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# HOW *BROWN V. BOARD OF EDUCATION* ACTUALLY ENDED: THE FORGOTTEN FINAL CHAPTER OF THE TWENTIETH CENTURY'S MOST FAMOUS CASE

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*Brown*, of course, will never actually be over. As long as there is an America, there will be fighting over American history, American values, and how both of those relate to American law. And central to that debate will be *Brown*—where it came from, what it meant or didn't mean, and what its legacy should be. But *Brown* the case, as opposed to *Brown* the icon, did have an ending. The judge made his final ruling, the lawyers packed up their suitcases, and the plaintiffs and defendants tried to return to their everyday lives. What tends to surprise most Americans—lawyers and non-lawyers alike—is just when that ending took place. A historically savvy non-lawyer might say 1954, and point to the famous image of mother, child, and newspaper: *High Court Bans Segregation in Schools*.[1] A lawyer or legal

* With thanks to Owen Fiss, Suzanne Al-Labban, Elizabeth Burnes at the National Archives at Kansas City, and Lizzy Beck.

[1] United Press International, *Mrs. Nettie Hunt, sitting on steps of Supreme Court, holding newspaper, explaining to her daughter Nikie the meaning of the Supreme Court's*

scholar will instead point you to *Brown II* and 1955 ("all deliberate speed"), then perhaps move on to Brown's legacy in cases like *Green*, *Swann*, *Milliken*, and *Parents Involved*.[2]

Do they know about *Brown III*? When Linda Brown—now Linda Brown Smith, now a mother herself—had to revive her case against the Topeka school system? About how that litigation stretched on through the 1980s, then the 1990s? About how Judge Richard Rogers finally declared the Topeka school district desegregated in 1999? Rogers had inherited that case from, among many others, Judge Huxman (1951), Chief Justice Vinson (1952), Chief Justice Warren (1954), and Judge Seymour (1989). The litigation had begun in the District Court of Kansas in 1951, when Harry S. Truman was President and the Rosenbergs were on trial. It ended back in the same District Court in 1999, when Bill Clinton was President—and on trial himself. The Supreme Court had been debating the "legacy" of *Brown* for nearly half a century before *Brown* itself actually ended. So: how exactly did it end?

## 1954-1955: THE SUPREME COURT OF THE UNITED STATES

Most Americans are intimately familiar with the details of Chapter One in this story. *Brown v. Board of Education*—at least its 1954 Supreme Court iteration—is taught in every popular history textbook in the country.[3] The Court's unanimous decision, written by Chief Justice Earl Warren, "stands alone as the most revered judicial opinion of the twentieth

*decision banning school segregation* (1954), available at http://www.loc.gov/pictures/item/00652489/.

[2] *See, e.g.* JUSTIN DRIVER, THE SCHOOLHOUSE GATE at Chapter Five (2018) (covering precisely those cases: *Brown*, *Brown II*, *Green*, *Swann*, *Keyes*, *Milliken*, and *Parents Involved*).

[3] Tom Donnelly, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L.J. 948, 978 (2009). Not only is *Brown* present in all of the most popular U.S. History textbooks, segregation is the largest (by page count) topic in those textbooks' treatment of the Supreme Court. *Id.* at 977-78.

century."[4] A good library might contain more than a hundred books with "Brown v. Board" in the title—and thousands more that discuss the case.[5]

Some retellings of *Brown* might start much earlier than 1954. They may begin with *Plessy v. Ferguson*,[6] or Charles Hamilton Houston's groundbreaking desegregation work with the NAACP. Most end with 1955 (*Brown II*). If the story keeps going, it is through other cases—after the 1950s, *Brown* becomes a "legacy," not a live case. And yet there it was, on the docket in the District Court of Kansas through 1999. For its last twenty years, the *Brown* litigation was overseen by Judge Richard Rogers, but you will not find his name mentioned once in any of the leading works on *Brown*. Not once in Michael Klarman's *Brown v. Board of Education and the Civil Rights Movement*;[7] not once in James Patterson's *Brown v. Board of Education*;[8] not once in the 880 pages of Richard Kluger's *Simple Justice*.[9]

Justin Driver, author of the recent, highly-acclaimed *The Schoolhouse Gate*, writes that "[o]n May 17, 1954, nearly four years after the Topeka dispute began, the Supreme Court resolved the matter . . . ."[10] If only. There was once a hope that *Brown*—not just the case, but what it stood for: integrated, equal education—*would* be finished, that is, achieved, by the 1960s. Thurgood Marshall, in what must have been his more optimistic years, gave a press conference at the NAACP headquarters after the Court's landmark decision. According to the May 18th, 1954 edition of the *New York Times*, "he was asked how long . . . it would be before segregation in education was eliminated."[11] His response? "[I]t might be 'up to five years'

[4] DRIVER, *supra* note 2 at 242.

[5] *See, e.g.* the 121 books with "Brown v. Board" in their titles available from Yale University's library collections.

[6] 163 U.S. 537 (1896).

[7] MICHAEL J. KLARMAN, BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT (2007).

[8] JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2001).

[9] RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (updated ed. 2004).

[10] DRIVER, *supra* note 2 at 244.

