**Law & Inequality: A Journal of Theory and Practice**

Volume 24 | Issue 1 Article 1

2006

# With All Deliberate Speed: Brown II and Desegregation's Children

Jim Chen

# With All Deliberate Speed: *Brown II* and Desegregation's Children

Only the crassest of societies would deny a fundamental commitment to the well-being of children and future generations.[1] In harmony with what is almost surely a universal desire for intergenerational justice, the people of the United States have dedicated their Constitution to the task of "secur[ing] the Blessings of Liberty to ourselves and our Posterity."[2] Nominally steadfast commitments, however, dissolve easily within the context of a constitution "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[3] Neither law nor "[g]eology knows [any] such word as forever."[4] Among the few duties that have held fast within a constitutional tradition that asserts its obligation to reject "anew . . . ideas and aspirations" not fit to "survive more ages than one"[5] is the nominal commitment of American society to "the upbringing and education of children."[6] "The American people," said the Supreme Court in 1923, "have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted."[7]

As though they were inspired by their state's lofty motto, *ad astra per aspera*,[8] the members of one family in Topeka, Kansas, put this nominal commitment to education and intergenerational justice to a test like none other seen before or since in American history. In what was quite possibly "the most important decision in [its]

---

1. *See generally, e.g.*, Lawrence B. Solum, *To Our Children's Children's Children: The Problems of Intergenerational Ethics*, 35 LOY. L.A. L. REV. 163 (2001) (discussing the problems of intergenerational ethics).

2. U.S. CONST. pmbl.

3. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis omitted). *See generally* William E. Scheuerman, *Constitutionalism in an Age of Speed*, 19 CONST. COMMENT. 353 (2002) (assessing the impact of societal change on constitutional theory).

4. WALLACE STEGNER, MORMON COUNTRY 48 (U. Neb. Press 1981) (1942).

5. Planned Parenthood v. Casey, 505 U.S. 833, 901 (1992).

6. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).

7. Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

8. KAN. STAT. ANN. § 73-2403(a) (2002). The literal translation of "ad astra per aspera" is "to the stars through difficulties."

history,"[9] the Supreme Court declared that "education is perhaps the most important function of state and local governments."[10] Notwithstanding the Court's earlier pronouncements on education, the original 1954 decision in *Brown v. Board of Education*[11] (*Brown I*) represented a crucial turning point in American law's treatment of schooling and its impact on children. Though the Supreme Court's 1954 desegregation decision is justly known for its stirring rejection of racial segregation by law,[12] *Brown I* also represents the first time that the Supreme Court acknowledged the singular importance of *public* involvement in education and the correlative "importance of education to our democratic society:"

> [Education] is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[13]

What had begun as one family's seemingly modest effort to eliminate its daughter's treacherous one-mile walk through a railroad switchyard between home and a segregated public school[14] sparked a forty-year battle for educational justice[15] that illustrates, as perhaps nothing else ever could, the slow but relentless progress of the American people through hardship to the stars.

*Brown I*, however, did not direct a remedy for the constitutional injury suffered by students in segregated schools. The following Term, the Supreme Court revisited the remedial issue in a second

---

9. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 286 (1993); *cf.* Jack M. Balkin, Brown v. Board of Education—*A Critical Introduction, in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 3, 4 (Jack M. Balkin ed., 2001) (describing *Brown I* as "the single most honored opinion in the Supreme Court's corpus").

10. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

11. 347 U.S. 483 (1954).

12. *See id.* at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place.").

13. *Id.* at 493.

14. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 408-09 (1975).

15. *See generally* Paul E. Wilson, *Ad Astra Per Aspera:* Brown v. Board of Education of Topeka, 68 UMKC L. REV. 623 (2000) (describing the decades of litigation that began with Oliver Brown's suit against the Topeka Board of Education and ended with the July 25, 1994, approval of a desegregation plan submitted by Unified School District #501 of Topeka).

case styled *Brown v. Board of Education*[16] (*Brown II*). Even as it directed school districts to "make a prompt and reasonable start toward full compliance with" *Brown I*'s stirring vision of equal protection, *Brown II* declared "that additional time [may be] necessary to carry out the ruling in an effective manner."[17] The Court thereupon remanded the desegregation cases to the lower courts where they first arose, with instructions to "take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis *with all deliberate speed* the parties to these cases."[18]

The infamous "all deliberate speed" formula and the South's massive resistance to desegregation arguably dissipated much of *Brown I*'s promise. At a minimum, *Brown II*'s "all deliberate speed' formula enabled public school districts in the South to delay desegregation for more than a decade. Nine years after *Brown II*, an exasperated Supreme Court finally declared that "[t]he time for mere 'deliberate speed' has run out."[19] In 1968, a unanimous Court declared again that "[t]he time for mere 'deliberate speed'" had expired and accordingly placed the legal burden on school officials "to come forward with a plan that promises realistically to work, and promises realistically to work *now*."[20] Desegregation did not begin in earnest, however, until the passage of the Elementary and Secondary Education Act of 1965.[21] As late as 1969, the Court found it necessary to admonish lower federal courts and local school officials that "continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible."[22] Seventeen years—enough time for a first-grader at the time of *Brown* to earn a college degree—elapsed before the Court finally endorsed aggressive remedies such as busing.[23] "Racial attitudes ingrained in our Nation's childhood and adolescence," in retrospect, could not be and were "not quickly thrown aside in its middle years."[24] The

16. 349 U.S. 294 (1955).

