CHAPTER 1

THE SIGNIFICANCE OF *BROWN*

On May 17, 1954, an otherwise uneventful Monday afternoon, fifteen months into Dwight D. Eisenhower's presidency, Chief Justice Earl Warren, speaking on behalf of a unanimous Supreme Court, issued a historic ruling that he and his colleagues hoped would irrevocably change the social fabric of the United States. "We conclude that in the field of public education the doctrine of 'separate-but-equal' has no place. Separate educational facilities are inherently unequal."[1] Thurgood Marshall, who had passionately argued the case before the Court, joined a jubilant throng of other civil rights leaders in hailing this decision as the Court's most significant opinion of the twentieth century. The *New York Times* extolled the *Brown* decision as having "reaffirmed its faith and the underlying American faith in the equality of all men and all children before the law."[2]

President Eisenhower, who later described the appointment of Earl Warren as chief justice as the worst decision he had ever made, was not as jubilant. At a White House dinner, he told Warren, "[Southern whites] are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big overgrown Negroes."[3] Eisenhower added, "It is difficult through law and through force to change a man's heart."[4] His heart, however, seemed to be with the opponents of integration.

At the time, no one doubted the far-reaching implications of the Court's ruling. The *Brown* lawyers had apparently accomplished what politicians, scholars, and others could not—an unparalleled victory that would create a nation of equal justice under the law. The Court's decision seemed to call for a new era in which black children and white chil-

dren would have equal opportunities to achieve the proverbial American Dream. It did not come too soon for the families whose children were victims of segregation.

The *Brown* case actually consisted of five different cases.[5]

In *Briggs v. Elliott*, thirty black parents from Clarendon County, South Carolina, sued the school district to improve the educational conditions for their children. They began organizing in 1947 with the help of local black ministers and the South Carolina chapter of the NAACP. The parents complained about the poor quality of the buildings, the lack of adequate transportation, and inadequate teacher salaries, among other things. The defendant in the case, Roderick W. Elliott, a sawmill owner and chairman of the board of trustees of School District no. 22, made no effort to supply black students with adequate educational facilities.[6] After the lawsuit was filed, Harry Briggs and his wife, the named plaintiffs, were both fired from their jobs and other blacks who participated in the lawsuit suffered threats and damage to their property from angry South Carolina citizens. Annie Gibson, another plaintiff, lost her job as a maid at a local motel, and her husband was forced from inherited land his family had sharecropped for decades.[7] One of the *Brown* lawyers, Jack Greenberg, has described the problem in South Carolina in blunt terms: "Soon many of Clarendon County's black leadership, their families, and other [black citizens generally] were fired from jobs, denied credit, forced to pay longstanding debts, refused renewal of leases on farmland, had trouble getting their cotton ginned, were sued for slander, threatened by the Klan, and one black person was even beaten to death."[8]

Lawyers representing the families in the *Briggs* case employed Professor Kenneth B. Clark and his wife, Mamie Clark, whose now famous study placed identical dolls differing only in skin color in front of black children. The children preferred the white doll to the black doll, picking the black doll as looking "bad"; more than half identified themselves with the "bad" doll.[9] Clark, a psychology professor at City College of New York, was brought into the desegregation cases as an expert witness to explain the psychological harm experienced by black children as a result of the racial caste system in the South. The doll test suggested to the Clarks that black children expressed positive identification with the white dolls and negative identification with the black dolls. Mar-

shall's goal was to demonstrate forcefully, by means of such empirical data, the harm that continued segregation had on black children.

In *Brown v. Board of Education,* after years of fruitless negotiations with the Topeka school board, black parents sued to desegregate the Topeka school system.[10] Oliver Brown, the father of Linda Brown, wanted to eliminate the segregation that required his daughter to attend an inferior school a considerable distance from their home. Linda had to walk one mile through a railroad switchyard to get to her black elementary school, even though a white elementary school was only a few blocks away.[11] Brown tried to enroll his daughter in the white school near his home, but the principal denied his request.[12] The Brown family approached the NAACP, and other black families decided to join the effort to sue the Topeka school board.

Dorothy Davis, a ninth-grade black student and the daughter of a local farmer, had no choice but to pursue her education in the harsh conditions of the all-black Robert Moton High School.[13] In *Davis v. County School Board,* plaintiffs charged that Virginia's segregated school system violated the federal Constitution, or, in the alternative, that the white community in Prince Edward County, Virginia, refused to spend sufficient money to upgrade the substandard black schools.[14] The students conducted a two-week protest and called on the NAACP attorneys Spottswood Robinson and Oliver Hill. Hill and Robinson filed a lawsuit on their behalf.

