Reflections on Wisconsin's Brown Experience

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REFLECTIONS ON WISCONSIN'S BROWN EXPERIENCE

PHOEBE WEAVER WILLIAMS*

I. INTRODUCTION

Numerous academic, civic, legal, and media organizations designated the year 2004, the fiftieth anniversary of the Supreme Court’s decision in Brown v. Board of Education, as an appropriate time to commemorate the Supreme Court’s decision. Reviews of the considerable commentary generated by Brown’s fiftieth anniversary suggest that the occasion has represented more than an opportunity to celebrate a momentous decision that redefined relationships between African and European Americans in this country. Brown’s fiftieth anniversary has been an opportunity to review social, political, and legal relationships between blacks and whites, and also other ethnic groups.

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Brown’s anniversary has prompted reviews of the legal precedent and legislative reforms evolving from the Court’s decision. Of most import, Brown’s anniversary has prompted re-examinations of the principles the Court set forth in light of present concerns that there remains much work to do to repair the vestiges of European enslavement of Africans; to address the effects of past and present racial oppression and discrimination against African Americans; and to address current disparities between African and European Americans’ access to economic and educational opportunities.

The complexity of long relationship is similar whether it is the interaction of individuals or divided cultures. Just as relatively little can be learned about a couple’s relationship—their successes, failures, challenges, or accomplishments—from peering at fifty-year-old wedding pictures, relatively little can be appreciated about the import of Brown, its relationship to our nation’s social, moral, educational, political, and legal structure, by focusing solely on the words the Court announced on May 17, 1954.

During the past fifty years, our national relationship with Brown has included both adherence and infidelities to Brown’s principles. As our relationship with Brown has matured, the case and its principles remain for some a beautiful symbol of moral courage, while for others Brown has grown old and unattractive. Some note that Brown has been reinterpreted and given so many legal “facelifts” that its principles are hardly recognizable. Whatever the viewpoint, for most people, Brown

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3. Dennis J. Hutchinson, Perspectives on Brown, 8 GREEN BAG 2d 43, 43 n.3 (2004) (discussing opinions about the significance of Brown and noting that twenty-five years later, Prof. J. Harvie Wilkinson characterized Brown as “among the most humane moments in our history,” while Richard Posner has acknowledged that Brown was a “triumph of enlightened social policy” in the short term, but in a “longer perspective... the decision seems much less important, even marginal”) (quoting Richard Posner, Appeal and Consent, THE NEW REPUBLIC, Aug. 16, 1999, 36, 39); Jack M. Balkin, What Brown Teaches Us About Constitutional Theory, 90 VA. L. REV. 1537, 1544 (2004) (concluding that while it would take a decade, passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act to secure Brown’s “canonical status,” the Court’s decision changed constitutional doctrine so that “supporting segregation meant advocating policies that had been declared outside the law”); DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 20-28 (2004) (concluding that a decision, which upheld “separate but equal” and required equalization of the schools, restructuring of school boards to include black representation, and judicial oversight of remedial measures, would have resulted in the implementation of more effective educational policies for black children).

4. Balkin, supra note 3, at 1564-67 (describing the various Supreme Court reinterpretations of Brown: by 1964 the Court had interpreted Brown as requiring strict scrutiny of racial classifications; by 1968 the Court had imposed an affirmative duty on school systems to eliminate all vestiges of prior discrimination; by 1971 states were required to
has mattered.

Almost immediately after its issuance, Brown evoked controversy. In some regions of the country, opposition was so strong that some feared Brown would irreparably rupture relationships between the federal judiciary and state and local governments, and between regions of the country that proclaimed racially egalitarian ideals and those that adhered to white supremacist beliefs. Part II of this Article discusses black-white racial relations in Milwaukee and Wisconsin communities during the era prior to Brown. Wisconsin’s reactions to the Brown racially integrate schools; by 1974 the Court interpreted Brown as requiring proof of either overt racial classifications or deliberate intentions to segregate for remedial measures—a decision that accelerated the resegregation of schools. In a line of affirmative action cases the Court interpreted the antidiscrimination principle in Brown as subjecting “all overt racial classifications to strict scrutiny whether they harmed blacks or whites”).


6. See Thomas J. Davis, Vouching for Vouchers? Zelman v. Simmons—Harris in Light of Lessons on Ends and Means From Brown v. Board of Education, 6 RUTGERS RACE & L. REV. 31, 82-83 (2004) (describing the reactions of Virginia Governor Thomas Stanley to Brown: In June 1954, Virginia Governor Thomas Stanley defiantly declared in response to Brown I, “I shall use every legal means at my command to continue segregated schools in Virginia.” In August 1954, Governor Stanley further declared that: “The people of Virginia and their elected representatives, are confronted with the gravest problems since 1865. Beginning with the decision of the Supreme Court of the United States on May 17, 1954, there has been a series of events striking at the very fundamentals of constitutional government and creating situations of the utmost concern to all of our people in this Commonwealth, and throughout the South.”... In August 1956 the governor convened a special session of the Virginia General Assembly to treat the state’s public school laws in light of the Brown desegregation mandates. The legislature responded with a contumacious anti-desegregation package of thirteen acts described as “massive resistance” laws. They included interposition, a theory arguing on Tenth Amendment grounds that within its limits a state may declare null and void U.S. Supreme Court decisions. The acts also purported to authorize the governor and other state officials to cut off state funding to, and actually close, any schools that integrated. Further, the legislature authorized tuition grants for children whose parents wished to send them to alternative schools to avoid integration. Id. (citations omitted)).
decision are discussed in Part III.

A review of the litigation inspired by Brown's principles and the legislative reforms necessitated to enforce them demonstrates that Brown transcended the Court's May 1954 holding that "separate but equal has no place in public school education." Many viewed the Court's holding as setting forth the principle that "separate but equal" has no place in numerous spheres of black-white interactions.\(^7\)

Acknowledging that the importance and relevance of Brown measured far beyond the immediate effects of the Court's decision, Marquette University Law School sponsored two conferences that encouraged retrospective, as well as prospective, examinations of Wisconsin's relationship with the Court's historic opinion. The first conference, entitled, Segregation and Resegregation: Wisconsin's Unfinished Experience, Brown's Legacy After 50 Years, undertook a retrospective examination of the Court's decision. That perspective, along with the personal reflections it generated, is the focus of this article. Conference planners encouraged individuals to reflect on Brown by posing questions that sought a broad range of observations, including the following: (1) What was the community like, before and after Brown?; (2) What was the impact of the news of desegregation because of Brown?; and (3) What changes came with the court's 1976 order to desegregate Milwaukee's public schools?

In addition, the conference considered the delayed arrival of school desegregation in Milwaukee Public Schools. Part III of this Article considers the impact of the news of desegregation on the Milwaukee Public Schools.

\(^7\) Brown, 347 U.S. at 495. For a discussion of how subsequent legislation was influenced by Brown's principles, see Balkin, supra note 3, at 1548-49 (using positive constitutional theory to explain how direct action, the Brown decision, and subsequent legislation such as the Civil Rights Act of 1964, which "placed Congress's seal of approval on Brown," the Voting Rights Act of 1965, which enfranchised a large number of African Americans residing in the south, and the Elementary and Secondary Education Act which distributed funds to local school districts and placed the Department of Health, Education and Welfare, which the 1964 Civil Rights Act gave the power to withhold funds in a "key position to influence desegregation efforts").

and Wisconsin communities, drawing on personal and public reflections on the Court's decision by legal counselors and community leaders who participated.

Across geographical regions, responses to the Court's decision varied. Differences in racial demographics and racial customs, along with variations in formal legal landscapes, influenced public reactions to Brown. However, to date the legal commentary has not addressed Wisconsin's response to the Brown decision in light of Wisconsin's legal, social, and political landscape. Milwaukee's response was a mirror of a nation still mired in a fierce and costly blight; its responses were, and continue to be, uniquely its own. Part III of this Article fills this void through a discussion of Wisconsin's response to Brown in light of the legal, social, and political frameworks that formed Wisconsin's black-white relationships.

