Preface

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Scope

The Topical Research Intern Program provides the opportunity for Service members and civilians of the Department of Defense (DoD) and U.S. Coast Guard to work on a diversity/equal opportunity project while on a 30-day tour of duty at the Institute. During their tour, the interns use a variety of primary and secondary source materials to compile research pertaining to an issue of importance to equal opportunity (EO) and equal employment opportunity (EEO) personnel, supervisors, and other leaders throughout the Services. The resulting publications (such as this one) are intended as resource and educational materials and do not represent official policy statements or endorsements by the DoD, U.S. Coast Guard or any of their agencies. The publications are distributed to EO/EEO personnel and senior officials to aid them in their duties. To reach the widest audience possible, the publications are posted on the Internet at: https://www.patrick.af.mil/deomi/deomi.htm.

The opinions expressed in this report are those of the author and should not be construed to represent the official position of DEOMI, the military Services, Department of Defense, or U.S. Coast Guard.

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Introduction

Race has shaped American history since the arrival of the first slave ships in 1619. In 1944, Swedish author Gunnar Myrdal wrote in his *An American Dilemma*: *The Negro Problem and Modern Democracy* (1944), "When we say there is a Negro problem in America what we mean is that Americans are worried about it. It is on their minds and on their consciences." Myrdal saw race relations in America as a moral issue at conflict with the mainstream American values of liberty, equality, justice, and fair opportunity for all citizens. Race relations have not only been influenced by changing conditions in American society but have also played a significant role in shaping America's character. Nowhere is this more evident than in our public schools – long a microcosm of society (Salomone, 1986).

Two hundred years of conflict, ambivalence, and incremental change have proven the complexity of arriving at a simple or quick solution to the racial question. The struggle to gain equality for African Americans was fought on the battlefield during the 19th century. In the 20th century, this struggle shifted to Congress, federal courts, and neighborhood schools. The process of using public schools to integrate society raised issues concerning the role of the judiciary in establishing public policy as well as the federal government in overriding the individual and local community interest (Ibid.).

America is a republic of laws whose history has often been made in the courts. No Supreme Court decisions have affected our society more than the two rulings in *Brown v. Board of Education of Topeka* on May 17, 1954 and May 31, 1955. Legal scholar J. Harvie Wilkerson III has stated, "Very little could have been accomplished in mid-century America without the Supreme Court….*Brown* may be the most important political, social, and legal event in America's twentieth-century history" (Patterson, 2001).

The change in race relations in the last 50 years has dimmed the collective memory of our nation as to what it meant to be a Negro citizen in the South in 1954. All public schools and accommodations were segregated; only a minute percentage of Blacks were registered to vote; Black public office holders were nearly non-existent; family incomes for Blacks were one-half the median level of Whites, and literacy rates were appalling. African Americans were not only second-class citizens, but were subjected to Jim Crow laws designed to perpetuate racial segregation (Levin, 1975).

In honor of Black History Month 2004 and the 50th Anniversary of the *Brown* decisions and their impact on many facets of American society, this booklet will examine these two rulings and subsequent affirmative action programs that have developed largely because of the momentum of the equality mandate set in motion by the decisions. The background of segregation and conditions faced by African Americans prior to the *Brown* rulings will give the reader a historical perspective from which to view the importance of these cases. Throughout this work, the terms African American and Black will be used interchangeably. The term Negro or Colored are used in a historical context and are not meant to portray any negative connotation.

Segregation before *Brown*

Government involvement with the race question began in 1863 with the Emancipation Proclamation freeing the slaves. The Thirteenth Amendment of the Constitution two years later officially ended slavery and created a feeling of optimism among the Black population. This optimism was tempered by the fact that racist sentiments throughout the nation still restricted Blacks from holding public office, voting, purchasing land within city limits, and in some cases, from entering a town without a permit (Salomone, 1986).

The Fourteenth Amendment guaranteed "equal protection of the laws" to all citizens. Section 1 reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (Greenberg & Hill, 1979).

The powers granted to Congress by the Amendment were tested early in the Supreme Court. In 1883, the Court declared Article 1 of the Civil Rights Act of 1875 unconstitutional. This law gave Blacks equal access with Whites to inns, theaters, and public transportation. The Court held that discrimination in these areas was a private matter not protected by the Fourteenth Amendment prohibition against state action. Between 1887 and 1891, eight states enacted legislation that required railroads to maintain separate facilities for Blacks and Whites (Salomone, 1986).

By 1896, many of the protections of Federal Reconstruction legislation had been whittled away. State-imposed racial segregation was practically the rule in the South and in some places in the North after having been recognized as constitutional by the Supreme Court. All legal separation since 1896 relied on the separate-but-equal doctrine from the case *Plessy v. Ferguson* (1896). Homer Plessy, who was one-eighth Negro and seven-eighths White had entered a railway coach to travel from New Orleans to Covington, Louisiana and was told that he must travel in the "Negroes Only" coach as required by Louisiana law. Plessy refused to move and was taken to jail. Although Plessy first argued that he was not a Negro, he later petitioned the Louisiana Supreme Court to prohibit District Court Judge Ferguson from going forth with the trial on the grounds that the segregation law was unconstitutional. After his plea was rejected by the

Louisiana Supreme Court, he appealed to the U.S. Supreme Court which upheld the Louisiana law (Greenberg & Hill, 1979).

The Court Opinion of *Plessy v. Ferguson*

This is the best known of the early segregation cases. In the opinion of the Court, Justice Billings Brown asserted that distinctions based on race did not run afoul of either the Thirteenth or Fourteenth Amendments of the Constitution, the two Civil War Amendments that abolished slavery and secured the legal rights of former slaves. Nowhere in the opinion are the words "separate but equal" found. However, the ruling gave approval to enforced segregation as long as the law did not make facilities for Blacks inferior to those of Whites. Speaking of the Fourteenth Amendment, Justice Brown writes:

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competencies of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced…(http://usinfo.state.gov.usa/infousa/facts/democrac/33.htm).

Justice Brown continues in the opinion: "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority" (Ibid.). He also writes:

> The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals…(Ibid.).

In his famous dissent to the *Plessy* decision, Justice John Marshall Harlan, stated the following:

> In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those are not involved. Indeed, such legislation, as that here in question, is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by everyone within the United States…(Ibid.).

He further writes:

> But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful (Ibid.).

Vigorously attacking the reasons behind the majority decision, Justice Harlan's dissent lays bare the true racial motive behind the ruling:

> Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons…(Greenberg & Hill, 1979).

Justice Harlan's words became a rallying cry for those determined to change the *Plessy* decision. In addition to having placed a "badge of servitude" upon the Negro, he added:

> What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana (Greenberg & Hill, 1979).

Here is a final thought from Justice Harlan in his dissent:

> The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law (http://usinfo.state.gov/usa/infousa/facts/democrac/33.htm).

