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Darby Dickerson

*John Marshall Law School*

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# STETSON LAW REVIEW

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## INTRODUCTION

### *BROWN v. BOARD OF EDUCATION: THE LEGACY CONTINUES, THE STRUGGLE CONTINUES\**

Robert D. Bickel\*\*

Darby Dickerson\*\*\*

On the occasion of its Golden Anniversary, *Brown v. Board of Education*<sup>1</sup> has been described by lawyers, historians, educators, and journalists as perhaps the most important civil-rights decision of the twentieth century. Without dispute, the decision holds a prominent place in American education law. The open question, however, is whether American education and American courts will ever fully embrace the vision of those, like Thurgood Marshall, who saw *Brown's* true promise.

Stetson University College of Law was honored to host an outstanding Symposium commemorating the fiftieth anniversary of *Brown*.<sup>2</sup> The seed from which the Symposium grew was a

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\*\* Professor of Law and Co-director, Center for Excellence in Higher Education Law and Policy, Stetson University College of Law. Chair, National Conference on Higher Education Law and Policy. B.A., University of South Florida; J.D., Florida State University College of Law.

\*\*\* Vice President and Dean, Stetson University College of Law. B.A., M.A., The College of William & Mary; J.D., Vanderbilt University Law School.

1. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), supplemented by 349 U.S. 294 (1955).

2. Stetson University College of Law hosted this Symposium on February 14, 2004, as part of the twenty-fifth annual National Conference on Law and Higher Education.

course titled "History of Civil Rights," which the College of Law added to its curriculum in 2001. Seeing how our students embraced this aspect of American legal history, and realizing that the *Brown* Golden Anniversary was just a few years away, we decided it was important for the College to honor *Brown's* legacy and to think critically about why the promise of equality articulated in *Brown* has not yet been fully realized.

We chose to commemorate this landmark decision by examining it in the context of higher-education law and policy, and by focusing, in an interdisciplinary manner, on the civil-rights history that preceded and followed *Brown*. We wanted to blend history, social policy, and law, and thus sought Symposium speakers who were part of the legacy—such as Dr. John Hope Franklin<sup>3</sup> and John Seigenthaler, Sr.<sup>4</sup>—and we wanted all participants to be persons who understand the true concept of equality. The result was a magical day with a true "dream team" of participants, all of whom have contributed to this issue.

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3. Dr. Franklin is the James B. Duke Professor Emeritus of History at Duke University. One biography describes him as follows:

As a social activist over the course of his adult life, Professor Franklin entered the maelstrom early; in the 1950s he worked on the non-legal research team for Thurgood Marshall to investigate the issues of segregation in the public schools. In 1965 he marched to Selma where he was "afraid, yes frightened out of my wits...it was much more than I had bargained for," but he has remained committed to the cause, and has continued his activism throughout his life.

Historic Preservation of N.C., *Preserving North Carolina, Learn More, John Hope Franklin*, <http://www.presnc.org/learnmore/franklin.htm> (accessed Oct. 23, 2004).

4. Mr. Seigenthaler is the founder of the Freedom Forum First Amendment Center at Vanderbilt University. He is also former publisher of the *Nashville Tennessean*, and former Executive Assistant to then-Attorney General Robert F. Kennedy. Seigenthaler was a negotiator during [the] Freedom Rides, [and was] attacked in Birmingham during Freedom Ride. . . . In 1961, the Attorney General sent him to meet with Alabama officials, including Governor [John] Patterson, about guaranteeing the security of the Freedom Riders. Though Patterson at first balked, state police did accompany the bus, but left it to the local police to protect the riders in city limits. In Montgomery, a mob attacked the riders and Seigenthaler was knocked unconscious by a rioter wielding a lead pipe.

Wash. U. St. Louis, *University Libraries, Film and Media Archive, List of Interviewees for Eyes on the Prize I*, <http://library.wustl.edu/units/spec/filmandmedia/hampton/eyesinterviews.html>; select "S" (last updated Aug. 16, 2004).

