

**PART ONE:
THE CONSTITUTIONAL MANDATE
FOR RACIAL EQUALITY IN PUBLIC EDUCATION
AND THE IMMEDIATE LEGAL HISTORY OF
BROWN V. BOARD OF EDUCATION
1954 - 1970**

David Halberstam writes in his book, *the Fifties*, that: “The Brown v. Board of Education decision not only legally ended segregation, it deprived segregationist practices of their moral legitimacy as well. It was therefore perhaps the single most important moment in the decade, the moment that separated the old order from the new and helped create the tumultuous era just arriving. It instantaneously broadened the concept of freedom, and by and large it placed the Court on a path that tilted it to establish rights to outsiders; it granted them not only greater rights and freedoms but moral legitimacy, which they had previously lacked. This had a profound effect on the growing and increasingly powerful communications industry in the United States. Because of Brown, reporters for the national press, print and now television, felt emboldened to cover stories of racial prejudice.

Brown v. Board of Education had been the first great step in giving equality to blacks, but nonetheless only one of the three branches of government had acted. And yet the law, it soon became clear, was not merely an abstract concept – it possessed a moral and social weight of its own. So it was that the country, without even knowing it, had passed on to the next phase of the civil rights struggle: education. The educational process began as a journalistic one. It took place first in the nation’s newspapers and then, even more dramatically, on the nation’s television screens. Those two forces – a powerful surge among American blacks toward greater freedom, mostly inspired by the Brown decision, and a quantum leap in the power of the media – fed each other; each made the other more vital, and the combination created what became known as the Movement. Together, the Movement and the media educated America about civil rights.”

And this is how Brown's history and legacy should be embraced on issues of political and social equality. But, within its broader moral premise and social vision, the Court's unanimous opinion must remain especially important as the foundation for reasserting the fundamental role of public education in the United States.

Coming to the Supreme Court as consolidated cases from the States of Kansas, South Carolina, Virginia, and Delaware, the common legal question presented in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) was whether pupils in these states were entitled to admission to public schools on a non-segregated basis. The American Jewish Congress, the American Civil Liberties Union, and the American Federation of Teachers filed *amici curiae* briefs. In a Constitutional context, the specific issue before the United States Supreme Court was whether the maintenance of racially segregated pupil assignments and public schools in these states – pursuant to state laws – deprived the plaintiffs of equal protection of the law under the Fourteenth Amendment to the United States Constitution. The Court's famous holding was that segregation of "white and Negro" children in public schools under state laws permitting or requiring such segregation violates the Equal Protection Clause of the United States Constitution, *per se*, notwithstanding that the facilities or other tangible factors at such schools might be equal.

The Court began its reasoning by emphasizing that attorneys for the plaintiffs properly recalled the practice of racial segregation in America prior to the adoption of the Fourteenth Amendment, the views of proponents and opponents of the Amendment, the details of its consideration in Congress, and its ratification by the states. The Court adopted plaintiffs' assertion that the "inconclusive" history of the Amendment was the result of the extreme positions of its proponents and opponents, and the nature of public education at that time. In the South, tax-supported public elementary and secondary education had not yet become established, and

private groups generally controlled the education of children. The formal education of black children was either forbidden by state law or withheld and they were, for the most part, illiterate. The Court observed that in the North, “the education of Negro youth was rudimentary” and noncompulsory “ungraded schools” with abbreviated terms were common in rural areas.

The argument of Thurgood Marshall and the other N.A.A.C.P. Legal Defense Fund attorneys who represented the plaintiffs in the consolidated cases noted that the “separate but equal” doctrine approved in the Court’s 1896 decision in Plessy v. Ferguson, 163 U.S. 537 (1896), involved transportation not education. Following Plessy, six cases raised the constitutionality of the “separate but equal doctrine” in public education, but had not decided the question. In the cases before the Court in Brown, that question was directly presented, because the tangible resources of the all-black and all-white schools involved in the consolidated cases had been, or were being equalized. The issue in the Brown cases was therefore specifically the effect of racial segregation itself, *i.e.*, the maintenance by state law of separate black schools and white public schools (*per se*) – in the context of the Fourteenth Amendment.

