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The Desegregation Decrees of the Delaware Court of Chancery

Joel Edan Friedlander

FRIEDLAND & GORRIS, P.A. –
UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

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The Desegregation Decrees of the Delaware Court of Chancery

Joel Edan Friedlander*

It is often said that the United States Supreme Court affirmed Chancellor Collins J. Seitz in Brown v. Board of Education*, but the legal history is more complex than that. Chancellor Seitz's decision in* Belton v. Gebhart *and* Bulah v. Gebhart *was simultaneously historic, influential, and disregarded as a model for desegregation. In this essay, I discuss how Chancellor Seitz's decision and decree can be seen as representing an alternative model for desegregation based on a more traditional form of equity jurisprudence. I examine Chancellor Seitz's approach to desegregation by examining* Belton/Bulah *within the context of three other challenges to racial segregation adjudicated by the Delaware Court of Chancery in the decade between 1950 and 1959. The manner by which Chancellor Seitz and Vice Chancellor Marvel discharged their judicial oath in these four cases is worthy of study and honor several decades later.*

Introduction

On April 1, 1952, Chancellor Collins J. Seitz issued a post-trial opinion in the consolidated actions *Belton v. Gebhart* and *Bulah v. Gebhart* ("*Belton/Bulah*"). Chancellor Seitz concluded, based on the testimony of expert witnesses, that segregation laws harmed Black students: "in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated."[1]

* Partner, Friedlander & Gorris, P.A., Wilmington, Delaware; Lecturer, University of Michigan Law School, University of Pennsylvania Carey Law School.

Two weeks later, Chancellor Seitz ordered the desegregation of Claymont High School and Hockessin School No. 29. He enjoined the State Board of Education "from denying to infant plaintiffs and others similarly situated, because of color or ancestry, admittance as pupils" in those two schools.

Chancellor Seitz's post-trial opinion and implementing order are noteworthy events in American legal history. Chancellor Seitz's factual findings and desegregation decree were left undisturbed on appeal by the United States Supreme Court, as part of the consolidated litigation known as *Brown v. Board of Education*. Never before had a court *both* adopted the factual basis underlying the challenges to segregated schooling advanced by the NAACP Legal Defense Fund, led by Thurgood Marshall, *and* then ordered the desegregation of a primary school or high school.[2]

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[1] Belton v. Gebhart, 87 A.2d 862, 864, *aff'd*, 91 A.2d 137 (Del. 1952), *aff'd sub nom.* Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294 (1955) ("*Brown II*").

[2] Neither the factual finding nor the form of injunction decree was unprecedented. Months earlier, a three-judge court sitting in the U.S. District Court for the District of Kansas had ruled against the plaintiffs under the "separate but equal" standard, but nonetheless made the (unpublished) factual finding that segregation "in public schools has a detrimental effect upon the colored children." Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 98 F. Supp. 797 (D. Kan. Aug. 3, 1951) (full text available in https://www.famous-trials.com/brown), *quoted in* Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483, 494 (1954) ("*Brown I*"). In an earlier case also litigated by Thurgood Marshall, which involved a town 50 miles away from Topeka, the Kansas Supreme Court held that certain schools had been segregated by race without legal authority under state law and ordered: "Colored and white pupils must be permitted to attend either school, depending on

In 1954, in the opinion known as *Brown I*, the United States Supreme Court famously declared: "Separate educational facilities are inherently unequal."[3] One year later, in the opinion known as *Brown II*, the United States Supreme Court authorized desegregation decrees "to effectuate a transition to a racially nondiscriminatory school system."[4] The Supreme Court affirmed Chancellor Seitz's judgment, which itself had been affirmed by the Delaware Supreme Court, "ordering the immediate admission of the plaintiffs to schools previously attended only by white children."[5] *Brown II* reversed the contrary decisions of the lower federal courts in Kansas, South Carolina, Virginia, and the District of Columbia, which had been consolidated on appeal with *Belton/Bulah*.

At a memorial tribute, Chancellor Seitz was eulogized by William T. Coleman, Jr., a former law clerk to Justice Felix Frankfurter and later a leading member of Thurgood Marshall's legal team. Coleman recalled what Justice Frankfurter had told him about the significance of Chancellor Seitz's opinion and decree in *Belton/Bulah*:

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convenience, or some other reasonable basis. In the meantime pending such action, the colored pupils and all pupils in District No. 90 must be permitted to attend the 'South Park District School' beginning with the school year of 1949-50 …." Webb v. School District No. 90, 206 P.2d 1066, 1073 (Kan. 1949).

[3] *Brown I*, 347 U.S. at 495.

[4] *Brown II*, 349 U.S. at 300-01.

[5] *Id.* at 301.

> I'd really like to bump into that young fellow Seitz some day and tell him exactly what he did, which greatly influenced the case which we now know as Brown versus Board of Education. First, he said, you have to realize that there were five decisions which had held that segregation was constitutional and giants at the law like Holmes, Brandeis, and Stone had voted that way. Next, you had to realize that Chancellor Seitz was the first person as a jurist, not as an advocate, to put in writing why in 1952 that segregated schools were completely inconsistent with the American dream. For Frankfurter, it was quite significant that this was done by a state court judge. The judge, moreover, was a son of Delaware, the first state to adopt the United States Constitution, which, as you know, unfortunately, had that horrible clause counting Negroes as only three-fifths of a person, and that is the evil that Brown finally put to the end. He was also a son of a state which bordered on the south and a graduate of a law school in the south. Particularly important to Justice Frankfurter was that the decision was by a Chancellor, which, as we know, since soon after Runnemede, had the responsibility to eliminate carefully and skillfully the sharp and unfair edges of the common law, and to do away with ancient destructive practices of a radically different type in a radically different past. These assets all combined in that young person Seitz, Frankfurter concluded, and demonstrated that history, including legal precedents of the Supreme Court, could be made to bow before the sheer stubbornness of a human conscience.[6]

It is often said that the United States Supreme Court "affirmed" Chancellor Seitz, but the legal history is more complex than that. The holdings and desegregation decree of Chancellor Seitz respecting Claymont High School and Hockessin School No. 29 differ markedly in various ways from the decisions issued by the Supreme Court in *Brown I* and *Brown II.*

[6] Remarks of William T. Coleman Jr., *Federal Judge Tribute*, C-SPAN (Jan. 29, 1999) [hereinafter *Coleman Remarks*], https://www.c-span.org/video/?119978-1/federal-judge-tribute.

First, Chancellor Seitz issued his desegregation decree while applying the legal regime of "separate but equal," as established by the United States Supreme Court in *Plessy v. Ferguson*.[7] Chancellor Seitz rejected the legal argument, preserved for appeal, that "State-imposed segregated education on the grammar and high school levels, in and of itself," violates the Fourteenth Amendment.[8] Chancellor Seitz ruled in favor of the plaintiffs on the alternative ground that Claymont High School offered superior facilities and educational opportunities as compared to Howard High School and Carver Vocational School, and that Hockessin School No. 29 was superior to Hockessin School No. 107. The United States Supreme Court declared that segregated schooling was unconstitutional, rejecting lower court rulings in other jurisdictions that segregated schools either were comparable or must be made equal.