Symposium participant Professor James T. Patterson,<sup>5</sup> in his critically acclaimed book, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy*,<sup>6</sup> explains why, in 1950s America, instead of simply seeking “separate” equality in all-black schools, it was important for Thurgood Marshall and his colleagues to challenge the segregation of public schools on the basis of race:

Advocates of desegregation were certain, above all, that racially mixed schools, more than any other institutions, would facilitate the cherished American dream of equal opportunity. In this belief they reflected long standing assumptions about the powerful role of education in life. Insofar as blacks were concerned, there seemed to be no doubting the logic of this assumption. Black schools under Jim Crow were not only inferior in terms of facilities. As Marshall emphasized, segregation was as damaging as inequality—perhaps even more so. It shunted black students from the mainstream, isolating them and depriving them from association or competition with whites. A people set apart, blacks in the South could not be sure how bright, how competent, how worthy they might be.<sup>7</sup>

Mr. Marshall’s decision to expose the inherent wrongfulness of *Plessy v. Ferguson*<sup>8</sup> remains pertinent. Fifty years after the Supreme Court unanimously rejected *Plessy*’s “separate but equal” doctrine in public education, America’s commitment to public education continues to be diminished by an inability to overcome the racial prejudice that prevents us from recognizing and appreciating the brilliance, competence, and worthiness of black students, educators, workers, and citizens.<sup>9</sup>

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5. Professor Patterson is the Ford Foundation Professor of History Emeritus at Brown University. Brown University, *James T. Patterson*, <http://www.brown.edu/Departments/History/faculty/jpatterson.html> (accessed Oct. 23, 2004). In 1997, he won the Bancroft Prize for distinguished work in American History for his book *Grand Expectations: The United States, 1945–1974* (Oxford U. Press 1996). Columbia University Libraries, *The Bancroft Prizes: Previous Awards*, <http://www.columbia.edu/cu/lweb/eguides/amerihist/bancroftlist.html> (updated Oct. 27, 2004).

6. James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (Oxford U. Press 2002).

7. *Id.* at xvii.

8. 163 U.S. 537 (1896).

9. For more of this discussion, see James T. Patterson, *Brown v. Board of Education*

Our legal history is rich with attempts to confer constitutional equality by presidential and congressional act, but this history is marred by the moral dilemma of racial prejudice. The influence of custom and mores on law—as revealed by Alexis de Tocqueville in 1835<sup>10</sup> and a century later by Swedish scholar Gunnar Myrdal, who exposed “separate but equal” as myth<sup>11</sup>—is evident in the cases that refused to recognize the full meaning of the Thirteenth and Fourteenth Amendments and allowed a false legal premise to perpetuate social segregation in America for more than a hundred years. We are grateful to Stetson University College of Law Professor James W. Fox Jr. for his thoughtful and meaningful review of this aspect of our legal history,<sup>12</sup> his contribution to this Symposium is essential and required reading.

That “separate but equal” was merely a myth to perpetuate discrimination now seems easy to understand. As Myrdal reflected,

The great difference in quality of service for the two groups in the segregated set-ups for transportation and education is merely the most obvious example of how segregation is an excuse for discrimination. Again the Southern white man is in the moral dilemma of having to frame his laws in terms of equality and to defend them before the Supreme Court—and before this own better conscience, which is tied to the American Creed—while knowing all the time that in reality his laws do not give equality to Negroes, and that he does not want them to do so.<sup>13</sup>

This reality made the theory of *Brown* and its companion cases compelling. And, fifty years after *Brown*, it is this reality that causes many to ask why *Brown*'s full influence has yet to be re-

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and the Civil Rights Movement, 34 Stetson L. Rev. 413 (2005).

10. Alexis de Tocqueville, *Democracy in America* vol. 1, 230–232 (Henry Reeve trans., Adland to Saunders 1838) (text available at <http://xroads.virginia.edu/~HYPER/DETOC/home.html>).

11. Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 579–582 (Harper & Row 1944).

12. James W. Fox Jr., *Doctrinal Myths and the Management of Cognitive Dissonance: Race, Law, and the Supreme Court's Doctrinal Support of Jim Crow*, 34 Stetson L. Rev. 293 (2005).

13. Myrdal, *supra* n. 11, at 581 (internal footnote omitted).

flected in American education. The answer begins with the Court itself, and its seminal opinion.

