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Nathaniel R. Jones

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Cover Page Footnote

Nathaniel Jones is currently a senior partner at Blank Rome, LLP in the commercial litigation group. From 1979-2002, he served as a U.S. Circuit Judge for the Sixth Circuit. Nathaniel Jones was general counsel for the NAACP from 1969-1979, and held a position as Assistant United States Attorney for the Northern District of Ohio from 1960-67. Mr. Jones received his A.B. from Youngstown State University in 1951, and his J.D. from Youngstown State University Law School in 1956. Mr. Jones has written extensively on Brown v. Board of Education, including the articles Is Brown Obsolete?, Milliken v. Bradley: Brown's Troubled Journey Forth, and Whither Goest Judicial Nominations, Brown or Plessy?–– Advice and Consent Revisited.

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THE JUDICIAL BETRAYAL OF BLACKS—AGAIN: THE SUPREME COURT'S DESTRUCTION OF THE HOPES RAISED BY *BROWN V. BOARD OF EDUCATION*

Nathaniel R. Jones∗

On May 17, 1954, the United States Supreme Court handed down its historic decision in *Brown v. Board of Education*,[1] and almost immediately officials of the National Association for the Advancement of Colored People met in Atlanta, Georgia, to celebrate and to confer. On May 23 and 24, they met to plan for a future filled with hope. With the firm belief that their goals could be realized in the wake of *Brown*, they issued a statment that has come to be known as the "Atlanta Declaration."[2]

Over time, this document has been obscured, to an extent that few students of civil rights are familiar with it. But this declaration is, in fact, the most authentic and definitive commentary on the hopes of black Americans following *Brown*. The NAACP, with other individuals, developed a strategy and embarked on a mission to eradicate the pernicious separate-but-equal doctrine that had been enunciated as the law of the land in *Plessy v. Ferguson*,[3] a decision in which the Court ignominiously betrayed the hopes of black Americans.

No commemoration of *Brown* can be credible, nor can the decision be evaluated effectively at this point in history, without revisiting and

∗ Nathaniel Jones is currently a senior partner at Blank Rome, LLP in the commercial litigation group. From 1979-2002, he served as a U.S. Circuit Judge for the Sixth Circuit. Nathaniel Jones was general counsel for the NAACP from 1969-1979, and held a position as Assistant United States Attorney for the Northern District of Ohio from 1960-67. Mr. Jones received his A.B. from Youngstown State University in 1951, and his J.D. from Youngstown State University Law School in 1956. Mr. Jones has written extensively on *Brown v. Board of Education*, including the articles *Is* Brown *Obsolete?*, Milliken v. Bradley: Brown*'s Troubled Journey Forth*, and *Whither Goest Judicial Nominations,* Brown *or* Plessy*?— Advice and Consent Revisited*.

1. 347 U.S. 483 (1954) (*Brown I*).
2. Statement by the NAACP (May 24, 1954) *reprinted in* THE CRISIS 198 (1979) (with the title *Atlanta Declaration*) (on file with the author) [hereinafter *Atlanta Declaration*].
3. 163 U.S. 537 (1896).

understanding the *Atlanta Declaration*. The full text of the declaration reads:

> We, as representatives of the National Association for the Advancement of Colored People from seventeen Southern and Border States and the District of Columbia, have assembled here in Atlanta, Georgia, May 22-23, for the purpose of collectively developing a program to meet the vital and urgent issues arising out of the historic United States Supreme Court decision of May 17 banning segregation in public schools.
>
> All Americans are now relieved to have the law of the land declare in the clearest language: ". . . in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." Segregation in public education is now not only unlawful; it is un-American. True Americans are grateful for this decision. Now that the law is made clear, we look to the future. Having canvassed the situation in each of our States, we approach the future with the utmost confidence. This confidence is based upon the many factors including the pledges of support and compliance by governors, attorney generals, mayors, and education officials; and by enlightened guidance of newspapers, radio, television and other organs of public communication and comment.
>
> We stand ready to work with other law-abiding citizens who are anxious to translate this decision into a program of action to eradicate racial segregation in public education as speedily as possible.
>
> We are instructing all of our branches in every affected area to petition their local school boards to abolish segregation without delay and to assist these agencies in working out ways and means of implementing the Court's ruling. The total resources of the NAACP will be made available to facilitate this great project of ending the artificial separation of America's children on the irrelevant basis of race and color.
>
> While we recognize that school officials will have certain administrative problems in transferring from a segregated to a non-segregated system, we will resist the use of any tactics contrived for the sole purpose of delaying desegregation.
>
> In pursuit of our objectives, we will accelerate our community action program to win public acceptance of the Court's desegregation order from all segments of the population. To this end, we are confident of the support of teachers, parents, labor, church, civic, fraternal, social, business and professional organizations.
>
> We insist that there should be integration at all levels including the assignment of teacher-personnel on a non-discriminatory basis. The fullest resources of the Association, including the legal staff, the research

> staff and educational specialists on the staff, will be utilized to insure that there will be no discrimination against teachers as a result of integration.
>
> We are aware that our region has been over-burdened in its effort to provide education for all children—in part because of the dual system—and accordingly, we strongly support Federal aid to assist our states in the building of new schools and the expansion of educational facilities for all our children, provided that any such legislation contains the necessary safeguards to insure the distribution of funds in accordance with the requirements of the Court's decision.
>
> We look upon this memorable decision not as a victory for Negroes alone, but for the whole American people and as a vindication of America's leadership of the free world.
>
> Lest there be any misunderstanding of our position, we here rededicate ourselves to the removal of all racial segregation in public education and reiterate our determination to achieve this goal without compromise of principle.[4]

In these confident words, the hopes engendered by *Brown* are clear.

