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Approaches to Brown v. Board of Education: Some Notes on Teaching a Seminal Case

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APPROACHES TO *BROWN v. BOARD OF EDUCATION*: SOME NOTES ON TEACHING A SEMINAL CASE

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During the past year, dozens of American law schools commemorated the fiftieth anniversary of *Brown v. Board of Education*.[1] The attention was appropriate because *Brown* is one of the Supreme Court's seminal decisions. By all appearances, the fiftieth anniversary of *Brown* attracted much more attention than did, say, the 200th anniversary of *Marbury v. Madison*[2] in 2003 or the centennial of *Lochner v. New York*[3] this year. *Brown's* unique significance resides in part in the fact that it changed America's constitutional norm regarding race, our most embarrassing and vexing problem. In effectively overturning the doctrine of *Plessy v. Ferguson*[4] that separate but equal was consistent with the Equal Protection Clause, *Brown* rejected apartheid as a constitutional principle to organize American society. It went "where no court had ever gone before: to dismantle an entrenched social order."[5] As such it has become "a beloved legal and political icon."[6]

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1. 347 U.S. 483 (1954). *See, e.g.*, Brown*@50 Symposium*, 47 HOW. L.J. 1 (2003); Survey, *Reflections on* Brown v. Board of Education *and the Civil Rights Movement in Virginia*, 39 U. RICH. L. REV. 1 (2004); Symposium, *50 Years of* Brown v. Board of Education, 90 U. VA. L. REV. 1537 (2004); Symposium: Brown *at Fifty*, 117 HARV. L. REV. 1302 (2004); Symposium, Brown v. Board of Education *at Fifty: Have We Achieved Its Goals?*, 78 ST. JOHN'S L. REV. 253 (2004); Symposium, Brown v. Board of Education*: Fifty Years Later*, 48 ST. LOUIS U. L.J. 791 (2004); Symposium, *Revisiting* Brown v. Board of Education*: 50 Years of Legal and Social Debate*, 90 CORNELL L. REV. 279 (2005).

2. 5 U.S. (1 Cranch) 137 (1803). *See, e.g.*, *Judicial Review: Blessing or Curse? or Both? A Symposium in Commemoration of the Bicentennial of* Marbury v. Madison, 38 WAKE FOREST L. REV. 313 (2003); Marbury *at 200: A Bicentennial Celebration of* Marbury v. Madison: Marbury *as History*, 20 CONST. COMMENT. 205 (2003); Symposium: Marbury v. Madison, *200 Years of Judicial Review in America*, 71 TENN. L. REV. 217 (2004).

3. 198 U.S. 45 (1905).

4. 163 U.S. 537 (1896).

5. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 27 (2000).

6. Jack M. Balkin, Brown *as Icon*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL

It was not surprising that *Brown* so captivated American law schools last year during its golden anniversary. It attracted attention at each of its earlier milestone anniversaries.[7] Do we give it the same level of attention on a regular basis in our Constitutional Law courses? It is difficult to know for sure without surveying Constitutional Law teachers—a task I have not undertaken. A review of Constitutional Law casebooks suggests we do not. A few provide extensive materials regarding *Brown*, but most treat *Brown* no differently than most other cases. A few notes typically introduce or follow the brief opinion, and then it's on to the next case. Of course, casebook pages are scarce, and the absence of extensive discussion of *Brown* in the casebooks does not mean that those teaching Constitutional Law do not spend days on it. Perhaps most Constitutional Law teachers know so much about *Brown* that the casebooks need provide little background. In any event, *Brown* is worth dwelling upon. It should be, perhaps with *Marbury v. Madison* and *McCulloch v. Maryland*,[8] the focal point of a Constitutional Law curriculum.

Brown's subject matter alone would justify giving it more time than most other cases. It is, after all, the third in a trilogy of prominent cases dealing with race, after *Dred Scott v. Sandford*[9] and *Plessy v. Ferguson*, and the only one of

RIGHTS DECISION 3 (Jack M. Balkin ed., 2001) [hereinafter BALKIN]; *see also* Earl Maltz, Brown v. Board of Education *and "Originalism*," *in* GREAT CASES IN CONSTITUTIONAL LAW 142 (Robert P. George ed., 2000) (calling *Brown* a "constitutional icon").

7. *See, e.g.*, Arthur J. Goldberg, *Reflections: Twentieth Anniversary of* Brown v. Board of Education, 50 NOTRE DAME L. REV. 106 (1974-1975); *A Dedication to Mr. Justice Marshall on the Twenty-Fifth Anniversary*: Brown v. Board of Education, 54 N.Y.U. L. REV. 1 (1979); Robert L. Carter, *Reexamining* Brown *Twenty-Five Years Later: Looking Backward into the Future*, 14 HARV. C.R.-C.L. L. REV. 615 (1979); Theodore M. Hesburgh, Brown *After Twenty-Five Years*, 28 EMORY L.J. 933 (1979); Betsy Levin, *Symposium: Educational Equality Thirty Years after* Brown v. Board of Education, 55 U. COLO. L. REV. 487 (1984); Nathaniel R. Jones, *The Desegregation of Urban Schools Thirty Years After* Brown, 55 U. COLO. L. REV. 515 (1984); David Hall & George Henderson, *Thirty Years after* Brown*: Looking Ahead*, 24 WASHBURN L.J. 227 (1985); Daniel Gordon, *Happy Anniversary* Brown v. Board of Education*: In Need of a Remake After Forty Years?*, 25 COLUM. HUM. RTS. L. REV. 107 (1993); Davison M. Douglas, *The Promise of* Brown *Forty Years Later: Introduction*, 36 WM. & MARY L. REV. 337 (1995); J. Clay Smith, Jr. & Lisa C. Wilson, Brown *on White College Campuses: Forty Years of* Brown v. Board of Education, 36 WM. & MARY L. REV. 733 (1995); Murray Dry, Brown v. Board of Education *at Forty: Where Are We? Where Do We Go from Here?*, 1 RACE & ETHNIC ANC. L. DIG. 8 (1995); Thomas B. McAffee, *The* Brown *Symposium—An Introduction*, 20 S. ILL. U. L.J. 1 (1995); Norman Williams, Jr., *Using Discourse Ethics to Provide Equality in Education for African-American Children Forty Years after* Brown v. Board of Education, 5 B.U. PUB. INT. L.J. 99 (1995); Robert W. McGee, Brown v. Board of Education*: More Than Forty Years of Asking the Wrong Question & the Case for Privatization of Education*, 17 ST. LOUIS U. PUB. L. REV. 141 (1997); Cheryl Brown Henderson, *The Legacy of* Brown *Forty Six Years Later*, 40 WASHBURN L. J. 70 (2000); Drew S. Days, III, *In Search of Educational E/Quality Forty-Six Years After* Brown v. Board of Education, 54 SMU L. REV. 2089 (2001).

8. 17 U.S. (4 Wheat.) 316 (1819).

9. 60 U.S. (19 How.) 393 (1857).

the three that virtually all Americans now find palatable. *Brown* clearly influenced the course of constitutional law during the subsequent half century. It heralded a new way of thinking about law. Yet *Brown*'s pedagogical significance does not stem simply from the importance of the topic it addressed and the result it reached. *Brown* also affords a rare opportunity to explore a whole range of central questions relating to constitutional law. How should courts interpret the Constitution? How much difference can judicial decisions make?

The professor's task is made easier by the vast literature *Brown* has spawned during the last half-century. More than 2170 reported cases cite it.[10] Moreover, scholars have subjected it to book-length studies.[11] Symposia celebrate each anniversary.[12] Thus, teachers have a wealth of information to draw upon in teaching *Brown*.

The purpose of this Essay is simply to suggest some of the angles teachers can usefully take in presenting *Brown*. This Essay is not exhaustive, nor does it seek to resolve the issues it raises. It draws heavily upon the rich corpus of work on *Brown* to summarize some issues that might contribute to a Constitutional Law course.

I. THE CASE(S)

Brown, of course, involved a challenge to the racially segregated school systems that prevailed in many states in the early 1950s.[13] In *Brown*, the Court considered and decided cases from Kansas, South Carolina, Virginia, and Delaware addressing state practices that separated white and black children in public schools.[14] A case from the District of Columbia, *Bolling v. Sharpe*,[15] was argued with the state cases but was the subject of a separate opinion. The District Court in *Bolling* had dismissed the case.[16] In *Gebhart v. Belton*, a Delaware state court struck down laws requiring racially segregated schools

10. This number was generated from the Westlaw "Citing References" list for *Brown*.

11. *See, e.g.*, BALKIN, *supra* note 6; ROBERT J. COTTROL ET AL., *BROWN V. BOARD OF EDUCATION*: CASTE, CULTURE AND THE CONSTITUTION (2003); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (Vintage Books 2004) (1975); J. HARVIE WILKINSON, III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978 (1979).

12. *See supra* notes 1, 7 and accompanying text.

13. Some seventeen Southern and border states required that public schools be segregated in 1954. *See* THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS, 646 n.35 (Del Dickson ed., 2001) [hereinafter DICKSON]. Four states (Kansas, New Mexico, Arizona, and Wyoming) gave local school boards discretion. *Id.*

14. 347 U.S. 483, 486–88 & n.1 (1954).

15. 347 U.S. 497 (1954).