17. *Id.* at 300.

18. *Id.* at 301 (emphasis added).

19. Griffin v. County Sch. Bd., 377 U.S. 218, 234 (1964).

20. Green v. County Sch. Bd., 391 U.S. 430, 438-39 (1968) (emphasis in original).

21. Elementary & Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended in scattered sections of 20 U.S.C.).

22. Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969) (*per curiam*); *accord, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 497 n.4 (1979).

23. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

24. Milliken v. Bradley, 418 U.S. 717, 814 (1974) (Marshall, J., dissenting).

tumultuous history of the desegregation agenda exposed "all deliberate speed' as little more than "a soft euphemism for delay."[25]

Twenty years after *Brown I*, roughly half the time that the desegregation agenda would dominate before the trilogy of *Board of Education v. Dowell*,[26] *Freeman v. Pitts*,[27] and the final phase of *Missouri v. Jenkins*[28] brought an effective end to the *Brown* era,[29] the Supreme Court dealt desegregation a nearly fatal blow. In the 1974 case of *Milliken v. Bradley*,[30] the Justices refused to sanction interdistrict remedies absent a showing "that there has been a constitutional violation within one district that produces a significant segregative effect in another district," a demonstration "that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation."[31] Not without reason is *Milliken* derided as "the case that effectively repudiated *Brown*'s integrationist mandate."[32] Almost contemporaneously with *Milliken*, the Supreme Court refused in *San Antonio Independent School District v. Rodriguez*[33] to treat inequalities in public school financing as a violation of the equal protection clause. Virtually all of the public school litigation of the last three decades can be described as one strategem or another to work around *Milliken*, *Rodriguez*, or both.[34]

Half a century later, *Brown II*'s contested legacy endures. Many of the social ills that continue to plague the contemporary United States—residential segregation, disparities in achievement and opportunity, the concentration of poverty and other social pathologies in inner cities—can be traced to the imperfect implementation of the Supreme Court's desegregation orders. By

---

25. Alexander v. Holmes County Bd. of Educ., 396 U.S. 1218, 1219 (1969) (Black, Circuit Justice).

26. 498 U.S. 237 (1991).

27. 503 U.S. 467 (1992).

28. 515 U.S. 70 (1995); *see also* Missouri v. Jenkins, 495 U.S. 33 (1990); Missouri v. Jenkins, 491 U.S. 274 (1989).

29. *See generally* PETER IRONS, JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE *BROWN* DECISION 259-88 (2002).

30. 418 U.S. 717 (1974).

31. *Id.* at 745.

32. Richard Thompson Ford, Brown*'s Ghost*, 117 HARV. L. REV. 1305, 1312 (2004).

33. 411 U.S. 1 (1973).

34. For exemplary works of scholarship describing this litigation, see Molly S. McUsic, *The Future of* Brown v. Board of Education*: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334 (2004); James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432 (1999); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999); James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529 (1999).

the same token, today's political and legal order is committed, as no previous generation of Americans has ever been, to *Brown I*'s vision of education as an essential component of intergenerational justice. Our schools are not only the primary vehicle for transmitting "the values on which our society rests,"[35] but also "a most vital civic institution for the preservation of a democratic system of government."[36] The responsibility for effecting justice and transmitting wisdom across generational lines falls squarely upon the adults who have lived and contested the tumultuous life of the Republic under *Brown*. "Children, after all, have no past whatsoever. That alone accounts for the mystery of charmed innocence in their smiles."[37] By contrast, legal scholars bear a special moral obligation to undo the "enduring disability" that has been inflicted on generations of children[38] by the failure to fulfill *Brown I*'s promise that full educational opportunity would "be made available to all on equal terms."[39]

On May 5, 2005, as part of University of Minnesota president Robert Bruininks' "Initiative on Children, Youth, and Families,"[40] the University of Minnesota Law School hosted a conference called "With All Deliberate Speed: *Brown II* and Desegregation's Children." Professor emeritus John J. Cound, whose very first assignment in the Department of Justice consisted of briefing the question of whether federal courts, in construing the Fourteenth Amendment to the Constitution, had the power "'to abolish segregation in public schools,'"[41] shared hosting duties with Dean Alex M. Johnson, Jr., and Jim Chen, both of whom are products of public schools directly affected by the *Brown* litigation.[42] A distinguished group of leading

35. Ambach v. Norwick, 441 U.S. 68, 76 (1979).

36. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); *see also* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) ("[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society.").