The efforts of the declarants to give meaning to that hope would include many struggles to obtain compliance with *Brown.* They began in the states of the Old Confederacy and in Delaware, Kansas, and the District of Columbia.[5] Slowly, the geographic scope of their efforts was expanded to include, for example, Little Rock, Arkansas, where a momentous battle was waged to overcome the attempt by Arkansas Governor Orval Faubus to nullify federal judicial power to implement *Brown*'s mandate.[6] That attempt caused the Supreme Court to reaffirm, in 1958,[7] the power of the federal courts, a power that had initially been articulated by Chief Justice John Marshall in the celebrated case of *Marbury v. Madison* in 1803.[8]

The blatant obstruction by the state government against a clear

4. *Atlantic Declaration*, *supra* note 2.

5. Nathaniel R. Jones, *Civil Rights After* Brown*: "The Stormy Road We Trod," in* RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 102 (Herbert Hill & James E. Jones eds., 1993).

6. David S. Tatel, *Judicial Methodology, Southern School Desegregation and the Rule of Law*, 79 N.Y.U. L. REV. 1071, 1083 (2004).

7. Cooper v. Aaron, 358 U.S. 1 (1958). In *Cooper*, the Court noted that it "made plain" in *Brown* "that delay in any guise in order to deny the constitutional rights of Negro children could not be countenanced, and that only a prompt start, diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance." *Id.* at 7. Accordingly, state officials were "duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system." *Id.*

8. 5 U.S. 137 (1803).

pronouncement of the federal courts caused the Supreme Court to reaffirm, initially, its dedication to upholding the rights of black children. Thus, the early hopes raised by *Brown* appeared to be justified. The federal courts not only appeared committed to overcoming the massive harm inflicted on black children by segregated schools, but they also appeared willing and able to overcome the massive resistance of state and local governments.

The hopes realized from *Brown* were not limited to the vision of black children now able to attend desegregated schools. *Brown* also delegitimized the grip of "separate but equal" on public facilities of every kind by discrediting *Plessy v. Ferguson*, a case involving segregation of a railcar.[9] In overturning *Plessy*, the Court encouraged blacks to believe that segregation could be, and would be, dismantled across the board in the United States. Thus, *Brown* became a launching pad for assaults upon broader aspects of segregation, as predicted in the *Atlanta Declaration*.[10]

The Montgomery, Alabama bus boycott that grew out of the weary but emboldened refusal by Mrs. Rosa Parks to give up her seat on a bus, was a shot heard around the nation.[11] The demand made upon her, which she rebuffed, was in accord with the public accommodation laws that blanketed the city of Montgomery and the state of Alabama. Civil rights lawyers who had pulled the laboring oars in the school-desegregation cases rose to the occasion again to fight the jailing of Mrs. Parks, Dr. Martin Luther King, and others who challenged state and local segregation laws. The strategy of combining implementation litigation with direct action challenges to public-accommodations segregation laws paid off.[12] The broad initial hopes after *Brown* were justified when one considers the often powerful exercise of federal judicial power that was exerted to overcome the immediate resistance to the Court's decision, along with the related

9. 163 U.S. 537, 544 (1896). In June 1892, Homer Plessy took a seat in a "whites only" train car in Louisiana. *Id.* When he refused the conductor's orders to move to the "colored" train car as required under state law, Plessy was forcibly removed and jailed. *Id.* He challenged the state law as a violation of the Fourteenth Amendment, but the Supreme Court concluded that the constitutional guarantee of equal protection under the law was intended only "to enforce the absolute equality of the two races before the law" and not to enforce "a commingling of the two races upon terms unsatisfactory to either." *Id.* The Court held that state laws "permitting, and even requiring, their separation, in places where they are liable to be brought into contact," such as with the establishment of separate white and colored schools, "do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures . . . ." *Id.*

10. *See Atlantic Declaration*, *supra* note 2.

11. *See* Susan Dente Ross & R. Kenton Bird, *The Ad That Changed Libel Law: Judicial Realism and Social Activism in* N.Y. Times v. Sullivan, 9 COMM. L. & POL'Y 489, 496 (2004).

12. *See id.*; *see also* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (*Brown I*).

successes resulting from the bus boycott.

It cannot be gainsaid that, during the decade after *Brown*, the progress toward desegregating American schools was slow and painful. The federal courts, however, continued to uphold the rights of black children in a number of cases.[13] By early 1970, litigation challenging dual systems had reached urban/metropolitan school systems of significant size.[14] Those state actors in charge of the systems were slow to act and in most cases did not act without private individuals initiating litigation. In 1971, in *Swann v. Charlotte-Mecklenburg Board of Education*, the Supreme Court made important pronouncements on the issue of neighborhood schools, quotas, and the use of transportation for desegregation.[15] This decision established the "basic framework of urban desegregation law."[16]

In *Swann*, the Supreme Court considered and approved the use of race-sensitive remedies, questioned the sanctity of neighborhood schools as a justification for segregation, and agreed that transportation was an integral tool of public education.[17] In this highly significant opinion, authored by Chief Justice Warren Burger, the Court declared:

> Absent a constitutional violation, there would be no basis for judicially ordering assignments of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations; and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school system.[18]

The *Swann* decision, and the earlier decisions in *Green v. County School Board of New Kent County*[19] and *Alexander v. Holmes*,[20] were made by a toughened and clearly exasperated Supreme Court. These decisions resulted in a body of remedial jurisprudence that promised to effectively transform school districts from segregated to desegregated. Further, these decisions sustained the hopes born in 1954 with the original *Brown* decree.