Second, Chancellor Seitz's desegregation decree was limited to prohibiting racial discrimination in the admission of students to specific schools. This form of relief exemplified what could be described as a traditionalist approach to doing equity, in which the equitable rights of plaintiffs are vindicated through a precisely worded order. In *Brown II*, the United States Supreme Court authorized an innovative remedy that became known as a structural injunction, by which judges

[7] 163 U.S. 537 (1896).
[8] Belton v. Gebhart, 87 A.2d 862, 865, *aff'd*, 91 A.2d 137 (Del. 1952), *aff'd sub nom.* Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294 (1955).

remade entire school districts and school systems, or similar public bodies, through judicial supervision of governmental administrators.[9] In the words of *Brown II*, judges could issue decrees that addressed "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations[.]"[10]

Third, as Coleman noted in his eulogy, the United States Supreme Court reversed Chancellor Seitz about the timetable for imposing equitable relief:

> And therefore, once again, [Chancellor Seitz] ordered forthwith … but the fact is that the Supreme Court of the United States, that case did get reversed, because on the decree he had moved too fast. And the court said "with all deliberate speed" rather than "forthwith."[11]

The Supreme Court's phraseology "with all deliberate speed" meant that desegregation required localized litigation against obstinate local officials over a period of decades.

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[9] *See* ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2003) (discussing the use of structural injunctions after *Brown II*); PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA xii (1990) (arguing that *Brown II* and subsequent mandatory injunctions are "very good constitutional equity"); GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY (1982) (arguing that *Brown II* and subsequent structural injunctions are inconsistent with the history of equity).

[10] *Brown II*, 349 U.S. at 300-01.

[11] *Coleman Remarks*, *supra* note 6.

Fourth, Chancellor Seitz ordered immediate desegregation as to the named plaintiffs "and others similarly situated" with respect to the individual schools in question. The United States Supreme Court affirmed Chancellor Seitz's decree as to the named plaintiffs only, and otherwise remanded the case to the Delaware Supreme Court. The fashioning of new school admission policies applicable to "similarly situated" Black students was left to local authorities under local judicial supervision.

These aspects of *Brown I* and *Brown II* show how Chancellor Seitz's decision in *Belton/Bulah* was simultaneously historic, influential, *and* disregarded as a model for desegregation. The United States Supreme Court opted not to authorize on a local or national scale Chancellor Seitz's remedy of prohibiting race discrimination when evaluating admissions to local all-white schools. Over time, the United States Supreme Court enforced with greater stringency its preferred model of gradual desegregation through structural injunctions.[12]

In this article, I discuss how Chancellor Seitz's decision and decree can be seen as representing an alternative model for desegregation based on a more

[12] See, most notably, Green v. County School Board of New Kent County, Virginia, 391 U.S. 430, 437-38 (1968), which held that school boards "operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch," and Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), which endorsed a remedial plan of city-suburban busing.

traditional form of equity jurisprudence. I examine Chancellor Seitz's approach to desegregation by examining *Belton/Bulah* within the context of three other challenges to racial segregation adjudicated in the Delaware Court of Chancery in the decade between 1950 and 1959. Then, as now, the Delaware Court of Chancery was a tribunal best known for applying equitable principles in corporate law disputes. The four cases show how two judges on the same trial court similarly determined to do equity when no state or federal legislation created a legal entitlement for the plaintiffs, no precedent from the United States Supreme Court provided a roadmap for desegregation, local political support was wholly lacking, and the Delaware Supreme Court had not spoken.

In each of the four cases, the Delaware Court of Chancery granted relief to the plaintiffs. The relief granted was immediately enforceable by the plaintiffs to provide relief from segregation.

All four decisions were controversial. Ruling for the plaintiffs required professional courage by trial judges who lacked lifetime tenure. The Delaware Supreme Court reversed two of the decisions. Two of the decisions led to landmark rulings by the United States Supreme Court.

The first two cases were decided by Collins Seitz, the first in his capacity as Vice Chancellor and the second in his capacity as Chancellor. The latter two were decided by then-Vice Chancellor William Marvel. Notwithstanding their long,

distinguished judicial careers—Seitz later served as Chief Judge of the Court of Appeals for the Third Circuit, and Marvel as Chancellor—both are remembered best for their respective rulings in these four cases.[13]

The first case was *Parker v. University of Delaware*.[14] Vice Chancellor Seitz was assigned the case because Chancellor Harington was a member of the board of trustees of the University of Delaware.[15] As the case progressed, Vice Chancellor Seitz was under consideration to succeed Chancellor Harington as Chancellor. Despite the risk to his career,[16] Vice Chancellor Seitz enjoined the University of Delaware from denying admission to Black students on the basis of their race, based on factual findings respecting the inferior educational opportunities at Delaware State College. His decision was not appealed.

Soon thereafter, Chancellor Seitz decided *Belton*/*Bulah*, which became part of *Brown I* and *Brown II*.

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[13] Wolfgang Saxon, *Judge Collins Seitz Dies at 84; Refuted Segregation in Schools*, N.Y. TIMES, Oct. 21, 1998, at C27; *William Marvel, 81, Judge in Delaware's Bias Cases of 1950's*, N.Y. TIMES (July 10, 1991), [hereinafter *Marvel Obituary*].

[14] 75 A.2d 225 (Del. Ch. 1950).

[15] *A Conversation with Judge Collins J. Seitz, Sr.*, 16 DEL. LAW. No. 3, at 29 (Fall 1998), https://delawarebarfoundation.deltaboston.com/all-documents/delaware-lawyer-magazine/1998-volume-16/61-volume16-number3-fall1998/file [hereinafter *Conversation with Judge Seitz*].

[16] *See* William J. Brennan Jr., *The Courage of Collins Seitz*, 40 VILL. L. REV. 547, 548-59 (1995).

At the beginning of the school year following *Brown I* eleven Black students were voluntarily admitted to Milford High School, only to be expelled weeks later by a new school board following mass demonstrations against integrated schooling, which made national news.[17] In his very first published opinion,[18] Vice Chancellor Marvel issued a preliminary mandatory injunction requiring re-admission of the Black students.[19] His injunction was reversed on appeal, on the basis that *Brown I* had not required immediate desegregation and the State Board of Education had issued a binding directive after *Brown I* prohibiting local school boards apart from the Wilmington Board of Education from desegregating schools unilaterally.

In 1959, in *Burton v. Wilmington Parking Authority*, Vice Chancellor Marvel granted "a declaratory judgment in the form of injunctive relief" that it was a violation of the Equal Protection Clause for a coffee shop that leased space from the Wilmington Parking Authority to deny admittance to Black would-be

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[17] *Education: Racial Flare-Up*, TIME (Oct. 11, 1954), https://content.time.com/time/subscriber/article/0,33009,936456,00.html; Selwyn James, *The Town That Surrendered To Hate*, 104 REDBOOK 70 (Apr. 1955).

[18] William T. Quillen and Michael Hanrahan, *A Short History of the Court of Chancery, 1792-1992* (1993), https://courts.delaware.gov/chancery/history.

[19] *Simmons v. Steiner*, 108 A.2d 173 (Del. Ch. 1954), *rev'd*, 111 A.2d 574 (Del. 1955).

customers.[20] His decision was reversed by the Delaware Supreme Court. A divided United States Supreme Court reversed the Delaware Supreme Court and adopted the reasoning of Vice Chancellor Marvel.