[11] *N.A.A.C.P. Sets Advanced Goals*, N.Y. TIMES (May 18, 1954).

for the entire country." What's more, in 1963—the 100th anniversary of the Emancipation Proclamation—"segregation in all its forms would have been eliminated from the nation." By 1957—three years into Marshall's five-year dream—civil rights advocates were still optimistic. Derrick Bell recalls meeting Judge William H. Hastie, the first black federal judge, and explaining how he hoped to work in civil rights law.[12] "I am afraid that you were born fifteen years too late to have a career in civil rights," the judge replied. After *Brown*, according to Hastie, "there might well be some mopping up to do," but no more.

Obviously, things turned out differently. The purpose of *Brown* was not fully achieved in 1959—or 1979, 1999, or 2019. But, for almost every legal scholar, journalist, or historian, at least *Brown* the case was over. And, to be fair, it makes some sense to move on from *Brown* to other landmark desegregation cases. It makes sense to study *Cooper v. Aaron* to watch the Court begin to recognize what "massive resistance" was going to look like.[13] To study *Green* for how the Court finally began to demand integration (that is, school boards could not just stop segregating, they had to affirmatively desegregate).[14] *Swann* to articulate and endorse various methods of desegregation (especially busing).[15] *Keyes* to watch desegregation move North, and West.[16] *Milliken*[17] and then *Missouri v. Jenkins*[18] for the Court's retreat from desegregation remedies, and *Dowell*[19] and *Freeman v. Pitts*[20] for its push to declare school districts desegregated. A typical survey might end with *Parents Involved*, the 2007 case which struck down plans for integration in two school districts.[21] Every one of

[12] DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 3 (2004).

[13] Cooper v. Aaron, 358 U.S. 1 (1958).
[14] Green v. County School Board of New Kent County, 391 U.S. 430 (1968).
[15] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).
[16] Keyes v. School District No. 1, Denver, 413 U.S. 189 (1973).
[17] Milliken v. Bradley, 418 U.S. 717 (1974).
[18] Missouri v. Jenkins, 515 U.S. 70 (1995).
[19] Board of Education of Oklahoma City v. Dowell, 498 U.S. 237 (1991).
[20] Freeman v. Pitts, 503 U.S. 467 (1992).
[21] Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).

these cases cites to *Brown*—the conflicting opinions in *Parents Involved*, for instance, nearly one hundred times.[22]

So why study *Brown* itself, after 1955? The interesting, surprising fact that it continued until 1999 may be enough of a hook for legal historians and Topekans, but what about the rest of us?[23] First, it is worth studying because what might be called the "long *Brown*," from complaint to closure, from 1951 to 1999, is the whole package. It has—in a single case—everything scholars and lawyers look for in the laundry list of cases above. You could study the entire history of American segregation and desegregation by tracing *Brown* across the decades, without jumping from district to district, case to case. *De jure* segregation and *de facto* segregation, remedies and resistance, judges and school boards, debates about how to measure segregation and integration, and debates about how to tell when it is all over. Indeed, questions about whether it is ever really over—and what comes next.

But the long *Brown* doesn't only have all the thematic and doctrinal elements of the desegregation cases—it paints a picture that no single appellate opinion ever can. A circuit or Supreme Court opinion is necessarily focused on one or a few questions, at one or a few moments in time. Is separate but equal constitutional? No. Do school districts have to desegregate? Yes. Can they use buses? Yes. Across districts? No. Should districts that segregated be treated differently forever? No. Can districts integrate even if they've never segregated? Sometimes. You find out that districts have to desegregate, but not what that means in practice. You find out that districts can bus, but not whether the busing helped. In other words, you never find out the most important answer in all these cases: did it work?

But if you focus on one case—and why not the most famous case of all?—you can put all the puzzle pieces together. You can see what happens after a school district is told to desegregate, and then how it tries to (or tries

[22] PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1213 (2018) (finding ninety-one citations to *Brown*).

[23] Though this might underplay how astonishing it is that so little work has been done to study *Brown* post-1955, given the quantity of ink has been spilled over *Brown* 1951-1955.

to avoid doing so). You can see how courts, lawyers, and parents struggle to figure out what "integrated" means, or looks like. You can see the moment when a court finally says *enough*, and ask yourself: is it? Jumping from landmark case to landmark case gives you a sense of all the various policies and problems in desegregation, but never lets you know how things turned out. By the time you've answered the busing question, you've moved on to the inter-district remedies question. By the time you've solved that problem, you're onto race-based transfer criteria. Rather than skittering from policy to policy, what if you focused on one school district, one case? What could you learn if you slowed down and watched a single place try to desegregate? Start to finish.

## 1955: THE DISTRICT COURT OF KANSAS

We have all read Chapter One of the *Brown* story over and over again. Our telling now picks up where most leave off: in 1955, after the Supreme Court had sent the case back to the District Court of Kansas.[24] In the Supreme Court's ambiguous and convoluted language, the district court now had to "take such proceedings and enter such orders and decrees . . . necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties . . . ."[25]

In fact, the schools in Topeka had already begun desegregating. In 1951—when the complaint in *Brown I* was first filed—Topeka had only one high school, for both black and white students.[26] And the Kansas Supreme Court itself had declared segregation in junior high schools unconstitutional. That left, at the start of the *Brown* litigation, Topeka's twenty-two elementary schools. There were eighteen schools attended by white students from each school's neighborhood, and four elementary

[24] As well as district courts in South Carolina, Virginia, Washington, D.C., and Delaware.