37. MILAN KUNDERA, THE BOOK OF LAUGHTER AND FORGETTING 187 (Michael Henry Heim trans., 1980).

38. Plyler v. Doe, 457 U.S. 202, 222 (1982); *accord* Grutter v. Bollinger, 539 U.S. 306, 331 (2003).

39. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

40. *See* http://www.cyfc.umn.edu.

41. John J. Cound, *A Very New Lawyer's First Case:* Brown v. Board of Education, 15 CONST. COMMENT. 57, 58 (1998).

42. Alex Johnson spent all thirteen years from kindergarten to high school graduation in predominantly black schools within the Los Angeles Unified School District. *See* Alex M. Johnson, Jr., Brown's *Ambiguous Promise* (Sept. 9, 2005) (unpublished manuscript, on file with author). Jim Chen divided his time between predominantly black public schools in Atlanta and historically white public schools in DeKalb County, Georgia. *See* Jim Chen, *Mayteenth*, 89 MINN. L. REV. 203, 203 n.†, 222-25 (2004).

scholars—Michelle Adams, Trina Jones, Goodwin Liu, Myron Orfield, Thomas Pettigrew, James E. Pfander, and Gerald N. Rosenberg—gathered under the Law School's aegis to address *Brown II* and its legacy. The Law School was also delighted to welcome a legendary figure of the struggle for civil rights, Julian Bond.

This issue of *Law & Inequality* publishes the proceedings of the University of Minnesota Law School's conference, "With All Deliberate Speed: *Brown II* and Desegregation's Children." Trina Jones describes the lessons of *Brown I* and *Brown II* and their applicability to current inequality and civil rights issues.[43] Extending a theme he first developed in *The Hollow Hope: Can Courts Bring About Social Change?*,[44] Gerald Rosenberg questions whether *Brown II* had any impact on a desegregation agenda already mortally wounded by the political and cultural opposition of most Southern Whites, and the unwillingness of federal officials to challenge them.[45] James Pfander strikes an optimistic note in finding "some reason to celebrate the fiftieth anniversary of *Brown II* even as we remain sober-minded about the costs of remedial thinness to generations of schoolchildren."[46] Finally, Goodwin Liu explores how school desegregation and school finance litigation diverged,[47] even though their doctrinal underpinnings nearly converged in the 1973 decisions of *Keyes v. School District No. 1*[48] and *San Antonio Independent School District v. Rodriguez*.[49]

As with all other roads to justice, the long, imperfect, and incomplete path of the law in *Brown I* and *Brown II* raises pragmatic questions "of how to promote a flourishing society," questions that should "be answered as much by experience [as by] theory."[50] This dedication to asking hard, practical questions unites the diverse contributions to this symposium. It is one thing to assert the "settled and invariable principle . . . that every right, when withheld, must

43. Trina Jones, *Recovering from Disappointed Expectations: The Lessons of* Brown II, 24 LAW & INEQ. 9 (2006).

44. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

45. Gerald N. Rosenberg, *Tilting at Windmills:* Brown II *and the Hopeless Quest to Resolve Deep-Seated Social Conflict Through Litigation*, 24 LAW & INEQ. 31 (2005).

46. James E. Pfander, Brown II*: Ordinary Remedies for Extraordinary Wrongs*, 24 LAW & INEQ. 47, 55 (2006).

47. *See* Goodwin Liu, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 LAW & INEQ. 81 (2006).

48. 413 U.S. 189 (1973).

49. 411 U.S. 1 (1973).

50. Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1347 (1988).

have a remedy, and every injury its proper redress."[51] It is another thing altogether, especially within "the untidy crucible of American public schools,"[52] to address the precise terms by which *Brown II* remedied the scar of official racism "with all deliberate speed." In other words, whereas "*Brown I* gave us an enduring symbol" of equal justice, "*Brown II* began to address matters of substance."[53] In the pages that follow, the participants in this conference on *Brown II* and desegregation's children will likewise "sing of that second kingdom / in which the human spirit is made clean / and becomes worthy to ascend to Heaven."[54]

— *Jim Chen*[*]

51. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

52. Liu, *supra* note 47, at 81.

53. *Id.*

54. DANTE ALIGHIERI, PURGATORIO: A NEW VERSE TRANSLATION 2 (W.S. Merwin trans., 2000) (canto I, *ll.* 4-6); *see also id.* at 1 ("e canterò di quel secondo regno / dove l'umano spirito si purga / e di salire al ciel diventa degno").

[*] Associate Dean for Faculty and James L. Krusemark Professor of Law, University of Minnesota Law School.