briggs* opinion written a year earlier in South Carolina.[33] The *Briggs* decision is discussed in Part V.

III. BROWN V. BOARD, TOPEKA, KANSAS: FINDINGS OF FACT, FOLLOWING THE COURT

Unlike the rigid Jim Crow laws of southern states, Kansas law only required school segregation at the elementary level, and then only in cities with a population greater than 15,000.[34] While the Kansas law gave the Topeka school board the opportunity to end school

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25 *Davis*, 103 F.Supp. at 339.

26 *Id.*

27 *Id.*

28 *Id.* at 340.

29 *Id.*

30 *Id.*

31 *Davis*, 103 F.Supp. at 340.

32 *Id.*

33 *See generally* Briggs v. Elliott, 98 F. Supp. 529 (1951).

34 Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 484 n.1 (1954).

segregation, the school board denied the NAACP's request to do so.[35] The Topeka case chronologically followed the South Carolina case (*Briggs*), which had been the NAACP LDF's first use of social science to complement its legal arguments about the inherent inequality of segregation.[36] The plaintiffs, led by Robert Carter, assembled a team of social scientists who testified not only about material differences between the educational environments for black and white children in Topeka, but whose testimony reinforced the conclusion that attending state-sanctioned segregated schools harmed black children.[37] This conclusion was essential to arguing that segregated schools violated the black students' right to equal opportunity.

In response to the plaintiffs' contention that segregation violated their rights, the three-judge panel in Kansas candidly admitted that this "poses a question not free from difficulty."[38] In an opinion written by Circuit Judge Walter A. Huxman, the judges went on to say by way of explanation that, as a lower court, they were bound by the Supreme Court if they had spoken on a given issue and could not "substitute [their] own views for the declared law."[39] Having found that Topeka's white and colored schools were substantially equal, the judges relied primarily on the *Plessy* decision to justify that segregation was not unequal.[40] In doing so, they explicitly refuted the plaintiffs' argument that contemporary social science evidence necessitated re-examining *Plessy*.[41] To support their reliance on legal precedent, the Kansas panel in *Brown* recounted several times that the Court in *Sweatt* and *Gong Lum* had not reviewed *Plessy*.[42] Yet, they also had difficulty reconciling the Supreme Court's treatment of segregation in *McLaurin* and *Sweatt* with *Plessy*.[43] Specifically, in *McLaurin* and *Sweatt*, the Court held that segregation was unconstitutional in the context of higher education.[44] Ultimately, the district court narrowly defined the questions considered in *Sweatt* and *McLaurin* as the application of the Equal

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[35] *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 394 (1975).

[36] *Id.* at 400.

[37] *See id*. at 419–20.

[38] Brown v. Bd. of Educ. of Topeka, 98 F. Supp. 797, 798 (D. Kan. 1951).

[39] *Id.*

[40] *Id.*

[41] *Id*. at 798–799.

[42] *Id*. at 799–800. *See also* Sweatt v. Painter, 339 U.S. 629 (1950). In *Gong Lum v. Rice*, a decision by the Supreme Court in 1927, the Justices determined that the state of Mississippi could classify Chinese students as "colored" for purposes of maintaining white and colored K-12 schools. 275 U.S. 78 (1927). Justice Taft's unanimous opinion cited *Plessy* in part to justify their holding. *Id*. Notably, even though the *Brown* decision went on to wrestle with whether the declaration that separate higher educational facilities were unequal in *Sweatt* should be applied in the present K-12 context, the decision noted that, "in the late case of *Sweatt v. Painter*, the Supreme Court again refused to review the Plessy case" to demonstrate that *Plessy*'s holdings remained guiding precedent. *Brown*, 98 F. Supp. at 799 (internal citations omitted).

[43] *Brown*, 98 F.Supp. at 799. *See also* McLaurin v. Okla. State Regents for Higher Educ. 339 U.S. 637 (1950).

[44] In *Sweatt*, the Supreme Court declared that the separate law school created by the University of Texas to educate black students (to avoid having to admit black students to its white-only law school) did not provide equal educational opportunity because segregation from white students limited the educational and future occupational prospects of students. *Sweatt*, 339 U.S. at 633–35. Similarly, in *McLaurin*, the Court ruled that the plaintiff attending medical school was handicapped by the requirement that he sit in a separate, designated spot in the classroom, library, and cafeteria, which prohibited interaction with other students. *McLaurin*, 339 U.S. at 639–41. This, they reasoned, also provided unequal preparation for his future profession and was therefore unconstitutional. *Id*.

Protection Clause to graduate education only.[45] Social science evidence was presented by the plaintiff's lawyers about the harms of racial segregation in higher education, but because the Kansas panel narrowly construed the focus of *Sweatt* and *McLaurin* to graduate education, could not consider this evidence as relevant.[46] Huxman's opinion raised a number of questions about the applicability of the *Plessy* decision to public education, but concluded that because *Plessy* and *Gong Lum* had not been overturned by the Court itself, a segregated but equal public school system like Topeka's was constitutional.[47]

In relying on *Plessy* as prevailing doctrine, the judges in the Kansas case quoted *Sweatt*: "nor need we reach petitioner's contention that *Plessy v. Ferguson* should be reexamined in the light of contemporary knowledge respecting . . . the effects of racial segregation."[48] In doing so, their final judgment of law did not incorporate the substantial testimony of social science evidence that the LDF lawyers presented about the psychological effect of racial prejudice and segregation. Perhaps as a compromise, the judges attached nine findings of fact to their decision, including a finding about the sense of inferiority that results from segregated schools.[49] Jack Greenberg, one of the NAACP LDF lawyers in the *Brown* case, believed that two findings of this lower court panel were critical: 1) black and white schools in Topeka were substantially equal; and 2) no matter how equal the facilities were, segregation injured black children in these schools.[50] This evidence, it would turn out, achieved prominence in the Supreme Court's decision three years later, yet there was no mention of the findings of fact in the text of the decision itself.[51] Although the judges must have agreed with much of the social science evidence to reach these conclusions, their ideas about race and racism were not strong enough to override the importance of the legal precedent of *Plessy*.