[25] Brown v. Board of Education of Topeka, 349 U.S. 294, 301 (1955).

[26] Brown v. Topeka Bd. of Ed. Shawnee Cty., Kan., 671 F.Supp. 1290, 1293 (D.Kan. 1987).

schools attended by black students bused in from all over Topeka.[27] For example: Linda Brown, who lived only four blocks from the all-white Sumner school, instead had to take a bus each day to all-black Monroe.[28] But, in 1953, a year before the Supreme Court declared school segregation unconstitutional, the Topeka Board of Education began to desegregate anyway. By early 1955, district-enforced segregation was over in all of Topeka's elementary schools—including Sumner and Monroe. By then, though, Linda Brown had already graduated from Monroe, and entered Topeka's already-integrated junior high system. She never got to—or had to—integrate a Topeka school herself.[29]

Looking at this situation, the Supreme Court complimented Kansas in *Brown II* for the "[s]ubstantial progress" already made.[30] So it is perhaps not surprising that, on remand, the District Court of Kansas only produced a two-page opinion affirming the Topeka Board of Education's desegregation plan.[31] The court didn't even bother explaining what that desegregation plan *was*. "No useful purpose," went the opinion, "would be accomplished by setting out the plan in detail."[32] The court did announce that the "central principle of the plan" was to require all students "to attend the school in the district in which they reside . . . ."[33] In other words, a neighborhood school plan—every kid goes to the closest school. This sort of plan necessarily reproduces, in the schools, any pre-existing residential segregation in the district. But it would have affected students like Linda Brown, who had always lived nearest an all-white school. And the court in 1955 was not remotely concerned about requiring integration as opposed to disallowing segregation. "Desegregation does not mean that there must be

[27] *See, e.g.* Oliver Brown, et al. v. Unified School District No. 501, Case No. T-316, Doc. 438: Memorandum Brief in Support of Motion for Unitary Status at 3 (Apr. 16, 1999).

[28] See, e.g.Harrison Smith & Ellie Silverman, *Linda Brown Thompson, girl at center of Brown v. Board of Education case, dies*, WASH. POST (Mar. 23, 2018); Claudio Sanchez, *A Visit To Topeka: Reflecting on Linda Brown's Legacy*, NPR (Mar. 30, 2018).

[29] Mark Walsh, *Some Reflections on Linda C. Brown, a Daughter, Litigant, and Civil Rights Icon*, EDUCATION WEEK'S SCHOOL LAW BLOG (Mar. 28, 2018).

[30] *Supra* note 25 at 299.

[31] Brown v. Board of Educ., 139 F.Supp. 468 (D.Kan. 1955).

[32] *Id.* at 469.

[33] *Id.*

intermingling of the races in all school districts," wrote the court. "It means only that they may not be prevented from intermingling or going to school together because of race or color."[34] According to the court, then, if all the black students lived near one school, and all the white students lived near another, the Constitution had nothing to say about it. The court considered the plan "a good faith beginning to bring about complete desegregation," but made clear that this opinion was not "a final decree."[35] It would retain jurisdiction over the case as Topeka continued to implement its comprehensive neighborhood-schools plan. The case was not closed. Everyone—the students, the parents, the school district, and the court—would have to wait and see how the plan went. And that's where the case was left, on pause, for the next twenty-four years.

## 1979: LINDA CAROL BROWN AND LINDA BROWN SMITH

Constitutional law has a problem with individuals. Eventually, cases can become landmarks, monuments that stand for some national principle, far removed from the life-stories of the original litigants. An individual's story can get lost in that abstraction, or distorted. And even before reaching landmark status—while the case is still being litigated—Derrick Bell has shown how public interest lawyers can move cases away from their clients' desires towards their own purposes.[36] Perhaps it makes sense for most lawyers and scholars to focus more on the principle—separate is "inherently unequal"[37]—than on the person: Linda Brown. But in our adversarial system of justice, it can only ever be individuals who make a case happen. Not just in a Farmer A stole Farmer B's cow kind of case, but in the most

[34] *Id.* at 470.

[35] *Id.* at 469.

[36] Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 512 (1976) ("[S]ome civil rights lawyers, like their more candid poverty law colleagues, are making decisions, setting priorities, and undertaking responsibilities that should be determined by their clients and shaped by the community.").

[37] Brown v. Board of Education of Topeka, 347 U.S. 483, 495 (1954).

important national cases defining constitutional norms. And yet in those latter cases, actual plaintiffs often become proxies, stand-ins, symbols—or are forgotten altogether.[38] No one is at risk of forgetting Linda Brown, but what else—except that constitutional law has a problem with individuals—can explain sentences like this one from liberal hero[39] and scholar Joseph Goldstein?:

> "How could Oliver Brown . . . and Spottswood Bolling—for that matter anyone, including their parents and their school boards—have understood the Constitution to mean anything less than that these children could no longer be compelled to attend segregated public schools?"[40]

Oliver Brown (and Spottswood Bolling) is the parent of Linda Brown (and, less egregious of an error, Spottswood Bolling, Jr.), not the schoolchild. But to many, *Brown* was never really about the Browns.