Our national relationship to Brown represents more than a time-bound response to the Court's first decision outlawing legal racial segregation in public education. We, as a nation, have extended Brown's legal principles to other spheres of public and private activities where racial segregation was sanctioned by law and perpetuated by facially neutral governmental policies. We have developed the courts' tools to address de jure racial segregation and racial inequity, though the problems before the judges arise from complex social issues.

Many scholars have written about legal and cultural dilemmas, and more recently Wisconsin's educational reforms have been subject to examination. Yet, the legal literature lacks sufficient discussions of

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9. Brittain, supra note 2, at 31 (describing the positive impact of Brown as ending "de jure segregation not only in education, but also in transportation and accommodations in hotels, restaurants, and shops.")

10. Candace Saari Kovacic-Fleishcher, Comparing Remedies for School Desegregation and Employment Discrimination: Can Employers Now Help Schools?, 41 SAN DIEGO L. REV. 1695, 1698 (2004) (comparing the remedial structure of Title VI and Title VII of the 1964 Civil Rights Act, the author concludes that Title VII's remedial structure led to greater integration of workplaces than Title VI's remedial structure, which relied only upon the withdrawal of federal funds from racially discriminatory educational institutions).

11. See, e.g., Tushnet, supra note 2, at 1706 (responding to Professor Gerald Rosenberg's conclusions that "Brown 'had virtually no direct effect on ending discrimination' and that change occurred only 'when Congress and the executive branch acted in tandem with the courts'"). Tushnet concludes that Rosenberg's analysis "misses one important way in which Brown matters: as part of a long-term collaboration between the Supreme Court and the New Deal (and later the Great Society) political coalition." Id. at 1694. Tushnet further explains that "Brown was the first indication from the very top of one of the nation's major governmental institutions that the civil rights leaders' appeal to the constitution might actually have some resonance—not only with the leaders and their constituencies, but with a broader public." Id. at 1708.
Wisconsin's *Brown* experience in light of these broader themes.

This Article addresses that void. In Wisconsin, *Brown* and its progeny evoked both laudable and critical responses of the Court's underlying assumptions and ensuing contributions to constitutional law and educational policy. *Brown* emboldened civil rights activists to pursue housing legislation to break patterns of neighborhood racial segregation.\(^{12}\) *Brown*’s principles encouraged critiques of state laws that pronounced state policies that race should not play a role in employment decisions, but provided no enforcement powers for either governmental or private litigants.\(^{13}\) *Brown* inspired challenges to educational policies that perpetuated and sustained racially segregated school systems in Milwaukee.\(^{14}\) Nevertheless, the critiques of *Brown*’s underlying assumptions about the necessity and efficacy for integrated schools to deliver quality education produced the greatest impact in Wisconsin.\(^{15}\) Those critiques led to unique and far-reaching experiments.\(^{16}\) Wisconsin’s experiences with those reforms subsequently influenced national educational policies.\(^{17}\)

Part IV concludes that, whatever opinion one holds of *Brown*, the Court’s decision surely transcended the geographical, temporal, and legal transactions addressed by its opinions. *Brown* reached past 1950’s educational policies, beyond southern mores and biases, into the very

\(^{12}\) See infra notes 200-08 and accompanying text.

\(^{13}\) See infra notes 195-99 and accompanying text.

\(^{14}\) See infra notes 190-94 and accompanying text.

\(^{15}\) Howard L. Fuller, *The Impact of the Milwaukee Public School System’s Desegregation Plan on Black Students and the Black Community (1976-1982)*, 10, 148-55 (May 1985) (unpublished dissertation) (on file with the author) (discussing *Brown I & II* and the subsequent desegregation measures used in Milwaukee schools—school closings, magnet schools, busing, and dislocation of students from neighborhood schools). Fuller concludes *Brown* was not based on racist tenets of black inferiority. Id. at 156. Nevertheless, desegregation was implemented in Milwaukee based on assumptions that “black schools and communities were ‘culturally inferior’” and, therefore, unsuitable for white children. Id. at 160.


\(^{17}\) Davis, *supra* note 6, at 39-40 (explaining that vouchers in Ohio represented grants of taxpayer money to “parents of elementary school children based on their financial need measured by family income” and noting that the “school voucher struggles began with a program in Milwaukee, Wisconsin, in 1990” with Ohio implementing its program in 1996, Florida in 1999, Texas and Louisiana legislatures considering vouchers during 2002 and 2003 and Colorado enacting a school voucher statute in April 2003; commenting further that “[a]nalysts such as Kathy Christie at the Education Commission on the States in Denver expect voucher programs to gain acceptance and popularity under President George W. Bush’s No Child Left Behind Initiative of 2001 that requires states to increase standardized testing and assessments of students”").
heart of Wisconsin's progressive political tradition. In some respect, Brown has mattered to most Wisconsin's residents, black and white, urban and rural, and surely to newer minority citizens.

Reflections from Wisconsin residents suggest that Wisconsin’s Brown experience has mirrored our national experience in many ways. It has included a mix of public and private responses to the Court’s decision demonstrating adherence to Brown’s moral mandate and resistance to Brown’s principles. Our relationship to the Court’s opinions has been just as complex as our national relationship to race. As Wisconsin’s Brown experience evolved, new challenges have emerged of increasing complexity. As African Americans and other racial groups successfully asserted rights and claims, public and private responses to those claims have eventually reflected majority preferences to segregate and exclude despite legal successes in courts and political successes in legislatures. Still, African Americans in Wisconsin persist with reevaluating positions and reframing arguments. Wisconsin’s Brown experience has been tumultuous and not always happy, but like the relationship of Brown to the rest of the country, it endures.

II. WISCONSIN'S STANCE ON RACE PRIOR TO BROWN: FROM 1846-1946: A CENTURY OF “WEAK RACIAL LIBERALISM”

Although Northern states were “virulently racist” during the antebellum period, residents in midwestern states were particularly hostile towards black rights, with Illinois, Indiana, and Iowa barring black migration during the 1850s.

Compared to most states, Wisconsin was progressive on racial issues; the majority of Wisconsin residents accepted only limited formal racial equality, applied and interpreted in a manner consistent with prevailing racist mores. While over one hundred petitions to the Wisconsin legislature after the Emancipation Proclamation sought to prevent Negroes from becoming residents, no such exclusionary legislation appeared in Wisconsin.

In 1866, when the Wisconsin Supreme Court recognized that African

20. Id. at 1889.
Americans were entitled to vote, Wisconsin became one of only six states in the nation to grant black suffrage. The achievement was not without long work, and this symbol of racial progress came after two decades of initiatives by black residents and white supporters. During the 1846 State Constitutional Convention, a majority of the delegates rejected proposals to include black suffrage in the state's constitution. At the 1847-48 Convention, delegates ratified language granting suffrage to "white male persons, over the age of twenty-one years, who have resided in this state one year next preceding any election, and who are citizens of the United States or have declared their intentions to become citizens, and also certain persons of Indian blood." Most notably, the delegates included a proviso that permitted the legislature to extend suffrage to those persons not already enumerated in the constitution. However, the state constitution required a referendum vote for approval by "a majority of all the votes cast at such election."

Wisconsin's first legislature passed a black suffrage law authorizing a referendum that was submitted to a vote during 1849. Voters approved the law by a vote of 5265 to 4075. However, the number who voted to approve black suffrage represented fewer than half of all of the voters who cast ballots in the election, which included voting on other matters such as persons running for office. Therefore, it was "universally understood" that the voters had failed to pass the legislation permitting black suffrage. During subsequent terms, the legislature passed suffrage laws in 1857 and 1865, but voters in those referenda clearly rejected black suffrage.