16. The District Court's dismissal was unpublished, but for the history of the case at this stage, see KLUGER, *supra* note 11, at 523–24.

and ordered Delaware's schools to integrate immediately until equal schools could be created.[17] In *Brown v. Board of Education*, the lower court had found that segregated schools harmed black children but refused to order desegregation on the grounds that the white and black schools were substantially equal.[18] In Virginia and South Carolina, the lower courts found that the black schools were inferior and ordered the defendants to equalize the schools.[19]

The states relied on the doctrine from *Plessy v. Ferguson*,[20] which had held that racially "separate but equal" railcars were consistent with the Equal Protection Clause.[21] The doctrine had provided the basis for many states to operate separate or dual school systems.[22] They were rarely equal. During the 1930s and 1940s, the National Association for the Advancement of Colored People ("NAACP") had brought suits challenging segregation in institutions of higher education. In a number of cases, the Supreme Court had required states to furnish equal opportunities for black students to study law or pursue other graduate studies. In *Missouri ex rel. Gaines v. Canada*, the Court ordered Missouri to admit a black man to its law school.[23] It could not meet its obligation to provide all qualified residents the same opportunity for training by sending Gaines to school in a neighboring state.[24] Ten years later, in *Sipuel v. Board of Regents of University of Oklahoma*, the Court ordered Oklahoma to educate Ms. Sipuel in accordance with the Equal Protection Clause.[25] Finally, in 1950 the Court decided *Sweatt v. Painter*[26] and *McLaurin v. Oklahoma State Regents*.[27] In *Sweatt*, the Court found that Texas could not provide Herman Sweatt an equal legal education in a separate school for blacks.[28] The quality of a legal education turned in part on intangible factors—reputation of faculty, alumni network, etc.[29] Because Texas could not furnish Sweatt an equivalent education, it was required to admit him to the University of Texas Law

17. 91 A.2d 137, 140, 152 (Del. 1952); *see Brown*, 347 U.S. at 487–88 n.1.

18. 98 F. Supp. 797 (D. Kan. 1951); *see Brown*, 347 U.S. at 487 n.1.

19. Davis v. County Sch. Bd. of Prince Edward County, 103 F. Supp. 337, 340–41 (E.D. Va. 1952), *rev'd by* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Briggs v. Elliot, 103 F. Supp. 920, 923 (E.D. S.C. 1952), *rev'd by* Brown v. Bd. of Educ., 347 U.S. 483 (1954); *see also Brown*, 347 U.S. at 486–87 n.1.

20. 163 U.S. 537, 548–49 (1896).

21. *Brown*, 347 U.S. at 488.

22. *See* DICKSON, *supra* note 13, at 646 n.35.

23. 305 U.S. 337, 352 (1938).

24. *Id*. at 349–50.

25. 332 U.S. 631, 633 (1948).

26. 339 U.S. 629 (1950).

27. 339 U.S. 637 (1950).

28. *Sweatt*, 339 U.S. at 633–34.

29. *Id*. at 634.

School.[30] In *McLaurin*, the Court held that Oklahoma could not subject George W. McLaurin to different treatment than white students received (i.e., segregated seating) in its graduate school.[31] In these cases, the Court was able to rule in favor of the black student without holding *Plessy* unconstitutional. In each case, separate schools were not or would not be equal. Thus, the cases did not force the Court to overrule *Plessy* or abandon the separate but equal doctrine.

Brown presented that question clearly, particularly because the lower court had found Kansas was providing substantially equal separate schools.[32] As Professor Lucas A. Powe, Jr. has written, "although everyone knew that Negro schools had less of everything except leaky roofs than white schools, these cases were intentionally litigated on the assumption that everything except student assignments was equal."[33] The Court first heard arguments on the cases in 1952.[34] The discussions at conference on December 13, 1952, revealed that the Court was split on the disposition of the cases.[35] Although Justices Black, Douglas, Burton, and Minton were prepared to hold that segregated schools violated the Equal Protection Clause and/or the Fifth Amendment Due Process Clause,[36] Chief Justice Vinson and Justices Reed and Clark seemed disposed to reaffirm *Plessy*'s separate but equal doctrine.[37] Justices Frankfurter and Jackson seemed troubled by the lack of conventional legal arguments to support striking down *Plessy*.[38] Rather than render a divided ruling, the Court unanimously ordered that all cases be reargued regarding the original intent of the Fourteenth Amendment and the Court's equitable powers.[39]

Fate intervened. Chief Justice Vinson died on September 8, 1953. President Eisenhower had previously promised California Governor Earl Warren the first Supreme Court opening.[40] Although Eisenhower may have intended to appoint Warren as an associate justice, Warren interpreted their

30. *Id*. at 635–36.

31. *McLaurin*, 339 U.S. at 640, 642.

32. Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954).

33. POWE, *supra* note 5, at 29.

34. *Brown*, 347 U.S. at 488.

35. *See* DICKSON, *supra* note 13, at 644–53; *see also* POWE, *supra* note 5, at 23; KLUGER, *supra* note 11, at 617–18.

36. *See* DICKSON, *supra* note 13, at 648, 652–53.

37. *Id*. at 646–49, 653.

38. *Id*. at 651–52.

39. Brown v. Bd. of Educ. Et al., 345 U.S. 972 (1953). *See generally* DICKSON, *supra* note 13, at 644–53. *See* POWE, *supra* note 5, at 23; KLUGER, *supra* note 11, at 618–19.

40. BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 2 (1983).

agreement to extend to the Chief Justiceship, and ultimately Eisenhower appointed him.[41]

The cases were reargued on December 7–9, 1953,[42] and initially discussed in conference on December 12, 1953.[43] At this time Warren was acting under a recess appointment.[44]

On May 17, 1954, the Court issued unanimous decisions in *Brown* and in *Bolling* holding that separate but equal had no place in public education.[45] Both opinions were brief. *Brown* contained thirteen paragraphs spread over thirteen pages of Volume 347 of the U.S. Reports.[46] In fact, the critical part of the opinion was shorter than even this description suggests. The first three pages listed headnotes and counsel.[47] The next three outlined facts and procedural matters.[48] Two pages explained the inconclusive nature of the Court's effort to determine whether the framers intended the Equal Protection Clause to preclude school segregation.[49] Almost two more pages introduced the "separate but equal" doctrine of *Plessy v. Ferguson* and sought to distinguish it as applying to transportation, not education.[50] The last page was a briefing order.[51]

The Court devoted only about two and one-half pages to outlining the rationale of the opinion. The Court could not "turn the clock back to 1868 when the [Fourteenth] Amendment was adopted" or to 1896 when it decided *Plessy*.[52] Instead, it "must consider public education in the light of its full development and its present place in American life throughout the Nation."[53]

The Court noted the paramount role of public education "to our democratic society."[54] It was a prerequisite to discharging basic civic responsibilities.[55] It inculcated American values.[56] "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[57] The states must provide education to all on equal terms.[58]

41. *Id*. at 5–7.
42. Brown v. Bd. of Educ., 347 U.S. 483, 483 (1954).
43. DICKSON, *supra* note 13, at 654.
44. *Id*. at 653.
45. *Brown*, 347 U.S. at 495; Bolling v. Sharpe, 347 U.S. 497, 500 (1954).
46. *Brown*, 347 U.S. at 483–96.
47. *Id*. at 483–85.
48. *Id*. at 486–88.
49. *Id*. at 489–90.
50. *Id*. at 490–92.
51. *Brown*, 347 U.S. at 495–96.
52. *Id*. at 492.
53. *Id*. at 492–93.
54. *Id*. at 493.
55. *Id*.
56. *Brown*, 347 U.S. at 493.
57. *Id*. at 493.

Separate but equal schools harmed black children. "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[59] "Modern authority" supported this finding.[60] That authority included psychological studies arguing that school segregation harmed African-American children.[61] Thus, "in the field of public education the doctrine of 'separate but equal' ha[d] no place."[62] The Court concluded its opinion by directing the parties to present further argument regarding questions as to remedy that had previously been proposed.[63]

Bolling required less than four pages.[64] Because Congress had jurisdiction over the public schools in the District of Columbia,[65] the Fifth Amendment applied.[66] Unlike the Fourteenth Amendment, it did not contain an Equal Protection Clause. Yet equal protection and due process both came from the American concept of "fairness."[67] Racial classifications "must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."[68] Liberty, as protected by the Due Process Clause, could not be restricted for arbitrary reasons but only for some "proper governmental objective."[69] School segregation was not such an objective.[70] Because the Equal Protection Clause precluded the states from operating segregated schools, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."[71]

Finally, on May 31, 1955, some fifty-four weeks after the Court issued the aforementioned opinions, the Court delivered its opinion relating to remedial issues.[72] The Court recognized that implementation of the constitutional principles it had stated might require different responses in different localities.[73] It remanded the cases to the courts that had originally heard

58. *Id*.
59. *Id*. at 494.
60. *Id*.
61. *Brown*, 347 U.S. at 494 n.11.
62. *Id*. at 495.
63. *Id*. at 495–96 & n. 13.
64. 347 U.S. 497, 497–500 (1954).
65. *See* U.S. CONST. art. I, § 8, cl. 17.
66. *Bolling*, 347 U.S. at 499 (discussing U.S. CONST. amend. V, XIV).
67. *Id*.
68. *Id*. at 499.
69. *Id*. at 499–500.
70. *Id*. at 500.
71. *Bolling*, 347 U.S. at 500.
72. Brown v. Bd. of Educ., 349 U.S. 294 (1955) ("*Brown II*").
73. *Id*. at 298, 299.

them.[74] While recognizing "the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis," the Court also noted the "public interest in the elimination of [a variety of] obstacles in a systematic and effective manner."[75] School boards must make a good-faith beginning, in other words "a prompt and reasonable start toward full compliance."[76] District courts should act "with all deliberate speed" to admit plaintiffs to public schools on a racially nondiscriminatory basis.[77]

II. WHAT DID *BROWN* DECIDE

At the most basic level, *Brown* and *Bolling* decided that the Constitution prohibited federal or state government from operating racially segregated public schools. Although the decisions made this result clear, they left broader implications murky. The Court wrote the decision narrowly, specifically limiting it to education: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place."[78]

The cases dealt with public elementary and secondary schools, and the Court referred to children.[79] The Court did not overrule *Plessy* generally. Indeed, its rejection of certain specific language in *Plessy*[80] implied that it otherwise stood.

