BAUGH The Detroit School Busing Case

JOYCE A. BAUGH

The Detroit School Busing Case

Milliken v. Bradley and the Controversy over Desegregation

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To my parents,

the late Reverend Jeff Baugh and Mrs. Ella Jones Baugh,

and to all who work for justice, freedom, and peace

The course of enforcement of desegregation in the United States was not straight or smooth, as school boards colluded with local authorities in massive resistance to the plain sense of the Supreme Court's ruling in its landmark *Brown v. Board of Education* (1954) decision. Bit by bit, after nearly two generations of litigation, schools in the country moved toward integration. The equitable means for this – the injunctive relief federal district courts fashioned for children of all races – often depended on complex busing plans, as "white flight" from integrated schools in some districts had effectually resegregated their school systems. Busing within school districts was approved by the High Court in *Swann v. Mecklenburg* (1971), but what about busing within a larger region that included urban and suburban, multicounty and multidistrict schools? If the right to be upheld was an education in integrated schools, how far did the busing remedy reach? *Milliken v. Bradley*, the case at the center of a tortured Detroit resegregation tale, answered that question.

Joyce Baugh has not only written here the definitive account of *Milliken*, she has lived the story in a way that gives a special authority and depth to her account. Growing up in South Carolina at a time when school integration was finally gaining acceptance, when she traveled to Ohio as a graduate student, she was surprised to discover the de facto segregation of northern schools. Hired as a faculty member at Central Michigan University, she found that the Detroit story, so powerful and poignant, was news to her students.

The events in Detroit made up only one chapter in a much bigger story reaching back to the earliest days of the new nation. In swift and sure strokes of the pen, Baugh's first chapters trace the malign impact of racialism from those days to the time that Detroit sought to bus some of its schoolchildren beyond the city limits to the almost entirely white schools in the nearby suburbs. She reminds us that even after the Civil War ended slavery, segregation was not limited to the South, but it also was a way of life in the North, including Michigan. Even when, in 1867, the state outlawed segregated schools, Detroit's school board resisted the new law – shades of the Jim Crow South.

Baugh has combined her personal insight, thorough scholarship,

and mastery of the details and doctrines of school desegregation to bring the Detroit case to life. She interviewed counsel representing both sides in the case, pored over school board minutes and records, and sat down to talk with the reporter who covered the events as they unfolded. Her account of the federal district court judge whose mind was changed by the evidence and whose courageous decision, if honored by the High Court, might have fulfilled *Brown*'s mandate, is truly moving. Her chapters on the Supreme Court deliberations and the doctrinal impact of the decision in *Milliken* are heart-rending. She also spent time with the federal district court judge who closed the litigation in 1989 and gained from him additional insights into the process and the meaning of the litigation.

What emerges from this book is Baugh's empathy for all the people in the story, giving their claims fair hearing. And when she writes that "more than thirty-five years after the first *Milliken* decision, urban education remains in crisis," who can doubt this judgment? Politics at the local level, mirrored by politics on an increasingly conservative U.S. Supreme Court, had drawn a line over which a more equitable vision of right and wrong could not cross. In summing up the contemporary landscape of education in Detroit, Baugh notes that "the school district remains plagued by high dropout rates, declining enrollments, ballooning deficits, high superintendent turnover, financial scandals and corruption, and public disputes among school board members." The poverty of the city, in part enabled or at least accelerated by *Milliken*, has impoverished the education it can offer its children. Surely that is a wrong that law should have righted.

In the fall of 1969, fifteen years after the Supreme Court's decision in *Brown v. Board of Education*, I entered the fifth grade at Dorchester Terrace Elementary School. This was the beginning of school desegregation in Charleston, South Carolina. From first through fourth grades I had attended Murray Hill Elementary, an all-black school. Very little conflict accompanied black students' entrance into the formerly all-white elementary school, although the formerly all-white high school to which students from my community and other nearby black neighborhoods were assigned did experience some degree of turmoil. Eight years later, in August 1977, I enrolled at South Carolina's Clemson University, where in 1963 another Charleston native, Harvey Gantt, had become the first African American student.

After completing my undergraduate degree at Clemson, I went to graduate school at Kent State University in Kent, Ohio, beginning in January 1982. There I learned about the political and social climate in northeastern Ohio, including the extent of racial segregation within the public school systems, especially in the Cleveland area. Based on what I had been taught about race relations while growing up in the South, I had expected these schools to be well integrated. That they were not was a great surprise to me.

