

BROWN AS A WORK IN PROGRESS: STILL SEEKING CONSENSUS AFTER ALL THESE YEARS

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Fundamentally, what I want to do today is to use the lens of *Brown v. Board of Education*,¹ the celebration of *Brown v. Board of Education*, and look at it as a “work in progress,” even after fifty years. But before getting to that part of my comments, it bears repeating that we are here to celebrate and recognize that this year is the fiftieth anniversary of *Brown*. However, we also need to celebrate and recognize all of the Browns, all of the Briggses, all of the Beltons, all of the Davises—that is the Virginia case—and all of the Bollings—that is the District of Columbia case. Those are the names of some of the parents and children that are associated with the five cases that constitute *Brown v. Board of Education*.²

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These comments are a slightly edited version of a presentation Professor Belton gave 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.

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

2. The cases ultimately consolidated under the *Brown* caption arose from the District of Columbia, Kansas, South Carolina, Virginia, and Delaware: *Bolling v. Sharpe*, 347 U.S. 497 (1954), *supplemented sub nom. Brown*, 349 U.S. 294; *Brown v. Bd. of Educ. of Topeka*, 98 F. Supp. 797 (D. Kan. 1951), *rev’d*, 349 U.S. 294; *Briggs v. Elliott*, 103 F. Supp. 920 (D.S.C. 1952), *rev’d sub nom. Brown*, 349 U.S. 294; *Davis v. County School Bd. of Prince Edward County, Va.*, 103 F. Supp. 337 (E.D. Va. 1952), *rev’d sub nom. Brown*, 349 U.S. 294; *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952), *aff’d sub nom. Brown*, 349 U.S. 294. All but *Bolling* were brought under the Equal Protection Clause of the Fourteenth Amendment; *Bolling* was brought under the Fifth Amendment. *Bolling*, 347 U.S. at 498–499.

Let me offer this disclaimer. Even though the name of the plaintiff in the Delaware case was Belton, I do not know if I am related to the Delaware Beltons or not, but I am still working on my genealogy, so who knows what may turn up? We also need to recognize Jack Greenberg,³ my former boss, and to whom my colleagues here have referred. We also need to recognize the “crusaders in the courts.” *Crusaders in the Courts* is the title of a book that Greenberg wrote about the role of civil rights lawyers—that small band of attorneys, he calls them, who fought the civil rights revolution.⁴ The “crusaders in the courts” include, in addition to Thurgood Marshall, Jack Greenberg, and the successors to Jack Greenberg, all of the cooperating attorneys in practice mainly in the South, who were so instrumental in trying to implement the mandate of *Brown* as well as the civil rights laws that were passed in 1964.

We need to celebrate the “unlikely heroes”⁵—the judges on the United States Court of Appeals for the Fifth Circuit who played a major role in school desegregation and in the enforcement of civil rights legislation. I argued a number of cases in the Fifth Circuit before some of the judges that are discussed in Jack Bass’s book.

We also must recognize the host of black teachers and administrators who lost their jobs as a result of the desegregation effort. They were competent to teach in black segregated schools before *Brown*. But once the hammer of *Brown* forced schools to do something to comply, these teachers were deemed to be no longer competent to teach in racially integrated schools where the majority of students were white. It is a tragedy from the civil rights movement along those lines. And we need to recognize them in addition to recognizing and celebrating the *Brown* decision itself.

3. Jack Greenberg succeeded Thurgood Marshall as the Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc., and is currently a Professor of Law at Columbia University School of Law. See Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* (Basic Books 1994) (a personal memoir of Greenberg’s work with the Legal Defense Fund). Greenberg also argued one of the *Brown* cases.

4. Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* (Basic Books 1994).

5. Jack Bass, *Unlikely Heroes: The Dramatic Story of the Southern Judge of the Fifth Circuit Who Translated the Supreme Court’s Brown Decision into a Revolution for Equality* (Simon & Schuster 1981).

We also need to recognize the thousands of black students who played a role in the desegregation process, including the thousands of black students who were bused out of their neighborhoods in order to comply with the mandates that were being handed down by the Supreme Court and other lower federal courts in school desegregation cases.