Issues of black rights predated the founding of the state and the writing of its constitution. Wisconsin is reputed to have "never countenanced de jure" racial discrimination, but state constitutional

22. RANNEY, supra note 18, at 540 n.8.
23. See infra notes 28-46 and accompanying text.
24. RANNEY, supra note 18, at 536.
26. Id. at 552.
27. Id.
28. RANNEY, supra note 18, at 537.
29. Gillespie, 20 Wis. at 544 (describing prior history of the case).
30. Id.
31. RANNEY, supra note 18, at 537.
32. Id.
33. RANNEY, supra note 18, at 536 (noting that at the time of statehood "Wisconsinites detested slavery, but they also felt that blacks were inferior to whites and they had no desire to integrate").
provisions affording suffrage rights to "white" residents represented a racially discriminatory legal mandate. In response to de jure racial discrimination enshrined in Wisconsin's Constitution, black Wisconsin residents were forced to employ a number of strategies to secure suffrage rights. They successfully pursued legislative reform not once, but three times. Initially, they garnered sufficient political support to approve the law during the 1849 referendum. However, those measures were not sufficient because election officials applied a "forced and unnatural" interpretation to language in the state's constitution. Blacks again successfully pursued legislative proposals during the 1857 and 1865 sessions, but voter referenda rejected the suffrage legislation.

Wisconsin's black residents finally decided on a direct action strategy that created a factual basis for litigation to challenge local officials' interpretations of the outcome of the 1849 referendum. Ezekiel Gillespie, a black leader in Milwaukee, attempted to register to vote and cast a ballot in the 1865 election. Local election inspectors rejected Gillespie's registration and denied him the opportunity to vote. Gillespie sued to challenge his exclusion in litigation before Wisconsin's Supreme Court, which concluded that Wisconsin's black residents had been eligible to vote since the 1849 referendum.

These events surrounding black residents' pursuit of suffrage rights set the stage for the state's response to black civil rights initiatives. Delay could be gained by offering weak formal protections that could be easily frustrated, thereby accommodating racist sentiments.

Why were black residents singled out and subjected to such treatment? Many of Wisconsin's white residents embraced sentiments, shared nationwide, that "racial differences were natural, the supremacy of the white race self-evident, and racial segregation [was] an imperative

34. *Id.* at 540, 561 (concluding that Wisconsin "never countenanced de jure discrimination, but de facto segregation and discrimination were common;" also noting that "[l]egal discrimination against blacks disappeared with the suffrage decision"). See *supra* note 28 and accompanying text.
35. RANNEY, *supra* note 18, at 537.
36. *Id.*
37. Gillespie, 20 Wis. at 556.
38. RANNEY, *supra* note 18, at 537.
39. *Id.* at 538 (describing Gillespie's motives for attempting to register to vote as "partly" at the suggestion of his attorney, Byron Paine, to test the effects of the 1849 election and also to publicize the suffrage issue).
40. Gillespie, 20 Wis. at 544.
41. *Id.*
42. RANNEY, *supra* note 18, at 538.
for the survival of both races.\textsuperscript{43} Edward Ryan, a legislative delegate who would later join Wisconsin’s Supreme Court, argued against including black suffrage in the state constitution, stating that “it was not right to mingle together two races whom God had declared could not mingle.”\textsuperscript{44} Another delegate, Moses Strong of Mineral Point, described white sentiments in his district when he warned black suffrage supporters that if such a clause was included in the constitution, “the people would deem it an infringement upon their natural rights thus to place them upon an equality with the colored race.”\textsuperscript{45}

Black Wisconsin residents confronted a pattern of recognition of rights of formal racial equality, only to find those rights thwarted by racist customs and beliefs, misunderstandings, and lack of enforcement mechanisms when asserting their rights across a range of social, civil, and political activities including voting, using public accommodations, and securing employment, housing, and quality educations for their children. Legal historian Joseph Ranney has characterized Wisconsin’s attitude towards black civil rights from 1846 to 1866 as representing a form of “weak racial liberalism” that “continued for the next century.”\textsuperscript{46} Discussions here illustrate that the pattern of “weak racial liberalism” was the prevailing political response to Wisconsin’s black residents’ efforts to secure equal access to the benefits of citizenship, gainful employment, and property ownership.\textsuperscript{47}

Wisconsin’s experiences with enacting and enforcing its early civil rights laws further demonstrate patterns of formal promises of equality followed by retrenchments to positions that permitted expressions of racial preferences and animus to continue. During 1889, for example, a theatre owner attempted to escort a black patron to racially segregated balcony seats.\textsuperscript{48} In response, about seventy-five black Milwaukeeans held an “indignation meeting” at which they formed a committee whose

\begin{itemize}
\item \textsuperscript{43} Klarman, \textit{supra} note 19, at 1895 (describing the “intellectual backdrop” supporting mid-nineteenth century views on black-white race relations).
\item \textsuperscript{44} RANNEY, \textit{supra} note 18, at 536-37 (quoting \textit{MADISON EXPRESS}, Oct. 27, 1846, reprinted in \textit{MILO M. QUAIFE, THE CONVENTION OF 1846} 243-44 (1919)).
\item \textsuperscript{45} RANNEY, \textit{supra} note 18, at 537 (quoting \textit{QUAIFE, supra} note 44, at 214-15).
\item \textsuperscript{46} \textit{Id.} at 540.
\item \textsuperscript{47} \textit{Id.} at 535, 540-42 (citing to circumstances surrounding suffrage, enforcement of Wisconsin’s fair employment laws, residential segregation and school integration controversies as inconsistencies between Wisconsin’s reputation as a progressive state and racial realities).
\item \textsuperscript{48} JOE WILLIAM TROTTER JR., \textit{BLACK MILWAUKEE: THE MAKING OF AN INDUSTRIAL PROLETARIAT} 1915-45, 25 (1985) (describing events that led to the Wisconsin Civil Rights Act of 1895).
\end{itemize}
purpose was to take the proprietor to court. The committee became a permanent organization, the Wisconsin Union League, the goals of which were to prosecute the court case and develop plans to secure passage of a state civil rights bill. The litigation was successful. The circuit court ruling, announced in May 1890, held that a person could not be excluded from equal access to places of public amusement on the grounds of race, color, or prior condition of servitude.

The Union League group persisted with their efforts. Wisconsin's only black attorney, William T. Green, drafted a comprehensive civil rights bill to present to the state legislature. That bill required that all places of accommodation and amusement must be open to the public regardless of race, and violators would be charged with a misdemeanor carrying fines from $25 to $500 and/or imprisonment for up to one year. That measure failed to pass the Democratic controlled 1891 legislature, however. When Republicans returned to office three years later, a new measure was introduced with reduced fines and penalties of $5 to $100 and/or six months in jail. That measure passed in 1895, resulting in Wisconsin's first Civil Rights Law.

The pattern of steps forward and backward continued nevertheless. As the enforcement of that legislation is described by historian Joe William Trotter, "judges usually imposed such lenient penalties, the lowest allowed by law, that the color line in public accommodations and amusements continued." Politicians could announce they had again attempted to meet the concerns of black residents with an amended version of Wisconsin's Public Accommodations Act. However, due to weak enforcement, patterns of racial exclusion, harassment, and discrimination could continue with relatively little cost to its perpetrators.

49. Id. at 26.
50. Id.
51. Id.
52. TROTTER, supra note 48, at 103 (noting that William T. Green died in 1911 and left the city without a practicing black attorney).
53. Id. at 26.
54. Id.
55. Id.
56. Id.
57. Id.
58. Id.
Racial hostilities increased after World War I with blacks increasingly being denied "access to theaters, restaurants, health services, recreational facilities, and a variety of other amenities and necessities." Trotter concluded that Wisconsin's Civil Rights Law was subverted through various devices: "harassment, outright refusal of service, poor service, and overcharging." Restaurants and theaters blatantly discriminated against Milwaukee's black patrons. For example, the Butterfly Theater refused to sell black patrons tickets and informed them the theatre was not "'catering to Colored patrons,' or that the house was 'sold out.'" The Davidson theatre during 1919 offered black patrons segregated seating in the balcony.

