Perspectives on *Brown*

Dennis J. Hutchinson

No one needs to be told what happened on May 17, 1954, but there is little agreement on how to measure the significance of what has happened since that day when the Supreme Court issued its first opinion in *Brown v. Board of Education*.[1] A quarter-century after the decision, then-professor J. Harvie Wilkinson called *Brown* "among the most humane moments in all our history."[2] Within the last decade, however, *Brown* has been dismissed by some leading scholars as ineffectual and even irrelevant. Richard Posner, writing in *The New Republic*, acknowledged that the decision "was a triumph of enlightened social policy" in the short term, but in "a longer perspective…the decision seems much less important, even marginal."[3] Others have pronounced *Brown* to be a failure, and point to the "re-segregation"[4] of public education, both North and South, where urban schools tend to be 80–95 per cent non-white.

Revisionist history is always popular, at least for a while, but I think the latest turn in the historiography of *Brown* betokens intellectual tunnel vision. Let us consider two of the most prominent "new histories" of *Brown* and then try to understand the case and its significance in somewhat broader contexts.

Michael J. Klarman of the University of Virginia has argued for a decade that *Brown* was inevitable, a product and not a cause of

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1 347 U.S. 483 (1954).

2 J. Harvie Wilkinson, From *Brown* to *Bakke*: The Supreme Court and School Integration, 1954–1978 at 39 (Oxford, 1979).

3 Posner, *Appeal and Consent*, The New Republic, Aug. 16, 1999, at 36, 39.

4 Gary A. Orfield and Susan E. Eaton, Dismantling Desegregation: The Quiet Reversal of *Brown v. Board of Education* (New Press, 1996); Orfield and John T. Yun, *Resegregation in American Schools* (June 1999), law.harvard.edu/groups/civilrights/publications/resegregation99.html.

the civil rights movement, and, in the short run counterproductive because of the backlash it triggered among many white southerners.[5] Although Klarman has qualified his argument somewhat over time, his basic thesis remains largely dismissive of *Brown* and has culminated in a 600-page volume entitled *From Jim Crow to Civil Rights*.[6] Shortly before Klarman began his project, Gerald Rosenberg of the University of Chicago published a book entitled *The Hollow Hope*,[7] which concluded, based on exhaustive empirical research, that "*Brown* and its progeny stand for the proposition that courts are impotent to produce significant social reform."[8]

I think both claims are overstated and highly dependent on the scope of the evidence each author examined. Moreover, for all the excitement their work has generated, much of their emphasis echoes views expressed previously. For example, Klarman's claim that *Brown* was simply the "conversion of an emerging national consensus into a constitutional command"[9] recalls the explanations offered almost fifty years ago by no less than Martin Luther King, Jr. and Walter White, the long-time Executive Secretary of the NAACP. Writing in 1955 shortly before his death, White explained *Brown* as the function of a variety of "forces – economic, religious, moral, political, and international – [which created] in 1954 a new climate of opinion that no one would have dared to predict even ten years before. … It is doubtful whether so basic and so bloodless a revolution of public thinking has ever previously occurred in human history."[10] Rosenberg's empirical demonstration of the Court's incapacity to implement *Brown* mirrors critiques in the mid-1960s when 99% of black school children still attended segregated schools in the South. Referring to the 1955 decision in *Brown II*, which ordered desegregation but "with all deliberate speed," Lewis M. Steel complained in 1968 that "The Court found that public relations – offense to white sensibilities – existed to justify the delay in school desegregation. Worse still, it gave primary responsibility for achieving educational equality to those who had established the segregated institutions."[11] Steel's essay in the *New York Times Magazine* was entitled, tellingly, "Nine Men in Black Who Think White."

Klarman and Rosenberg share a common premise: that the Supreme Court must be understood broadly as a political actor – not in the partisan sense but in the sense of exercising and mediating power between and among other branches of government. The role is inevitable, of course, especially when the Court deals with constitutional law, but the role is not one in which the Court enjoys comparative advantage in experience or expertise, and it is to that problem that I now wish to turn.

The Supreme Court can be forgiven, at least to some extent, for feeling sandbagged by the Executive Branch during what might

5 Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 Va. L. Rev. 7 (1994); *How* Brown *Changed Racial Relations: The Backlash Thesis*, 81 J. Am. Hist. 81 (1994); Brown v. Board of Education: *Facts and Political Correctness*, 80 Va. L. Rev. 185 (1994).