Belton/Bulah remains a source of pride for Delaware's bench and bar. Chancellor Seitz's order on blue-backed paper, with his interlineations and signature, is preserved at the Delaware Public Archives, with a copy put on public display by the Delaware Court of Chancery. What is less appreciated is that Chancellor Seitz's order typifies a consistent approach to desegregation for the Delaware Court of Chancery in that era.

The four cases are discussed more fully below.

Parker v. University of Delaware

Very late in his life, then-Judge Seitz described *Parker v. University of Delaware* as "an easy case":

> In *Parker v. University of Delaware*, the plaintiff had named the board of trustees of the University of Delaware as defendants too. Chancellor Harrington was on the board, so he couldn't take the case and it fell to me. That was an easy case. It was decided under the separate but equal doctrine. And to compare the University of Delaware with Delaware State College at that time was sort of ludicrous. I visited both universities before I decided the case and the opinion sets forth the disparities. As I say, it was easy.[21]

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[20] 150 A.2d 197, 198 (Del. Ch. 1959), *rev'd*, 157 A.2d 894 (Del. 1960), *rev'd*, 365 U.S. 715 (1961).

[21] *Conversation with Judge Seitz*, *supra* note 15, at 29.

The case was only "easy" because Vice Chancellor Seitz was fearless in applying a longstanding legal standard to a set of observable facts, and then awarding a novel remedy that chipped away at the edifice of segregated schooling. Vice Chancellor Seitz's ruling was the first decision in the country to result in the immediate admission of Black students to an otherwise white undergraduate program.[22]

Ruling against the University of Delaware meant ruling against the political and legal establishment of the State of Delaware. The Board of Trustees of the University of Delaware included eight individuals appointed by the Governor and twenty individuals elected by the Board, all of whom were subject to Senate confirmation. The Governor and the President of the State Board of Education were trustees *ex officio*.[23] So was the Chancellor. The University of Delaware was represented in the case by Delaware's Attorney General.

Ruling against the University of Delaware meant ruling against actions taken by the current trustees. The University of Delaware was not segregated as a matter of some longstanding statute. The plaintiffs were challenging a resolution adopted by the Board of Trustees on January 31, 1948, several months after Jackie Robinson broke the color barrier in Major League Baseball and several months before President Truman ordered the desegregation of the military. That board

[22] *Id.* at 30.
[23] Parker v. University of Delaware, 75 A.2d 225, 229 (Del. Ch. 1950).

resolution permitted the admission of Black students, subject to the condition that "a course of study leading to the same degree is not furnished in any educational institution provided by this State within this State for the education of bona fide colored residents of this State."[24] In February 1950, the Board of Trustees resolved not to provide requested admission application forms to Black students, notwithstanding the fact that Delaware State College had lost its accredited status.[25]

The Vice Chancellor "assume[d], without deciding, that the Trustees of the University were entitled under Delaware law to refuse admission to these Delaware Negroes solely because of their race."[26] Plaintiffs challenged the Trustees' action under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Plaintiffs sought injunctive relief requiring the admission of qualified Black students:

> a permanent injunction restraining defendants from denying to plaintiffs and others similarly situated, the customary blanks upon which application may be made for admission to undergraduate study at the University; restraining the defendants from considering and acting upon the application blanks of plaintiffs and others similarly situated when filled out and returned to the University, upon grounds relating to the color or ancestry of the plaintiffs; restraining the defendants from enforcing a resolution, custom or usage whereby the

[24] *Id.* at 226.
[25] *Id.*
[26] *Id.* at 230.

> plaintiffs and others similarly situated are excluded from admission to undergraduate work at the University.[27]

Three defenses were proffered: (i) there was no properly defined class to allow maintenance of a class action; (ii) the University of Delaware was not a state institution subject to the Fourteenth Amendment; and (iii) "the evidence fails to show that the College is unequal to the University."[28]

As to the first defense, Vice Chancellor Seitz stated that "a class action is particularly appropriate here" because the "basic question to be decided involves the application of one of the great guarantees of the Constitution of the United States—the equal protection of the laws."[29] He continued: "Many of the students at the College and many of the June graduates of the Negro high schools may properly be considered to be in the class. Yes, the class is real enough."[30]

Vice Chancellor Seitz concluded that "the University and its Trustees are representatives of the State of Delaware to an extent and in a sense sufficient to apply to them the great restraints required by the Constitution."[31] The "great restraint" under then-current jurisprudence was *Plessy v. Ferguson* and the legal standard of "separate but equal." The Plaintiffs asked Vice Chancellor Seitz to

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[27] *Id.* at 227.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at 230.

rule that a "segregated school … cannot be an equal school," but he stated that he did "not believe I am entitled to conclude that segregation alone violates that clause."[32]

Vice Chancellor Seitz's application of "separate but equal" was intensely factual. He did not cite any precedent, as if it were unremarkable to be the first judge to hold that a dual system of undergraduate education was unconstitutionally unequal. At points he used strong language:

> "It is rather shocking that at this stage in the progress of higher education in Delaware many of its citizens do not have available to them in their college work anything resembling seminar courses."[33]

> "One cannot but note the shocking lack of tenure at the College."[34]

> "The College is woefully inferior to the University in the physical facilities available to and in the educational opportunities offered its undergraduates in the School of Arts and Science."[35]

The Vice Chancellor's factual findings led him to conclude that a particular remedy was appropriate, without any discussion of potential alternative remedies.

> It follows from my conclusions that the Trustees of the University by refusing to consider plaintiffs' applications because they are Negroes have violated the guarantee contained in the Equal Protection Clause of the United States Constitution. The plaintiffs are therefore entitled

[32] *Id*.
[33] *Id.* at 232.
[34] *Id*.
[35] *Id*. at 234.

> to a permanent injunction in accordance with the prayers of their complaint.[36]

The decision to grant the requested injunction meant that the University of Delaware could no longer discriminate on the basis of race in admissions, creating the potential for Black students to be admitted for the following school year.

In an interview late in life, then-Judge Seitz explained that he had awarded an injunction in the traditional form, which could be seen as modest in scope:

> I decided that the University of Delaware could not consider color when passing on admissions, not that I ordered them admitted. That may sound like a distinction without a difference to some people, but that's really the typical equitable form of injunction. So that, in effect, they then apply for admission on their merits like anyone else.[37]

Judge Seitz further explained that his choice of remedy was innovative for the subject matter, and is part of what distinguished him from other judges, who were more sympathetic to maintaining racial segregation:

> That was the typical approach to segregation in all of those cases: we may be in default, but give us time. That same thing happened later in *Belton*, that same argument was made. That's the difference between my decision and a lot of the others.[38]

The alternative remedy that Vice Chancellor Seitz rejected—as summarized by the phrase "we may be in default, but give us time"—was a structural injunction to improve the quality of segregated all-Black schools. That alternative remedy

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[36] *Id.*
[37] *Conversation with Judge Seitz*, *supra* note 15, at 29.
[38] *Id.*

could entail further injunctions to require additional government funding of Delaware State College, which could require judicial review of the budgeting process, or orders that the State issue bonds or raise taxes. It would also require judicial oversight of the operations of Delaware State College over a period of years, to compare various facets of the school to the University of Delaware. It would entail mandating governmental action to create a school that did not exist—an accredited college for an all-Black student body, with facilities, faculty, student support services, and educational opportunities comparable to those at the University of Delaware. In practice, the alternative remedy of a structural injunction would order the creation of a legally defensible simulacrum.