Blacks and their white allies urged the legislature to pass provisions that improved the 1895 Law, and in 1931, the legislature responded by clarifying some terms and prohibitions, specifically forbidding the practice of overcharging black customers as a means of discouraging their patronage and prohibiting discrimination in the sale of auto insurance. Trotter notes that some blacks brought suit under the law's provisions and prevailed, but certainly many lacked financial resources to pursue litigation.

Racially discriminatory denials to places of amusement, while important, were likely overshadowed by racially discriminatory denials of employment opportunities. Trotter notes that many African Americans joined the Milwaukee industrial workforce during the busy production years of World War I. In a heated economy, conflicts with other workers over jobs were diminished.

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60. Id. at 116.
61. Id.
62. Id. at 117.
63. Id.
64. TROTTER, supra note 48, at 117; RANNEY, supra note 18, at 541 (noting the legislative expansion of the civil rights law to cover auto insurance sales).
65. TROTTER, supra note 48, at 117.
66. Id. at 151.
67. Id. at 44-45 (noting the "curtailment of European immigration, destructive conditions in southern agriculture..., industrial recruitment campaigns, the lure of higher wages in northern industries, and favorable press comment (especially during the war) from both black and whites encouraged the flow" of migration; discussing examples of press
During the Depression, in contrast, those gains were "arrested" and "temporarily reversed." 68 A 1933 survey by the Milwaukee Urban League of 351 black workers revealed that 54.6% were unemployed. 69 The U.S. Census of 1940 reveals stark disparities in unemployment between whites and blacks with 29.3% of black males seeking work compared to 12.7% of white males in the same work category. 70

One explanation for disproportionately high black unemployment was racial discrimination practiced by unions. Trotter notes: "When blacks sought to gain employment in the breweries during the early 1930s, employers uniformly pointed to union opposition as the basis for black exclusion." 71 Racial stereotypes about blacks' abilities caused certain large industrial employers to offer black hires employment only to perform hot and difficult jobs, including foundry work. 72 Relief from high levels of black unemployment occurred only with World War II, after "the manpower needs of war plants and the military draft depleted white supplies of labor." 73 Thus, by 1942-1943, heavy industry employers actually sought black employees. 74

Even in circumstances of such need for workers, however, black employment in Milwaukee's industrial defense plants occurred only after "a vigorous campaign against both the racist hiring practices of employers and the discriminatory policies of labor unions." 75 The federal government, backing the war effort, stepped in. During 1941, "President Franklin D. Roosevelt issued Executive Order 8802, which established a Fair Employment Practices Committee [FEPC] to work against job bias in government and defense industries" and prohibited racially discriminatory employment practices by defense contractors. 76 Local black leaders Attorney James Dorsey, President of the National
Association for the Advancement of Colored People ("NAACP"), and Williams Kelley, Executive Director of the Milwaukee Urban League, gathered affidavits from black workers alleging racially discriminatory practices by Milwaukee firms that performed federal defense work contracts.

Appearing at hearings in Chicago before the FEPC, the NAACP and the Milwaukee Urban League successfully presented cases against five Milwaukee companies. The evidence established that the firms refused to employ blacks and Jews. The firms issued restrictive work orders to public and private employment agencies where they sought "only white or only Gentile" workers. Testimony from the few black workers hired alleged that their employers confined them to jobs such as "porters, janitors, and common laborers." The FEPC ordered those companies to "accept applicants for all classifications of employment without regard to race, color, creed or national origin," warning that if they failed to comply they could incur claims of contract violations, fines, or suspension of their defense contracts. It required the convergence of federal policies and orders, acute labor shortages, and pressure from blacks and their white allies to compel Milwaukee industrial firms to reform their racist policies and employ blacks in larger numbers.

The segregation of schools was a microcosm of the broader experiences of racial exclusion, involving differences in resources, curriculum, and teaching faculty. Black Milwaukeeans encountered decades of racially exclusionary barriers when seeking teaching positions with Milwaukee Public Schools ("MPS"). The barriers were much more difficult to overcome than barriers in the defense industry because no federal orders backed black advocates' claims.

Changes in the proportion of and opportunities for black Milwaukee

77. Trotter, supra note 48, at 166.
78. Id.
79. Id. at 166-67.
80. Id. at 167.
81. Id.
82. Id.
83. Id. at 168, 173 (noting also that the Congress of Industrial Organizations ("CIO"), in contrast to the American Federation of Labor unions, organized black workers and developed a rapport with the black community).
84. See infra notes 90-123 and accompanying text (noting campaigns to secure employment for black teachers beginning in 1928 and continuing past 1953).
85. See supra notes 75-83 and accompanying text.
citizens created inner city schools defined by racist segregation. The relatively recent influx of African Americans in search of jobs and opportunities created a concentrated, but not exclusive, population. By the late 1930s, over 92% of Milwaukee's 7500 black residents (representing just 1.3% of the city's population) lived in a 120 block impoverished area that was known as Milwaukee's "Near Northside." However, due to their relatively small representation in the city, this residential segregation had not resulted in an all black community. Nevertheless, "nearly all black children [residing in Milwaukee] attended either Fourth Street or Ninth Street Elementary" schools. Both schools "had racially mixed student bodies [that enrolled] between 35 to 50% black students in the early 1930s." So, when William Kelley and his colleagues assessed the situation during 1928, they concluded, "school segregation was not the issue." Rather, the problem was that there was not a "single black teacher in the Milwaukee public school system." All the teachers of black children were white.

These community leaders began the first black educational reform movement in Wisconsin identifying and defining jobs for black teachers as the leading reform issue for inner city Milwaukee education. The agenda persisted undisturbed for the next thirty years. Admittedly, benefits could be derived from obtaining employment for black teachers with MPS and also for black children who could respect them as role models. Public schools offered employment opportunities for black middle class professional teachers, and these teachers assisted with addressing the "many complaints about white teachers' low expectations

86. JACK DOUGHERTY, MORE THAN ONE STRUGGLE: THE EVOLUTION OF BLACK SCHOOL REFORM IN MILWAUKEE 11 (2004) (examining the history of educational reform in Milwaukee). Dr. Dougherty concludes that "there is more than one story to be told" about the history of black education and viewing that history "solely through the lens of Brown distorts our understanding of the past" that included "struggles for numerous reforms: hiring black teachers; resettling migrant families; gaining better resources, including black curricula; and exercising community control." Id. at 3.

87. Id. at 12.
88. Id.
89. Id.
90. Id. (noting that Kelley observed on his arrival to Milwaukee during 1928 that MPS had never employed a single black teacher).
91. See infra notes 97-123 and accompanying text. See also DOUGHERTY, supra note 86, at 4 (identifying three periods of black activism for educational reform in Milwaukee: "black teacher hiring of the 1930's"; "school integration in the 1950's"; and "a countermovement that gave rise to private school vouchers in the 1990's").
92. Id. at 12.
93. Id.
for black students. 94

The problems of policy choice and change were difficult, however. After analyzing how blacks in other northern cities had used their resulting political strength from growing populations to secure employment for black teachers, Kelley and his colleagues faced a painful dilemma: "Should they press for a handful of black educators in a racially mixed system, or for a greater number of black educators in a segregated system?" 95 The answer had to include politics and principle. 96

Initially, black community leaders used political connections with a white politician running in a contested election to secure employment for two black teachers to work at Fourth Street Elementary as day to day substitutes—a type of work sought by teachers who desired eligibility for full time permanent openings. 97 Encouraged by this success, during a Milwaukee School Board meeting, black community leaders presented a resolution "to give consideration to persons of the colored race' when hiring teachers." 98 Discussions on the proposal became heated when MPS school superintendent, Milton Potter, surprised some school board members by acknowledging that he had discretely hired "two black teachers during the previous election year... in order to avoid raising the race issue." 99 In response to charges of racial discrimination, Potter retorted, MPS "had 'never drawn any color line' and hired teachers based solely on merit." 100

The rhetoric was indeed confused. Another school board member argued that MPS had not hired any black teachers "because none were qualified, adding, 'If you knew enough about the colored population here you would know why.'" 101

The proponent of the resolution for consideration of black applicant

94. Id. at 13 (noting William Kelley heard complaints that white teachers demonstrated to black students their low expectations). For example, vocational counselors advised "black boys against training in higher-level occupations on the grounds that these jobs would not be made available to members of their race." Id.