6 From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality (Oxford, 2004).

7 (Chicago, 1991).

8 Id. at 71.

9 Klarman, *From Jim Crow to Civil Rights*, at 310.

10 Walter White, How Far the Promised Land? 64 (Viking, 1955).

11 Steel, *Nine Men in Black Who Think White*, New York Times Magazine, Oct. 13, 1968, reprinted in Leonard W. Levy, ed., The Supreme Court and Earl Warren 82, 85–86 (Quadrangle, 1972).

be called the early *Brown* era. During the late 1940s, the Department of Justice and the NAACP seemed to be involved in a joint venture to eradicate the constitutional underpinnings to Jim Crow. For the first time in a private civil rights suit, the Attorney General personally signed an *amicus curiae* brief in *Shelley v. Kraemer*[12] – the racial restrictive covenant case – in 1948. Two years later, the Department of Justice urged the Court to overrule *Plessy v. Ferguson*,[13] the 1896 decision that upheld state-mandated racial segregation in transportation as "reasonable" and thus not inconsistent with the Equal Protection Clause of the Fourteenth Amendment. Even the NAACP was not willing to go that far at that point. The Department also supported the NAACP's successful challenges in 1950 to racially segregated public graduate schools.

In all of these cases, the NAACP and the Department of Justice stood shoulder to shoulder against Jim Crow, and in all the Court unanimously sustained their positions. When *Brown* was first argued in December of 1952, a month after the Presidential election, the NAACP and the Department were again aligned. But the Department's position had been developed by the Truman administration, and although it was not clear at the time, the new administration turned eloquent resolve on civil rights into reticent hesitation. In the words of William E. Leuchtenburg, the distinguished presidential historian: "It was altogether a misfortune for blacks in America that in the year the Supreme Court handed down the *Brown* decision, Dwight Eisenhower was president of the United States. … It is not too much to say that a great deal of the violence as well as the pitifully slow rate of compliance after 1954 may be laid at Eisenhower's door."[14]

Eisenhower thought that *Brown I* was wrong, resisted the Court's invitation to the administration to participate in *Brown II*, and tempered the Department of Justice's final position in the case. Asked by the press whether he had any advice for the South when *Brown I* was decided, Eisenhower replied, "Not in the slightest" – in fact, he told an aide in 1956 that the "decision *set back* progress in the South *at least fifteen years*. The fellow who tries to tell me that you can do these things by *force* is just plain *nuts*."[15]

He was good to his bitter word. His Attorney General, Herbert Brownell, instructed the FBI not to investigate reports of violent resistance to school desegregation.[16] The Department's official position was that the incidents were matters of local concern. When violence escalated against blacks registering to vote or seeking enforcement of *Brown*, Martin Luther King, Jr. implored Eisenhower to visit the South and urge obedience to the Court's decisions. The President's response – to a reporter, not to King directly – was annoyed indifference: "I don't know what another speech would do."[17] Only Governor Orval Faubus's "interposition" to prevent the integration of Little Rock Central High School in 1957 spurred Eisenhower to action, and then it was as

12 334 U.S. 1 (1948).

13 163 U.S. 537 (1896). See *Brief for the United States, Henderson v. United States*, 339 U.S. 816 (1950), at 40.

14 Leuchtenburg, *The White House and Black America: From Eisenhower to Carter*, in Michael V. Namorato, ed., Have We Overcome: Race Relations Since *Brown* 121–22 (Mississippi, 1979) (cited below as Namorato).

15 Id. at 123 (emphasis in original).

16 See Michael R. Belknap, Federal Law and Southern Order: Racial Violence and Constitutional Conflict in the Post-*Brown* South, ch. 2 (Georgia, 1987).

17 Leuchtenburg in Namorato, at 125.

much to teach the governor about the chain of command as it was to protect the black school children. The Supreme Court's opinion in the Little Rock case[18] – ostentatiously signed by all nine justices – spoke more to vindication of the Court's power than to the underlying issues of compliance with *Brown*.

Without the support of the Department of Justice, prompt and sweeping implementation of *Brown* was doomed. The NAACP did not have the resources to be everywhere *Brown* needed to be enforced, and their staff was chronically at risk of life and limb. And, as Lewis Steel pointed out, those who created segregated schools were charged with the burden of undoing their handiwork – hardly the eager allies needed by the NAACP.

