

1996

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Recommended Citation

Shaw, Theodore M., "Equality and Educational Excellence: Legal Challenges in the 1990s" (1996). *Minnesota Law Review*. 2409.
<https://scholarship.law.umn.edu/mlr/2409>

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Equality and Educational Excellence: Legal Challenges in the 1990s

Theodore M. Shaw*

I would like to thank you for inviting me to visit with you to share some thoughts today, and I also acknowledge the pleasure I always feel at having the opportunity to be reunited with some people I have worked with over the years, including Gary Orfield, Michael Sussman, and John Powell; and although I have not had the opportunity to work with her closely, I certainly have long been an admirer of Nancy Denton and her work. I think that this forum is fortunate to have these scholars here today. Kenneth Clark, of course, is one of the giants of our time, and he is still on fire about issues of race and segregation even at this point in his life. He has never let them go; although we sometimes might want to, none of us can let these issues go because they will not let us go.

I want to share a few thoughts today about educational equity and litigation challenges for the 1990s, but I also want to speak a bit more broadly about the discussion of race and segregation in this country today. I was in the Supreme Court recently when two of the most important civil rights cases in decades were argued before the Court. One case is from Louisiana and is called *United States v. Hays*;¹ the other case is out of Georgia, *Miller v. Johnson*.² These two cases involve the question of whether a state legislature, pursuant to the Voting Rights Act of 1965,³ can redraw districts where the majority of voters are members of minority groups. That is, does the Constitution allow the creation of majority black districts in southern states with histories of discrimination, segregation, and racially polarized voting? By "racially polarized voting," I mean that for the most part majority white districts will not elect black candidates, so that it is virtually impossible for black

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1. 115 S. Ct. 2431 (1995).

2. 115 S. Ct. 2475 (1995).

3. 42 U.S.C.A. § 1973 (West 1995).

candidates to be elected to public office unless they come from majority black districts.⁴

The plaintiffs in these cases were white voters who argued that the creation of these districts deprived them of the constitutional right to equal protection under the law. In other words, these districts, because they were intentionally created as majority black districts, were discriminatory against them as white voters. What is ironic is that the districts in *Hays* and *Johnson* are among the *most integrated* districts in the country. The district under challenge in Louisiana is 55 percent black, and the district in Georgia is 60 percent black. The district under challenge in North Carolina in *Shaw v. Reno*⁵ is 53 percent black. Now, once in a while it might be a healthy thing for white folks to be a minority in a majority black district; but in *Hays*, *Johnson*, and *Shaw*, the electorates are integrated, and the politicians cannot ignore the significance of white voters in those districts.

Why am I talking about these cases? What is their relevance to the issue of school and housing segregation? to what is going on here in Minnesota? and to the public discourse about race today? What we are seeing today is a gross distortion of the realities of race in this country, in which black is white and up is down. Those who oppose these districts are appropriating the language of the Civil Rights Movement and saying that what they want is a color blind society.⁶ What they are ignoring is that in Louisiana no black person has been elected to a statewide office in this century; no black person has been elected from a majority white district to the state legislature; no black person has been elected from a majority white district to Congress; and that, if left to the majority of white voters in the state of Louisiana, David Duke would be the governor today—not ten years ago, not five years ago, not twenty years ago, not yesterday, but right now.

The plaintiffs in *Hays* and *Johnson* ignore the continuing

4. See, e.g., *Thornburg v. Gingles*, 106 S. Ct. 2752, 2761 (1986) (discussing the district court's findings regarding the poor success rate of black candidates' election to public office in North Carolina).

5. 113 S. Ct. 2816 (1993).

6. See, e.g., *Hays*, 115 S. Ct. at 2440 (citing appellees' complaint that Louisiana's redistricting scheme violated voters' right to engage in a color-blind process); *Shaw*, 113 S. Ct. at 2824 (pointing to language in appellants' complaint that North Carolina's redistricting scheme deprived voters of the right to participate in a color-blind election process).

history of racially polarized voting at the expense of black citizens. They are saying that redrawing these districts discriminates against them as white people⁷ and that we are abandoning the concept of a color blind society that Justice Harlan championed in his dissent in *Plessy v. Ferguson*.⁸ We are told that the nation is abandoning the principle of Dr. Martin Luther King, Jr., and his hope that we would one day live in a society where his "four little children [would] not be judged not by the color of their skin but by the content of their character."⁹ According to these folks, it is an insistence on race consciousness by *African-Americans* that is keeping racial divisiveness and balkanization alive. And indeed Justice O'Connor, in her opinion in *Shaw v. Reno*¹⁰ (the decision that kicked off these cases), talked about how these districts run against the constitutional command to weld together the various ethnic, racial, and religious groups in this country. She talked of our tradition of trying to weld together those groups, not as a matter of social policy, but as a matter of constitutional command. So, these districts are balkanizing, they are divisive. In fact, Justice O'Connor likened them to political apartheid.¹¹