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There is something incredible about the full caption—the case name—for *Brown v. Board of Education*. There are thirty-three named plaintiffs, starting with Oliver Brown and including Linda Carol Brown, "an

[38] *See, e.g.* BROWN FOUNDATION FOR EDUCATIONAL EQUITY, EXCELLENCE AND RESEARCH, RECOVERING UNTOLD STORIES: AN ENDURING LEGACY OF THE BROWN V. BOARD OF EDUCATION DECISION at vii (2018) ("Countless volumes have been published in law review articles, treatises, and history books about the case itself, the Supreme Court that decided it, the lawyers who argued it, the times from which it arose, and so much more. But . . . these essays draw into focus an underreported but vital part of the *Brown* story—the memories of some of the plaintiffs whose lives were the impetus for bringing the cases in the first place . . . .").

[39] *See, e.g.* OWEN FISS, PILLARS OF JUSTICE at Chapter Nine (2017).

[40] JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION 59-60 (1992).

infant, by Oliver Brown, her father and next friend."[41] In 1979, another eight named plaintiffs joined the case—intervened—including Linda Brown Smith, "mother and next friend of minor children Charles and Kimberly Smith." In other words, Linda is a plaintiff in *Brown* twice: first as a Topeka schoolchild, then as a parent of Topeka schoolchildren. She, and the first generation of *Brown* schoolchildren, had now grown up. Some of them were parents themselves, with kids in the same school system they had gone to. And looking at that school system, Linda Brown Smith was not satisfied. Brown Smith, along with other black parents and children, filed a motion in the District Court of Kansas to join (or perhaps rejoin, or join in another capacity) the *Brown* lawsuit and actively pursue it once more. Topeka's schools, they argued, still bore the hallmarks of unconstitutional segregation.

But first the district court judge, Richard Rogers, had to rule on the motion to intervene. Was *Brown* really still a live case? Could new plaintiffs join this class action from the 1950s? Revisiting the district court's 1955 opinion, the court pored over its wording, and found—to its own astonishment—"that no order of compliance has ever been issued," and that "this action, although dormant, has been technically open for the past 24 years."[42] It had "remained open an exceptionally long time," but was never "officially closed."[43] Having satisfied himself that the case was ongoing, Rogers was "prepared to rule upon the request that another chapter be written in what has been termed the Case of the Century."[44] He allowed the intervenors to join the case.

By then, the plaintiffs' names were not the only ones to have changed. Topeka had reorganized its school system, and the successor to the district defendant in *Brown* was called Unified School District #501. "If we find," wrote Judge Rogers, "that U.S.D. #501 is in full compliance with all constitutional requirements, we intend to enter an order of compliance

[41] Using the term "infant" in its legal, not colloquial sense of a minor of any age, and "next friend" to mean someone's representative in a court proceeding.

[42] Oliver Brown et al. v Board of Education of Topeka, Shawnee County, Kansas, 84 F.R.D. 383 (1979).

[43] *Id.* at 401, 403.

[44] *Id.* at 386 (internal quotation marks omitted).

and close the case so that questions such as we have just resolved are not presented to another judge 24 years from now."[45] If only Judge Rogers could have known that twenty years from then, the case would still be open—and there wouldn't be "another judge" resolving its questions; it would still be him.

## 1987: THE DISTRICT COURT OF KANSAS

It was seven years before Judge Rogers oversaw *Brown* at trial, and eight before he released his opinion. No one argued that Topeka was still segregated by law. The argument was over whether "the vestiges of *de jure* segregation ha[d] been eliminated."[46] The Supreme Court had described school districts where there had been black schools and white schools as "dual systems," which needed to be converted into "unitary system[s] in which racial discrimination would be eliminated root and branch."[47] How could you tell when those roots and branches had been eliminated? In *Green*, the Court considered several factors, including the "composition of student bodies" at the various schools, and the characteristics of the "faculty, staff, transportation, extracurricular activities and facilities."[48] Allowing black students to enroll in formerly white schools (and white students to enroll in formerly black schools) was not enough. Formerly segregated school districts needed to "convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."[49]

By the 1980s, did Topeka still have white schools and black schools, or did it just have schools? After the trial, Judge Rogers meticulously went through the "*Green* factors"—and many more—in a twenty-two page opinion. First, he analyzed the white and black student populations in the

[45] *Id.* at 405.

[46] Brown v. Topeka Bd. of Ed. Shawnee Cty., Kan., 671 F.Supp. 1290, 1291 (D.Kan. 1987).

[47] Green, *supra* note 14 at 437-38.

[48] *Id.* at 435.

