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The Struggle for Civil Rights

Truman and the First Steps • The NAACP Intensifies Its Efforts • The Vinson Court and Civil Rights • Enter Earl Warren • The Five School Cases • Brown v. Board of Education *• The Reaction to Brown • Implementation • "All Deliberate Speed" • Eisenhower and Little Rock • For Further Reading*

NO OTHER SET of decisions by the U.S. Supreme Court has so altered the social fabric of the nation as those involving the civil rights of African Americans. Though the Civil War erased legal bondage, Reconstruction failed to wipe out other badges of discrimination, and the entire nation acquiesced as the South created a complex legal and social system designed to keep blacks in separate and inferior status. But eight decades of tradition began to crumble after World War II, and in *Brown v. Board of Education* (1954), the Court sounded the death knell of legally enforced racial discrimination. The case did not mark the triumph of equality, however, but merely the end of legally imposed inequality. *Brown* was only the first stage in a continuing campaign to end racism and discrimination in America.

Truman and the First Steps

During World War II, the nation's declared aim of fighting intolerance abroad led black Americans to renew their demands for the end of racial injustice at home. In response, President Roosevelt issued an executive order on June 25, 1941, directing that blacks be accepted into job-training programs in defense plants. The order also forbade discrimination by employers holding defense contracts and set up a Fair Employment Practices Commission (FEPC) to investigate charges of racial discrimination. But aside from this step, civil rights remained a low priority of the war administration.

President Harry S. Truman, beset by a multitude of crises after taking office, put up no protest when Congress killed the wartime agency. Later on, however, he asked Congress to create a permanent FEPC, and in December 1946, he appointed a distin-

guished panel to serve as the President's Commission on Civil Rights to recommend "more adequate means and procedures for the protection of the civil rights of the people of the United States." The commission's report, "To Secure These Rights," issued in October 1947, defined the nation's civil rights agenda for the next generation. The commission noted the many restrictions on blacks and urged that each person, regardless of race, color, creed, or national origin, should have access to equal opportunity in securing education, decent housing, and jobs. Among its proposals, the commission suggested antilynching and antipoll tax laws, a permanent FEPC, and the strengthening of the civil rights division of the Justice Department.

In a courageous act, the president sent a special message to Congress on February 2, 1948, calling for prompt implementation of the commission's recommendations. The Southern delegations promptly blocked any action by threatening to filibuster. Unable to secure civil rights legislation from Congress, Truman moved ahead by using his executive authority. He bolstered the civil rights section of the Justice Department and directed it to assist private litigants in civil rights cases. He appointed William Hastie, the first black judge of a federal appeals court, and named several African Americans to high-ranking positions in the administration. Most important, by executive orders later in the year, the president abolished segregation in the armed forces and ordered full racial integration in the services.

The achievements of the Truman administration fell far short of the promises. While Southern control of key congressional committees blocked legislative action, the president never made civil rights a top priority of his administration. Aware that he had limited political capital, Truman chose not to expend it on an issue whose outcome remained uncertain. Nonetheless, black Americans had gotten the attention of the nation's political leaders; not until they learned to exert political force of their own would they be able to move civil rights to the top of the country's agenda.

While Congress refused to create a federal agency, a number of states set up their own FEPCs. New York acted first in 1945, establishing the State Commission Against Discrimination to investigate and stop prejudice in employment. In the next decade, other Northern states passed similar laws, so that nearly two-thirds of the entire population of the country came under some form of governmental protection against bias in hiring.

The NAACP Intensifies Its Efforts

Against this backdrop the National Association for the Advancement of Colored People (NAACP) resumed its campaign, or to be more precise, intensified its efforts, because even during the war it had not been quiescent. In 1941, the Court for the first time had upheld a black plaintiff's challenge to segregated transportation. Congressman Arthur W. Mitchell of Illinois had been ejected from a Pullman car when the train crossed into Arkansas. Mitchell filed a complaint, not in court, but with the Interstate Commerce Commission, claiming he had been discriminated against in violation of the Interstate Commerce Act. When the ICC upheld the railroad, Mitchell appealed to the high court, which upheld his claim (*Mitchell v. United States* [1941]). The Mitchell decision gave the NAACP hope that the Court stood ready to review its earlier transportation holdings that had sustained segregation.