In important respects, the decision proved broader than its language suggested. Although *Brown* spoke only of public education, it clearly had a wider impact than its language hinted. In short order the Court made clear that pursuant to *Brown*, *Plessy* and the Jim Crow laws it sustained were invalid. Ten months after the Court's decision, the United States Court of Appeals for the Fourth Circuit unanimously applied *Brown* to bar Baltimore from operating racially segregated public beaches and bathhouses.[81] It was "obvious," the court said, that the police power did not authorize states to segregate facilities to "preserve the public peace."[82] In a series of cases the Court outlawed "separate but equal" golf courses,[83] public parks,[84] libraries,[85] buses,[86] airport

74. *Id*. at 301.
75. *Id*. at 300.
76. *Id*.
77. *Brown II*, 349 U.S. at 301.
78. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).
79. 347 U.S. at 493.
80. *Id*. at 494–95.
81. Dawson v. Mayor & City Council of Baltimore City, 220 F.2d 386(4th Cir. 1955), *aff'd*, 350 U.S. 877 (1955) (holding segregation at public beaches unconstitutional).
82. *Id*. at 387.
83. Holmes v. City of Atlanta, 350 U.S. 879 (1955).
84. New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (per curiam), *aff'g*, 252 F.2d 122 (5th Cir. 1958).
85. Brown v. Louisiana, 383 U.S. 131 (1966).
86. Gayle v. Browder, 352 U.S. 903 (1956).

restaurants,[87] municipal auditoriums,[88] and courtrooms.[89] As Robert L. Carter wrote, "*Brown* thus extended to its natural consequences could mean that the fetters binding the Negro were at last being struck, and that he would henceforth be able to stretch himself to his full potential."[90] One area took longer; the Court postponed ruling on antimiscegenation issues until 1967,[91] having been persuaded to duck a challenge to Virginia's law in 1955[92] apparently to avoid further inflaming Southern passions.

In other respects, *Brown* probably did not extend as far as its broad language suggested. The Court stated that where a State operated a public school system it created "a right which must be made available to all on equal terms."[93] Yet if the Court meant in 1954 that all public schools in a State had to be of equal quality, it never acted upon that vision. Indeed, two decades later, in *San Antonio v. Rodriguez*[94] the Court held that Equal Protection did not mandate funding equity, a decision which Justice Thurgood Marshall viewed as a departure from *Brown*.[95]

Ultimately, the issue before the Court in *Brown* and *Bolling* was whether segregated public schools, even if equal in tangible factors, deprived minority children of equal educational opportunities. The Court held that they did. Its conclusion rested upon a rationale the Court stated in a single sentence. "To separate them [African-American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[96]

If the result—segregated public schools were illegal—was clear, the rationale was subject to debate. Did *Brown* rest on the principle that government could not use race as a basis for classifying? Alternatively, did the opinion rest on a notion that government could not subordinate blacks to whites?

Both ideas had impressive pedigrees. Indeed, Justice Harlan had deployed the ideas side by side in his famous dissent in *Plessy*. There he wrote:

> But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our

87. Turner v. City of Memphis, 369 U.S. 350 (1962).

88. Schiro v. Bynum, 375 U.S. 395 (1964).

89. Johnson v. Virginia, 373 U.S. 61 (1963).

90. Robert L. Carter, *The Warren Court and Desegregation*, 67 Mich. L. Rev. 237 (1968), *in* THE WARREN COURT: A CRITICAL ANALYSIS 47 (Richard H. Sayler et al. eds., 1968).

91. Loving v. Virginia, 388 U.S. 1 (1967).

92. *See* Naim v. Naim, 350 U.S. 891 (1955).

93. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

94. 411 U.S. 1 (1973).

95. *Id.* at 71–72.

96. *Brown*, 347 U.S. at 494.

> Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.[97]

Justice Harlan's "no caste" idea suggested that the antisubjugation rationale animated the clause. His color-blind constitution metaphor pointed to an anticlassification norm. Moreover, in arguing *Brown* before the Court, the NAACP had advanced both arguments. It argued, first, that Kansas lacked power "to impose racial restrictions and distinctions."[98] Moreover, it claimed that segregation harmed black children by stamping them as inferior.[99]

The Court did not need to choose between the anticlassification and anticaste principles to decide *Brown*. In that case both roads led to the same destination. Separate but equal classified based on race and reflected a belief in the inferiority of blacks. Yet the issue had more than esoteric interest. It affected the resolution of questions which later arose and dominated the jurisprudence of much of the last third of the twentieth century. If *Brown* rested on the anticlassification principle, other programs would be affected. Could a school district use race to assign students in order to achieve integration? Was racial balancing an appropriate objective? Would affirmative action and other race conscious programs be inconsistent with a principle that Thou Shalt Not Classify By Race? Alternatively, the antisubjugation principle would allow government greater latitude to distinguish between races to redress past injustices or achieve other instrumental goals.

Both positions have had proponents on the Court. At the 1952 conference, Justice William Douglas argued that "[n]o classification on the basis of race can be made" under either the Equal Protection Clause or the Fifth Amendment.[100] More recently, Justices Scalia[101] and Thomas[102] have embraced the anticlassification principle as the proper idea behind the Equal Protection Clause. Others, such as Justices Thurgood Marshall[103] and Harry Blackmun[104] endorsed the anticaste rationale.

97. 163 U.S. at 559.

98. Brief for Appellants at 6, Brown v. Bd. of Educ., 347 U.S. 483 (1954).

99. *Id*. at 9.

100. DICKSON, *supra* note 13, at 652.

101. *See* Grutter v. Bollinger, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part, dissenting in part) ("The Constitution proscribes government discrimination on the basis of race . . .").

102. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 121 (1995) (Thomas, J., concurring) ("[S]egregation violated the Constitution because the State classified students based on their race.").

103. Regents of the University of California v. Bakke, 438 U.S. 265, 396 (1978) (Marshall, J.) (noting that the Fourteenth Amendment does not preclude use of racial classification to remedy past discrimination).

104. *Id*. at 407 ("In order to get beyond racism, we must first take account of race.").

It is difficult to attribute the anticlassification idea to *Brown*. *Brown* did not state that the Constitution precluded racial classification.[105] Its failure to articulate this principle is particularly significant because plaintiffs pushed this argument in their brief. On the contrary, its key language addressed the effects of segregation on black children.[106] The Court wrote: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[107]

The implication was, of course, that segregation harmed black children because it represented the majority's message that they must be kept separate because they were inferior. *Brown* rejected contrary language in *Plessy*, which asserted that any inference that segregation "stamps the colored race with a badge of inferiority" was not "by reason of anything found in [the Louisiana law at issue in *Plessy*], but solely because the colored race chooses to put that construction upon it."[108]

Chief Justice Warren saw the subjugation issue as central to *Brown*. He voiced this premise early in his opening remarks at the December 12, 1953, conference. He told his new Brethren:

> The more I read and hear and think, the more I come to conclude that the basis of the principle of segregation and separate but equal rests upon the basic premise that the Negro race is inferior. That is the only way to sustain *Plessy*—I don't see how it can be sustained on any other theory. If we are to sustain segregation, we must do it on that basis. If oral argument proved anything, the arguments of Negro counsel proved that they are not inferior.[109]

Chief Justice Warren made this point explicit in his opinion. The "question presented," wrote the Chief Justice, was whether school segregation deprived "the children of the minority group of equal educational opportunities[.]"[110] The Court stated the problem in language which suggested antisubjugation, not anticlassification, was its concern.

Moreover, the Court cited a finding in the Kansas case that "well stated" the "effect of this separation" on the "educational opportunities" of black children.

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the

105. *See* Reva B. Siegel, *Symposium:* Brown *at Fifty: Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1481 (2004).

106. *See generally* Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

107. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

108. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

109. DICKSON, *supra* note 13, at 654.

110. 347 U.S. at 493.

> sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."[111]

Indeed, in a recent article Professor Reva B. Siegel has argued that the Court did not adopt the anticlassification idea for more than a decade after *Brown*.[112] Instead, it favored the antisubjugation norm, which pivoted on the notion that segregation harmed blacks.[113] Southerners contested this idea and argued that integration, not segregation, harmed both races.[114] Courts embraced the anticlassification rationale as a way to insulate integration from attack on the grounds that it harmed rather than helped.[115] Even as courts adopted the anticlassification norm "they understood that the purpose of equal protection doctrine was to prevent the state from inflicting certain forms of status harm on minorities."[116]

Yet the issue is a bit murkier. In *Bolling* the Court included some language which suggested that the anticlassification principle had a role: "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."[117] The Court may well have had an extraordinarily generous view of "our traditions" because any reading of history would suggest that racial classifications had been intrinsic to certain of our less noble traditions. But perhaps the Court meant simply that those odious practices violated our aspirations and ideals and in this sense violated the traditions we sought to establish. It went on to quote language that the Constitution "forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race."[118]

How to reconcile that language with the different approach of *Brown*? It seems unlikely the Court meant to apply a different test to federal and state governments because *Bolling* quoted language that subjected them to a common norm. Could the difference have been that the language on which the

111. *Id*. at 494.

112. *See generally* Siegel, *supra* note 105.

113. *Id*.

114. *See id*. at 1498–99.

115. *See id*. at 1499.

116. *Id*. at 1514; *see also* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1. 33 (1959) (noting that *Brown* turned on antisubjugation principle); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L. J. 421, 421 (1960) (stating that the Equal Protection Clause forbids states from "significantly disadvantag[ing]" blacks).

117. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

118. *Id*.

Court relied in *Bolling* came from cases interpreting a Due Process Clause and accordingly the Court felt uncomfortable applying the anticlassification principle in Equal Protection cases? Different law clerks worked on the two opinions.[119] Yet the Court considered the opinions so thoroughly it seems inconceivable that the fortuity of which clerk worked on which opinion accounted for the difference. Ultimately, two points are worth making. First, *Brown* was the lead opinion, the one which received the most attention and to which most significance attached. Second, *Bolling* raised a modest version of the anticlassification rationale. *Bolling* did not push anticlassification as far as modern day proponents such as Justices Scalia and Thomas sometimes do. *Bolling* did not preclude government from classifying based on race. It said simply that such classifications "must be scrutinized with particular care" and that they were "constitutionally suspect."[120] That requirement implied that racial classifications were not per se unlawful. If they were, no careful scrutiny would be needed. Identifying the classification would suffice to strike it down. Indeed, in the lead case the Court cited for the point, *Korematsu v. United States*, the Court had specifically noted that all racial classifications were not necessarily unconstitutional.[121] Indeed, *Korematsu* had not scrutinized the racial classification with much care and upheld it as serving a public necessity![122] To the extent that *Bolling* supports an anticlassification principle, it is a qualified one.