[49] *Id.* at 442.

school district and at each school. "When this case was filed," he wrote, "100% of black elementary students attended 100% black schools." Now, only one of the twenty-six elementary schools had a "majority black student population," and "[n]o school had a ninety-five percent white student population."[50] Judge Rogers discussed whether the district had intentionally segregated, or avoided integration, through any of its modern policies or actions: student transfers, optional attendance zones, space additions in select schools, school openings and closings, school locations, and school boundaries. He went through the history of each "allegedly racially identifiable nonwhite school" in the district: Belvoir, Hudson, Avondale East, Highland Park North, Lafayette, Quinton Heights, Lowman Hill, and Eisenhower. He made sure to check off the rest of the *Green* factors: facilities, extracurricular activities, transportation, faculty, and staff. He also considered school curricula, community attitudes, and whether there was equality of education across the district. Finally, he examined whether the district had failed to take advantage of opportunities to desegregate, and discussed minority membership on the school board itself. In short, the opinion is a far cry from the cursory two-page summary from 1955. Or to put it another way: section nine of Judge Rogers' opinion, "Does Illegal Segregation Remain in U.S.D. #501?" runs from subsection "A" through subsection "S."[51]

For Topeka to be declared fully desegregated, and released from the supervision of the court, Judge Rogers would have to find that "the characteristics of the 1954 dual system either do not exist or, if they exist, are not the result of past or present intentional segregative conduct . . . ."[52] Rogers acknowledged that "racial balance has not been achieved," but insisted that "students are not separated on the basis of race."[53] After his "careful review of all relevant circumstances," Rogers announced that "the *de jure* system of segregation ha[d] been dismantled and its vestiges eliminated."[54] Topeka was unitary.

[50] *Supra* note 46 at 1294.
[51] *Id.* at 1295-1310.
[52] *Id.* at 1293.
[53] *Id.* at 1298.
[54] *Id.* at 1310.

Or was it? The plaintiffs appealed Judge Rogers opinion to the Tenth Circuit Court of Appeals. "[W]e are convinced," wrote Circuit Judge Seymour for the panel's majority, "that Topeka has not sufficiently countered the effects of both the momentum of its pre-*Brown* segregation and its subsequent segregative acts in the 1960s . . . ."[55] As a result, they reversed the district court's judgment.

Reframing many of the same facts that Judge Rogers had outlined, the Court of Appeals saw things differently. In a city where black students made up less than twenty percent of the district, why did four schools have majority black student populations? (Judge Rogers had focused on the one majority black elementary school.) Why were five schools more than ninety percent white?[56] (Judge Rogers had focused on the fact that no schools were ninety-five percent white.) Furthermore, the school district should be judged on what it "has done or not done," its "actions or inactions," and "the extent to which further desegregation is feasible."[57] And most importantly, it was not the plaintiffs job—or burden—to show that the school district had done anything unconstitutional. "This is not a *liability* case," the court explained. "[T]hat was established in 1954."[58] All the plaintiffs needed to show was that there was ongoing segregation—or ongoing racial identifiability (there should be "just schools," not "white schools" and "black schools"). After showing the ongoing effects of segregation, the burden belonged with the district to prove that it "ha[d] done everything feasible" to eliminate those effects, and that any existing segregation was completely unconnected from its historical dual system.[59]

[55] Brown v. Board of Educ. of Topeka, 892 F.2d 851, 854 (10th Cir. 1989).
[56] *Id.* at 856.
[57] *Id.* at 859.
[58] *Id.* at 862.
[59] *Id.* at 865-66.

According to the court, there were still connections between Topeka's 1954 system and its 1986 system. "This is a system improved," wrote Circuit Judge Seymour, "but it is still the same system."[60] The plaintiffs had decided not to appeal the trial court's determination that the vestiges of segregation were gone with regard to "facilities, extracurricular activities, curriculum, transportation, and equality of education."[61] But they had insisted that the Topeka school's were still racially identifiable on the basis of student and faculty assignment. They argued that there were a disproportionate number of black students and black teachers at some schools, a disproportionate number of white students and white teachers at others. The Court of Appeals agreed. Even if most of that imbalance was based on demography (more black students in one neighborhood, more white students in another), "a school district is not absolved by demographics from its affirmative duty to desegregate before it achieves unitariness."[62] Topeka could not be declared unitary until it "exhausted the repertoire available for desegregating schools."[63]

## 1992: THE SUPREME COURT OF THE UNITED STATES

The school district appealed, and, three years later, the Supreme Court took the case. Or to be more precise, it granted certiorari, vacated, and remanded to the Tenth Circuit in a single paragraph opinion.[64] The Supreme Court wanted the Court of Appeals to reconsider their decision "in light of *Freeman v. Pitts* and *Board of Education of Oklahoma City Public Schools . . . . v. Dowell*."[65]

[60] *Id.* at 877.
[61] *Id.* at 870 n. 53.
[62] *Id.* at 882.
[63] *Id.* at 885.
[64] Board of Education of Topeka, Shawnee County, Kansas v. Oliver Brown, et al., 503 U.S. 978 (1992).
[65] *Id.* at 978 (citations omitted).

