

LECTURES

BROWN v. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT

James T. Patterson*

When Ralph W. Ellison heard about the *Brown v. Board of Education*¹ decision in May 1954, he wrote a friend, “What a wonderful world of possibilities are unfolded for the children!” Other African-American leaders were equally excited—in part because they had wondered, even as late as May 1954, what the United States Supreme Court might say. Thurgood Marshall later commented, “I was so happy I was numb.” At the time, Marshall estimated that legalized school segregation would be wiped out within five years.

I was so taken with Ellison's comment, “What a wonderful world of possibilities are unfolded for the children,” that I considered using it as the title of my book on the subject, or at least as the subtitle. But my publisher thought that nobody would know what the book was about and, therefore, gave it the very catchy and memorable title of *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy*.² Still, the subtitle does state my point of view. My book is in part a commemoration, verging occasionally on a celebration, of the courageous decision that Chief Justice Earl Warren and the other Supreme Court justices

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Dr. Patterson is Professor of History, emeritus, at Brown University. This article is an edited version of remarks Dr. Patterson made at Stetson University College of Law's Special 50th Anniversary Symposium on *Brown v. Board of Education* and the Principle of Equality in Higher Education, February 14, 2004. Minimal citations have been added to aid the reader in finding cases or print sources mentioned specifically by Dr. Patterson; questions about other information or sources should be directed to him.

1. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), *supplemented*, 349 U.S. 294 (1955).

2. James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (Oxford U. Press 2001).

fashioned. No other institution of government at that time could have done what those nine men did. If we look at *Brown* in the context of the times, when Jim Crow remained an all-powerful, apparently ineradicable institution in all or parts of twenty-one states, we will have to agree that Warren and his colleagues were bold indeed. We should also avoid making ahistorical critical statements based on hindsight about what the Court *should* have done in 1954 to improve American race relations in general. What the Court did do was hailed by liberals at the time.

On the other hand, American race relations today remain troubled—far more so than optimists like Ellison and Marshall anticipated in 1954. *Brown* did not lead to the great advances that they had imagined at the time.

There are, of course, many troubled legacies of *Brown* that I could talk about. What effect did the decision have upon desegregation of schools and the education of children of both races? What impact did it have on the development of tolerance or on race relations generally? I want to focus on only one legacy: the impact of the decision on the civil rights movement of the 1950s and 1960s.

When the civil rights movement gained force in the 1960s, the answer to this question—what was the impact of the decision on the civil rights movement?—seemed to be fairly obvious. That impact appeared to be huge. The chronology of events following *Brown* suggested that it was the first strong link in a chain of causation leading to the great acceleration of the civil rights movement of the 1960s. In fact, among the large number of history books that have studied the civil rights movement, many begin with the *Brown* decision in 1954, and understandably so. The bus-boycott movement in Montgomery arose only one-and-a-half years after *Brown*. In 1957, President Dwight D. Eisenhower sent in federal troops to Little Rock. This would not have happened without *Brown*. And in the 1960s, the direct-action phase of the civil rights movement swelled, ultimately forcing Congress to pass the historic Civil Rights Act of 1964 and the Voting Rights Act of 1965.

There are also scattered events in this chain of causation, as these historians choose to see it, that seem to link the *Brown* decision directly to the civil rights movement. For instance, Martin Luther King, Jr. staged a prayer pilgrimage to Washington, D.C.

in 1957, on May 17, the third anniversary of *Brown*. The first group of 1961 Freedom Riders announced that they intended to reach their final destination, New Orleans, on May 17, 1961.

The decision also resonates today among advocates of civil rights. In 2003, when the Supreme Court was considering the Michigan affirmative action cases,³ demonstrators outside the Court held up placards reading, "Save *Brown v. Board of Education*." Early in 2004, the Massachusetts Supreme Court decided that gay and lesbian marriages should be legal in the state.⁴ They set May 17, 2004—the 50th anniversary of *Brown*—as the day when these marriages would first become possible.