I noticed similar patterns after arriving as a faculty member at Central Michigan University in 1988. As I began to I teach my Constitutional Law: Civil Rights and Liberties course, I found that while my students had heard of *Brown* and school segregation in the South, they knew nothing about similar problems in the North generally or about *Milliken v. Bradley* specifically. This was particularly striking, since so many of them came from the Detroit metropolitan area (both the city and suburbs). Most attended public schools that were overwhelmingly white or black, but they seemed to have no idea why this was so. Suspecting that this was true for students in other major metropolitan areas, as well as for the general public, I came to realize just how significant *Milliken* really is.

Telling the story of *Milliken* is not an easy task; this is a complex case with interesting origins, characters, and many twists and turns. The book is organized into seven chapters. Chapter 1 discusses the

significance of *Plessy v. Ferguson*'s "separate but equal" doctrine, the NAACP's successful legal strategy to overturn it, and the Supreme Court's major school desegregation cases in the first decade after *Brown*. In Chapter 2, I provide a history of race relations in the Detroit metropolitan area, setting the stage for understanding how Detroit became central to the conflict over northern school desegregation. The initial focus of Chapter 3 is the impact of *Brown*, including federal enforcement of the decision, along with patterns of school segregation in the North, with particular emphasis on Detroit.

Chapter 4 describes the specific events that led to the lawsuit being filed in federal district court, followed in Chapter 5 by an examination of the proceedings in the district court and court of appeals. Chapter 5 also recounts the political and social atmosphere surrounding the case as it unfolded in the lower courts. Chapter 6 follows events as the case reached the Supreme Court and was decided there. This includes an extensive discussion of the briefs, oral arguments, and written opinions. Finally, Chapter 7 covers the aftermath of the Supreme Court's decision, including reactions to the ruling, events occurring after the case was remanded to the federal district court, its impact on educational opportunities for students in Detroit and other metropolitan areas, and a discussion of later Supreme Court school desegregation cases.

Many people deserve recognition for their assistance and encouragement as I worked on this book. Paul Dimond, a member of the NAACP legal team, wrote a compelling account of his experience litigating *Milliken* and other desegregation cases. He was the first person I interviewed, and his insights and suggestions helped propel me in the right direction. William Grant, former education writer for the *Detroit Free Press*, had a unique vantage point as the only reporter who followed the case diligently. I very much appreciated the perspective he shared in our interview, as well as the numerous articles he wrote before, during, and after the case. William Saxton, attorney for the suburban districts that challenged the metropolitan remedy, also provided valuable information, both in his reflections of the case and by loaning me a substantial set of documents, which included key excerpts from the trial transcripts, important motions, and other exhibits. His generosity saved me valuable travel and research time. I also interviewed federal district judge Avern Cohn, who eventually closed the

case; he also provided useful documents, including his complete file on the proceedings from the second round. In addition, he spearheaded a four-part series on *Milliken* that was published in 2008 and 2009 in *The Court Legacy*, the journal of the Historical Society for the United States District Court for the Eastern District of Michigan.

I also wish to thank the staff at the Manuscripts Division of the Library of Congress, who helped to facilitate my research into the collected papers of Justices Harry Blackmun, William Brennan, William O. Douglas, and Thurgood Marshall, along with the NAACP files on *Milliken*. The reference staff of the Park Library and the Clarke Historical Library at Central Michigan University also provided helpful assistance. Michael J. Klarman and Paul A. Sracic, who carefully reviewed the manuscript, made numerous suggestions that helped me sharpen and improve the final product. I am grateful to Peter Charles Hoffer and N. E. H. Hull, the editors of the Landmark Law Cases & American Society series, for including this project in the series and especially to Michael Briggs, my editor, for his patience and encouragement from start to finish.

I appreciate the insights of members of the Social Ethics Seminar, a group of scholars who have studied and written about racial justice issues for more than thirty years, especially Warren Copeland, who commented on early drafts of parts of the manuscript. Thanks go also to colleagues in the Department of Political Science at CMU and to Thomas R. Hensley and Christopher E. Smith, who have collaborated with me on previous research projects on the Supreme Court and civil rights and liberties, for their words of encouragement and moral support.