In *Gebhart v. Belton,* plaintiffs charged that Ethel Louise Belton and the other black students living in a suburb of Wilmington, Delaware, had to commute eighteen miles to attend Howard High School in Wilmington. This segregated school, like many cited in the other *Brown* cases, was a poorly maintained facility, with very high pupil-to-teacher ratios and a curriculum that did not adequately prepare the children for higher education. The related Delaware case, *Bulah v. Gebhart*, involved Sarah Bulah, a working mother, and her husband, Fred, a foreman at a paper mill, determined to get equal bus transportation for their daughter Shirley Barbara.[15] Mrs. Bulah sought the help of Louis Redding, a local NAACP attorney, who agreed to represent all of the plaintiffs.

Bolling v. Sharpe, the fifth case, involved a Washington, D.C., parents group whose black children attempted to register for the all-white

Philip Sousa Junior High School. When the black parents arrived on registration day with the white parents, they were ordered to leave the school and their children were subsequently denied admission because of their race. In particular, twelve-year-old Spottswood T. Bolling, Jr., attempted to enroll at Philip Sousa Junior High. Turned away, he had no choice except to return to Shaw Junior High, the substandard school he was attending.[16] Charles Hamilton Houston represented the families until he became ill. The case was later handled by two Howard Law School professors, James Nabrit, Jr., and George E. C. Hayes, who sued C. Melvin Sharpe, president of the board of education of the District of Columbia, on behalf of Spottswood T. Bolling, Jr., and the other black children. The *Bolling* case posed an even greater challenge because the Fourteenth Amendment at the time applied only to states, and the District of Columbia was not a state. The lawyers in this case based their claim on the Fifth Amendment, relying on the argument that the plaintiffs suffered deprivation of life, liberty, or property without due process.[17]

The argument presented by the *Brown* lawyers, as well as Dr. Kenneth Clark's doll experiment, persuaded the Supreme Court of the magnitude of the problem and led Chief Justice Earl Warren, writing for the unanimous Court, to conclude,

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. 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. Such an opportunity, where the state has undertaken to provide it, is a right, which must be made available to all on equal terms. We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.[18]

The Court's decision recognized the negative impact of segregation on black children in America and saw quality education as the appropriate means for beginning to eliminate the crippling effects of segregation. The Court applied these principles to the schools in question, but made it clear that the mandate applied to any school system with similar practices.

During oral arguments, the justices asked the lawyers probing questions, giving little indication of where they were leaning. Justice Felix Frankfurter seemed particularly interested in how a decree would be implemented if the Court were to rule that segregation was unconstitutional. Thurgood Marshall responded by emphasizing the importance of establishing the legal principle in these cases; in the event of a favorable ruling, the specific details would have to be hammered out by the district courts and implemented by the individual school boards. The *Brown* lawyers, however, recognized the Court's concern with, and indeed "fear" over, the implementation of a Court decree abolishing segregation, specifically noting that this "fear" was the most "persuasive factor" working for the other side.[19] To the lawyers arguing in favor of segregation on the basis of precedent, some justices raised several questions about whether changed circumstances could compel a result different from the one the Court had reached in the past. In response to this line of questioning, the representative of South Carolina, John Davis, replied that "changed conditions cannot broaden the terminology of the Constitution."[20]

After each day of oral arguments, the *Brown* lawyers considered the justices' line of questioning and attempted to discern which way the decision might come out. On the last day of argument, however, the lawyers were not quite sure how the justices would decide the thorny issue of ending racial segregation in education.