On a more personal level, last year—2003—marked the fiftieth anniversary of my graduation from high school. I graduated in 1953. That was the year before the Supreme Court handed down its decision in the *Brown* case. I went to racially segregated elementary, secondary and high schools and lived in a society that was described by Eugene Patterson in terms of segregated housing and segregated busing. I sat in the back of segregated buses as Rosa Parks did in 1955.⁶ Because I am black, I had to use the back door entrances of establishments such as stores, restaurants, and homes of whites for whom I worked or whose assistance I sought in researching projects in high school.

In a sense, I suppose growing up in High Point, North Carolina was the tale of two cities. There were hard times, and there were good times as well. I remember going to racially segregated theaters where blacks had to sit in the balcony. The other thing I would note is that regularly on Sundays after church we would go home, take off our Sunday school clothes, and get into our football gear—a pair of overalls and shirt. And there were regular football games between whites and blacks on Sunday afternoons, after church. We could do that on Sundays. And the games with the white boys were fun. But almost inevitably, those games would end when name calling—racial epithets—started taking place. But it was fun for an afternoon.

But it was also dangerous living during those times when racial segregation was the order of the day. I will note only two episodes relating to that. One is that on two different occasions I was with my dad when he faced a lynch mob for something he did that angered a group of white men. Those two times are the most pow-

6. In December 1955, Rosa Parks occupied a seat in a segregated bus in Montgomery, Alabama that had been reserved for white passengers. She was arrested after she refused to give up the seat for white passengers. Her refusal to do so led to the Montgomery bus boycott by blacks in the city. The boycott was instrumental in accomplishing the desegregation of passenger buses in Montgomery and in initiating the civil rights movement. See Juan Williams, *Eyes on the Prize: America's Civil Rights Years, 1954–1965* (1987).

erful experiences that I will never forget in my life, and these experiences account for a substantial part of my decision to go to law school and become a civil rights litigator.

The other episode that I will mention, and I am just happy to be here after this episode. One time, when I was about ten years of age—no, I was a little younger than that—about seven or eight years of age, my sister and I—my mother asked my sister and me to visit my grandmother who lived three miles away. We could walk there. On our way to our grandmother's house, we encountered a little white boy and a little white girl. And we started talking, having a nice conversation. That event, too, eventually ended up in name calling. We eventually had a shoving match. The little white girl fell down. My sister and I ran to my grandmother's house. On the way back to our home, we encountered a group of about fifty angry whites. My sister tells me that I exaggerate when I tell this story; but I swear the mother of that kid had a knife this long—indicating about two feet long. The only thing that saved the life of my sister and me is that the little girl said that she did not recognize us. So living in those times could be the best of times and the worst of times, and many of those are experiences that will stay with me forever.

My personal experience with racial segregation leads me to make a suggestion. There is a set of books called the *Slave Narratives*.⁷ I think a very good project for one of our historian friends would be to do a civil rights narrative. There are some very interesting stories that came out of the civil rights movement.

Looking back over my own personal involvement as a lawyer in school desegregation litigation, I think the description that one of my colleagues made is quite accurate: the process of implementing *Brown v. Board of Education* was essentially trench warfare.⁸ I will just mention this other episode from personal experience. Several of my colleagues have mentioned *Swann v. Charlotte-Mecklenburg School Board*.⁹ In addition to the Legal Defense Fund, which was very involved in that case, my old law firm—

7. *Born in Slavery: Slave Narratives from the Federal Writers' Project, 1936-1938* (Library of Congress 2001) (collected narratives originally assembled in 1941 as a seventeen volume collection titled *Slave Narratives: A Folk History of Slavery in the United States from Interviews with Former Slaves*).

8. See generally Greenberg, *supra* n. 4 at 244-255.

9. 402 U.S. 1 (1971).

Chambers, Stein, Ferguson & Lanning—which is one of the first racially integrated law firms in the South—had a major role in the *Swann* case. *Swann* was decided in 1971. At the height of the litigation in the *Swann* case, the Supreme Court approved busing and quotas.¹⁰ But also, at the height of the litigation in the *Swann* case, our law offices in Charlotte, North Carolina, were fire-bombed. One of the things that was saved from that firebombing was most of our law library, which was very extensive. Most of our law library had been saved. The reason why it had been saved was because, about a month before, we had received one of our first retainers, and that retainer was from the Charlotte firefighter's department. And they did a wonderful job in coming in and covering up those books. And we were able to salvage maybe eighty or ninety percent of our library.