The *Brown* decision likely would not have been the same without a change in the Court's composition. In describing the process leading to the first *Brown* opinion, Professor Patterson writes about Earl Warren's pivotal role as the Court's new Chief Justice; Warren was appointed by President Dwight D. Eisenhower because Chief Justice Fred Vinson died suddenly in 1953:

The issue[, Warren thought,] was fairly simple: *de jure* school segregation was unconstitutional . . . "[T]he basis of segregation and 'separate but equal' rests upon a concept of the inherent inferiority of the colored race." In stating his views this way, Warren avoided saying anything about the intent of the framers of the Fourteenth Amendment, a question that he did not think could be answered. He also avoided blaming the South, adding that the Court must not take "precipitous action" that would inflame the region. For Warren in 1953, as in later years, the issues in *Brown* were moral above all.

\* \* \*

[Warren's] arrival on the Court had provided a five-man bloc for the reversal of *Plessy*—himself, Douglas, Black, Burton, and Minton. Clark seemed prepared to join them. But Reed appeared likely to dissent. Frankfurter, having lost hope that historical research might clinch the case against school segregation, was struggling to find a constitutionally satisfactory means of joining Warren and the others. And Jackson was still convinced that there was no judicial (as opposed to political) basis for reversing *Plessy*.

\* \* \*

By late March . . . all but Reed seemed prepared to support a decision against segregation.

\* \* \*

Warren then set to work drafting opinions—one for the four state cases and one for the *Bolling* case concerning the District of Columbia. Within a few weeks he had done so, and he hand-delivered drafts to his colleagues . . . In a memo accompanying the drafts, Warren stated that his opinion [in

*Brown*] was "prepared on the theory that [it] should be short, readable by the lay public, non-rhetorical, unemotional, and, above all, non-accusatory."<sup>14</sup>

The Court's unanimous opinion in *Brown* masterfully achieved Chief Justice Warren's objectives. It unmasked the legal fiction and immoral purposes behind the "separate but equal" doctrine from *Plessy*, and ended the law's legacy of support for social segregation in public education. It announced—hopefully once and for all—that state laws permitting or requiring race-based segregation in public schools deny black children the equal protection of the laws guaranteed by the Fourteenth Amendment. This denial occurs, the Court explained, even though the physical facilities and other "tangible" factors of white and black schools may be equal.<sup>15</sup>

Although many Southern legislatures and governors continued to pass or support laws allowing segregated pupil assignment, federal case law ultimately established that *Brown* had overruled *Plessy* and thus denied it any further place in American education law. Of equal importance, the Court's decision in *Brown* recognized the importance of education to America's democratic society. Indeed, the Court's opinion addressed the concerns of desegregation advocates described by Professor Patterson in his book:<sup>16</sup> Reasoning that segregation in higher education had denied black students the ability "to study, to engage in discussions and exchange views with other students, and, in general, to learn [their] profession,"<sup>17</sup> the Court concluded that to separate black elementary and secondary students "from others of similar age and qualifications solely because of their race"<sup>18</sup> has an even greater impact, because it generates a feeling of inferiority about their status in the community. This feeling of inferiority adversely affects children's motivation to learn and "may affect their hearts and minds in a way unlikely ever to be undone."<sup>19</sup>

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14. Patterson, *supra* n. 6, at 64–65 (internal footnotes omitted).

15. *Brown*, 347 U.S. at 493–494. This may have been Mr. Marshall's most important argument.

16. Patterson, *supra* n. 6, at 9–11 (listing many of those concerns).

17. *Brown*, 347 U.S. at 493.

18. *Id.* at 494.

19. *Id.*

In the decades following *Brown*, the resistance to its gentle but compelling message demonstrated the depth of the racism dilemma. Presidential pragmatism, from Eisenhower to Kennedy, was manifested by openly stated concerns for gradualism, and it took more than a decade of federal litigation, principally in the United States Court of Appeals for the Fifth Circuit and United States Supreme Court, to secure passage of the 1964 Civil Rights Act,<sup>20</sup> and the enforcement, through that Act, of the rights of national citizenship. Along the way, while officially abolishing separate, race-based schools at the elementary and secondary levels, the Supreme Court did little to require the realization of *Brown's* mandate for equality in public higher education. And, in *University of California Regents v. Bakke*,<sup>21</sup> the Court lost a definitive opportunity to extend *Brown's* legacy. Unlike the unanimous opinion in *Brown*, the Supreme Court justices in *Bakke* failed to reach even a majority decision on the constitutional question, writing no fewer than six separate opinions. Justice Harry Blackmun's unsung opinion brilliantly explained the dilemma created by historical discrimination in higher education. Revealing that less than two percent of the physicians, attorneys, and medical and law students in the United States were members of what we now refer to as minority groups, and that three-fourths of America's black physicians were trained at only two medical schools, he stated with firm conviction that, "[if] ways are not found to remedy that situation, the country can never achieve its professed goal of a society that is not race conscious."<sup>22</sup>