IV. CONSTRAINED BY PRECEDENT: FACT VS. LAW IN DELAWARE

The lower court judge in Delaware, Chancellor Collins Seitz, considered both the social science evidence and legal precedent and came to two different conclusions about racial segregation in public schools.[52] Seitz, a judge recently promoted from vice-chancellor to chancellor, began his opinion discussing the testimony of the plaintiffs' expert witnesses in "education, sociology, psychology, psychiatry and anthropology" whose "qualifications were fully established."[53] He pointed out that there were "no witnesses in opposition."[54] Relying heavily on the testimony of one of "America's foremost psychiatrists," Seitz concluded that state-

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[45] *Brown*, 98 F. Supp. at 799–800.

[46] *Id.* According to Mark Tushnet, Thurgood Marshall thought social science evidence would be more necessary in the K-12 school context than in *Sweatt*, for example, since the Justices had an "intuitive" understanding of how segregated legal education might be harmful. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW, THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 156–57 (1994).

[47] *Brown*, 98 F. Supp. at 799–800.

[48] *Id*. at 798.

[49] KLUGER, *supra* note 35, at 424.

[50] JACK GREENBERG, CRUSADERS IN THE COURT: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 131 (1994).

[51] *See Brown*, 98 F. Supp at 797–800.

[52] *See* Belton v. Gebhart, 32 Del. Ch. 343 (1952).

[53] *Id*. at 348.

[54] *Id*.

imposed segregation might create feelings of inferiority in black students to the point that it might hinder their education as compared to white students.[55]

Despite this finding of fact, little evidence exists in the opinion to suggest that Seitz was aware of, or influenced by, contemporary social sciences understanding of race. Seitz's focus was on the effects of a segregated environment in creating a sense of inferiority, and he determined that segregation created a "mental health problem in many Negro children."[56] Decades earlier, anthropologist Franz Boas had discussed the effect of a segregated environment based on observations he had made, primarily focusing on how they caused changes in physical type. He concluded, however, that "the mental make-up of a certain type of man may be considerably influenced by his social and geographical environment."[57] Boas' observations of the environment challenged the notion of the stability of racial classification. While this could have undermined prior precedent to the extent that it would not apply to the present case, it was not a question that Seitz raised in his opinion.

After boldly declaring that segregation resulted in an inferior education, Seitz hastened to add that this fact did not answer the question of whether segregation violated the Constitution.[58] Instead, he believed that it was important to consider decisions of the Supreme Court that spoke to this issue.[59] Although conceding, as plaintiffs had argued, that the Court had never considered a case regarding the effect of segregation on students, he believed it was fairer to consider a broader question about the general holdings of the Court with regard to the constitutionality of segregation.[60] Framing the question in such a way led him to *Plessy* and *Gong Lum*, the latter case determining that a "colored" student's segregated school was constitutional.[61] Relying on these cases as the proper precedent, he believed that the Court had recognized separate could be equal in elementary and secondary education even though, "this could not be true were my finding of fact [that segregation creates feelings of inferiority in black students that hinders their education] given constitutional recognition."[62] Seitz concluded that "while [s]tate-imposed segregation in lower education provides Negroes with inferior educational opportunities, such inferiority has not yet been recognized by the United States Supreme Court as violating the Fourteenth Amendment. . . . It is for that Court to re-examine its doctrine in the light of my finding of fact."[63]

Once Seitz concluded that, according to legal precedent, segregation was not in violation of the Fourteenth Amendment, he then turned to the question of whether separate was equal in the New Castle County, Delaware schools.[64] His lengthy analysis of this issue considered a variety of common measures—length of students' journeys to school, the school's facilities, the educational

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55 *See id*.

56 *Id*.

57 Boas, *supra* note 14, at 88.

58 Belton v. Gebhart, 87 A.2d 863, 865 (Del. Ch. 1952).

59 *Id*.

60 *Id*.

61 *See* Gong Lum v. Rice, 275 U.S. 78 (1927). In fact, in *Gong Lum*, the Court declared that the question of whether segregated schools were constitutional was easier than that of the segregated railroad cars under consideration in *Plessy*. *Id*.

62 *Belton*, 87 A.2d at 865.

63 *Id*. at 866.