Segregation had been the law of the land since the country's inception; what the *Brown* lawyers were fighting in particular, however, was the infamous 1896 Supreme Court decision in *Plessy v. Ferguson*.[21] In that case, the Court gave a constitutional rubber stamp to segregated public facilities, finding that they did not violate the equal protection clause of the Fourteenth Amendment so long as they were equal. For the next fifty-eight years, with a few modest exceptions, the Court continued to interpret that clause so as to render it essentially without any bite. The *Brown* lawyers were thus faced with a challenge, particularly

because NAACP lawyers had in prior cases pursued a strategy of "equalization" that implicitly did not challenge *Plessy*'s logic but instead focused on showing that separate facilities typically were not equal. In other words, despite *Plessy*'s moral reprehensibility, Fourteenth Amendment litigation leading up to *Brown* worked *within* the "separate but equal" framework. The Court had supported the "equalization" strategy, but *Brown* asked it to switch horses in midcourse and revisit *Plessy* as a whole. The behind-the-scenes discussion during the Court's post-hearing conference indicated that there was indeed resistance to the demand for integration. Some of the justices' personal records reflect a strongly divided Court. After a vote was taken in 1953, when the case was originally heard, the outcome was (according to some sources) 5 to 4 against the plaintiffs, with Chief Justice Fred Vinson holding the deciding vote.

On June 8, 1953, instead of issuing its opinion in *Brown*, the Court ordered that the cases be reargued. Even more surprising, it asked each side to answer five specifically targeted questions. The first asked the lawyers to discern whether the Congress and state legislatures that ratified the Fourteenth Amendment had the understanding that the amendment would compel integrated education. If the answer to this question was no, the next question was whether the Congress and state legislatures that ratified the Fourteenth Amendment understood that either future Congresses or the courts could construe the amendment as mandating integrated education in light of changed conditions. The Court also asked the lawyers whether they believed it was within the Court's power to reason that the Fourteenth Amendment required the abolition of segregation. The final two questions dealt with the Court's concern about the implementation of a decree mandating integration. Specifically, the Court wanted to know, if it overruled *Plessy*, should black students "forthwith be admitted to schools of their choice" or should the Court allow for a "gradual adjustment." Along these same lines, the Court asked who would implement and oversee this transition.[22]

In hindsight, it is pretty clear that these questions were meant to stall a decision on this important constitutional question. Some members of the Court felt that the newly elected and appointed Eisenhower administration would need some time to deal with the decision in *Brown*, regardless of its outcome.[23] It is also reported that Frankfurter,

who viewed unanimity as necessary in a case of such grave import, wanted to hold off the decision for a year because the Court was divided. In fact, he drafted the five questions and persuaded his colleagues that the case should be reargued. The *Brown* lawyers viewed the issuance of the questions as favorable, especially since some of them indicated that the Court was seriously contemplating remedial action. In preparing to answer these questions, Marshall employed a team of historians and constitutional scholars, including Howard Graham, law librarian of the Los Angeles County Bar Association Library, John Hope Franklin, Constance Baker Motley, and C. Vann Woodward. Teams of scholars were given a discrete issue to research, and the lawyers would then incorporate it into the brief.[24]

On September 8, 1953, before the second round of oral arguments, Chief Justice Fred Vinson died, and President Eisenhower appointed Earl Warren the new chief justice. On hearing of his colleague's death, Frankfurter, no friend of Vinson's, is reported to have said, "This is the first indication I have had that there is a God."[25]

President Eisenhower's appointment of Warren, who had been attorney general and then governor of California, did not suggest a change of course for the Court. Warren, after all, was the attorney general who had defended the result in *Korematsu v. United States*, the 1944 case that ratified the internment of Japanese Americans for the first years of World War II and that was authored by another still-sitting justice, the Alabaman Hugo Black.[26] What most observers, Eisenhower included, did not fully realize was that *Korematsu* had troubled Warren and that, as a Californian, he was considered to be a moderate Republican. Warren immediately recognized the importance of the *Brown* case and began an effort to persuade all of his colleagues to reach a unanimous decision. By May 17, 1954, the day the *Brown* ruling was handed down, he had his unanimity, but at a cost that would prove to be exceedingly high.

In a break with tradition, the Court did not order the states to enforce the rights just announced, but instructed the *Brown* lawyers to return a few months later to address specific questions concerning the scope of their ruling. The *Brown* lawyers wasted no time in giving the Court their view of the urgency of ending segregation immediately. In their briefs, they argued it should end "forthwith" and certainly no later

than September 1955.[27] Those representing the states forced to integrate after *Brown* argued that the Court's ruling could do irreparable harm; there would be sustained hostility by whites, withdrawal of white children from integrated schools, racial tensions, violence, and loss of jobs for black teachers. Some opponents of integration went to extremes, arguing that integration could bring blacks with lower IQs into the schools, that many black children were retarded, and that tuberculosis and venereal disease would spread, as would the enrollment of illegitimate children. Their point was that integration would destroy their way of life.