William H. Chafe, a colleague of Professor John Hope Franklin at Duke University, wrote an excellent book some years ago entitled *Civilities and Civil Rights*,⁵ concerning Greensboro, North Carolina. He made this apparently strong causal connection between *Brown* and the civil rights movement especially clear. The day after *Brown*, the city's school board indicated that it would comply with the decision and would desegregate the city's schools. But white opponents quickly mobilized, and the board betrayed its promise. Nothing of substance changed thereafter in the racial composition of the city's schools. Frustrated and impatient with the delay, four black students staged their historic sit-in at Woolworth's in Greensboro in February 1960. Three of these students had grown up in Greensboro and had attended all-black schools despite the promise of *Brown*. Their anger at the noncompliance with *Brown*, Chafe argued, spilled forth into the decision to sit in. The rest, as we say, is history. The Greensboro sit-ins touched off the huge explosion of civil rights activism that produced the remarkable successes of the next few years.

In hindsight, however, I think we may be justified in wondering, as many scholars have done in recent years, how vital the *Brown* decision was as a stimulant to the civil rights activism that only really took off in the 1960s. Subsequent scholarship has also cast doubt on the iconic status of *Brown* as "the" event that inspired the movement. I don't mean to denigrate the extraordi-

3. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

4. *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

5. William H. Chafe, *Civilities and Civil Rights: Greensboro, North Carolina, and the Black Struggle for Equality* (Oxford U. Press 1980).

nary accomplishment of the Warren Court in reaching unanimity in a decision aimed at overturning *de jure* school segregation. Rather, I intend to help us remember the importance of *other* elements that helped to bring on the direct-action phase of the civil rights movement in the 1960s.

To begin with, the decision was supported at the time by a small majority of northern whites. But it did not transform these northern whites into forceful champions of desegregation. Until the 1960s when the civil rights movement forced their hand, most white Americans, including liberals such as former First Lady Eleanor Roosevelt, counseled for cautious, incremental change, as the Court had recommended in its *Brown II*⁶ ruling of May, 1955. In that decision, the justices said, again unanimously, that desegregation should be carried out “with all deliberate speed.” Those of you who are lawyers will be interested to know that thirty-eight of the forty-six state chief justices who were polled on the question in the summer 1957, declared that the Supreme Court was moving too fast and ought to exercise some restraint. And conservatives still felt comfortable at that time openly defending the right of white people to take charge of the rules of race. In 1957, William F. Buckley’s *National Review* asked,

whether the White community in the South is entitled to take such measures as are necessary to prevail politically, and culturally, in areas where it does not predominate numerically? The sobering answer is *Yes*—the White community is so entitled because, for the time being, it is the advanced race.⁷

Even in the early 1960s, most white political leaders were slow to embrace the cause of activists who were leading the sit-ins, freedom rides, and large-scale demonstrations. President John F. Kennedy ultimately did throw his weight behind the civil rights movement in mid-1963, but many civil rights workers had long before then grown impatient, indeed angry, with him. During the 1960 campaign, Kennedy had promised to issue an executive order against racial discrimination in federally supported hous-

6. *Brown v. Board of Educ. of Topeka*, 349 U.S. 294 (1955), supplementing 347 U.S. 483 (1954).

7. *Why the South Must Prevail*, Natl. Rev. 148, 149 (Aug. 24, 1957) (emphasis in original).

ing. Such an order, he said, would not necessitate congressional action; it would require only a “stroke of the pen.” But Kennedy procrastinated, leading impatient people to send a slew of pens to the White House. When Kennedy finally acted following the mid-term elections of 1962, the order was carefully circumscribed and had relatively little effect.

The reasons for Kennedy's caution are, of course, well known. First of all, he and his brother, Attorney General Robert Kennedy, were pragmatic politicians, largely contemptuous of ideologues. Bobby was known to sneer at ideologues and call them “professional liberals,” that is, do-gooders who had no sense of what was politically possible.