Brown was also ambiguous as to what the Constitution required. Did *Brown* simply outlaw segregation or did it require integration? The *Briggs* court subsequently concluded that *Brown* did not require that "the states must mix persons of different races in the schools."[123] Instead, it simply held that states could not "deny to any person on account of race the right to attend any school that it maintains."[124] Government could not segregate, but it need not integrate. The difference was significant. Did Southern states need to simply show they were not still separating the races, or did they need to present plans creating racially mixed school populations? Although the Court ultimately recognized a difference between de jure and de facto segregation, Del Dickson reports that private Court documents suggest that in 1973 five justices thought the distinction should be discarded.[125]

In retrospect, *Brown* stands for at least four basic constitutional ideals. First, *Brown* celebrates education as a prerequisite to the American Dream.[126]

119. *See* SCHWARTZ, *supra* note 40 at 98.
120. *Bolling*, 347 U.S. at 499.
121. 323 U.S. 214, 216 (1944).
122. *Id*. at 223–24.
123. Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955).
124. *Id*.; *see also* WILKINSON, *supra* note 11, at 82.
125. DICKSON, *supra* note 13, at 680–81.
126. *See, e.g.*, WILKINSON at 41 ("Schools were then the great hope.").

Brown recognized "the importance of education to our democratic society."[127] Education is "the very foundation of good citizenship."[128] It exposes a child to cultural values, allows her to adjust to her environment, and prepares her for professional training.[129] A child cannot be expected to succeed if denied an education.[130] Accordingly, education was a "right" that had to be made "available to all on equal terms."[131] Separate education was inherently unequal because it meant that the American Dream could be reality for white, but not black, children.

Second, *Brown* stands for the communitarian idea implicit in the Constitution that we are one people. The preamble of the Constitution begins with the words "We, the people." Those words had not included blacks during the long period when slavery was legal and Jim Crow constitutional. *Brown* changed that. *Plessy* stood for the notion that America consisted of two communities, white and black, who lived in separate neighborhoods, attended different schools, rode in different railcars, and used different restaurants, restrooms, and doors. *Brown* challenged that model. In implicitly rejecting *Plessy*, *Brown* signifies that there is one America in which whites and blacks are to be equal members.

Third, as suggested above, *Brown* endorses the antisubordination ideal as the meaning of the Equal Protection Clause. Racial classification is offensive because it casts blacks as lesser members of the community. *Brown* signifies that blacks are equal members of America. Finally, *Brown* represents a constitutional principle regarding how majorities should treat minorities. After all, *Brown* notes the psychological harm segregation caused black children by signifying their legal inferiority. *Brown* stands for the ideal that majorities must structure society in a way that does not allow minorities to reasonably conclude that they are lesser members of the political community. *Brown* implicitly embraces the insight in the *Carolene Products* footnote four that courts should carefully scrutinize classifications adverse to discrete and insular minorities.[132]

III. IMPLICATIONS FOR CONSTITUTIONAL ARGUMENT

A. Brown

Brown affords an opportunity to engage students on the merits of different styles of constitutional argument. Lawyers and judges typically employ

127. *Brown*, 347 U.S. at 493.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. United States v. Carolene Prod. Co., 304 U.S. 144, 152–53 n.4 (1938).

several modes of constitutional analysis in arguing about constitutional interpretation. Although most would agree on a descriptive statement of the six or seven types of argument typically used,[133] there is less consensus regarding the prescriptive or normative claims regarding what sorts of arguments should receive emphasis. Whereas some emphasize textual argument or intent of the framers as preferred methods of analysis, others prefer doctrinal, structural, or moral or consequential argument.

Brown provides one lens through which to examine the relative merits of these claims. As Professor (now Judge) Michael McConnell put it, "[s]uch is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited."[134]

The most familiar and comfortable modes of constitutional analysis would not, in 1954, have produced the ruling *Brown* reached. The constitutional text did not speak directly to school segregation. No constitutional language said "no State shall provide segregated education for white and black children" or words to that effect. The Constitution did prohibit a state from denying any person equal protection of the laws, but, as a matter of abstract logic at least, it was not clear that equal protection mandated integrated facilities. After all, no one claims a constitutional violation when the state provides separate restrooms for men and women. Why could not separate but equal schools protect all equally? This consideration poses challenges for textualists. Did textual argument support the position of the school boards in favor of separate but equal? Was textual argument inconclusive? Or must the textual requirement of equal protection be considered in some historical context rather than as a matter of abstract logic?

Textual argument was even less helpful in *Bolling v. Sharpe*, which considered whether Congress could maintain racially separate schools in the District of Columbia. Clearly the Equal Protection Clause of the Fourteenth Amendment did not limit federal action and other constitutional clauses spoke to the issue remotely at best.

Nor was originalist argument very helpful. The Supreme Court had directed the parties to brief whether the framers of the Fourteenth Amendment intended to ban racially segregated schools.[135] That order, on its face, suggested the Court gave credence to original intent. Presumably, if the evidence had suggested that the framers of the Amendment intended to bar

133. *See, e.g.*, Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189 (1987); PHILIP BOBBITT, CONSTITUTIONAL FATE (1982); CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 14–38 (1969); NORMAN REDLICH ET AL. UNDERSTANDING CONSTITUTIONAL LAW 6–20 (3d ed. 2005).

134. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995).

135. Brown v. Bd. of Educ., 345 U.S. 972 (1953).

school segregation the Court would have so argued. Such a finding would have eased the decision for those justices who were morally opposed to segregation but were groping for a conventional legal argument to strike it down. Some justices apparently expected the evidence to so point. The parties submitted mountainous volumes of materials that drew upon some of the foremost historians and legal scholars.[136] Yet the Court concluded that although the exhaustive discussion regarding original intent "cast some light" it was insufficient to resolve the question because "[a]t best, [the sources] are inconclusive."[137]

The Court's analysis highlighted two reasons why efforts to rely on original intent are often unsuccessful. First, the record was inconclusive because it failed to reveal a complete or consistent picture of the preferences of those who drafted and ratified the Fourteenth Amendment.[138] Second, the record was inadequate because the problem the Court faced in 1954—was separate but equal constitutional in public education?—was not a pressing issue in the late 1860s. Public education was in its infancy and education of blacks "was almost nonexistent."[139]

In fact, the evidence regarding original intent may have been worse than the Court suggested. "The original understanding of the Fourteenth Amendment plainly permitted school segregation[,]" wrote Michael Klarman in his recent book on race in America.[140] Most scholars who have studied this question share Professor Klarman's conclusion.[141] Mark Tushnet, for instance, points out that the Congress which proposed the Fourteenth Amendment supported segregated schools in the District of Columbia.[142] Proponents of the Amendment routinely denied that it would lead to integrated schools.[143] Five northern states excluded black children from public schools altogether; eight states allowed segregated schools.[144] Michael McConnell, now a judge on the Court of Appeals for the Tenth Circuit, reached a different conclusion. An

136. *See* KLUGER, *supra* note 11, at 620–59.

137. *Brown*, 347 U.S. at 489.

138. *Id*.

139. *Id*. at 490.

140. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 26 (2004).

141. *See, e.g*., KLUGER, *supra* note 11, at 637; Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 800 (1983); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 75 (1990) ("The opinion did not choose to face the uncomfortable fact that the effect on public education was ignored because no one then imagined the equal protection clause might affect school segregation."). *See generally* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT (1988).

142. MARK TUSHNET, TAKING THE CONSTITUTION FROM THE COURTS 156 (1999).

143. *Id*.

144. KLUGER, *supra* note 11, at 636–37.

originalist, Judge McConnell argues that in a series of votes after the states ratified the Fourteenth Amendment, a majority of Congress voted in favor of school desegregation.[145] Judge McConnell suggests that the congressional support suggests that *Brown* is consistent with what the drafters intended.[146] Professor Klarman has disputed this claim. He argues that most Americans would not have agreed to a constitutional amendment in 1868 banning segregated schools.[147] He criticizes Judge McConnell's emphasis on the actions of drafters rather than ratifiers.[148] And he argues that debates from 1872 to 1874 do not reflect intent several years earlier.[149]

Precedent, too, would not take the Court to the result it ultimately reached. *Plessy v. Ferguson* had promulgated the doctrine of separate but equal fifty-eight years earlier.[150] In *Brown*, the Court rather feebly distinguished it as dealing with transportation rather than education.[151] Yet *Plessy* had, as the Court acknowledged, relied on an education case,[152] had compared transportation to education,[153] and the Court had applied it in a half dozen cases dealing with public education.[154] Cases had demonstrated that equality rarely followed from separation and had eroded somewhat the underpinnings of a system which subordinated blacks. Yet *Plessy* remained part of the law of the land in 1954.

Thus, conventional legal arguments could not readily produce the result the Court needed to reach. The Court could not attribute its result either to the framers of the Fourteenth Amendment or to the logic of the decisions of earlier courts.[155]

The Court rejected the premise that history set the Constitution's meaning. Instead, the Court embraced a notion of a living Constitution. "[W]e cannot

145. McConnell, *supra* note 134, at 953.

146. *Id*.

147. Michael J. Klarman, Brown, *Originalism and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1884 (1995).

148. *Id*.

149. *Id*. *But see* Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995).

150. 163 U.S. 537 (1896).

151. *See* Brown v. Bd. of Educ., 347 U.S. 483, 491(1954).

152. Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 206 (1850).

153. *Plessy*, 163 U.S. at 544–45 (dicta stating racial segregation of schools constitutional).

154. *Brown*, 347 U.S. at 491–92.