Having broadly proclaimed its support of desegregating public schools, the Supreme Court shortly thereafter issued its opinion—the opinion that legitimized much of the social upheaval that forms the central theme of this book. Fearful that southern segregationists, as well as the executive and legislative branches of state and federal governments, would both resist and impede this courageous decision, the Court offered a palliative to those opposed to *Brown*'s directive. Speaking again with one voice, the Court concluded that, to achieve the goal of desegregation, the lower federal courts were to "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."[28]

As Thurgood Marshall and other civil rights lawyers pondered the second decision, they tried to ascertain what the Court meant in adding the crucial phrase "all deliberate speed" to its opinion. It is reported that, after the lawyers read the decision, a staff member consulted a dictionary to confirm their worst fears—that the "all deliberate speed" language meant "slow" and that the apparent victory was compromised because resisters were allowed to end segregation on their own timetable. These three critical words would indeed turn out to be of great consequence, in that they ignore the urgency on which the *Brown* lawyers insisted. When asked to explain his view of "all deliberate speed," Thurgood Marshall frequently told anyone who would listen that the term meant S-L-O-W.[29]

The Supreme Court, in *Brown v. Board of Education*, did not craft the phrase "with all deliberate speed" out of thin air.[30] Justice Oliver Wendell Holmes first used it in his 1912 decision of *Virginia v. West Vir-*

ginia: "[A] State cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English Chancery, *with all deliberate speed*."[31] Justice Felix Frankfurter, Holmes's contemporary, used the phrase five times[32] prior to Chief Justice Warren's immortalizing it in *Brown*.

The phrase "deliberate speed" appears to be a derivative of "speed thee slowly" found in Sir Thomas Elyot's 1545 introduction of the word "maturity" into the English language. "Speed thee slowly" was taken from a Greek proverb and translated from the Latin *festina lente*.[33] One famous American use of the expression *festina lente*, particularly relevant to our subject matter, is by President Abraham Lincoln. When Lincoln was asked whether he favored the immediate emancipation of the slaves, he responded, "It will do no good to go ahead any faster than the country will follow. . . . You know the old Latin motto *festina lente*."[34] Lincoln in this case was referring to Augustus Caesar's interpretation: "make haste slowly."[35]

Although Justice Holmes attributed the phrase to the English Chancery, no one has yet found a single quotable instance of that court's use of the phrase. The more familiar Chancery phrase was "all convenient speed."[36] However, "all deliberate speed" appears in the writings of many classic poets and novelists. Sir Walter Scott, in his 1817 novel *Rob Roy*, used the exact phrase "with all deliberate speed" in describing the progress of a lawsuit. The poet George Gordon, Lord Byron, the author of *Don Juan*, used it in an 1819 letter to his publisher; and the poet Francis Thompson wrote in his often quoted poem "The Hound of Heaven" (1893), "But with unhurrying chase/And unperturbed pace/Deliberate speed, majestic instancy. . . ."[37]

Even though the Court's ruling was unanimous, its reluctance to take a more forceful position on ending segregation immediately played into the hands of the integration opponents. The victory in *Brown* would be tested often and by a variety of methods. The efforts to give meaning to these decisions led to many organized civil rights marches. These protests, however, were frequently met with increasing hostility and violent resistance. In 1957, for example, nine black students, whose admission had been ordered by a federal district court, attempted to enroll at Central High in Little Rock, Arkansas. They were prevented from entering the school by the Arkansas National Guard, under orders

of Governor Orval Faubus, who had declared a state of emergency. This incident gained worldwide attention and entered the Cold War dialogue, as Communists harshly criticized the United States for its policies. President Eisenhower also ordered federal troops to be available to enforce the desegregation laws in Little Rock, Arkansas, in 1957.

After a series of legal battles centering on court orders of desegregation, the issue made its way to the Supreme Court, which convened an extraordinary summer session in order to hear the case. Marshall served as the NAACP's counsel. The cause faced significant opposition from white segregationists. Governor Faubus called a special session of the state legislature two days before the Supreme Court hearing was scheduled and persuaded the legislature to pass bills that gave him broad power to oppose desegregation. Some of these bills were intended to establish legal pretenses for closing desegregated schools and transferring the money to private, segregated schools. Pursuant to one of these bills, Faubus called a local referendum, which produced a vote of 19,470 to 7,561 in favor of closing the public schools in order to avoid desegregation. Nevertheless, Marshall and the NAACP prevailed in the famous unanimous decision of *Cooper v. Aaron*, in which the Court rejected the Little Rock school board's reasons for delaying desegregation and stated that "law and order are not here to be preserved by depriving the Negro children of their constitutional rights."[38]

