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J. Clay Smith Jr.

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# HOWARD UNIVERSITY

2900 VAN NESS STREET, N.W.  
WASHINGTON, D.C. 20008



SCHOOL OF LAW

## BROWN AT THE U.S. SUPREME COURT IN 1994

By: Professor J. Clay Smith, Jr.  
Howard University School of Law<sup>1</sup>

Forty years ago, some one must have asked this question: What effect will the Brown v. Board of Education and Bolling v. Sharpe<sup>2</sup> opinions have on America in year 2000? As framed, this question may have been asked by either the opponents or proponents to these decisions. The critics of Brown attacked this decision with what today can only be referred to as reams of paper in opposition to it. African Americans, and other Americans who supported the Brown opinion, continue their vigilance to protect the principles announced in Brown, principles that closed the curtain of jurisprudence announced by the U.S. Supreme Court in the infamous

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<sup>1</sup> At the U.S. Supreme Court, May 12, 1994. The event was sponsored by several alumni of Howard University School of Law: Rawle Andrews, Jr., '90; Richard A. Bancroft. '51; Roland W. Burris, '63; Joan A. Burt, '64; T.J. Cunningham, '57; M. Ashley Dickerson, '48; Julian R. Dugas, '49; Ethel C. Ellison, '54; Frankie M. Freeman, '47; Bernadette A. Gartrell, '70; Reginald Holt, '73; Carolyn D. Jordan, '66; Vernon E. Jordan, Jr., '60; Damon E. Keith, '49; Singleton B. McAllister, '84; Ruby Burrows McZier, '65; Eileen R. Petersen, '66; Alvin L Pittman, '78; Algenita Scott-Davis, '74; James E. Sheffield, '63; Dana B. Stebbins, '75; Delano S. Stewart, '64; Ruthie L. Taylor, '65; Gloria E.A. Toote, '54; Walter E. Washington, '48; Togo & Gail West, '68; L. Douglas Wilder, '59; Alexander Williams, Jr., '73; Larry C. Williams, '59; and Patricia M. Worthy, '69.

Associate Justice Anthony Kennedy was the host. The Dean of the Howard University School of Law is Henry Ramsey, Jr.

<sup>2</sup> Brown v. Board of Education, 347 U.S. 483 (1954) (Brown I); 349 U.S. 294 (1955) (Brown II); Bolling v. Sharpe, 347 U.S. 497 (1954). These decisions determined that *de jure* discrimination in public education violate the Fourteenth and Fifth Amendments to the U.S. Constitution. See generally, LOREN MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO (1966).

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Dred Scott, and Plessy v. Ferguson opinions.<sup>3</sup>

The Brown decision commands the public to look to the effects that segregation has had on public education, and to correct it.

It is simple enough for us to look at America today and take pride in the progress that African-Americans have made in public education in America. However, the fact is that segregation remains apart of the architecture of American public education, and the white flight reported in the U.S. Supreme Court's decisions in Milliken I & II,<sup>4</sup> which horrified Justice Thurgood Marshall in his dissenting opinion, seems to have limited the power of Brown to help conform the society to real equality in public education.

Today, in cities like Detroit and the District of Columbia, a child can be born and die without ever having known a classmate, who is white. Today, it is possible that a white student anywhere in America can be educated without ever studying algebra, chemistry with an African American or exchanging ideas about the other's origin, ethnicity or history.

Today, the state may allocate less money to educate a poor child in one section of town, and spend more to educate children in affluent parts of town. Today, states may, on one hand, underfund public black colleges so that white students will not be attracted

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<sup>3</sup> Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); Plessy v, Ferguson, 163 U.S. 537 (1896). Respectively, these decisions held that black people were not citizens under the Constitution and established the doctrine of separate but equal.

<sup>4</sup> Milliken v. Bradley, 418 U.S. 717 ((1974) (Milliken I); 433 U.S. 267 1977) (Milliken II).

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to attend them while, on the other hand, claiming that black people want segregation, which, of course, is not true. Such propaganda must be carefully analyzed because such arguments may be a way of closing black colleges without a correlative duty to provide educational opportunities to black students seeking higher education.

Integration in America has been a rocky path.<sup>5</sup> At Howard University School of Law, we continue to be inspired by the words of Professor Herbert O. Reid, Sr., who once told a skeptical student that "Brown and Bolling v. Sharp will live to conquer its foes and will live on after their foes are gone."

The principles embodied in the Brown decision and its progeny has torn down discriminatory barriers for white Americans as well as African American people. As a matter of law, women, the disabled, gays rights advocates, immigrants, children with AIDS, who are fighting to remain in public schools, have and are benefitting from the power of Brown. Such a broad application of the Court's decision in Brown was probably not expected in 1954, but the moral power of Brown is so wrapped in grace, so rooted in the earth, so laced with such an affirmative rejection of simple wrong that nothing, or no one can or will stop its mighty movement.

Justice Thurgood Marshall, did not live to celebrate the Fortieth anniversary of the Brown decision.<sup>6</sup> Indeed, many of the

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<sup>5</sup> See Special Issue of EMERGE MAGAZINE, May 1994.

<sup>6</sup> J. Clay Smith, Jr., *Thurgood Marshall: An Heir of Charles Hamilton Houston*, 20 CON. L. Q. 503, 505 n6 (1993), stating that Justice Marshall died at 2 p.m., on January 24, 1993.

lawyers who argued these cases, both black and white, have gone beyond.<sup>7</sup> But, we are alive. Each of us has the power to join the

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<sup>7</sup> The list is legion of black and white lawyers who fought so valiantly to destroy Old Jim Crow. They are remembered today. Among the honorees cited in the program--all alumni and or Deans of the Howard University School of Law, who are deceased are: Harold Boulware, '38; Elwood H. Chisolm, '51; George E.C. Hayes, '18; Thurgood Marshall, '33; Frank D. Reeves, '39; Herbert Ordre Reid, Sr. Hayes, Chisolm, Reeves and Reid served on the faculty for several years. Reid, a Harvard law graduate, also served as Acting Dean of Howard's law school from 1972-1974.