The connection here should be obvious to you by now. We have, on the one hand, black folks who choose to try to empower themselves politically within a set of ugly realities: that neighborhoods and schools are largely and heavily segregated in this country according to race; that white people run from black people—white flight is a reality in spite of what some people say to the contrary; that public school desegregation is something to which this country may be committed in principle but is not committed to in practice. So African-Americans say, "Because we find ourselves within this segregated reality, let us politically empower ourselves within this reality—let us try to at least be able to elect representatives of our choice." And so we are

7. *Hays*, 115 S. Ct. at 2440; *Johnson*, 115 S. Ct. at 2485 (citing appellee's Equal Protection claim against Georgia's redistricting plan).

8. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

9. Dr. Martin Luther King, Jr., Address at the Civil Rights March (Aug. 28, 1963).

10. 113 S. Ct. 2816 (1993).

11. *Id.* at 2827 ("A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.").

castigated as divisive, balkanizing—we are abandoning the dream of a color blind society.

Well, the NAACP Legal Defense Fund and many other people in the Civil Rights Movement have been fighting for desegregation for decades, and we continue to fight these desegregation struggles. At the same time, we know that this fight is not accepted with grace, nor is it welcomed by the majority in this country, not in practice, maybe in policy or in principle, but not in practice. So there is a hypocrisy here. We see an American society today in which black folks are being told that *they* are responsible for maintaining race consciousness as this divisive element in the national agenda, even though from the beginning of this country those who were the founding fathers put race on the agenda. We fought a Civil War about race, and race has always been the great American divide. And so all of the sudden African-Americans are responsible for maintaining racial divisiveness?

White Americans, the majority of them or many of them, are running from black folks in practice and are running from desegregation. You cannot have it both ways. You cannot criticize African-Americans for trying to politically empower themselves within segregated realities and, at the same time, call them separatists, or segregationists, or divisive, or balkanizers because *they stopped chasing you* and instead tried to empower themselves. It does not work.

This hypocritical discussion is everywhere. I do not claim to be an expert on what is going on in Minnesota, but I was sent an article published fairly recently called *Good Intentions Are Not Enough*.¹² I do not know much about the author, and I do not know her motivations or what is in her heart or mind. I can tell you, though, that I read through it and saw language which resonated with some of the observations I have made about the national discourse on these issues. The author opposes the idea of a voluntary metropolitan school desegregation plan in Minneapolis.¹³ She writes that if the Minnesota Board of Education adopts rules it is considering to promote desegregation, Minnesota will take a giant step away from the color blind society envisioned by *Brown v. Board of Education* and Dr.

12. KATHERINE KERSTEN, CENTER FOR THE AM. EXPERIMENT, GOOD INTENTIONS ARE NOT ENOUGH: THE PERIL POSED BY MINNESOTA'S NEW DESEGREGATION PLAN (1995) (on file with the *Minnesota Law Review*).

13. *Id.* at 6-7.

Martin Luther King, Jr.¹⁴

Well, what does this say? I take it that what it says is that if we begin to make these kinds of decisions to assign students or to develop plans that allow students to be assigned to schools or to choose to go to schools with desegregation in mind, this will promote racial divisiveness. Well, that inverts the truth. Discussions of school desegregation invariably turn to busing, but the issue is not busing. I talked about busing when I was at the Justice Department. Mike Sussman was there at the time, about fifteen years ago, and used to debate about busing with folks. I refuse to talk about busing any longer. White people will put their children on buses and send them to West Hell if at the end of that ride there is an all-white, quality education. So busing is not the issue. The great majority of public school students in this country are bused to school for purposes just of getting to school, and only a fraction of that busing is for desegregation. So let's not talk about busing. What we are really talking about is whether we are committed to having desegregated education or whether we are not. Let's talk about it in those terms honestly—if we are not committed to desegregation, let's acknowledge that and then talk about what we *are* willing to do.

So the title of this piece was *Good Intentions Are Not Enough*. This leads me to ask this question: if good intentions are not enough, then what *is* enough? What are you willing to do? Before you can come to me and talk about black folks balkanizing society, you have to tell me what you have done lately in your daily life to promote desegregation. What have you done, or what are you doing to promote the principles you say we should hold aloft?