With these brief introductory comments, I want to identify about seven or eight points in thinking about *Brown* as being a “work in progress.” I am not going to be able to expand upon these themes. But I think that looking back after fifty years and categorizing *Brown v. Board of Education* as a “work in progress,” these are points, it seems to me, that we do have to consider.

First, I think that *Brown* is still a “work in progress” because this country has never reached a consensus on the meaning of “equality.” We do not have a consensus on that term. Many look at *Brown v. Board of Education* as endorsing the colorblind theory of equality. And I think a very powerful argument can be made that the more recent decisions by the Supreme Court in the Michigan cases¹¹ generally endorse that view. Under this colorblind theory of equality, the notion is that race should not, under any set of circumstances, be a factor in the allocation of goods and services in our society

But there is another theory of equality out there that also has been endorsed by the Supreme Court. This theory of equality

10. *Id.* at 28–30.

11. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that the University of Michigan Law School's admission program did not violate the Equal Protection Clause because it was narrowly tailored to serve its compelling interest in obtaining a diverse student body); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding that the University of Michigan's admission policy violated the Equal Protection Clause because it was not narrowly tailored to achieve its compelling interest in obtaining a diverse student body).

flows from the Court's 1971 decision of *Griggs v. Duke Power Co.*¹² *Griggs v. Duke Power* was not a case based on the equal protection clause of the Fifth Amendment. It was a case based on Title VII of the Civil Rights Act of 1964.¹³ The Supreme Court in the *Griggs* case endorsed the disparate-impact theory. The disparate-impact theory holds that facially neutral policies and practices, policies and practices that do not specify race on the face of those policies and practices, constitute unlawful discrimination unless the adopter of those policies, be it a school or be it an employer, unless they can justify those policies by something referred to in the literature as "business necessity."¹⁴ I ask you to think for a moment about these two theories as they apply to *Brown v. Board of Education*. Under the colorblind theory one has to prove that a defendant intentionally took race into account or that race was a motivating factor for the adverse action for which relief is sought. I think it is because of the intent requirement we have the kind of difficulties that we have today in the school segregation cases. The intent requirement allows the Supreme Court to reach the result that it did reach in the more recent cases that have been handed down.¹⁵

I ask you to think for a moment—I am not going to develop this theme here—what would happen if the Supreme Court—well, let me mention one other case we don't hear about so terribly much now: *Washington v. Davis*,¹⁶ was a case brought under the Equal Protection Clause. The issue was whether the impact the-

12. 401 U.S. 424 (1971).

13. 42 U.S.C. § 2000e-1–2000e-17.

14. See e.g. *Lansing v. Southeastern Pa. Transp. Auth.*, 181 F.3d 478 (1999) (discussing the issue of the proper test of business necessity adopted by Congress in the 1991 amendments to Title VII, U.S.C § 2000e-2(k) (2002)).

15. See *Freeman v. Pitts*, 503 U.S. 467 (1992), in which the Court said,

In one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and persist. But though we cannot escape our history, neither must we overstate its consequences in fixing legal responsibilities. The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the *de jure* violation being remedied. It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a *de jure* violation. And the law need not proceed on that premise.

Id. at 495–496.

16. 426 U.S. 229 (1976).

ory—the disparate-impact theory—is applicable in any way to claims that are based solely on the Equal Protection Clause. The Supreme Court in that case held that it is not.

If you think about this for a moment, I wonder what would have happened if the Supreme Court had gone the other way in *Washington v. Davis*, in terms of how it would have impacted in a positive way on finishing or further implementing the mandate of *Brown*. Let me give you one example of what I am talking about. That example is one of the latest decisions by the Supreme Court on *Brown* as it applies to higher education: *Grutter v. Bollinger*.¹⁷ *Grutter* is a case in which whites claimed racial discrimination because of an affirmative action plan adopted by a law school.¹⁸ If that case would have been brought—could have been brought—under this disparate-impact theory, the results, I think, would have been different.

The point I make here is we have not as a society reached a consensus on the meaning of “equality.” And those two notions have yielded different results, even in the Supreme Court.¹⁹

Second: The second point I want to make in characterizing *Brown* as a “work in progress” goes back to the very beginning of the civil rights movement. In the 1960s a very effective and very powerful coalition emerged that consisted of whites, blacks, Jews, Protestants, women, and men.²⁰ This coalition rallied around the notion that we need to take steps to make equality a reality in our society. That coalition was very effective because it played a major role in moving us to the adoption of civil rights legislation that Congress enacted in the 1960s. The point I want to make is, when I looked at that coalition, I think the problem is that that coalition never had a meaningful dialogue about the meaning of equality and what role race should play in trying to effectuate a remedy for the long history of racial discrimination in our society. What

17. 539 U.S. 306.