The Era of Jim Crow

The judicially-sanctioned, separate-but-equal doctrine as established by the *Plessy* decision led to implementation of Jim Crow laws throughout the South. Jim Crow was the name of a character in minstrelsy where White performers in blackface used African American stereotypes in songs and dances. Although the origins of the word are unclear, Jim Crow had its origins in the "Black Codes" imposed on African Americans after the Civil War. Jim Crow became a strict, unwritten code of behavior governing interracial relationships. Under Jim Crow etiquette, Blacks were denied all social forms of respect. Even adult Black men were addressed as "boy" (http://www.africana.com/research/ /encarta/tt_026.asp).

This state-sponsored, constitutionally protected system of racial discrimination permitted the separation of Blacks and Whites in schools, housing, jobs, public accommodations, cemeteries, hospitals, and labor unions (Salomone, 1986). Signs reading "Whites Only" or "Colored" hung over drinking fountains, doors of restaurants, movie theaters, and other public places. Along with segregation, Blacks were subjected to discriminatory practices in jobs and housing. Whether by law or custom, these obstacles to equality went by the name of Jim Crow (http://www.african.com/research/ encarta/tt_026.asp).

Election officials often denied Blacks their constitutional right to vote through clever manipulation of polling requirements. Devices such as literacy tests and poll taxes administered with trick questions effectively barred most Blacks from voting. Of more than 130,000 Blacks registered to vote in Louisiana in 1896, only 1,342 were on the rolls by 1904 (Greenberg & Hill, 1979).

Constant personal humiliation, lack of economic opportunity, and inferior segregated educational facilities were decisive factors prompting thousands of African Americans to leave the South in the Great Migration of the 1920's to 1940's. Many Blacks found conditions in the North little better (http://www.africana.com/research/ encarta/tt_026.asp). Such were the conditions faced by African Americans in their attempt to become equal citizens. These were the hurdles faced in the fight against Jim Crow (Patterson, 2001).

Race and Education before *Brown*

State enforced segregation of schools continued well into the 20th century. Capital expenditures on White students far outweighed the expenditure for Black students in most Southern and border states. The system was far more separate than equal. This unequal state of affairs became the target of the NAACP (National Association for the Advancement of Colored People) (Salomone, 1986).

Founded on February 12, 1909, by a multiracial group of activists, the NAACP is the oldest civil rights organization in the United States. This organization is built on the

individual and collective courage of people of all races and religious denominations united on the premise that all men are created equal (http://www.naacp.org/past_future/naacptimeline.shtml). By 1921, the NAACP had grown to over 400 local organizations and had won three Court decisions on voting, housing, and jury cases. In the late 1930's, the NAACP's Legal Defense Fund (LDF) was created as a major source of funds for school desegregation litigation. The NAACP formulated a two-pronged strategy to confront segregation – first to sue on behalf of schools on the theory that a dual-racial system was cost prohibitive to maintain and secondly, to pursue desegregation on the university level where it was thought least likely to encounter serious resistance. Finally, desegregation would take aim at the elementary and secondary schools where school choice was closely tied to choice of residence (Salomone, 1986).

Interestingly, a founder of the NAACP, W.E.B. DuBois, the prolific African American author, philosopher, first Black to receive a Ph.D. from Harvard University, and a forceful crusader for integration, had become disillusioned by the late 1930's. In a controversial essay from 1935 entitled "Does the Negro Need Separate Schools?" he stated: "Theoretically the Negro needs neither segregated nor mixed schools. What he needs is Education." However, Dubois' ideas did not receive support from a majority of Black leaders (Patterson, 2001).

Between 1938 and 1950, the NAACP challenged the separate-but-equal doctrine in a variety of cases before the Supreme Court. In *State of Missouri ex rel. Gaines v. Canada* (1938) and *Sipuel v. Board of Regents* (1948), the Court mandated that the state provide equal, albeit separate facilities for Blacks and Whites. The Court rejected the option offered by the state for Black applicants to attend desegregated law schools in other states. In neither *Gaines* nor *Sipuel* was any in-state legal education provided for Blacks (Salomone, 1986). Writing for the majority, Chief Justice Charles Evans Hughes said "a privilege has been created for white [*sic*] students which is denied to Negroes by reason of their race" (Patterson, 2001). Although an encouraging victory, the state of Missouri began to set up a clearly inferior law school for Blacks that forced the NAACP to resume its fight (Ibid.). In 1939, the plaintiff, Gaines, disappeared and never resurfaced. Some suspect that he was either murdered or accepted a bribe to disappear. The NAACP no longer had a plaintiff and was forced to abandon its efforts after years of expensive litigation (Ibid.). Such were the conditions faced by African Americans in their attempt to become equal citizens.

The NAACP concentrated its litigation efforts in the 1930's and 40's against publicly funded institutions with the hope of making segregated states live up to the equal part of the separate-but-equal doctrine. Other than Howard University, there was only one other accredited medical school for Blacks in the South - (Meharry in Nashville), as opposed to 29 institutions for Whites. Blacks had one provisionally accredited law school compared to 40 for Whites. Nowhere could a Black pursue doctorate level studies (Patterson, 2001).

The *Sweatt* and *McLaurin* Decisions

Twelve years after *Gaines*, on June 5, 1950, the Supreme Court ruled in favor of the NAACP in two higher education cases. The first case involved Herman Sweatt, a Houston mail carrier who had been rejected on racial grounds when applying for admission to the state law school. Additionally, the Court also ruled in favor of a 68-year-old Black schoolteacher named George McLaurin who had applied to the all-White University of Oklahoma to be accepted into a Doctorate of Education program.

In the *Sweatt* case, the state set up a poorly supported law school for Blacks in a basement. The Court ruled unanimously that it could not "find substantial equality in the educational facilities offered white [*sic*] and Negro law students by the state" (Ibid.).

Some of the physical differences between the University of Texas Law School and the Negro school were: 65,000 volumes for White students compared to 10,000 volumes for Blacks, 3 librarians for Whites, and none for Blacks, 16 full-time and 3 part-time professors for Whites and 3 professors who did double duty teaching both Whites and Blacks (Greenberg & Hill, 1979). Robert Redfield, a lawyer, Chairman of the Department of Anthropology at the University of Chicago, and former Dean of Social Sciences there, testified as to the reasonableness of educational segregation at the trial. He stated:

> My opinion is that segregation has effects on the student which are unfavorable to the full realization of the objectives of education…it prevents the student from the full, effective and economical coming to understand the nature and capacity of the group from which he is segregated. My comment therefore applies to both whites [*sic*] and Negroes, and as one of the objectives of education is the full and sympathetic understanding of the principal groups in the system in which the individual is to function as a citizen…segregation intensifies suspicion and distrust between Negroes and whites [*sec*], and suspicion and distrust are not favorable conditions either for the acquisition and conduct of an education, or for the discharge of duties as a citizen (Greenberg & Hill, 1979).

Sweatt's fight extended not only to Texas, but against briefs filed in eleven other Southern and border states (Patterson, 2001). Sweatt suffered intimidation from Whites, a cross was burned next to his car, and his tires were slashed. He eventually became ill and flunked out of law school (Ibid.).

