

## SEPARATE BUT EQUAL: THE "JIM CROW" PHENOMENON IN AMERICAN EDUCATION

The Civil War brought about the second constitutional revolution in American history after the adoption of the Constitution itself. The victory of the North over the South resulted in the defeat of the doctrine of "state sovereignty" and a dramatic expansion of the power of the national government. It also put an end to the institution of slavery that had divided the country along the 36°30' line and had almost caused the disintegration of the Union. The Thirteen and Fourteen Amendments of the Constitution erased the blemish of the Dred Scott decision of 1857 and legalized the civil rights granted to the African-American population of the United States. White racism, however, survived in the South, as well as in the North, and was institutionalized in various acts of racial discrimination known nowadays as "Jim Crow" legislation. Though clearly violating the Fourteenth Amendment equal protection clause, "Jim Crow" practices flourished in the decades, following the Civil War, thus endorsing the cult of "white supremacy" across the country.

In general, the "Jim Crow" era in American history dates back to the late 1880s when Florida became the first state to adopt a statute requiring separate accommodations in transportation for black and white people. In the 1890s state legislatures began systematically to strengthen state laws and adopt new provisions of their respective state constitutions, which designated a subordinate position in society for African Americans. Most of these legal acts were aimed at separating the races at public places, such as public schools, parks, churches, and transportation, and preventing black males from

exercising their Fifteenth Amendment right to vote. Segregation and disfranchisement laws were often enforced by means of mob violence against Blacks, including public lynching which became a common practice in the South in the years after the Civil War.

Racial segregation, however, did not develop overnight in the late nineteenth century, but "rested on attitudes and practices running deep into the American past" (Lofgren, Charles 7). It had its roots in England's North America and was reflected, though indirectly, in some articles of the Constitution itself, a fact that the constitutional historian Paul Finkelman construed as an effort of the Framers to create a "proslavery compact"(31). Although it is controversial to claim that certain provisions, such as the Migration and Importation Clause of Article I, Section 9, Article IV, Section 2, Clause 3 which required that states return fugitive slaves to their owners, or the Three-Fifth Clause of Article I, Section 2, were intended to endorse slavery, the rather vague text of the Constitution allowed different interpretations throughout the years and made possible Chief Justice Taney's opinion in the Dred Scott case. In Taney's view, Blacks are "altogether unfit to associate with the white race, either in social or political relations" (*Dred Scott vs. Sanford* 13How. (60 U.S.) 393, 1857). In that way, long before the seminal case of *Plessy vs. Ferguson* 163 U.S. 537, 3 S.Ct. 18 (1896) legalized the "separate but equal" doctrine, Blacks were stigmatized as unable to match the qualities of the white Americans and, consequently, unworthy of equality of treatment.

"Jim Crow" laws gained impetus from the Supreme Court in the last two decades of the 19th century. In 1883, in five cases, coming from California, Kansas, Missouri, New Jersey, and Tennessee, known as the Civil Rights Cases, the Supreme Court declared unconstitutional the Civil Rights Act of 1875. The act made it illegal for owners

of public accommodations to prevent citizens from using the facilities because of race or religion. With only Justice John Marshall Harlan dissenting, the Court held that the Constitution "does not invest Congress with power to legislate upon subjects who are within the domain of state legislation" (*Civil Rights Cases* 109 U.S. 3, 3 S.Ct. 18, 1883). Therefore, by adopting the Civil Rights Act, Congress had violated the Tenth Amendment of the Constitution. The Supreme Court went further to make the difference between discrimination by private individuals and discrimination backed by the state or its officials, and claimed that the Fourteenth Amendment offered protection only when discriminative state action of some kind was involved. Consequently, when private property or private interests were involved, African Americans could not claim a violation of the Equal Protection of the Laws Clause of the Fourteenth Amendment, as "[i]ndividual invasion of individual rights is not the subject-matter of the amendment" (*Civil Rights Cases* 1883).