Judge Seitz explained why he chose to grant the injunction requested by the plaintiffs in *Parker*, which was the same type of remedy he later granted in *Belton*/*Bulah*:

> I haven't read my *Belton* opinion in a long, long time, but I think I said why in that opinion, that the Constitution on equal protection didn't say it was to be deferred for some students. It was to apply to all students. When they could come back and show that it applied to all students, then maybe we would have a different problem. Otherwise, we weren't to wait to educate their grandchildren.[39]

The Equal Protection Clause had been interpreted by the United States Supreme Court as requiring separate but equal education. The State of Delaware had

[39] *Id.*

defaulted on that obligation. Vice Chancellor Seitz's chosen remedy was to grant the plaintiffs before him, and those similarly situated, an equal education in fact, by means of the formally modest remedy of forbidding their exclusion from all-white schools.

Belton v. Gebhart; Bulah v. Gebhart

The Plaintiffs in *Belton* were Black students who had been refused admission to Claymont High School. They were permitted to attend either Howard High School or Carver Vocational School, both of which were located approximately nine miles from the residence of one of the plaintiffs. The Plaintiff in *Bulah* was a seven year old residing near Hockessin who was refused admission to Hockessin School No. 29.

Delaware law required "that there be separate free school systems for Negroes and whites."[40] A striking aspect of Chancellor Seitz's decision is his consideration of plaintiffs' evidentiary case that "legally enforced segregation in education, in and of itself, prevents the Negro from receiving educational opportunities which are 'equal' to those offered whites."[41] Chancellor Seitz summarized:

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[40] Belton v. Gebhart, 87 A.2d 862, 864, *aff'd*, 91 A.2d 137 (Del. 1952), *aff'd sub nom.* Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294 (1955).
[41] *Id.*

> Plaintiffs produced many expert witnesses in the fields of education, sociology, psychology, psychiatry and anthropology. Their qualifications were fully established. No witnesses in opposition were produced. One of America's foremost psychiatrists testified that State-imposed school segregation produced in Negro children an unsolvable conflict which seriously interferes with the mental health of such children.
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> … The other experts sustained the general proposition as to the harmful over-all effect of legally enforced segregation upon Negro children generally…. The fact is that such practice creates a mental health problem in many Negro children with a resulting impediment to their educational progress.[42]

Chancellor Seitz rejected the defense that Delaware's white population would not accept integrated schooling:

> Defendants say that the evidence shows that the State may not be 'ready' for non-segregated education, and that a social problem cannot be solved with legal force. Assuming the validity of the contention without for a minute conceding the sweeping factual assumption, nevertheless, the contention does not answer the fact that the Negro's mental health and therefore, his educational opportunities are adversely affected by State-imposed segregation in education. The application of Constitutional principles is often distasteful to some citizens, but that is one reason for Constitutional guarantees. The principles override transitory passions.
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> I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated.[43]

These factual findings did not contribute to Chancellor Seitz's holding. They were made in aid of appeal. Chancellor Seitz proceeded to discuss why, as a

[42] *Id.* (footnote omitted).
[43] *Id.* at 864-65.

matter of law, he was bound by the implication of Supreme Court precedent that "a separate but equal test can be applied, at least below the college level."[44] Chancellor Seitz stated that he believed this legal rule was wrong: "This Court does not believe such an implication is justified by the evidence.... I believe the 'separate but equal' should be rejected, but I also believe its rejection must come from the Court."[45] Chancellor Seitz continued: "It is for that Court to re-examine its doctrine in the light of my finding of fact."[46]

The United States Supreme Court's decision in *Brown I* is famous in part for its footnote 11, which inaugurated the citation of social science research in Supreme Court opinions.[47] Less appreciated is footnote 10, which quotes Chancellor Seitz's post-trial finding for the same proposition—that State-imposed segregation in education results in inferior educational opportunities for Black students.[48]

Chancellor Seitz ruled for the plaintiffs on the basis that the separate schools for the Black plaintiffs were not "equal to those furnished white children similarly

[44] *Id.* at 865.
[45] *Id*.
[46] *Id*. at 866.
[47] *Brown I*, 347 U.S. at 494 n.11.
[48] *Id.* at 494 n.10.

situated."[49] One identified factor was the additional travel time for one Black student, Ethel Louise Belton, a Claymont resident, due to her exclusion from Claymont High.[50] Additionally, Carver Vocational lacked an auditorium, a gymnasium, or a regular cafeteria.[51] Claymont High was superior in the categories of "teacher training, pupil-teaching ratio, extracurricular activities, physical plants and aesthetic considerations."[52] Chancellor Seitz made similar findings respecting the facilities and educational opportunities of the elementary schools in question.[53]

Chancellor Seitz discussed why he refused to grant an injunction directing the defendants to equalize facilities and opportunities. He offered three reasons:

> (1) I do not see how the plans mentioned will remove all the objections to the present arrangement. (2) Moreover, and of great importance, I do not see how the Court could implement such an injunction against the State. (3) Just what is the effect of such a finding of a violation of the Constitution, as has here been made…. If, as the Supreme Court has said, this right is personal, such a plaintiff is entitled to relief immediately, in the only way it is available, namely, by admission to the school with the superior facilities. To postpone such relief is to deny relief, in whole or in part, and to say that the protective provisions of the Constitution offer no immediate protection.[54]

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[49] Belton v. Gebhart, 87 A.2d 862, 866, *aff'd*, 91 A.2d 137 (Del. 1952), *aff'd sub nom.* Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294 (1955).
[50] *Id.*
[51] *Id.* at 866-67.
[52] *Id.* at 869.
[53] *Id.* at 870-71.
[54] *Id.* at 869-70 (citation omitted).

Chancellor stated that "the State's future plans" provided no defense to the requested relief, and that "[i]f it be a matter of discretion, I reach the same conclusion."[55] His injunction orders were not stayed pending appeal.

The newly created, constitutionally bipartisan[56] Delaware Supreme Court affirmed Chancellor Seitz. The affirmance has a formal quality that limits its historical significance. Nothing about the Delaware Supreme Court's opinion criticizes racial segregation by law. It reads as a narrow effort to police the contours of "separate but equal."

The Delaware Supreme Court did not express any opinion as to the Chancellor's factual finding of the ill effects of segregated schooling. Chief Justice Sutherland wrote that the Chancellor recognized that his factual finding was immaterial to his legal conclusion, and added: "We agree that it is immaterial, and

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[55] *Id.* at 870.