155. Justice Jackson observed at conference on December 13, 1952:

> I would start with these cases as a lawyer would. I find nothing in the *text* that says this is *unconstitutional*. Nothing in the opinions of the courts say that it is unconstitutional. Nothing in the history of the Fourteenth Amendment says that it is unconstitutional. There is nothing in the acts of Congress either way. On the basis of precedents, I would have to say that it *is* constitutional. Marshall's brief starts and ends with sociology, not legal issues.

DICKSON, *supra* note 13, at 652.

turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written."[156] Implicitly, the Court did not think the Constitution's meaning was fixed by the framers' intent. Rather, it must adapt to changing circumstances. Accordingly, the Court relied on less conventional constitutional arguments. It made a sociological argument based on empirical data measuring psychological harm on black children from segregated schools. It cited, in its controversial footnote 11, the doll studies of Dr. Kenneth Clark and other "modern authority."[157] Yet this data could only be persuasive if it connected to a norm that held such psychological harm a constitutional violation. As Professor Edmond Cahn argued, the data confirmed what the justices already knew.[158] Segregation sent a message blacks were inferior, lesser members of the community. And that was wrong. Ultimately, *Brown* was essentially a moral decision.[159] The Court concluded that school segregation was morally wrong because it imposed psychological harm on black children.

But if *Brown* was a moral decision does that suggest that it rested simply on the subjective ethics of the nine justices who decided it? That the decision had no objective basis? And if so, what elevated *Brown* above *Dred Scott v. Sandford* and *Plessy v. Ferguson*? Was the difference simply that *Brown* strikes a contemporary audience as morally just whereas we regard the other decisions as morally hideous?

The moral or political nature of the decision left *Brown* open to the charge that the judiciary had usurped the role of the legislature, federal and state, and had engaged in judicial legislation. The argument proceeded from two different premises. To some extent the charge rests on a preference for modes of constitutional argument which the Court avoided. Proponents of textualism and originalism argue that those modes of argument constrain judicial choice. By so doing, they inhibit judicial legislation and leave more issues to political decision. Even precedent, a mode of argument to which committed textualists and originalists generally assign less weight, forces judges to connect their decisions to the work of prior jurists. Such claims are controversial. Should the Court have adhered to the text, the framers' specific intent and precedent and have upheld separate but equal?

A second line of attack, however, suggested that Congress had authorized Congress, not the Court, to enforce the Fourteenth Amendment. Section 5 of the Amendment signaled an intent that Congress take the lead in vindicating

156. *Brown*, 347 U.S. at 492.

157. *Id.* at 494 & n.11.

158. Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 159 (1955); *see also* Wechsler, *supra* note 116, at 33 (doubting case turned on psychological evidence).

159. *See, e.g.*, RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 8 (2001); Cahn, *supra* note 158 at 158–59.

the Amendment's purpose. Of course, as Charles L. Black, Jr. pointed out, there was "no contradiction, either logical or practical, in applying both judicial and legislative power to the same end."[160] Moreover, Professor Black pointed out, the argument was raised a little late, after many cases, including *Plessy*, implicitly held the opposite.[161] The objection that would effectively convert the Equal Protection Clause into a political question would, of course, radically transform constitutional law. If it is the province of the Court "to say what the law is,"[162] as *Marbury* proclaimed, removing Equal Protection from its jurisdiction would change things quite a bit. In any event, the present Court, which frequently asserts *Marbury* and has confined Congress's power under Section 5,[163] although apparently not regarding race,[164] seems to be going in a different direction. Finally, would not reliance on Section 5 have clashed with the philosophy expressed in *Carolene Product*'s footnote 4? The national legislature, dominated as it was by Southerners who could veto meaningful civil rights legislation, would preclude action regarding school desegregation. Blacks, as the paradigmatic "discrete and insular minority" would receive no relief from the political process. The Court, in stepping in, acted in concert with that approach.

The appeal of some forms of interpretation reside in their claimed potential to provide objective sources for constitutional outcomes. Thus, some argue that textualism and originalism can constrain the discretion of unelected judges who otherwise might write their own moral or policy preferences into constitutional law. Regardless of the merits of these claims, they depend on textualism or originalism being able to resolve pressing constitutional issues. But what if, as in *Brown*, they are indeterminate? Or they produce a resolution that is morally unacceptable?

A number of prominent scholars have rejected textualism and originalism in demonstrating how a *Brown* opinion might have been drafted. Professor John Hart Ely dismissed as irrelevant the quest "to guess what particular instances of inequality our 1868 forebearers had at the forefront of their minds."[165] Rather, the Equal Protection Clause is one of the Constitution's open textured provisions written to accommodate changing exigencies. The Equal Protection Clause "is among the Constitution's clearest examples of a

160. CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 139 (1960).

161. *Id*.

162. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

163. *See, e.g*., City of Boerne v. P.F. Flores, 521 U.S. 507 (1997); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); Bd. of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001).

164. *See* Tennessee v. Lane, 541 U.S. 509, 561 (2004) (Scalia, J., dissenting).

165. John Hart Ely, *Concurring in the Judgment (except as to remedy)*, *in* BALKIN, *supra* note 6, at 135.

provision whose exact content was understood not to be frozen in time."[166] Indeed, Professor Ely suggests that those who framed the Clause would have expected their descendants to interpret it "in terms of the principles they set forth" not based upon their specific preferences which did not find their way into the constitutional text.[167] Similarly, Professor Jack Balkin relied on a mode of constitutional interpretation that rejects slavish adherence to the framers' particular preferences. He reasons that "the meaning of the American Constitution evolves because the document is redemptive."[168] The Constitution challenges each new generation "to live up to the promises and ideals contained within it," even if those who framed it had different understandings.[169] They follow Judge Louis Pollak who in 1959 wrote that the history of the Fourteenth Amendment contemplated "an essentially dynamic development by Congress and [the] Court of the liberties outlined in such generalized terms in the Amendment."[170]

Professor Archibald Cox argues that we should distinguish between the specific intent of the framers regarding school desegregation and their broader purpose.[171] The former should not bind; the latter should have its influence. Or as Alexander Bickel put it, a "two fold" analysis of congressional purpose behind a constitutional amendment is needed. One inquiry should relate to congressional understanding "of the immediate effect of the enactment on conditions then present"; the other should address "what if any thought was given to the long-range effect, under future circumstances, of provisions necessarily intended for permanence."[172] The "proposition that all men are born with equal right to human dignity and to equal standing in the eyes of government regardless of the circumstances of their birth" not only inheres in the Equal Protection Clause but "had been a basic American ideal since before the Declaration of Independence."[173] Robert Bork, who essentially followed Professor Bickel's approach, argued that the framers of the Fourteenth Amendment thought that equality and segregation were compatible. Subsequent history showed that "segregation rarely if ever produced equality."[174] "The Court's realistic choice" was between equality and

166. *Id*.

167. *Id*. at 135–36.

168. Jack M. Balkin, *Rewriting* Brown: *A Guide to the Opinions*, *in* BALKIN, *supra* note 6, at 54.

169. *Id*.

170. Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 25 (1959).

171. ARCHIBALD COX, THE COURT AND THE CONSTITUTION 259–60 (1987).

172. Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59 (1955).

173. Cox, *supra* note 171, at 259.

174. BORK, *supra* note 141, at 82.

segregation, a decision which inevitably pointed towards equality.[175] Thus, according to Judge Bork, *Brown* was consistent with the original understanding to the extent it emphasized equality.[176]

B. Bolling v. Sharpe

Bolling offers other opportunity to explore issues regarding constitutional interpretation. Unlike the other cases that arose in four different states, *Bolling* considered whether segregated schools in the District of Columbia violated the Constitution. The Equal Protection Clause addresses state, not federal, action; it could not furnish the constitutional norm in *Bolling* as it did in *Brown*. As such, *Bolling* posed different constitutional questions. Is there a reverse incorporation doctrine such that the Fifth Amendment Due Process Clause incorporates the Equal Protection Clause?[177] Can the Constitution state a different constitutional norm for federal and state government?

The Court concluded that segregation in public schools in the District of Columbia was unconstitutional. It rested its conclusion on two arguments. First, "liberty" in the Due Process Clause required that government not restrict human conduct "except for a proper governmental objective."[178] School segregation was not "reasonably related" to such an objective and accordingly was an arbitrary burden on the liberty of black children.[179] Moreover, because the Constitution bans states from maintaining racially segregated public schools, "it would be unthinkable" for the Constitution to "impose a lesser duty on the Federal Government."[180]

This resolution might not satisfy all. A textualist might suggest that the Constitution does not prevent the federal government from operating segregated schools. For instance, Judge Bork argues that had *Bolling* "been guided by the Constitution, it would have had to rule that it had no power to strike down the District's Laws."[181] The Equal Protection Clause may have been thought necessary vis-a-vis the states because history cautioned that states had proclivity to mistreat minorities. The absence of an Equal Protection Clause binding the federal government might mean that the Constitution trusts the national political process to handle such issues. An originalist might reach the same conclusion.

Even if one accepted Judge McConnell's argument that the framers of the Equal Protection Clause intended to outlaw school segregation, it does not help

175. *Id*.

176. *Id*. at 81–82.

177. *See, e.g.*, Cahn, *supra* note 158, at 154–55 (Court approaches position that equal protection guarantee should be read into Fifth Amendment).

178. Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954).

179. *Id*. at 500.

180. *Id*.

181. BORK, *supra* note 141, at 83.

resolve the propriety of school desegregation in the nation's capital. Quite clearly, those who framed the Fifth Amendment did not intend to ban public school segregation. Yet an originalist cannot comfortably conclude, as did the Court, that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."[182] For quite clearly, those who framed the Fifth Amendment did not mean to bar school segregation. Does the Constitution allow the federal government to discriminate? The Court viewed this prospect as "unthinkable."[183] As Michael Klarman observes, "[w]hat Frankfurter found compelling was the moral, not the legal, argument against segregation in the nation's capital."[184] Yet this resolution turns on "morality and. . . politics,"[185] argues Judge Bork. The Court has left other issues to the political process; why not this one, too?