*Freeman*[66] and *Dowell*[67] were a pair of recent cases which had tried to clarify how "unitary status" could be achieved. By this point, the federal courts were approaching their fourth decade of overseeing hundreds of school district desegregation cases[68]—and some wanted out of the school-monitor business. *Dowell* insisted that "federal supervision of local school systems was intended as a temporary measure to remedy past discrimination."[69] Court orders over school districts were "not intended to operate in perpetuity," and local control should be returned as soon as the district satisfied two tests: "whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable." Good faith and practicability—no more or less. *Freeman* explained that school districts could be released from court orders piece by piece. As districts came into compliance with the various factors outlined in *Green*, the courts could stop supervising those factors. Rather than hold onto its oversight over an entire district's operations, the courts would relinquish whichever elements were in compliance—extracurriculars, staff assignment, etc.—and focus only on areas of non-compliance.

Both cases, *Dowell* and *Freeman*, gave a clear message to the lower courts: move these desegregation cases off your dockets; it is time for unitary status and for school districts to run their schools.[70] Or, as Justice Scalia put it in *Freeman*: "At some time, we must acknowledge that is has become absurd to assume, without any further proof, that violations of the

[66] Freeman v. Pitts, 503 U.S. 467 (1992).

[67] Board of Educ. v. Dowell, 498 U.S. 237 (1991).

[68] Nikole Hannah-Jones, *Lack of Order: The Erosion of a Once-Great Force for Integration*, PROPUBLICA (May 1, 2014) ("At the height of the country's integration efforts, there were some 750 school districts across the country known to be under desegregation orders."); Monika L. Moore, *Note: Unclear Standards Create an Unclear Future: Developing a Better Definition of Unitary Status*, 112 YALE L.J. 311 (2002) (In 2001, "over 400 school districts were still under federal court supervision, making the federal bench the largest school district in the country.").

[69] *Supra* note 67 at 247.

[70] Today, there are over three hundred school districts still under court orders to desegregate. Yue Qiu & Nicole Hannah-Jones, *A National Survey of School Desegregation Orders*, PROPUBLICA (Dec. 23, 2014), available at https://projects.propublica.org/graphics/desegregation-orders.

Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools. We are close to that time."[71] Now, it is not clear at all why this should be true as a historical matter. Why shouldn't events from LBJ's time, or Abraham Lincoln's, or George Washington's for that matter, continue to have an "appreciable effect"? Why should the effects of any historical event, achievement, crime, or constitutional violation attenuate over time? Why is it absurd to assume that those effects actually *endure*? Or maybe they *grow*?

A final note from *Freeman*. As with every other desegregation case, *Freeman* begins with the obligatory discussion of *Brown v. Board of Education*.[72] Justice Blackmun's concurrence does as well: "It is almost 38 years since this Court decided *Brown v. Board of Education*."[73] But of course, that very year, the Court was remanding *Brown v. Board of Education* to the Tenth Circuit in light of its decision in *Freeman*—which cited *Brown*. Desegregation cases can apparently go on for so long that, eventually, judges have to cite to cases which cite their own case.

## 1992: THE TENTH CIRCUIT COURT OF APPEALS

The Tenth Circuit was not impressed. It had waited three years for the Supreme Court to review its 1989 decision, only to be told to reconsider in light of two cases it found inapposite. The Tenth Circuit quickly applied the required "further consideration," then decided to "reinstate [its] prior opinion in full . . . ."[74] The court added several pages, but revised nothing. "To expect the lingering effects of legally mandated separation to magically dissolve with as little effort as the Topeka school district exerted, is to expect too much."[75] The Court of Appeals acknowledged the Supreme

[71] Freeman v. Pitts, 503 U.S. 467, 506 (1992) (Scalia, J., concurring).
[72] *Id.* at 472.
[73] Freeman v. Pitts, 503 U.S. 467, 509 (Blackmun, J., concurring) (citations omitted).
[74] Brown v. Board of Educ. of Topeka, 978 F.2d 585, 587 (10th Cir. 1992).
[75] *Id.* at 590.

Court's seeming concern about judge-run schools, but refused to give up on Topeka. "We are mindful of the limited authority and ability of the courts to reshape society, but we possess an abiding respect for the constitutional guarantee of equal protection and the responsibility of the courts to insure that government fulfills its promise to all its citizens."[76] For the fourth time, *Brown* was headed back to the District Court of Kansas.

## 1993: THE DISTRICT COURT OF KANSAS

We are in the homestretch now. From here on out, the case does not leave Judge Rogers' courtroom (though the judge took senior status in 1989). Over the course of six years, from 1993 through 1999, *Brown* becomes an exercise in motion practice, as the lawyers from both sides engage in the final stages of unitary status litigation. There are interrogatories and objections to interrogatories; motions to extend time and orders on those motions; motions for attorney fees and costs and memoranda of law on attorney fees and costs; affidavits and supplemental affidavits; motions to appear and motions to withdraw; reply memoranda and surrebuttal memoranda; witness lists, amended witness lists, and supplemental witness lists; pre-trial briefs and trial briefs; notices of modifications, notices of changes of address, and notices of errata.[77] Then, in 1999, at last, there is a final order.

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On remand from the Tenth Circuit, Judge Rogers adopted the reviewing court's conclusion that some "schools were racially identifiable"

[76] *Id.* at 593.