64 *Id*. at 868.

qualifications of faculty members, class size, and curricular and extracurricular activity offerings.[65] In fact, he personally visited the specific white and black schools that were at issue.[66] Seitz brushed aside arguments by the defendants that in some aspects the Negro schools were superior.[67] Rather, his comparison of schools led him to write, for example, "[i]f this be a harsh test, then I answer that a State which divides its citizens should pay the price."[68] Comparing the education offered to students in black schools with that offered to students in white schools, he concluded that the State had violated the rights of the plaintiffs by denying them admission to the white school.[69] Despite the arguments of the defendants that equalization plans for the black schools were in progress, he ordered the immediate admission of plaintiffs and other similarly situated students to the white schools.[70] Further, he placed the burden on the school board at some later date when students were offered an equal education to prove that such access was unnecessary.[71]

Although Seitz explicitly recognized the value of new social science evidence in concluding on the harmful impact of state-imposed segregation, he evidently did not believe that the evidence was strong enough to render past legal decisions irrelevant.[72] In a conflict of judicial precedent and current "facts," the former proved a stronger influence in Seitz's decision, a conclusion that was upheld by a three-judge Delaware Supreme Court panel that reviewed his decision.[73] The panel did not review the Chancellor's finding that segregation harmed students because they concluded that he was correct in determining that this finding did not affect the determination of whether segregation was in violation of the Constitution. Nor did they argue with his finding of inferior educational opportunities, and instead agreed that the Supreme Court should be the court to say that segregation is unconstitutional.[74]

In fact, the three-judge panel upholding Seitz's lower court decision was similarly unaffected by contemporary understanding of race. Although there is no explicit consideration of race or racial understanding in the decision, in the beginning of his Delaware Supreme Court opinion, Chief Justice Southerland referred to plaintiffs as "citizens of Negro blood."[75] This description echoed a nineteenth century understanding of race as being biologically determined, a view that by the 1950s was discredited. The *Plessy* decision also used blood as a way of defining race, referring to the "colored blood" of plaintiff Homer Plessy who appeared white but was one-eighth black (and therefore considered black according to the one-drop rule).[76]

In a decision affirmed by the higher court, Seitz ultimately believed that legal precedent prevented him from ruling that segregated schools, in principle, were unconstitutional despite his factual finding that segregated schools created inferior educational opportunities for black

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65 *Id.* at 866–71.

66 *Id.* at 866.

67 *Id.* at 867.

68 *Id.* at 868.

69 *Id.* at 871.

70 *Belton*, 87 A.2d at 871.

71 *Id.* at 870.

72 *Id.* at 865.

73 Gebhart v. Belton, 91 A.2d 137, 142 (Del. 1952).

74 *Id.*

75 Gebhart v. Belton, 91 A.2d 137, 139 (Del. 1952).

76 Plessy v. Ferguson, 163 U.S. 537, 541 (1896).

students. Yet, plaintiffs in the Delaware case were the only plaintiffs in the four cases to be granted admission to white schools as relief to their claims on the second issue in their case, specifically the equality of the segregated schools in question.

V. THE BRIGGS' MAJORITY FOCUS ON PRECEDENT

Briggs v. Elliott, in South Carolina, was the only decision with a dissent, although the majority affirmed the legality of South Carolina's segregation practices. The majority opinion in *Briggs*, written by Fourth Circuit Judge John Parker[77] and joined by District Judge George Timmerman,[78] contained no explicit discussion of race. Parker's opinion repeatedly emphasized the importance of constitutional precedent and the legislative branch in determining whether segregation was wise policy. In fact, it even suggested that if the court abolished segregation where equal schools existed, it would threaten the very existence of the constitutional system.[79]

For Parker and Timmerman, social science theories about the role of race in classifying and segregating students, as well as the harms that result from such actions, were not strong enough to overturn a large body of law permitting segregated schooling that they saw as "reasonable."[80] In addition, their majority opinion downplayed the significance of social science theories influencing judicial ideas about race. In contrast to Chancellor Seitz who wrestled with the conflict of legal precedent and what he believed to be contradictory findings of fact, Judge Parker's opinion was dismissive of theories of educators and sociologists, which he believed had little bearing on constitutional law.[81] The opinion noted that segregation was not in violation of the Fourteenth Amendment, asserting, "we think that this conclusion is supported by overwhelming authority which we are not at liberty to disregard on the basis of theories advanced by a few educators and sociologists."[82]

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[77] Judge Parker was the chief judge of the Fourth Circuit, and, according to Jack Greenberg, was liked by Thurgood Marshall. *See* GREENBERG, CRUSADERS IN THE COURT, *supra* note 50, at 121. The NAACP had achieved several early civil rights victories in Judge Parker's courtroom, including affirming Judge Waring's lower court decision invalidating the white primary in North Carolina. *See* KLUGER, SIMPLE JUSTICE, *supra* note 35, at 303.

[78] Judge Waring described Judge Timmerman, the third member of this three-judge panel, as an avowed segregationist, while Kluger described him as an "out-spoken advocate of white supremacy." *See* JULIUS WATIES WARING, ORAL HISTORY PROJECT AT COLUMBIA UNIVERSITY, REMINISCENCES OF JULIUS WATIES WARING 358 (1957); KLUGER, SIMPLE JUSTICE, *supra* note 35, at 303.

[79] *See* Briggs v. Elliott, 98 F. Supp. 529, 537 (D.S.C. 1951).

[80] *Id.*

[81] *Id.* at 536.