President Kennedy, moreover, had the smallest of popular mandates. In 1960, he received 49.7 percent of the vote, compared with Richard Nixon's 49.5 percent. And he presided over a deeply divided Democratic Party, which then relied on southern whites, by and large the only southerners who could vote, for a Democratic majority in Congress. On Capitol Hill, southerners, by virtue of their seniority, had great influence.

Kennedy had special concerns about pressing for desegregation of schools. The idea of sending his brother Robert, who was Attorney General, into southern states in order to press for school desegregation especially distressed him. Southern white opponents, he realized, would block him at every turn. The President also recognized that desegregating schools was a far more difficult and controversial task than desegregating universities or public accommodations. In taking account of these difficulties, Kennedy was thinking as virtually all leading politicians at that time would have done.

Dwight Eisenhower, of course, was one such politician. After the Court fashioned the unanimous opinion in *Brown*, Ike complained privately that his appointment of Warren as Chief Justice had been “the biggest damn fool [mistake]” that he had ever made.

My purpose in sketching the views of Eisenhower and JFK is simple. Both presidents knew that desegregating schools was (and remains) the toughest nut to crack in American race relations. As Kennedy emphasized, dealing with segregation in universities or public accommodations was child's play compared with managing the highly sensitive issue of race relations in the

public schools. When Lyndon Johnson took office in November 1963, almost ten years after the *Brown* decision, fewer than two percent of African-American public school children went to schools with whites in the South.

LBJ, of course, was the president who had to push Kennedy's civil rights bill through Congress. He did this with great political skill and with real determination and engagement. Partly because of his efforts and mainly because of the militancy of the civil rights movement, which was prodding Congress to do things it never would have dreamed of doing a few years earlier, the historic Civil Rights Bill of 1964, and later the Voting Rights Bill of 1965, became law. These are the two most important pieces of domestic legislation in all of modern American history.

For a while thereafter, Johnson supported federal officials who put pressure on recalcitrant white school officials in the South. "Get 'em! Get 'em! Get the last ones!" he reportedly said while literally roaming the halls—you can picture Johnson doing this—of the Health and Education and Welfare office building. By "Get 'em," he meant that federal officials should enforce, if necessary, Title VI of the 1964 Civil Rights Act, which authorized the federal government to cut federal education money from segregating school districts.

By 1968, however, Johnson was fed up with "black power" and with race riots. He was worried about the forthcoming election. He was well aware that the Democratic Party was splitting badly over civil rights issues. He also realized that use of Title VI did not really do much to promote school desegregation. Districts that were cut off simply did without the money, which was not significant in most cases. The only people likely to suffer from the cutoff of federal funds were the school children involved. Johnson decided that he would try to use the carrot, not the stick, in the hope that he could ultimately bring around resisting districts. In so doing, he agreed that so-called freedom-of-choice plans in southern districts would be acceptable. These were plans that enabled southern parents to choose where to send their children to school. On the face of it, this freedom seemed promising. But the result was that almost all the white parents sent their children to the white schools. Very few black parents, fearing intimidation, dared send their children to the white schools.

For all these reasons, when Johnson left office in January 1969—then almost fifteen years after *Brown*—there was still very little desegregation of schools. This advanced only in 1969 and in the 1970s, when the courts and federal officials finally demanded that the South desegregate. That is to say, they dumped the “all deliberate speed” standard that had been in place since 1955.

I won't make the foolish claim that *Brown* made no difference to the civil rights movement or that it made no difference to the desegregation of southern schools. On the contrary, we can agree the decision had some early visible effects. It encouraged some non-southern states—*Brown* did not challenge states where segregation was *de facto*—to approve civil rights laws against discrimination in employment and public accommodations. There was also modest progress in the late 1950s and early 1960s toward desegregation of schools in predominantly white areas in the border states.