With the Civil Rights Act pronounced void, the basis for the states to adopt "Jim Crow" legislation was laid. By 1894, the majority of them had statutes establishing separate accommodations in transportation. "Jim Crow" laws, however, did not amount only to racial segregation. In almost all Southern states suffrage for African Americans was restricted by the so called "poll taxes", requiring every citizen to pay a certain tax to register to vote. Consequently, almost half of the black population of the South vanished from the polls. "Poll taxes", as well as other state legislation, such as literacy tests and "grandfather clauses", despite clearly abridging Blacks' voting rights, did not confront directly with the Fifteenth Amendment, as they were applied equally to both white and African-American citizens. What undoubtedly contradicted the Fifteenth Amendment,

however, was the disfranchisement provision which the state of Mississippi added to its constitution in 1890. The provision alluded to "black governmental incompetence" (Lofgren, Charles 96) and officially excluded all African-American voters from the polls, thus legalizing the existence of "Jim Crow" legislation.

The landmark case in which the Supreme Court took on an active position and declared racial segregation constitutional did not come to the docket until 1896. Homer Plessy, a one-eighth black man, challenged a Louisiana law which barred colored people from using railroad cars reserved for white passengers. Plessy's attorney claimed that the statute, enacted in 1890 and supported by the Supreme Court opinion in the case of *Louisville, New Orleans & Texas Pacific Railroad vs. Mississippi*, 133U.S. 587(1890) that the powers of a state legislature to enact laws segregating railroad cars for intrastate usage did not interfere with Congress's power to regulate interstate commerce under the Commerce Clause, still violated the Thirteenth and Fourteenth Amendments. Delivering the decision of the Court, Justice Brown construed both amendments narrowly. He paid special attention to the Fourteenth Amendment, declaring that "... 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" (*Plessy vs. Ferguson* 163U.S. 537, 3 S.Ct. 18, 1896). Consequently, racial segregation was completely acceptable, as it was not in the power of either a court, or a legislature to determine the personal preferences or dislikes of individuals and to enforce on whites the presence of people of the black race. The law can only require the establishment of equal facilities for

both races in the cases when segregation was necessary. It is interesting that Justice Brown motivated the decision of the Court with the fact that the "separate but equal" phenomenon had been endorsed by the federal government with the establishment of separate schools for colored children in the District of Columbia. Actually, it is a fact that schools were the first segregated public facilities long before the adoption of the Fourteenth Amendment.

The "separate but equal" doctrine in education had its origin in Boston, Massachusetts. Slavery was abolished in Massachusetts by the late 1700's. As a result, Boston schools were not officially segregated. However, African Americans felt that their children are at a disadvantage going to the integrated schools where they felt discriminated and mistreated. Consequently, the first private all-black school was established by parents in Boston in 1798. In the beginning of the 19th century, facing difficulties to support financially their own schools and fearing that, in fact, segregated education fosters prejudice and make black children feel inferior, African-Americans petitioned unsuccessfully in 1845, and again in 1846 and 1848, for the abolition of segregated schools. Besides, black parents resented being taxed to support schools which their children were not allowed to attend. However, the reason for the drives for integrated education was not entirely financial. As Leonard W. Levy mentions in his "Essays on American Constitutional History", "behind the political agitation for equal school rights for Negroes in Boston existed a source of discontent which was not itself strictly political: the acknowledged failure of the black educational system, a failure that, according to Negro militants and their allies was the result of racial segregation in the school system"(320). Although sponsored largely by parents, white benefactors and,

partially, by the city of Boston, all-black schools failed to provide for their students qualified teachers, good books, and suitable facilities. When segregation in public education was officially abolished with a statute by the Massachusetts legislature in 1855, representatives of the Boston Telegraph attended the last graduation ceremony at the entirely black Smith School. Commenting on the quality of teachers and students, the newspaper reported that "it would but a farce to present testimonials of scholarship to so inferiorly educated pupils. The position of this school in mental attainments is positively below mediocrity, and illustrates most forcibly the depressing results and the total lack of ambition and pride, which must ever follow a caste school, or any other caste institution"(qtd.in Levy 338).

Clearly black children in the North did not enjoy the equality of opportunity in education granted to all citizens by the Constitution. Still, many black activists continued to criticize the attempts for desegregation of public schools. In their view, claims for integrated facilities only came to prove the inability of the African-American community to educate its own children away from the influence of the white race. However, most parents acknowledged the discrepancies of the entirely black educational system and went on pressurizing the authorities to abolish racial discrimination in all public schools.