The Brown Court observed that in the modern era, compulsory school attendance laws and the amount of public funds allocated to public education supported the argument that education is one of the most important governmental functions in a democracy. More specifically, the Court adopted plaintiffs’ argument that public education is necessary to the development of citizenship, cultural values, and later professional training. Speaking to this inherent connection between education and citizenship, the Court recognized the assertion that a child is unlikely to succeed in life if s/he is denied the opportunity of a fundamental public education.

These observations about the effects of racial segregation of students on the ability of a black child to learn are central to the Court’s view of the Fourteenth Amendment’s purpose,

and was supported by the Court's citation to then prominent education authorities, including: K. B. Clark, "Effect of Prejudice and Discrimination on Personality Development" (Mid-century White House Conference on Children and Youth, 1950); Witmer and Kotinsky, "Personality in the Making" (1952); Deutscher and Chein, "The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion," 26 J. Psychol. 259 (1948); Chein, "What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?" 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, "Educational Costs, in Discrimination and National Welfare" (MacIver, ed., (1949); Frazier, "The Negro in the United States" (1949); and the seminal 1944 work by Gunnar Myrdal "An American Dilemma: The Negro Problem and American Democracy," a work commissioned in 1938 by the Carnegie Corporation (Myrdal was the co-recipient of the Nobel Prize in Economic Sciences in 1974).

Prior to Brown, in Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938), Sipuel v. Board of Regents of the University of Oklahoma, 332 U.S. 631(1948), Sweatt v. Painter, 339 U.S. 629 (1950) and McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950), the Court had rejected the "separate but equal" doctrine in cases involving law schools and graduate education, finding that it "denies a Negro student the opportunity to study and exchange views with other students, and to learn his profession." But, in Brown v. Board, the Court saw public education as Albert Einstein had described it in his *Ideas and Opinions*, observing in his comments at Albany, New York in 1936, that "The school has always been the most important means of transferring the wealth of tradition from one generation to the next."

Brown therefore becomes a case not just about access to knowledge, but access to the cultural values that should be inherent in a democracy. And the Court speaks in a unanimous voice that "even more so at the elementary and secondary level, the separation of school children solely because of their race...generates a feeling of inferiority as to

their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” This sense of inferiority, the Court held – borrowing language from a prior case – “affects the motivation of a child to learn.” Viewing public education in this light, newly appointed Chief Justice Earl Warren wrote for a unanimous Court that, where the state has undertaken to provide for public education, it is a right, which must be made available to all children on equal terms. In its most famous sentence, the Supreme Court concluded that, “... in the field of public education, the doctrine of ‘separate but equal’ has no place, [and that] separate educational facilities are inherently unequal” under the Equal Protection Clause of the Fourteenth Amendment.

Brown’s impact was immediate in its intent. Professor Jack Bass posits in his book *Unlikely Heroes*, that in the decade following the Court’s initial opinion (Brown I), federal judicial decisions at the District Court level, and the decisions of the Fifth Circuit Court of Appeals, revealed the Court’s pronouncement that the Constitution imposed an “affirmative duty,” which shifted the burden to school boards to disestablish dual systems of public education and take affirmative steps to overcome the effects of past discrimination based on race. However, Brown’s fundamental mandate would be the subject of further argument and a second decision that would unintentionally reawaken a pre-Civil War view of state’s rights, and test the leadership of three Presidents. The federal case law that would follow the Court’s second decision for the next decade would be driven by the greatest example in modern American history of the bond between the First Amendment’s freedom of speech and assembly, freedom of the press, and the right of citizens to protest their government for rights.

This journey to implement Brown’s affirmative mandate through the bond between the First Amendment and the Civil War Amendments began with the Court’s decision, in the second Brown case, on the question of the implementation of its seminal decision requiring the desegregation of the public

schools in the affected states [Brown v. Board of Education of Topeka, 349 U.S. 294 (1955)(Brown II)]. In May 1955, Chief Justice Warren, again writing for a unanimous Court, considered the question left unanswered in the Court's first decision, specifically, the manner in which relief would be accorded. Chief Justice Warren's stated justification for consideration of this question was that the cases considered in the seminal Brown decision arose under different local conditions and presented local issues related to implementation of Brown's fundamental mandate.