13. *See infra* notes 45-46 and accompanying text.
14. *Id.*
15. 402 U.S. 1 (1971).
16. Jill Hirt, *Current Federal Policies on School Desegregation: Constitutional Justice or Benign Neglect*, 13 URB. REV. (1982) (on file with author).
17. *See* 402 U.S. 1.
18. *Id.* at 28.
19. 391 U.S. 430 (1968).
20. 396 U.S. 19 (1969).

Through the courage, perseverance, and sacrifice of black Americans, combined with the brilliant legal acumen of Charles Hamilton Houston, Thurgood Marshall, and their cadre of lawyers, the legal system became the instrument of change.[21] Even though the *Brown* decision was vigorously resisted all across the South, a small group of committed federal judges emerged who met the resistance to *Brown* with a body of remedial jurisprudence.[22] That required a judicial maturing process led by the Supreme Court and a handful of other federal courts, driven by lawyers who would not compromise on principle. These lawyers pressed the Supreme Court to reconsider its "all deliberate speed" pace set out in *Brown II* in 1955.[23]

Political forces, however, began to subvert the process of implementing desegregation mandates. Political leaders indifferent to the rights of black children—influenced heavily by some constituents' stubborn insistence on returning to the pre-*Brown* status quo—engaged in a racial/political sleight-of-hand that sunk its roots during the presidential campaign of George Wallace in 1972 and the presidencies of Richard Nixon and Ronald Reagan. These leaders and others pretended to support the constitutional principle of equality laid down in *Brown* while denouncing the remedy needed to give it meaning. It was akin to endorsing a war on cancer, but denouncing the surgery and medication needed to rid the body of it.

The Southern strategy of the Nixon administration provides a good starting point.[24] This administration made a number of attacks on the school desegregation remedy of transportation.[25] President Nixon demagogued this issue, disparaging it ceaselessly as mere "busing."[26] On March 16, 1972, in a national television address, he announced the introduction of legislation to "call an immediate halt to all new busing orders by federal courts."[27] Nixon's tactics forced Leon Panetta, director of the Office of Civil Rights of HEW, to resign.[28] Panetta's protests of the Administration's policies had fallen on deaf ears.[29]

When Ronald Reagan commenced his 1980 campaign, he chose to give his kick-off address in Philadelphia, Mississippi, the small town where civil

21. *See* Jones, *supra* note 5, at 98.

22. *See infra* notes 46-49 and accompanying text.

23. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (*Brown II*) (reargued on the question of relief).

24. Jones, *supra* note 5, at 101.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

rights workers Andrew Goodman, Michael Schwerner, and James Chaney were murdered when they attempted to register blacks to vote in 1964.[30] Reagan supported "states' rights" in the address, and his message could not have been more clear; he promised, in effect: I will do everything possible to prevent the federal government, including the federal courts, from protecting the rights of black children by implementing decisions such as *Brown v. Board of Education.*[31]

These leaders gave lip service to the rights of black Americans but exerted considerable pressure against any effective remedy to dismantle segregation in the schools.[32] Their legerdemain was designed to mislead Americans. They recited facile platitudes about "equality and dignity for all" while undercutting remedies for the residual effects of segregation and, indeed, the residual effects of slavery. They feigned ignorance as to the true import of their words, endorsing a national amnesia into which many Americans were willing to sink.

The evils of segregation, set forth in histories such as the one presented in *Briggs v. Elliott*,[33] cannot be rationally disputed. Yet over the course of the last few decades, the national amnesia about segregation's realities would often be fueled, in no small measure, by those afflicted by it.

It is important, however, that the appalling conditions that resulted under segregation must not be forgotten. In *Briggs,* in which counsel for the NAACP exposed the conditions of the segregated schools in Clarendon County, South Carolina, the cruel reality of segregated schools was captured by Reverend James M. Hinton:

> The black schools of South Carolina were a disgrace. In the first place, it was an ordeal to get to them because there were no buses for black children. Was there any clearer way for whites to say they did not want the Negro to rise above his present station? If the message was somehow not clear enough, the rickety schoolhouses themselves brought it home: small, dark, leaking all over, heated by coal stoves that sometimes smoked the children out of the building. In most places, the state or community did not even pay for the schools to be put up or, as in Clarendon, for the coal or for even a single crayon. All it paid was the teachers' salaries, and in Clarendon County the average white teacher

30. John Herbers, *Mississippi: A Profile of the Nation's Most Segregated State,* N.Y. TIMES, June 28, 1964, at E3.

31. *See* Jack White, *Lott, Reagan, and Republican Racism,* TIME ONLINE EDITION (Dec. 14, 2002), *at* http://www.time.com/time/nation/article/0,8599,399921,00.html (last visited Oct. 25, 2004).

