Washington University Law Review

Volume 1976 | Issue 2

January 1976

Segregation and the Fourteenth Amendment in the States: A Survey of State Segregation Laws 1865-1953

Francis H. Heller

BOOK REVIEW

SEGREGATION AND THE FOURTEENTH AMENDMENT IN THE STATES: *A Survey of State Segregation Laws 1865-1953; Prepared for United States Supreme Court in re: Brown vs. Board of Education of Topeka.*[1] Edited by Bernard D. Reams, Jr.,[2] and Paul E. Wilson.[3] Buffalo, N.Y.: William S. Hein & Co. 1975. Pp. xiv, 761. $27.50.

Philip B. Kurland described *Brown v. Board of Education* as a symbol of change for the entire country in the resolution of the deepest and most provocative problem that the country has ever faced."[4] Bernard Schwartz compared *Brown's* impact on American society to "that caused by political revolution or military conflict."[5] "*Brown*," wrote Yale Kamisar, "is a momentous decision" with consequences that "cannot begin to be measured by cold statistics. . . . White America was never to be the same after *Brown*."[6]

Other commentators have been more disparaging in characterizing what are now known as the *School Desegregation Cases*.[7] Polemics against the Warren Court often begin with severe criticism of the *Brown* decision.[8] (In fact, however, eight members of the Vinson Court, joined and assuredly led by new Chief Justice Warren, decided *Brown*; furthermore, the Vinson Court's ruling in *Sweatt v. Painter*[9] had had clearly paved the way for *Brown*.)[10]

---

1. 347 U.S. 483 (1954).
2. Professor of Law and Law Librarian, Washington University.
3. Kane Professor of Law, University of Kansas.
4. P. KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT 79 (1970).
5. B. SCHWARTZ, THE LAW IN AMERICA 241 (1974).
6. KAMISAR, *The School Desegregation Cases in Retrospect*, in ARGUMENT xxiii-xxv (L. Friedman ed. 1969) [hereinafter cited as ARGUMENT]. The order of the quoted sentences has been rearranged from the original.
7. Perhaps the most notable scholarly critic was Alexander Bickel. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962), and A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970), both *passim*.
8. Typical of this literature is J. CARTER, THE WARREN COURT AND THE CONSTITUTION: A CRITICAL VIEW OF JUDICIAL ACTIVISM (1973).
9. 339 U.S. 629 (1950).
10. L. PFEFFER, THIS HONORABLE COURT: A HISTORY OF THE UNITED STATES SUPREME COURT 409-10 (1965); Mendelson, *The Politics of Judicial Activism*, 24 EMORY L.J. 43, 57 n.63 (1975).

Unquestionably, *Brown v. Board of Education* is destined to rank among the most important decisions in the Supreme Court's history, and to be discussed and criticized repeatedly.[11] The oral arguments before the Supreme Court were published seven years ago,[12] prefaced by an excellent essay by Yale Kamisar and a useful comment by Dr. Kenneth B. Clark on the sociological aspects of the case. Professors Reams and Wilson[13] have now provided another important ingredient of the *School Desegregation Cases*—a compilation of the states' responses to one of the questions the Supreme Court propounded when it set the cases[14] for reargument.[15]

The Court sought counsel's assistance in answering a number of questions regarding the fourteenth amendment's impact on segregated public schools. Two of the Court's inquiries concerned the intent of the Congress that submitted and the states that ratified the fourteenth amendment in 1868. Counsel were asked to gather any historical evidence indicating that in 1868, Congress and the states contemplated either that the fourteenth amendment required an immediate end to segregated public schools, or that it might be so construed by future Congresses or courts.[16]

---

11. *See, e.g.*, D. BERMAN, IT IS SO ORDERED: THE SUPREME COURT RULES ON SCHOOL DESEGREGATION (1966); R. KLUGER, SIMPLE JUSTICE (1976); KELLY, *The School Desegregation Case*, in QUARRELS THAT HAVE SHAPED THE CONSTITUTION (J. Garraty ed. 1966).