The Court's opinion in the second case reaffirmed its decision that state enforced mandates sustaining racially segregated public schools violated the Fourteenth Amendment, and asked whether black children should be admitted to their school of choice, or whether the Court should devise specific decrees or remand that responsibility to the lower tier of "three-judge" federal courts. These questions were influenced by the Court's general concern whether it had the authority to require an adjustment of existing school district powers so as to create local school systems that were not based on racial distinction. In responding to these issues, Justice Warren's opinion recognized that substantial steps had been taken in some southern states, or certain local communities, to eliminate racial segregation in their public schools.

Then, in language that would arguably diminish the significance of the Court's fundamental holding in the first Brown case, the Chief Justice emphasized that the implementation of Brown was, inevitably, a challenge that required the consideration of circumstances unique to individual school districts. The Court thus gave special deference to local school officials to assess and determine the approach to local circumstances, and saw the role of the federal three-judge courts as determining whether the action of school authorities constituted a good faith implementation of Brown's general Constitutional mandate.

Although Justice Warren emphasized the need for compliance with the Constitutional principles announced in

the Court's first decision, specifically the affirmative duty to eliminate racial segregation in public schools, his opinion used arguably vague language requiring "a prompt and reasonable start toward full compliance" with this basic mandate. In language later to be the basis for a southern legal and political strategy of delay, and outright resistance to school desegregation for more than a decade, the Court demanded only that the defendant school boards demonstrate that their timetables for desegregation were established in good faith.

More specifically, the Court clearly abandoned any demand for immediate compliance, and allowed school districts to propose to the federal courts the time needed for revision of laws or regulations supporting racially separate schools, consideration of school plants, transportation systems, personnel, revision of school districts and attendance areas. The opinion ended with the language that would become the basis for southern resistance to desegregation: That the transition from racially segregated public schools to the operation of public schools on a nondiscriminatory basis would occur with "all deliberate speed."

It is more than a footnote in legal history that Brown's legacy was first defined in a lesser-known case filed in 1952, shortly after Brown v. Board was filed in 1951. The case of Oliver Bush v. Orleans Parish School Board came before a three-judge court that included Judge J. Skelly Wright, who would play a significant role in the jurisprudence that shaped the *post-Brown* decade. This case, like Brown, was a class action alleging that black children were denied admission to schools attended by white children under Article 12, Section 1 of the Louisiana Constitution, and Louisiana Acts 555 and 556, state laws requiring segregation of the races in public elementary and high schools of the State of Louisiana. In 1956, the Bush three-judge court held that, under the decision of the United States Supreme Court in the consolidated Brown cases from Kansas, South Carolina, Virginia and Delaware, provisions of the Louisiana Constitution and statutes requiring or permitting segregation

on the basis of race in public schools violated the Fourteenth Amendment, and that a three-judge federal court was not necessary in Bush.

On appeal, the issues were defined in a way that reveals what might have supported a more immediate demand for southern compliance with Brown, cutting off the opportunity for the development of the southern legal and political strategy that spanned the decade following Brown II. Bush raised directly a State's assertion that its pupil assignment laws were enacted in the exercise of the sovereign police power to promote and protect public health, morals, better education and the peace and good order in the State. This was the State's strategy for obscuring the issue of race, *i.e.*, asserting that the State's exercise of its police power function invokes its immunity from federal Constitutional inquiry.

The federal Circuit Court disposed of the state police power argument by observing that the state failed to affirmatively explain the pupil assignment process on any ground other than race. The State alleged disparities between the two races as to intelligence ratings, school progress, incidence of certain diseases, and percentage of illegitimate births, but its purported statistics made no effort to classify the students of Orleans Parish according to the degree to which they possessed these traits. Instead the State used race as a surrogate for traits it asserted as harmful to the public interest in the context of public education.

Finally, and importantly, the federal appellate court rejected the State's attempt to assert police power as a *per se* defense preventing federal constitutional inquiry based upon the state's mere use of the term in federal litigation. The Fifth Circuit panel in Bush held that a state's police power, in and of itself, could not justify the passage of laws or ordinances that violate the federal constitution. Thus, under Brown I, Louisiana's state constitutional provisions and Act 555, which maintained by force of law separate schools on the basis of race, violated the Equal Protection Clause of the Fourteenth Amendment.

