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SYMPOSIUM DISCUSSION

The following is an edited transcript of the discussion that took place during the afternoon session of "Fifty Years Later: Brown in the Appellate Courts," a Journal-sponsored symposium held on April 2, 2004, at the University of Arkansas at Little Rock's William H. Bowen School of Law. Mark V. Tushnet, Carmack Waterhouse Professor of Constitutional Law at Georgetown University, chaired the panel. Joining him were Regina Austin, William A. Schnader Professor of Law at the University of Pennsylvania; Paul D. Carrington, Chadwick Professor of Law at Duke University; Tony Freyer, University Research Professor of History and Law at the University of Alabama; Dennis J. Hutchinson, William Rainey Harper Professor in the College and Senior Lecturer in Law at the University of Chicago; and Mildred Wigfall Robinson, Henry L. and Grace Doherty Charitable Foundation Professor of Law at the University of Virginia. The footnotes have been added by the editors.

PROFESSOR TUSHNET: We thought that one way to frame the conversation among the panelists would be to pose the quite general question about the enduring significance of *Brown v. Board of Education*. This morning you heard a number of probes into the question of what *Brown's* enduring significance is, and we thought it would be useful to have those generalized and in some ways made more speculative than we were willing to be in formal presentations.

I want to begin by framing the question in actually two and a half ways. The first way is to mention something that has come up earlier today, which is what might be called the revisionist historian's view of *Brown*. This is represented in political science by Gerald Rosenberg, who has written a book which many of you may have read in your undergraduate work called *The Hollow Hope*.¹ The subtitle is something like "Can the Courts Bring about Social Change?" and the answer is "No," or at least no in the circumstances of *Brown v. Board of Education*. And Rosenberg examines *Brown* and its effects and argues that *Brown* did not accomplish essentially anything significant on its own. That is, the courts couldn't bring about social change. There was some effect in terms of desegregation of the schools, but that occurred only after Congress signed onto the program, essentially in the Civil Rights Acts of 1964 and 1965, and Congress signed onto those programs primarily because of the mobilization and political effects of the civil rights movement, which Rosenberg says didn't take much inspiration from *Brown* itself. So he doesn't see *Brown* as playing an important causal role in the development of whatever degree of desegregation occurred after 1965.

Another revisionist view is posed by law professor Michael Klarman in a number of articles now collected in a book that has literally just been published in the past month.² Klarman's argument is that actually *Brown* did have an effect, but in some ways a perverse effect. It did not encourage desegregation directly; what it did was, in Klarman's telling, interrupt a gradual, probably quite gradual, transformation of southern politics in the direction of ameliorating the southern system of segregation. So, he says, before 1954, moderate southern politicians were ameliorating segregation, but what the Court's intervention did was to energize and transform southern politics so that the moderates lost out systematically to the strong segregationists. So there was an immediate backlash in the South, which stopped the transformation that Klarman said was gradually occurring.

1. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (U. Chicago Press 1991).

2. Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford U. Press 2004).

But Klarman says that's not the end of the story because the backlash in the South involved a fair amount of violence against the civil rights movement and that violence was widely publicized in the North. And northern whites reacted to the violence that they were seeing by coming to agree with the political program of the civil rights movement. So in the end *Brown* contributes to the transformation—to the extent it occurred—of race relations by provoking a backlash and violent white racism that in turn produces a change in the politics, essentially in the North.

Now, a final version of this revisionist approach would be to ask what if *Brown* had come out differently. That is, don't remove *Brown* entirely from your thinking, but imagine two possible alternative outcomes to *Brown*. The first would be the Court saying, "Well, *Plessy v. Ferguson*³ is right; separate but equal is constitutional. We haven't met equality seriously until now, but right now we're going to start taking equality seriously, and so we're going to require those states that maintain segregated schools actually to provide equal educational facilities in the schools for African Americans and the schools for whites." What if the Court had done that? What can you imagine the course of history being? Would the world look different in 1965, 1985, 2004, had that been what the Court said instead of what it did in *Brown I* and *II*?

The other what-if question is what if the Court had said, "*Plessy v. Ferguson* is right, separate but equal is constitutionally permissible, and basically we're not going to insist on serious enforcement of the equality requirement. Make some gestures in the direction of equality and that's going to satisfy us"? And then ask what's going to happen: What's the world going to look like in 1965, 1985 and 2004?

Obviously, doing this sort of counter-factual history is impossible, but the reason for asking the question is to bring out the possibility of or thinking about what a mobilized civil rights movement might have looked like without *Brown*, whether there would have been such a movement without *Brown*, and so on, and what its effects would have been.

3. 163 U.S. 537 (1896).

And here's the sort of half question I wanted to pose, particularly the second what-if question: What if the Court had said, "*Plessy v. Ferguson*, and no real serious judicial enforcement, but equality"? The half question is then: Does what actually happened tell us something about the capacity of the courts to effectuate at least certain kinds of social change? And that goes back to Rosenberg's subtitle as well.

The other framing question is to note that the question of the enduring significance of *Brown* can be addressed in a lot of different contexts, some of which we heard this morning. What were the effects of *Brown* on the level, in the context, of the lives lived by ordinary people? Did *Brown* make a difference in the lives people lived? These questions I'm going to pose are actually not analytically sharply distinct but they may elicit some different kinds of responses.

So one, what was the effect on the personal level? Second, what were the effects more broadly in the society as a whole of *Brown*? And the third point is one I want to make sure we distinguish: Are there differences between the effects of *Brown* in the society as a whole, and its effects on education?

One of the things that routinely comes up in discussions of the enduring significance of *Brown* is that—the timing of this, again, is a little tricky—since the 1990s, the racial composition of urban schools throughout the country has reverted to the state that it was at in 1954 or worse. That is, if you look at the country as a whole and urban schools in particular, there are fewer—again formulating this precisely is tricky—white kids attending schools with African Americans in the nation's major cities today than there were in 1950. There are fewer African-American kids attending schools with white kids than there were in the 1950s. Obviously for the South that's not entirely accurate because the numbers then were zero, but what you want to say is they were zero in 1950, they got to be not insubstantial by 1970, and they're back to near zero today.

So if that's the story about segregation in the schools or racial separation in the schools, so as not to give it a specific legal label, what is the enduring significance of *Brown* for education?

And then finally I have a note about what was the significance of *Brown* in terms of the social meaning of race in

our country? Did *Brown* do something permanent about the way Americans think about race?

So those are the questions I want to pose to the panel. Maybe we should start at Mildred.

PROFESSOR ROBINSON: Okay. Let me talk a little bit about what if *Brown* had come out differently, and I'm going to choose the B option: *Plessy v. Ferguson* is correct, no serious enforcement required, equality. My reaction is segregation really had matured into apartheid in this country. I think there would have been continued black migration out of regions, out of the South; it had been ongoing for some time. There were enclaves of black people living in all of the large northern cities, more isolated than anyone, I think, had appreciated at the time. But I think that those enclaves would grow and be no less isolated because *de jure* segregation did not exist in the North, and theoretically anybody could move in a seamless fashion through any part of society.

I think in the South, black people who were left in the South, would be similarly very isolated, segregated. The black belts of Alabama, and Mississippi, and Arkansas, because there's a black belt along the Arkansas Delta, would have been, again, emphatically even more so. It would have locked in the poorest and least well-educated black people in the South in those enclaves, and I think the situation would have deteriorated very dramatically, and it would be far worse now than we could even have imagined at that point.

PROFESSOR TUSHNET: Again, I want to pose two questions about that scenario. One is to suggest that there would have been a real difference in racial separation in the North from racial segregation in the South, the difference being that in the South the racial segregation was backed up by disfranchisement enforced by terror. And in the North there was no parallel phenomenon. That is, when African Americans migrated from the South to the North, they became full participants in the political process. And the thought, the suggestion, is the enhanced political power of African Americans located in the North would have brought about some transformation in national law, statutory law, regarding segregation. That's the first part.

The second is in the situation that you're imagining, what happens to the incipient civil rights movement? There had been some protest activities before *Brown*, bus boycotts in Baton Rouge, and I want to say Jacksonville, but I could be wrong about that. And what's your thought about what would have happened to the mobilization of the African-American community in the South had *Plessy* been reaffirmed?

PROFESSOR ROBINSON: Well, I think in my worst-case scenario, and I'll agree this is very much a doomsday scenario, you would have had some segment of the population bled off. So theoretically this would have been the most able and the most economically viable people, if you will, or a large percentage of them, who would ultimately have given up and left. So those who may have been most instrumental in bringing a civil rights movement to the fore will no longer have been in the region. It's true they would have been in some northern cities and more or less able to operate from those bases, but that's so unpredictable that it's hard to know nationally what kind of impact they may have had. It's likely to be isolated again on a regional basis. I can't see them having much effect necessarily in the West or the Midwest, for that matter. It may have made a difference in the North but not necessarily for other parts of the country.