[82] *Id.* at 537. The NAACP Legal Defense Fund (LDF) presented social science experts from a number of prominent universities in the *Briggs* case including Horace McNally, a professor at Teachers College, Columbia University, who argued that separating students implied stigma; Ellis Knox, education professor at Howard University, who stated that segregation cannot exist without disadvantage to the minority group; Kenneth Clark, professor of psychology at City College, presented his findings of black inferiority due to segregated schools based on his doll studies; and Louis Kesselman, professor of political science at University of Louisville, who said segregation prevented students from understanding the needs and interests of both groups. *See* GREENBERG, CRUSADERS IN THE COURT, *supra* note 50, at 123. Additionally, the LDF lawyers read into the record, from the *Sweatt* case, testimony of Robert Redfield, a law professor at University of Chicago in which he discussed evidence that there had not been differences between Negroes and whites in intellectual capacity or inability to learn. *Id.* at 125. According to Judge Waring's dissent, other social science experts were unable to make it to South Carolina due to maneuvers by the school board. *Briggs*, 98 F. Supp. at 540. Because of the school district's surprising admission that their schools were not equal, a remarkably short defense,

The two judges bolstered their opinion by relying on the traditional belief in the supremacy of law, which governed legal thinking and placed heavy emphasis on preexisting law.[83] If followed to its fullest extent, this prevented new ideas about race from affecting judicial decisions. The majority opinion cited and quoted extensively from *Plessy* and *Gong Lum* as precedent for the constitutionality of segregating black and white children despite the Supreme Court's more recent higher education decisions of *McLaurin* and *Sweatt*.[84] They also took considerable pains to point out the many areas—including states outside the South—where segregated schools prevailed.[85] Finally, to vindicate their position, they cited a decision from the District of Columbia in the previous year that called attention to the difficulties that occur when people of more than one race coexist in the same area, a problem that was insoluble by force, according to the opinion.[86]

Similar to the Virginia opinion the following year, Parker and Timmerman neglected to examine the racial customs of South Carolina and how those customs affected their ruling. They wrote, "[t]he classification of children for the purpose of education in separate schools has a basis grounded in reason and experience; and, if equal facilities are afforded, it cannot be condemned as discriminatory. . . ."[87] This statement is indicative of a belief in the validity of racial classifications that had long been the custom in South Carolina society; yet it was a belief that was extensively questioned by social scientists at the time.

VI. THE LONE DISSENTER

The dissenting judge in the *Briggs* case, and, in fact, the only dissenting judge among the more than a dozen lower court judges to hear the original four cases that were consolidated in 1952 before the Supreme Court as *Brown v. Board of Education* was J. Waties Waring, a district court judge in the Eastern District of South Carolina. Waring wrote a vigorous dissent as a member of the three-judge panel hearing *Briggs v. Elliot.* Although he later commented that he viewed Chief Justice Earl Warren's *Brown* decision as much more eloquent than his,[88] Waring's dissent goes into greater discussion of race than Warren's or any other judge involved in the school segregation decisions. In ultimately declaring that segregation violated the Fourteenth Amendment, Waring not only lamented the effect of the practice of racial discrimination (in the form of state-imposed school segregation) on black children, but he also challenged the very notion of race as a concept.[89] To some extent, his dissent both addressed the opinion of the *Briggs* majority, and dialogued with the *Plessy* majority of over fifty years earlier.

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and the impatience of Judge Parker to wait for more social science testimony, the other LDF experts did not make it to South Carolina prior to closing arguments. KLUGER, SIMPLE JUSTICE, *supra* note 35, at 358–63.

83 *Briggs*, 98 F. Supp. at 537.

84 *Id*. at 532–35.

85 *Id*. at 537.

86 *See* Carr v. Corning, 182 F.2d 14 (D.C. Cir. 1950).

87 *Briggs*, 98 F. Supp. at 536.

88 *See* WARING, ORAL HISTORY, *supra* note 78, at 365.

89 *Briggs*, 98 F. Supp. at 542.

A. Questioning "Race"

Waring began his dissent by praising the plaintiffs for bringing the *Briggs* case, noting that it "must have cost much in effort and financial expenditures" despite the "long established and age-old pattern of the way of life" that had existed in South Carolina "since and as a result of the institution of human slavery."[90] While the *Briggs* majority relied upon this "way of life" as rationale for their holding, Waring criticized the defendants and the court for using this as an excuse for avoiding the question of whether "segregation in education in our schools is legal" and whether this was permitted under the guarantees of the U.S. Constitution.[91]

Important to Waring's reasoning about the nature of school segregation was the country's history of inequitable treatment on the basis of race. In instituting human slavery in the United States, Waring noted "[s]lavery was nothing new in the world."[92] Discussing various forms of slavery, he suggested that it "perhaps reached its worst form in Nazi Germany."[93] Waring contextualized the adoption of the 13th, 14th and 15th Amendments as a way of eradicating slavery and part of the world's "great awakening" that began with philosophers and religious leaders.[94] Indeed, he portrayed their adoption as practically inevitable in order for the country to endorse the principles of the Declaration of Independence.[95] Thus, he found it "unnecessary" to sort through "voluminous arguments and opinions" to ascertain what the Fourteenth Amendment meant.[96] He believed that anyone "of ordinary ability and understanding of the English language" would know that it was intended to eliminate "all idea of discrimination and difference between American citizens."[97] This contrasted directly with the majority's opinion in *Plessy*, which remarked that racial distinctions would invariably be made.[98]

In considering whether South Carolina's laws conflicted with the "true meaning" of the Fourteenth Amendment, Waring further challenged previous judicial discussions of race by charging that they had "been intermingled with sophistry and prejudice."[99] By 1951, Justice Harlan's *Plessy* dissent was one of the few judicial opinions in opposition to segregation. Although it was a decision about transportation and not about public schools, *Plessy* was subsequently cited as precedent to justify school segregation. Even Harlan's dissent had not questioned the validity of racial classification and, in fact, had acknowledged a racial hierarchy.[100]