The importance of Bush is its rejection of the state immunity argument, and the court's clear view of Louisiana's Acts as an attempt to directly defy the Supreme Court's decision in Brown, using not merely ingenious, but Constitutionally flawed state's rights arguments. This is an important early recognition, in the context of the post-Brown school desegregation cases, that the Supreme Court's seminal decision in 1908 in Ex Parte Young prevented a state from asserting immunity for the purpose of empowering public officials to maintain racially separate schools through a race-based pupil assignment scheme.

The first famous political crisis, and the first instance of a state's complicity in white violence as a strategy for delaying or resisting compliance with Brown is identified with the attempted admission of nine black students to Central High School in Little Rock, Arkansas, for the Fall 1957 school term. Little Rock would be an event that would create an ambivalent view of President Dwight Eisenhower's leadership on the issue of Brown's mandate, and that would later have a significant influence on President John F. Kennedy's approach to southern legal and political strategy in general. Although President Eisenhower publicly embraced the Supreme Court's holding in Brown, he had also spoken publicly that the issue of school desegregation would be a problem for the south, and that he was sympathetic to an approach which would avoid any immediate implementation of Brown.

A review of both the oral and written historiography on the subject, and a review of major news media accounts of President Eisenhower's public position on the subject of integration clearly indicate that, to the disappointment of Thurgood Marshall and other N.A.A.C.P. Legal Defense Fund lawyers who were involved in the desegregation cases, the President embraced Brown's fundamental holding, but only if the Court's second decision permitted a gradual approach to school integration. President Eisenhower's position was clearly articulated as being sympathetic with white southern cultural and politics. His public position, intentionally or

unintentionally, tilted the Court's "all deliberate speed" language toward a southern strategy that would instead create a Constitutional, political and cultural crisis. That crisis arose immediately as nine distinguished black students attempted to enter Central High School on September 4, 1957, pursuant to a voluntary desegregation plan adopted by the school board under the jurisdiction of the Federal District Court.

Governor Orval Faubus had spoken on public television two days earlier, announcing his intent to use Arkansas National Guard troops to, in his words, preserve order by preventing the black students from attending the school. Despite meetings with President Eisenhower, the Governor opposed the admission of the nine black students, and the school district petitioned for a delay in its court-ordered plan to admit the students, based on their asserted fear of white riots. Following further federal judicial proceedings finding that the Governor was misusing the National Guard, the students attempted to enter the school three weeks after their original attempt.

Having followed the proceedings, news media, including newspaper correspondents and an emerging television media, covered the event, and for the first time, a television audience saw a white riot the purpose of which was to prevent enforcement of Brown v. Board. The impact of this media exposure cannot be understated. Print and television coverage created a watershed moment. On September 24, Eisenhower was forced to take a public position on the crisis. He condemned the rioting and ordered federal troops to carry out the admission of the nine black students, and protect them as they entered school each day and proceeded from class to class. The television coverage of the events in Little Rock would be an early instance of the First Amendment freedoms of speech and press, and the new era of television technology, exposing American citizens to a live, visual account of southern political exploitation of Brown II, specifically the awareness that popular southern resistance would include white group violence targeting black students.

The legal history of the Little Rock case culminated in the United States Supreme Court's decision in Cooper v. Aaron, 358 U.S. 1 (1958). In a unanimous opinion, the Supreme Court refused to suspend the integration plan of the school board pending further legal proceedings. This unanimous opinion established at least one important step in the interpretation of the two Brown opinions. Whatever the Court might have meant by its "all deliberate speed" language in the second Brown opinion, it refused, in the Cooper case, to allow state executive efforts encouraging white mob resistance to the admission of nine carefully selected black students to Central High School under the school board's voluntary desegregation plan, as a strategy to justify further delay in implementing the racial integration of the State's public schools.

If widely applied and expanded, the Court's language could have prevented a decade-long southern strategy of legal resistance to Brown. But such resistance continued, coupled with continued construction of all-white schools and perpetuating all-black schools, because the Supreme Court's holding in Cooper was that Brown could require the immediate general admission of otherwise qualified black students to previously all-white schools, unless a District Court properly found justification for alternative arrangements "pointed toward the earliest practicable completion of desegregation, [including] steps to put [a program of desegregation] into effective operation." But, at least the Court recognized southern state political complicity in violent popular resistance to integration, and flatly rejected the State's argument that threatened violence or disorder justified delay in implementing the Little Rock plan, especially where that threatened violence followed actions of the state itself (*i.e.*, Governor Faubus' announcement of his opposition, as Governor, to federally mandated integration, and his open call for public support for racially segregated schools).