The future of *Brown's* legacy remains uncertain. The Court's most recent decision in *Grutter v. Bollinger*<sup>23</sup> favored a law school's "narrowly tailored" efforts to admit a diverse class, but failed to debunk inferences in some lower federal courts that the general societal discrimination that sustained segregated higher education until the mid-1970s no longer exists. What is most disappointing and "hope-limiting" is the thought that the Supreme Court might never write another unanimous opinion that will be seen as the next *Brown v. Board of Education*—a new and

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20. Pub. L. No. 88-352, 78 Stat. 241 (1964).

21. 438 U.S. 265 (1978).

22. *Id.* at 403 (Blackmun, J., concurring in the judgment).

23. 539 U.S. 306, 343 (2003).



unanimous opinion that will chart a legal path to true equality in American education.

In this light, as mentioned earlier, Stetson University College of Law decided to celebrate *Brown* as a civil-rights milestone—but, more importantly, to also discuss our responsibility to sustain the principle of equality in American education. The remarkable individuals whose commentary fills the pages to come are all direct players in *Brown*'s history or legacy. Dr. John Hope Franklin's great historical scholarship, and his research and collaboration with Thurgood Marshall in the litigation strategy leading to *Brown*, are legendary. No one in higher education has contributed more to the legal history that surrounds *Brown*, or to the effort to treat the sickness of racism, than John Hope Franklin.<sup>24</sup> John Seigenthaler, Sr.'s comments allow us to reflect both on the relationship between Robert Kennedy and Martin Luther King, Jr. and the impact these great men had on the struggle to sustain *Brown*'s mandate through their efforts to pass and sustain the Civil Rights Laws.<sup>25</sup> Eugene Patterson's great editorials from the *Atlanta Constitution*,<sup>26</sup> and the images of the sociopolitical events of the Civil Rights Era that he and John Seigenthaler describe, bring these events to life again and remind us about those individuals who demonstrated great courage when facing the violent resistance of segregationists.<sup>27</sup> And Professor Jack Bass's account

24. John Hope Franklin, *Behind the Brown Decision: A Conversation with John Hope Franklin*, 34 *Stetson L. Rev.* 423 (2005).

25. John Seigenthaler, Sr., *Brown v. Board of Education: Making a More Perfect Union*, 34 *Stetson L. Rev.* 457 (2005).

26. Eugene Patterson served as executive editor of the *Atlanta Constitution* from 1956–1960, and editor from 1960–1967; in 1967 he earned the Pulitzer Prize for editorial writing. As described in one biography,

Gene wrote directly to his fellow white Southerners every day, working to persuade them to change their ways. His words were so inspirational that he was asked by Walter Cronkite to read—live on the CBS Evening News—his most famous column about the Birmingham church bombing. Gene wrote at the height of the civil rights movement, amid real and threatened violence, to anyone who bucked Jim Crow. He wrote when Southerners, wanting to make sense of the civil rights movement, looked to one another for courage, leadership, and for a moral compass in a world seemingly coming apart. He wrote when newspapers mattered much in “making” news by what they reported, or ignored, and what they encouraged people to do.