So I'm not sure we would have had a civil rights movement that would have been very effective in the South, and this assumes there wouldn't have been very much at all. I guess I'll stop there. I don't want to monopolize.

PROFESSOR CARRINGTON: Well, I'm having trouble imagining the decision you posed. I can't imagine the Supreme Court saying, "Oh, well, *Plessy v. Ferguson* has got it all right." That wasn't one of the options that was on the agenda in the 1950s. Something had to give. Now, they didn't have to do exactly what they did. Maybe there were some other responses possible, but that particular aspect of it just seems to me not a real option because there was a lot of political and moral pressure to do something about segregation generally, not just about segregated schools.

PROFESSOR HUTCHINSON: Let me ask a historical question about that. Recently there's been a fair amount of attention to the foreign-affairs aspects of segregation. I'm just wondering from your standpoint, Mark or Tony, how much of a

factor do you think that was? Because Phillip Elman's recently published oral history⁴ indicates that Elman, working in the Solicitor General's Office, was the one who asked for a letter from Dean Acheson that would be produced in the briefs in the *Brown* litigation to say that segregation hurts the United States overseas. The communists had exploited it for twenty years. It was tied into the whole Scottsboro affair. And then certainly, with respect to Little Rock, it was a concern for John Foster Dulles as Secretary of State. How much of a role did that play, how significant was it?

PROFESSOR FREYER: There's been a lot of work on that very aspect, but the key point is that the Soviets didn't have to lie in their propagandist campaign. And so there is no doubt whatsoever from all of the station offices—CIA, the embassies and so forth—that the United States was unsuccessful in presenting an effective rejoinder to the Soviet Union in places like Malaysia and Africa. Even when Nixon went to South America, it was used as an illustration. There's no doubt it was bad. The United States was not able to rebut it.

But the key finding of Dudziak⁵ is that all Eisenhower needed to counter it was a symbolic minimalist reaction, which in Little Rock was the 101st Airborne. In other words, that use of force had incredible symbolic power which everyone could understand. And the Soviets were put in a position of having to rebut it. Using force in your own country and this kind of thing, but it was minimalist.

And that really goes to this other point that was raised that Eisenhower didn't like *Brown*, and he said Warren was the worst mistake he had ever made. All of that is true, but it's also really important to remember that the counter side is what was the most he had to do? He wasn't concerned as much about Little Rock as Little Rock; he was concerned about what Little Rock meant internationally. And what it showed him internationally is that he didn't have to do very much from the point of view of justice. He had to do something from the point of view of force, but not from the point of view of justice.

4. Norman Isaac Silber, *With All Deliberate Speed: The Life of Philip Elman* (U. Mich. Press 2004).

5. Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. Cal. L. Rev. 1641 (1997).

PROFESSOR HUTCHINSON: It was the gesture that was significant.

PROFESSOR FREYER: Exactly.

PROFESSOR HUTCHINSON: And not one of enduring effect.

PROFESSOR TUSHNET: That seems to me to reformulate the question. So I take Paul Carrington's point to be right: that in the historical circumstances of 1954, reaffirming *Plessy v. Ferguson* in either of the two forms that I have articulated was not on the table. It was not an imaginable thing for the people who were making the decision to do. Even, I think, the most reluctant, Stanley Reed, wasn't an enthusiast of *Plessy v. Ferguson*; he just didn't want to overturn it, which is somewhat different. But he didn't think that *Plessy* or segregation was the right thing to do. He thought it wasn't appropriate for the Court now to overturn it, which had a different feel.

So those people were going to repudiate *Plessy v. Ferguson*. And then they want to get the gesture, the symbolic nature into the discussion. So I suppose one way to ask the question is to suppose that *Brown* really is symbolic and a gesture. Is it significant along any of the dimensions I have mentioned, even as purely a symbol or a gesture, or does it have to be something more to be significant?

And what lies behind the second part of that question is that it may be difficult to say that there was much more to *Brown*, as things turned out, than its symbolism and its gesture. So for it to be significant, it has to be more than a gesture, and if it wasn't much more than a gesture, maybe it's not all that significant. Is that the line of argument?

PROFESSOR FREYER: Just a couple of responses. First of all, I think we have to take what the symbolism meant at the time. And this goes back to Paul Carrington. When I teach *Brown*, I point out that there were really two grounds for the result in *Brown I*. One was the evidence, the sociological evidence, but the other one is this straightforward precedent. They said, "All right, if we look at the track of precedents actually going way back to *Gaines*, if we go back and we look at the track, then we're pointing in that direction already." So upholding *Plessy* wasn't on the table, but more than that, there was a precedent-based idea that there's a momentum. So that's

the first point. Now, what that momentum would suggest is that there's something going on out there that has an impact on society of which the elementary and secondary schools are an important facet, as the civil rights lawyers are telling us, and also the Justice Department.

In my mind what's really important in evaluating it as a symbol is asking, "What did it say?" What did *Brown I* say versus what was the problem with *Brown II*? And that's where I get to this second point about Little Rock. It's that Little Rock is really a very interesting kind of laboratory of all the revisionists' arguments and everything else, because you can in Little Rock go back and look at what the situation was in '54, what it was in '52, what it was in '53.

People forget that Little Rock was the best that the South had to offer when it came to the possibility of racial cooperation, and amelioration of race, and it was considered to be the most progressive. It had displaced North Carolina. And so you can actually look and ask, "What was the situation?" And you find that there were a lot of symbolic gestures, the kind of thing that Faubus⁶ had been doing, and other governors as well. The libraries in Little Rock had been desegregated, for example.

But the bottom line was that people like Jim Johnson⁷ said that none of this had any bearing at all on what was important to them. What was important to them was what would be the scope of interracial relations as it related ultimately to desegregation. It underlined everything. And from 1950, if there was any indication that there was going to be anything that would eventually move toward desegregation, they were willing to resort to violence—terrorism, if you want. In 1954, when they looked at the Blossom plan, they started mobilizing. That's when Johnson campaigned, and that's why that there's a real problem with the timing of the backlash thesis as it actually works itself out.

What *Brown II* gave the opposition was that they really did believe for a while that if they caused enough disorder, enough violence, that they'd be able to get a constitutional amendment

6. Orval E. Faubus was governor of Arkansas from 1955 to 1967.

7. Jim Johnson, a member of the Arkansas legislature who later served on the Arkansas Supreme Court, was among the leaders of the White Citizens Councils that organized protests against the integration of the Little Rock schools.

or be able to get the Supreme Court overruled. They really did believe that. Because they thought it; they thought it for years. And as soon as the Court started indicating that there was a real possibility here, then that's when they resorted to their terrorism tactics. It was frightening.

PROFESSOR HUTCHINSON: But *Brown II* defuses that, because *Brown II* temporizes and equivocates, so you don't have to have a direct confrontation, you can—

PROFESSOR FREYER: What it meant was that segregation was the replacement for class: The people who had the power were always their adversary and they thought that they had been empowered.

PROFESSOR HUTCHINSON: Right.

PROFESSOR FREYER: That was true. And at first their enemy was really the moderates.

PROFESSOR HUTCHINSON: If I can remember all of Mark's questions, I'd like to respond to a couple of them.

One, what did *Brown* accomplish? Is there something here to celebrate or are we looking back in sorrow, if not in anger? And I think *Brown* did accomplish one thing that was terribly important, and that as a formal matter it de-legitimized Jim Crow. It said that the social attitude that you have—this insulting, demeaning, humiliating attitude that you as white people have about black people—does not have the official imprimatur of the law. You may feel it in your heart, you may still continue to say it, but it's not official policy. I think that's significant; I think it makes a difference.

Unfortunately, what it doesn't do is change people's behavior. And in many respects I think *Brown* was a failure and has been a failure for fifty years with respect to the very source of the litigation, and that's public education. It's not only *Brown's* fault, by that I mean that the courts or the administration were simply not being far-sighted. Talk about not being far-sighted: The Court didn't know what it was doing in 1955. Sherman Minton has been quoted as saying it's going to take ten years to fully desegregate the southern schools, and he thought that he was being pessimistic. But remember the statistic I quoted this morning. In ten years there was less than two percent desegregation. They just didn't have a clue in the South, absolutely right.

So to me there's both achievement and failure. And it says something about the capacity of courts, as Paul Carrington was talking about this morning, to establish and sustain stable social change.

