Part One
(excerpts)

Brown v. Board of Education:
A Critical Introduction

Jack M. Balkin

reprinted from Jack M. Balkin, ed.
What Brown v. Board of Education Should Have Said
(NYU Press, 2001)

Chapter One

Brown as Icon

On May 17, 1954, the Supreme Court of the United States handed down one of its most famous opinions-- *Brown v. Board of Education of Topeka, Kansas*. The case called *Brown* was actually a collection of five cases, from Delaware (*Gebhardt v. Belton*), Kansas (*Brown v. Board of Education*), South Carolina (*Briggs v. Elliott*), Virginia *(Davis v. County School Board of Prince Edward County*), and the District of Columbia (*Bolling v. Sharpe*). The Court heard them together because each raised the issue of the constitutionality of racially segregated public schools, albeit with slightly different facts and circumstances. In fact, Thurgood Marshall, the main architect of NAACP's legal strategy to overturn Jim Crow, actually represented the plaintiffs in the South Carolina case, *Briggs v. Elliott*. The District of Columbia case, *Bolling v. Sharpe*, was treated separately from the others because it raised distinct issues about the federal government's duty to respect racial equality. It was handed down on the same day. Finally, the Supreme Court decided to delay the issue of the proper remedy for segregated schools for another year. It issued a second opinion in *Brown v. Board of Education* on May 31, 1955 to deal with remedial issues, concluding with the order to go forward "with all deliberate speed." This opinion is usually referred to as *Brown II*, to distinguish it from the first opinion, called *Brown I*. Together, the three opinions of *Brown I*, *Brown II*, and *Bolling* have come collectively to be known as "*Brown*" or "the *Brown* opinion" in the popular imagination, and in the discussion that follows I will refer to them in this way.

In the half century since the Supreme Court's decision, *Brown* has become a beloved legal and a political icon. *Brown* is one of the most famous Supreme Court opinions, better known among the lay public than *Marbury v. Madison*, which confirmed the Supreme Court's power of judicial review, or *McCulloch v. Maryland*, which first offered an expansive interpretation of national powers under the Constitution. Indeed, in terms of sheer name recognition, *Brown* ranks with *Miranda v. Arizona*, whose warnings delivered to criminal suspects appear on every police show, or the abortion case, *Roe v. Wade*, which has been a consistent source of political and legal controversy since it was handed down in 1973.

Even if *Brown* is less well known than *Miranda* or *Roe*, there is no doubt that it is the single most honored opinion in the Supreme Court's corpus. The civil rights policy of the United States in the last half century has been premised on the correctness of *Brown*, even if people often disagree (and disagree heatedly) about what the opinion stands for. No federal judicial nominee, and no mainstream national politician today would dare suggest that *Brown* was wrongly decided. At most they might suggest that the opinion was inartfully written, that it depended too much on social science literature, that it did not go far enough, or that it has been misinterpreted by legal and political actors to promote an unjust political agenda. The use made of *Brown* is often criticized, but the idea of *Brown* remains largely sacred in American political culture.

It was not always thus. In the decade following 1954 the Supreme Court and its opinion in *Brown* were villified in terms far stronger than many of the attacks leveled against *Roe* and *Miranda*. Even many defenders of the result had little good to say about the opinion, arguing that its overruling of previous precedents was abrupt and unexplained and that its use of social science to demonstrate the harm that segregation imposed on black children was unconvincing. The day after the decision, May 18, 1954, James Reston wrote in the New York Times that the Court had rejected "history, philosophy, and custom" in basing its decision in "the primacy of the general welfare. . . . Relying more on the social scientists than on legal precedents -- a procedure often in controversy in the past -- the Court insisted on equality of the mind and heart rather than on equal school facilities. . . . The Court's opinion read more like an expert paper on sociology than a Supreme Court opinion."[1]

If the defenders of *Brown* were uneasy, its opponents were positively incensed by the decision. People who accuse the contemporary Supreme Court of abusing its office may forget how deeply *Brown* was resented, especially in the South. In March of 1956, southern Senators and Congressmen issued a "Southern Manifesto" denouncing *Brown* as a "clear abuse of judicial power," that substituted the Justices' "personal political and social ideas for the established law of the land." This proved to be one of the more moderate reactions. Although Congressional leaders pledged to "use all lawful means to bring about the reversal of this decision which is contrary to the Constitution," other opponents of the decision were less committed to peaceful legal methods. *Brown* gave rise to the era of "massive resistance" in the South, leading President Eisenhower at one point to call in federal troops to enforce

---

[1] Quoted in Richard Kluger, Simple Justice 711 (1975).

a desegregation order in Arkansas. Yet, by the close of the twentieth century, *Brown* had achieved a special place of honor.