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[90] *Id*. at 540. Waring's opening narrative omits the beginning of this historic case. Waring later commented that Marshall would not have challenged the constitutionality of segregated schools had Waring not forced him to withdraw his earlier case that simply challenged the equality of schools in Clarendon County, South Carolina. *See* WARING, *supra* note 78, at 344–345. Greenberg suggested that Waring, having grown estranged from Charleston society, wanted to confront segregation directly and thus urged Marshall to re-file his case to do so. *See* GREENBERG, CRUSADERS IN THE COURT, *supra* note 50, at 122; TUSHNET, MAKING CIVIL RIGHTS LAW, *supra* note 46, at 157–58.

[91] *Briggs*, 98 F. Supp. at 541.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id*. at 541–42.

[98] *See* Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

[99] *Briggs*, 98 F. Supp. at 542.

[100] Harlan's dissent has long been held up even by LDF lawyers, who argued the segregation cases that culminated in *Brown*, as a ringing endorsement of the meaning of the Fourteenth Amendment, but a closer reading shows

Waring, however, questioned the arbitrary nature of defining races, echoing the arguments of Albion Tourgee who represented Homer Plessy over fifty years earlier.[101] Waring asked, "What possible definition can be found for the so-called white race, Negro race or other races? Who is to decide and what is the test?"[102] Highlighting the arbitrary nature of racial classification, Tourgee had suggested if "separate but equal" was adopted for separating two races, then such laws could also exist separating those whose hair was different colors or who were different nationalities.[103]

Social scientists for several decades prior to *Brown* had questioned conceptions of race. Ashley Montagu, for example, proposed in the early 1940s that the concept of race is "utterly erroneous and meaningless" and "has done an infinite amount of harm and no good at all."[104] Reference to blood was a common response in defining the race of a person in the nineteenth century and also in legal decisions; the majority opinion in *Plessy*, for example, described the petitioner as a mixture of Caucasian and African blood.[105] Despite the fact that "the mixture of colored blood was not discernible in him," he was considered colored under Louisiana's statute.[106] Even as late as 1952, the Delaware Supreme Court that reviewed Seitz's decision referred to the plaintiffs as being of Negro blood.[107] Not unaware of this history, Waring directly challenged this perception of race, and in doing so, the entire system of separating students according to race. He wrote, "[s]cience tells us that there are but four kinds of blood: A, B, AB and O, and these are found in Europens [sic], Asiatics, Africans, Americans and others."[108] Dismissively, he continued, "we need not further consider the irresponsible and baseless references to preservation of 'Caucasian blood.'"[109]

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a similar conception of race to that of the *Plessy* majority and a belief in white supremacy. *See* TINSLEY E. YARBROUGH, JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN 227–29 (1995). Where Harlan differs from the majority, causing him to dissent, is that he believed that the country's laws protected the civil rights of all men. *Id*. In other words, he believed in legal equality but *not* social equality between whites and blacks. *Id*. He had explained these views earlier when running for governor of Kentucky in 1871, twenty-five years earlier. Harlan advocated full legal equality between the races despite saying that he believed social equality could never exist in Kentucky and that it was proper to segregate Negro and white students in school. Alan F. Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637, 662–63 (1957).

[101] *Briggs*, 98 F. Supp. at 542.

[102] *Id*.

[103] *Plessy*, 163 U.S. at 549. Harlan briefly echoes Tourgee's questioning of the arbitrary nature of laws regulating behavior on the basis of race, asking "why may not the state require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?" *Id*. at 558.

[104] Ashley Montagu, *The Concept of Race in the Human Species in the Light of Genetics*, *in* THE IDEA OF RACE 100, 101 (Robert Bernasconi & Tommy Lott eds., 2000).

[105] Likewise, the Court's 1927 *Gong Lum* decision, which confirmed the applicability of *Plessy* to public education, referred to blood to determine that the plaintiff, a Chinese student, was "colored." Gong Lum v. Rice, 275 U.S. 78, 78 (1927).

[106] *Plessy*, 163 U.S. at 538.

[107] Gebhart v. Belton, 91 A.2d 137, 139 (1952).

[108] Briggs v. Elliott, 98 F. Supp. 529, 542 (D.S.C. 1951).

[109] *Id*. Defenders of school segregation often raised the specter of intermarriage as a further reason schools should remain segregated. For example, white Southern attorney generals filed an *amicus* brief in *Sweatt* saying that they did not want "their women in intimate social contact with Negro men." PETER IRONS & STEPHANIE GUITTON, MAY IT PLEASE THE COURT: THE MOST SIGNIFICANT ORAL ARGUMENTS SINCE 1955, at 376 (Peter Irons & Stephanie Guitton eds., 1993). There are more recent examples of this biological basis of race persisting in judicial thought. For example, during oral arguments of a case about racial preferences in government contracting, Justice Antonin Scalia argued that a