12. ARGUMENT, *supra* note 6.

13. Paul E. Wilson was Assistant Attorney General of Kansas from 1952 to 1957 and argued the *Brown* case for the State of Kansas. ARGUMENT 26-33, 263-72; Wilson, *Brown v. Board of Education Revisited*, 12 KAN. L. REV. 507 (1964).

14. *Briggs v. Elliott* (South Carolina), *Davis v. County School Bd. of Prince Edward County* (Virginia), and *Gebhart v. Belton* (Delaware) were heard and decided by the Supreme Court in conjunction with *Brown*. A District of Columbia case, *Bolling v. Sharpe*, was argued with these four cases but was the subject of a separate opinion, 347 U.S. 497 (1954), because the fourteenth amendment is not applicable to the District of Columbia.

15. 345 U.S. 972 (1953).

16. The Supreme Court's intermediate order of June 8, 1953, asked that

> [i]n their briefs and on oral argument counsel . . . discuss particularly . . . the following questions . . .
>
> 1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would require the immediate abolition of segregation in public schools?
>
> 2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment

Amassing evidence of this type was a challenging task, because of the often fragmentary condition of state legislative records and because the states retained the records in their respective capitals. Furthermore, counsel had little time to do the necessary research, since the Court handed down its order posing the questions only four months before the scheduled reargument.[17] Participating counsel therefore coordinated their efforts. The Virginia Attorney General's staff assumed responsibility for assembling evidence of the intent of the state legislatures that ratified the fourteenth amendment.[18] Counsel sent inquiries to (and received responses from) all thirty six states that were members of the Union when the amendment was proposed and rati-

---

(a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or

(b) that it would be within the judicial power in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

3. On the assumption that the answers to questions 2(a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

5. On the assumption on which questions 4(a) and (b) are based, and assuming further than this Court will exercise its equity powers to the end described in question 4(b)

(a) should this Court formulate detailed decrees in these cases;

(b) if so, what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

345 U.S. at 972-73 (1953).

17. The order posing the questions was handed down on June 8, 1953, and the cases were set for reargument on October 12, 1953. The October 12 reargument was postponed, however, and finally began on December 10, 1953. Wilson, *supra* note 13, at 523.

18. Brief for Appellees on Reargument, App. B, at 1, Briggs v. Elliott, 347 U.S. 483 (1954); SEGREGATION AND THE FOURTEENTH AMENDMENT IN THE STATES vii (B. Reams & P. Wilson eds. 1975) [hereinafter cited as Reams & Wilson].

Attorney General J. Lindsay Almond, Jr. later served as Governor of Virginia (1958-62) and Judge of the United States Court of Customs and Patent Appeals (1962-73). WHO'S WHO IN AMERICA 54 (30th ed. 1976); Wilson, *supra* note 13, at 521.

fied,[19] asking each state to provide a narrative statement and to answer the following eleven questions:

1. Did your state have a system of free public education at the time of the adoption of the Fourteenth Amendment (1868)?
2. When was the free public school system established in your state? Give constitution or statute reference to school establishment.
3. Has there been segregation by race in the public schools of your state at any time since their establishment? Give constitution or statute reference to establishment of such segregation by race and its abolition, if subsequently abolished.
4. Has segregation by race ever been established in your state for any other purpose, such as transportation, miscegenation, lodging, public institutions, public halls and restaurants? If so, specify date of institution and abolition, if any, and constitution or statute reference.
5. Are there any records of any kind—public or private—as to (a) the action taken by the legislature or convention in your state in the consideration of the Fourteenth Amendment, and (b) action taken by the legislature or constitutional convention in the establishment after 1868 of segregated public schools in your state? Are reports of debates available? If so, please identify and state where such reports may be found. Are Committee reports available? If so, please identify and state where such reports may be found. If there are records of other kinds, please identify such records and state where such records may be found.
6. Do these records indicate that the question of segregation by race in public schools or otherwise was considered by the legislature or convention of your state as it related to the adoption of the Fourteenth Amendment? If so, identify where the report of such consideration may be found and specify the consideration given.
7. Is there evidence of any character that the legislature or convention of your state that considered the ratification of the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand that (ratification of the Fourteenth Amendment) would abolish segregation in public schools? If so, state where such evidence may be found and specify what evidence shows.
8. Do the records in your state relating to the adoption of the Fourteenth Amendment in any way indicate an understanding (either affirmative or negative) (a) that future Congresses might, in the exercise of their power under Sec. 5 of the Amendment, abolish such segregation or (b) that it would be within the judicial power, in light of future condi-