If the justices who decided *Brown* were naïve about the role that the Department of Justice would continue to play, they were anything but unselfconscious politically. Every feature of the opinion in *Brown* – length, tone, and unanimity – was calculated to win popular support for the outcome, especially in the Deep South. When Chief Justice Warren finally circulated draft opinions in the case (one for the four states, one for the District of Columbia case), his cover memorandum explained that the drafts had been "prepared on the theory that the opinions should be short, readable by the lay public, non-rhetorical, unemotional, and, above all, non-accusatory."[19] He hoped that the opinions were brief enough to be published in full by any newspaper. He also knew that the tone was critical to winning the two justices most reluctant about what the Court was doing, Robert H. Jackson and Stanley F. Reed.

Warren, fresh from three terms as Governor of California, was writing more as a politician than as a judge. He was appealing to other politicians as well as to the lay public. And he needed to unite a fractious Court that included three former United States Senators, each convinced of his own political acuity. But if Warren satisfied his own political ear and those of his brethren with political experience, he received a failing grade from the legal profession, especially in the academy, and even from friendly critics. Gerald Rosenberg has reminded us that "elite law reviews repeatedly blasted the Court. For example, the Harvard Law Review poured out a torrent of criticism, especially in its annual Forewords. *Brown* was criticized as poorly thought out, insufficient to support other cases, and unprincipled."[20] Scholars focused on three issues: the treatment of the history of the Fourteenth Amendment, the reliance on social science evidence, and the failure to identify an underlying theory capable of application in future cases and grounded in the Constitution.

Warren's boldest move in the *Brown* opinion was his dismissal of the historical question. The Court had predicated its order for reargument on a direction to the parties to show what light the writing and ratification of the Fourteenth Amendment threw on the cases. The NAACP assembled a distinguished group of historians to work on the problem. Warren's opinion blunted the question by tersely concluding that the history was "in-

18 *Cooper v. Aaron*, 358 U.S. 1 (1958).

19 Warren to Conference, May 7, 1954, Box 263, Harold H. Burton Papers (Library of Congress), quoted in Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 Geo. L. J. 1, 42 (1979).

20 Rosenberg, *African-American Rights After* Brown, in Clare Cushman and Melvin I. Urofsky, eds., Black, White, and Brown: The Landmark School Desegregation Cases in Retrospect 203, 213 (CQ Press, 2004).

21 347 U.S. at 489.

conclusive."[21] The most controversial part of the opinion was a footnote citing contested social science studies on the effects of segregation on black school children and concluding with the words "And see generally, Gunnar Myrdal, An American Dilemma"[22] – a reference to the Swedish sociologist's scathing documentation of the brutalities of Jim Crow. Critics, most notably Edmund Cahn,[23] derided the reliance on dubious psychology and polemical sociology to defend what he viewed as a moral judgment.

The great failing of Warren's opinion in *Brown* was the ambiguity, practical and theoretical, about its scope.[24] Did racially segregated schools violate the Constitution only because the state required or permitted them, or was the Constitution also offended if the state merely tolerated their existence without actively authorizing them? Did the Equal Protection Clause prohibit *all* racial classifications or only those that disadvantaged or harmed a racial group? What weight do history and precedent enjoy in determining the constitutional requirement of equal protection of the law? Fourteen[25] and 24 years[26] would elapse before the Court would produce answers to these questions, and even then the results appeared to rest more on fidelity to the "promise of *Brown*" than to the logical development of first principles.

Bolling v. Sharpe,[27] the District of Columbia case, was also criticized severely, in essence for begging the question. "In view of our decision that the Constitution prohibits states from maintaining racially segregated schools," Warren declared, "it would be unthinkable that the same Constitution would impose a lesser duty on the federal government."[28]

Notwithstanding the palpable defects of Warren's drafts, his colleagues endorsed them warmly – and, as everyone knows, unanimously. Warren has been praised for a half-century for forging unanimity in *Brown* and *Bolling v. Sharpe*.[29] The united front, which included three justices from south of the Mason-Dixon line, was an argument in and of itself for the wisdom of the decision. That the Court had also been unanimous in 1948 in the restrictive covenant cases, and in 1950 in the segregated graduate school cases, suggested uncompromising inevitability to the deconstitutionalization of Jim Crow.