[56] *See* Joel E. Friedlander, *Is Delaware's "Other Major Political Party" Really Entitled to Half of Delaware's Judiciary?*, 58 Ariz. L. Rev. 1139, 1149-51 (2016) (discussing history of 1951 Delaware constitutional amendments). The constitutional amendments of 1951 did not create a bipartisanship requirement for the Court of Chancery. 48 *Del. Law* c. 109, https://legis.delaware.gov/SessionLaws/Chapter?id=32970. The twin subjects of this article, Collins Seitz and William Marvel, served together as the only members of the Court of Chancery between September 1954 and the expansion of the Court in 1961. Quillen and Hanrahan, *supra* note 18. Before becoming judges, they were both northern Delaware Democrats. Seitz once "wrote the whole Democratic state platform myself." *Conversation with Judge Seitz*, *supra* note 15, at 26. Marvel was former chairman of the New Castle County Democratic Party. *Marvel Obituary*, *supra* note 13.

hence see no occasion to review it."[57] Relatedly, the Delaware Supreme Court did not join the Chancellor's implicit challenge to the United States Supreme Court to overrule "separate but equal" doctrine. Chief Justice Sutherland wrote: "The question of segregation in the schools, under these authorities, is one of policy, and it is for the people of our state, through their duly chosen representatives, to determine what that policy shall be."[58]

The Delaware Supreme Court found that the high schools in question were substantively unequal in limited respects.[59] The Delaware Supreme Court also concluded that the elementary schools in question were "substantially unequal."[60]

As to the remedy, the Delaware Supreme Court agreed with Chancellor Seitz that a decree to equalize the high school facilities would not afford adequate relief, notwithstanding contrary rulings by three-judge courts in federal districts in South Carolina and Virginia.[61] The Chancellor's injunction requiring plaintiff Bulah's admission to School No. 29 was also affirmed. The affirmance of the injunctions had a grudging quality:

> In affirming the Chancellor's order we have not overlooked the fact that the defendants may at some future date apply for a modification of the order if, in their judgment, the inequalities as

[57] *Gebhart v. Belton*, 91 A.2d 137, 142 (Del. 1952).
[58] *Id.*
[59] *Id.* at 148.
[60] *Id.* at 152.
[61] *Id.* at 148-49.

> between the Howard and Claymont schools or as between School No. 29 and School No. 107 have then been removed. As to Howard, the defendants, as above stated, assert that when the Howard-Carver changes are completed, equality will exist. The Chancellor apparently thought to the contrary. We do not concur in his conclusion, since we think that that question, if it arises, is one which will have to be decided in the light of the facts then existing and applicable principles of law.[62]

The Delaware Supreme Court also questioned the scope of Chancellor Seitz's injunction order. The Delaware Supreme Court "express[ed] no opinion whether, as to those 'similarly situated' other than the plaintiffs, the judgment is *res judicata* or whether it has force only under the rule of *stare decisis*."[63]

The defendants appealed to the United States Supreme Court. At oral argument, the Justices wrestled with the significance of Chancellor Seitz's factual finding respecting segregated schooling and his injunction ordering the admission of the named plaintiffs to the formerly all-white schools. In colloquies with Delaware's Attorney General, Justice Frankfurter made the following comments about Chancellor Seitz's fact-finding, his injunction, and his opinion:

> "A very powerful finding by the Chancellor."
>
> "Here is what troubles me. It is asking a great deal of this Court, for one-ninth of this Court, to overrule the judgment of the Chancellor, affirmed by the supreme court of the State, that the equity of the situation requires the decree that they entered."

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[62] *Id*.
[63] *Id*.

"If I may say so, it was an unusual opinion, as opinions go."[64]

On May 17, 1954, the United States Supreme Court handed down its decision in *Brown I*, in which the Court declared: "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[65]

The Court requested further argument on the proper remedy. The potential alternative models of injunctive relief are set forth in the following questions, which the Court had previously posed to the litigants:

> 4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
> (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
> (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?
> 5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),
> (a) should this Court formulate detailed decrees in these cases;
> (b) if so, what specific issues should the decrees reach;
> (c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;
> (d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court conclude and what

[64] *Gebhart v. Belton*, No. 448 (Dec. 11, 1952) (afternoon session), lonedissent.org/transcripts/pre-1955/brown1/gebhart-v-belton.
[65] *Brown I*, 347 U.S. at 495.

> procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?[66]

New litigation in the Delaware Court of Chancery would require the application of *Brown I* before the United States Supreme Court answered these questions.

Simmons v. Steiner

On June 9, 1954, Delaware's Attorney General addressed a letter to the President of the State Board of Education respecting *Brown I*. It read in part:

> The opinion is not self-executing and does not call for immediate integration. It is possible for any school district, however, where circumstances permit and the situation warrants, to effect integration as now announced by the recent Supreme Court opinion without doing violence to the Constitution and laws of our own States, notwithstanding the fact that the mandate of the United States Supreme Court has not yet been handed down.
>
> On the other hand, the State Board of Education may well require time within which to bring about integration in an orderly fashion within the spirit and meaning of the recent Supreme Court decision. I am sure that the Board will formulate some concrete plan directed towards an effective gradual adjustment from existing segregation in the public schools in Delaware to a system of non-segregation in accordance with the spirit, purposes and intent of the opinion as expeditiously as it is possible for it do so.[67]

On June 11, 1954, the State Board of Education announced a policy by which "the actual carrying out of the integrative process will require a longer

[66] *Id.* at 495 n.13.
[67] *Steiner*, 111 A.2d at 580-81.

period of time in some parts of the State than in others."[68] Only the Wilmington Board of Education was granted permission to "move promptly in the direction of integration."[69]

On August 19, 1954, the State Board of Education promulgated further regulations, including the following: "No pupils, except those with proper transfer permits shall be accepted by any school from other schools unless and until plans from that school for desegregation in that area have been approved by the State Board of Education."[70] On August 26, 1954, the State Board of Education listed a number of suggestions "designed as a guide to local boards in arriving at a proposal for ending segregation in the respective school districts."[71]

On September 8, 1954, eleven Black students were admitted to the previously all-white Milford High School, despite the Milford Special School District never having submitted a desegregation plan to the State Board of Education.[72] Milford is in southern Delaware, which is below the Mason-Dixon line. A typed chronology prepared decades later by the co-author of a book on the

[68] *Id.* at 581.
[69] *Id*.
[70] *Id*. at 582.
[71] *Id*.
[72] *Id.* at 575, 583.

subject[73] describes how a mob succeeded in undoing the voluntary limited integration of Milford High School:

Friday, Sept. 17	Mass Meeting at the American Legion to protest integration – Petition circulated to request School Board to re-consider integration – presented to School Board at some point next week
Monday, Sept. 20 to Friday, Sept. 24	Milford schools officially closed due to fear of violence
Tuesday, Sept. 21	Harry Mayhew resigns from School Board
Thursday, Sept. 23	Citing lack of support from State School Board, remaining members of Milford School Board resign, i.e., Ida Phillips, Wm. V. Sipple, and Dean Kimmel, President
Friday, Sept. 24	Governor Boggs orders schools to be reopened under the State Board Spokesman for Negro students says they will attend
Sunday, Sept. 26	Rally at Harrington Airport, Bryant Bowles of NAAWP [National Association for the Advancement of White People] was present and receives first mention in The Milford Chronicle on Oct. 1
Monday, Sept. 27	Schools re-opened; 3-500 adults present for the opening; Dr. George R. Miller, State Superintendent, was present
Thursday, Sept. 30	Newly created Board, consisting of Edmund F. Steiner, George A. Robbins, George P.

[73] ORLANDO J. CAMP & ED KEE, THE MILFORD ELEVEN (2011).