32. *See generally id.*

33. 103 F. Supp. 920 (D.S.C. 1952), *rev'd*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (*Brown I*).

> earned two-thirds more than the average black one. On top of the advanced state of dilapidation of the schoolhouses was the inevitable waste of time because so many of the rural schools had only one or two teachers, who could tend to only one of several classes at a time while the rest of the crowded room went uninstructed.[34]

The wretched conditions in Clarendon County were typical of the conditions that formed the legal vehicle that carried the issue of segregated education to the Supreme Court and resulted in the historic decision May 17, 1954.[35]

The terrible effects of segregation on children were also described compellingly by the late Roy Wilkins in a Cleveland, Ohio speech. He declared:

> [The states] instituted and wove into a smothering pattern a thousand different personal humiliations, both public and private, based upon color. Through legal and extra-legal machinery, through unchallenged political power, and through economic sanctions, a code of demeaning conduct was enforced with a cast down on children before they could dream, and eroded manhood after they came of age.[36]

The decision in *Brown* led black families to hope and trust that the smothering, humiliating, and demeaning effects of segregation would not be imposed on their children in the years to come, and many Americans, both black and white, expected that the spirit of freedom and justice would lead the country forward. Indeed, as the NAACP noted in its *Atlanta Declaration*, the decision was a victory for the whole American people and as a vindication of America's leadership of the free world.[37]

***BROWN* GOES NORTH**

While attention was focused on desegregation attempts in the South, segregation in schools in the North and the West was not going unnoticed. Many thought *Brown*'s reach went no further than the States of the Old Confederacy, the Border States, and the District of Columbia.[38] Because states in the North and West did not constitutionally or statutorily mandate such separation, it was contended that there was no affirmative duty to correct what was described as "de facto" racial separation in the schools.[39]

34. RICHARD KLUGER, SIMPLE JUSTICE 13-14 (1977).

35. *See Brown I*, 347 U.S. at 483.

36. Address at the Cleveland City Club Forum (April 16, 1960), *reprinted in* THE CRISIS 259-260 (1977) (on file with author).

37. *See Atlanta Declaration*, *supra* note 2.

38. *See* Jones, *supra* note 5, at 102.

39. *See infra* notes 40-42.

That view was backed up by appellate court decisions in such cases as *Bell v. School of Gary*,[40] *Deal v. Cincinnati Board of Education*,[41] and *Cragett v. Cleveland Board of Education*,[42] among others.

Realists continued to apply pressure, convinced that with respect to public schools, the distinction between "de facto" and "de jure" segregation was illusory.[43] If segregated conditions were to be exposed as resulting from state action sufficient to invoke the remedial power of the federal courts, a theory would have to be developed that would establish that predicate.[44]

By the early 1970's, a number of cases in the North, based on just such a theory, were beginning to reach the decisional point. In 1970, Judge Damon Keith ruled against the Pontiac School Board in favor of black plaintiffs.[45] A similar result was obtained in Pasadena, California.[46]

Also of significance was *Lee v. Nyquist*, in which a three-judge panel of the federal court struck down a New York State statute that prohibited the State's education officials from assigning students to schools in such a way as to enhance racial balances.[47] At about the same time, the landmark case of *Keyes v. School District No. 1* was filed and ultimately decided by the United States Supreme Court.[48] *Keyes* was a landmark decision and greatly aided plaintiffs who sued urban Northern systems with their multiple school districts. The Court followed *Brown* principles and held that a presumption of system-wide segregative intent arises where proof of intentional segregation in a significant portion of the system is shown and remains effectively unrefuted.[49]

Even with the *Keyes* presumption, however, plaintiffs nonetheless were required to prove intentional acts of segregation before any remedy could be obtained in these Northern systems.[50] This task required resources

40. 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

41. 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).

42. 338 F.2d 941 (6th Cir. 1964).

43. Jones *supra* note 5, at 102.

44. *Id.*

45. Davis v. School Dist., 443 F.2d 573 (6th Cir. 1971), *cert. denied,* 404 U.S. 913 (1971).

46. Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501 (D.C. Cal. 1970), *intervention denied,* 427 F.2d 1352 (9th Cir. 1970), *cert. denied,* 402 U.S. 943 (1971), 427 U.S. 424 (1976).

47. 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971).

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

49. *Id.* at 227-28.

50. *Id.*

greater than individual, often impecunious, plaintiffs could muster.[51] In the same manner as was done when Charles Houston was tackling the segregation at the graduate and professional school levels in the 1930's and 40's, the individual plaintiffs sought help from civil rights organizations.[52]

Complicating the problem for black plaintiffs was the range of tools with which defendant school officials armed themselves. They had, for example, the financial resources to employ top legal talent. They had ready access to the media and the ability to exert considerable political leverage. In addition to engaging in forceful legal resistance in the courts, they could ignite backfires even within the minority community, through the use of such buzz terms as "forced busing" and "white flight." Nevertheless, the desire by black plaintiffs to challenge segregation in the public schools moved forward.