In the *McLaurin* case, the state had reluctantly admitted him in 1949 while forcing him to sit in an anteroom off the classroom where instruction was given. He had a segregated desk in the library behind a pile of magazines. In the cafeteria he had to eat in an alcove by himself at a different hour from White students. McLaurin complained of the humiliation and the handicap he experienced in doing effective work (Ibid.). The Solicitor General of the United States filed an *amicus curiae* (friend of the Court) brief in these cases urging that the *Plessy* doctrine be overruled. This brief made two major points: the psychological harm inflicted on Negroes because of segregation and the harm caused by segregation in its relations with foreign countries (Greenberg & Hill, 1979). The brief even contained quotes from press organizations behind the iron curtain and from Communist representatives at the United Nations. The Secretary of State was quoted:

> …the existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries. We are reminded over and over by some foreign newspapers and spokesmen that our treatment of various minorities leaves much to be desired. While sometimes these pronouncements are exaggerated and unjustified, they all too frequently point with accuracy to some form of discrimination because of race, creed, color, or national origins. Frequently we find it next to impossible to formulate a satisfactory answer to our critics in other countries; the gap between the things we stand for in principle and the facts of a particular situation may be too wide to be bridged…I think it is obvious…that the existence of discrimination against minority groups in the United States is a handicap in our relations with other countries (Ibid.).

The lead lawyer in these trials was to play an ever-greater role in the fight to end segregation. His name was Thurgood Marshall.

Thurgood Marshall, Pioneer

No discussion of school desegregation would be complete without an examination of the principal player in the struggle. Thurgood Marshall and his legal team decided to challenge school segregation in 1950. His tenure as Chief Counsel for the NAACP and founder of its Legal Defense and Educational Fund made him one of America's best-known and influential lawyers (http://www.africana.com/archive/articles/tt_112.asp). He was born on July 2, 1908, in Baltimore, Maryland, in a region where many White people were proud of being south of the Mason-Dixon line (Davis & Clark, 1992). Marshall grew up in a middle class neighborhood in west Baltimore, a religiously and racially mixed area where Whites and Blacks, Jews, Episcopalians, and Catholics resided. Some of his ancestors had been slaves. His father had served as a steward of an all-White yacht club on the Chesapeake Bay and his mother was an elementary school teacher in an all-Black school. His parents instilled him with racial pride and self-confidence while their experiences taught him what discrimination and inequality meant (Patterson, 2001). After graduating from Baltimore's Douglass High School, he attended Lincoln University in Pennsylvania where he graduated with honors in 1930. Denied admission to the University of Maryland Law School in Baltimore, because it excluded Blacks, an institution he later challenged and defeated in *Murray v. University of Maryland* (1936), he entered law school at Howard University in Washington, D.C. (http://www.africana.com/archive/articles/tt_112.asp).

Marshall was often a bit earthy for some of the more urbane Black attorneys with whom he worked. He normally spoke with a refined and gentle Southern accent that he could switch off at an instance and replace with a dialect full of double negatives. He often relied on his sense of humor to shock White attorneys. While leading a discussion of the Supreme Court's power to rule in segregation cases, he remarked as if addressing judges in court: "White bosses, you can do anything you want 'cause you got de power" (Patterson, 2001). He had a common touch that endeared him to many southern Blacks who often risked their lives and livelihoods to sign on as plaintiffs against racial injustices. Marshall also risked his life in many of his travels in the South where he was careful not to violate Jim Crow laws.

He once remarked: "I've got back trouble, you know…a big yellow stripe down the middle" (Ibid.). An emerging leadership figure in the Black Civil Rights movement, he was building a constituency as early as 1935 when he served as Secretary of the National Lawyers Guild (a Negro counterpart of the American Bar Association). He thrived on good company and laughter without losing sight of his main mission (Kluger, 1975). Marshall saw his task as not so much winning his cases, as getting a fair hearing on the record for subsequent appeal to higher and possibly friendlier courts (Ibid.).

Between 1939 and the early 1950's, Marshall and the Legal Defense and Educational Fund (LDF) were involved in twenty elementary and high school segregation cases, a dozen cases of higher education, as well as cases involving housing, railway and bus companies, recreation facilities, and voting. They also handled numerous courts-martial and criminal cases. Cases involving sexual assault were especially grave due to

the death penalty for rape (Patterson, 2001). Marshall handled every type of case in places where there were too few Black attorneys with the talent and courage to confront racism and challenge it for what it was (Kluger, 1975).

De jure and *De facto* Segregation

De jure is a latin phrase meaning "by right" or "legally" that has been incorporated into English legal jargon. Its counterpart, *de facto* means "in fact but not in law" (http://www.bartleby.com/68/7/1707.html). Southerners often accused Northerners of hypocrisy when criticized over the South's *de jure* segregation of its schools. The North was not challenged directly by desegregation legislation even though in housing and schools it was *de facto* racially segregated. *De facto* segregation reflected two important aspects of America's public educational system; schools depended on local property taxes that varied from town to town; and class divisions normally followed racial divisions (Patterson, 2001). The system has been criticized as highly unequal – the wealthier the town, the better financed the schools. Those capable of paying higher property taxes could afford to move to the best districts in the wealthiest towns. Many relocated precisely to avoid sending their children to school with lower-income Blacks (Ibid.).

De facto segregation did not result entirely from private residence decisions. Public policies such as zoning, school district boundaries, school bus routes, and development of new school sites were implemented by elected (as well as non-elected) officials to separate Black and White children (Ibid.). In reality, such publicly sanctioned and intentional *de facto* segregation was little different from *de jure* segregation under Jim Crow laws. It lent credence to an old saying: "In the South, white people don't mind how close a Negro gets to them as long as he doesn't rise too high [economically or socially], while in the North people don't mind how high a Negro gets as long as he doesn't get too close" (Ibid.).

Desegregation

Desegregation advocates were enthusiastic over the *Sweatt* and *McLaurin* victories. They were certain that racially mixed schools would have the greatest impact in achieving the cherished ideal of equal opportunity. They felt Black students who were isolated from associating and competing with White students would never know if they were inadequate or inferior (Patterson, 2001). Thurgood Marshall and others had long since targeted schools as their primary focus in the belief that desegregation had to lead to a betterment of conditions for all Black people. Marshall was aware of studies done by one noted psychologist, Dr. Kenneth Clark of Columbia University, that indicated the damaging effects of segregation on the psychological and emotional well-being of Black children beginning in childhood (Davis & Clark, 1992). Several weeks after the *Sweatt* and *McLaurin* decisions, Marshall urged the NAACP to adopt a resolution condemning segregation in public education. The resolution declared that all NAACP litigation would henceforth "be aimed at obtaining education on a non-segregated basis and that no relief

other than that will be acceptable" (Ibid.). No one was sure exactly how desegregated schools would work in practice or of the vehement reaction such legislation would produce (Patterson, 2001).

