

BROWN v. BOARD OF EDUCATION: MAKING A MORE PERFECT UNION

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It is impossible for me to reflect on *Brown v. Board of Education*¹ and its meaning these five decades later without revisiting in my mind's eye the white Southern racist society of my youth and young adulthood.

That was a time when my hometown, Nashville, Tennessee, was as racially segregated as any city in South Africa at the height of Apartheid; when every city in the South, large and small, was the same; when African-American residents of those communities were denied access to any place and every place they might need or wish to go.

The legal myth of "separate but equal" had cunningly banned black citizens from every hospital, school, restaurant, trolley, bus, park, theater, hotel, and motel that catered to the white public. These tax-paying citizens were denied access to these places solely on the basis of their race by tradition, custom, local ordinance, state statute, federal policy, and by an edict of the United States Supreme Court fifty-eight years before *Brown* in *Plessy v. Ferguson*.² In too many of these cities, black citizens were even denied access to the ballot box on election day.

The posted signs of the times read, "White Only." If you never saw those signs, it is difficult to imagine their visible presence in every city hall, county courthouse, and public building, including many federal buildings. They were on every public drinking fountain and on the door of every restroom. They were posted on every public transport vehicle.

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

2. 163 U.S. 537 (1896).

Whenever I reminisce about those pre-*Brown* days (and the importance of anniversary events such as this one in which we are forced to reflect on the past), I cannot help but ask myself how it could have been that we, who were the white sons and daughters of the racist South, were so blind to it all. In Ralph Ellison's classic *Invisible Man*, his protagonist says, "I am invisible, understand, simply because people refuse to see me. . . . [Y]ou often doubt if you really exist. You wonder whether you aren't simply a phantom."³ To whites, blacks were often invisible.

It is an embarrassment for me to remember the dozens of times in my youth when I sat on a city bus, insensitive and unfeeling, as black women—Nashville's counterparts of Rosa Parks, worn out from a long day's work as domestic servants in some white households—boarded, paid their fare, and struggled to the rear of the conveyance where the signs directed they should sit or stand. I saw them without seeing them. They were invisible. I felt no twinge of guilt at the injustice or the indecency of it. I now ask: Where was my heart? Where was my head? Where were the hearts and heads of my parents and teachers? How could we have been so unseeing? So insensitive? So cruel? So callous? Why could we not see the evil?

There were no signs that excluded African-American citizens from jury duty, but the reality was that the ironclad Jim Crow policies effectively excluded blacks from virtually every civic duty except paying taxes. The exclusion from jury service was particularly pernicious because it mocked the concept that civil litigants and criminal defendants were constitutionally entitled to a jury of their peers.

To comprehend how pervasive the concept of white supremacy was in the South prior to May 17, 1954, is to apprehend why I think it is a mistake to look at the *Brown* decision solely as a school desegregation case. Certainly it involved public education. The court consolidated education cases from four states: Kansas, Delaware, Virginia, and South Carolina,⁴ the first two of them outside the so-called "Old Confederacy."⁵

3. Ralph Ellison, *Invisible Man* 3 (Modern Lib. 1994).

4. *Brown*, 347 U.S. at 486.

5. *Id.*

The opinion asserted that it was a bald deception to pretend that black and white schools were equal.⁶ It plainly declared that the official pretense that separate schools could be equal had created psychological problems for black children because it placed them in inherently inferior schools and treated them as an inferior class.⁷ Critics of the opinion condemned it as more psychological than legal; more social engineering than judicial scholarship; more John Dewey than John Marshall. The white Southern response to the opinion resulted in violence targeted at public schools. For people of my generation, places like Little Rock and Clinton are first remembered for the violence and viciousness exercised by gangs of angry white adults toward black schoolchildren crossing the public school threshold. In my hometown, Hattie Cotton School was dynamited off its foundation the night after a single black child was enrolled there.

But as *Plessy v. Ferguson*, in 1896, was about so much more than riding a train, so *Brown v. Board of Education* has been about so much more than education. The decision threatened and would dramatically, if not speedily (for no one knew what “all deliberate speed”⁸ meant), alter the totality of an established way of life, and the character and the culture of an entire region as it had evolved over the more than a half-century since *Plessy*.

It required no graduate degree in rocket science to know that if blacks could not be denied access to public schools because of race, they could not be denied access to any public place. *Brown* quaked the earth, and the walls put up since Reconstruction gradually began to crumble. Heroic lives would be snuffed out in the violence that marked the falling debris.

The passage of time has a way of dulling our memories and making even contemporary history seem irrelevant. Those old times gone should not be forgotten; they never should be allowed to become irrelevant.