The Court reaffirmed that Brown's interpretation of the Fourteenth Amendment is binding on the states under the federal Supremacy Clause, and held that a state governor or

legislature cannot engage in or encourage actions (including support of segregated schools), which demonstrate a refusal to uphold the Constitution. In legal terms, Cooper v. Aaron may have put an end to southern political opposition to Brown, if Constitutional imperatives had been recognized by governors sworn to uphold the responsibilities of their office.

But that would not be the case, and for the next decade, southern white strategy included maintaining black schools and white schools. By 1963, in Birmingham, the protest of the deliberate maintenance of racially separate schools, and the under-resourcing of black schools, from classrooms to athletic fields, provoked national attention. Although Brown I was based on the invalidity of racial segregation of students *per se*, it was clear that the denial of full access had always translated to inferior educational resources for teachers and students at black schools. In other words, black schools were both separate *and* unequal.

The analytical approach to the school desegregation cases is illustrated by one of the most important cases to come before United States District Judge Frank Johnson, Jr., who had written the opinion in the Montgomery Bus Boycott case, and who would later become famous for the most important First Amendment case in the Movement's direct action campaign for voting rights.

The school desegregation case was to be known as Arlam Carr, Jr. v. Montgomery County Board of Education, and would be filed in 1964 by Arlam Carr, Jr.'s parents, Johnnie Carr (the 40 year leader of the Montgomery Improvement Association, which had been formed to support the bus boycott and subsequent efforts at desegregation and equal opportunity), and Arlam Carr, Sr., in the United States District Court for the Middle District of Alabama. Legal counsel in the case included some of the greatest names in the legal history of the Movement: Fred Gray and Solomon S. Seay, Jr., of Montgomery, Alabama, and Jack Greenberg and Charles H. Jones, for the N.A.A.C.P Legal Defense Fund.

Judge Johnson's original decree was entered on July 31, 1964. In that decree, Judge Johnson enjoined the school district from their continued operation of district schools on a racially segregated basis, and from failing to take immediate affirmative steps, to be effective for the next immediate school term, to desegregate the 1st, 10th, 11th and 12th grades in Montgomery County, Alabama. The decree provided that students were to have full access to services, facilities, activities, and programs (including transportation, athletics, and other extracurricular activities) without any waiting period for newly admitted students.

Judge Johnson ruled explicitly that race or color would no longer be a factor in the hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff, with the exception that assignments would be made in order to eliminate the effects of past discrimination. This meant that the faculty, administration and staff of any school could no longer be of one race. Judge Johnson required the County to inform applicants that it operated a racially integrated school system and that assignment of applicants who were hired would be made in the best interest of the system and without regard to the race or color of the newly hired employee.

Faculty assignments were crucial, and Judge Johnson was aware that many white teachers preferred not to teach in integrated public schools. Responding to the reaction of these teachers to seek employment at the growing number of all-white private schools being established in response to public school integration, Judge Johnson ordered that the Superintendent of Schools of Montgomery County should take affirmative steps to solicit and encourage currently employed teachers to accept transfers so as to achieve the desegregation of school faculty. His order also specified that race could not be a motivating factor in the dismissal of teachers or staff, or in promotion, retention or rehiring decisions. And finally, he required that, if teachers or other professional staff were displaced as a result of desegregation or school closings, they

would be transferred to a vacant position for which they are qualified.

The factual setting of the Carr case reveals everything about the deliberate exploitation by southern school districts of Brown II's "all deliberate speed" language for the specific purpose of avoiding desegregation in public education. When Judge Johnson entered his original decree in July 1964 (five years after the Supreme Court's decision in Brown II), there were approximately 15,000 black students and 25,000 white students in the Montgomery County Public School System. Yet, the system remained completely segregated on the basis of race. As Judge John Minor Wisdom would later recall, it was a system of "white schools, and black schools." In 1967, three years after the original decree (and 12 years after Brown II), the singular change was that approximately 550 black students were attending traditionally all-white schools, under a "freedom-of-choice" procedure.