	Adams, and David B. Greene, meets and votes to remove the 11 Negro students from the rolls, effective 3:10 P.M., Sept. 30 Appeals to all constituents of the District to send their children to school on Friday, October 1. Prior to this attendance was cited by The Milford Chronicle to be 31.9%
Sunday, Oct, 10	Mass Meeting at Harrington Airport with Bowles, who is out on bail from charges relating to disrupting De. School Laws[74]

Amidst the unfolding events listed above, Delaware's Attorney General delivered a revised legal opinion respecting *Brown I* to the State Board of Education on September 23, 1954. It stated in part:

> At the conference called by the Governor held in my office yesterday afternoon, I was asked whether the Board of the Milford Special School District had acted within the law in admitting the eleven Negro children to the white school in its district. My answer was and is in the affirmative.
>
> In so doing, the Milford Special School District did not violate any constitutional provision, Federal or State, or any State law.
>
> ….
>
> Finally, on either count, first, under the United States Supreme Court Opinion, which nullifies our constitutional provision and its statutory counterpart with regard to the separate but equal doctrine in secondary education in our State, since it contravenes the Federal Constitution, and, secondly, facilities not being equal under our own State law and its judicial decisions, the Board of the Milford Special School District acted in accordance with the law of this State and the

[74] Ed Kee, *1954 In the Milford School District A Chronology* (Feb. 27, 1994), Delaware Public Archives (on file with the author).

> law of the land in admitting the eleven Negro pupils to the white school in its district.[75]

Louis Redding filed suit in the Delaware Court of Chancery on behalf of the eleven Black students who had been removed from the records of Milford High School. The plaintiffs moved for a preliminary mandatory injunction that they be readmitted.[76] The complaint alleged that the plaintiffs had been removed from Milford High School solely due to their race and that no school facilities near Milford were equal to those afforded by Milford High School.[77]

Vice Chancellor Marvel granted the requested injunction. He reasoned that the plaintiffs were "equitably entitled" to an education at Milford High School, notwithstanding the pending remedy proceedings in the United States Supreme Court:

> In light of the sweeping declaration of the Supreme Court on the unqualified right of all persons to a public school education in which race plays no part, it necessarily follows that plaintiffs and those similarly situated are equitably entitled to an education at Milford High School. Under the facts of this case how long must plaintiffs wait?
>
> ….

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[75] *Steiner*, 111 A.2d at 583-84.

[76] A casebook on remedies includes an excerpt of Cooling v. Security Trust Co., 49 A.2d 121 (Del. Ch. 1946) (Seitz, V.C.), for the authority of an American court of equity to issue a preliminary mandatory injunction. EDWARD D. RE & JOSEPH R. RE, CASES AND MATERIALS ON REMEDIES 273-75 (4th ed. 1996).

[77] Simmons v. Steiner, 108 A.2d 174-75 (Del. Ch. 1954), *rev'd*, 111 A.2d 574 (Del. 1955).

> [Defendants'] argument overlooks the fact that whether eventual decrees in the decided cases are res judicata for those similarly situated or merely bear the force of stare decisis, the Court has given its decision, and decrees were withheld only because they will have wide applicability under a great variety of local conditions. The Supreme Court evidently was of the opinion that it could not without further argument and consideration frame decrees having a broad compulsory scope. This Court at this stage is concerned solely with the constitutional rights of ten students to continue their education at a school to which they had been admitted during a period of permissive integration.
>
> ….
>
> I hold that plaintiffs, having been accepted and enrolled, are entitled to an order protecting their status as students of Milford High School; that their right to a personal and present high school education having vested on their admission, they need not wait for decrees in the cases decided by the United States Supreme Court in May as a prerequisite to the relief they seek.
>
> ….
>
> I hold that plaintiffs' constitutional rights to a non-segregated education vested on their admission to Milford High School, rights which defendants concede but wish to withhold for the present. I find plaintiffs' legal right 'clear and convincing', that they are entitled to mandatory relief, and that any inconvenience or distress to defendants must give way before the much greater injury which would be inflicted on plaintiffs by denial of their personal and present rights.[78]

In a footnote, Vice Chancellor Marvel stated that he attached "no legal significance" to the absence of prior approval of the Delaware State Board of Education to the local school board's plan to admit the plaintiffs to Milford High School, citing the Attorney General's advice of September 23.[79]

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[78] *Id.* at 175-76.
[79] *Id.* at 174 & n.2.

Vice Chancellor Marvel's opinion followed the model of *Parker* and *Bulah/Belton*. It granted an injunction prohibiting school officials from denying the admission of Black students from attending a local all-white school on account of their race. It depended on case-specific facts. It recognized the equitable rights of the plaintiffs before the Court, who otherwise would attend an inferior school. It did not substitute a future-oriented structural injunction in place of that present relief. It placed more weight on the equitable right of the plaintiffs than on the inconvenience and practical difficulties of the defendants. The granting of an injunction in *Simmons* could be seen as a more obvious form of relief as compared to *Parker* or *Belton/Bulah*, given that *Brown I* had been decided in the interim.

But the granting of an injunction did not logically follow from the procedural posture of *Brown I.* The United States Supreme Court had left open the possibility that "effective gradual adjustment" was a permissible model of injunctive relief, as opposed to Black students being entitled "forthwith [to] be admitted to schools of their choice."[80] Vice Chancellor Marvel elided the question of which model of injunctive relief was more appropriate by basing his narrow injunction on the case-specific fact that the Milford school board had previously admitted the Milford eleven.

[80] *Brown I*, 347 U.S. at 495 n.13.

The Delaware Supreme Court delayed the effectiveness of Vice Chancellor Marvel's injunction. They later vacated it.

The basis for the Delaware Supreme Court's decision was two-fold. First, the Delaware Supreme Court interpreted *Brown I* as having the following effect: "States having segregation laws are not required, *at the moment*, to desegregate their schools."[81] Second, the Delaware Supreme Court ruled that the Milford school board had lacked the authority to admit Black students to Milford High School because the regulations propounded by the State Board of Education "directing the local boards to submit plans looking to gradual integration" had the "the force of law throughout the State."[82]

In summary, the Delaware Supreme Court deferred to State Board of Education regulations forbidding local school boards from unilaterally admitting Black students in geographic areas where the majority local white population was opposed to integration. The Delaware Supreme Court ruled that the original Milford school board members who had been hounded out of office had acted improperly in admitting the Black students, and that the new Milford school board members had acted lawfully in striking the Milford Eleven from the high school rolls:

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[81] *Steiner*, 111 A.2d at 579 (emphasis in original).
[82] *Id.* at 576.

> We are justified in inferring that the State Board's policy has proved to be a workable one.
>
> We think, therefore, that these regulations are reasonable, and (if we may say so) embody a commendably wise and cautious approach to a problem of great delicacy and difficulty…
>
> ….
>
> The lamentable sequence of events suggests the importance of adherence by the local boards to the spirit and letter of the State Board's regulations….
>
> ….
>
> … Certainly the appearance of yielding to threats of violence was most unfortunate. But this circumstance cannot affect the right and duty of the new Milford Board to comply with the regulations of the State Board. If its action was correct, it must be upheld, whatever reason was assigned for it.[83]

A mob had driven school board members out of office and shut down the schools. State school administrators and politicians did nothing. In the face of mob action opposing a limited, voluntary, local effort to integrate Milford High School, the Delaware Supreme Court endorsed as "commendably wise" a ban by State school officials on unilateral local integration as an appropriate means of implementing *Brown I*.