The explosions and the carnage were by no means solely focused on schoolhouses. The detonations should not have been a surprise. And yet, the street scenes depicting physical attacks on

6. *Id.* at 494–495.

7. *Id.* at 494.

8. *Brown*, 349 U.S. at 301 (setting “all deliberate speed” as the standard and time frame for the desegregation of public schools).

blacks did create shock waves. Jim Crow law had always relied on brutality and intimidation to impose the rule of supremacy. For many decades, the administration of justice in the Southern states had condoned lynching. "Lynch-law justice" was part of that culture that now was threatened.

Nowhere should the inevitability of that terror have been more clearly understood, and perhaps even anticipated, than inside the chambers of the nine justices of the Supreme Court who, despite diverse backgrounds and ideologies, came together in consensus and unanimous support for the *Brown* opinion written by Chief Justice Earl Warren. In reflecting on *Brown* a half-century later, it is important to remember who those judges were and from where they had come.

All of them (as has always been the case with virtually all federal judges) had been named to the high court because of their involvement in national politics. Chief Justice Warren, appointed by President Dwight Eisenhower, had been a hard-nosed prosecutor, Governor of California, and the 1948 Republican vice-presidential nominee. Five of them, Justices Felix Frankfurter, Hugo Black, William O. Douglas, Robert Jackson, and Stanley Reed, had been appointed by President Franklin Roosevelt. President Harry Truman named the remaining three: Tom Clark, Sherman Minton and Harold Hitz Burton. Six were Democrats, while Frankfurter, the former New Deal radical, now a conservative judicial voice, professed no party affiliation. Three of them had served in the United States Senate, including Black, a former Alabama Klansman. Reed, a Kentucky Senator, had studied law at Yale, the University of Virginia, and the Sorbonne, but never graduated. Minton, a Senator from Indiana, had been a federal appeals court judge just before he was elevated to the Supreme Court. Two of them had been distinguished law school professors, Frankfurter at Harvard and Douglas at Columbia. Several had held high-ranking legal posts in government—at the SEC, the IRS, the Reconstruction Finance Corporation, and the Labor Department. Clark had been Truman's Attorney General, and Jackson was Roosevelt's Solicitor General.

Given all that experience, it is certain that they talked among themselves about the impact and the effect their ruling would have on Southern society. Those discussions should have permeated their deliberations, which began when the case was first ar-

gued in December 1952, continued through re-argument a year later, and on into the spring before the decision came down May 17, 1954. Concern about the negative racist reaction helps explain why the Chief Justice labored so long for a unanimous ruling, talking Justice Jackson out of a concurring opinion and Justice Reed out of a dissent. Black, the one-time Alabama Klansman, Clark from Texas, and Minton from Kentucky must have anticipated that a wave of Klan terror would ensue.

It is impossible, of course, that the Justices could have predicted the emergence of Martin Luther King as the leader of an African-American revolution that would push their theory of equal justice for blacks from the field of education to the entire society. It is doubtful that they could have envisaged the intensity and extent of the murder, mayhem, intimidation, and harassment that would attend the nonviolent civil rights revolution.

In some minds, it may be stretching historical linkage to the breaking point to relate the violence that was visited on civil rights demonstrators—the children murdered in church, the activists shot to death in the night, and the dogs and fire hoses unleashed on nonviolent demonstrators in the streets—to the thrust of the decision in *Brown*. The “mind of the South,” as W.J. Cash once wrote, was never easy to read.⁹

The murder of a fourteen-year-old boy in Money, Mississippi, a year after the decision, might still have occurred had *Brown* been decided another way. Emmett Till, the Chicago lad whose harmless whistle or comment was said to have insulted a white woman, might still have been brutalized and murdered, his body thrown in the river, had the case still been in the bosom of the Court. Had the all-white male Mississippi jury never heard of “all deliberate speed,” its members still might have acquitted his two killers. Lynch-law justice had prevailed for many decades, and protected by the rule against double jeopardy, the two slayers might have confessed their murderous act to a magazine writer in exchange for \$3,500, even if *Brown* had still been undecided.

The timing of the tragic case of young Till’s murder nonetheless sent a message that, as the doctrine of *Brown* spread and ex-

9. W.J. Cash, *The Mind of the South* 440 (Random H. 1941).

panded, outrageous acts of violence would recur. Shameful acts of judicial malfeasance would resist the doctrine of change.