One might accept the Court's resolution that views the Fifth Amendment Due Process Clause as having a substantive, as well as procedural, mission. Liberty might include freedom to attend desegregated schools, and such liberty could not be arbitrarily denied. Yet if the Due Process Clause in the Fifth Amendment was capable of outlawing racial segregation in schools, presumably the Due Process Clause in the Fourteenth Amendment would be as well. What then is the purpose of the Equal Protection Clause, why was it included, and why did the Court rely on it in *Brown*?

The equality norm might be traced to the Declaration of Independence, which declared the "self-evident truth" that "all men are created equal." Perhaps that ideal was made applicable against the federal government by the Ninth Amendment, which made clear that the enumeration of certain constitutional rights was not meant to negate the existence of others.[186] Yet the equality norm which the Declaration announced did not render slavery unconstitutional. And if it was sufficient to preclude the federal government from operating segregated schools why was it also not robust enough to restrain the states without the need to ratify the Equal Protection Clause?

Alternatively, one might identify precedent as applying such a requirement on the federal government. Indeed, in *Korematsu v. United States*,[187] ten years before *Brown*, the Court applied an equal protection norm against the federal government. Perhaps *Korematsu* provided a precedential argument that the norm limited Congress. Indeed, in *Bolling* the Court did cite *Korematsu* regarding the need to scrutinize racial classifications closely. It might have

182. *Bolling*, 347 U.S. at 500.

183. Interestingly, Justice Frankfurter initially found it easier to resolve *Bolling* than *Brown*. When the conference discussed the cases in December, 1952, he opined that allowing school segregation in the nation's capital was "intolerable." DICKSON, *supra* note 13, at 649–51.

184. KLARMAN, *supra* note 140, at 295.

185. BORK, *supra* note 141, at 83.

186. *See, e.g.*, Ely, *in* BALKIN, *supra* note 165, at 141 n.10.

187. 323 U.S. 214 (1944).

cited it for the related point that the Due Process Clause of the Fifth Amendment restricted Congress's ability to discriminate based on race. Of course, *Korematsu* ultimately found that the military internment of Japanese American citizens did not violate the constitutional norm at issue. It has become a much maligned decision. Should such an important point rest simply on the implicit reliance on such a disfavored case?

Although the Equal Protection Clause only applies to states, the Citizenship Clause in the Fourteenth Amendment is not so limited. Rather, it established a national standard of citizenship, making all persons born or naturalized in the United States citizens of the United States and their states of residence. The Citizenship Clause might provide a basis for concluding that the federal government would not treat some as lesser citizens than others.[188] Yet the same argument would also seem to apply to the states, too. If so, what was the purpose of the Equal Protection Clause? Moreover, Professor Frank Michelman has argued that the Citizenship Clause may have given African-Americans rights previously enjoyed by whites, but it does not describe what rights those were.[189] If the Constitution did not previously outlaw racial separation, the Citizenship Clause could not convey such a right.[190]

IV. DID *BROWN* MAKE A DIFFERENCE?

Brown has achieved iconic status in American constitutional law. It "may be the most important political, social, and legal event in America's twentieth-century history,"[191] wrote J. Harvie Wilkinson, III in 1979. Professor (now Judge) Wilkinson's statement regarding *Brown*'s significance can easily be multiplied many times over. The sheer number of celebrations of *Brown* to mark its fiftieth anniversary (not to mention those that marked May 17 on prior five-year intervals) testify to the special place it holds. To many, *Brown* confirmed that an activist Court could overcome political inertia to achieve justice and social change.[192] But how much difference did *Brown* really make? Was *Brown*'s success (or failure) due to the nature of the problem it addressed or the manner in which it dealt with it? Or does the verdict on *Brown* reveal strengths (or weaknesses) of the judiciary?

Some scholars have argued that *Brown* made little difference in transforming race relations during the mid-twentieth century. "The history of the campaign against racial injustice since 1954, when the Supreme Court

188. *See, e.g.*, Drew S. Days, III, *Concurring*, *in* BALKIN, *supra* note 6, at 97–98; Bruce Ackermann, *Concurring*, in BALKIN, *supra* note 6, at 114–16.

189. Frank I. Michelman, *Concurring in Part and Concurring in the Judgment*, *in* BALKIN, *supra* note 6, at 129–30.

190. *Id.*

191. WILKINSON, *supra* note 11, at 6.

192. *See, e.g.*, Balkin, *in* BALKIN, *supra* note 6, at 16–17.

decided *Brown v. Board of Education*, is a history in large part of failure,"[193] wrote Ronald Dworkin in 1985.

Because *Brown* addressed segregation in public education, the public schools are one place to look to measure its impact. In the 1954-55 school year, only .001% of Southern black children went to public schools with whites.[194] Nine years later, the figure had risen to only 1.2%[195] Most of the increase occurred in Texas and Tennessee.[196] More than 2000 school districts still maintained racially segregated schools a decade after *Brown*.[197]

As Professor Gerald Rosenberg has argued, in the South "[f]or ten years, 1954–64, virtually nothing happened."[198] The picture changed during the next decade. Whereas 1.2% of southern black children attended integrated public schools in 1963–64, 91.3% did in 1972–73.[199]

What accounts for the difference? In 1964 Congress passed the Civil Rights Act of 1964.[200] It empowered the Attorney General to initiate school desegregation suits on behalf of individuals, a significant development since plaintiffs often suffered severe personal and economic injury. Title VI empowered the federal government to withdraw federal funds from public schools that practiced racial discrimination. The Elementary and Secondary Education Act of 1965[201] appropriated substantial sums of federal assistance to low income school districts. Federal regulations that HEW promulgated to supplement Title VI required schools desegregate to preserve their funding.[202]

This data suggests several lessons. First, school desegregation did not occur simply because the Court rejected separate but equal. By 1966–67, less than 17% of Southern blacks attended integrated schools.[203] Put differently, most Southern children who entered school the fall after the Court decided *Brown* experienced segregated education through graduation.

193. RONALD DWORKIN, A MATTER OF PRINCIPLE 298 (1985).

194. GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING SOCIAL CHANGE 50 (1991).

195. *Id*.

196. *Id*.

197. *Civil Rights, Hearings Before Subcommittee No. 5 of the House Comm. on the Judiciary*, 88th Cong. 1st Sess. 1509 (1963) (testimony of Anthony J. Celebrezze, Sec'y of Health, Educ., and Welfare).

198. ROSENBERG, *supra* note 194 at 52 (emphasis omitted). Rosenberg notes that in the border states the picture was quite different. Blacks attending integrated public schools rose 15.2% from 1956 to 1964 and 28.1% excluding the District of Columbia. *Id*. at 50.

199. *Id*. at 52.

200. Pub. L. No. 88-352, 78 Stat. 241 (1964).

201. Pub. L. No. 89-10, 79 Stat. 27 (1965).

202. *See generally* ROSENBERG, *supra* note 194 at 52–54.

203. *Id*. at 50.

Second, change occurred only after the political branches became engaged. During the 1950s, President Dwight Eisenhower did little to support *Brown*.[204] At his press conference two days after the decision, he declined to give the South guidance and simply stated that "[t]he Supreme Court has spoken and I am sworn to uphold the constitutional processes in this country; and I will obey."[205] Eisenhower's endorsement of the decision would have lent it the imprimatur of his prestige as President and as a national hero. As Civil Rights Leader Roy Wilkins put it, if Eisenhower "'had fought World War II the way he fought for civil rights, we would all be speaking German today.'"[206] Although President John F. Kennedy supported *Brown* he did not become fully engaged until June of 1963.[207] In the aftermath of Birmingham, when police turned fire hoses and dogs on peaceful black demonstrators, Kennedy gave an eloquent televised address supporting integration and introduced Civil Rights legislation.[208] Congress took no meaningful action to support *Brown* until 1964 when it passed the Civil Rights Act.[209] In the 1950s, Congress was stymied by Southern resistance. In March of 1956, some 100 Senators and Representatives signed the Southern Manifesto attacking *Brown* as lawless and pledging to take action to achieve its reversal and to prevent its implementation.[210] *Brown*, Professor Rosenberg argues, suggests the limited impact courts can have in transforming society.[211]

Finally, after *Brown* the Court itself retreated. Its decision the following year in *Brown II* called for the defendant school boards to "make a prompt and reasonable start toward full compliance" and called on District Courts to move with "all deliberate speed."[212] The adjectives suggested integration need not occur immediately. Many communities responded with resistance.[213] As Richard Kluger observed, "[t]hroughout the balance of the Fifties, the South interpreted 'all deliberate speed' to mean 'any conceivable delay,' and desegregation was far more a figment in the mind of the Supreme Court than a

204. *See, e.g.*, *id*. at 75 ("[Eisenhower] steadfastly refused to commit his immense popularity or prestige in support of desegregation in general or *Brown* in particular."); KLUGER, *supra* note 11 at 755.

205. The President's News Conference of May 19, 1954, 1954 PUB. PAPERS 489, 491 (May 19, 1954).

206. *Quoted in* ROSENBERG, *supra* note 194 at 76.

207. *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 178–82 (2000).

208. Radio and Television Report to the American People on Civil Rights, 1963 PUB. PAPERS 468 (June 11, 1963).

209. *See* ROSENBERG, *supra* note 194 at 46–47.

210. 102 CONG. REC. 4515 (1956).