Clarendon County, South Carolina

Sprawled across the middle of the state at the foot of the Blue Ridge Mountains, Clarendon County, South Carolina, in the 1950's, was predominantly agricultural, poor, and Black. After the Civil War, Blacks left the coastal plantations where they lived and worked as slaves and moved inland onto Clarendon's lowlands to eke out their existence growing corn, soybeans, and tobacco (Davis & Clark, 1992). The town of Summerton (currently located off Interstate 95) would become the focal point of legal proceedings.

In May 1950, Harry Briggs, Sr., a 34-year-old Navy veteran who pumped gas and repaired cars in his hometown of Summerton, brought an equalization suit on behalf of one of his five children, Harry, Jr., in U.S. District Court (Ibid.). Briggs' wife Liza was a chambermaid at a local hotel. The Briggs' were joined in their legal action by other Summerton parents of elementary-school-age Black children. The case was filed in Federal District Court against the School Board of Clarendon County for failing to provide equal access to public education as segregated schools were vastly inferior and provided no transportation to African American students (http://www.nps.gov/brvb/brown2.htm). Briggs and his wife were fired from their jobs and harassed by Whites as a result of their legal action, but they refused to drop the lawsuit. The situation in Summerton came to the attention of the National Headquarters of the NAACP in New York where Thurgood Marshall decided to take on the case (Davis & Clark, 1992).

Although Clarendon County was over 70% Black, more than half the public school funds went to White schools. Per capita outlay for White students was nearly one hundred times as great as for Blacks (Ibid.). Teacher salaries were also disparate, but the Briggs' had won an earlier lawsuit challenging that situation. Marshall was heartened when the judge assigned to the case was J. Waties Waring, the White judge who had ruled in favor of the Briggs in the equalization suit over teachers' pay. Although not originally favorable to Blacks, Waring was persuaded by his wife to read Myrdal's *An American Dilemma* to gain an accurate understanding of the mentality of White southerners toward the Black race. His wife publicly expressed her view that "we don't have a Negro problem in the South; we have a White problem" (Ibid.).

At a November 17, 1950 pre-trial conference with the judge, Marshall was told that his brief did not plead segregation strongly enough and that it should be revised to include a frontal attack on segregation. Waring told Marshall, "You've partially raised the issue, but of course the court can and may do what has been done so very, very often before: decide a case on equal facilities…it's very easy to decide this case on that issue" (Ibid.). Marshall was reluctant to follow the course suggested by Waring given the demographics of Clarendon County. Desegregation would entail not only allowing Blacks to attend White schools, but it would also force White children to attend schools

that were predominately Black. This made the *Briggs* case risky because desegregation would take on the socially and politically unpalatable specter of forced integration (Ibid.). Marshall gambled and followed the judge's recommendation.

Marshall argued against segregation and its effects on the developing minds of Black children supported by testimonies of social psychologists. The Court dismissed his argument and the testimony by citing the *Plessy* decision. However, the Court refused final adjudication and, in January 1952, passed the case to the Supreme Court (Ibid.).

Kenneth Clark, Doll Man

Thurgood Marshall and LDF attorneys enlisted the help of the 37-year-old social psychologist and Assistant Professor at City College of New York, Kenneth Clark, who would later become the nation's most well-known and highly regarded Black social scientist. The author of many works including *Dark Ghetto* (assigned reading at many universities), Clark, in 1951, was neither well-known nor highly regarded (Kluger, 1975). Marshall and the LDF would be taking a chance by using him as a professional witness in testimony regarding self-esteem of African American children. Clark and his wife Mamie (also a psychologist), had developed a series of projective tests that disclosed just how early in life Black children realized that success, beauty, and status were determined by the whiteness of ones' skin. Clark used four dolls that he had purchased for fifty cents each at a five-and-ten cent store in New York. Each doll measured a foot in height and was sexually neuter; the only difference being two were pink and two were brown (Ibid.). To demonstrate the damage caused by racism, Clark's doll test consisted of the following experiments: Negro children in the five-to-seven year range were shown four identical dolls, two of them brown and two white ones. To test the understanding of their own awareness of color (or Negritude), they were asked to "give me the white doll" and to "give me the colored doll." Three-quarters of the children did so successfully. Then the children were asked the following questions: (1) "Give me the doll you like to play with" or "the doll you like best." (2) "Give me the doll that is the nice doll." (3) "Give me the doll that looks bad." (4) "Give me the doll that is a nice color." The majority of Negro children tested in diverse communities, such as, Philadelphia, Boston, and cities in Arkansas, indicated a preference for the white doll and a rejection of the brown doll. This was the case even with three-year-olds (Kluger, 1975). The Clarks also administered a coloring test with similar results. Clark himself was disturbed by the tests and did not reveal the findings for several years. The extent of the damage caused by racism was surprising even to researchers. Clark remarked:

> Some of these children, particularly in the North, were reduced to crying
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> when presented with the dolls and asked to identify with them. They
>
> looked at me as if I were the devil for putting them in this predicament.
>
> Let me tell you, it was a traumatic experience for me as well (Ibid.).

The tests confirmed what Clark and others had suspected – that racial prejudice and its social expectations were formed at a very early age. If anything was to be done about the problem, it would have to begin before despair and self-hatred took their toll on the children (Ibid.). From a legalistic viewpoint, it would be necessary to isolate the psychological damage caused specifically by school segregation as opposed to other manifestations of prejudice in society as a whole (Ibid.). Such a distinction would be impossible to make even though the effect of the early school years on a person's life were beyond dispute. America's best-known social philosopher, John Dewey, wrote:

> It had become the office of the school environment to balance the various elements in the social environment, and to see to it that each individual gets an opportunity to escape from the limitations of the social group in which he was born, and to come into living contact with a broader environment. (Ibid.).

Not all of the attorneys assembled by Marshall were enthusiastic about Kenneth Clark's participation. His dolls and the tests were an object of derision by many and the social science approach itself was viewed as unlikely to sway the justices of the Court (Ibid.). Professor Edmond Cahn, one of our great legal philosophers, stated that the social science testimony used in the *Brown* decision was "a fact of common knowledge." He also stated that "segregation does involve stigma; the community knows it does" (Levin, 1975). The *Brown* decision did not directly refer to the work of Dr. Clark who ultimately testified in three of the consolidated cases of *Brown*, as more than 40 scientists and educators in total contributed to testimony that filled four volumes of judicial record (Ibid.).

The *Brown* Decisions

School segregation was the norm across America in the early 1950's. The separate-but-equal doctrine failed Blacks not only in the state of the physical facilities of the school buildings, but also in the distance some Black children were required to travel to attend school. In Topeka, Kansas, a Black third-grader, Linda Brown, had to walk one mile through a railroad switchyard to get to her Black elementary school, even though a White elementary school was located seven blocks from her home (http://www.watson.org/~lisa/blackhistory/early-civilrights/brown.html). Her father, Oliver Brown, tried to enroll her in the White school, but was refused. Brown sought the help of the Topeka Branch of the NAACP to assist him in his challenge to end segregation in the schools. The NAACP felt that with Brown, they had the right complaint and the right plaintiff.