But I think something else is going on which law professors have to talk about sooner or later, and that's the power and authority of the Court. The Court gets into the public education issue at the K-12 level, of course, with *Brown* and its four companion cases. It decides *Brown II* in '55, and then essentially goes into hiding with respect to the implementation of *Brown II* until its hand gets forced, more or less, by *Cooper v. Aaron*.⁸ And then it goes back into hiding again. The Court really doesn't squarely look at the implementation, I think, of *Brown II* until 1968, in *Green v. New Kent County School Board*.⁹ And that's the most significant school opinion after *Brown*, because what Justice Brennan does in *Green v. New Kent County School Board* in invalidating freedom of choice is essentially to change the *Brown I* right in the guise of applying *Brown II*. He says if you've been in a school district that has been historically segregated in violation of *Brown I*, you're entitled to go to a desegregated school, such that in the end there will be "just schools."¹⁰

Well, as soon as that becomes the right in 1968, bussing is three years down the line, and is absolutely inevitable. So *Green* is really the linchpin in what we think about the history of desegregation since *Brown*. But notice the time frame, '54, '55, '58, and essentially nothing serious on schools until 1968. And then '71 for bussing. But what happens in 1974? You're looking at *Milliken v. Bradley*,¹¹ the Detroit case where the Court says, "We said bussing, but only this much bussing: Don't cross the lines of school districts." And the Court essentially gets out of the *Brown* business.

So in a way, with respect to public education, *Brown* lasts twenty years. And what's the consequence of that, not for school children, but for the Court? *Brown* enhances the Court's power

8. 358 U.S. 1 (1958).

9. 391 U.S. 430 (1968).

10. *Id.* at 442 ("The Board must be required to . . . convert promptly to a system without a 'white' school and a 'Negro' school, but just schools.")

11. *Milliken v. Bradley*, 418 U.S. 717 (1974).

by reasserting itself in '68, in '71, and then in drawing the line in '74. Think about it. One of the most significant features of *Brown* is that the Court decided this great moral issue. Well, courts walk into big buildings and build up self-confidence as someone was saying this morning. And if you can decide a great moral issue like segregation, well, you could decide prayer in public schools. You can decide Bible reading in public schools. You can decide reproductive rights cases. You can decide whether a president has an executive privilege when it looks like he's going to be impeached. And if you can decide all those things, why can't you just decide a presidential election?

I think in a way, and I'm not being facetious, but I think that's one of the legacies of *Brown* and the trajectory of cases that it begins.

PROFESSOR FREYER: There's one very clear benefit that *Brown* launched, and that was the invalidation of terrorism and violence that was given permission in the South. When I did my interviewing in Little Rock, a lot of the people remembered a lynching that had occurred in Little Rock, not far from downtown. It was an undercurrent. Respectable people didn't talk about it, and they may not have liked it and countenanced it in principle, but they would always say, "Well, it was understandable, and the black probably deserved it." Now, that is not part of the average southerner's discourse any longer. It was part of it at one time, at least well into the middle of the nineteenth century. It would be as an undercurrent, something that would be spoken, or something that would be talked about. I think that's one real benefit.

There's another that is not politically correct to talk about but I wish we could at least get it on the table at some point, and that is that the outcome that we have is not quite as sharp as Mark presented it, that is no desegregation. What we have in the major metropolitan areas is token desegregation.

And what I'd like to put on the table, is given what the ideal was and how we failed to meet the ideal, can we look at any cost benefits of tokenism? And part of that is what DuBois said at the turn of the century when he talked about "the soul of the black folk."¹² One benefit would be that there is a ten

12. W.E.B. DuBois, *The Souls of Black Folk* (Penguin Books 1996) (reprint of 1903 edition).

percent, this kind of ten percent thing. Now, it was very complicated and I don't like to say I'm addressing the sophistication of it, but one point of it was that empowering blacks politically would benefit this ten percent, would allow for this ten percent to provide leadership that would then be good for blacks. But it would also be good for whites.

And my own son was a minority: He was white in a mostly black school, and it was incredibly important to him. My wife teaches in a predominately black school system. And I'm from San Diego where when I went to school the schools were very segregated. It was tokenism, and now that's not true at all. The schools really are mixed, even though most whites, it is true, are in private schools now which didn't exist then.

So is there a value in tokenism? And one outcome of that is that certainly if you compare the United States in 2000 with the United States 1950, we're much closer to the ideal of *Brown* in terms of who our leaders are. In other words, we're much more multicultural than we were in 1950, and that can be seen, I think, as part of this *Brown* trajectory. And I'd like at least to put that down on the table as something we can talk about.

PROFESSOR AUSTIN: Maybe it's because I grew up in Washington, D.C., which is the South to some people but not to me, so I have a very different perspective on this. When I was four, my mother decided to enroll me in kindergarten, and so we went to the local, the closest school, which was Petworth, and we walked in the door. And I remember this distinctly, although I was only four. We encountered a white woman who informed us that we must be in the wrong place, and she basically told us that I could not go to school there. I was four years old and I remember this. So I had to go to the segregated school which was about fifteen blocks away, and that meant that my mother had to walk with me the fifteen or twenty minutes to the school, go home, and then walk back again, pick me up and go home. And I remember all of that. I was five years old.

The next year after *Brown*, I went to Petworth, which was the school that was three blocks away, and something had happened to all the white people. There was one kid in my class and I know his name. I don't know why I remember this, but his name was Timothy Bissell, and he was it. That was it. And so that was the sum total of the impact of *Brown* in terms of my

integrated public school education, because after that I went to schools that were 99.99 percent black until I went to college. And I was tracked in this all black school. I worked my way into the honors program. I was not born into the middle class. I did what my teacher said I needed to do in order to make my way to a good integrated college. I went to the University of Rochester in upstate New York. There were six blacks in a class of over 600; there were three women and three men. And by the time I was a sophomore there were three women in the class; we graduated and the guys had disappeared. So that was my first experience in an integrated setting.

We were not happy in that integrated setting, so after Martin Luther King was assassinated, we took over the faculty club. We figured we'd hit them where they ate, and as a result of that we got an affirmative action program for admissions and a black studies program. And then I went to Penn, and I settled down and I worked hard, and so now I'm a law professor. And all along the way I've been fighting the stigma of inferiority.

And so *Brown* means something to me. It means something perhaps more in terms of its moral message than its legal message. I think that people who live in the South may not have a good understanding of the terror that northern blacks experienced, which was in some ways modified by *Brown*. We lived in a police state. We did not have individual actors seeking to enforce boundaries, but the power of the police to control behavior of blacks was omnipresent and quite terrorizing.

And then there was a lot of social terror. I distinctly remember not being able to go into stores because I was black. There were theaters that we were not permitted to go into. There were restrictions on our conduct, and there was a kind of police terror behind that. So I think that perhaps in the North *Brown* had a somewhat different significance because its legal impact was not primary to us, but its moral significance certainly made for better lives for us.

PROFESSOR ROBINSON: Let me add to that, Regina. Your point reminds me of something that I noticed, that we noticed, in the essays that we have received thus far. And I neglected to mention that Professor Bonnie and I do plan to publish a book that will be called *Voices of the Brown Generation: Collected Memories of Law Professors*. It may not

have a very sexy title, but I think it will be a wonderful little book. A number of our contributors whose desegregation experience consisted of one or two black kids in the class could always tell us the name of the black person. "I don't why I remember, but his name was Tim Brown, and he was with me for third, fourth and fifth grade, and I don't know what happened to him," or "He's become a very famous physicist," or something of that sort. So it's kind of interesting, the point and counterpoint, if you will.

Second, with regard to *Brown* itself, I don't have the feeling that the Court understood very much what they were getting into. They didn't understand the extent to which segregation was embedded in the southern way of life and for that matter manifested, although on a *de facto* basis, in life in the North. It was kind of like the pronouncement that you've talked about: "We've said it and they will now go out and do it." I think that they were as much shocked as anybody when the whole thing sort of fell apart. And even black people in the South, a large number of them, I suspect, thought that we had the pronouncement from the Supreme Court, and it was now going to be all right. Nobody anticipated the kind of lawlessness that emerged, first overt and then in terms of the dilatory tactics that were so "brilliantly" engaged in, so extensively engaged in, at the very least, over the next few years.

In matters of race nobody really had a handle on it. The Justice talks about ten years after *Brown* to get it straight; Justice O'Connor, in *Grutter*,¹³ says twenty-five years and it will all be gone away. Right.

PROFESSOR HUTCHINSON: Now they're hedging their bets a little bit.

PROFESSOR TUSHNET: On this last part I just wanted to mention that in the years after *Brown*, basically each year on the anniversary of *Brown*, Thurgood Marshall would issue a statement on behalf of the NAACP about the progress towards desegregation, and in the first couple of years he says, "Well, we're moving forward steadily and in a couple of years it will be accomplished." And by, I think it's 1957 or 1958, he says something like, "Well, on the anniversary of the Emancipation

13. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Proclamation, which is 1863, it will be done.” So he’s now pushed it back five years, and nine years from *Brown I*. And then he stops doing that. He leaves the NAACP in 1961, but I don’t think he makes these statements after ‘59 or ‘60, because even he can’t spin it in a favorable way. Obviously some part of this was spin in these public relations statements, but he decides that he just can’t live with spinning it in a favorable way by 1960.