Finally, words cannot express adequately my gratitude to Roger Hatch, my husband, for patiently serving as a sounding board and a superb proofreader and informal editor of this manuscript.

CONTENTS

CHAPTER 1

From *Plessy* to *Brown*

The Rise and Demise of "Separate but Equal"

> The object of the [Fourteenth] 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. . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.
>
> JUSTICE HENRY BROWN, MAJORITY OPINION IN *PLESSY V. FERGUSON* (1896)

Justice Brown's majority opinion in *Plessy v. Ferguson* (1896) helped to legitimate Jim Crow, a system of racial subjugation in the South that lasted for nearly a century. This period of American history was marked by rigid, government-imposed racial segregation in nearly every aspect of life. As a result of *Plessy*, the so-called "separate but equal" doctrine was established, a legal concept that would take a carefully planned litigation strategy, several Supreme Court decisions, a Civil Rights Movement, and a federal civil rights law to fully overturn.

"Separate but Equal": The Legalization and Perpetuation of Jim Crow

Plessy concerned the 1890 Louisiana Separate Car Act, which required "equal but separate" accommodations for blacks and whites in railcars. Individuals who violated the law were subject to criminal penalties, outraging Louisiana's black community. During Reconstruction, the state legislature actually had passed a law *forbidding* segregation in railcars, but the Supreme Court had struck it down as an interference with

Congress's power to regulate interstate commerce (*Hall v. DeCuir*, 1878), even though the statute applied only to railway operations within the state. Louisiana was not the only state with a law requiring segregation on the railways. Florida passed the first one in 1887, followed by Mississippi (1888) and Texas (1889). The Supreme Court upheld the Mississippi law over claims that it interfered with interstate commerce, but, as Richard Kluger noted, "the Court ducked the more profound question of whether Negro passengers had to submit to such state-imposed segregation and ride in separate cars."

New Orleans blacks and Creoles formed the Citizens Committee to Test the Constitutionality of Louisiana's Separate Car Law. The group's challenge was supported by railway companies, who also objected to it; having to establish separate cars increased their operational costs. The Citizens Committee and the companies arranged to have Homer Plessy arrested for refusing to move to the "colored" section of a coach. Plessy, a very light-skinned man, was classified as "colored" although he was seven-eighths white and could "pass" for white. At his trial, Plessy was pronounced guilty of violating the statute.

Taking his case to the Supreme Court, Plessy claimed that the law was unconstitutional under both the Thirteenth and Fourteenth Amendments. By a 7-1 vote, the Court rejected both claims. Justice Brown's majority opinion held that the Thirteenth Amendment did not apply because it was meant only to forbid actions that reintroduced slavery. Furthermore, Brown concluded, the Louisiana law did not violate the Equal Protection Clause of the Fourteenth Amendment because that clause was not meant to abolish all distinctions based on color or to guarantee social equality. As evidence, he argued that laws forbidding interracial marriage "have been universally recognized as within the police power of the State" and that the "establishment of separate schools for white and colored children . . . 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." Brown relied explicitly on an 1849 Massachusetts Supreme Court decision, *Roberts v. City of Boston*, which upheld the authority of the Boston school committee to require separate educational facilities for black and white children. (This case is discussed in more detail in Chapter 3.)

In a solo dissent, Justice John Marshall Harlan criticized the majority for affirming the power of states to deny civil rights to citizens because of their race. In the dissent's most frequently quoted passage, Harlan wrote: "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." Harlan's dissent was particularly notable because he was a former slaveholder and avid supporter of slavery.

Although the words "separate but equal" did not appear in the opinions, judicial sanction of Louisiana's "equal but separate" accommodations law helped to ensure state passage of additional Jim Crow laws. In the aftermath of *Plessy*, state-ordered segregation pervaded every aspect of life (and death) in the South: transportation, schools, water fountains, telephone booths, hospitals, cemeteries, and a host of other public accommodations. Even textbooks for schoolchildren had to be stored separately. Presumably, these laws were valid as long as the accommodations provided were equal, but in most places this was not the reality.