One reason for that special status is that *Brown* fits nicely into a widely held and often repeated story about America and its Constitution. This story has such deep resonance in American culture that we may justly regard it as the country's national narrative. I call this story the Great Progressive Narrative. The Great Progressive Narrative sees America as continually striving for democratic ideals from its founding and eventually realizing democracy through its historical development. According to the Great Progressive Narrative, the Constitution reflects America's deepest ideals, which are gradually realized through historical struggle and acts of great political courage. The basic ideals of America and the American people are good, even if America and Americans sometimes act unjustly, even if people acting in the name of the Constitution sometimes perpetrate terrible injustices. The basic ideals of Americans and their Constitution are promises for the future, promises that the country eventually will live up to, and, in so doing, confirming the country's deep commitments to liberty and equality.

It is easy to see how *Brown* fits into this narrative and confims its truth: Through years of struggle and a great Civil War, America gradually freed itself from an unjust regime of chattel slavery. The country's failures were redeemed by the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution. To be sure, the Civil War was followed by retrenchment and the establishment of Jim Crow, which was given official sanction in the 1896 decision in *Plessy v. Ferguson*. Nevertheless, eventually the country redeemed itself once again by overturning that unjust precedent and firmly establishing the principle of racial equality. Seen in this way, *Brown* represents the Good Constitution-- the Constitution whose deeper principles and truths were only fitfully and imperfectly realized, rather than the Constitution that protected slavery and Jim Crow. By extension, *Brown* also symbolizes the Good America, rather than the country that slaughtered Native Americans, subordinated women, and enslaved blacks.

A. *Brown and the State of Education Today*

In many respects the honor *Brown* has received is ironic. *Brown* was a case about public school desegregation, but by the end of the twentieth century many public schools in the United States remained largely segregated by race. Indeed, the United States has been

in period of resegregation for some time now. The tendency is most pronounced in the South, which, during the 1970's and 1980's had been transformed from a region of virtually compete educational segregation to one of the most integrated in the Nation. The tendency toward segregation of Latinos is, if anything, even more pronounced than that with respect to blacks.[2] Perhaps equally important, the increasing resegregation of schools is strongly correlated with class and with poverty. Although only 5 percent of segregated white schools are in areas of concentrated poverty, over 80 percent of segregated black and Latino schools are.[3] Schools in high poverty areas routinely result in lower levels of educational performance; even well- prepared students with stable family backgrounds are hurt academically by attending such schools.

The pace of desegregation has slowed since the middle of the 1970's, due in part to Supreme Court decisions that made it very difficult to implement desegregation orders that would encompass both increasingly white suburban and increasingly minority inner city school districts. The 1974 case of *Milliken v. Bradley*,[4] involving metropolitan Detroit, largely freed white suburban districts from any legal obligation to participate in metropolitan desegregation efforts. As a result, in metropolitan areas where minorities were concentrated in inner cities, significant desegregation became virtually impossible, because fewer and fewer white children lived in those school districts and fewer still attended public schools. Nevertheless, desegregation actually increased a bit during the 1980's, even though the Reagan administration repeatedly tried to persuade courts to scale back their intervention in school districts.[5]

However, during the 1990's, the Supreme Court began to signal strongly to the lower federal courts to relax their supervision of school districts. In the 1991 case of *Board of*

---

[2] See Gary Orfield, Mark D. Bachmeier, David R. James and Tamela Eitle, "Deepening Segregation in American Public Schools," Harvard Project on School Desegregation (April 5, 1997); Gary A. Orfield, and John T. Yun, "Resegregation in American Schools" (June 1999)(available at <http://www.law.harvard.edu/groups/civilrights/publications/resegregation99.html>).