PROFESSOR CARRINGTON: What I said earlier this morning in a way reflected, I suppose, the influence of Rosenberg particularly, and Klarman to make the point that legal decisions don’t make as much difference as we would like to think that they do. But there’s the opposite to that: Can legal institutions or legal decisions impede social change and social progress? And I think you have to admit that in some degree that’s what the law is made to do, that is there’s an awful lot of law that is there to impede social change. In fact the Constitution of the United States was written pretty much with that objective in mind, and the amendments to it were intended to qualify that. So I think there was a serious risk at the time of *Brown* that whatever they did with this would impede social change that seemed to me to be sort of in the works.

And the specific question about *Brown* that still bothers me to this day is that I do not understand why Linda Brown couldn’t go to school. How could they say all that and not let Linda Brown go to school where she was entitled to go? They said she was entitled to go there, so why didn’t they do that? And I don’t have an answer to that question. Maybe some wiser panelist can supply an explanation. I guess the answer is that you wanted unanimity, but did unanimity matter that much?

PROFESSOR HUTCHINSON: That’s always been my favorite counter-factual question about *Brown*: Warren got it in his head that if they were unanimous as they had been in *Shelley v. Kraemer*,¹⁴ the racially restrictive covenants case, and the two graduate segregation cases, *Sweatt v. Painter*¹⁵ and *McLaurin v. Board of Regents*,¹⁶ that when they went for the K-12 cases, they had to continue to be unanimous. This would enhance

14. 344 U.S. 1 (1948).

15. 399 U.S. 629 (1950).

16. 399 U.S. 637 (1950).

acceptability. It would show that they were a united front, and the last thing that he wanted was one of the most southern judges on the Court dissenting.

But one of my clerkships that Nancy mentioned was with Justice White, who always said the biggest win is not nine to nothing but eight to one, where you get somebody as authoritatively as possible spelling out the argument that everyone else rejects. So that you had your day in court, you had your say, and everybody else went the other way.

Now, I don't know what sort of effect that would have had in *Brown I* in terms of its acceptability. It certainly would have taken the pressure off of being unanimous in *Brown II*, and the Court might have avoided being so equivocal and so temporizing in the tone of the *Brown II* opinion.

PROFESSOR FREYER: Again, Little Rock points this up. Everyone talks about unanimity, but there was one break in unanimity. It came in *Cooper v. Aaron*, with a concurrence by Justice Frankfurter. And when I interviewed Justice Brennan because I was interested in it from the point of the view of the Little Rock story, I really can't convey to you how irritated he was with Justice Frankfurter for insisting on that concurrence. And he intimated that this was true of all the justices.

In other words we had to ask, "Well, what was the significance?" There is one example. It's a shadowy, cloudy one of what happens with no unanimity. And from the Court's point of view the conclusion, at least for the majority, is that what it would do is to empower the southern lawyers, in effect, to delay and to be obstructionists. So they thought that it might have a symbolic value.

What I think is more interesting is what Justice Frankfurter thought. Justice Frankfurter really did think that the whole kind of engineering consequence of *Brown* would be brought about by moderate lawyers who had an elite status in their communities, and that they would be able to present to these elite federal judges these great cases, and the outcome would be kind of orderly, predictable change. That's why he insisted. I know this from all of the letters that he got and so forth. When I interviewed in Little Rock, there was actually correspondence between Justice Frankfurter and a number of the school board lawyers after the concurrence, and they were congratulating

Justice Frankfurter, kind of mutual congratulations on how insightful and how helpful this concurrence was and so forth.

PROFESSOR HUTCHINSON: He was trying to be a rallying point for southern moderate lawyers, many of whom were his former students.

PROFESSOR FREYER: Right. But it was a rallying point for, "Let's have delay."

PROFESSOR HUTCHINSON: Right.

PROFESSOR FREYER: That's what it was a rallying point for.

PROFESSOR TUSHNET: It seems to me that actually in the story of *Brown* itself—to put it back from *Cooper v. Aaron* to *Brown*—Justice Frankfurter plays exactly the same role. And my own view—I think, of the people who have studied this, that I'm in the minority on this interpretation—but my own view is that Thurgood Marshall was presenting them with what he was calling an immediate desegregation order, which would have meant that Linda Brown would go to a school in a year. Basically, Marshall was willing to put up with a year. And that made some of the justices quite nervous, primarily because they saw the case as a class action. The consciousness of class actions was not terribly well-developed, but they had this idea that if they ordered the admission of Linda Brown, they were thereby necessarily committing themselves to ordering the admission of every other African-American kid, whether or not that person had actually filed a lawsuit, or the parents had filed a lawsuit. And in the South, in the Deep South, they properly anticipated violent resistance to that. So Justices Black and Douglas figured out one way to deal with it, but the other justices didn't like it. Justices Black and Douglas would have said, "Treat this as an individual lawsuit. Linda Brown gets in, and anybody else who brings a lawsuit gets in, but it's not a class action."

PROFESSOR FREYER: That's the trial lawyers.

PROFESSOR TUSHNET: But the others had this idea that it really was a class action, sort of immediately. I think they were more accurate than Justices Black and Douglas, but they were anticipating violent resistance. And so Justice Frankfurter had this idea that he could encourage the responsible white leadership of the South, as he kept calling it, to take the lead in pursuing gradual desegregation, and that is, in my view, the

origin of the “all deliberate speed” formulation. It’s an attempt to figure out a way of accomplishing something beyond token desegregation, which was what Justice White and Justice Black and Justice Douglas were pushing, at least as they saw it. They could accomplish something beyond token desegregation without provoking violent resistance. Now, that turned out to be wrong, and probably should have been anticipated to be wrong, but I think that’s the story.

PROFESSOR HUTCHINSON: Just to that point, and that is that the brief for the United States in *Brown II* really opens the door for temporizing too, where it says, and as you know, Eisenhower himself passed on the language, that feasibility was an issue with respect to the timing of desegregation. So you’ve got the United States in the 1950 cases saying *Plessy* has got to go, it’s time for it to be reversed, and there should be relief in the graduate school cases. By the time you get around now four years later to the briefing with the new administration, you’ve got the government saying it has to be done, practicalities are important, feasibilities are a limitation, and it’s an entirely different sort of tenor. The Court must have been struck by that because the United States had basically signed on to the NAACP’s approach in the late ‘40s, and now suddenly when it came to actually implementing *Brown*, the new administration is being much more hesitant, and I’m sure that that made some members of the Court nervous.

QUESTION: How do you reconcile *Brown v. Board of Education* with the radio interview that I heard about a charter school in Los Angeles dealing with the Hispanics, and their feeling that they were not being embraced by the whole education system and that it wasn’t teaching their children? The schools weren’t culturally recognizing them, so they developed a charter school which is 100 percent or near 100 percent Hispanic, teaching straight to the Hispanic culture. It sounds like many of the same kind of reasons that Professor Austin was talking about as far as public schools not reaching the black students and their cultural differences. How do you think *Brown* will reconcile with this kind of charter-school movement?

PROFESSOR AUSTIN: I take it that you’re asking whether the imperative of integration, the moral imperative of integration, is one that we ought to pay heed to or give more

prominence to, or that ought to be included within the statutory framework for independent schools. Is that a way of rephrasing your question?

QUESTION: Possibly. I guess I was thinking in the interview many of the teachers were actually saying it's a good thing that we're taking the Hispanic students out of the public school system, because it's not reaching them. It's a good thing that we have this segregation, and with the charter school of course you have the public money, and I just wonder if in your opinion that will come to a head.

PROFESSOR AUSTIN: Well, no, I think that that's an important question in that we clearly are somewhere between a system of *de jure* segregation and the ideal of a multicultural society. And in the road from one extreme to the other, from the bad past to the bright future, there may need to be some compromises with regard to some of the values that we have thought to be important.

It's not clear whether integration is an end goal or whether it is a means to the end. I suspect at this point that it's more a means to the end than it is a goal. And I would hope that the folks who are behind the charter school would recognize, not only the significance of giving Latino kids an opportunity to be educated in an environment where their capacity to be intellectually engaged, to be culturally engaged, and to have an education which assumes the best with regard to their moral development, would be one that would not be unavailable to blacks or Anglos who would profit from being in an environment where white superiority was not presumed.

PROFESSOR TUSHNET: As you're talking now and also earlier this morning the following question, which would in certain circles be taken as a provocation, occurred to me: In the last round of the Kansas City desegregation case, Clarence Thomas has what is probably, at least at this point, his most celebrated line, which is, "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior,"¹⁷ and I guess I wonder what people's reaction to that is in this context.

17. *Mo. v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring).

Another way of putting it is it seems to me that he's picking up on the concern expressed here about assumptions of black inferiority and using it in the context of a desegregation case where he imputed to the trial judge the view that he's criticizing. And so I just wonder if people have reactions to his observation.