Judge Johnson observed that no white children were attending traditionally black schools, and all faculty desegregation in the system was confined to the district's high schools. More important to Judge Johnson was the lack of an administrative plan to correct the *status quo*. No real progress was being made regarding student or teacher assignments, or in the disestablishment of segregated facilities and programs in contemplation of the 1968-69 school year. (In contemplating this situation, think of *any genuine* definition of "all deliberate speed" as a phrase to define expectations of Brown I regarding desegregation efforts beginning in 1955) and apply it to the situation Judge Johnson faced.

At issue, *inter alia*, was the construction of Jefferson Davis High School, Peter Crump Elementary School and Southlawn Elementary School in predominantly white neighborhoods, and the expansion of Hayneville Road School and Carver High School, both located in predominantly black neighborhoods. These projects openly perpetuated the racially structured school system in Montgomery County, aided by the

designation of the three new schools located in predominantly white neighborhoods as “nontransported” schools (schools to which no transportation would be provided).

In language clearly meant to expose the District’s deliberate exploitation of the idea of “gradualism” to an absurd extreme, Judge Johnson observed that the new “Jefferson Davis High School” was to be opened in 1968 under the direction of a white principal, and based on the approximated number of white students residing in the general vicinity, with a school name and crest designed to create the impression that it was to be a predominantly white school. And, revealing the identification between high schools and social group custom and culture, Johnson noted that the District hired three white coaches and a white band director for the school, actively engaged in a fundraising campaign for athletic and band programs only among white persons in the community, and sought affiliation with the Alabama High School Athletic Association, a white association. These were not paper indicators of southern resistance to Johnson. They were realities and evidence he understood personally, as Arlam Carr, Jr. explains in our interview with him.

Judge Johnson held that, given more than a decade of noncompliance with any legitimate interpretation of Brown I and II, the school district had ignored or affirmatively resisted its duty to implement Brown’s mandate, and was obligated to tolerate no further delay in the integration of Montgomery’s public schools. In *Unlikely Heroes*, Jack Bass writes that Brown I itself had imposed this affirmative duty on southern school systems, and in Carr, Judge Johnson held explicitly that these school systems were placed under an affirmative duty to disestablish their dual school systems based upon race, without further delay.

It is worthy of note that “freedom-of-choice” language was first recognized as relevant, depending upon its purpose. Judge Johnson recognized in Carr that so-called freedom-of-choice would be permitted, *but only if “choice-influencing”*

factors were eliminated. This requirement is the seminal history of the concept of freedom-of-choice plans: That without integrity, such plans offered no free choice and could perpetuate segregation by being written and administered to avoid Brown's mandate. Citing the separate opinion of Judges Sobeloff and Bell in Bradley v. School Board of the City of Richmond, 345 F.2d 310 (1965), Judge Johnson reasoned that: "A freedom-of-choice plan ordered by a court or adopted by school authorities is not an end in itself; it is but a means to an end. The plan must operate in such a manner as to meet the constitutional mandate of the Fourteenth Amendment." Affirmative action means more than telling those who have long been deprived of freedom of educational opportunity, "you now have a choice." In many instances the choice will not be meaningful unless the administrators are willing to bestow extra effort and expense to bring the deprived pupils up to the level where they can avail themselves of the choice in fact as well as in theory * * * The district judge must determine whether the means exist for the exercise of a choice that is truly free and not merely *pro forma*."

Judge Johnson retained jurisdiction, and outlined the expectations of the District's desegregation plan regarding faculty and staff transfers and hiring, new construction (including the impression created by plans for the three new public schools that were a part of the Carr litigation), and transportation of students (*i.e.*, that race would not be the basis for assigning students to school buses). This meant, Judge Johnson specified, that the school board would honor the choice of any black student choosing to attend Jefferson Davis High School during the upcoming 1968-1969 school year, unless compelling circumstances were advanced by the school district and approved by the Court.

Revealing its ongoing deliberate resistance to Brown, the Montgomery School District appealed and ultimately the case was heard by the United States Supreme Court as United States v. Montgomery County Board of Education, 395 U.S. 225 (1969) on *certiorari* to the Fifth Circuit Court of Appeals –

fifteen years after Brown had been decided. Writing for the Court, Mr. Justice Black emphasized that Brown I had not decided how the transition from segregated to unitary school systems would be achieved, and that Brown II had given local authorities significant discretion regarding the process of abolishing segregated school systems. But Justice Black was clear about the affirmative duty recognized in Brown. He wrote that while some southern school districts did not mandate racial segregation, many states had maintained separate school systems for white and black students for many years, and that segregated schools were a part of dominating white customs, expectations, and state law.