[77] Most of these documents are not available on the commercial databases, PACER, or even from the District Court of Kansas. They are, however, available from the National Archives at Kansas City, where this author obtained some of these records.

because of their unusually high or low minority student or staff populations.[78] For the most part, the court accepted plus or minus fifteen percentage points around the district average as the acceptable range from which individual school populations could vary. In practice, that meant that any school in the Topeka system with a minority student population under twenty-six percent or above fifty-six percent was considered racially identifiable. Until the school district got every school within the acceptable range, it could not be declared unitary.

Through 1993 and into 1994, the school district prepared a desegregation plan to submit to the court. The district consulted experts, studied the relevant literature, held community meetings, visited their schools and schools in other districts, and finally voted to adopt their "Brown v. Board of Education of Topeka Remedy Plan" in June, 1994.[79] The plan involved changing some school boundaries, encouraging student transfers that would increase integration, enhancing their English as a Second Language and multicultural education programs, as well as closing several schools and opening others—including two new magnet schools.[80] At the end of July, 1994, the court approved the district's plan.

From then on, every year, the district submitted an Annual Monitoring Report to the court.[81] The reports included snapshot data on minority enrollment and staff assignment in each of the district's schools, as well as updates on the district's progress, and other relevant details. There would be, for instance, tables listing each multicultural activity taught at each school in the past year, organized by grade level, participants, time, and title. Activities like: Native American Math Games/Songs, How Slaves Came to America, Hmong culture, or Cinco de Mayo songs.[82] In the continuing trend of *Brown* becoming a case that constantly referred to itself, one of the multicultural activities listed in 1998 was a "Speaker on Brown

[78] Oliver Brown, et al. v. Unified School District No. 501, Case No. T-316, Doc. 411: Memorandum and Order at 1-2 (Jul. 25, 1994).

[79] *Supra* note 27 at 13-14.

[80] *Supra* note 78 at 6.

[81] *See, e.g.*, Oliver Brown, et al. v. Unified School District No. 501, Case No. T-316, Doc. 435: Brown Remedy Plan Annual Monitoring Report (Nov. 2, 1998).

[82] *Id.* at 20-23.

vs. Board." That is, the district informed the court that it was satisfying its requirements under *Brown v. Board of Education* by having a speaker come to the schools to talk about *Brown v. Board of Education*.[83]

Before the plan was implemented, there had been thirteen racially identifiable schools in the district. In its first year, 1994, the plan had reduced that number to seven. In 1995, there were six racially identifiable schools, and in 1996 there were zero.[84] That figure stayed at zero in 1997 and 1998, so in 1999 the district asked the court to declare Topeka unitary.[85]

A declaration of unitary status changes everything. School systems that have been declared unitary become indistinguishable in the eyes of the law from school systems that never segregated at all.[86] Before achieving unitary status, a school district can explicitly use race-based mechanisms to achieve greater integration. After unitary status, most race-based measures of integration are considered unconstitutional.[87] Before unitary status, a parent or student need only show that schools are racially identifiable to demand court action. After unitary status, a parent or student must show that the district intentionally segregated students. Before unitary status, the school has the burden of proof to show that racial imbalance isn't their doing. After unitary status, the burden of proof is on the plaintiffs. Before unitary status, schools cannot defend racial imbalance as the product of changing demographics—they must actively continue desegregating. After unitary status, the district has zero responsibility to combat demographic segregation through its own school policies.[88] In other words, unitary status can be the whole ball game.

[83] *Id.*

[84] *Supra* note 78 at 24.

[85] Oliver Brown, et al. v. Unified School District No. 501, Case No. T-316, Doc. 438: Motion for Unitary Status (Apr. 16, 1999).

[86] *Supra* note 21.

[87] *Id.*

[88] *See, e.g. Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31-32 (1971) ("Neither school authorities nor district courts are required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished . . . .").

So, when Unified School District #501 asked Judge Rogers to declare the district unitary, what did the lawyers for Linda Brown Smith and the rest of the *Brown* plaintiffs do? On June 28, 1999, two months after the district asked for unitary status, the plaintiffs submitted their response. Their memorandum was one sentence long: "Plaintiffs do not object to the Court granting defendant's motion and declaring that the school system has attained unitary status."[89]

The next month, Judge Rogers officially ended *Brown v. Board of Education*. The final order was short: three pages long. "The history" of *Brown*, wrote the judge, in a fine example of understatement, has been "reviewed in other published opinions. . . . [T]he court shall not unduly lengthen this order with a detailed recitation." Since there had been no racially identifiable schools for several years, and since the defendant "ha[d] announced its continuing commitment to diversity and intolerance of discrimination," the court felt comfortable granting the district its unitary status. "[T]he court ceases further supervision of defendant stemming from past mandates in this case," Judge Rogers concluded. "[T]he court directs that this case be closed."

## EPILOGUE: 2019: TOPEKA, KANSAS, U.S.A.

After more than forty years, *Brown v. Board of Education* was over. You wouldn't have learned that, though, from the next day's *New York Times*—or perhaps any other paper. The *Times* had referenced *Brown* (the 1954 version) only three days earlier, in an obituary[90]—and would again three days later, in an article about education.[91] But on July 28th, 1999, the last word in the Case of the Century did not make the news.

[89] Oliver Brown, et al. v. Unified School District No. 501, Case No. T-316, Doc. 444: Plaintiffs' Response to Defendant's Motion for Unitary Status and Memorandum In Support Thereof (June 28, 1999).