PROFESSOR ROBINSON: Well, I'll say that one example I've seen of this that dates from the time of the *Brown* litigation is a letter that was written by the superintendent of schools to black teachers who were then under contract to the school district that said, "If we have to desegregate next year, you're fired, because white students, white parents will not want you teaching their kids." That is not quite the same thing because there's a possibility that the black teachers may have been in the white schools, but I think it is yet another example of that thinking. If you are black, you are presumptively not going to be able to measure up and you will not have as much to offer. Without saying how much I agree with Justice Thomas generally, I think he has tapped into something very important. And I think that there is a presumption that no matter how bright a shining star you may be, you must prove yourself time and time again, and until you can establish your bona fides on the basis of what is generally accepted as indicia of success, you will presumptively be less than equal; you'll be inferior.

PROFESSOR AUSTIN: The same issue is raised with regard to the desegregation of dual college and university systems and the extent to which there ought to be an upgrading of the programs at historically black universities and colleges. In Mississippi there was an agreement to settle a longstanding desegregation case in which the court made as a condition of extra funding the enrollment of ten percent white students, and there were objections to this settlement agreement. In other words, you couldn't get the money until you had enrolled ten percent whites. And it was a very, very controversial, a very controversial move. You wonder whether or not they withheld money from the white schools until they had achieved a ten percent enrollment of blacks, and I doubt it. One of the problems with *Brown* was that it made it seem as if black segregated institutions were not worth preserving. We have this notion in this country that white institutions are somehow better than black institutions. And I think that it's important for black

institutions to be preserved and made into places that whites want to integrate, so that we have movement in both directions. And the issue of movement, I think, is fairly important.

So in the case to which you referred, I need to know what the dynamic is. It's not simply looking at it in a static way, but looking at it in a dynamic way and to see if we're moving in a direction away from assumptions of black inferiority and the companion assumption of white superiority or not.

PROFESSOR TUSHNET: In the context of that case the district judge actually had two theories for what he did. One was by improving the quality of the schools in the city whites who had fled to the suburbs would be drawn back into the city schools, and so there would be, if I am understanding you right, there would be movement into schools by whites because they were good schools.

His other theory was even if that didn't happen, the schools that were predominately African American or nearly exclusively African American, needed some educational compensation for that fact. So in Justice Thomas's focusing on that second part, his vision of the argument was not wrong, I think.

Interestingly, in the version of the Mississippi case, the university case that got to the Supreme Court, Justice Thomas also makes an observation that fortunately what the Court does here doesn't preclude the strengthening of historically black institutions without regard to what happens in terms of their racial composition. At the stage of the remedy that they were dealing with, that's what he had to worry about. And again, he did focus on the value of those institutions to the black community.

PROFESSOR ROBINSON: Mark, I'd just like to observe, too, that in the Kansas City case, there was general agreement at the end of ten years that the schools had in fact improved. It appeared that the kids had made strides in performance by traditional measures in regard to developing the basic skills, and the district had also succeeded in attracting back into the schools some white kids who had previously fled. It may have been predominately in the magnet schools or specialized programs, but they did turn it around to that extent.

And I think that underscores the importance of education per se. Regardless of what the racial makeup of the schools may

be—and one hopes there will be movement back and forth—ultimately the kids need to be guaranteed an environment in which they will be able to develop the basic skills without regard to whether or not some integration is possible. There may be instances in which for demographic reasons it's very difficult, but that doesn't diminish in any regard the obligation to provide to them, in my view, the very best education that can be provided, and if that takes additional resources, then so be it.

QUESTION: I have a question for some of the historians on the panel. Obviously, Hoxie got media attention as a voluntary segregation effort in Arkansas. I just finished reading Dale Bumpers's autobiography, and he talks about his hometown when *Brown* came down.¹⁸ A school board member comes to him and says, "What have we got to do?" Bumpers says, "Desegregate." And they do. Then he talks about Fayetteville, Arkansas, also doing it at the same time. I'm wondering how common that was. Were there places that voluntarily desegregated without the hullabaloo that Hoxie created?

PROFESSOR FREYER: I can answer in Arkansas and I can answer in Alabama. In Arkansas the examples are few, outside of Eureka Springs and Fayetteville. And by the way, you're talking about five students and they were the burden of whatever the county that Fayetteville is in. They were being transported, they had to pay for the bussing and all of that because it was predominately rural. And so Bumpers was given credit because he was the head of the school board at the time. But you are absolutely right: There was no hullabaloo. Why? Because Bumpers specifically said, "We want to keep this as quiet as possible."

Now, similarly in Bearden, that's not that far from Hoxie and it's actually in the Delta, they used Hoxie as an example of what not to do. Despite the fact that Johnson and his people were active, Bearden was able to do it. But again, you're talking about a predominately rural place, and they were succeeding in keeping it quiet.

18. Dale Bumpers, who served as Arkansas governor and then as a United States Senator, is from Charleston, Arkansas. See Dale Bumpers, *The Best Lawyer in a One-Lawyer Town* (Random House 2003).

Now, with regard to Alabama, you're talking about the Deep South, far away from progressive Arkansas. Remember, Arkansas was the best the South could offer. It was the best, while in Alabama, there was zero desegregation. I had a student once who told me, "Well there was one black in Anniston who was registered to vote, even though every time he showed up, they wouldn't let him." It was that kind of thing.

Now it does get to be complicated in places in the Republican counties in northern Alabama. But even there, you had absolute—absolute—segregation in the public sector. There was more interracial employment, but certainly not in schools, not even in Winston County, which is where Johnson¹⁹ came from. It seceded from Alabama during the Civil War because it was Republican. It was all the symbols of independence in the South. And there's some variation with regard to the potential of violence and so forth, but when it comes to where the rubber hits the road—that is, in the public sector—Alabama couldn't even match Bearden.

QUESTION: You were talking about how the South was very slowly integrating on its own in certain areas. I was wondering if by chance it may have started slower but sped up, and then the integration would have been better than it is today, after white flight, after some of these symbolic things like the 101st Airborne and everything else, once that happened. Do you think by chance if it had happened slower, that the whites in the South and everywhere else would have reacted a little better and been less resistant, or blended?

PROFESSOR FREYER: Well, if you're asking me, I don't know how you could get any slower than it was. Let me just say first of all that Klarman's argument is pretty sophisticated using the case data. He's very careful, and he does look at this basically two-year period where he tries to measure the pros and cons of *Brown*. But when it comes to this business about progress, you've got to be very careful what Klarman said. He said that there was this undercurrent of terrorist-oriented whites who were concerned about miscegenation. It just absorbed them absolutely, and they were looking out from their world view on this. They were always looking for what would now be called

19. Judge Frank M. Johnson, Jr., of the United States District Court for the Middle District of Alabama, later appointed to the Fifth Circuit, and then to the Eleventh Circuit.

wedge issues. They didn't see desegregating the law school at the University of Arkansas as a wedge. What they saw as a wedge was elementary schools. That was the fundamental problem. That would lead ultimately to everything that they feared in terms of the miscegenation. There is no place, there is no place, in the Deep South where you don't have a coalescing of violence where that possibility could come about. Now, when you get to the upper South that's where the two percent occurred. That's not only Little Rock, but it's in Maryland, and some in Delaware.

PROFESSOR HUTCHINSON: West Texas, you know.

PROFESSOR FREYER: Where there aren't that many blacks. It's hard maybe for you to understand. It took me interviewing a lot of people before it dawned on me because I'm from San Diego, but the average working-class white southerner was absolutely terrified that there would be some kind of interaction between a black male and his daughter. They were terrified. And I can't exaggerate that. I've gone through so many FBI interviews even, for example, where you're supposed to be talking about some technical or some factual situation and they're saying, "This is a communist plot to force my little girl to sit next to a big black." That doesn't seem to be logical for what the FBI is investigating about. But it's fundamentally visceral with the average working-class white southerner.

And that's why, again, Little Rock was really a mistake. It was a class struggle between Pulaski Heights and the neighborhood where Central is.

The same thing happened in New Orleans, which I know first-hand because my wife is from there. Skelly Wright²⁰ should not have, but he allowed the working-class part of uptown—these were largely Irish and Italians—to be the schools that were going to be desegregated. And he said, "It's not a good idea but my neighbors are from the other parts of uptown and they'll never talk to me" if he desegregated their schools. They ended up not talking to him anyway.

It's hard to recapture that kind of visceral reaction.

PROFESSOR CARRINGTON: Well, if you look around the world, this is a very commonly shared impulse.

20. Judge J. Skelly Wright of the United States District Court for the Eastern District of Louisiana, later appointed to the D.C. Circuit.

PROFESSOR FREYER: Absolutely.

PROFESSOR CARRINGTON: People need an identity, and one way they get an identity is to latch onto people who look like them, or share a religious culture or some other thing and then wish to look down on somebody else. And I don't know how you completely eradicate that, but it's a pretty deeply seated human trait, I think, that you confront when you deal with this.