The last effort was undertaken in 1849 under the leadership of attorney Charles Sumner, who later went on to become Senator, in the case of Roberts *vs. The City of Boston*(59 Mass. 198). In 1847, first grader Sarah Roberts was denied admission to four different schools and finally was forced to enter a school, situated far away from her home. Sarah Roberts was black and the Boston School Committee had reserved only two primary schools for black children, although no state law at the time required separate

schools for African Americans. Benjamin Roberts, Sarah's father, who at the time was one of the leading activists in the battle against segregation, brought suit against the city of Boston, challenging the constitutionality of the school committee's policy. In the Roberts case the Supreme Court of Massachusetts upheld the committee's authority to segregate public schools and to establish suitable provisions so that colored children have a school of their own. Determining school regulations was entirely in the province of local authorities and the judiciary did not intend to assume the responsibility for overruling decisions that undoubtedly served the welfare of a certain community. The court went further to say that black children were not denied equal protection of the laws as soon as they were "provided with separate facilities that are substantially the same as those for whites" (*Roberts vs. The City of Boston*, 5 Cush. 198, 1849). Although segregation in education was officially banned in Massachusetts in 1855 and thus the decision of the state court was invalidated, the United States Supreme Court used the Roberts precedent to endorse the "separate but equal" doctrine on a national level in the case of *Plessy vs. Ferguson* (1896).

After the end of the Civil War in 1865, African Americans built and financed schools for their communities. Newly elected black legislators voted for tax support of separate schools for blacks and whites. Controversies, however, remained, particularly in the Southern states and in the Border States with a large percentage of black population, such as Kansas, which was to play a central role in the struggle for educational freedom.

In 1868, Kansas law allowed, but did not require, separate schools, and most schools admitted children without discrimination on racial grounds. Segregation was more largely spread in big cities, while urban schools in the state were predominantly

integrated. With the increase of the African American population in the 1870s, however, the attitudes in Kansas changed and some schools started separating their students by race. Consequently, in 1877, the Kansas legislature passed a statute allowing cities with population of 15,000 or more to establish and manage separate elementary schools. This law remained in effect until the 1950s when it was struck down by the Supreme Court decision in the landmark case of *Brown vs. The Board of Education of Topeka (1954)*.

Before *Brown vs. The Board of Education of Topeka*, African American parents in Kansas in a span of seventy years, from 1881 to 1949, had initiated eleven court challenges to segregated public schools. In *Elijah Tinnon vs. The Board of Education of Ottawa (1881)* seven parents questioned the placing of their children in a separate room in the local school. Represented by local white lawyers, Elijah Tinnon took the case to the court. The district court judge ruled in favor of Tinnon, citing the Fourteenth Amendment as a source that provided equality for all citizens.

Another similar case was *Knox vs. The Board of Education of Independence (1891)*. In deciding the case, the Kansas Supreme Court used the Tinnon precedent to strike down the practice of the school board of Independence to exclude African American children from schools established for whites.

The situation was completely different when schools in large cities were involved. A case in 1906 is an illustration of the segregation policy of the school board in Kansas. Mamie Richardson sued the Board of education in Kansas City after she was not allowed to attend the Morning High School, to which white students were assigned. After an incident in the school, the Kansas legislature adopted an act that permitted Kansas City to

operate separate high schools. The Kansas Supreme Court ruled against the plaintiff in supporting the specific state legislation.

In six other cases involving school segregation in second class cities (*Cartwright vs. The Board of Education of Coffeyville*(1906), *Rowles vs. The Board of Education of Wichita*(1907), *Williams ns. The Board of Education of Parsons* (1908), *Woolridge vs. The Board of Education of Galena*, and *Thurman-Watts vs. The Board of Education of Coffeyville*,( 1924) parents won the right for their children to attend white elementary and high schools. The controversy, however, remained, as in most of the cases the court left the door open for other separate school arrangements.

Another Kansas case, *Wright vs. The Board of Education of Topeka* (1929), affirmed the right of Topeka, as a first class city according to the statute of 1905, to operate separate elementary schools based on race. Some more recent cases, however, indicate the changing position of the judiciary on the issue of school segregation. In *Graham vs. The Board of Education of Topeka* (1941), the Kansas Supreme Court ruled the refusal of a white junior high school to admit a black boy "discriminatory". The most important of all eleven cases involving school segregation in Kansas was *Webb vs. School District No.90., South Park Johnson County*, in which for the first time in the history of the "separate but equal" doctrine in education the Kansas Supreme Court pronounced segregated school facilities clearly unequal and made the board in the respective district admit black children to a entirely white school, thus indicating that the end of the era of segregating education was not far away.