As noted earlier, the inflammatory and divisive issue in the early 1970's was clearly the issue of busing. Fortunately, plaintiffs, with few exceptions, refused to capitulate. The wonder is that more did not give up, given the climate that was created. It was not until the affirmative-action case of *Regents of University of California v. Bakke*[53] that many blacks and others who had been misled on the "forced busing" issue, began to understand that as a remedial tool, busing was indivisible from remedial techniques to correct other forms of discrimination. They came to understand that to equivocate on the "busing" issue in school desegregation cases was to create vulnerability for the remedies needed in the related areas of employment, housing, voting rights, and the entire array of affirmative-action programs. They came to realize that the problem was race—not a bus—given that white pupils by the thousands had been and were still being transported to school by buses every day. Indeed school systems had used bus transportation to achieve segregation, transporting both white and black children to segregated schools.[54] *Bakke* demonstrated that where the remedy was racial in its objective, resistance was certain to follow. The real heroes of the 1970's are those litigants, students, parents, and judges who did not and still do not compromise on the issue of remedy.

As we explore the efforts in the 1970's aimed at overcoming racial segregation in urban schools, particularly in the North, it is helpful to understand the strategies that evolved. First, it must be noted that in taking on urban school systems in the North, where plaintiffs were required to

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51. *See* Jones, *supra* note 5, at 102.
52. *See* Tatel, *supra* note 6, at 1088.
53. *See* 438 U.S. 265 (1978).
54. *See* PAUL R. DIMOND, BEYOND BUSING, INSIDE THE CHALLENGE TO URBAN SEGREGATION 5 (1985).

prove intentional racial discrimination by public officials, an enormous allocation of resources was necessary, as was the development of specialized skills beyond those usually employed in the ordinary civil rights case.[55] Plaintiffs were obliged to compile immense histories and statistical analyses to show how deliberate choices in school construction, feeder patterns, grade levels, boundary-drawing, student assignments, faculty assignments, and other administrative practices served to cause and maintain segregation.[56] Establishing the interdependence of housing segregation, school zones, and employment discrimination is complicated, expensive, and time consuming. When undertaken, however, these efforts permitted the presentation to courts of proof that led to a string of significant victories.[57] These cases brought by private parties kept alive the drive for segregation during periods, particularly the early 1970's, when federal governmental policies were hostile to desegregation attempts.[58] Plaintiffs, for the most part, had to carry the battle alone, often in the face of this governmental opposition.

The metropolitan or interdistrict approach to school desegregation posed an even more complex set of problems for litigators in the 1970's. The Detroit experience best demonstrates those complexities. First, the financial requirements were daunting. Even in the single-district school cases, proving intent required more resources than most plaintiffs had.[59] Second, the political climate was hostile. Though the Nixon and Ford Administrations professed support for the holding in *Brown I*, they resisted the remedies necessary to give it meaning.[60] The Justice Department and the Office of Civil Rights of the Department of Health, Education, and Welfare were much more willing to give *Brown* meaning when the Carter administration came to power in 1977.[61] By that time, however, Congress had badly weakened the administrative capacity to use Title VI of the 1964 Civil Rights Act to desegregate through the congressional enactment of a number of anti-busing amendments.[62]

Among the most intriguing strategies were those conjured up by anti-busing forces in the Seattle and Los Angeles school districts. The use of busing in Seattle was attacked through the use of statewide initiative and

55. *See* Jones, *supra* note 5, at 102.
56. *See id.*
57. *Id.* at 103.
58. *See supra* notes 24-29 and accompanying text.
59. *See* DIMOND, *supra* note 54, at 25.
60. *See id.* at 97.
61. Jones, *supra* note 5, at 104.
62. *Id.*

referendum, and the state constitutional standard to obtain a remedy in California courts was severely blunted.[63]

Equal to the drama and importance of the developments in the West during the 1970's and 80's were the events in Michigan, Ohio, and Massachusetts. Interesting remedial principles were honed and reaffirmed on appeal. The developments in the Detroit case, however, appeared to offer the greatest hope of breaking the back of Northern school segregation. As general counsel for the NAACP, I oversaw this and the other Northern cases, and argued both of the Detroit appeals in the United States Supreme Court.

In June 1970, shortly after Governor William Milliken signed Michigan Act 48 into law, suspending a voluntary desegregation plan by the Detroit Board of Education, the Detroit Branch of the NAACP asked me to provide assistance from the national office in filing suit to enjoin the enforcement of the law. Detroit School Board members who had voted for the plan were targeted for recall and were in fact removed from office, which had also occurred in Dayton, Ohio. When their replacements took over, the new majority chose to put in place a magnet plan that would have perpetuated pupil segregation to a significant degree. Following a meeting with lawyers for the plaintiffs and the school board, I decided that the NAACP would initiate a lawsuit on behalf of its Detroit branch to enjoin the enforcement of Act 48 and compel a re-activation of the suspended desegregation plan. That was the beginning of *Milliken v. Bradley*.[64]

The trial judge was the late Judge Stephen Roth of the U.S. District Court for the Eastern District of Michigan.[65] Counsel for the NAACP and black plaintiffs presented him with an application for a temporary restraining order ("TRO") and preliminary injunction.[66] He reacted with considerable hostility. Upon denying the request for a TRO, he scheduled a hearing on the preliminary injunction request.[67] After hearing testimony, Judge Roth denied the plaintiffs any relief, whereupon plaintiffs filed an immediate appeal to the U.S. Court of Appeals for the Sixth Circuit.[68] The appellate court scheduled an emergency hearing, after which it agreed with the plaintiffs that Act 48 was unconstitutional.[69] The Act interfered with

63. *See* Washington v. Seattle School District No. 1, 458 U.S. 457, 457 (1982); *see also* Crawford v. Bd. of Educ., 458 U.S. 527 (1982).