PROFESSOR TUSHNET: And one part of the gradualists' story is why, to the extent that it was happening, why was it happening. And the reason is not that white elites said, "Well, racial segregation is morally wrong but we have to bring our people along and so we can only do it gradually." What they said was, "People aren't investing here because the folks with the money in the North don't like what we're doing down here, so we've got to accommodate them for essentially prudential reasons."

And there are two things about that. First, that probably placed some inherent limit on how far the gradualism would go. And second, to the extent that the enduring legacy of *Brown* was the declaration by the Supreme Court of the moral unacceptability of the premises of racial segregation, you wouldn't have gotten that from the gradualist move.

PROFESSOR CARRINGTON: I've got to say as man or boy I never heard an economic argument for it in Texas. I never heard anybody in Texas say, "This is why we've got to do it: because otherwise we won't get foreign capital investing here." It may have been in the minds of some banker somewhere, but it wasn't out there in common discourse, and I never heard a lawyer talking about it.

PROFESSOR FREYER: In fact it worked the other way. Southerners were used to being exploited by the Yankees.

QUESTION: One of the effects that a lot of people see since *Brown* is the emergence of all-white private schools in the South. I just wondered whether any of you thought that maybe that one of the things that *Brown* did might be introducing a class-discrimination system that was traditionally confined just to New England into all of the United States.

PROFESSOR CARRINGTON: I don't think it's just because of *Brown*. I think there are a lot of other factors that

feed into that, but I do think that *Brown* was—that desegregation was—a stimulus to that, and we’ve got more of it than we otherwise would have had. But there are a bunch of other things going on in our culture that would have produced much of that anyway. Home schooling is a variation on that, too. There are a million children being home schooled, and some of them are getting very good home schooling. It’s not just because of desegregation, but I think it’s not totally unrelated.

QUESTION: What about when the Court after deciding *Brown* is confronted with re-segregation and the barriers in preventing re-segregation? Today, as Ms. Austin said, it’s more economic: where you live, and whether you can afford to move to a white-flight neighborhood. How far reaching should we bring *Brown*? Does the state have an obligation to correct those imbalances that are now the barrier for integration through vouchers or some other means of correcting those imbalances?

PROFESSOR FREYER: Just in terms of evaluating *Brown* on the white-flight point, I think that people tend to forget that there was this incremental expansion of the *Brown* principle beyond education to the libraries and buses, and so on. Now, that was pursued by the small group of advocates that Mark referred to across the board. And there was, of course, the *Rodriguez*²¹ litigation, where you tried to address white flight as well and, of course, the Court drew the line, just as it drew the line with inter-district bussing.

Now, the first answer that we need to remember is that when the Court makes the big jump to “We’re going to do *Brown*,” it didn’t really push that far beyond the circumscribed area of Jim Crow-imposed segregation. When it came to class-driven things specifically, in which white flight is involved—or the inter-district thing, which is highly class driven—what they did was to say, “We’re not going to get involved in that because that involves the white majority.” So the first point is that their tendency is that they only go so far when it comes to actually dealing with the white majority in these race cases.

The second thing, I just think we really need to remember that the private-school movement was not only a matter of blacks but it was multiculturalism. It was all sorts of groups.

21. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

When I grew up in San Diego, there were only two private schools—there were a number of Catholic schools, of course, but there were only two non-Catholic private schools. Now, it's a major alternative that is much more the kind of self-identity related to class than it is trying to get away from blacks.

In other words, I guess my answer is that you're dealing, as Professor Carrington said, with this psychology of self-identity. It's so fundamental. And given the way in which the Court responded incrementally within a very cabined way, I don't see that it would ever get to the kind of things that you're talking about. It's so involved with the white majority, that I just don't think that you can get close.

PROFESSOR ROBINSON: I'd like to add that I don't see the litigation going away because I see *Brown* as being the spiritual parent of the litigation that has attacked the financing of schools. And *Rodriguez*, of course, did not succeed because there is no federal right to an equal education, whatever that means. Access to education under *Rodriguez* is enough. But there has been litigation in almost every state on the adequacy of funding, and I think Arkansas has recently had that kind of litigation. This state is in an uproar, and the other state that's still in an uproar, if I remember correctly, is New Hampshire. There's an attempt there to impose a Robin Hood system in which the richer school districts are supposed to have a part of their excess bled off and then redistributed to the poorer school districts. So they are in an uproar because the richer school districts, of course, don't want to give anything up.

Nevertheless, I see *Brown* as being the spiritual parent for that kind of litigation, and I think that attempts to equalize the schools in a meaningful fashion. I can't tell you what that means, but I think that's going to be ongoing. It's going to cause additional examination of the underlying property tax system, and I think from there funding systems in general. There will always be children who need access to education through public schools, and there will always be attempts to figure out how best to fund that. And that's the way in which I see that going. And I think *Brown* is a direct provocateur, if you will, of that line of litigation.

PROFESSOR CARRINGTON: The complexity of the problem may be illustrated by an experience I had some many

years ago. I served a term on the Ann Arbor School Board, and I was interested in school finance because we were a defendant in the school finance case in Michigan because we paid very high taxes. It was a university town; there's almost no limit to the willingness of university faculty to pay school taxes for their children, so we had very high taxes. And we, therefore, were spending a lot of money per kid and we were working on that.

And while working on that I noticed that the school district of Inkster, Michigan, was about the poorest school district in the state in terms of resources available for real-estate taxes. There were no factories in Inkster, and there was nothing but housing and it was pretty low-income housing relatively. And they were right next to Dearborn. Dearborn had all the Ford plant, they had everything, and they had low taxes and very high revenue. They were spending like \$2,500 a kid a year, and in Inkster they were spending \$500 a kid a year.

I went to the Inkster School Board one night and I said, "Fellows, if you'd like, I think we could get a couple of lawyers together and just for the fun of it we would blow away the line between Inkster and Dearborn, and merge you into the Dearborn school district, and then you'd have a \$2,200 a year education for your kids," and I almost got lynched. Those folks were enraged by the idea that they would turn their children over to the people in Dearborn. I'm now old enough to sort of understand that, but at the time I was really amazed. But it does speak to a lot of these problems. I mean, what would you have gotten for the extra \$1,700 on the kid? I don't know. I didn't have an answer to that question, and they were very much troubled by who was going to make decisions about their children. And so the idea got nowhere.

Now, something needed to be done to equalize the resources between those two school districts, and I guess ultimately it was done. I think they have addressed the problem in Michigan in some way or other. But it is a complex social and political problem and there's not any quick fix about how to do that. And I don't know what happens when they start equalizing resources and they move in on the Ann Arbor School District.

Private schools are the answer. There is now a large private school system in Washtenaw County, Michigan, that was not there in my time, and it's partly a result of the financial

equalization, which has diminished the Ann Arbor schools. It's also a result, let me say, of two-career families with more income, and they're more likely to buy into a private school system. It's been a transformation in that particular situation.

PROFESSOR AUSTIN: I was just going to say that counter-factuals are dangerous because I'm not a historian. I don't do them. But we've been talking about the problem in a one-dimensional way, and it's much more multi-dimensional. White flight was aided by a system of home financing that was also discriminatory. The people who engaged in white flight bought homes that reflected the value of the public education that the children living in those homes would get. So people were willing to buy more house than they could really afford because of the implicit value of the education that the kid would get from living in the house.

As long as housing values continued to rise, as long as there was government support for the housing, this made sense. But mortgage loads are not keeping pace with the value of the homes. When these two-career families break up, you find that it's the woman who gets stuck with the house because she's the primary caregiver, the primary parent, and the one responsible for educating the kids. If somebody gets sick, or if a person can't keep up the mortgage payments for other reasons, you're finding more and more people bearing too much of a debt load. They're finding themselves in debt and going to bankruptcy, so that the rates of bankruptcies are rising. And a lot of this has to do with the burden that white families, particularly white mothers, are bearing to educate their children in schools that are not accessible to poorer people and poorer minorities in particular. You have a system which is quite complex and it may be that the funding equalization is going to take care of some of this. But there's also a scenario that says that the system is going to collapse under its own weight, and that we are not doing enough to assure these mothers that their kids are going to get quality educations. At the same time we're not doing enough to educate the kids who are in the cities. The United States is not going to be able to maintain its competitive advantage if we don't educate both sets of children: the poorer white kids who don't have the daddies who can afford the mortgages on the houses and the minority kids who are being educated in the poorer inner

city schools. The system is going to collapse and something more definitive is going to have to be done.

So you're right in saying that, there is this accommodation now. It looks as if we've got these white private schools and we've got maybe problems with disparities, and all of that will hit the fan at some point and something is going to have to be done about it.