211. ROSENBERG, *supra* note 194 at 70–71.

212. Brown v. Bd. of Educ., 349 U.S. 294, 300, 301 (1955).

213. *See, e.g.*, Green v. County Sch. Bd., 391 U.S. 430, 432–33 (1968).

prominent new feature on the American social landscape."[214] Although the Court in *Cooper v. Aaron* held that violence and disorder was not a basis to defer enforcement of *Brown*,[215] the Court did not decide another school desegregation case until 1963. Only after the political branches became involved in the mid-1960s, did the Court aggressively return to the fray. In *Green v. County School Board* it ordered school boards to immediately offer realistic plans to completely remove state imposed segregation "root and branch."[216] The following year, the Court directed that "the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."[217]

Other scholars have joined Professor Rosenberg in challenging the heroic account of *Brown*. Professor Michael Klarman argues that *Brown*'s direct effects were limited. Outside of the South, some desegregation began before *Brown*. In the South, change did not begin for a decade. After *Brown*, Southern politics polarized, becoming more racial. Southern school boards became intransigent. Desegregation depended on plaintiffs initiating lawsuits, and few were willing or financially able to assume that role with the attendant economic and personal risks. When desegregation occurred, it was due to the Civil Rights Movement and the 1964 Act, not to *Brown*. Professor Klarman suggests that *Brown*'s most significant effect was an indirect one. The decision radicalized southern politics. The violent and extremist nature of white supremacy came to the surface in response to the decision. Its exposure transformed national opinion on race, making possible the political support for the 1964 Act.[218]

Some suggest that in *Brown* a Northern majority imposed its will on a Southern minority.[219] Does the presence of three Southerners on the Court—Hugo Black, Tom Clark and Stanley Reed—soften this account? Moreover, *Brown* included cases in Kansas and Delaware (not to mention the District of Columbia), hardly the deep South. Yet notwithstanding its words,[220] the Court seemed to conceive of the problem as an issue for the South, where segregation was overt, rather than for the rest of the country where it stemmed in part from residential patterns.

214. RICHARD KLUGER, SIMPLE JUSTICE 752–53 (1975).

215. 358 U.S. 1 (1958).

216. 391 U.S. at 437–38.

217. Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969) (citations omitted).

218. KLARMAN, *supra* note 140 at 344–442.

219. *See, e.g.*, TUSHNET, *supra* note 142 at 145; POWE, *supra* note 5 at 23.

220. Brown v. Bd. of Educ., 347 U.S. 483, 491 n.6 ("It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.").

Alternatively, Professor Derrick Bell argues that *Brown* reflects his "interest-convergence" thesis.[221] Professor Bell does not see *Brown* as a moment when America came to grips with its racist history. In essence, he argued that the Court protects the interests of African-Americans when their interests converge with those of whites,[222] particularly elite whites. In part, Professor Bell bases his theory on the argument that in the 1950s school segregation had become an embarrassment to America in prosecuting the Cold War.[223] The Soviet Union was able to exploit America's racial problems with third-world countries. Professor Mary Dudziak has also argued that the "Cold War imperative" contributed to *Brown*.[224] Professor Dudziak notes that "promot[ing] democracy among peoples of color around the world was seriously hampered by continuing racial injustice at home."[225] Indeed, NAACP and government briefs in *Brown* argued that segregation jeopardized America's international interests.[226] Surely America's racial problems did provide the Soviets an easy way to score propaganda points in the third world. Yet interestingly, this Cold War imperative did not move President Eisenhower, who had a primary constitutional responsibility in the Cold War, to champion *Brown*. If *Brown* had much significance in the success of the Cold War, the paramount issue of the day, why was Eisenhower not a more forceful advocate for integration? Nor did the Court argue in *Brown* that desegregation would help combat communism, an argument that might have carried weight in the South.

Did the Court miss the mark because it misconstrued the problems under attack in *Brown*? Robert L. Carter has stated that in 1954 he, like others, "saw the dual school system as the key barrier to equal educational opportunity for African-Americans."[227] Looking back forty years later, he thought his faith "naive."[228] Indeed, by 1968, he already had come to conceive the problem differently. "Few in the country, black or white, understood in 1954 that racial segregation was merely a symptom, not the disease; that the real sickness is that our society in all of its manifestations is geared to the maintenance of white superiority."[229]

221. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

222. *Id*. at 518; *see also* DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 4 (2004) [hereinafter SILENT COVENANTS].

223. SILENT COVENANTS, *supra* note 222 at 60.

224. *See* DUDZIAK, *supra* note 207.

225. *Id*. at 12.

226. *Id.* at 99.

227. Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS U. L.J. 885, 885 (1993).

228. *Id*.

229. Carter, *supra* note 90 at 56.

Professor Mark Tushnet has suggested that we should distinguish between the short-term and long-term effects of the Court's decisions. *Brown* "was so widely disregarded in the deep South" that it was a "long-term irrelevancy" (measured over its first decade).[230] If the chronological measure is stretched to a generation, *Brown* successfully "eliminat[ed] legally sanctioned explicit racial school segregation."[231] The findings of Professors Rosenberg and Klarman show that congressional and executive action was needed to integrate southern schools.

Notwithstanding its limitations, *Brown* represented a constitutional principle against discrimination against blacks that was applied in other contexts. It was, in Robert L. Carter's words, "a revolutionary statement of race relations law."[232] During the debates over the Civil Rights Act of 1964, for instance, many legislators invoked *Brown* as the law of the land. The task of proponents of the Act would have been complicated had the Court reaffirmed *Plessy v. Ferguson*. Clearly, as Professor Tushnet argues, there was value in "the public assertion by the nation's highest court of a principle, arguably with large-scale though long-term effects on public opinion about race."[233] It signaled to the nation "that one of its major institutions took the claims of African-Americans to equal treatment seriously."[234] As Professor Bickel put it, "announcement of the principle was in itself an action of great moment, considering the source from which it came."[235] *Brown* no doubt played an important part in winning acceptance by whites of the principles for which it stood. As the ruling of a unanimous Supreme Court, it represented the first time a branch of our federal government embraced the general principles that states must treat blacks equally.[236] *Brown*, as Richard Kluger put it, "represented nothing short of a reconsecration of American ideals."[237]

Finally, outside the South, *Brown* did have some positive short-term effects on schools. The decision triggered much school desegregation in border states and in the North.[238]

230. TUSHNET, *supra* note 142 at 135–36.

231. *Id*. at 136.

232. Carter, *supra* note 90 at 237.

233. TUSHNET, *supra* note 142 at 136.

234. *Id*.

235. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 245 (1962).

236. *See* Mark Tushnet, *The Significance of* Brown v. Board of Education, 80 VA. L. REV. 173, 177 n.16 (1994).

237. KLUGER, *supra* note 11 at 713.

238. ROSENBERG, *supra* note 194 at 50.

V. *BROWN* AND THE NATURE OF CONSTITUTIONAL LAW

Brown made the Equal Protection Clause an instrument to protect minorities. As late as 1927 Justice Holmes had derided the Clause as the "usual last resort of constitutional arguments."[239]

Although the Court occasionally invoked the Clause[240] prior to *Brown* it "was not a strong element in the Supreme Court's arsenal."[241] *Brown* changed that. In a series of cases, after *Brown*, the Court used the Equal Protection Clause to strike down segregation in public auditoriums,[242] beaches,[243] golf courses,[244] sporting events,[245] public restaurants,[246] buses,[247] jails,[248] and courtrooms.[249] So, too, the Court ultimately used the Clause to strike down antimiscegenation statutes.[250]

The reinvigoration of the Equal Protection Clause was not limited to racial discrimination. *Brown* served as a model for other groups to claim protected status. Women,[251] aliens,[252] the mentally retarded,[253] children born out of wedlock,[254] and gays and lesbians[255] used *Brown* as a paradigm in claiming protected status under the Equal Protection Clause.

Brown also inaugurated a proliferation of "rights consciousness" among Americans.[256] Constitutional rights were not asserted simply by various groups claiming protected status under the Equal Protection Clause. Others made novel claims regarding rights they viewed as fundamental. "*Brown* was the first case in which the Supreme Court struck down numerous laws of many states in order to protect individual civil, as distinguished from economic,

239. Buck v. Bell, 274 U.S. 200, 208 (1927).

240. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886).

241. PHILIP B. KURLAND, POLITICS THE CONSTITUTION AND THE WARREN COURT 110 (1970).

242. Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954).

243. Mayor & City Council of Baltimore v. Dawson, 350 U.S. 877 (1955).

244. Holmes v. City of Atlanta, 350 U.S. 879 (1955).

245. State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959).

246. Turner v. City of Memphis, 369 U.S. 350 (1962).

247. Gayle v. Browder, 352 U.S. 903 (1956) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896)).

248. Lee v. Washington, 390 U.S. 333 (1968).

249. Johnson v. Virginia, 373 U.S. 61 (1963).

250. Loving v. Virginia, 388 U.S. 1 (1967).

251. *See, e.g.*, Frontiero v. Richardson, 44 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

252. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973).

253. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

254. Trimble v. Gordon, 430 U.S. 762 (1977).

255. Romer v. Evans, 517 U.S. 620 (1996).

256. Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867 (1991); *see also* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 7 (1970) ("*Brown* . . . was the beginning.").

rights,"[257] wrote Professor William E. Nelson. Due to *Brown*, Professor Nelson wrote, "Americans of all groups . . . have grown to understand that they have rights and that those rights can be enforced through law."[258] As such, *Brown* became the model that other disadvantaged groups used to assert their own rights. Women, gays, even whites used *Brown* to justify their own claims for better constitutional treatment.

The proliferation of constitutional rights relates to another change identified with *Brown*—the enhanced role of the Supreme Court. *Brown* put the Court in the midst of the nation's most pressing domestic problems. Whereas the post New Deal Court had essentially given Congress a wide berth regarding economic legislation, *Brown* marked the beginning of the Court's embrace of the logic of Justice Stone's famous *Carolene Products* footnote four. Yet the Court did not limit itself to protecting discrete and insular minorities and keeping the democratic processes open as Justice Stone's footnote prescribed. It also assumed a broader, more ambitious role in articulating and defining constitutional norms in areas like criminal justice and privacy.

The Court's work impacted the shape and operation of American government at the national and local level. The new constitutional norms that the post-*Brown* Court articulated constrained federal and state political institutions. Legislative and executive bodies needed to conform their conduct to accommodate the Court's constitutional interpretations. Moreover, the Court's intervention resulted in part from Congress's failure to act. Section 5 of the Fourteenth Amendment empowered Congress to address school segregation. As Justice Jackson put it during oral argument, "'I suppose that realistically the reason this case is here is that action couldn't be obtained from Congress.'"[259]

In a recent article, Professor Nelson also claims that *Brown* changed the way in which Americans think about law. In essence, prior to *Brown* "legal thinkers tended to see law as a caboose and the judge as someone who tidied up and ensured that law was following in the direction society was leading."[260] After *Brown* "we now tend to look upon law more as the engine that will dictate the course society will take."[261] The old approach was "progressive, although never radical."[262] The new orientation could accommodate radical but also reactionary dispositions.[263]

257. William E. Nelson, Brown v. Board of Education *and the Jurisprudence of Legal Realism*, 48 ST. LOUIS U. L.J. 795, 797 (2004).