64. 418 U.S. 717 (1974) (*Milliken I).*

65. *See* DIMOND, *supra* note 54, at 100.

66. *Id.* at 32.

67. *Id.*

68. *Id.* at 74.

69. *Id.*

local attempts to comply with the Constitution's equal protection clause as determined in *Brown,* in the same manner as had been done in the South, through interposition and nullification. The case was remanded for further proceedings.[70]

During the ensuing trial, which lasted for forty-one days, the hostility of Judge Roth melted; he was sufficiently impressed with the plaintiff's evidence to find against the Detroit Board of Education and the State of Michigan in a decision supported by numerous findings of fact. On September 27, 1971, Judge Roth held:

> Pupil racial segregation . . . and the residential racial segregation resulting primarily from public and private racial discrimination are interdependent phenomena. The affirmative obligation of the defendant Board has been and is to adopt and implement pupil assignment practices and policies that compensate for and avoid incorporation into the school system the effects of residential racial segregation. The Board's building upon housing segregation violates the Fourteenth Amendment.[71]

This decision was a pivotal development in the battle against school segregation. It revealed a potential formula for breaking down northern urban segregation by linking evidence of educational and residential segregation.

On appeal, the Sixth Circuit, sitting *en banc*, upheld Judge Roth's findings. The court concluded:

> This record contains a substantial volume of testimony concerning local and State action and policies which helped produce residential segregation in Detroit and in the metropolitan areas of Detroit. In affirming the District Judge's findings of constitutional violations by the Detroit Board of Education and by the State defendants resulting in segregated schools in Detroit, we have not relied at all upon testimony pertaining to segregated housing except as school construction programs helped cause or maintain such segregation.[72]

With regard to the need for interdistrict relief, the Court of Appeals held

70. The Sixth Circuit held the Act unconstitutional but affirmed the denial of a preliminary injunction and remanded for a trial on the merits. 433 F.2d 897 (6th Cir. 1970). On remand, Judge Roth again refused to grant a preliminary injunction, and the Sixth Circuit court affirmed, again directing a trial on the merits. 438 F.2d 945 (6th Cir. 1971).

71. Bradley v. Milliken, 338 F. Supp. 582, 593 (D.C. Mich. 1971). Judge Roth's findings included an explicit finding that both the State of Michigan and the Detroit Board had committed "acts which have been causal factors in the segregated condition of the public schools of the City of Detroit." *Id. at 592.*

72. Bradley v. Milliken, 484 F.2d 215, 242 (6th Cir. 1973) *(en banc) (affirming* both the finding of de jure segregation and the propriety of an interdistrict remedy). The Supreme Court granted certiorari and reversed in part. *See* Milliken v. Bradley, 418 U.S. 717 (1974) (*Milliken I*).

that the only feasible desegregation plan would require pupil assignments that crossed the boundaries between the city and suburban school districts.[73] The court concluded that an effective desegregation plan required a disregard of artificial barriers, especially where, as here, the state government had helped create and maintain racial segregation using those district boundary lines.[74] Liability having been found, all-out relief required an interdistrict approach, consistent with precedents in Southern cases. Chief Judge George Edwards framed the judicial challenge in this way:

> The instant case calls up haunting memories of the now long overruled and discredited 'separate-but-equal' doctrine of *Plessy v. Ferguson*. If we hold that school district boundaries are absolute barriers to a Detroit school desegregation plan, we would be opening a way to nullify *Brown v. Board of Education* which overruled *Plessy*.[75]

The decisions by the trial court and the appellate court met a fate in the Supreme Court that proved to be a turning point in the judicial implementation of school desegregation. A review of that case illustrates what can only be regarded as the demise of the metropolitan school desegregation strategy.

In its 5-4 decision, the Supreme Court affirmed with respect to the findings of intradistrict segregation, but it reversed the portion of the holding dealing with the interdistrict remedy.[76] Writing for the majority, Chief Justice Warren Burger declared, "We conclude that the relief . . . was based upon an erroneous standard and was unsupported by record evidence that acts of the outlying districts effected the discrimination found to exist in the schools of Detroit."[77] The conclusion of the Court was based on a rejection of the principle that gave state control over local education in Michigan.[78] It attributed to the local educational administrative units that the state created a degree of independence heretofore unrecognized, even in Michigan.[79] This was a profound limitation on the reach of *Green* and

73. *Bradley*, 484 F.2d at 249.

74. *Id.*

75. *Id.* at 250.

76. *Milliken I*, 418 U.S. at 717; *see* Jones note 5, at 103.

77. *Milliken I*, 418 U.S. at 718. The Court held the district court had no equitable power to include in its remedial decree any school district whose racial composition had not been shown to be the product of de jure segregation. The defendants did not, however, challenge the district court's finding of de jure segregation within the city of Detroit. Accordingly, the Court remanded the case for formulation of a Detroit-only remedial decree. *Id.*; *see* Jones, note 5, at 103.

78. *Milliken I*, 418 U.S. at 718; *see* Jones, *supra* note 5, at 103.

79. *Milliken I*, 418 U.S. at 718; *see* Jones, *supra* note 5, at 103.