In another important wartime case, the NAACP had gotten the Court to strike down the all-white primary in *Smith v. Allwright* (1944). The organization had always had as its goal the defeat of the separate-but-equal doctrine, but its leaders, especially Thurgood Marshall, realized that in terms of tactics, it would have to begin by attacking the South's failure to provide equal facilities. In a wide range of cases, decided primarily in the lower courts on the basis of Chief Justice Hughes's opinion in *Gaines*, Marshall and his colleagues forced Southern states to improve the physical facilities of all-black schools and to pay black teachers on a par with whites.

In the spring of 1946, Marshall and William Hastie came to Washington to argue a transportation rather than a school case. Irene Morgan, a black woman, had boarded a bus in Richmond to go to Baltimore, and she had been ordered to the back of the bus as Virginia law required. Morgan refused, claiming that as an interstate passenger Virginia law did not apply to her. After her arrest and conviction, the NAACP took the case on appeal.

The NAACP relied on an 1878 decision, *Hall v. DeCuir,* in which the Court had invalidated a Louisiana Reconstruction statute prohibiting discrimination on account of race as a burden. Chief Justice Morison Waite had ruled that railroads needed a uniform policy throughout the country, but that only Congress could make such a policy through its control of interstate commerce. However, a few years later, the Court refused to void a Mississippi law requiring segregation, in *Louisville, New Orleans & Texas Railway Co. v. Mississippi* (1890). In the transportation cases that followed, leading up to *Plessy*, the Court validated the doctrine of separate-but-equal. It did not, however, ever overrule *Hall v. DeCuir's* holding regarding the supremacy of Congress in interstate transportation.

In *Morgan v. Virginia* (1946), Justice Reed, for a 7–1 majority, followed the reasoning in *DeCuir,* but stood it on its head. Claiming that railroads needed a uniform policy, he held that in interstate travel, rail and bus lines could not discriminate on the basis of race. Reed very carefully made it clear that the opinion did not affect state law regulating intrastate commerce.

Two years later, the Court ignored both *DeCuir* and *Morgan* to uphold a Northern state's antidiscrimination law, even though it clearly affected interstate and foreign commerce. A Detroit amusement park company operated a steamboat to an island on the Canadian side of the Detroit River. The company had refused to allow a young black woman to go on an outing with a number of white classmates and claimed that the Michigan Civil Rights Act had no applicability since the steamboat ran in foreign commerce.

> Today we are just emerging from a war in which all of the people of the United States were joined in a death struggle against the apostles of racism. . . . How much clearer, therefore, must it be today than it was in 1877, that the national business of interstate commerce is not to be disfigured by disruptive local practices bred of racial notions alien to our national ideals, and to the solemn undertakings of the community of civilized nations as well.
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> —NAACP brief in *Morgan v. Virginia* (1946)

In *Bob-Lo Excursion Company v. Michigan* (1948), Justice Rutledge evaded the precedents by ruling that the commerce, although technically foreign, was actually "highly local," since the island, except for its foreign ownership, for all practical purposes was part of Detroit. The case indicated the problems the Court would have if it tried to decide race discrimination suits on the basis of the commerce power. Justice Douglas pointed the way to the future in his concurrence, suggesting that the Equal Protection Clause would give the courts a far more flexible tool; he also intimated that as far as he was concerned, one could not square the separate-but-equal doctrine with the constitutional mandate of equal protection.

The Court had still one more chance to abandon separate-but-equal in transportation, in *Henderson v. United States* (1950). Elmer Henderson had been traveling from Atlanta, Georgia to Washington, D.C. in May 1942, and had wanted to eat dinner. Upon reaching the dining car, he found ten tables reserved for white passengers and one, shielded by a curtain, set aside for blacks. Although the "black" table was full, the conductor refused to allow Henderson to occupy an empty seat at one of the white tables. Henderson filed a complaint with the ICC, which still proved timid in attacking discrimination, and the Supreme Court unanimously struck down the practice on the same grounds as *Mitchell*, namely, such arbitrary arrangements interfered with the equal access of passengers in violation—not of the Constitution—but of the Interstate Commerce Act. By relying on *Mitchell*, the Court did not attack separate-but-equal, but made it far more difficult for the carriers to meet the standard. *Plessy* remained alive, but somewhat restricted.