Still, the evidence does not enable us to measure with assured accuracy how important *Brown* really was in advancing the civil rights movement. I believe that an important immediate result of *Brown* was instead to stimulate massive white *backlash* against any and all liberalizing ideas about race in the South. As this backlash mounted in the late 1950s, black leaders such as Marshall continued to hope that strategies based on litigation would bring the South around. But younger black militants were far less patient. In a counter-backlash against southern resisters, they adopted direct-action strategies in the 1960s, strategies that in turn led to the swelling of a morally powerful civil rights movement that far exceeded in effectiveness anything that *Brown* alone had sparked in the 1950s. This movement, not *Brown*, broke the back of the white South. In this somewhat roundabout, unintended way, *Brown* was necessary to the arrival of an effective civil rights movement in the 1960s. But the decision was not sufficient to drive through the monumental civil rights laws of the mid-1960s.

Those who question the iconic status of *Brown*, as I do, also argue that many larger socio-economic and educational forces, forces existing largely independent of and prior to the decision, were very important stimulants, more important, perhaps, than *Brown* to the rise of the civil rights movement. One was demographic—massive south-to-north and rural-to-urban migrations of

black people, who were thereby in better positions to organize and protest. Another force was the rising educational level of both blacks and whites—gains such as these helped to advance more tolerant racial attitudes. A third factor was the Cold War. How could the United States stand tall as the leader of the so-called Free World when it denied freedom to its African-American population? All of these forces were liberalizing American thought about race in the 1940s and early 1950s. They were keys to the decision of Warren and his colleagues to issue *Brown*. And they were keys to the successes of the civil rights movement.

In this respect, Philip Elman, a liberal Justice Department official who was involved in civil rights issues at the time, later observed, “In *Brown*, nothing that the lawyers said made a difference. Thurgood Marshall could have stood up there and recited ‘Mary had a little lamb,’ and the result would have been exactly the same.” Jack Greenberg, who followed Marshall as head of the Legal Defense Fund, offered a similar view years later. “[There] was a current of history,” he said, “and the Court became part of it.”

When I signed up in the late 1990s to write my book on the *Brown* case, I did so in part because the book was to be published among a series of volumes focusing on “Pivotal Moments in American History.” In the late 1990s, not having researched the history of *Brown*, I assumed that the case had been such a “pivotal” moment.

I still believe *Brown* was pivotal in a number of ways, especially as a constitutional precedent against state-mandated segregation. This was a precedent that the Supreme Court, later in the 1950s, used as the basis for a series of *per curiam* decisions declaring that other publicly mandated forms of segregation, such as at municipal golf courses, in bus transportation, and at public beaches, were also unconstitutional. *Brown* also stimulated many other movements for rights, which in turn drove a nationwide surge of rights consciousness that has been vitally important in the United States since the 1960s.

Over time, the decision also promoted the rise of judicial activism in the courts, especially in the Warren Court of the 1960s. Increasingly, activist judges supported the claims of rights-conscious groups, thereby advancing the entitlements and freedoms of a host of Americans who had earlier expected little from

the courts. But whether *Brown* was “pivotal” for the civil rights movement, I am not sure.

The complicated legacies of *Brown* since 1954 reveal a truism about American constitutional history. That is that our courts must have large popular backing and sustained political support—in the case of race, for instance, from a dynamic movement—if they hope to promote significant social change, at least in the short run. The Supreme Court did not receive this support in the 1950s from the white American public, from influential white leaders, or even from state supreme court chief justices. In part for these reasons, *Brown* has had what my subtitle calls a “troubled legacy.”

Let me close with a quote from Jack Greenberg. In 1994, he wrote, “Altogether, school desegregation has been a story of conspicuous achievements, flawed by marked failures, the causes of which lie beyond the capacity of lawyers to correct. Lawyers can do right, they can do good, but they have their limits. The rest of the job is up to society.”