[90] Robert D. McFadden, *Frank M. Johnson Jr., Judge Whose Rulings Helped Desegregate the South, Dies at 80*, N.Y. TIMES (Jul. 24, 1999).

[91] Sara Rimer, *Teaching as a Torrent of Bubbling Information*, N.Y. TIMES (Jul. 31,

In 2016, Judge Richard Rogers passed away. His *Topeka Capital-Journal* obituary described him as presiding over the "[r]eopening of the historic Brown v. Topeka Board of Education case, which ultimately resulted in the construction of magnet schools in Topeka. He dismissed the case in July 1999 after dealing with it for 15 years."[92] Indeed, the case did result in the construction of a pair of magnet schools. It also, more significantly, resulted in the declaration—after nearly half a century—that Topeka was finally desegregated. To describe his painstaking management of the case for twenty years as "dealing with it" (for fifteen years?) seems sadly trivializing. So too does describing his final order as "dismiss[ing] the case." A similar attitude is present in the obituaries for Linda Brown Smith, who passed away in 2018. Her obituary in the *Topeka Capital-Journal* incorrectly describes the procedural history of the 1979 case, then ends with the approval of the "desegregation plan for Topeka Unified School District in 1993."[93] But then what happened? Did the plan work? Did *Brown* end? The paper does not say. The *New York Times* obituary was no better. Like Judge Rogers', it ends the pair of sentences about the 1979-1999 litigation with: "The case resulted in the opening of several magnet schools."

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In the meantime, American schools have been resegregating. On the sixtieth anniversary of *Brown I*, historian and law professor Richard Rothstein concluded that "*Brown* was unsuccessful in its purported mission—to undo the school segregation that persists as a central feature of

1999).

[92] Tim Hrenchir, *Richard Rogers, who spent 40 years as a federal judge in Kansas, dies at 94*, TOPEKA CAPITAL-J. (Nov. 26, 2016), available at https://www.cjonline.com/news/2016-11-26/richard-rogers-who-spent-40-years-federal-judge-kansas-dies-94.

[93] Katie Moore, *Linda Brown, center of Brown v. Board case, dies at 75*, TOPEKA CAPITAL-J. (Mar. 26, 2018).

American public education today."[94] There is "ample reason," writes Justin Driver, "for pessimism about the rate of progress" in school integration.[95] Across the country, minority students are more racially isolated in their public schools than they were at the height of integration, in the 1980s.[96] In short: "We are going in reverse."[97]

And in Topeka? A recent report from the *Topeka Capital-Journal* worried: "*Is Brown v. Board's Legacy Fracturing?*"[98] The report covered six high schools in and around District #501, increasingly lopsided in terms of minority enrollment. But the district's director of certified personnel and equity defended those enrollment trends as reflecting underlying demographic trends. Was the equity director correct? Analyzing the data like the district court would have reveals real racial imbalance—not just population-wide changes. The Kansas State Department of Education publishes student demographics each year, for each district and for each school.[99] Today, the district is around one-third white and two-thirds non-white. And while the director of equity was right that the white population in Topeka schools has been decreasing, racial imbalance in desegregation litigation is measured relative to district averages. The real question becomes: are any schools in Topeka more than fifteen percentage points above or below the district's average minority enrollment? By the court's own standards—the standards Topeka had satisfied for three years running before being declared unitary—things have gotten worse. Of the twenty-seven schools operated by District #501, six are outside of what the court would have considered acceptable during *Brown*: Eisenhower, Highland Park High, Randolph Elementary, Scott Dual Language Magnet, Whitson

[94] Richard Rothstein, *Brown v. Board at 60*, ECONOMIC POLICY INSTITUTE (Apr. 17, 2014), available at https://www.epi.org/publication/brown-at-60-why-have-we-been-so-disappointed-what-have-we-learned/#_note3.

[95] DRIVER, *supra* note 2 at 308 (2018).

[96] Alvin Chang, *The data proves that school segregation is getting worse*, VOX (Mar. 5, 2018).

[97] *Id.*

[98] Katie Moore, *Is Brown v. Board's Legacy in Topeka Fracturing?*, TOPEKA CAPITAL-J. (2018).

[99] KANSAS STATE DEPARTMENT OF EDUCATION, *Kansas Report Card 2017-2018*, available at http://ksreportcard.ksde.org/demographics.aspx?org_no=D0501&rptType=2.

Elementary, and Williams Science and Fine Arts Magnet. All six schools were within fifteen percentage points of the district average in 1999; none are now. Of course, since the district is now "unitary," this racial imbalance has no constitutional significance. The time when Topeka parents could go to court and get an order for the school district to deal with that kind of segregation is over.

A journalist for the *Topeka Capital-Journal* recently interviewed Nancy Noches, one of the original schoolchildren from *Brown*. In the 1940s, she had gone to Buchanan Elementary, one of Topeka's all-black schools, where her mother was a teacher. Later, she attended the integrated Boswell Junior High, then Topeka High. When she became a parent herself, one of her daughters went to another Topeka district school, Lowman Hill. "Things," she said, "seem to be going backwards . . . ."[100]

[100] *Supra* note 98.