I want to be clear about what we are talking about. What drives school desegregation is not the principle that there is something inherently wrong with all-black institutions. There is *nothing* inherently wrong with an all-black institution. There *is* something inherently wrong with all-black institutions that are created and maintained by a predominately white power structure and that do not have the resources because the resources are withdrawn as white folks flee. Can those institutions provide quality education? While this is up to every individual, I personally believe there is nothing wrong with all-

14. *Id.* at 4.

black institutions, and I do not have to live next door to white folks to feel good about myself. At the same time, I think that in a multi-cultural society there are some real advantages to all of us from being educated in a desegregated environment. So we are not talking about all-black institutions as inherently inferior because something magic about white children rubs off on black children that allows them to learn in a better way. That is not the underlying principle. What we are talking about are structural realities that continue to exist within the society and within the schools that make learning next to impossible.

For example, the article I have referred to discusses the Kansas City case, *Missouri v. Jenkins*,¹⁵ and distorts what is going on in that case. I know a little bit about the Kansas City case because I have spent a good chunk of my life in recent years working on it. After the Kansas City School District became majority black¹⁶ (although the city and electorate was still majority white), it became impossible for the District to get the support it needed. From the moment the School District became majority black, not one tax levy, not one bond issue passed.¹⁷ As a consequence, the district court found, those schools literally crumbled.¹⁸ Not only did the schools literally rot, but the quality of education also began to decline.¹⁹ So you had separate and unequal education in Kansas City.

We fought an inter-district law suit, and the court ruled against us on inter-district desegregation.²⁰ I will tell you that the evidence we put before the court was powerful and compelling, and I think the court was wrong. But that's sour grapes. What I do know is that as a consequence of the remedy that we *did* get at Kansas City, we turned around a district with schools that were crumbling. Although some people would have you believe otherwise, *Jenkins* does not involve two billion dollars spent on a useless remedy. I went into the schools, and I remember looking at the ceiling of one classroom and seeing the sky. And I remember going into bathrooms that were filthy,

15. 672 F. Supp. 400 (W.D. Mo. 1987), *aff'd in part, rev'd in part*, 38 F.3d 960 (8th Cir. 1994), *rev'd*, 115 S. Ct. 2038 (1995).

16. SCHOOL DIST. OF KANSAS CITY, MO., THE REAL FACTS (1994) (reporting on the progress of "halting the decline of non-minority enrollment in the [Kansas City School] district").

17. *Jenkins*, 672 F. Supp. at 411, 412.

18. *Id.* at 403.

19. *Id.* at 410-11.

20. 38 F.3d 960, 964 (8th Cir. 1994).

that were not fit for young children to use. And I remember schools that were too hot in the summertime and not adequately heated in the wintertime and nobody was doing anything about it because the legislature did not have the will. And I am unapologetic about the fact that the state and the Kansas City School District have spent 1.3 billion dollars to begin to turn those schools around. So the Kansas City School District has made significant changes, and test scores among younger students have been improving.²¹

Now the issue that we argued before the Supreme Court in January 1995 was manufactured by the state because it wanted to get out of its remedial obligations. The district court had said in passing that in order to get out from underneath the obligation, the school district had to show that it had turned around the educational harms that had flowed from segregation, but that test scores still showed disparity between black and white students. Because the state could not show that it had done all it could do, it argued that the district court was requiring it to equalize test scores between black and white students, and that there is no constitutional command to do so. The subtext was, "The bell curve—can't do it."

The Supreme Court took that case because there were some conservative Justices on the Court who were interested in the Kansas City remedy and thought it had gone too far. I am not going to predict what the Court will do, but I am saying that the issue we had to argue is not the issue that the case actually presents. The real question is whether test scores can be a measure among many measures of the efforts of the Kansas City School District to eliminate the effects of segregation. States buy into test scores all the time. They use them to measure whether students are learning what they ought to learn. If students have to be measured by them, it seems to me that test scores ought to be a measure of educational quality, unless you happen to believe in the bell curve thesis—in which case we do not need to have a long discourse here.