Attacking the notion of race further, Waring specifically questioned the proportions South Carolina had delineated as determining one's race, namely that someone who was one-eighth or more of African ancestry was considered to be a "Negro".[110] He questioned this proportion and whether it was based on any "reason" (a term frequently used in the majority's decision in *Briggs* as well as *Plessy*).[111] He further questioned how those assigning children would even be able to tell who was white and who was Negro.[112] Carrying the law's logic to its fullest extent, he rhetorically asked why the state should not establish a series of schools so that students of each percentage of African and Caucasian blood would not have to mix with students of different combinations.[113] He answered himself, "the whole thing is unreasonable, unscientific, and based upon unadulterated prejudice."[114] This was in direct contradiction of the majority's opinion that classifying and segregating students in schools was "grounded in reason and experience."[115]

Before Waring even discussed legal precedent—and perhaps in response to the majority's criticism of social science theories, he had not cited any social science references to support his argument—he indicated his belief in the absurdity of race as a concept and as a means of classification.[116] Mentioning that scientific understanding undermined the legal understanding of "blood" as a means of separating races, Waring challenged the very basis of *Plessy* and subsequent decisions that the other judges, including the other members of the *Briggs* panel, upheld as precedent.[117]

B. The Practice of Racial Discrimination

Walter Jackson argued that Swedish sociologist Gunnar Myrdal's *An American Dilemma* had a strong effect on both intellectuals and policymakers from the 1940s to 1960s in "establishing a liberal orthodoxy around the ideas of integration," but Jackson ultimately found that this was a somewhat limiting view in the realm of school segregation because, by focusing on prejudice as the source on inequality, it ignored the structural sources of racism.[118] Further, by emphasizing the harm of segregation to African American students, Myrdal's work also neglected a careful discussion of structures of African American resistance.[119]

An avowed reader of Myrdal's *An American Dilemma*, perhaps it is not surprising that Waring was also sensitive to the role of prejudice in affecting children in segregated schools.

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policy giving racial and gender preferences was only about "blood . . . blood, not background and environment." Neil Gotanda, *A Critique of our Constitution is Color-Blind*, *in* CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT 257, 261 (Kimberlé Crenshaw et al. eds., 1995).

110 *Briggs*, 98 F. Supp. at 542.

111 *Id*.

112 *Id*.

113 *Id*.

114 *Id*.

115 *Id*. at 536.

116 *Id*. at 542.

117 *Id*.

118 WALTER A. JACKSON, GUNNAR MYRDAL AND AMERICA'S CONSCIENCE: SOCIAL ENGINEERING AND RACIAL LIBERALISM, 1938-1987, at xviii (1990).

119 *Id*. at xix.

After his challenge of the nature of defining racial groups, Waring discussed studies and testimony of the plaintiffs' expert witnesses that demonstrated the harmful effect of segregation on children.[120] Saying there was "absolutely no reasonable explanation for racial prejudice," he disagreed with the majority's determination that such classifications that resulted from this prejudice were reasonable.[121] Moreover, Waring saw racial prejudice as acquired, not natural or inherited.[122] Segregation, particularly in younger children, aided the acquisition of prejudice, which was later difficult to change.[123] Waring implicitly drew upon social science evidence from Boas to Myrdal to emphasize the harmful nature of the practice of racial discrimination.

Interestingly, Waring suggested a rationale for prior judicial decisions regarding segregation as he sought to buttress his dissent with legal precedent. Noting that the *Plessy* decision came at a time when blacks were either former slaves themselves or children of former slaves, he suggested that this was why blacks were viewed as inferior by the Justices.[124] Waring cited law in a variety of different twentieth-century contexts that had removed racial classification.[125] Waring's conception of what could be called racial liberalism in the judicial system in 1951—noting that the *Plessy* majority relied on pre-Civil War precedent[126]—was perhaps overstated in trying to support his opinion.[127] Waring, however, argued that *Briggs* was not a case about railroad accommodations, and that too much time had already been wasted in trying to make such comparisons.[128] Instead, he focused on the Court's recent decisions in *Sweatt* and *McLaurin* to argue that the Court's trend had been to declare that segregation in education was illegal.[129] Waring's reliance on the higher education cases contrasted with the *Briggs* majority, who painstakingly delineated the facts in the current case from the facts of the higher education cases as their reasoning for why *Plessy*, but not *Sweatt* and *McLaurin*, applied to public school segregation.[130]

C. Influences on Waring's Thinking

What caused this one judge, a native in one of the Deep South states, to question what were commonly accepted ideas about race in judicial history and his own upper-class Charleston society?

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120 *Briggs*, 98 F. Supp. at 547.

121 *Id*.

122 *Id*. at 547.

123 *Id*.

124 *Id*. at 544.

125 *Briggs*, 98 F. Supp. at 543–44. In fact, citations to these cases were some of the only footnotes in Judge Waring's entire dissent, and none were to any books, articles, or other social science evidence. For example, he cited cases about peonage, transportation, criminals, housing, labor, suffrage, and higher education. *Id*.

126 *Id*. at 544.

127 Lani Guinier defines racial liberalism as "reject[ing] scientific racism and discredit[ing] its postulate of inherent black inferiority." Lani Guinier, *From Racial Liberalism to Racial Literacy:* Brown v. Board of Education *and the Interest-Divergence Dilemma*, 91 J. OF AM. HIST. 92, 100 (2004).

128 *Briggs*, 98 F. Supp. at 544–45.

129 *See* KLUGER, *supra* note 35 at 266–67.

130 *Briggs*, 98 F. Supp. at 545.