95. Id. at 14-19 (describing how blacks in northern cities brokered their political influence to secure teaching positions for black professionals).

96. Id.

97. Id. at 20 (describing how a black newspaper publisher offered a full page ad supporting a local white politician who used his influence with his brother, a member of the Milwaukee School Board, to secure employment for black teachers Susie Bazzelle and Millie White).

98. Id. at 21 (quoting P.J. Gilmer, a black physician and Urban League member).

99. Id. at 22.

100. Id. (quoting Milton Potter).

101. Id.
teachers responded by offering the names of recent Milwaukee State Teachers College black graduates. Nevertheless, the Board voted against the resolution. As a further setback, by the mid-1930s both black teachers employed at Fourth Street had left their jobs—one due to termination, the other because of demotions from a full-time position "to sporadic, part-time work."

By 1939, William Kelley had accepted two realities: Milwaukee's white residents were not ready for black instructors to teach their children; and since the black student population at the Fourth Street School had increased from 68% to 90%, Kelley reasoned that although he thought black teachers should be hired to teach at any school in the MPS system, the Board might agree to hire black teachers to work at predominantly black schools. The legal reality of Kelley's position was that there were no state fair employment laws that offered legal protections to black applicants for teaching positions. Fourteenth Amendment constitutional principles were governed by Plessy's "separate but equal" principle, and unlike the defense industry, black teachers had no Executive Orders they could rely upon to bring federal pressure on MPS. So, Kelley primarily used moral persuasion, along with appeals to white self-interests, and negotiated a compromise that brought racially segregated school practices to MPS.

The compromise worked so that publicly the school board denied any intentions to create racially segregated schools and announced they intended to pursue "merit-based and color-blind hiring."
Nevertheless, discussions by MPS Board members demonstrated that “race had shaped the district’s behind-the-scenes negotiations” and subsequent hiring policies.\textsuperscript{110}

During the following year, the Board hired three black teachers who were appointed to the two predominantly black schools.\textsuperscript{111} By 1946, MPS employed five black teachers.\textsuperscript{112} MPS hiring officials also enforced a “gentlemen’s agreement” not to hire blacks as high school teachers,” since high school teachers had “higher-status and better-paid jobs in school buildings that were still almost all-white in Milwaukee.”\textsuperscript{113}

Even this limited policy proved an unrealistic and uncomfortable search for school race policies acceptable to all. By 1951, at the request of a high school principal, MPS had discretely appointed a black male teacher, Thomas Cheeks, to a high school that had a 15% black population.\textsuperscript{114} While the high school principal proudly touted the success of Cheeks’ appointment, noting he had not heard any comments from white parents,\textsuperscript{115} rumors circulated among black teachers that the lack of comment may have been due to Cheeks’ “very light skin complexion,” which decreased white anxieties about his presence.\textsuperscript{116} By 1954, MPS employed only forty-five black teachers, suggesting limited success under the tacit hiring agreement.\textsuperscript{117}

A new generation of activists found the city’s progress lacking. During October 1953, MPS’s tacit agreement with Urban League black leaders to confine black teachers’ employment opportunities to predominantly black elementary schools drew protests from black civil rights activists.\textsuperscript{118} Just months before the Supreme Court issued its opinion in \textit{Brown}, a new generation of NAACP activists voiced

\begin{itemize}
  \item \textsuperscript{110} Id. at 27.
  \item \textsuperscript{111} Id.
  \item \textsuperscript{112} Id. at 28.
  \item \textsuperscript{113} Id. at 29 (adding that blacks were denied high school teaching positions because many whites did not believe blacks possessed the necessary intellectual skills; some saw the exclusionary policies as an effort to avoid interracial interactions between blacks and white adolescents).
  \item \textsuperscript{114} Id. at 31 (describing the circumstances surrounding the hiring of Thomas Cheeks as “an experienced black male teacher who had previously chaired a high school social studies department in Indiana”).
  \item \textsuperscript{115} Id.
  \item \textsuperscript{116} Id. at 31.
  \item \textsuperscript{117} Id. at 32 (noting that by 1950 MPS employed nine black teachers and that number had doubled again four years later); see E-mail from Sharon Jackson to author (March 30, 2004, 17:19:00 CST) (on file with the author).
  \item \textsuperscript{118} Id. at 34.
\end{itemize}
objections to MPS’ racially restricted employment opportunities. At the October 1953 MPS School Board meeting, Vel Phillips, a black female attorney who would later win election to the city council inquired, “Is it a mere coincidence... that there are so many Negro teachers at Roosevelt [Junior High School], at Ninth Street, at Fourth Street?” Attorney Phillips and others asserted that schools with predominantly black student populations had been used as “dumping grounds” or as disciplinary assignments for white teachers. An assistant to the superintendent responded that MPS “did not keep race records [and] teachers were simply assigned to schools close to their homes[,]... and since most blacks lived in the Near Northside, it was no surprise that they were largely assigned to Fourth Street, Ninth Street, and Roosevelt Junior High.” He added, “many black teachers preferred schools with predominantly black student populations.”

Other presentations reflect the pressing concerns about MPS today. Attorney James Dorsey also confronted the Board, but his concerns centered on the quality of education MPS offered black children. He questioned if MPS schools “adequately prepared black youth to compete in the labor market for high-quality jobs rather than for ‘the dirty work’ handed down to them.” Attorney Phillips supported concerns raised at the meeting that some high school counselors “discouraged Negro youths who aspired to advanced education,” with an account of her own experiences with racially motivated counseling while a student at Roosevelt Junior High School. Phillips remarked that “a faculty adviser told her that ‘Negro women were best prepared to train for cooks and maids and not to take college courses.’” The

119. Id.
120. Id.
121. Id. at 34-35.
122. Id. at 35.
123. Id.
124. Id.
125. Id. at 35.
126. Id. (quoting Henry Reuss, a school board member and future Democratic Congressman).
127. Id. Attorney Phillips also related this story to the participants at the Law School’s Brown Conference. C.f. Josie Foehrenback Brown, Escaping the Circle by Confronting Classroom Stereotyping: A Step toward Equality in the Daily Educational Experience of Children of Color, in SYMPOSIUM: REKINDLING THE SPIRIT OF BROWN V. BOARD OF EDUCATION, supra note 2. Professor Brown concludes that “subliminally biased perceptions continue to compromise teachers’ effectiveness and children’s education, and the initiation of a systematic effort to address the issue of racial and ethnic stereotyping by teachers remains an outstanding challenge in contemporary American schools.” 19 BERKELEY WOMEN’S L. J.
gap between policy and practice played out, making any significant integration appear to be an ideal rather than a reality.