Brown, a 32-year-old World War II veteran, was a welder in the shops of the Santa Fe Railroad and Assistant Pastor of a local Methodist Church. He believed that God approved of his participation in this case. Segregationists could not portray Oliver

Brown as a radical (Patterson, 2001). Other parents joined in the injunction. The case was heard in the U.S. District Court of Kansas, from June 25-26, 1951. The NAACP argued that segregated schools sent a message to Black children that they were inferior to Whites and that the schools were inherently unequal (http://www.watson.org/~lisa/blackhistory/early-civilrights/brown.html).

The Board of Education's defense was that since segregation in Topeka and elsewhere pervaded many aspects of life, segregated schools simply prepared Black children for the segregation they would face as adults. The Board also argued that segregated Black schools had produced great Black Americans, such as, Frederick Douglass, Booker T. Washington, and George Washington Carver. The request for an injunction placed the Court in a difficult position. The judges agreed with the testimony of expert witnesses. They wrote:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law, for the policy of separating races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would normally receive in a racially integrated school system (Patterson, 2001).

However, the precedent established in *Plessy v. Ferguson* allowed separate-but-equal school systems and no Supreme Court decision had yet overturned *Plessy*. The District Court felt compelled to rule in favor of the Board of Education (http://www.watson.org/~lisa/blackhistory/early-civilrights/brown.html). Brown and the NAACP appealed to the Supreme Court on October 1, 1951, and their case was combined with other cases challenging school segregation in South Carolina, Virginia, Delaware, and the District of Columbia (Ibid.). The combined cases became known as *Oliver L. Brown et. al. vs. The Board of Education of Topeka* (1954) (http://brownboard.org/summary/backgrnd.htm).

The Court Decides

Chief Justice Earl Warren mended a fractured Supreme Court in 1953-54, as his friendly and open manner enabled him to establish cordial relations with his colleagues. When the segregation cases came to the Court in late 1953, relations were more harmonious than had been for some time. Just as Warren desperately wanted a unanimous or near- unanimous decision in the school cases, he also wanted to avoid blaming the South or take any precipitous action that would inflame the region. He worked diligently to convince his colleagues, even winning over Justice Reed, who had been the last holdout. Warren told Reed that he stood alone and that a dissent could encourage resistance in the South. Reed acquiesced when he was assured that Warren's opinion would give the South time to dismantle segregation. By March of 1954, Warren felt he would have his way (Patterson, 2001).

Warren assigned himself the task of writing the opinion and the justices agreed on a compromise: they would declare *de jure* school segregation unconstitutional, but would ask for a hearing in the fall term to decide on the best means of implementing the decision (Ibid.). Warren wanted his decision "prepared on the theory that [it] should be short, readable by the lay public, non-rhetorical, unemotional, and, above all, non-accusatory" (Ibid.).

On May 17, 1954, at 12:52 p.m., America would finally be on the road to the equality promised to all of its citizens in the Declaration of Independence. Chief Justice Warren read the unanimous decision of *Oliver Brown et. al. v. Board of Education of Topeka* (1954). In his first major opinion as Chief Justice, the opinion was short as promised - only eleven pages (Patterson, 2001). After alluding to previous cases such as *Gaines, Sweatt*, and *McLaurin*, he said:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may

> reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms (http://www2.law.cornell.edu/).

Up to this point in the reading, the Chief Justice had not yet stated what the Court had decided. The suspense was mounting in the courtroom when he asked "Does segregation of children in public schools solely on the basis of race…deprive the children of the minority group of equal educational opportunities?" He answered, "We believe that it does." Shortly thereafter he stated what would become perhaps the most famous paragraph in recent judicial history:

> To separate them [black children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone (Patterson, 2001).

This paragraph especially relied heavily on the testimony of Dr. Clark and other social scientists that would come under fire from legal purists. Warren observed that the *Plessy* decision had also relied on psychological theories including the fallacy that any stigma attached to Blacks because they were relegated to nonwhite railway cars came entirely from the eye of the beholder and not from any White racist policy (Ibid.). Responding to this theory, Warren stated:

> Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding [by the Kansas Court in 1951 that racial segregation leads to inferiority and damages the motivation to learn] is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected (Ibid.).

This assertion was stated in the now famous *Footnote Eleven*, as it came to be called. This footnote listed the works of seven social scientists cited in briefs by lawyers for the Legal Defense Fund. The list started with an article by Dr. Clark and ended with Gunnar Myrdal's *An American Dilemma* (Ibid.).

The final two paragraphs of the decision made clear the fundamental point against *Plessy*. "We conclude" (at this point Warren departed from his printed text and added the word "unanimously") (Patterson, 2001):

> that in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others are similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment" (http://www2.law.cornell.edu/cgi-bin/foli…s={body}/hit_headings/words=4/hits_only?).

The closing paragraph dealt briefly with the implementation of the ruling. This was the part of the decision that had delayed the ruling for over a year, and Warren explained that the Court would set aside time in the fall term to hear evidence from various attorney generals throughout the South concerning means of compliance (Patterson, 2001). The Supreme Court ruling in the first *Brown* decision did not abolish segregation in other public areas nor mandate that desegregation be accomplished by a specific time. It did, however, declare the segregation that existed in 21 states as unconstitutional. The dream of total or even partial desegregation was, however, still a distant prospect.

Implementation-*Brown II*

One of the major issues to arise out of the first *Brown* decision was the question of what rights would flow to Black children as a result of the equal protection clause of the Fourteenth Amendment – were they to attend integrated schools or merely be free of state-imposed segregation? (Salomone,1986). The 1954 decision had refrained from setting forth implementation specifics, delaying the inevitable and postponing how desegregation was to be accomplished until the following term. Oral argument on *Brown II* did not begin until April 11, 1955 (Wilkinson, 1979). NAACP lawyers insisted integration begin immediately in affected districts, preferably in September of 1955, but no later than September of 1956. A gradual implementation was something Marshall and

the NAACP did not want. Conversely, the Southern states sought a gradual implementation with infinity as the deadline (Ibid.).

On May 31, 1955, fifty-four weeks after the first *Brown* decision, an unanimous Court addressed its implementation. In language meant not to offend Southern sensibilities and sought to persuade and mediate rather than dictate or demand, *Brown II* set no definite date for desegregation to occur (Ibid.). Implementation was to be left in the hands of local school districts. The ruling stated:

> School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the actions of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal (Greenberg & Hill, 1979).

The final paragraph contained an ambiguous phrase that Black plaintiffs must be admitted to public schools on a racially nondiscriminatory basis "with all deliberate speed." Speed was a word that meant different things to different groups. "In the grand tradition of politics, there was in that phrase something for everyone. "Speed" was promised to the long-denied Negro. And the South was permitted to "deliberate," to move, as was its wont, [*sic*], in the fullness of time" (Wilkinson, 1979).