Not wanting to slow down the pace of litigation designed to bring the Jim Crow system to its knees, Marshall in 1961 assigned Constance Baker Motley, the first woman on his civil rights legal team, to assist James Meredith, a black student who had been denied admission by the University of Mississippi. After a series of court rulings that rejected his contention that the denial was based on race, and a series of appeals all the way to the Supreme Court, during which Meredith was arrested and rioting took place, he was finally allowed to enroll in the university in 1962. Motley, who later became a judge, stated that the *Meredith* case "effectively put an end to massive resistance in the Deep South" to the *Brown* decision.[39] History seems to suggest that Motley's optimism was premature, since both the South and the North resisted the mandate of integration for generations to come.

The success of Marshall's post-*Brown* litigation strategies was not limited to education cases. After the *Brown* victory, NAACP attorneys

broadened their efforts to end segregation. Their strategy was to attack segregation in areas such as housing, travel, employment, voting, and public accommodations. The NAACP challenged segregation wherever it existed, including public beaches, parks, and swimming pools. Specifically, in 1955 the Supreme Court found segregation unconstitutional in requiring racial separation whenever blacks desired to enjoy the public beaches and bathhouses of Baltimore with whites.[40] At the same time, it handed down an opinion ruling that it was likewise unlawful to mandate segregation on municipal golf courses.[41]

In the following year, the Supreme Court declared Alabama's bus segregation laws invalid and thus assured blacks that they could end their bus boycott and resume riding the city buses without fear of arrest.[42] In 1958, attorneys for the NAACP achieved another victory for blacks: segregation in the use and enjoyment of city parks was held unconstitutional.[43] Again, in 1963 the NAACP fought and won the battle against segregation in the courtroom itself.[44] Finally, segregation was eventually declared unconstitutional in prisons and jails.[45]

By the 1970s, opponents of *Brown* had begun creatively to avoid the impact of integration. *Palmer v. Thompson*, decided in 1971, marked the start of a trend reflecting the Court's unwillingness to order measures that would require blacks and whites to integrate.[46] The NAACP had fought for the right of blacks in Jackson, Mississippi, to have equal and equivalent access to the public facilities, including its parks, auditoriums, golf courses, and city zoo. At that time, there were five publicly available swimming pools in Jackson—four for white residents and one for black residents. When faced with the prospect of having to desegregate public swimming pools, white residents refused to come to the swimming pools, and the city of Jackson preferred to close all the swimming pools rather than require integration.[47] Reasoning that it would not be economically feasible to continue maintaining the swimming pools, the Supreme Court embraced the defendants' creativity and did not fault them for violating the holdings of prior segregation cases.[48] It thus permitted the city of Jackson to avoid the integration problem altogether.

Brown's success in ending legal segregation in education is undeniable. It is appropriately viewed as perhaps the most significant case on race in America's history. Not only did the *Brown* opinion lead to more

than a dozen unanimous decisions by the Supreme Court finding segregation of public schools unconstitutional or upholding desegregation remedies,[49] it also went a long way toward healing the black community's wound in the wake of *Dred Scott v. Sandford*, which held that blacks had "no rights which the white man was bound to respect,"[50] and *Plessy v. Ferguson*'s conclusion that the Fourteenth Amendment was not intended "to abolish distinctions based upon color, or to enforce social . . . equality . . . of the two races."[51]

While the *Brown* lawyers were right to celebrate this remarkable achievement, the evil that *Brown* sought to eliminate—segregation—is still with us, and the good that it sought to put in its place—integration—continues to elude us. The violent resistance to integration proved to be more than anyone had imagined. Yet, the more subtle forms of resistance, such as white flight, denial of funding for equalization, and rejection of *Brown* principles by a conservative Supreme Court, have been the most effective in limiting the promise of *Brown*.

As we reflect on fifty years of *Brown* in the context of where we are today as a country of diverse people, we have a clearer sense of its successes and failures and the challenge for the future. In the pages to follow, my goal is to share my assessment of *Brown* and its progeny, in the hope that others will seek solutions to these problems and meet the laudable goals of *Brown*, which have, regrettably, thus far not been achieved.