The opinion and its mandate to integrate with “all deliberate speed” said one thing to Southern white racists and something else to African Americans, too long denied equal justice. For the former, it was a call to arms to protect and maintain racial superiority. For the latter, it was a call to Gandhian nonviolent protests that would disrupt, then destroy the status quo.

In 1955, one year after *Brown* and still two years before the school desegregation crisis in Little Rock, Rosa Parks refused to follow the “White Only” signs to the back of a city bus in Montgomery, Alabama, and was arrested. Black citizens, with King as their leader, responded by boycotting public transportation there until the signs came down as the “separate but equal” rule in public transportation ended. There the civil rights movement was born.

Legal historians have speculated that members of the *Brown* Court, and particularly the Chief Justice, were disappointed when President Eisenhower offered only vapid comments in support of their courageous and controversial opinion. The President, who later was to remark that his nomination of Warren to the Court was his biggest presidential mistake, was two years into his first term when *Brown* came down. He had safely been reelected to a second term the previous year, when in 1957, riotous gangs of whites in Little Rock, Arkansas, encouraged by their governor, Orval Faubus, sought to block integration at Central High School. The President finally was forced to call out federal troops to enforce the Court’s order.

When John F. Kennedy came to office in 1960, it had been his hope and the determination of his brother, Attorney General Robert Kennedy, to keep civil rights conflicts off the streets and in the courts. J. Edgar Hoover, the FBI director, contended that his agency lacked jurisdiction to become involved in civil rights disputes. He insisted that murder, assault, arson, and bombing were all state offenses to be investigated and prosecuted by state and local authorities. Thus, the protection of civil rights demonstrators was left to local police departments, most of which the Klan infiltrated.

The FBI’s presence in these Southern towns was always a skeletal crew of one or two agents who worked closely in coopera-

tion with local law enforcement agencies on federal crimes, such as bank robbery, kidnapping, and interstate criminal activity. Had Hoover acknowledged a duty to investigate civil rights violations, he would have been looking into criminal acts by policemen who were white supremacists.

In his first meeting with Dr. Martin Luther King, Jr. after his brother was in office, Robert Kennedy, serving as the President's political lightning rod, urged the civil rights leader to focus on voter registration, an area of law about which Hoover could not claim lack of jurisdiction, and in which cases could be easily won before federal judges. While he acknowledged the importance of that effort, King said that his own mission was to confront the corruption of racism wherever it existed—and in ways to dramatize the evil.

For King, the concept of separate but equal had to be knocked down in areas beyond the schools—in public accommodations, transportation, employment, and in housing. The meeting between the two men—King, the ultimate idealist, and Kennedy, the ultimate pragmatist—ended with the Attorney General well aware that his brother's administration would have to deal with civil rights conflicts and violence. It was likely, at some point, that U.S. Marshals or federal troops might be needed to maintain law and order in the South.

The following month, in May 1961, Kennedy made his first public speech as Attorney General at the University of Georgia, where violence had occurred earlier when two black students were admitted. It was a tough-minded speech intended for Southern ears far removed from the campus at Athens. It was a message that was unmistakable: the Justice Department would enforce civil rights laws. That same month, marshals and the National Guard were sent to Montgomery, Alabama, after Freedom Riders were assaulted.

As the new school year approached in the summer of 1961, Robert Kennedy sent officers of the Justice Department in advance of integration to New Orleans, Memphis, and Dallas to offer mayors in those communities troops or marshals to enforce the law should violence occur. All three cities declined the offer, and all three integrated without violence. Later in Oxford, the Kennedy administration sent troops and marshals to put down a riot

and enforce the law when the University of Mississippi was integrated.

Other assaults and deaths would come. Indeed, James Meredith, whose enrollment had sparked the riot in Oxford, would be shot down outside Memphis on the way to the University of Mississippi in 1966, and King would later be murdered there.

The walls were continuing to crumble a full decade after *Brown* when President Johnson endorsed a 1965 voting-rights law and declared, in the words of the anthem of the movement that “we *shall* overcome.”

Five decades after Warren’s opinion, white flight, the push for busing, proposed school voucher programs, and the founding of something called charter schools have continued to create political questions about public education, much of it subtly but certainly questioning the wisdom and impact of *Brown*.

Four decades after President Johnson’s speech, there remain questions about whether the nation will yet “overcome” the legacy of American racism, the origins of which are older than the founding of the American republic.

Whatever criticisms and flaws are expressed as the nation marks (and as some of us celebrate) the anniversary of *Brown*, even the severest critics of Chief Justice Warren’s work cannot deny that the ruling has made the nation what the founding fathers hoped for and expressed confidence in: a more perfect Union. That is an achievement worth noting at this time—and for all time.