PROFESSOR TUSHNET: I wanted to make one small observation and one more extended legal argument. The small observation is in connection with vouchers. It's an interesting and I think not insignificant fact that the Ohio school voucher plan that the Court upheld against an establishment clause challenge a couple of years ago had a statutory provision authorizing vouchers given to kids in Cleveland to be used in suburban public schools if the suburban public schools were willing to participate in the program.²² But no suburban district was willing to participate. So what you have to think about is designing a voucher program that requires suburban schools to accept vouchers, and what the political constraints on adopting such a program would be.

The legal argument is that as of 1973, it actually wouldn't have been difficult to construct an argument that it was either perfectly permissible or maybe even constitutionally required to include suburban school districts in urban desegregation plans. You combine the *Green v. New Kent County* rule that the kids in previously segregated schools are entitled to attend just schools with the holding in the Denver case²³ that if a district itself has engaged in some segregatory activities that affect a substantial part of the district, then the kids in the entire district are entitled to attend just schools. But you can't give them what they're entitled to by confining the remedy to the city schools themselves and, therefore, *Green* says you either can or have to include the suburbs in it.

The result is that the metropolitan desegregation plans that were at issue in Richmond and Detroit were not legally crazy at the time; they were politically impossible.

22. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

23. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973).

PROFESSOR HUTCHINSON: Well, there's Justice White's point about district lines being just an artifice.

PROFESSOR TUSHNET: Right.

PROFESSOR HUTCHINSON: An artifice that the state approves.

PROFESSOR TUSHNET: Right. And my point is you actually don't have to do anything terribly fancy to get these metropolitan remedies. Then you can bolster it with the idea that the reason that there's white flight is discriminatory financing and all that sort of analysis and evidence, which the Court actually didn't technically rule out as part of a permissible case. But you don't really need to do that. The real constraint on this is the position that the Court seems still to adhere to that there's a constitutional entitlement in parents to send their kids to private schools. It's *Pierce v. Society of Sisters*²⁴ from the 1920s.

PROFESSOR HUTCHINSON: And my friend Justice McReynolds, of all people.

PROFESSOR TUSHNET: Right. And obviously, there's a lot of law now that you couldn't do this with. But as of 1973, you could have gone quite a long way, but you would have had to think about the entitlement to send kids to private schools.

PROFESSOR HUTCHINSON: Think about this history, these watershed cases, and I've claimed that *Green* is one and *Milliken v. Bradley*, the Detroit case, is one. I know you may not flock to this in your spare time, reading dissenting opinions that aren't assigned, but read the dissents in *Milliken v. Bradley*. They are extremely moving. Justice Marshall's dissent, Justice White's dissent, Justice Douglas's dissent. They know that an era is over on the spot, and they know that white flight is being constitutionally protected, and that the Court is now in the business of getting out of the desegregation business on a substantial scale in the urban areas. And they pull out the stops. The majority opinion, as I recall, was really pretty bland, but the dissents are breathing fire, and it's worth re-capturing these occasional moments.

PROFESSOR FREYER: As you embark upon your equalization experience here in Arkansas, I'll point to a couple of aspects of Alabama's experience. Alabama was one of the

24. 268 U.S. 510 (1925).

later states to succeed before the state supreme court with an equalization argument, and it's an exact replay of *Brown II*: just continual delay. Nothing. The whole outcome—and I have signed a few of the briefs so it's something that is a very live subject despite being politically sensitive—indicates that this is going nowhere. And the bottom line is that it's a poor state and you'd have to change the whole tax structure. They haven't changed the tax structure in 102 years, and it's not going to change now. That's point number one, as you look upon your own experience.

But point number two is that you've got other states around you, Texas and Kentucky, which were somewhat earlier. Now, they are richer states, and there the story is not an Alabama story. It's not a bright-hope story either, but it's somewhere in between. They've been able to use the entree of an admittedly regressive tax structure to provide what would be at least improvement, not equalization, but improvement.

Now, I guess the lesson is that it depends on how hard your lawyer is willing to work whether you come out with an Alabama example or you come out with the middle-of-the-road kind of Kentucky or Texas example, but the history would suggest that it's open to potential. It's an opportunity.

QUESTION: What concerns me now about the continuing discussion of *Brown*—not only here on this panel, but more generally—is just the continuing clutching at the original statements of *Brown*, which for their time were great and important and fit the bill completely, but I wonder if we ought to move beyond that more naïve statement now. And this is what I mean by it. At the time when *Brown I* and *II* were decided, there was no way of dividing up the inequality of racial segregation because there was nothing but racial segregation. Therefore, the problem was to get black students into places or in a position where they would receive the privileges that the white students were receiving. But at this point we're talking more about access to the funding necessary to equalize achievement across the board.

So two things, I think, would happen. One is that there has been a bifurcation of the discussion so that the radical right will bring up a comment like, "Well, what about traditionally black schools, why should they still be around?" or "Why should we

establish culturally Latino schools, culturally Asian schools, and the like, because that speaks against *Brown*?" The point is just to say that dividing up the bodies, the physical races of students for any reason, is wrong, and adhering to *Brown* will require that we not do that. It seems to me that this is marching down maybe a literal interpretation of *Brown*, but not the true spirit of *Brown*, which is really to say that we have to access that pot of money that will bring us equality.

All the remedies that have been talked about or have even been attempted were that the vouchers, or white flight, or red-lining, or the like are attempts to re-segregate the bodies by bringing the funding or sending off that funding to white students in other places.

My problem is this: I don't think that the analyses of *Brown* stand up anymore in the way that they did when we had a more naïve point of view. When we talk now about the problem of bringing money back to the urban schools, that doesn't really fit the paradigm of a lot of states, including Arkansas, for the poorer schools are the rural ones, and also the more segregated ones.

In other words, I think there's a problem now of focusing on getting whites into traditionally black schools before the funding is given to black schools, or preventing let's say Latino-culture or Asian-culture schools from popping up. Shouldn't we be talking now, in view of what *Brown* wants to have happen in the schools, more about ensuring that the government never ends up funding the division between access to achievement and inability to access achievement?

PROFESSOR TUSHNET: Well, one thing that occurs to me is that in the literature that's sort of at the intersection of law and educational policy there is this statement frequently made that green follows white. That is, if you're concerned about getting adequate financial resources to minority kids, actually the only way that's going to happen is that if you get those kids into schools with white kids. Not on the theory that Justice Thomas criticized about the educational problems of majority/minority institutions, but as a matter of practical politics in this country, green follows white. And at some level that's a depressing message when you have an experience where there are pretty clear political constraints on, as you put it,

integrating the bodies, or allocating the bodies in that way. The strategic picture may be pretty unpleasant, if that's the reality.

So the next thing is to ask whether there are strategies that can be used to break the green-follows-white idea. And again, to some extent I think that Justice Thomas's articulations are efforts to develop some thinking that might be used to push some strategy that would break the green-follows-white idea.

PROFESSOR FREYER: Just on the point of whether you call it naïve or not. What Mark just said was exactly the concern in the *Plain Talk* report from UALR in 1997, that not only was the Little Rock School District facing bankruptcy, but the reason why there was a call for change in consciousness on behalf of the blacks as well as whites. The blacks got to a point where they believed that if you took away the federal courts, they'd at least have to have some kind of minimal authority to continue to channel at least some taxpayer funding. If you took that away, there was absolutely no reason why they could count on white support. The natural inclination of the whites would be not to support black-only schools.

And I must say that in Alabama it's been very recent. Alabama is unique in the South in that it was the only state where the whole state was placed under one court jurisdiction, it was the middle district of Alabama, and the one judge was Frank Johnson. You have to go town-by-town in Alabama in order to get out from an order because it's a statewide thing.

And just recently Tuscaloosa got out from under it. And sure enough, up until that point there was no talk about tax base going to the almost all black, or eighty-percent black, schools. As soon as the federal court leaves, though, now you start talking about inadequate tax base, and already the state board of taxes is politicized to the extreme. So it's a really, really tough problem. That's why the green following the white is complicated because things are so disproportionate. You've got eighty- or eighty-five-percent black districts and taxpayers are still supporting them. But the question really is what happens when coercive authority is removed. And we don't know what will happen in Alabama, but the outlook is not really optimistic.

PROFESSOR AUSTIN: One of the reasons that I talked about the underlying ideologies of white supremacy and black inferiority is that we tend to associate *Brown* with integration.

And I think the experience is that integration is not the goal but the means. White flight took care of integration when I was growing up, and it's taken care of integration in a lot of different places. But even in schools that are thought to be integrated because of the overall enrollment, you'll find segregation within them, so that the honors classes and the Advanced Placement classes will be occupied by white students, or in some places white and Asian students. And then the general studies courses will be occupied by blacks. So that the school is integrated but the programs are not. That's why I talked about inferiority and superiority: because it seems to be the more important consideration.