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Justice Potter Stewart concurred, providing the critical fifth vote.[80] He emphasized the aspects which to him would have led to an approval of an interdistrict remedy.[81] He described the containment segregation of black children within Detroit as caused by "unknown and perhaps unknowable factors . . . ."[82] He was unable to discover any evidence in the record that would lead to a conclusion that "the State or its political subdivisions have contributed to cause the situation to exist," or that the situation was caused by "governmental activity."[83] His conclusion appeared to contradict or ignore the specific findings of fact made by Judge Roth as to the causes of the segregated conditions in the Detroit metropolitan schools—a review of the total record would have shown that the causes were established, and that actions by both state and local governments had effected segregation of the schools.

While this decision was a serious setback, it did not block the efforts to proceed against segregation within single districts. In a number of instances in Michigan and elsewhere with generally favorable results, single district cases were pursued.[84]

The Detroit case in *Milliken* continued on remand. After the trial court ruled on an intradistrict remedy, the case found its way back to the Supreme Court in *Milliken II*.[85] The issue on this appeal was whether the state, having explicitly been found culpable (along with the local board) for maintaining segregation within Detiot, could be required to share in the cost of the remedy.[86] Specifically, the Supreme Court addressed the issue of the Eleventh Amendment and the state's contention that it was shielded by that amendment from having to pay from the treasury the funds ordered by the district court and affirmed by the Sixth Circuit.[87] The Court held to the contrary—that the State, having been found liable, could be required to help pay the cost of remedying the dual system, and this extended to

80. *See Milliken I*, 418 U.S. at 753 (Stewart, J., concurring); *see* Jones, *supra* note 5, at 103.

81. *See* Jones, *supra* note 5, at 103.

82. *Milliken I*, 418 U.S. at 756. His comment appeared to contradict or ignore the specific findings of fact made by Judge Roth as to the causes of segregated conditions in the Detroit metropolitan schools. *See* Jones, *supra* note 5, at 103.

83. *Milliken I*, 418 U.S. at 756; *see* Jones, *supra* note 5, at 103.

84. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979); Oliver v. Kalamazoo Bd. of Educ., 706 F.2d 757 (6th Cir. 1983); Reed v. Rhodes, 607 F.2d 714 (6th Cir. 1979), *cert. denied*, 445 U.S. 935 (1980).

85. Milliken v. Bradley, 433 U.S. 267 (1977) (*Milliken II*).

86. *Id.*

87. *Id.* at 290.

underwriting the cost of ancillary educational relief.[88] Thus, Michigan was ordered to pay half of the $56 million for vocational programs and to make annual payments of $5.8 million for such educational relief as in-service training, reading programs, guidance and counseling, and community relations.[89]

Thus, *Milliken II* provided immense benefits to all children in the urban district, which was heavily composed of minority students. The Court did what the political branches in Michigan had refused to do—support the rights of minority children, at least in part. The decision also proved to be the basis for a number of subsequent courts to order ancillary relief, with states being required to contribute substantial sums of money.[90] The implications of *Milliken II* seemed lost, however, on those who argued that school-desegregation litigation was a waste of time and money, and did nothing to enhance the quality of education being offered minority children. There is no doubt that, at least for a time, without the Court orders here, the funding for the programs developed as a part of ancillary relief would not have been forthcoming.

In *Milliken II*, the Supreme Court reconfirmed the funding orders. With firm language, it restated its view of the proven, widespread manifestations of intentional school segregation: that "discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system founded on racial discrimination."[91] Explicitly recognizing some of the "inequalities . . . which flow from a long standing segregation system," the Court found:

> Children who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be a part of that community.[92]

Clearly the *Milliken II* court held that, to the extent these personal variations exist in the segregated pupils, those responsible for maintaining the segregation must fashion ancillary programs of remedy as a part of the affirmative duty to eliminate "root and branch" all remnants of the dual system.

88. *Id.*

89. *Id.* at 293.

90. *See* United States Bd. of School Comm'rs, 677 F.2d 1185 (7th Cir. 1982); *see also* Oliver v. Kalamazoo Bd. of Educ., 640 F.2d 782 (6th Cir. 1980).

91. 433 U.S. at 283.

92. *Id.* at 287.

Despite the benefits that flowed from the litigation, it was clear that the decision regarding interdistrict relief was a severe setback. An early warning of the dire consequences if the Supreme Court reversed *Milliken* was sounded by Judge Skelly Wright of the U.S. Court of Appeals for the District of Columbia.[93] Speaking at the Harvard Law School on the twentieth anniversary of *Brown*, Judge Wright predicted that if the Supreme Court were to hold that interdistrict relief was impermissible, "the national trend toward residential, political and economic apartheid" would not only be "greatly accelerated," it would be "rendered legitimate and irreversible by force of law."[94]

Likewise, the four dissenting justices in *Milliken* did not allow the majority's opinion to stand unchallenged. Justice Douglas, for one, declared: "When we rule against the metropolitan area remedy we take a step that will likely put the problems of Blacks and our society back to the period that antedated the separate-but-equal regime of *Plessy v. Ferguson.*"[95] Yet that is exactly what the Supreme Court majority did. No one was more prophetic than another of the dissenters, Justice Thurgood Marshall, whose words continue to resonate to this day. He wrote:

> Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is a product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities, one white, the other black—but it is a course, I predict, our people will ultimately regret.[96]

On remand to the Sixth Circuit, Judge George Edwards strongly lamented the Supreme Court's ruling with these words:

> I join my colleagues in the drafting and issuance of today's Order because any final decision of the United States Supreme Court is the law of the land. But conscience compels me to record how deeply I disagree with the decision which we are enforcing. In *Milliken v. Bradley* . . . , the Supreme Court overruled this court and the fully documented finding of fact that racial desegregation in the schools of Detroit could not be accomplished within the boundaries of the Detroit school district . . . . The decision also imbued school district boundaries in Northern states (which, like Michigan, had never had school segregation laws) with a constitutional significance which neither federal nor state law had ever

93. Notes of the author, who attended the anniversary program and heard Judge Wright's address.

94. *Id.*

95. Bradley v. Milliken, 418 U.S. 717, 759 (1974) (*Milliken I)* (Douglas, J., dissenting).

96. *Id.* at 814-15 (Marshall, J., dissenting).

accorded them.[97]

In the long term, Judge Roth has been proven correct. His findings that a desegregation order limited only to Detroit would not stand for long and that multi-district metropolitan desegregation was necessary for an effective remedy have both been borne out. So too have the predictions of Judge Wright and Justices Marshall and Douglas been proved accurate. What is now happening, with devastating effect, is that segregation is retaking American schools.[98]

Various school reform strategies that target aspects of education have been advanced as a panacea for the failure to deal with *Brown*, with charter school and voucher programs leading the way.[99] What is really needed is for advocates of desegregation to question the legality of states ceding their authority for public education to unaccountable groups of persons who implement racially isolated schools, as is the case with charter schools. We must again exalt the value of integrated education, and the obligation of the judiciary to be true to the Constitution. We must also read with new eyes the bold decisions that squarely overturned *Plessy* and the "separate but equal" doctrine. As we join the current struggle over disparity of race and educational resources it is essential to gain and act on our historical understanding of *Brown*.

Unless we do, the hopes to which *Brown* gave birth will die. As the commitment for desegregation of schools clearly loses momentum, a rationale has surfaced for turning a blind eye to the separate and inadequately funded schools in which black children find themselves.

Some blacks have been recorded as pining for the "good old days" of segregation when "we had our own schools." In support of that nostalgia, reference is made to the handful of segregated schools that were the clear exceptions to the dreadfulness associated with segregated schools. The children exposed to the Clarendon County, South Carolina schools experienced anything but "exceptional" schools.[100]

What is particularly distressing during the fiftieth anniversary of *Brown* is the extent to which revisionists, even now, try to convince contemporary Americans that it is somehow unconstitutional for the courts to be involved in efforts to make *Brown* real. Clothing themselves in constitutional righteousness, they profess to support color-blind policies in education,

97. Bradley v. Milliken, 519 F.2d 679, 680 (6th Cir. 1975) (Edwards, J., concurring).

98. GARY ORFIELD ET AL., HARVARD PROJECT ON SCHOOL DESEGREGATION, DEEPENING SEGREGATION IN AMERICAN PUBLIC SCHOOLS 115 (1997); Bill Bush, *Separate and Unequal,* COLUMBUS DISPATCH, June 25, 2000, at 1A.

99. *See* ORFIELD ET AL, *supra* note 98, at 355.

100. *See* KLUGER, *supra*, note 34 and accompanying text.

rather than supporting racially sensitive remedies designed to redress the documented violations of black children's constitutional rights.

Educational policies that ignore the color of students are, of course, the ultimate goal. Anyone living in the United States who thinks that our institutions have achieved color-blind status, however, is hiding from reality or is a wishful simpleton. The fact is, race remains a barrier. In fact, race matters. It is incontrovertible that a disproportionate number of children of color attend inadequate schools. The vestiges of slavery and law-enforced humiliation and inferiority still exist. Therefore, remedies that take race into account are necessary and justifiable. But, although remedies that take race into account are aimed at *achieving* constitutional equality, adversaries contend that these remedies are unconstitutional *because* they take race into account. As a result, advocates pressing for an end to racism via racially sensitive remedies are themselves labeled racists.

When race-based remedies are challenged on the basis of the Fourteenth Amendment, an irony arises that is intolerable to those who fought for civil rights—under the banner of the Constitution—for so many decades, and for those who are still fighting the battle for equality in the United States. Those who argue that the struggle for desegregated schools should be abandoned and that black Americans should fight for schools that may be separate but are equal, have fallen victim to the national amnesia under which the appalling conditions of segregation have been forgotten. Schools that are systematically and intentionally separated by race, with one set of schools for white children and another set for children of color, are inherently unequal. That was the truth recognized in *Brown.* Those who argue for abandoning the struggle for desegregation have either forgotten the degrading realities of segregation, or perhaps they have given up in the wake of the Supreme Court's betrayal of their hopes, again.

Rather than give up, the new challenges must be faced. These include confronting the issue of inadequate school financing. School reforms that do not address racial segregation and inadequate funding of schools are merely a back door to reintroduce what *Brown* outlawed—segregated, inferior education. For that to occur during the fiftieth anniversary of *Brown* would be unconscionable; it would not only betray the hopes imbedded in the *Atlanta Declaration*, but dishonor the sacrifices of those who fought to put *Plessy* in its grave.