Given the racial climate in the mid 1950's, *Brown II* seemed a political compromise. Integration could be accomplished by dividing existing school populations into geographic zones, but that, in turn, would likely promote gerrymandering of school districts by local authorities (Wilkinson, 1979). The attitude of the South was one of noticeable relief as demonstrated by the following quote from a Southern newspaper: "The Court's wisdom, we think, will dissipate the thunderhead of turmoil and violence which had been gathering in Southern skies since the Court held school segregation unconstitutional a year ago…" (Ibid.). *Brown II* implied that local resistance could indeed delay desegregation. School administrators would be allowed to move with all deliberate speed in order to work out logistics, such as, redistricting, developing new school bus routes, and the reassignment of students and teachers. Deliberate speed was not meant to imply granting time to delay in order to satisfy local racial opinions (Patterson, 2001).

By allowing gradual implementation and subsequent litigation in local courts, some scholars, such as, Professor Charles Black have argued that the Court paid a price

by not demanding immediate compliance with *Brown I*. He stated that the Court "asked of the laity an understanding of which lawyers are scarcely capable – an understanding that something could be unlawful, while it was nevertheless lawful to continue it for an indefinite time" (Wilkinson, 1979). It could be seen as yet another mistreatment of the Black race – to declare a constitutional right and in this particular instance to postpone its implementation, undermined the respect many Americans felt for the law. The Court had issued a decree in *Brown I* that the public (especially the South) thought disruptive and political branches were reluctant to support, while *Brown II* allowed the South to evade, delay, and possibly ignore integration indefinitely (Ibid.).

One can also find support for the Court's gradualist theory of integration. A more confrontational challenge to the segregated South of the 1950's could have possibly provoked severe civil strife. Gradual integration would allow children of different races to live together in an agreeable environment that would hopefully expand to other areas of their lives since many feared that forced integration might generate mutual withdrawal and hostility (Ibid.). The Supreme Court decision did help to minimize social upheaval by permitting Southern courts to apply integration in token measures while the public gradually came to grips with the reality and "rightness" of equal and integrated schools for America's youth (Ibid.).

With 50 years of hindsight, "all deliberate speed" was perhaps the least disruptive way to accomplish integration in the racist environment of the 1950's. Still, many wonder why the Court subordinated immediate compliance with *Brown I* and racial justice in the name of not ruffling regional sensibilities (Ibid.). Carl Rowan charged:

> We rationalize this travesty of delay…by saying that we want peaceful change and by convincing ourselves that to comply with the court's decision would cause trouble. And, of course, everybody's against trouble. But does any American know of any great social advance in the history of mankind that was not accompanied by trouble? When we Americans reach the point of soft indifference where we hate trouble more than injustice, we shall have reached the dawning of our era of greatest troubles (Ibid.).

The lukewarm reception given to integration by public officials (including President Dwight D. Eisenhower) would slow down the integration process. An *amicus curiae* brief of the government in *Brown II* reflected the administrations' coolness by agreeing with the South that compliance must come through a process of localized gradualism. Litigation throughout the late 50's and early 60's was aimed at delay while

integration received little encouragement from Congress. Chief Justice Warren and his colleagues of the Supreme Court knew that they alone could not greatly change American society. Governmental foot-dragging would lead to unrest in the turbulent 1960's (Ibid.). Only the civil rights movement of the early 1960's brought about the reforms that the Court hoped to implement in the first *Brown* decision (Patterson, 2001).

Remedies

The principal aim of desegregation was to eliminate a caste system based on color in our nation. Black children had long suffered in inferior schools where segregation hampered learning. Given the resistance of incidents in the 1950's, such as, children being accompanied by National Guard troops to school in Little Rock, Arkansas, it is hardly surprising that integration did not immediately upgrade the educational process.

Little Rock desegregated its parks, buses, and hospitals and approved a plan to admit six Black girls and three Black boys to Central High School in 1957. Arkansas Governor, Orval Faubus, announced that desegregation could not be accomplished without violence and mobilized the National Guard to surround the school on the first day of classes. When no mob materialized, racist feelings were whipped up and the nine children encountered irate crowds and troops blocking their entrance on the second day of classes. For two weeks, the "Little Rock nine", as they were called, were unable to attend school.

On September 20, 1957, a federal judge enjoined Governor Faubus from preventing the students from attending school. The Governor ordered the troops away leaving the nine Black children at the mercy of a vicious mob. The students were taken out of school and sent home at midday (Patterson, 2001). This standoff captured national and international attention especially due to the new medium of television. Integrationists appealed to President Eisenhower to intervene. Hoping that local authorities could solve the problem, Eisenhower hesitated and even conferred with Governor Faubus before finally relenting and ordering regular Army and National Guard troops to protect the Black children as they finally entered school for their next day of classes. A total of 1,100 troops were needed to protect nine children (Ibid.). Such was the plague of racism infecting America in the 1950's.

In the mid-1960's, several White liberals, including President Lyndon Johnson, turned their attention to the social ills facing America's Black population. One of these was Daniel Patrick Moynihan, a social scientist who later became Assistant Secretary of Labor in the Johnson administration. Moynihan published a report detailing rates of unemployment, family breakup, and welfare dependency among Black families. He urged vigorous Federal policy to counteract these trends by supporting legislation for Blacks that would promote not only equality of opportunity, but also, "equality as a fact and equality as a result" (Ibid.).

Other scientists worried that Black children (even those in non-segregated schools) scored poorly on standardized tests and began to devise remedies for the cultural deprivation suffered by Blacks. Although not inferior by nature, growing up in racially isolated, poverty-stricken, and deprived surroundings caused Blacks to test poorly and quickly fall behind their White counterparts (Ibid.). One solution proposed was to place Black children with achievement-oriented White children. However, not all social scientists or African Americans believed that simply placing Black students alongside White students was the solution. One African American woman on the Atlanta School Board stated, "I've always thought it was insulting to Blacks to say that they would do better if they could just sit next to a White child in school."

Her sentiment was echoed by Harvard Law School professor Derrick Bell, "The insistence on integrating every public school that is black perpetuates the racially demeaning and unproven assumption that blacks must have a majority white presence in order to either teach or learn effectively" (Patterson, 2001). By 1966, social scientists were questioning the assumption that Black children would perform well simply by being mixed with White children. A report to the Office of Education by sociologist James Coleman, after surveying schools throughout the nation, concluded that most children still attended all-White or all-Black schools, and that property taxes being the primary revenue source for school funding, enormous differences in financing and the state of the physical facilities would exist across districts. Therefore, the class and economic situations of the students' families were primarily responsible for differing levels of academic achievement (Patterson, 2001).

A report submitted to the New York State Commissioner of Education by several Black educators suggested that minority pupils have "been the victims of an intellectual and educational oppression," due to the "Euro-American monocultural perspective" that dominates most school curricula (Hacker, 1995). These New York educators claimed a "terribly damaging effect on the psyches of young people" because their ancestral cultures were "distorted, marginalized, or omitted" in lessons and textbooks (Ibid.). A pride in one's ancestry can translate into academic achievement when children "see themselves in the curriculum" (Ibid.). The Coleman Report offered a conclusion that stated:

> Taking all these results together, one implication stands out above all:
>
> That schools bring little influence to bear on a child's achievement that is
>
> independent of his background and general social context; and that this
>
> very lack of an independent effect means that the inequalities imposed on
>
> children by their home, neighborhood, and peer environment are carried

along to become the inequalities with which they confront adult life at the end of school (Patterson, 2001).