Although Wisconsin had a fair employment law in 1945,\textsuperscript{128} racially discriminatory practices in fact barred blacks from employment opportunities. While legislation offered promise to black residents of equal access to employment, at enactment the legislature pared provisions so that violators were spared administrative and judicial enforcement.\textsuperscript{129} The 1957 case of \textit{Ross v. Ebert}\textsuperscript{130} illustrated the Fair Employment Act’s shortcomings. The plaintiffs, black bricklayers, brought suit under Wisconsin law after the Local Bricklayers Union refused to accept their transfers from a union outside the state, citing its policy that only white persons were eligible for membership.\textsuperscript{131} After carefully examining the Act’s language, the Wisconsin Supreme Court found that the Fair Employment Statute that announced racial discrimination in employment was “undesirable,”\textsuperscript{132} and the “public policy of the state [was] to encourage and foster employment without such discrimination.”\textsuperscript{133}

However, the statute did not contain even the “slightest reference to ‘require’ or ‘compel’” employers or unions not to discriminate.\textsuperscript{134} Certainly, the statute did not declare racial discrimination in employment illegal.\textsuperscript{135} Neither did it include language that gave “a colored applicant an enforceable right to union membership over the objection, on racial grounds, of the members already there.”\textsuperscript{136} Instead, the statutory remedies available to those who believed they were victims of discrimination were to complain to the State Industrial Commission, which could only investigate, publicize its findings, and make recommendations to the parties.\textsuperscript{137} The commission had held a hearing and found that the union had discriminated because of the plaintiffs’ color, publicized its findings, and recommended that the union accept

\begin{thebibliography}{99}
\bibitem{Ross} \textit{Ross v. Ebert}, 82 N.W.2d 315, 318 (Wis. 1957) (noting that Senate Bill No. 131 granted the industrial commission powers to order violators to cease and desist and gave courts powers to review those orders but prior to passage those provisions were removed).
\bibitem{Id} \textit{Id}.
\bibitem{Id at 316} \textit{Id.} at 316.
\bibitem{Id at 317} \textit{Id.} at 317.
\bibitem{Id at 318} \textit{Id.} at 318.
\bibitem{Id} \textit{Id}.
\bibitem{Id} \textit{Id}.
\bibitem{Id} \textit{Id}.
\bibitem{Id} \textit{Id}.
\end{thebibliography}
the two plaintiffs as members. The court found that the commission had carried out its responsibilities.

Anticipating the frustrations that could be engendered by its decision, the court expressed empathy with the plaintiffs' circumstances: "We grant it is cold comfort to appellants but it is all the legislature saw fit to provide." The court declined the opportunity to more explicitly critique the wisdom of the legislators. Rather, the court reasoned that the legislature must have concluded the statute's policies were better served by "moral force, aroused by the findings, publicity, and recommendations of the commission," rather than by granting the commission the power to order an employer or union to comply or seek court decrees compelling compliance with its orders.

Prior to the Supreme Court's decision in Brown, weak or no formal prohibitions against racial discrimination in Wisconsin resulted in racially segregated conditions and practices that were not unlike those experienced by African Americans living in the South. Milwaukee's real estate and housing markets were replete with practices that created racially segregated residential areas and in turn racially segregated neighborhood schools. Reflecting on conditions in Milwaukee prior to Brown, Attorney Ross R. Kinney recalled "the greater Milwaukee community was severely segregated racially (e.g. residences, schools) both before and after the Brown decision."

138. Id.
139. Id.
140. Id. at 319.
141. See id.
142. Id. (noting also that bills had been introduced to grant the industrial commission the power to order violators to cease and desist and give courts the power to review and enforce such orders; however, before passage, the bill was amended and these provisions were removed; attempts were also made during 1955 to amend the statute to include enforcement provisions; however, they failed).
143. TROTTER, supra note 48, at 66 (describing efforts by the Milwaukee Urban League to persuade an employer to remove signs designating separate women's restrooms).
144. Id. at 25 (describing complaints that landlords refused to rent to black tenants and noting racially discriminatory practices by hotels and rooming houses); id. at 71 (noting that blacks were denied the opportunity to participate in the 1923 Garden Homes low income project, the "first low-income housing project of its kind in the United States"); id. at 182-83 (explaining how racially restrictive covenants and "gentlemen's agreements" among white property owners not to rent or sell to blacks outside certain geographical areas were among the factors contributing to segregated housing for blacks in Milwaukee; racially discriminatory lending practices exacerbated the plight of the black middle class to secure housing).
Frank P. Zeidler recalled that, prior to the Court’s issuance of the *Brown* decision, “[s]ome real estate operators engaged in ‘block busting.’” Zeidler explained block busting occurred when real estate agents informed “white property owners on a street or on a block that African American owners would be purchasing or renting a house.”

This information would “depress real estate prices and values” because some white owners “immediately [sold] at a reduced price after which the property . . . [was] sold to an African American owner for a much higher price.” Zeidler attributed “white flight” to block busting practices that were prevalent on the “Old West Side” and “German North Side” of Milwaukee. He also attributed higher concentrations of African American families in the “central North Side” and exacerbated racial tensions to block busting, and explained, “[w]hites felt they had lost property value and were being forced out, and African Americans felt they were being charged excessively high prices for property.”

Racially discriminatory practices and increased numbers of southern black migrants, along with pressures to address the housing needs of returning World War II veterans, created overcrowded and unsafe conditions in homes occupied by black residents. The *CIO News* reported on a fire in a Sixth Ward lodging house that resulted in the deaths of two black Army enlistees; other articles noted the death of a child and the hospitalization of two steelworker’s family members as illustrative of overcrowded, unsafe housing conditions caused by housing discrimination against black residents. In one article the reporter declared, “You don’t have to go down South to see the scourges and tragedies caused by segregation, ‘restricted’ property, and other forms of discrimination.—The largest city in Wisconsin—our own Milwaukee—prides itself on being ‘debt free’ while small children die in

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147. Id.

148. Id. at 78-79.

149. Id. at 79.

150. Id.

151. Id. at 76 (discussing the “severe shortage of housing” in Milwaukee that developed between 1929 and 1946; observing that housing “for returning veterans was one of the major issues in the 1948 municipal elections”; describing the increased migration of African Americans to mostly the Sixth Ward).

152. TROTTER, supra note 48, at 187 (reporting that housing discrimination “caused blacks to double up in available units”).
the [sixth] ward because of poor housing.\textsuperscript{153}

Prior to Brown, housing shortages were so severe that blacks and whites competed for public housing projects.\textsuperscript{154} In the midst of intense housing pressures, white residents attempted to use political maneuvers to prevent black residents from building homes in their area.\textsuperscript{155} Housing discrimination had entered into the mix of societal racially discriminatory transactions contributing to a synergistic matrix of racial oppression.\textsuperscript{156}

III. WISCONSIN’S REACTIONS TO BROWN

Various shorthand references to the Supreme Court’s decision in Brown often obscure the reality that Brown consists of a collection of cases. In his discussion of Brown as an icon, Professor Jack Balkin explains that “in the popular imagination” Brown references are to a collection of decisions.\textsuperscript{157} It is useful to remember Balkin’s point when considering the reactions of Wisconsin’s residents to the Brown opinion. Balkin explains that Brown I\textsuperscript{158} includes the following cases that addressed the issue of segregated public schools as violations of the Fourteenth Amendment’s Equal Protection Clause in Delaware (Gebhart v. Belton\textsuperscript{159}); Kansas (Brown v. Board of Education\textsuperscript{160}); South

\textsuperscript{153} Id. at 187.

\textsuperscript{154} Id. at 183-84 (describing how white resistance blocked the placement of Milwaukee’s first subsidized housing project, Parklawn, in the predominantly black Sixth Ward; instead, during August 1937, 418 low income housing units were far beyond the “northwestern limits of the black community”).

\textsuperscript{155} Id. at 184 (describing how white residents persuaded an alderman to secure passage of a resolution by the common council that designated forty acres of city land as a playground; the land had been previously purchased by eighteen black families for building homes; black protests resulted in the common council rescinding the resolution).

\textsuperscript{156} C.f Robert S. Chang & Jerome M. Culp, Jr., Business as Usual? Brown and the Continuing Conundrum of Race in America, in SYMPOSIUM: PROMISES TO KEEP?: BROWN V. BOARD AND EQUAL EDUCATIONAL OPPORTUNITY, 2004 U. ILL. L. REV. 1181, 1189 (concluding that social institutions, such as education, housing, family, health care, employment, and criminal justice, create interlocking systems that perpetuate inequality for minorities and wealth for whites).

\textsuperscript{157} Jack M. Balkin, WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID 3 (Jack M. Balkin ed., 2001).