After Vice Chancellor Marvel was reversed for ordering immediate integration as to eleven students, the United States Supreme Court in *Brown II* decided to entrust local courts with oversight of gradual integration by local school authorities:

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[83] *Steiner*, 111 A.2d at 583-86.

> School authorities have the primary responsibility for elucidating, assessing, and solving these [local school] problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal.[84]

* * *

Desegregation of Delaware's public schools arrived slowly, especially in the vicinity of Milford. In 1959, Delaware began implementing a plan, approved by the federal district court, of grade-by-grade desegregation over a period of twelve years beginning with first graders. In 1960, a divided panel of the Third Circuit Court of Appeals reversed the district court, with Chief Judge Biggs adopting the logic of Chancellor Seitz's injunction orders: "individual plaintiffs in a class suit such as those at bar, have a personal right to immediate enforcement of their claims if such be feasible. We can perceive no reason why the individual infant plaintiffs who presently actively seek integration should not be granted that right immediately."[85]

On rehearing, Chief Judge Biggs distinguished rulings in other courts approving grade-by-grade integration plans. He did so on the basis that those courts were in "the deep South, a part of our Nation where emotional reactions

[84] *Brown II*, 349 U.S. at 299.
[85] Evans v. Ennis, 281 F.2d 385, 389 (3d Cir. 1960).

concerning school integration are more intense than in our own State of Delaware."[86] In his original opinion, Chief Judge Biggs had written: "Concededly there is still some way to go to complete an unqualified acceptance but we cannot conclude that the citizens of Delaware will create incidents of the sort which occurred in the Milford area some five years ago."[87]

The model of integration ordered by the Third Circuit was that the State must process on a racially non-discriminatory basis the school assignment requests of the relatively few Black students who were "presently actively seeking integration."[88] As to everyone else, much was unchanged. The sole high school in Sussex County to which all Black students had been assigned, built in 1950, remained essentially all-Black until it was dismantled in 1967, under federal Executive Branch pressure to desegregate.[89] It was not until 1978 that United

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[86] *Id.* at 393.
[87] *Id.* at 389.
[88] *Id.* at 393.
[89] Education Trust, *Special Edition: Segregation, Integration and the Milford 11*, https://edtrust.org/extraordinary-districts/special-edition-segregation-integration-and-the-milford-11/ ("It was not until 1967, when the Department of Health, Education and Welfare under President Lyndon Johnson threatened to withhold funds unless schools desegregated, that Delaware dismantled its segregated schools."); A REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION 1966-67, at 1 (July 1967) ("The sanction of withdrawal of Federal Assistance has acquired increased significance with the rapid rise in such assistance under recently expanded Federal aid to education programs."); *id.* at 8 n.18 ("Although there are no all-Negro schools in Delaware, there are schools which are nearly all-Negro. For example, in April 1967, one high school in Sussex

States District Judge Murray Schwartz ordered city-suburban busing and ancillary relief to eliminate the *de jure* segregated school system which had previously existed in northern New Castle County.[90]

Burton v. Wilmington Parking Authority

Meanwhile, racial segregation under color of law remained intact in various aspects of public life. Local lawyer Frank Hollis, a former law clerk of Chancellor Seitz, told the story about how a class action challenging the refusal of a particular coffee shop in Wilmington to serve Black patrons in 1958 came before the Delaware Court of Chancery and later the United States Supreme Court:

> The beginnings of the landmark case *Burton v. The Wilmington Parking Authority* were lodged in the efforts of seven workers at the Chrysler Newark Plant who sought to be served in a restaurant housed under lease in this government facility. When they were denied service, they were arrested and charged in the Wilmington Municipal Court with, inter alia, criminal trespass. As their legal representative, I conferred with Louis Redding, Jr., who was then counsel for the local

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County, Delaware had 264 Negro students and only 15 white students, all of whom were in a special class for the trainable mentally retarded."), https://www.crmvet.org/docs/ccr_sch_desegregation_south_6707.pdf; Delaware Public Archives, *State of Delaware Historical Marker: William C. Jason Comprehensive High School—First African-American Secondary School in Sussex County* ("The desegregation of schools in Delaware led to the closing of Jason in June 1967 after which it became part of Delaware Technical and Community College."), https://archives.delaware.gov/delaware-historical-markers/william-c-jason-comprehensive-high-school/.

[90] *See* Evans v. Buchanan, 447 F. Supp. 982, 1040 (D. Del.) ("Over twenty-three years have elapsed since Brown II and the goal of nondiscriminatory public education in the desegregation area has not reached fruition."), *aff'd*, 582 F.2d 750 (3d Cir. 1978).

> branch of the NAACP. We decided to test the owner's no service to blacks policy by having City Councilman Burton seek service. He was arrested for trespassing and thanks to Louis Redding and Leonard Williams, the law is now established that a governmental entity cannot by inaction do what it could not do by action - enforce and countenance discrimination on the grounds of race in a publicly-owned facility.[91]

In 1958, no State or federal statutes forbade private restaurants from discriminating on the basis of race. Nor were all eating establishments in downtown Wilmington integrated by custom. In its defense, The Eagle Coffee Shoppe invoked a Delaware statute that read as follows:

> No keeper of an inn, tavern, hotel, or restaurant, or other place of public entertainment or refreshment of travelers, guests, or customers shall be obliged, by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business.[92]

The basis for the plaintiff's claim was the Equal Protection Clause of the Fourteenth Amendment and the application of *Brown I*. Plaintiff argued that the Eagle Coffee Shoppe was bound by the Fourteenth Amendment because it leased space from the Wilmington Parking Authority, as part of a parking lot structure on Ninth Street. The parking authority disclaimed any control over the policies and

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[91] Frank Hollis, *My Memories of Law Practice in Wilmington, Delaware*, 16 DEL. LAW. No. 2, at 26-27 (Summer 1998), https://www.delawarebarfoundation.org/all-documents/delaware-lawyer-magazine/1998-volume-16/60-volume16-number2-summer1998/file

[92] 24 *Del. C.* § 1501, *quoted in* Burton v. Wilmington Parking Authority, 365 U.S. 715, 717 n.1 (1961).

practices of the coffee shop. The 20-year lease, signed in April 1957, only required the tenant to "use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority."[93]

Vice Chancellor Marvel reasoned that Wilmington Parking Authority was prohibited from leasing space in a public parking facility to a commercial tenant that discriminated on the basis of race:

> There is no doubt but that the Parking Authority is a tax exempt agency of the State engaged in furnishing public parking service in a facility, the financing of which is being borne in large part by rentals received from tenants occupying other parts of the building. Because these rentals constitute a substantial and integral part of the means devised to finance a vital public facility, in my opinion it was incumbent on the Authority to negotiate and enter into leases such as the one here involved on terms which would require the tenant to carry out the Authority's constitutional duty not to deny to Delawareans the equal protection of the laws. To say that the Authority has no statutory power to operate the restaurant itself is to beg the question in view of the direct relation of rental income to the financing of the facility.[94]

Vice Chancellor Marvel decided that the plaintiff was entitled to a declaratory judgment preventing the coffee shop from declining to serve him and others on the basis of their race.