Affirmative Action

Racism still ranks high on the list of America's unsolved problems and equality in general can only become a reality when racial inequality is specifically addressed. One of the most divisive issues facing our society confronts the racial issue head on – affirmative action. As the Coleman Report concluded, race has become more of a social than a physical category (Ryan, 1982). The aftermath of the *Brown* decisions demonstrated that relying on voluntary measures of compliance did not lead to successful school integration in most cases (Rosenfeld, 1991).

What exactly is affirmative action? Born in the civil rights movement, affirmative action is the nation's ambitious attempt to redress its long history of racial and sexual discrimination (Ward, 1999). No one definition is sufficient to cover the enormity of the concept; several variants are "any effort taken to expand opportunity for women or racial, ethnic and national origin minorities by using membership in those groups that have been subject to discrimination as a consideration [in decision making or allocation of resources]." Also,:

> a range of governmental and private initiatives that offer preferential treatment to members of designated racial or ethnic minority groups (or to other groups thought to be disadvantaged), usually as a means of compensating them for the effects of past and present discrimination (Smelser, Wilson, & Mitchell, 2000).

These definitions stress the compensatory nature of many affirmative action initiatives. Other interpretations de-emphasize the retrospective and compensatory aspects and focus on enhancing diversity, particularly in educational institutions and the workforce (Ibid.). Moving beyond the ambiguity surrounding the definitions of affirmative action and the confusion of existing programs, there is actually more agreement among different racial groups than one would expect. Many people feel an unease involving overt racial preferences while, at the same time, supporting outreach programs that benefit the disadvantaged. Acknowledging the issues where we have a consensus of opinion is a necessary step in the development of a successful public policy in our multiracial society (Ibid.). The true spirit of affirmative action is to put an end to a long history of discriminatory practices by taking positive initiatives to recruit, hire, train, and promote those who are qualified, but belong to groups long excluded from full equality of opportunity (Ward, 1999).

The term affirmative action first appeared in the 1935 National Labor Relations Act (Wagner Act), but did not become associated with civil rights legislation until 1961, when President John F. Kennedy issued Executive Order 10925. The order directed federal contractors to take "affirmative action" to insure nondiscrimination in hiring, promotion, and other areas of private employment (Smelser, Wilson, & Mitchell, 2000). The concept was not formally defined and went largely unnoticed. In 1965, President Lyndon B. Johnson issued Executive Order 11246, reaffirming support for President Kennedy's order linking civil rights enforcement with affirmative action requirements (Ibid.). Executive Order 11246 stated, "It is the policy of the government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each department and agency" (Ward, 1999).

Two years later, Executive Order 11375 was issued to include affirmative action requirements to benefit women (Ibid.). The Civil Rights Act of 1964 broadened the application of equal opportunity by declaring that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participating in, denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance" (Ibid.). In a 1965 commencement address at Howard University, President Johnson argued that fairness required more than a commitment to impartial treatment. He said:

> You do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and say, "you're free to compete with all others," and still justly believe that you have been completely fair. Thus it is not enough to just open the gates of opportunity. All our citizens must have the ability to walk through those gates…We seek not…just equality as a right and a theory but equality as a fact and equality as a result (Ibid.).

Noted scholar Herman Belz writes in his book, *Equality Transformed*, that "the fundamental issue in civil rights policy was whether equality would be defined in racially impartial terms of individual rights, or in racially preferential terms aimed at achieving proportional representation of groups" (Belz, 1992). The concept of affirmative action began to evolve from a vague concept to an established set of legal regulations.

During the administration of President Richard Nixon, in December of 1971, the Department of Labor issued Revised Order No. 4 requiring all contractors to develop an

acceptable affirmative action program to include an analysis of areas where the contractor is deficient in the utilization of minority groups and women. Contractors would now be required to establish goals and timetables for the hiring of minority group members and women and to show "good faith efforts" with which to meet these goals (Smelser, Wilson, & Mitchell, 2000). Minority groups referred to "Negroes, American Indians, Orientals, and Spanish Surnamed Americans" (Ward, 1999). Underutilization meant having fewer minorities or women than might be reasonably expected. Goals were not to be "rigid and inflexible quotas" but "targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work" (Ibid.).

Essentially, affirmative action programs, whether undertaken voluntarily or as the result of government pressure or a court decision, are intended as methods of transforming the words of law into a semblance of reality (Ryan, 1982). The program outlines a plan to end intentional or unintentional discrimination and specifies procedures to be used to increase the representation of minorities and women from the particular segment of the workforce, faculty, student body, or elsewhere. It also specifies goals, such as, dates and numbers that are being sought (Ibid.). These goals and timetables may be flexible or rigid, short-term or long-term, and limited or unlimited in scope. The means used to attain the goals may be as simple as strict adherence to equality of opportunity, or may be extended to allow the unrestricted use of preferential treatment (Rosenfeld, 1991).

Critics of affirmative action argue that it is illegal, immoral, or unethical to make hiring or admissions decisions with any reference whatsoever to membership in a particular group – be it racial, ethnic, or gender. They say that we should not advance beyond the equal opportunity threshold in opposing discrimination and that an all-White male institution would be perfectly acceptable if they were selected merely on the basis of their superior qualifications. This argument implies that discrimination can only be directed at an individual and that nondiscriminatory treatment is one that treats an individual solely on the basis of his or her abilities (Ryan, 1982). In fact, discrimination is rarely directed at an individual; it is usually directed at individuals as a member of a group. Racial or gender discrimination does not consist of an unrelated series of actions directed against a random group of people who happen to be Black or female, but is instead directed at Blacks or women in general (Ibid.). This is the essential nature of discrimination – when one categorizes an entire group of people based on the observations or preconceptions of a particular group. Therefore, anti-discrimination efforts and actions need to be formulated by group observation. The end of discriminatory practices can be measured only by the observation of changes in the distribution of members of different groups. Critics typically ignore the fact that affirmative action programs are a set of remedial actions designed to correct past injustices and to level the playing field (Ibid.).

Critics also charge that any preferential treatment of a particular segment of society constitutes reverse discrimination since the decision to grant preferential treatment involves consciously deciding not to hire or admit a member of the majority

group (Ryan, 1982). Most Americans are comfortable with the fact that universities will grant preferential status to athletes needed for sports teams or musicians needed to field a marching band. These critics of affirmative action programs appear more willing to tolerate the preferential admission of quarterbacks than to afford an equal chance to minorities and women (Ibid.).

In one area of affirmative action, the question of representation figures prominently; the admissions process to institutions of higher learning. The most famous case challenging affirmative action in college admissions was brought to the Supreme Court by a young student seeking admission to the University of California Medical School at Davis. His name was Allen Bakke, and his case would be yet another episode in the ongoing controversy over the meaning of equality and the moral limits of politics (O'Neill, 1985).