The living giants of the cause include Spottswood W. Robinson III, '39, who also served on the law faculty for several years and was Dean of the Law School from 1960-1963, Robert L. Carter, '40; Oliver White Hill, '33; Charles Todd Duncan, a Harvard law graduate, who served on the faculty for several years and was Dean of the Law School from 1973-1977; James Madison Nabrit, Jr., a Northwestern law school graduate, who served on the faculty for several years and was dean of the Law School from 1956-1960.

William Robert Ming, Jr., deceased, also served on the team. Ming was a member of the Law Faculty, as was George Marion Johnson, a Boalt Hall law graduate, deceased, who served on the faculty and was Dean of the Law School from 1946-1958.

Others members of the Brown team include Charles L. Black, Jr., William T. Coleman, Jr., Jack Greenberg, Loren Miller (deceased), Constance Baker Motley, David E. Pinsky, John Scott (deceased), Jack B. Weinstein and Louis L. Redding. John Scott, a graduate of Washburn University's law school, was one of the lawyers of record who filed the Brown suit in Topeka, Kansas.

Many of these lawyers are mentioned in the following books which treat the Brown decision: *See generally* RICHARD KLUGER, *SIMPLE JUSTICE* (1976); MICHAEL D. DAVIS & HUNTER R. CLARK, *THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH* (1992); CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL* (1993); MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961* (1994); JACK GREENBERG, *CRUSADERS IN THE COURTS* (1994).

As we celebrate Brown, Robert Morris, Sr., the second black lawyer in the United States, who in 1848, filed the first desegregation law suit in Boston, Massachusetts, a case that he lost, must be acknowledged. He filed *Roberts v. City of Boston*, Case No. 976, Court of Common Pleas, Suffolk County, Boston, Massachusetts. Subsequently, this case was appealed to the Massachusetts Supreme Council, the highest court in Massachusetts, by Morris and Charles Sumner, but the court upheld the lower court's decision. *See Roberts v. City of Boston*, 5 Cush 198, 59 Mass. 198 (1849), discussed by J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944* 97 (1993). Many black lawyers planted the seeds which nourished the legal ground for Brown, *Id.* (passim), and for Resident Vice-Dean Charles Hamilton Houston,

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Brown movement which is aimed at assuring that African American children, and young black adults have access to and receive an education. Such an ongoing movement is the legacy of Brown, and the Last Will and Testament of the parents, who brought the law suits in Brown and Bolling, and the legacy of the lawyers, in Topeka, Kansas, and the District of Columbia, and elsewhere, who tried these cases. Brown is the legacy of the Warren Court which penned, without dissent, one of the most important court decisions ever decided in the world.

In year 2004, when Brown and Bolling v. Sharp turn 50, I hope that the Brown decision and the courts of the Nation will have freed all of America from the badges of slavery that separate us, and that makes it difficult for us to think, act, talk and cooperate as one Nation.

If public education fails, if the education of our youth enslaves only the poor and people of color within the public education system, the compelling values embodied in Brown and Bolling v. Sharp may be lost, and this will rob our Nation of its rich possibilities and, perhaps, its future. This must not happen.

Let us lift our voices for the longevity of Brown v. Board of Education; let us lift our voices for our Nation.

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while at Howard University School of Law. See GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983). But, it was Houston, and the modern civil rights architects, drawing on these seeds, that made Morris's, et al. work a reality.

HOWARD UNIVERSITY SCHOOL OF LAW

COMMEMORATIVE PROGRAM

40TH ANNIVERSARY OF *Brown vs. Board of Education*

AT THE

UNITED STATES SUPREME COURT

WASHINGTON, D.C.

THURSDAY, MAY 12, 1994

4:30 P.M.

"FROM WHERE I STAND" EASTERN HIGH SCHOOL CHORAL ENSEMBLE  
*Huff* Washington, D.C.

GREETINGS ..... ASSOCIATE JUSTICE ANTHONY M. KENNEDY  
U.S. Supreme Court

THE OCCASION ..... DEAN HENRY RAMSEY, JR.  
Howard University School of Law

PRESENTATION OF HONOR SCROLLS TO HOWARD LAW

ALUMNI, FACULTY AND DEANS WHO WERE

ATTORNEYS OF RECORD IN THE *Brown vs.*

*Board of Education* CASES ..... RUBY BURROWS MCZIER, ESQ., '65  
CYNTHIA BOOKHART, '94

HONOREES:

ALUMNI HAROLD BOULWARE, '38\*  
ROBERT L. CARTER, '40  
ELWOOD H. CHISOLM, '51\*  
GEORGE E.C. HAYES, '18\*  
OLIVER W. HILL, '33  
THURGOOD MARSHALL, '33\*  
FRANK D. REEVES, '39\*  
SPOTTSWOOD W. ROBINSON, III, '39

FACULTY WILLIAM R. MING, JR.\*  
HERBERT O. REID\*

DEANS CHARLES T. DUNCAN, '74-77  
JAMES M. NABRIT, JR., '56-60  
SPOTTSWOOD W. ROBINSON, III, '60-63

CLOSING REMARKS ..... J. CLAY SMITH, PROFESSOR  
Howard University School of Law

"LIFT EVERY VOICE AND SING" ..... AUDIENCE

BACKGROUND MUSIC ..... HOWARD UNIVERSITY JAZZ BAND

\*Deceased