[3] Orfield et al., "Deepening Segregation in American Public Schools," at 2, 16-19.

[4] 418 U.S. 717 (1974).

[5] Orfield et al., "Deepening Segregation in American Public Schools," at 4, 7.

Education of Oklahoma City v. Dowell,[6] the Supreme Court held that courts could end desegregation orders in school districts that had attempted in good faith to comply, even if this would result in immediate resegregation. The replacement of Justice Thurgood Marshall by Justice Clarence Thomas in 1991 consolidated a general trend toward restricting court supervision. In 1992, in *Freeman v. Pitts*,[7] the Supreme Court held that courts could end some aspects of school desegregation orders even if other aspects had never been fully complied with. And in the 1995 case of *Missouri v. Jenkins*,[8] the Supreme Court overturned an ambitious plan for magnet schools in Kansas City designed to attact white students back into the innner city as unjustified and unnecessary to achieve desegregation. It also rejected the argument that increased spending on education could be justified in order to remedy reduced achievement by students in inner city schools. Justice Thomas, concurring, chastised those who thought of integration as a panacea for the problems of the black community, arguing that the theory that black children suffer psychological harms from segregation "rest[ed] on an assumption of black inferiority." The Supreme Court's decisions have accelerated the federal courts' drive to end existing desegregation orders, which, in turn, has accelerated the tendency toward resegregation in the 1990's.

Racial segregation today is the result of a complicated mix of social, political, legal, and economic factors, rather than the result of direct state commands ordering racial separation. Yet whatever the causes, it remains overwhelmingly the case that minority children in central cities are educated in virtually all-minority schools with decidedly inferior facilities and educational opportunities. Even when minorities in suburban and rural schools are included, a majority of black and Latino students around the country still attend predominantly minority schools.[9]

In a way, the subsequent history of school desegregation mirrors the Supreme Court's

---

[6] 498 U.S. 237 (1991).

[7] 503 U.S. 467 (1992).

[8] 515 U.S. 70 (1995).

[9]Orfield et al., "Deepening Segregation in American Public Schools," at 11. The figures for the 1994-95 school year indicate that 67.1 percent of blacks and 74.0 percent of Latinos attend predominantly minority schools.

original separation of the principle of racial equality (*Brown I*) from the remedy for previous injustices (*Brown II*). *Brown I* is venerated for declaring segregation unconstitutional, but the desegregation remedies begun in *Brown II* have been honored in the breach more than the observance. The shift in attitudes over the past half century is well symbolized by the fact that the Supreme Court seat once held by Thurgood Marshall, the acolyte of integration as the path to equal opportunity for blacks, is now held by Clarence Thomas, who argues that integration will not help blacks, that one-race schools do not necessarily violate the Constitution, and that the only concern of the courts should be whether schools have deliberately classified students by race.

The effective compromise reached in the United States at the close of the twentieth century is that schools may be segregated by race as long as it is not due to direct government fiat. Furthermore, although *Brown I* emphasized that equal educational opportunity was a crucial component of citizenship, there is no federal constitutional requirement that pupils in predominantly minority school districts receive the same quality of education as students in wealthier, largely all-white suburban districts.[10] Although these suburban districts seem as healthy as ever, the public school system in many urban areas is on the brink of collapse. Increasing numbers of parents who live in these urban areas are pushing for charter schools, home schooling or vouchers for private schools in order to avoid traditional public school education. By the end of the century, the principle of *Brown* seems as hallowed as ever, but its practical effect seems increasingly irrelevant to contemporary public schooling.

---

[10] San Antonio Independent School District v. Rodriguez 411 U.S. 1 (1973). However, in the years since that decision, many states have found obligations to equal educational funding in their own constitutions. This has produced considerable litigation with some degree of improvement in equalizing school expenditures. On the whole, however, results have not been uniformly successful. This is due in part to the fact that (1) in many states schools have traditionally been funded out of local property tax revenues, so that reform requires a complete overhaul of taxation and funding mechanisms; (2) parents in wealthier school districts continue to use their affluence to guarantee their children greater educational opportunities than other children; and (3) mere equalization of expenditures is only one step toward achieving equal educational opportunity; it may leave many other sources of inequality and many other serious problems in school districts untouched.