Beyond that, there were two strains to the litigation. One part had to do with integration, the other part had to do with equalization of resources. I think you're right in saying that equalization of resources, or litigation over access to the pot of money, is part of the legacy of *Brown*. And the response here is that that pot of money is not an assured pot of money, that there has to be some political basis for creating and distributing that pot of money, and so we have to work on that, and it may be that the ideology of integration is one means for getting people to sign onto the creation of the pot and the distribution of the pot.

There might be other concerns. I talked about globalization, the ability of the United States to compete. But more important, I think, is that education is becoming privatized. Much, much of what the government used to do is becoming privatized. And so not only do we now have private schools, but we also have corporations that are interested in schools and private schools and in partnering with public schools because industry is beginning to recognize that the schools are not producing competent workers. And business is also beginning to recognize that they need to have consumers. This they learned from Henry Ford, who knew that it wasn't enough just to manufacture Fords. He knew that he had to have people to buy them, so he wanted to build cars that his workers could buy.

I think that one of the things that is developing is a political strategy of looking to the private sector as an impetus for getting some changes in the schools. The private sector is much more committed to diversity than are public schools, and so is the military. It was the military brief that really had a big impact in

the Michigan cases,²⁵ with the military saying, “The soldiers are going to be minority people and we need an officer corps that can deal with the soldiers, so please think about integrating the schools and the universities and the graduate schools.”

I think things are changing to take into account changes in the material world.

QUESTION: In Arkansas now, if you concentrated enrollment for the number of students that are home schooled, that would constitute the second- or third-largest school district in the state. And I wonder why the numbers keep growing as quickly as they do for home schooling. There were a couple of self-segregating impulses we’ve seen.

In central Arkansas, the perception is that the schools are unsafe. Now, whether that’s directly related to any race, I’ll leave up to you to speculate. I think it probably is. In the rural areas, it’s not a fear of race, it’s a fear of difference. You have folks who decide to segregate their children from the public schools mostly for what we can call home, cultural, and religious reasons. They feel that the values that their children might be exposed to in the public schools are not the values that those homes want their children to be exposed to. And the numbers keep growing.

Of course the foundation for our public support is taxes going to schools. My question, or my observation, then, is about the value of public schools, what I would consider sort of old-fashioned values where you would go to school for much more than three Rs. You would go for learning to get along, to see other citizens, and to learn citizenship in a pluralistic society. Is that basically being debased by the home schooling and by self-selected segregation? My concern is that with regard to the legacy of *Brown*, we thought that there was something to that in addition to integration. There was something to the value of going to school together. The home-schooling advocates claim that their kids do better on standardized tests, and they are doing much better; they’re getting into better colleges because of it. Of course those standardized tests seldom if ever measure these other values of a pluralistic society: getting along and learning citizenship in a pluralistic setting.

25. *Gratz v. Bollinger*, 539 U.S.244 (2003); *Grutter*, 539 U.S.306.

So I'm just wondering if there are any panelists who have any ideas or comments on this phenomenon.

PROFESSOR CARRINGTON: Well, I guess I agree with the premise and the observation. I don't have a solution to the problem. I do think public education had a moral premise to it, and that's what I mentioned earlier this morning: the equal rights groups on the frontier who wanted public schools, free public schools. The idea was that we're going to share our kids, and we're going to raise them together. And the teachers were regarded as a kind of adjunct to the family enterprise, and it was a very communitarian vision that they were sharing.

I don't know what the answer is. I think it is true that the public schools have had a lot of other assignments loaded on them, aside from representing parents, and it's not just trying to deal with the segregation problem by any means. I think there are other things. One of the things driving private schools now is the religion thing. At least in the area where I live, in North Carolina, to the extent we have private schools, they are Christian academies that are there to protect the children from the diluted religiosity of the public schools where we don't pray or do other things that these parents think are important.

I don't have a solution to that problem. I find that I'm not comfortable telling those parents, "Sorry, but you've got to send your kids to the public school. We require them; we are taking them away. We're going to take them to the public school." That doesn't seem to be a very satisfactory answer. But in any event, the premise about public schools, I think you're right.

PROFESSOR TUSHNET: I have a couple of comments again. One is your comment reminded me of one of the two favorite moments that I have in the oral argument of *Brown*. And this moment is Marshall saying, "Well, you know, these kids play together in the morning in front of the school, and then the school bell rings and they separate. And then the day goes along and the school bell rings, and they get out of school, and they play together after school." And he says, "There's some magic in this." Magic meaning that you can't keep them together in the school even though they're perfectly fine being together outside the school. It's a very powerful moment.

Now, that's sort of flip side of it, and one way of interpreting what he's saying is, "Look, they're getting all these

things about living together that they're supposed to be getting from the public schools, but we're not letting the schools give that to them. They're getting it outside, but why is there some magic in it in letting it happen inside the schools?" As I say, it's one of my favorite moments in the argument because it does capture a kind of experience that actually *de jure* segregation precludes.

The other thing, as I mentioned earlier, is that it may be that the way the world has developed, the way the United States has developed, people who are interested in improving the quality of education available to minority children, or interested in integrated schools, or interested in the promise of desegregation—there are a lot of different ways to put it—might have to rethink *Pierce v. Society of Sisters* and the constitutional entitlement to send your kids to private schools. Now, at the moment this is both doctrinally and politically not quite unthinkable, but certainly unachievable. But it might be a necessity. That is, it might be that all of the other things that people with those views try to do, can be, and we now know have been, undermined by parents exercising this constitutional right. If you don't want it undermined, you might have to rethink whether they have such a right.

PROFESSOR FREYER: Just two points. First of all, there were in the *Brown* briefs, and I think there are a few intimations even in the decision, where the focus on the public school as the miniature democracy was cast in Cold War terms. That is, "This is a way to fight the Cold War and so it's good for that reason." So in other words it was clearly a moral value, as you have described it, but it was politically contingent on this foreign policy struggle.

Now, that then leads to a suggestion to put on the table. One of the things that you might do in all of the equalization arguments, when you start seeing that it is difficult and complicated, would be to ask, "What is the underlying consciousness?" If there is some kind of alternative that has to be pursued, what would the underlying consciousness be, and how do you start trying to rethink the underlying consciousness? And that might be identity politics. What is really involved here is self-identity, and that's a feature that runs through American history, but it's not the customary way in which causation is

explained. And that might be a useful way to start thinking about strategies of persuasion and strategies of media packaging and even litigation arguments and this kind of thing.

QUESTION: This is for Professor Austin. I would like to hear some ways that you think we might be able to get beyond the replication of the results of segregation. I went to a predominantly black junior high school and high school in the District of Columbia in the 1960s, and I saw almost everything that you described except that among males, which was the only gender I thought I even sort of understood at the time, I saw no less individual competitiveness among black males than I did among white males. And yet I do see the replication of the results. What do we need to do?

PROFESSOR AUSTIN: I think that one thing we have to do is to begin to structure schools so that it becomes clear to the children that their achievement is the *raison d'être* of the enterprise, and I'm not sure that happens. And I think that's very difficult, but I don't think we can leave it just to the children to come around to the point of view that it's important for them to want to achieve in school. I think we have to make it clear that as a societal matter it's very important to us that they achieve, and that the measure of achievement is such that they do not have to give up their black identities; they do not have to give up their solidarity.

There's a difference between the kinds of competitiveness that black men show in playing the dozens, and the kind of competitiveness that we associate with the capitalist system that we live in. They are much more interested in showing that the group's kind regard is important to them, so that their solidarity has to do with making certain that everyone understands that they're black, that they don't intend to act as anything other than black. And I think we have to capitalize on that and use that as a way for getting them to help each other to achieve. And I just don't think that we do that.

In terms of more specifics, I'm not an educator, but I found it heartening to think that *Brown* recognized that black inferiority was something that the Court could see embedded in structures and in institutional practices, and as such could see that there were wrongs that could be righted. And I think we need to go back to understanding the way in which white

supremacy and black inferiority have a corporeal existence, that it's not just a question of feeling and it's not just a question of bad attitudes, and that we can find some ways to use the law to deal with the concrete.

PROFESSOR TUSHNET: The time has come to wrap this up. I'm not going to say very much as a summary. You have all been exposed to what I regard as an extremely rich set of presentations.

I think it's almost a standard line now to observe in connection with events like this to the point that it's become a cliché really, that a hundred years ago W. E. DuBois wrote that the problem of the twentieth century was the problem of the color line. And fifty years after *Brown*, I think we're able to say that the problem of the twenty-first century may well be the problem of the color line. One thing to think about in connection with that observation is whether our understanding of the nature of the problem has changed or deepened, whether we know more about what the nature of the problem is because of a hundred years of social learning. And in connection with an event like this—for you as potential lawyers, for us as law professors—is there something special that our conversations today may tell us about what the law can contribute to either the understanding of the problem of the color line? Or to the extent that there's some hope of addressing that problem, is there something that the law can contribute to addressing the problem of the color line?

With that I thank you for your attendance today and I hope that you found it profitable.