The Jim Crow system was undergirded by disenfranchisement, sharecropping, economic reprisals, physical threats and violence from individual citizens and the Ku Klux Klan, and, ultimately, lynchings. Despite the dangers, African Americans resisted this racial caste system, as a case decided three years after *Plessy* illustrates. It involved segregation in the public schools in Augusta, Georgia. In *Cumming v. Board of Education* (1899), at issue was the school board's decision to close a public high school for blacks while at the same time providing a high school for whites. A group of black parents contended that because state law required "separate but equal" school facilities, the white school should be closed until a comparable one was opened for black children. A unanimous Court, however, did not apply its own doctrine and refused to invalidate the board's decision. This time, Justice Harlan accepted the segregation policy, concluding that the plaintiffs had not proven that the board decision was based on racial malice. To the contrary, he apparently was persuaded that the board actually was trying to assist the black community. The black high school could accommodate the increasing number of black primary school students, and there was insufficient funding available to build another school.

Nearly a decade later, a challenge to segregation in higher educa-

tion met a similar fate. In *Berea College v. Kentucky* (1908), the Court upheld a state law that required separate classes for students who were being educated in institutions that taught both blacks and whites. Berea College, a private, religious college, had been racially mixed since its founding in 1859, and the trustees asserted that the state illegally impaired its charter through the law requiring blacks and whites to be taught separately. In a 7-2 decision, the majority ruled that the state was free to limit the college's rights because the school functioned as a corporation that owed its charter to the state. The Court also noted that the state did not prevent the college from teaching both races altogether; it merely prohibited them from being taught in the same space at the same time. Justice Harlan dissented, describing the statute as "an arbitrary invasion of the rights of liberty and property guaranteed by the Fourteenth Amendment against hostile state action."

The Court was also forced to address the question of whether segregation laws applied to racial or ethnic groups other than blacks. At issue in *Gong Lum v. Rice* (1927) was the application of Mississippi's school segregation laws to children of Chinese ancestry whose families had lived in the state's Delta region since the 1870s. In many of these communities, Chinese children had been permitted to attend white schools, but when Gong Lum tried to keep his nine-year-old daughter, Martha, enrolled in the white school in Bolivar County, he met stiff resistance. The trial judge ruled in his favor, but he lost his appeals at the state level.

Gong Lum, concerned about the inferior conditions of the "colored" schools, went to the Supreme Court. He requested that his daughter not be classified as colored so that she would not be sent to colored schools, but a unanimous Court rejected his plea without even hearing oral argument in the case. Chief Justice Taft held that no argument was necessary because "we think that it is the same question which has been many times decided." Citing federal and state cases upholding racial segregation in public schools, Taft said the decision to exclude Chinese children from white schools was within the discretion of the state in regulating its public schools. He concluded: "Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils, but we can not think that the question is any different or that any different result can be

reached . . . where the issue is as between white pupils and the pupils of the yellow races."

Charles Hamilton Houston, Thurgood Marshall, and the Development of a Legal Strategy to Overturn *Plessy*

In 1909, the National Association for the Advancement of Colored People (NAACP), an interracial civil rights organization, was founded in response to a devastating race riot in 1908 in Springfield, Illinois. During the riot, two blacks were lynched, four white men were murdered, and seventy other persons were injured. Richard Kluger notes that it took nearly 5,000 members of the militia to restore order, and afterwards, "more than 2,000 blacks . . . fled the city in terror – a principal goal of the rioting ringleaders, none of whom was punished." The national headquarters for the NAACP was in New York City, but local branches sprang up in communities across the country, including in the South. Much of the NAACP's initial effort was focused on an antilynching campaign, including a push for federal legislation to impose stiff penalties against participants. (Despite the efforts of NAACP officials and others, no federal antilynching law ever was passed.) The NAACP focused its attention on other civil rights issues as well, and, under the leadership of Charles Hamilton Houston, it eventually became the primary organization that worked actively to end the "separate but equal" legal doctrine.

Charles Hamilton Houston was born in Washington, D.C., in 1895. His father, one of about two dozen black attorneys in private practice in the city, also taught part-time at the law school at Howard University. His mother, trained as a teacher, found more lucrative work as a hairdresser and seamstress. After graduating Phi Beta Kappa from Amherst College in Massachusetts, Houston returned to Washington, where he taught school for two years before serving from 1917 to 1919 in a segregated army during World War I. Genna Rae McNeil, Houston's biographer, explained that his experiences with Jim Crow during the war led him to the study of law as a means to change that system and work for racial and economic justice. Houston had observed a black officer being court-martialed for following orders. Houston also had