19. Reams & Wilson vii.

tions, to construe the Amendment as abolishing such segregation of its own force?

9. Is there any general reference book as to the establishment and history of the public school system in your state? If so, please name the book and state where it may be found.

10. Has there ever been segregation of Indians in the public schools of your state? If so, give constitution or statute reference to establishment of such segregation and its abolition, if subsequently abolished. If Indians have not been segregated, how have they been classified?

11. Has there ever been segregation by sex in your state? If so, give constitution or statute reference to establishment of such segregation and its abolition, if subsequently abolished.[20]

The *Brown* opinion suggests that the Supreme Court was unimpressed by counsel's response to these questions. The Court acknowledged that reargument had "covered exhaustively consideration of the [Fourteenth] Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of of proponents and opponents of the Amendment."[21] The Court concluded, however, that "[t]his discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive."[22]

Professor Alfred H. Kelly, a constitutional historian who assisted the NAACP in preparing its response to the Court's questions, speculated that "advocate's overkill" provoked the Court's rather cavalier dismissal of the effort to furnish historical support for the decision. What counsel finally presented to the Court was, in Kelly's phrase, "law-office history . . . doctored, distorted, twisted, and suppressed . . . ."[23]

The specific responses compiled by Professors Reams and Wilson, of course, are largely factual. A statutory reference is not easily twisted or distorted, though one might wish to suppress it. Considering the eleven inquiries sent to the states, however, one may legitimately wonder why the last two questions were included. The issue before the Court was limited to discrimination against blacks. Why, then, the questions about women and Indians?[24] Perhaps an imaginative lawyer saw the possibility of a diversionary argument?

20. The questions appear in this form in each of the thirty-six responses.

21. Brown v. Board of Educ., 347 U.S. 483, 489 (1954).

22. *Id.*

23. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 144.

24. Interestingly, none of the briefs for appellees (appellant in the Delaware case) referred to the replies to these two questions.

The editors suggest that their compilation "may be useful to both the historian of the law and the practicing lawyer."[25] To be sure, this volume is a significant supplement to the story of the *School Desegregation Cases*. I am more dubious about the book's usefulness to the practitioner. Significant advancements in school desegregation litigation since *Brown*[26] have rendered the intent of legislatures a century ago largely irrelevant. Thus, the prime importance of the volume is its value as an historical record. For example, this book will permit a scholar to assess the extent to which participating counsel actually relied on the assembled data, and to what end. This assessment, in turn, will permit some observations on how lawyers use history—a topic that deserves illumination in light of the limited but suggestive examinations by Charles Miller[27] and Alfred Kelly.[28] Finally, and most importantly, this book presents another part of the story of a landmark decision. The editors deserve our thanks and plaudits for their efforts.

FRANCIS H. HELLER*

25. Reams & Wilson vii-viii.

26. For recent examples, see Pasadena City Bd. of Educ. v. Spangler, 44 U.S.L.W. 5114 (U.S. June 28, 1976) and Runyon v. McCrary, 96 S. Ct. 2586 (1976).

27. C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969).

28. Kelly, *supra* notes 11 & 23.

* Roy A. Roberts Professor of Law and Political Science, University of Kansas.