18. *Id.*

19. Compare e.g. *Washington v. Davis*, 426 U.S. 229 (1976) (a test that has adverse impact on employment of blacks survived a constitutional challenge under the equal protection clause because plaintiffs failed to prove intentional discrimination) with *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (tests and high school diploma requirements that have an adverse impact on employment of blacks was struck down under the disparate-impact theory applicable in Title VII cases).

20. See generally Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 Harv. L. Rev. 1327, 1327 (1986).

happened is that the coalition failure to have a meaningful dialogue about the important question of “What do you mean by equality?” led to the ultimate dissolution of that coalition and debate over affirmative action began to emerge.²¹

Third: The next point I make is the failure of the Supreme Court to recognize in a positive way, a correct way, the role of societal discrimination as an explanation as to where we stand right now. I often make the comment when I make this point that in many instances when the Supreme Court uses that term, “societal discrimination,” and it uses it frequently in the school segregation cases,²² it is always in quotes. Not always, but most times that word is in quotes. And the Supreme Court has not attempted to address what “societal discrimination” means. But the Supreme Court has said that we should not take “societal discrimination” into account either in deciding a violation of the Equal Protection Clause or in considering what the appropriate remedy should be.²³ We all accept, I think, the reality of something called “societal discrimination.” But we tend to put it aside—or the Supreme Court puts it aside—in deciding these cases.

Fourth: Another reason I think that *Brown* is a “work in progress,” is that we have two different standards for evaluating the legality of affirmative action plans.

We are all quite familiar with the test for determining the legality of affirmative action plans when the challenge is based on the Equal Protection Clause of the Constitution. The strict scrutiny test applies.²⁴ But there’s another test out there, a statutory test, that we do not hear about that often. This is a test established in the 1978 decision of the Supreme Court in *Steelworkers v. Weber*.²⁵ *Weber* was a case in which the defendants adopted an affirmative action plan that took race into account in making employment decisions. In that case, the Supreme Court said in effect that, if one who is subject to Title VII adopts an affirmative action

21. *Id.* at 1346 n. 1.

22. *E.g. Grutter*, 539 U.S. at 323; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 272, 274, 276, 278 (1986); *Regents of the U. of Cal. v. Bakke*, 438 U.S. 265, 306, 307, 310 (1978).

23. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498–500 (1989) (plurality); *Wygant*, 476 U.S. at 274–276 (plurality).

24. *See Grutter*, 539 U.S. at 326 (applying a strict-scrutiny analysis to the University of Michigan Law School’s race-based admissions policy).

25. *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979).

plan that is designed to eliminate societal discrimination, it does not unduly trammel the employment opportunities of white employees, and is not designed to maintain quotas, that plan can survive an attack under Title VII. *Weber* is still good law. That test is different from the strict scrutiny test that the Supreme Court uses in making the decision about the legality of affirmative action plans under the equal protection clause.

Fifth: The next point. We as a nation have not decided whether the laws, and this includes both the Equal Protection Clause as well as the statutory laws on civil rights, we have not made a decision whether these laws ought to protect individuals or groups. This is related in part to the point I was making about societal discrimination. The Supreme Court has not been consistent on the issue of whether laws prohibiting racial discrimination protect individuals or groups or both.²⁶ Sometimes the Court says that these laws must be construed to protect only the individuals and not groups. And other times the Supreme Court says it is appropriate under certain circumstances to have a group remedy. We should not have to choose between these two options—either individuals or groups.

Three other points.

Sixth: One of the sad things about the whole segregation process for me, the whole campaign of *Brown*, is the destruction of the support system for quality education for black students that existed in the black community prior to the *Brown v. Board of Education* dismantling of segregated public education. This phrase, “it takes a village to raise a child,” captures in some way this support system that I am talking about. When I was growing up all of us went to school. Every day. All day sometimes. But the whole community was very much on the ball. If someone knew that you were not in school, they would call your parents and your parents would know that you had not gone to school well before you got home. Your parents would then take you to the woodshed.