Thus he implied, Brown's "all deliberate speed" language in 1955 was not a retreat from Brown I's substantive constitutional mandate – the affirmative constitutional duty to dismantle racially segregated schools – but rather a recognition that the disestablishment of an old dual structure and the creation of a new unitary system could not be immediately accomplished. What was clear in his mind was that "all deliberate speed" meant at the earliest practical time, and this is what Judge Johnson's opinion had defined as the issue in Carr.

This was indeed why Carr became the path to understanding Brown's mandate and southern state resistance to the Fourteenth Amendment. Little Rock had revealed obstreperousness in the form of open violence and raw emotion; Carr revealed an attempt to exploit Supreme Court law through a more sophisticated strategy that was equally disingenuous. In the end, the responsibility of preventing the exploitation of Brown II's language as a strategy for obstructing integration resided in the federal District Courts, as Judge Johnson had reaffirmed. The Supreme Court's view of the record in the Carr case reaffirmed Judge Johnson's finding that, a decade after Brown was decided, Montgomery County had taken no effective steps to integrate its public schools, but instead deliberately and strategically acted to perpetuate the dual system of racially segregated

schools in defiance of unanimous federal decisions that a state's maintenance of racial separate schools violated the federal Constitution.

The Supreme Court saw Carr as an imperative case, and adopted Judge Johnson's findings of fact. While recognizing some progress, as reflected in the School Board's annual reports to Judge Johnson, the Supreme Court supported Judge Johnson's concern for unnecessary delay, and his efforts to expedite compliance as years passed in the manner that he specified in his 1968 order. In fact, although the Supreme Court arguments focused on the issue of faculty assignment, and the Board's argument that Judge Johnson's order required rigid quotas, the Supreme Court held that Judge Johnson had no intention to impose rigid numerical requirements.

The Supreme Court observed that Judge Johnson understood and permitted flexibility, and it adopted his order as written, complementing him for his patience and wisdom during the five years that the Carr case was before him. The Carr case illuminates Brown's legacy, and ultimately before the Supreme Court, the Montgomery County Board of Education recognized its affirmative duty to provide a racially integrated school system, abolishing the custom and law that supported separate black schools and white schools.

The lessons of the Carr case, and its legacy, are found in United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), which Judge John Minor Wisdom of the Fifth Circuit Court of Appeals would describe as his most important opinion on the subject of public education. The Jefferson case (decided while Carr was evolving before Judge Johnson) is significant in the legal history of cases like Carr, because it explains the significance of the early line of cases in which courts reexamined school desegregation standards following the enactment of the Civil Rights Act of 1964 and the Guidelines of the United States Office of Education,

Department of Health, Education and Welfare.

Judge Wisdom brilliantly introduced the relevance of cases like Carr by revisiting Brown's basic holding. In language typical of his unique style, at once expository and expressive, Wisdom writes: "When the United States Supreme Court...decided Brown v. Board of Education, the members of the High School Class of 1966 had not entered the first grade." Brown I had held that separate schools for black children and white children were inherently unequal. Black children, said the Circuit Court, have the "personal and present" right to equal educational opportunities with white children in a racially nondiscriminatory public school system.

Framing the statistical case, Judge Wisdom pointed to the deliberate failure of school districts in Alabama and Louisiana to implement Brown: He noted that, in Alabama, as of December 1965, there were 295,848 black students, only 1,250 of whom were actually enrolled in schools with 559,123 white students, 0.43% of eligible black students. In Louisiana, there were 2,187 black students, out of a total of 318,651, enrolled in school with 483,941 white children, 0.69% of eligible black students. And, mirroring Judge Johnson's observation in Carr, Judge Wisdom emphasized that no proper voluntary effort had been made to alter this consequence in the decade following Brown, and that any progress was the product of court orders vigorously opposed by school boards.

The Carr case was typical and illustrative of what Judge Wisdom described as the deliberate attempt by southern states to avoid Brown's mandate by mischaracterizing its language to suggest only that black students could be considered for admission to white schools – a spurious mischaracterization that ignored the affirmative duty imposed by Brown I, and that shamelessly over-read Brown II. Exposing such a deliberate misreading of Brown as strategy, Judge Wisdom rejected any judicial distinction between the terms desegregation and integration, and interpreted Brown to require public school boards that had previously operated racially segregated school systems to integrate students,

faculties, and school activities so as to achieve a transition to racially nondiscriminatory school systems.