1. Contemporary Social Science Understanding of "Race"

Waring had decided several cases regarding race before the *Briggs* case, which he later said:

> [made him] begin to think an awful lot because every time you looked into one of these things, the less reason you can see for resistance to what we commonly call the American creed of equality of all citizens of this country . . . you saw the old sophistry of trying to keep within the law, but declaring two classes of citizens, and that Negroes or people of partial Negro descent were not treated as ordinary American human beings, but were put in a separate classification . . . .[131]

Waring further talked about the influence of reading Myrdal's *An American Dilemma* (echoing, as quoted above, Myrdal's notion of an American Creed) and Cash's *The Mind of the South*.[132] These books helped Waring to understand the complexity of racial matters. His solution to dealing with this complexity was simply to reject distinctions made on the basis of race.

Speaking in the mid 1950s, Waring further discussed the racial ideas that influenced his thinking in deciding the *Briggs* case, commenting on Kenneth Clark's testimony that segregation had "this deleterious effect [that] not only applied to Negro children, that it gave them the inferiority feeling . . . but that it had an equally bad effect on white children, because it gave them the idea that they were a race apart and separate."[133] He lamented that racial segregation created the idea of separate races in the minds of white and black students, which he saw as a false idea. But what seemed central to his skepticism of the *Plessy* doctrine were questions about the very meaning of race. He mused:

> [I]f the people of the United States want to say that only people who come from the so-called Caucasian race can vote . . . . I won't like it and I don't know how they can enforce it, because I don't know what the Caucasian race is and I don't think anybody else knows. It's an entirely false idea that was based on the fact that a fellow . . . discovered a skull in the Caucasus that he thought was the finest type of human race, and he called it the Caucasian race. Webster [dictionary], I believe, describes the Anglo-Saxon race as a mixed race. I think all races are mixed races.[134]

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131 WARING, *supra* note 78, at 235–36.

132 Contemporary reviews of Cash's *The Mind of the South* were somewhat positive. A reviewer in *The Journal of Negro History* commented on Cash's "incomplete emancipation" from Southern society, but hailed it as a "courageous and daring statement of the truth" of the "tardiness of [the South's] progress." W.M. Brewer, 26 J. OF NEGRO HIST. 253, 253–55 (1941) (reviewing W.J. CASH, THE MIND OF THE SOUTH (1941)). *See also* C. Vann Woodward, 7 J. S. HIST. 400, 400–01 (1941) (reviewing W.J. CASH., THE MIND OF THE SOUTH (1941)). More recently, however, critics have found much to condemn in Cash's book, including his blindness as a white Southern man to issues of power and sexuality. *See* NELL IRVIN PAINTER, SOUTHERN HISTORY ACROSS THE COLOR LINE 178–98 (2002).

133 WARING, *supra* note 78, at 354.

134 WARING, *supra* note 78, at 269–70.

Given such feelings about the idea of "race,"[135] it is not surprising that Waring was opposed to accepting the constitutionality of schools that segregated students based on a concept whose validity he doubted existed and the application of which he viewed as being detrimental to the opportunities of black students.

2. Race and Awareness of Larger Context

A widely accepted view among historians today is the importance of Cold War ideology in forcing the U.S. government to deal domestically with racial inequality. In its briefs to the Court in the *Brown case*, the Justice Department relied heavily on national security issues, arguing that school segregation was unconstitutional and "presents an unsolved problem for American democracy, an inescapable challenge to the sincerity of our espousal of the democratic faith."[136] The Justice Department argued that the existence of racial discrimination against African Americans had harmed the country's relationships with other countries and perception by the foreign press, the United Nations, and was part of the Soviet Union's propaganda against the U.S. The brief closed with an emphasis on the potential impact of an anti-segregation statement by the Court on international perceptions of the United States.[137] Legal historian Mary Dudziak argues that the federal government's response to civil rights was one that was constantly governed by attempts to promote the ideals of democracy abroad, and that during the early years of the Cold War, civil rights reforms were critical to the government's narrative of race and democracy.[138] Dudziak's analysis provides another example as to how the global context offered African Americans an opportunity to gain leverage with white Americans that was often difficult to achieve in the United States.[139]

In his dissent, Waring expressed his disappointment at the opinion of his fellow district court judges in South Carolina.[140] This was not the first time; in an earlier civil rights case regarding the constitutionality of an all-white primary, he had called on South Carolina to finally rejoin the Union.[141] In *Briggs*, he wrote soberly that he thought the issue of school segregation was:

> [C]lear and important, particularly at this time when our national leaders are called upon to show to the world that our democracy means what it says and

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[135] These comments were made in the mid 1950s, several years after his decision *and* after the unanimous *Brown* decision. These decisions along with the passage of time may have made him only more adamant in his rejection of race as a means for separating and segregating students.

[136] Brief for the United States as Amicus Curiae, Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954) (No. 1, 2, 3, 4, 5), 1952 WL 82045 at *31.

[137] Mary L. Dudziak, Brown *as a Cold War Case*, 91 J. AM. HIST. 32, 34 (2004).

[138] *See generally* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000) (arguing that the Cold War helped advance a civil rights agenda, as American leaders didn't want American Racism to tarnish its international image).

[139] During earlier eras, other prominent African Americans including Frederick Douglass and Ida B. Wells have effectively appealed to foreigners when they lacked the ability to improve racial equality domestically.

[140] *Briggs*, 98 F. Supp. at 548.

[141] *See* Elmore v. Rice, 72 F. Supp. 516, 526–27 (1947).