The support system about which I speak included very supportive teachers. Personally, I feel fortunate because about ninety percent of my teachers in high school had Ph.D.s. And the reason

26. See e.g. *Connecticut v. Teal*, 457 U.S. 440 (1982) (disagreement between majority and dissent over whether Title VII protects individual or groups or both individuals and groups).

why they were teaching high schools is because there were only so many historically black colleges where they might seek jobs, and they were barred from teaching at white colleges and universities because of racial discrimination.

The support system of which I was a beneficiary has been virtually destroyed because as black kids began to go to these integrated schools, the support system wasn't there. And they just simply fell through the cracks.

I am not saying this explains the whole state of affairs where we are now. But rarely do we talk about the destruction of the support system that existed in the black community at that time—the time before *Brown*. I am a beneficiary of that system.

Seventh: Let me make one further comment—two further comments—and I'll sit down.

I think *Brown* is still a “work in progress” because, as I like to phrase it, “race” has become a dirty word.²⁷ We don't like to talk out loud about it anymore. If we cannot talk about it, we'll never solve the race problem. And I think that the development with respect to silence in using the word “race” is grounded in substantial part with this whole debate about “political correctness.” The richness of the dialogue that took place twenty-five years ago about the problem of race in our society has been lost. We cannot have an enriching dialogue now, because we simply have become uncomfortable talking about “race.” But I think “race” has become a dirty word. Maybe, just maybe, the more recent decisions by the Supreme Court in which the Court endorsed diversity may help us to reopen that dialogue.²⁸

Eighth: The final point I'm going to make is this. There's some general consensus that the 1954 decision by the Supreme Court in *Brown v. Board of Education* ushered in the Second Reconstruction. The First Reconstruction took place right after the Civil War when the country enacted the Thirteenth, Fourteenth,

27. See e.g. Jacques Steinberg, *Using Synonyms for Race, Colleges Strive for Diversity*, N.Y. Times (National Edition), Dec. 8, 2002, at A1 (describing how some college admission officials have stopped saying aloud words like “black,” “African American,” “Latino,” or “Hispanic”); *Applicants to Selective Colleges Show New Reluctance to Divulge Their Race*, 40 J. Blacks in Higher Ed. 18 (Summer 2003) (discussing the story of the increasing number of applicants to the highest-ranking colleges and universities who are declining to disclose their race).

28. *Supra* n. 11 (discussing two recent cases).

and Fifteenth Amendments, and Congress enacted enabling legislation. If you look at some of that enabling civil rights legislation enacted by Congress in the wake of the Civil War, it parallels in substantial part some of the civil rights legislation that was passed by Congress in the 1960s. In fact, I could teach my course on civil rights without even having to reach the 1964 civil rights legislation. The Supreme Court played a major role in bringing that First Reconstruction to an end.

The Second Reconstruction begins with *Brown v. Board of Education*. Congress enacted the new civil rights legislation during that time. The Second Reconstruction came to an end with a series of decisions decided by the Supreme Court during its 1989 term.²⁹ The civil rights cases decided by the Supreme Court during its 1989 term, including the *Croson* case,³⁰ brought to a halt a very positive development on the interpretation and implementation of the civil rights laws that had been enacted during the 1960s.

Some date the beginning of the Third Reconstruction with the 1991 Civil Rights Act in which Congress either substantially modified or overturned many of those prior decisions the Supreme Court handed down and much of the law that had been made in prior years.³¹

I don't know exactly where we stand on whether the Third Reconstruction is still alive or not. But it is quite possible we may very well have to have a fourth Reconstruction. How many more Reconstructions will we have to go through before we reach "heaven." Let me tell you what I mean by "heaven." After I graduated from high school, I left my home town. And I went to heaven. And heaven back in 1953 was going North. I went North to heaven.

29. I have discussed these cases in several earlier articles: Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 Rutgers L. Rev. 921 (1993); Robert Belton, *The Dismantling of the Griggs Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 Yale L. & Policy Rev. 223 (1990).

30. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

31. See the Civil Rights Act of 1991, Pub. L. No. 102, 105 Stat. 1071 (1991), § 2 (noting a decision the Supreme Court had handed down that "weakened the scope and effectiveness of Federal civil rights protection"), and § 3 (noting the need "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination").

How many more Reconstructions is it going to take before we get to that point? I just simply do not know. But I do believe we must continue to hope that we will get there.