The Vinson Court and Civil Rights

The Vinson Court proved equally reluctant to confront the separate-but-equal rule in education, but it continued on the path laid out in *Gaines* before the war. Although it decided only a handful of cases in this area and took a very cautious approach, it anticipated some of the Warren Court's landmark decisions.

In 1948, two cases reached the Court involving restrictive covenants, which denied blacks access to housing in white neighborhoods. The covenants had become widespread after the Court, in *Buchanan v. Worley* (1917), had struck down local ordinances enforcing residential segregation; as "private agreements," the covenants presumably did not come within the reach of the Fourteenth Amendment. But all six members of the Court who participated in *Shelley v. Kraemer* agreed that state action existed. Chief Justice Vinson explained that so long as the discriminatory intent of the covenants could be enforced in state courts, then the states were sanctioning racial discrimination in violation of the Fourteenth Amendment. The Court was careful not to declare the covenants themselves illegal, since private discrimination continued to be constitutionally permissible, but it did make them unenforceable. In a companion case, *Hurd v. Hodge*, Vinson applied the holding to covenants in the District of Columbia. Although the Fourteenth Amendment did not apply to the national government, the chief justice found that such actions violated the 1866 Civil Rights Act and that it went against public policy to allow a federal court to enforce an agreement that was unenforceable in state courts.

> These are not cases . . . in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights.
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> —Fred M. Vinson, *Shelley v. Kraemer* (1948)

The Court also took a few hesitant steps against racial segregation in education. In *Missouri ex rel. Gaines v. Canada* (1938), Chief Justice Hughes had startled the South by insisting that if it wanted to keep segregated schools, then it had to provide some form of similar or equal opportunity. The Court did not have a chance to show how seriously it meant this until after the war. The first case involved Ada Sipuel, who after compiling an excellent record at the State College for Negroes in Langston, had applied to the University of Oklahoma Law School, the only one in the state. The school refused to admit her and told her a separate law school with "substantially equal" facilities would soon open. She sued for immediate admission, and Thurgood Marshall, chief counsel for the NAACP, knew he would lose in the lower courts. But he prepared the ground for his appeal, and four days after the Court heard arguments in *Sipuel v. Board of Regents of the University of Oklahoma* in 1948, it issued a unanimous *per curiam* order directing Oklahoma to provide Ms. Sipuel (by then Mrs. Fisher) with a legal education "in conformity with the equal protection clause of the Fourteenth Amendment and to provide it as soon as it does for applicants of any other group." The board of regents angrily created a law school overnight, roping off a small section of the state capitol in Oklahoma City and assigning three teachers to attend to the instruction of Ada Sipuel and "others similarly situated." When Marshall appealed to the Supreme Court, the justices, with only Murphy and Rutledge dissenting, refused to consider whether the state had in fact established an equal facility.

A few years later, the state again tried to get around the rules. The University of Oklahoma had grudgingly admitted sixty-eight-year-old George W. McLaurin to its graduate school, where he hoped to earn a doctorate in education. But McLaurin had to sit in the corridor outside the regular classroom, use a separate desk on the mezza-

> I was saying to [Mac Q. Williamson, attorney general of Oklahoma] how I thought that even if they were eventually able to persuade the Supreme Court that the facilities of the Negro school were equal, what was the state going to do when a Negro applied for a medical education—build him a whole medical school? He suddenly saw a flash of light, I guess, and struck his forehead with his palm as the revelation hit him. "Oh, my God," he said, "suppose one of them wanted to be a petroleum engineer! Why, we've got the biggest petroleum-cracking laboratory in the country here." And I think the fire went out of his case after that.
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> —Walter Gellhorn, NAACP expert witness in *Sipuel v. Oklahoma Board of Regents* (1948)

nine of the library, and eat alone in a dingy alcove in the cafeteria. When the NAACP challenged these rules, the university allowed McLaurin inside the classroom but surrounded his seat with a railing which said "Reserved for Colored." For a unanimous bench, Chief Justice Vinson struck down these rules in *McLaurin v. Oklahoma State Regents* (1950) as imposing inequality on the petitioner even though he physically attended the same school as whites. The Vinson Court refused to overrule *Plessy*, but consciously or not, the chief justice had provided a clue to the NAACP on how it might attack segregation in the future.