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[93] 150 A.2d 197, 199 (Del. Ch. 1959), *rev'd*, 157 A.2d 894 (Del. 1960), *rev'd*, 365 U.S. 715 (1961).
[94] *Id.* (citation omitted).

One way to think about this reasoning and outcome is that Vice Chancellor Marvel interpreted *Brown I* as creating an equitable entitlement of Black citizens to enforce as third-party beneficiaries a non-discrimination covenant absent in the lease that the State of Delaware had been obliged to insist upon. The Vice Chancellor's declaratory judgment and injunction enforced the Plaintiff's equitable right to the obligatory covenant.

The Delaware Supreme Court reversed, reasoning that the parking authority's interest in collecting rent was not sufficient to change the private character of the coffee shop. The Delaware Supreme Court distinguished cases involving a public park, a public airport, a courthouse cafeteria, a municipal swimming pool, and a public amphitheater, on the basis that a relatively small percentage of the overall cost of the Wilmington Parking Authority structure, its allocation of space, and its revenue was attributable to commercial leases, as opposed to public parking.[95]

In reaching that decision, the Delaware Supreme Court stated that it refused to extend *Brown I* and encroach further on Delaware law, which historically tolerated both public and private race discrimination:

> We neither condemn nor approve such private discriminatory practices for the courts are not the keepers of the morals of the public.

[95] *Wilmington Parking Auth.*, 157 A.2d at 896-902.

> We apply the law, whether or not that law follows the current fashion of social philosophy.
>
> Particularly is this true of a state court which is called upon in this field to apply rules made for by the Supreme Court of the United States, which, in the case of this state, have resulted in the discard of a large portion of our local law dealing with the emotional subject of racial relations. We are, of course, bound to follow the Federal decisions, but we think we are equally bound, when they erode our local law, not to extend them to a point which they have not as yet gone.[96]

The Delaware Supreme Court concluded by invoking the above-quoted Delaware statute, 24 *Del. C.* § 1501. The Court stated that because the coffee shop was "acting in a purely private capacity," consistent with the common and the statutory law of Delaware, it was "not required to serve any and all persons entering its place of business, any more than the operator of a bookstore, barber shop, or other retail business is required to sell its product to every one."[97] The plaintiff argued that under Delaware common law, an inn or tavern could not deny service to any customer, but the Delaware Supreme Court decided that even though the coffee shop served alcoholic beverages, it was "primarily a restaurant" and protected by the Delaware statute.

The case proceeded to the United States Supreme Court, in part on the question whether the Delaware Supreme Court had construed 24 *Del. C.* § 1501 in a manner incompatible with the Fourteenth Amendment. A separate question was

[96] *Id.* at 901-02.
[97] *Id.* at 902.

whether the discriminatory actions of the coffee shop were "purely private" or subject to the Fourteenth Amendment and *Brown I*.

Five members of the United States Supreme Court expressly endorsed the reasoning of Vice Chancellor Marvel respecting the responsibility of the State of Delaware as a commercial landlord, and rejected the holding of the Delaware Supreme Court:

> It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and unentitled to service, but at the same time fully enjoys equal access to nearby restaurants in wholly privately owned buildings. As the Chancellor pointed out, in its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be…. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.
>
> … Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.[98]

[98] *Burton*, 365 U.S. at 724-26.

Justice Stewart concurred on the alternative basis that the Delaware Supreme Court had unconstitutionally construed a State statute "as authorizing discriminatory classification based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment."[99] Three other Justices would have remanded the case to the Delaware Supreme Court "for clarification as to the precise basis of its decision."[100] These three Justices agreed that it would be impermissible to construe the state statute as authorizing racial discrimination, and that the constitutional question of what constitutes impermissible state action under *Brown I* could be avoided if the statutory interpretation question controlled. No United States Supreme Court Justice shared the Delaware Supreme Court's apparent sympathy for pre-*Brown I* state and federal law.

Conclusion

In the decade between 1950 and 1959, Vice Chancellor/Chancellor Seitz and Vice Chancellor Marvel adjudicated four constitutional challenges to legally entrenched racial segregation. The first two cases were decided under *Plessy v. Ferguson*. The latter two cases were decided under *Brown I*. The disposition of the four cases was consistent with each other and distinctive for their time.

[99] *Id.* at 727 (Stewart, J., concurring).
[100] *Id.* at 729 (Harlan, J., dissenting); *see id.* at 731 (Frankfurter, J. dissenting).

All four cases were decided in favor of the plaintiffs. The two members of the Court of Chancery both held that the Equal Protection Clause created an enforceable right to equal treatment and equal opportunities by the State of Delaware and its instrumentalities.

As notably, the Court of Chancery awarded immediate equitable remedies on behalf of the named plaintiffs and similarly situated members of a socially marginalized race, in a manner that would unsettle local government and local folkways. Black high school students and college students became entitled to apply to the University of Delaware and have their applicants considered in a non-discriminatory manner; Black students became entitled to attend Claymont High School and Hockessin School No. 29; the Milford Eleven were ordered to be re-enrolled in Milford High School; City Councilman Burton and the Black workers at the Newark Chrysler plant became entitled to dine at the Eagle Coffee Shoppe. The proffered alternative of structural injunctions, such as increased funding for Delaware State University or Howard High School, or a future gradual integration plan for public schools in Sussex County, were rejected. The equitable rights of the plaintiffs were not balanced against opposing public sentiment, or even the threat of violence.

The discrete injunctions awarded by the Court of Chancery on behalf of the name plaintiffs can be seen as examples of traditional equitable relief, consistent

with the larger private law docket of the Court. The injunctions are akin to awarding specific performance against a defaulting seller, or imposing a constructive trust upon the proceeds taken by a disloyal fiduciary. They put the plaintiffs in the position to which they were equitably entitled.

Discrete, immediate injunctive relief may not have been a scalable or sufficient means of redress for structural violations of constitutional rights. But at the time, the relief awarded to the plaintiffs by the Court of Chancery compared favorably to stasis. In December 1956, the then-leading scholar of equity, Professor Zechariah Chafee, Jr. of Harvard Law School, wrote a private memo to the members of the United States Supreme Court entitled "The Disintegration of Integration," in which he voiced his frustration with *Brown II*:

> I have great dissatisfaction with the present situation as to segregation. Once the Supreme Court had laid down the general principle of integration in the first case, I think that everything depended on the framing of a satisfactory scheme to carry out that principle…. Instead of framing a scheme, [the Supreme Court] turned all the dirty work over to local United States courts….
>
> I don't believe that a problem which involved every school in a dozen states which are firmly determined not to do anything towards integration, can be solved by fragmentary litigation.[101]

Parker, *Belton/Bulah*, *Simmons*, and *Burton* show what could be achieved through fragmentary litigation adjudicated by local trial courts. The manner by

[101] Zechariah Chafee memo to U.S. Supreme Court, "The Disintegration of Integration" (Dec. 19, 1956), Zechariah Chafee Papers, box 86, folder 1, Harvard Law School Library (on file with the author).

which two members of the Court of Chancery discharged their judicial oath in these four cases is worthy of study and honor several decades later.