\textsuperscript{160} 98 F. Supp. 797 (D. Kan. 1951).
Carolina (Briggs v. Elliott\[161\]); and Virginia (Davis v. County Board of Prince Edward County\[162\]).\[163\] The collection of cases also includes Bolling v. Sharpe,\[164\] issued the same day as Brown. However, Bolling addressed whether the federal government’s operation of racially segregated schools in the District of Columbia violated Fifth Amendment requirements for due process. Finally, the Brown cases include the Court’s second opinion, Brown II,\[165\] issued on May 31, 1955, which addressed remedial issues.

The question presented to the Court in Brown I was the following: “Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?”\[166\] In clear terms, the Court answered: “We believe that it does.”\[167\] Without expressly referencing Plessy v. Ferguson,\[168\] the Court concluded, “in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”\[169\]

Reasoning that the Fifth Amendment does not contain an equal protection clause, the Court in Bolling explained that the sources of concepts of equal protection and due process were American ideals of fairness.\[170\] While the concept of “equal protection of the laws” represented a more explicit safeguard of fairness than “due process of law,” the Court stated that discrimination could be so “unjustifiable” it violated due process.\[171\] Explaining further that “liberty” interests were protected by the Due Process Clause, the Court concluded: “Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.”\[172\]

163. BALKIN, supra note 157, at 3.
167. Id.
168. 163 U.S. 537 (1896).
171. Id.
172. Id. at 500.
In Brown II, the Court restated, in broad terms, fundamental principles set forth in Brown I. In its opening statement the Court declared that "racial discrimination in public education is unconstitutional." The Court added, "All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle."

However, when offering guidance to lower courts with responsibilities to fashion remedies, the Court concluded that their roles included reconciling Brown's principles and the rights of individual parties with countervailing "public interests" and the "varied local school problems" that could arise during transitions from unlawfully segregated to constitutionally acceptable school systems. The Court remanded the cases to the lower courts to "enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."

Responses of African Americans to Brown I demonstrated that the majority viewed the Supreme Court's opinion as useful for attacking the full spectrum of racially discriminatory and oppressive practices. Professor Derrick Bell recalled having similar reactions to Brown I and states that his beliefs were consistent with the majority of African Americans. While Professor Bell "was on a ship heading home from a year's military duty in Korea" when he first learned of the Court's opinion, he remembered that "[n]othing in [his] legal education altered [his] assumption that the Brown decision marked the beginning of the end of Jim Crow oppression in all its myriad forms."

Bell's account of a discussion with Judge William H. Hastie, a civil rights activist who was later appointed to the federal bench, suggests Judge Hastie was even more optimistic about the broad impact of the Court's decision. While in law school, Bell confided to Judge Hastie that upon graduation, he intended to practice civil rights law. Judge Hastie responded that "while there might well be some mopping up to do, the Brown decision had redefined rights to which blacks were

174. Id.
175. Id. at 301.
176. Id. at 301.
177. DERRICK BELL, supra note 2, at 2.
178. Id.
179. Id.
180. Id. at 3.
181. Id.
entitled under the Constitution.” Hastie added, “Son . . . I am afraid that you were born fifteen years too late to have a career in civil rights.”

News accounts of reactions to Brown I suggest that initially black leaders in Milwaukee “distanced the ruling from their local struggles for civil rights.” Attorney Dale Phillips, President of Milwaukee’s Chapter of the NAACP was reported to have stated that he thought Brown would help America “clean up a large section of its own back yard,” with backyard meaning the southern region of the country. A news article reported that Attorney James Dorsey characterized Brown as representing a “tremendous blow to communism,” injecting even further distance between Milwaukee’s problems with racial discrimination and Brown.

White local residents also may not have immediately comprehended the significance of Brown to Milwaukee’s civil rights struggles. When reflecting on public reactions to Brown, Attorney L.C. Hammond, former defense counsel in the MPS desegregation suit, stated: “While Brown certainly was a watershed decision insofar as those States or communities that separated the races in schools by law, at first it was not considered to have a very significant impact on the rest of the country that did not have such legislation.” Attorney Irvin B. Charne, former court-appointed counsel for plaintiffs in the MPS desegregation suit, offered a similar assessment. Charne stated, “In Milwaukee nothing happened to implement the Brown decision until 1965, when attorney Lloyd A. Barbee brought a class action in the United States District Court for the Eastern District of Wisconsin challenging actions of the Milwaukee School Board, which he alleged created a segregated school

182. Id.
183. Id.
184. DOUGHERTY, supra note 86, at 38.
185. Id. at 38 (quoting Dale Phillips, past Milwaukee NAACP president).
186. Id. at 39.
187. Id. at 39 (noting that Dorsey’s remarks were caricatured by the Milwaukee Sentinel in a political cartoon that featured “Uncle Sam delivering a knockout punch to Communist propagandists”). Dorsey’s comments may have been more strategic than distanced from local civil rights struggles. C.f. KLARMAN, supra note 59, at 182-83 (describing how the “Soviet Union capitalized on American racial atrocities to trumpet the deficiencies of democratic capitalism” and how black leaders “became adept at using the Cold War imperative for racial change”).
Despite initial public declarations and beliefs by some that nothing occurred in Milwaukee to implement *Brown* until protests and litigation to desegregate MPS, some of Milwaukee’s black leaders appreciated and used *Brown*’s legal principles to advance agendas for reforms of educational, employment, and housing policies. During the late 1950s William Kelley appropriated *Brown*’s “symbolic value” to renegotiate the compromise he accepted fifteen years earlier that confined black teachers to assignments in elementary schools in black neighborhoods. Kelley’s lobbying and protests against MPS black teacher assignment policies contributed to significant increases in the numbers of black teachers employed by MPS (from forty-five in 1954 to 191 in 1960 and 439 by 1965). Further, at Kelley’s instigation, MPS officials gradually began assigning black teachers to work at schools with substantially white student populations. By 1955, MPS had assigned only two of the city’s forty-five black teachers to schools outside of black neighborhoods. However, by 1960, of the 191 black teachers working for MPS, ten worked at schools with “virtually” all white student populations; by 1965, of the 439 black teachers employed, forty-three were assigned to schools with predominantly white student populations.

By 1957, Attorney James Dorsey demonstrated, through his representation of black bricklayers in *Ross v. Ebert*, that he believed the Wisconsin Supreme Court should apply *Brown* when interpreting Wisconsin’s legislation addressing racial discrimination in employment. Dorsey argued to the Wisconsin Supreme Court, albeit unsuccessfully, that the union’s racially discriminatory refusals of plaintiffs’ applications for membership violated the Fourteenth Amendment of the United States Constitution. The Court’s decision

190. DOUGHERTY, supra note 86, at 45.
191. *Id.* at 47.
192. *Id.*
193. *Id.*
194. *Id.* at 48.
195. 82 N.W.2d 315 (Wis. 1957).
196. *Id.* at 319-20.
197. *Id.* (rejecting plaintiff’s Fourteenth Amendment argument on the grounds of lack of state action); see also *id.* at 534 (the dissenting opinion of Justice Fairchild accepting Dorsey’s position):

But there is another reason, in any event, for denying members of a union
generated such negative publicity that Dorsey and black state assemblyman Isaac Coggs proposed a bill to strengthen Wisconsin's Fair Employment Laws, which the legislature passed.\textsuperscript{199}

By 1962, Attorney Dorsey had redefined \textit{Brown}'s principles and applied them in an even broader context. When advocating passage of a City of Milwaukee Fair Housing Ordinance, Dorsey restated \textit{Brown}'s concepts in expansive terms: "The court said [in 1954] the doctrine of equal but separate accommodations for white and negro people had no place in America . . . Segregation in any form is immoral . . . ."\textsuperscript{200}