The *Bakke* Case

Allen Bakke was a White male who twice applied to the University of California at Davis and was denied on both occasions. The school had 100 openings per year, sixteen of which were reserved for "disadvantaged" minority students, defined as Blacks, Hispanics, Asians, and American Indians (http://www.wku.edu/Government/vbakke.htm.

Bakke was denied admission although minorities with significantly lower grade point averages and lower Medical Aptitude Test (MCAT) scores were admitted. His suit charged that the quota system at Davis violated the California Constitution, the Equal Protection clause of the Fourteenth Amendment, and Title VII of the Civil Rights Act of 1964. The Supreme Court of California agreed and petitioned the Supreme Court of the United States for a writ of *certiori*, which was granted (Ibid.).

Mr. Justice Powell announced the opinion of a divided Court in the case of *Regents of University of California v. Bakke* (1978). Justice Powell stated: (1) the special admissions program was illegal, however (2) race may be one of a number of factors considered by schools in passing on applications, and (3) since the school could not show that the White applicant would not have been admitted even in the absence of the special admissions program, he was entitled to be admitted (http://www.soc.umn.edu/~samaha/cases/bakke%20v%20bd%20of%20regents.htm). According to Bakke, anti-discrimination counseled neutrality and protected every individual regardless of his or her social or ethnic ancestry (O'Neill, 1985). Evidence introduced in the California trial concluded that the medical school had, in fact, established racially exclusionary quotas for the special admissions program and carried out these policies in the admissions process (Ibid.).

Justice William Brennan, writing for himself and for Justices Marshall, White, and Blackmum, said that both Title VII and the Fourteenth Amendment permit the use of a "color conscious" means to offset the debilitating effects of social discrimination against Blacks and other minorities. However, realizing the potential danger of

affirmative action programs, regardless of their intentions, Brennan stated that they could not be used "to stereotype and stigmatize politically powerless segments of society" (O'Neill, 1985). He thought that any preferential process singling out "those least well represented in the political process to bear the brunt" of an otherwise benign program was unconstitutional (Ibid.). In his decisive swing opinion, Justice Powell wrote: "When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect" (Ibid.). Justice Powell did seek to establish a constitutional justification for less exclusionary affirmative action programs by stating that, "universities must be accorded the right to select those students who will contribute the most to the robust exchange of ideas" (Ibid.). The First Amendment protects the constitutional interest of academic freedom that makes the search for a diverse student body permissible for institutions of higher learning (Ibid.).

The Supreme Court decision in *Bakke* unleashed much controversy in the media and Congress. The decision has been called racist and a devastating blow to the civil rights struggle, while University of Chicago law professor Philip Kurland made the following statement: "This is a landmark case, but we don't know what it marks" (Ibid.). The division among the Supreme Court justices represented the division of the society as a whole over the fundamental choices and doubts confronting the nation. The Courts' consensus over values could not be easily converted into practice. Justice Stevens sought both color-blind neutrality and the less effective compromise between the dictates of the merit principle and the demands of compensatory justice. *Bakke* demonstrated how difficult the achievement of a color-blind society would be.

Affirmative Action 2003

Recent court decisions reflect the continued confusion and contentiousness of affirmative action programs. The U.S. Supreme Court handed down its decision in *Gratz v. Bollinger* (2003) and *Grutter v. Bollinger* (2003) cases. These cases involved challenges to the University of Michigan's minority admissions policies (Stewart, 2003). In the *Grutter* decision, the Court affirmed that student body diversity is a compelling interest when used to narrowly tailor the use of race in university admissions. Justice O'Connor, writing for the majority, declared; "Today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions…when race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied" (Stewart, 2003). Justice O'Connor further noted that claims advanced by the law school were reinforced in the many amici curiae briefs. These briefs stated, "numerous studies show that student body diversity promotes learning outcomes," and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals" (Ibid.).

These rulings have profound implications across the various segments of American society. Justice O'Connor cites specific language from a brief that links

diversity in the officer corps of the military to university admissions. She states "At present, the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC use limited race-conscious recruiting and admission policies" (Ibid.). This statement harkens back particularly, to the early 1970's when racial tension reached its zenith in the military and the "chasm between the racial composition of the officer corps and enlisted personnel undermined military effectiveness" (Ibid.). The absence of trust and communication of the 70's has taught us that "a future officer's most effective training and education cannot take place at an institution 'in isolation from the individuals and institutions' that he or she will command" (Ibid.). The opinion also stated, that "in order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity" (Ibid.).

The *Gratz v. Bollinger* (2003) case, by a decision of 6 to 3, reversed in part, the University's undergraduate admissions policy while still allowing for the consideration of race in admissions. Chief Justice William Rehnquist wrote the majority opinion in this decision, which is also referred to as the College of Literature, Science, and the Arts (LSA) case. The majority declared that while existing affirmative action law established in the *Regents of the University of California v. Bakke* (1978) allows for race to be a factor in the admissions process, it must not be a deciding factor. The point value awarded to minorities was the primary issue (http://www.umich.edu/news/Releases/2003/Jun03/supremecourt.html). Chief Justice Rehnquist wrote that the University policy of automatically awarding 20 points (one-fifth of the points needed to guarantee admission) to every underrepresented minority applicant because of their race is not sufficiently narrowly tailored to achieve the educational diversity that the respondents claim justifies their program. The University of Michigan must therefore refine its admission policy to comply with the Court's ruling. LSA Dean Terrence McDonald said that the Court's decision to uphold *Bakke* is nonetheless an endorsement of a diverse student body (Ibid.). These decisions reflect the conflicting and sometimes murky waters of affirmative action issues. Both decisions imply that diversity and excellence go hand in hand while the narrow decisions in both cases also suggest that these issues will likely be revisited again in the near future.

As W. Perkins wrote in *Multicultural Review* in 1996, affirmative action was developed "more than thirty years ago, as a partial remedy for centuries of discrimination, exclusion, and inequality for African Americans, Asian Americans, Native Americans, Latinos, and women…affirmative action plays a small role in the overall battle against racial and sexual discrimination, yet it has been made to bear the burden for America's great experiment in social equality" (Ibid.).

Conclusion

This paper was an overview of the historical background of racism in our nation, the significance of the *Brown* decisions in attempting to overcome years of separate and unequal education, and some of the remedies currently in place to affect positive and lasting change. While many people will continue to hold strong and differing opinions concerning affirmative action programs, the intent of this paper has been to empower the reader with facts to spur the debate beyond rhetoric. Much work remains to be done to enfranchise those segments of society that have traditionally been excluded from full participation in the bounty that is America. The following quote from the late author and Paleontologist Stephen Jay Gould sums up the intentions of this promise:

> We pass through this world but once. Few tragedies can be more
>
> extensive than the stunting of life, few injustices deeper than the denial of
>
> an opportunity to strive or even to hope, by a limit imposed from without,
>
> but falsely identified as lying within (Gould, 1996).

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