> that it is a true democracy and there is no under-cover suppression of the rights of any of our citizens because of the pigmentation of their skins.[142]

In describing the U.S.'s history of slavery on the basis of racial distinctions, Waring linked this practice to the recent atrocities in Nazi Germany due to notions of racial superiority.[143] Although he did not explicitly cite him, the influence of Myrdal's writing is apparent as Waring expressed dismay at the practice of racial discrimination, and its conflict with his interpretation of the Constitution and the American creed.

Writing over a half-century before Waring, Justice Harlan expressed a similar concern for how the *Plessy* majority's decision contradicted the United States' position relative to the rest of the world. He wrote,

> We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.[144]

Even at the close of the nineteenth century, Justice Harlan was uncomfortable enough with the contradictions between America's proclamation of freedom to other nations and their treatment of some citizens because of ideas about race and racial discrimination. It is interesting that the two judges to question the prevailing judicial ideas of race in *Plessy* and *Briggs*—albeit to a differing extent and at times when scientific notions about the concept of "race" were quite different—both noted the discrepancy between the majority opinion's treatment of race and the contemporary ideals of the country as they would be viewed in a global context.

VII. CONCLUSION

There was a variation in the extent that new social science understandings about race and racial classification informed the rulings of the lower court judges in the early 1950s as they considered four challenges to segregated schools brought by the NAACP LDF. District court judges are expected to base their decisions on prior decisions by higher courts on related issues, as well as the facts of the case as presented in their courtrooms. With the exception of Judge Waring, the other judges who heard school segregation cases prior to the Supreme Court in 1952 all voted to affirm the *Plessy* precedent that separate could be equal. The majority opinions in the South Carolina and Virginia cases, the two cases in the South, were the least receptive to incorporating contemporary scientific ideas about race that challenged legal precedent or, perhaps more significantly, deeply ingrained customs in their society. The opinions from outside the South—Delaware and Kansas, former slave states but not part of the Confederacy—were more sympathetic to the social science evidence presented. However, despite findings of fact in both opinions that segregation harmed children in segregated schools, the judges still felt bound by legal precedent to rule that segregated schools did not violate the Constitution. Ironically, despite

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142 *Briggs*, 98 F. Supp. at 548.

143 *Id*. at 541.

144 Plessy v. Ferguson, 163 U.S. 537, 562 (1896).

the fact that these decisions affirmed *Plessy,* they ultimately had more of an immediate impact on ending segregation than Waring's dissent. In Delaware, black students were admitted to white schools deemed to be superior to existing black schools, and the findings of fact in the Kansas case were incorporated into the Supreme Court's *Brown* decision.

Yet, Waring, a native of Charleston and a member of its elite society, presented with the same social science evidence and arguments about appropriate legal precedents, not only agreed with the plaintiffs about the harmful practice of racial discrimination in segregating students, but questioned the entire basis of racial classification: the concept of race itself. Almost in dialogue with the *Plessy* majority, in addition to the majority in the *Briggs* case, Waring parsed the racial arguments that had long been used to justify legal separation and demonstrated a keen awareness of the ideas about race and racial discrimination from social science knowledge, which had been questioning traditional understandings of inferior and superior races.

To some extent, Waring's opinion was more radical in its conception of race than even the monumental *Brown* decision by a unanimous Supreme Court three years later. By the time *Brown* was decided, Waring had left the bench and South Carolina, believing that his *Briggs* opinion had ended his usefulness as a judge there.[145] The *Brown* decision was sweeping in declaring that in the field of public education, segregation was inherently unequal, but the opinion contained no discussion of race itself and made no mention of Waring's dissent.[146]

Towards the end of the fairly short opinion in *Brown*, Chief Justice Earl Warren incorporated one of the factual findings that the Kansas judges had appended to their decision: the finding that segregated schools had a detrimental effect on black children.[147] This mention preceded a short yet heavily contested statement that this finding of inferiority was supported by modern social science, including a footnote to a series of social science works, most concerning the effects of racial discrimination, but not race itself.[148] ''The differing and more modest treatment of race in the *Brown* decision may be explained by Warren's need to gain the approval of the entire Court, as opposed to a dissent in which Waring did not have to compromise with other judges.'

Outside the South, in the district court decisions leading to *Brown,* social science made it difficult for judges to follow what they considered to be binding legal precedent, yet they ultimately did. Southern majorities summarily dismissed any attempts to question segregation. Only Waties Waring, in his last major case and writing in dissent, challenged the ideas of race and racial classification that had long been accepted by the judicial system and, as seen in the majority opinion in his case, local society. The influence of ideas about race affected the willingness of district court judges, to varying degrees, to challenge legal precedent in the area of school segregation, and ultimately set the legal and factual record for the *Brown* decision, a decision that forever changed judicial and societal thinking about the practice of racial discrimination.

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145 WARING, *supra* note 78, at 365.

146 In one of their briefs filed with the Supreme Court prior to oral arguments, LDF echoed some of the language in Waring's dissent. In a short brief summarizing social science evidence that had been presented in the lower court cases and invoking the Kansas court's findings of fact about the harms of segregation, lawyers argued that "racial distinction which has been held arbitrary in so many other areas of governmental activity is no more appropriate and can be no more reasonable in public education." Brief for Appellant at 8, Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954), 1952 WL 82046.

147 Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 494 (1954).

148 *See id*. at 494 n.11.