But unanimity came at a high price. Although the justices slowly coalesced on abandoning *Plessy v. Ferguson* between 1952 and the spring of 1954, they were sharply divided and deeply anxious over the question of precisely what relief they should order. After assigning a team of law clerks to review the options during the summer of 1954 prior to the reargument on relief, the justices were no closer to an answer than they had been when the cases were first argued.[30] Their research

22 347 U.S. at 494 n.11.

23 *Jurisprudence*, 30 N.Y.U. L. Rev. 157 (1955).

24 For a careful sketch of the problems identified here, see David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. Chi. L. Rev. 935 (1989).

25 *Green v. New Kent County School Board*, 391 U.S. 430 (1968) ("freedom-of-choice" plans generally do not comply with *Brown II*, 349 U.S. 294 (1955)).

26 *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (sustaining state medical school's affirmative action programs in admissions).

27 347 U.S. 497 (1954).

28 Id. at 500.

29 See generally Hutchinson, cited in note 19 *supra*.

30 Id. at 52–55.

disclosed substantial differences among the school systems in the various cases, and no "one size fits all" answer presented itself. They agreed on only one point: they must, again, be unanimous.[31] That conviction, combined with radically different views about pace and tone of the relief order, handcuffed Warren's opinion in what came to be called *Brown II* on May 31, 1955. The brief opinion temporized on every line, ordering a "prompt and reasonable start"[32] to desegregation of the affected schools, but acknowledging that "additional time"[33] may be necessary as problems with compliance arose. The bottom line was that desegregation should proceed "with all deliberate speed,"[34] which became a constitutionally authorized excuse for segregated school districts to evade *Brown I* for a decade.

To rehearse the critiques of the opinions in the Segregation Cases, as they were then called, may seem gratuitous today and even quaint in light of all that has happened in the last half-century. Yet rehabilitating the opinions in the cases has been a perennial exercise in the legal academy almost from the moment they were issued. Judge Pollak,[35] who is with us today, was one of the first, and both Alexander M. Bickel[36] and Charles L. Black[37] also tried to make theoretical sense out of what the Court did. Three years ago, Jack M. Balkin of Yale Law School recruited eight other distinguished scholars to produce opinions, as the title of the book announces, of *What* Brown v. Board of Education *Should Have Said*.[38] The book makes for lively reading, but none of the judges-for-a-day are capable of overcoming the distortions produced by 20–20 hindsight.

The Warren Court, unlike the Balkin Court, had no idea of what would happen next. Thurgood Marshall hoped that southern schools could be desegregated in five years; less optimistic NAACP officials thought it might take somewhat longer ("Free in '63" was a slogan at the time). Justice Sherman Minton – former senator, former federal appellate judge – worried that full compliance might actually take as long as a decade. I think the Warren Court thought they were making something like the controlled release of water from an overflowing dam but did not – and probably could not – foresee that their decisions detonated the entire edifice of Jim Crow with all of the attendant collateral damage that ensued.

Brown v. Board of Education, and "its progeny," involve a paradox that makes assessing its significance over time difficult. As Thurgood Marshall liked to emphasize, *Brown* was about schools and obtaining quality education for black children. But *Brown* was also about the constitutional legitimacy of Jim Crow. Even if the primary goal of integrated education failed, *Brown* succeeded in reading Jim Crow out of the constitutional lexicon. That achievement must not be underestimated. No longer could the government officially declare the second-class citizenship of African Americans; no longer could official social or intellectual inferiority

31 Id. at 55–56.

32 349 U.S. at 300.

33 Ibid.

34 Id. at 301.

35 Pollak, *The Supreme Court Under Fire*, 6 J. PUB. L. 439 (1957); *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 27 (1959).

36 Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Bobbs-Merrill, 1962).

37 Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

38 (NYU Press, 2001).

based on skin color be government policy; the insulting, humiliating, and menacing regime of Jim Crow lost its constitutional safe harbor at a stroke.