The expansion of the legal history of Brown was in Judge Wisdom's recognition of the role of the Executive (*i.e.*, the Department of Health, Education & Welfare) in the evaluation of school desegregation plans. Judge Wisdom emphasized that HEW Guidelines had been formulated by officials with expertise in education and school administration (to direct the progress of specific desegregation plans as a part of a coordinated national program), and that federal courts in the Fifth Circuit should give great weight to such Guidelines.

The need for such executive guidelines was revealed by Judge Wisdom's identification of the cultural realities which act as barriers to compliance with constitutional imperatives: First, Judge Wisdom discerns that a segment of white opponents of desegregation would be willing to abandon public education rather than send their children to racially integrated schools. This opposition takes the form of white movement to suburbs, perpetuating urban neighborhood school patterns and the establishment of private and parochial schools that promote immediate racial re-segregation. He also recognizes that a significant number of white teachers would prefer not to teach in integrated public schools, and would select between teaching in the growing number of private schools, or to retire. And, he notes that many black families, unlike the Carr family, would choose to simply have their children remain at their current school.

Finally, Judge Wisdom makes clear that the resulting performance disparities of students are influenced, not just by the unequal resources that would distinguish predominantly black schools from predominantly white schools, but by the socioeconomic status of black families, which would determine their choices for their children's education. Judge Wisdom concluded that these realities posed the need for the enforcement of Title VI of the 1964 Civil Rights Act. Federal executive branch preconditions for federal aid to public school districts, and authorization of enforcement litigation would

advance the intended result of cases like the Carr case by providing a template for the evaluation of compliance efforts by southern school districts.

The final defining significance of Judge Wisdom's opinion in the Jefferson County case is his reminder that Brown was not a case between individual schools and individual students or families. The issue in Brown was the denial of equal justice to an entire class. Black students and families were collectively harmed by the state enforcement of racially segregated school systems.

Recalling the essence of Brown's holding that "separate" is inherently unequal under the federal constitution, Judge Wisdom made it clear that what Brown recognized was that dual systems of public education for white and black students was a part of a cultural, political and legal apartheid, condemned by the Thirteenth and Fourteenth Amendments. Adequate redress for such wrongs to an entire group demanded group remedies, and Judge Wisdom makes it clear that allowing a few black children to attend a previously all-white school cannot be defended as compliance with the Constitution and Brown's mandate. Judge Wisdom therefore holds specifically that the only meaningful remedy is the remedy that Judge Johnson required in Carr, the affirmative disestablishment of dual systems based on race and the transition to racially unbiased school systems that truly corrected the effects of past segregation.

Judge Wisdom exposed an apartheid system established by dual zoning. Thus viewed, any minimalist attempt to comply with Brown by considering one family's application for transfer does nothing to satisfy the class remedy demanded by Brown. The group harmed by dual systems is all black students attending inherently unequal schools and the remedy is the conversion of dual zones into a single system.

In this regard, the gradual transition approved by Brown's "all deliberate speed" language was clearly meant to give states time to address administrative problems inherent

in that transition. Judge Wisdom realized the spuriousness of school district arguments that Brown's language meant the justification of only individual remedies. Judge Wisdom revealed the obvious: That no delay would have been necessary if only individual rights were the issue in Brown. It not only was a class action; read otherwise, the Court's holding made no sense, and those who resisted Brown knew the hollowness of their "individual remedies" argument.

In concluding language that would be relevant a half-century later, Judge Wisdom exposed the birth of "school-choice" plans as a strategy for avoiding compliance with Brown. Such plans were a way to vest uncontrolled discretion in school officials in order to preserve the reality of a dual school system, while appearing to address Brown. While in theory a school choice plan allows a family to choose a school, the effectiveness of this choice depends on the availability of seats in so-called balanced schools, and some check on the use of transfers to promote re-segregation. In other words, Judge Wisdom made it clear that any implementation of so-called school choice plans must facilitate a transition to a *bona fide* unitary system, including the abolition of dual attendance zones and the availability of schools that are substantially equal in academic quality.