The same day as *McLaurin*, the Court handed down its decision regarding efforts to keep blacks out of the University of Texas Law School in Austin. After Heman Marion Sweatt applied in 1946, the district court gave Texas six months to establish a law school. The state created the School of Law of the Texas State University for Negroes; a makeshift classroom in an Austin basement marked the beginning of the allegedly equal black law school, although before long the state did appropriate a significant sum to upgrade it. While the physical plant and library had grown by the time Thurgood Marshall carried the case to the Supreme Court, Marshall felt confident he could show that the absence of a good library, well-known faculty, and all the other intangibles that made the University of Texas Law School a topflight institution denied Sweatt an equal education.

If nothing else, the members of the Supreme Court---especially Tom Clark, a graduate of the Texas Law School—knew what made a good law school, and in *Sweatt v. Painter*, they unanimously rejected the Texas claim that it had provided equal facilities. Chief Justice Vinson ordered Sweatt admitted to the Austin school, the first time the Supreme Court had ever ordered a black student admitted to a previously all-white school on grounds that the state had failed to provide equal separate facilities. But despite the steps taken in all three cases, the *Plessy* rule of separate-but-equal remained the law of the land.

Enter Earl Warren

When Chief Justice Fred Vinson died unexpectedly of a heart attack on September 8, 1953, speculation about his successor quickly focused on Earl Warren, the popular Republican governor of California. In fact, Dwight Eisenhower had already promised Warren the first vacancy on the bench, although at the time, the president did not expect it to be the center chair. Admirers would later call Earl Warren "Superchief" and "the greatest Chief Justice since John Marshall," but there was little in his previous record to foreshadow his extraordinary tenure as the nation's highest judicial officer. Warren had no prior judicial experience, and many observers viewed his appointment as a piece of political patronage.

> The University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.
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> —Fred M. Vinson, *Sweatt v. Painter* (1950)

Yet political savvy on the bench is not a quality to be despised. William Howard Taft had used his political talents during the 1920s to expand the power of the Court, and his successor, Charles Evans Hughes, had skillfully averted permanent damage to the Court during the tumultuous New Deal era. Although Harlan Fiske Stone had been greatly respected as a judge, he had not been a successful chief justice, and the personality and ideological cracks on the Court had opened up even wider during Fred Vinson's tenure. Beyond his ability to establish peace and manage the Court effectively, Warren understood the necessity of making controversial decisions acceptable, if not palatable, to the public at large. A lifelong public servant, he saw the bench not as a hermitage or an ivory tower, but as a vital part of daily government.

The Five School Cases

The new chief would preside over the rehearing of arguments in five potentially explosive suits challenging racial segregation in public schools. The justices had been anticipating a direct attack on the separate-but-equal doctrine, especially after the decisions in *McLaurin* and *Sweatt*. For Thurgood Marshall, the Texas opinion was "replete with road markings telling us where to go next." Seventeen Southern and border states, as well as Washington, D.C., legally required segregation in public schools; another four states permitted it. The attack on segregation per se and not just on the lack of equal facilities had been the goal of the NAACP for years, but in deciding to take on these cases, Marshall and his legal team knew they would face formidable obstacles.

In June 1952, the Court had announced that it would hear arguments the following December in cases challenging school segregation laws in Delaware, Virginia, South Carolina, Kansas, and the District of Columbia. The Court had consolidated the cases, with the Kansas appeal as the lead case so that, according to Justice Clark, "the whole question would not smack of being a purely Southern one."[1]

The Court, as an *amicus* brief from the Justice Department pointed out, had several options. It could avoid overruling *Plessy* by the simple expedient of finding the colored schools unequal and ordering either integration or another remedy. But the two

1. In the same term that the brethren wrestled with the school cases, they also heard another challenge to the South's white primary system. For fifty years, the Jaybird Democratic Association of Fort Bend County, Texas, had been holding a May primary separate from the official one run by the county the following month. The criteria for voting in the Jaybird primary were the same as those for voting in the regular election, except blacks could not vote (as they could in the county election, thanks to *Smith v. Allwright*). In court, Jaybird officials acknowledged that they intended to exclude blacks and claimed they could so as a private club. But as Justice Black noted in *Terry v. Adams* (1953), the Jaybird primary served as a subterfuge, since whoever won the Jaybird balloting in effect won not only the official primary but the general election as well.

cf Smith v. Allwright