The seminal case that challenged the constitutionality of the racially segregated public schools arrived on the Supreme Court docket in 1951. *Brown vs. The Board of*

*Education of Topeka* 347U.S. 483, 74 S.Ct.686 (1954) was accompanied by three other cases coming from Delaware, South Carolina, and Virginia, as well as *Bolling vs. Sharpe* 347 U.S.497, 74 S.Ct.693 (1954), which attacked and eventually abolished the federal government's segregated school system in the district of Columbia. Considering the importance of the psychological aspect of the issue, the Supreme Court needed a unanimous decision to strike down the segregation doctrine. If the case had been decided in the year it came to the Supreme Court, it is doubtful whether a conclusive majority would have been secured. It is even possible that the Court could have supported the "separate but equal" doctrine, since most of the judges were clearly reluctant to take on an activist position and ignore a Supreme Court landmark precedent of the kind of *Plessy vs. Ferguson* (1896). Besides, Chief Justice Vinson himself, despite his support of desegregation in previous cases, such as *McLaurin vs. Oklahoma State Regents*, 339U.S.637(1950) and *Sweatt vs. Painter*, 339U.S.629 (1950), in which the Court declared the separate but equal facilities in higher education discriminative, had taken a middle-of-the-road view and was obviously not ready to put an end to a clearly unconstitutional practice that "had been the foundation of a whole structure of racial discrimination"(Schwartz, Bernard 287).At the first Brown conference Chief Justice Vinson made it clear that he was not ready to overrule the Plessy case. On the other side, Justice Black and Justice Douglas stressed the unconstitutionality of the "separate but equal doctrine" and pressed for a delay of the final decision of the Court on the issue. Eventually, the case was postponed and scheduled for the following term of the Court in the autumn of 1953.

By the time the Court summoned up again, the situation had changed dramatically. Chief Justice Fred Winston died suddenly and was replaced by Earl Warren, the governor of California, who had had a splendid career as a state attorney general. Earl Warren expressed his view, to the surprise of all judges who considered him a person of moderate beliefs, that racially segregated schools denied blacks their constitutional rights under the Fourteenth Amendment. In doing so, he endorsed a different interpretation of the Fourteenth Amendment privileges and immunities clause. In 20th century America, "privileges and immunities" could mean nothing else but all constitutional rights granted to all American citizens, regardless of their race. Any other interpretation of the provision would contradict the values of liberty and equality of the American political system. To a large extent, Warren's firm position influenced the judges who still hesitated and predetermined the outcome of the case.

The opinion of the Court, delivered by Chief Justice Warren himself, was short and conclusive. After outlining the facts of the case and history of the Court's decisions concerning the "separate but equal" doctrine, Warren pointed out the "importance of education to [a] democratic society" (*Brown vs. Board of Education of Topeka*). He went on to stress that education is of great significance for the "awakening [of] the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment" (*Brown vs. Board of Education of Topeka*). Using the language of a legal realist, Chief Justice Warren pointed out that no matter how equal separate school facilities might be, the result of segregated education was highly detrimental to the psyche of colored children and "deprived [them] of the equal protection

of the laws guaranteed by the Fourteenth Amendment" (*Brown vs. Board of Education of Topeka*).

The impact of *Brown vs. Board of Education of Topeka* case on the whole country was enormous. The decision caused a wave of resistance in the South, often accompanied by mob violence. As a result, the implementation of Brown was slow and by 1964 only two percent of the black students in the Southern states attended integrated schools (Ruby Martin, " Oral History Interview" qtd in O'Brien 1367). However, with the adoption of the Civil Rights Act of 1964, the federal government assumed the responsibility for the enforcement of school integration around the country and cases of racial segregation in education were isolated only to certain areas in the South.

The *Brown vs. The Board of Education of Topeka* was initially intended to abolish racial discrimination in education. However, the case posed the question of the constitutionality of segregation in general. Not only segregated schools were discriminative, but also all other accommodations in which the "separate but equal" doctrine was still applied. In the years to come, on the Supreme Court docket arrived a number of cases, concerning desegregation in transportation, on public beaches, and in other public facilities. Consequently, the Brown case indirectly struck down the *Plessy vs. Ferguson* decision of 1896, thus completely overturning the "separate but equal" doctrine.