Endemic housing discrimination in Milwaukee had created racially segregated residential housing patterns that played a role in creating Milwaukee's racially segregated schools. Attorney Vel Phillips, a member of the Milwaukee Common Council since 1956, proposed a Fair Housing Ordinance that would have prohibited discrimination in the "sale, rental or financing of housing because of race, color, religion or ancestry."\textsuperscript{201} Early press accounts have not expressly linked Phillips' Fair Housing initiatives to \textit{Brown}'s concepts. Nevertheless, they have established Phillips' appreciation for the relationship between racially restricted housing practices and the resulting de facto racial segregation in public schools. Phillips believed that if housing opportunities were made equally available to black residents, perhaps racially segregated schools could be avoided. In support of a Fair Housing Ordinance she proposed for the Common Council's adoption, Phillips set forth as a "Finding of Fact" the following:

> Discrimination in housing results in other forms of discrimination and segregation, including racial segregation in the public schools and other public facilities, which are prohibited by the constitution of the

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\textsuperscript{198} Ross v. Ebert, 82 N.W.2d 315 (Wis. 1957).
\textsuperscript{199} DOUGHERTY, supra note 86, at 48.
\textsuperscript{200} Phillips Housing Plan Rejected in 5-0 Vote, MILWAUKEE J., April 24, 1962.
\textsuperscript{201} Id.
United States of America, and are against the laws and policy of the State of Wisconsin and the City of Milwaukee.\textsuperscript{202}

These assertions brought vehement denials from MPS officials of de facto segregation. Dr. Dwight Teel, an assistant to the superintendent of schools, responded that, “there was no segregation in Milwaukee public schools in the sense the word is used.”\textsuperscript{203} However, carrying his protests perhaps too far, Dr. Teel inadvertently supported Phillips claims when he admitted “there are some areas mostly populated by Negroes with school enrollments predominantly Negro.”\textsuperscript{204} Further, he explained, “there are areas in which whites reside where mostly white children attend school.”\textsuperscript{205} In an effort to absolve MPS, Dr. Teel contradicted earlier policy statements MPS officials used to justify black teacher assignments (MPS officials stated they purportedly assigned teachers to schools close to their residential locations). Teel stated, “If there are areas in which there is segregation, it is because of residential locations—not by policy of law or the Milwaukee school system.”\textsuperscript{206}

Thus, efforts to address racially discriminatory housing practices, teacher employment, and teaching assignments created the nascent foundations upon which Attorney Lloyd Barbee could later construct theories of unconstitutional racial segregation in Milwaukee’s public schools. Earlier in his career Barbee implicitly acknowledged the significance of civil rights initiatives that preceded his efforts to integrate Milwaukee’s schools. During 1959, Barbee spoke at the Wisconsin Education Association convention and urged its predominantly white audience to support fair employment practices for black educators.\textsuperscript{207} In 1961, Barbee led a sit-in at the State Capitol for thirteen days in an unsuccessful attempt to pressure the legislature to pass a state fair housing bill.\textsuperscript{208}

When Federal District Judge Irving Kaufman ruled in \textit{Taylor v.}

\textsuperscript{202} City School Segregation Charge Denied, MILWAUKEE SENTINEL, Mar. 15, 1963; DOUGHERTY, supra note 86, at 80 (noting that Phillips later clarified her claim of racially segregated schools stating: “school segregation does not exist by law, but it does exist in fact[;]” claiming essentially de facto segregation).

\textsuperscript{203} DOUGHERTY, supra note 86, at 80.

\textsuperscript{204} Id.

\textsuperscript{205} Id.

\textsuperscript{206} Id.

\textsuperscript{207} DOUGHERTY, supra note 86, at 75.

\textsuperscript{208} Id.
Board of Education\textsuperscript{209} that the school district had discriminated against black students by gerrymandering neighborhood school boundaries to perpetuate racial imbalances and refused citizen requests to correct racial imbalances.\textsuperscript{210} Barbee was "intrigued." \textsuperscript{211} By 1962, the NAACP had embarked upon a program to desegregate schools in Northern as well as Southern cities.\textsuperscript{212} By the end of that year, the NAACP had launched legal action and activism against segregated schools in "sixty-nine cities and communities across the North and West."\textsuperscript{213} As the former President of the Madison branch of the NAACP and later President of the state NAACP, Barbee hoped to persuade Milwaukee to join the Northern school integration movement.\textsuperscript{214}

Ultimately, the energy and force of Barbee's commitment succeeded in directing civil rights initiatives in Milwaukee from pursuing employment opportunities for black teachers to conforming with national priorities of the NAACP,\textsuperscript{215} achieving integrated schools for black students. Announcing that the NAACP should not be "accepting student segregation in exchange for black teachers' jobs,"\textsuperscript{216} Barbee embraced Brown's principle that "separate schools are inherently unequal."\textsuperscript{217} He set out to prove that Milwaukee's black schools offered black students an inferior education.\textsuperscript{218} Despite intra-racial tensions about its efficacy, integration emerged as the preferred strategy for ensuring the delivery of a quality education to Milwaukee's black youth.\textsuperscript{219} Yet, when considering the strategies of Kelley and Barbee,
educational historian Jack Dougherty concludes their "respective struggles should not be compared head-to-head but understood through a historical lens as part of a long line of cumulative, and sometimes conflicting, movements for black education."220

After attempting to negotiate with MPS officials, Barbee offered MPS a plan for desegregation, which it declined to adopt. Barbee used MPS officials' recalcitrance, along with objections to intact busing (i.e., busing the African American class and its teacher when school facilities were too limited, as described in detail below), to mobilize protests and boycotts of MPS schools.221 Sharon Jackson, an African American teacher, recalled participating in the "all district boycott" during 1965 while she was a senior attending Milwaukee's Rufus King High School.222 The inequities associated with "intact busing" inspired Jackson to risk truancy sanctions for participating in the school boycott.223 She remembered losing her exemptions from senior examinations because she was absent from school.224

Intact busing began during the 1950's as a strategy to address overcrowding in inner city schools.225 During 1957, MPS began "transporting entire classrooms of elementary students to nearby under-enrolled schools, where they were kept intact for the entire day."226 By 1962, the policy disproportionately affected black students with crowding increasing in inner city schools and vacancies occurring in predominantly white schools because of "white flight" to the suburbs.227 The spectacle of busing black children to white schools and keeping them separate in some instances for lunch, playground recess, and even bathroom breaks, offered painful reminders of "separate but unequal" responses to racial segregation and mobilized hundreds to protest these policies.228

Despite the visibility drawn to the problem by the boycott, Barbee

220. Id. at 103.
221. DOUGHERTY, supra note 86, at 95-100 (discussing how intact busing symbolized "Milwaukee-style segregation" failed negotiations with Milwaukee School Board which left black residents with the impression that the board members were not interested in the educational interests of black children led to school boycotts).
222. E-mail from Sharon Jackson to author, supra note 117.
223. Id.
224. Id.
225. DOUGHERTY, supra note 86, at 94.
226. Id.
227. Id.
228. Id. (describing intact busing).
eventually concluded litigation was the best course of action to bring about desegregation of MPS schools. During July 1965, Barbee successfully pursued litigation against MPS in *Amos v. Board of School Directors of the City of Milwaukee*,\(^\text{229}\) in the Eastern District of the Wisconsin federal court.\(^\text{230}\) While settlement of the *Amos* case led to limited busing, specialty schools to attract white suburbanites to transfer to MPS schools, and allotment of funds to permit limited numbers of black Milwaukee students to attend suburban schools,\(^\text{231}\) it is generally agreed that today Milwaukee’s schools are more segregated than they were in 1976.

**IV. CONCLUSION: LESSONS FROM BROWN AND ITS PROGENY**

The repeated lesson of Milwaukee’s path from the *Brown* decisions, through its own court ordered desegregation to the persistent isolation of inner city poor, shows that the grip of racism is strong. Renewed vision and rededication to education initiatives have marked *Brown’s* fiftieth year, with Milwaukee’s vitality in the balance.

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230. *Id.*