Poynter Inst., *Poynteronline, Eugene Patterson*, <http://www.poynter.org/column.asp?id=62&aid=56279> (posted Dec. 12, 2003). Mr. Patterson also served as managing editor for the *Washington Post* from 1968–1972, and later as editor and chief executive officer of the *St. Petersburg Times*. *Id.*

27. Eugene Patterson, *Progress through Political Sacrifice: Southern Politicians' Re-*

of the judicial leadership exhibited by a small group of federal judges—and the Southern Jurisprudence that secured *Brown's* doctrine of affirmative duty—is a vivid story of the essential bond between judicial and social activism and adds greatly to our understanding of the legal history leading to *Brown*.<sup>28</sup>

Vanderbilt University Law School Professor Robert Belton<sup>29</sup> and civil-rights leader Ted Shaw<sup>30</sup> take us inside the NAACP Legal Defense Fund and depict for us the litigation strategy that defined *Brown* and its progeny.<sup>31</sup> Professor Belton's account of how *Brown* encouraged the litigation strategy leading to *Griggs v. Duke Power Co.*,<sup>32</sup> and his perspective of the importance of *Brown* beyond education, gives us a picture of *Brown's* immediate impact and enduring importance as a civil-rights case. Mr. Shaw's insight into the jurisprudence of the Civil Rights Era, the continuing role of the Legal Defense Fund, and the invaluable contributions of Thurgood Marshall and his colleagues to American education and civil rights, give us hope for the future. Mr. Shaw asks us to transcend any singular celebration of *Brown* and to instead renew our commitment to the legal struggle so that we might secure the vision of American education articulated in *Brown*.

sponse to *Brown v. Board of Education*, 34 Stetson L. Rev. 465 (2005); Seigenthaler, *supra* n. 25.

28. Jack Bass is a Professor of Humanities at the College of Charleston. He has authored or co-authored six books that focus on civil rights, race relations, and Southern politics, most notably *Unlikely Heroes* (Simon & Schuster 1981), and *Taming the Storm* (Doubleday 1993). College of Charleston, *Department of Communication, Faculty Bio, Jack Bass*, <http://www.cofc.edu/communication/faculty/bios/bass.html> (accessed Oct. 23, 2004).

29. One succinct biography of Professor Belton states the following:

From 1965 through 1975, Professor Belton was a leading civil rights attorney, first as Assistant Counsel with the NAACP Legal Defense and Educational Fund, and then as a partner in one of the first racially integrated law firms in the South. He is a leading scholar and teacher of employment law and civil rights law. . . . Professor Belton is currently writing a book on *Griggs v. Duke Power Company* . . .

Vand. U. L. Sch., *Faculty Profiles, Professor Robert Belton*, <http://law.vanderbilt.edu/faculty/belton.html> (last modified Oct. 8, 2004).

30. On May 1, 2004, Mr. Shaw became Director-Counsel of the NAACP Legal Defense Fund. He previously served as Associate Director-Counsel of that organization. NAACP Legal Defense Fund, *LDF Board Unanimously Selects New President*, <http://www.naacpldf.org/content.aspx?article=272> (Jan. 28, 2004).

31. Robert Belton, *Brown as a Work in Progress: Still Seeking Consensus after All These Years*, 34 Stetson L. Rev. 487 (2005); Theodore M. Shaw, *Dividing History: Brown as Catalyst for Civil Rights in America*, 34 Stetson L. Rev. 473 (2005).

32. 401 U.S. 424 (1971).

To this end, we attempt, in this Symposium, to celebrate the history told in Professor Patterson's account of *Brown's* fiftieth year, and to present the personal and professional reflections of seven remarkable men who, for two wonderful days, shared with each other, and with us, the importance of this case.

We also must express our gratitude to Professor Ray Arsenault, the John Hope Franklin Professor of History at the University of South Florida, St. Petersburg Campus, for bringing Gene Patterson and Dr. Franklin to the Symposium and for moderating the magnificent roundtable portion of this historic dialogue.<sup>33</sup> Professor Arsenault's research and writing, and related work on the subject of Florida's Civil Rights History, the Freedom Riders,<sup>34</sup> and other events that have shaped Florida's culture, are renowned in Florida and nationally. His contribution to this Symposium was significant.

We hope that you enjoy reading this Symposium and take from it lessons from the past and for the future. *Brown* allowed this country to make great strides, but the journey is not over. We must continually look for ways to ensure that all Americans truly have equal opportunities—unimpeded by the legacy of racial bias—in education, in work, and in the protection of the right to vote. That being said, we believe in *Brown*, its past, and its future. We will honor its legacy and continue the struggle.

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33. *Knights at the Roundtable: Panel Reflections and Discourse on Brown I and Brown II*, 34 Stetson L. Rev. 499 (2005).

34. Raymond O. Arsenault, *Freedom Riders* (Oxford U. Press forthcoming 2005).