The reality is that the school desegregation cases have worked imperfectly. But I do not know of anything in life that is perfect, and I think the standard that people apply to these school cases is one that is applied to few other fields of human

21. *Commonly Held Myths and Facts About the Kansas City, Missouri School District in THE SCH. DIST. OF KANSAS CITY, MO.*, *supra* note 17.

endeavor. I think it ultimately comes down to a question of will. We lost a case in a Connecticut state trial court just last week, *Sheff v. O'Neill*,²² in which we were trying to litigate the question of how race and poverty affect the educational opportunities of children in the Hartford School District—one of the most segregated school districts in the country. We put evidence before the court that the state constitution mandates equal educational opportunity *and* minimally adequate education.²³ The district court judge in *Sheff* simply failed as a matter of will, I believe, to rule in our favor. The opinion is incomprehensible. It is convoluted. It is legally a mess. You cannot make sense out of it, and it reflects a simple failure of will which has happened time and again.

Here in Minneapolis there is an opportunity now to go down another road, but it requires a conscious exercise of will that the court in *Sheff* did not assert. If you do not have the will, you will find out that these problems will not go away. They will continue to snowball, they will continue to grow, and as we move further and further away from the point where these problems begin, it will become harder to address them—because the compounding effects of race and poverty only become more intractable as time passes.

There is very little fortuitous segregation in this country. Segregation is a consequence of years, indeed centuries, of social *policy*; governmental policy on the local, state, and federal levels combined with private actions have worked to produce the patterns of race segregation that exist in this country today. Segregation is a consequence of social engineering; a different kind of social engineering is the aim of civil rights lawyers. I gladly accept the label of “social engineer.” The great lawyer Charles Houston, who was the architect of the Civil Rights legal struggle, said that a lawyer is either a social engineer or is a parasite on society. If we do not give these problems attention, we cannot wish them away or sweep them under the rug. They will not go away. We have to consciously engineer our way out of them.

I close by telling you that I admire my colleagues at this forum. Gary Orfield is one of the biggest optimists I know; John

22. No. CV89-03609975, 1995 WL 230992 at *1 (Conn. Super. Ct. Apr. 12, 1995).

23. *Id.* at *1.

powell is one of the most gentle warriors I know. I tend to be susceptible to anger. I have to fight bitterness, because bitterness is corrosive and destructive. I may not be as optimistic as some others here today about where we are on race in this country. But I do know that if we lay down and cease to struggle, this problem will only get worse. We are not going to be able to ignore this problem as we move into the twenty-first century. W.E.B. DuBois said that the problem of the twentieth century will be the problem of the color line,²⁴ and he was right. The problem of the twenty-first century will be the problem of the color line *and* the class line, and if we do not address it, the social fabric will tear. We will not sustain ourselves as a country, or as a community, if the disparities between the rich and the poor continue to grow as they have grown over the last twenty years. It simply will not happen. People will not buy into the social compact. And so while I may be angry, and sometimes bitter, I also know that we have to continue the struggle. I am reminded of a wonderful African proverb; it goes like this:

Life has meaning only in a struggle.
Victory and defeat are in the hands of the Gods.
So let us celebrate the struggle.

Editors' Afterword

Mr. Shaw delivered these comments on April 22, 1995. On June 12, 1995, the Supreme Court issued its opinion in the Kansas City desegregation case, Missouri v. Jenkins,²⁵ which Mr. Shaw had argued before the Court. The Court, in a 5-4 decision, held that the district court had exceeded its remedial authority in crafting orders designed to attract white students to the Kansas City School District and to improve conditions in district schools.²⁶ Concurring, Justice Thomas stated that "[i]t never ceases to amaze me that the courts are so willing to assume that anything that is predominately black must be inferior."²⁷

On June 29, 1995, the Court handed down its decision in Miller v. Johnson,²⁸ the redistricting case from Georgia. Again split 5-4, the Court held that Georgia's legislative redistricting,

24. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* at vii (11th ed. 1918).

25. 115 S. Ct. 2038 (1995).

26. *Id.* at 2051-56.

27. *Id.* at 2061 (Thomas, J., concurring).

28. 115 S. Ct. 2475 (1995).

effected after intervention by the Justice Department under the Voting Rights Act, violated the Equal Protection Clause.²⁹ Quoting *Shaw v. Reno*, the Court stated that “[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.”³⁰ Justice Stevens responded in dissent that the “Court’s refusal to distinguish an enactment that helps a minority group from enactments that cause it harm is especially unfortunate at the intersection of race and voting, given that African Americans and other disadvantaged groups have struggled so long and so hard for inclusion in that most central exercise of our democracy.”³¹

29. *Id.* at 2488-90.

30. *Id.* at 2486 (quoting *Shaw*, 113 S. Ct. at 2832). In the other redistricting case, *United States v. Hays*, the Court held that the plaintiffs lacked standing. 115 S. Ct. 2431, 2437 (1995).

31. 115 S. Ct. at 2499 (Stevens, J., dissenting).