Even those who write revisionist histories are forced to concede, as Klarman has, that "it would be mistaken to deny *Brown*'s inspirational impact on American blacks."[39] Still, Klarman insists that *Brown* did "*not*" supply "critical inspiration for the modern civil rights movement."[40] This strikes me as revisionism by special pleading. As David J. Garrow has pointed out, the leaders of the Montgomery bus boycott of 1955–56 viewed *Brown* as restoring "hope to a people who had come to feel themselves helpless victims of outrageous and inhuman treatment."[41] Rosa Parks, in her autobiography, wrote that after *Brown*, "African Americans believed that at last there was a real chance to change the segregation laws."[42] The evidence on this point in the end is overwhelming. Klarman's fallback position seems to be that the "modern" civil rights movement did not begin until violence broke out in the South over desegregation, some years after both *Brown* and the boycott; if I understand him accurately, this is special pleading squared. *Brown* set off a chain of events whose ultimate outcome no one could predict with precision but that was premised on a declaration by the Supreme Court of the United States that the social structure of the South was subject to constitutional scrutiny.

Brown's inspirational effect on whichever civil rights movement you decide to examine may be debatable, but there is no doubt that the decision had and continues to have an enormous effect on another audience – the legal academy. Beyond the immediate critiques and the earnest efforts to rehabilitate the opinions of the Court, a generation of scholars emerged whose self-appointed task was to develop a constitutional theory that simultaneously justified *Brown* but established limiting principles on the ahistoric and intellectually elusive decision. In the judgment of then-professor Michael W. McConnell: "Such is the moral authority of *Brown* that if any particular theory [of judicial review] does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited."[43] Judge Posner makes the same point: "No constitutional theory which implies that *Brown v. Board of Education* was decided incorrectly will receive a fair hearing nowadays, though on a consistent application of originalism it *was* decided incorrectly."[44] Indeed, infidelity to original intent has been transformed, as McConnell points out: "What was once seen as a weakness in the Supreme Court's decision in *Brown* is now a mighty weapon against the proposition that the Constitution should be interpreted as it was understood by the people who framed and ratified it."[45]

Chief Justice Warren's dismissal of history was two-fold: he found that the evidence of the framers' intent was "inconclusive," but he also added that, "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even

39 Klarman, 80 Va. L. Rev. at 80 (cited in note 5 *supra*).

40 Id. at 84.

41 Garrow, *Happy Birthday*, Brown v. Board of Education? Brown's *Fiftieth Anniversary and the New Critics of Supreme Court Muscularity*, 90 Va. L. Rev. 693, 718 (2004) (quoting the Reverend Edgar N. French).

42 Ibid. (quoting Rosa Parks).

43 McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 949, 952–53 (1995).

44 Posner, Overcoming Law 247 (Harvard, 1995).

45 McConnell, 81 Va. L. Rev. at 952–53 (cited in note 43 *supra*).

to 1896 when *Plessy v. Ferguson* was written."[46] He seemed to be suggesting that the nature of constitutional rights was historically contingent, at least to some extent. The implication, of course, is that *Plessy* may have been correct at the time it was decided, but that the constitutional calculus may change as times change. The constraints of history and the commands of *stare decisis* were thus crippled with one blow. No wonder scholars rushed in to restore some sort of a net to the constitutional tennis court.

Another theoretical casualty of Warren's approach to *Brown* was the doctrine of judicial restraint, as Morton Horwitz explained in 1979: "For a half-century until the decision in *Brown v. Board of Education* the notion that courts should ordinarily defer to the policies of the legislature became the principal article of faith of liberal jurisprudence. All of that changed with *Brown*. And for the last twenty-five years liberal opinion has gradually tried to make jurisprudential sense of its abandonment of the dogma of judicial restraint in that case and many that followed."[47] As Horwitz implied, the project was largely a failure and much of the effort seemed half-hearted. When the Supreme Court changed ideological stripes some twenty years ago, what Horwitz called "liberal opinion" was left in a theoretically compromised position. A Court without reticence to rule on the constitutionality of school segregation could also rule on abortion, capital punishment, affirmative action, or – dare I say – even a Presidential election.

The recent efforts to diminish *Brown* as an historical matter have provided a convenient agenda for disciplining our appreciation of what the case has meant during the half-century since it was decided. It is tempting, depending on your point of view, to overstate or understate the significance and reach of the decision. For the Supreme Court, however, there is no doubt that May 17, 1954, ushered in a brave new world.

46 347 U.S. at 492.

47 Horwitz, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, in Namorato at 173, 174.