258. *Id*.

259. *Quoted in* BICKEL, *supra* note 256, at 7.

260. Nelson, *supra* note 257, at 799.

261. *Id*.

262. *Id*. at 832.

263. *Id*.

VI. WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID

Much of the controversy regarding Brown relates to what it said or failed to say rather than to the result it reached. Put differently, most cannot imagine living in a society in which *Brown* was not law. But many would have written the opinion differently than the Court did. As such, the case provides an opportunity for students to consider how the opinion should have been crafted. Of course, this consideration turns on legal principles as well as political realities. The Court needed to anticipate the likely response to its decision and opinion and calculate how to achieve a favorable outcome. Here, of course, hindsight confers on modern would-be jurists a perspective and advantage Chief Justice Warren lacked.

Some praised Chief Justice Warren's opinion. Professor Edmond Cahn thought his style "most commendably bland."[264] Warren was very wise to avoid the "temptation—to indulge in democratic rhetoric" and to subordinate "getting into the anthologies [to] presenting the country with a model of rational calm."[265] Others suggest the Court should have elevated its rhetoric. J. Harvie Wilkinson, III observes that "the Court refused to lift the nation to the magnificence of the principle it . . . redeemed. . . . In short, the opinion failed to rouse or inspire; it simply existed."[266]

The Court, in *Brown*, sought to "persuad[e] the persuadable southerner."[267] To pursue this objective, Chief Justice Warren wrote a short opinion in which he consciously pulled his punches to avoid accusatory rhetoric that might inflame the South. Yet in this respect, Professor Powe argues *Brown* was "a failure."[268] The opinion could only persuade those capable of persuasion if it argued that desegregation would help, not harm, them. Professor Powe suggests that by relying on psychology the Court sacrificed its claim to expertise; after all, the justices were presumably constitutional, not psychological, wizards.[269] Moreover, he suggests that the Court missed a persuasive argument regarding the general intent of the Fourteenth Amendment.[270] Its framers favored equality but also assumed that segregation was consistent with it. Yet American history had proved that separate but equal was an oxymoron regarding race. The overriding purpose of the clause should dominate the specific, but inconsistent, preferences of some framers.[271]

264. Cahn, *supra* note 158, at 151.
265. *Id*.
266. WILKINSON, *supra* note 11, at 29.
267. POWE, *supra* note 5, at 39.
268. *Id*. at 40.
269. *Id*.
270. *Id.* at 40–41.
271. *Id*.

Professor (now Judge) Louis Pollak provided an alternative draft of the Court's opinion on its fifth anniversary. Professor Pollak recognized that *Plessy* applied to schools but thought the Court was obligated to reexamine "grave constitutional questions in a proper case" especially "when the constitutional provisions at issue are themselves of an evolutionary generality."[272] The Court need not engage psychological offerings because legislation "curtail[ing] the civil rights of a single racial group are immediately suspect."[273] Jim Crow laws degraded blacks and that was their function. "Such governmental denigration is a form of injury the Constitution recognizes and will protect against."[274]

Professor Jack Balkin recently invited eight leading constitutional law scholars to join him on a mock court to rewrite *Brown*. Whereas Chief Justice Earl Warren's eight colleagues silently joined his opinion, Professor Balkin's opinion was joined only by his two colleagues at Yale Law School, Professor Bruce Ackerman and Professor Drew Days, III. Five others concurred in the judgment but for different reasons.

Should *Brown*, for instance, have overruled *Plessy v. Ferguson* rather than simply concluding that separate but equal had no place in public education? Whereas Professor Days argues that *Plessy* should have been overruled outright,[275] Professor Cass Sunstein's adherence to judicial minimalism leads him to follow Chief Justice Warren's course in limiting his rejection of the doctrine to public education.[276] Professor Derrick Bell, however, argued that overruling *Plessy* would be a charade. Whites would continue to resist equality for blacks. Better to preserve *Plessy* but press for truly equal schools.[277]

Chief Justice Warren tried to avoid condemning the South in his opinion. Rather than documenting the inhumane mistreatment of African-Americans, he argued simply that segregated education based on race "generates a feeling of inferiority" in black children which compromised their ability to learn.[278] The Court, in its famous footnote eleven, relied on Dr. Kenneth C. Clark's doll study and Gunner Myrdal's book, *The American Dilemma*. Yet Dr. Clark's work was controversial—although Southern black children preferred a white to a black doll, so, too, did black children in the North where de jure school

272. Pollak, *supra* note 170, at 25–26.

273. *Id*. at 27.

274. *Id*. at 28.

275. *See* Days, *in* BALKIN, *supra* note 6, at 95–96 ("There is, in my estimation, no justification for judicial timidity in this regard. For we know as men and women that until the *Plessy* doctrine is eliminated 'root and branch,' true progress in achieving racial equality will be significantly frustrated and retarded.").

276. Cass R. Sunstein, *Concurring in the judgment*, *in* BALKIN, *supra* note 6, at 181.

277. Derrick A. Bell, *Dissenting*, *in* BALKIN, *supra* note 6, at 198–99; *see also* SILENT COVENANTS, *supra* note 222, at 21–28.

278. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1953).

segregation was not prevalent. Should the Court have relied on social science showing psychological harm? Many believe that the reliance on psychological studies was a mistake.[279] The doll study used a small sample and the data did not uniformly point to segregation as the source of psychological harm. Moreover, if equal protection turns on psychological proof, segregation could be reinstituted if such proof were absent.[280] Further, Southerners were able to turn *Brown*'s wording around and claim that they were victims suffering psychological harm from the Court's interference with their traditional way of life.[281] Justice Clarence Thomas viewed the psychological study as irrelevant. He wrote:

> Segregation was not unconstitutional because it might have caused psychological feelings of inferiority. Public school systems that separated blacks and provided them with superior educational resources—making blacks "feel" superior to whites sent to lesser schools—would violate the Fourteenth Amendment, whether or not the white students felt stigmatized, just as do school systems in which the positions of the races are reversed. Psychological injury or benefit is irrelevant to the question whether state actors have engaged in intentional discrimination—the critical inquiry for ascertaining violations of the Equal Protection Clause. The judiciary is fully competent to make independent determinations concerning the existence of state action without the unnecessary and misleading assistance of the social sciences.[282]

Alternatively, should *Brown* have emphasized legal principles? Professor Days, for instance, draws from *Hirabayashi v. United States*[283] the principle that racial or ancestral distinctions between citizens "'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'"[284] Judge Pollak invoked a similar principle in his 1959 article, condemning governmental action abridging the civil rights of one racial group.[285] Discussion earlier suggests some alternative lines which the Court might have pursued.

VII. SUPREME COURT POLITICS

Brown provides a fascinating window into the decision-making process of the Court, an institution whose deliberations generally remain inscrutable to all

279. *See, e.g.*, Mark G.Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57, 70 (1978); Cahn, *supra* note 158, at 159–68; POWE, *supra* note 5, at 41–44.

280. *Cf.* Cahn, *supra* note 158, at 167–68.

281. *See generally* Rachel E. Goldstein, *The Strife for Inequality: Victimization and* Brown v. Board of Education (unpublished paper, on file with Princeton University).

282. Missouri v. Jenkins, 515 U.S. 70, 121 (Thomas, J., concurring).

283. 320 U.S. 81 (1943).

284. Days, *in* BALKIN, *supra* note 6, at 97 (quoting *Hirabayashi*, 320 U.S. at 100).

285. *See generally* Pollak, supra note 170.

but Court insiders. Several excellent accounts shed light on how the Court reached its unanimous result.[286] The episode provides a case study in judicial leadership as exemplified by Chief Justice Warren. It also illustrates the way in which justices must accommodate their colleagues' dispositions to serve institutional goals.

The Court was, of course, split when it first heard the cases in 1952. Some estimate that four or perhaps five justices would have voted to sustain *Plessy*. Klarman concludes that four justices—Black, Douglas, Burton and Minton—were prepared to vote that segregation was unconstitutional in 1952, that Vinson and Reed were disposed to affirm *Plessy*, and the others were uncertain.[287] His analysis is generally consistent with Justice Douglas' memorandum of May 17, 1954.[288] Justice Frankfurter thought a vote in December 1952 would have invalidated segregation, 5-4 (with Frankfurter joining the majority) but in several opinions.[289]

Chief Justice Fred Vinson had little influence with his colleagues; Bernard Schwartz has written that when *Brown* came to the Court, "the Brethren were openly to display their contempt for their Chief."[290] As a stalling tactic, Justice Felix Frankfurter persuaded his colleagues to direct the parties to file additional briefs, on the intent of the framers of the Fourteenth Amendment and regarding remedial matters. Yet more argument would not necessarily resolve the split on the Court. And some, like Justice Frankfurter, thought a unanimous decision necessary to mitigate Southern resistance. On September 8, 1953, fate intervened. Vinson died. Justice Frankfurter told an associate, "'This is the first indication I have ever had that there is a God.'"[291]

Eisenhower's appointment of Chief Justice Earl Warren offered an opportunity for the Court to resolve *Brown*. Eisenhower certainly did not have this result in mind. He did not apply a litmus test for appointment to the Court. Indeed, he did nothing to advance the plaintiffs' case. While *Brown* was before the Court, Eisenhower invited Warren to a White House dinner and seated him next to John W. Davis, the attorney for South Carolina. Eisenhower praised Davis effusively and told Warren: "'These [Southerners] are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big black bucks.'"[292]

286. *See, e.g.*, Tushnet & Lezin, *supra* note 256, at 1867; Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1 (1979); KLARMAN, *supra* note 140, at 301–303; KLUGER, *supra* note 11, at 585–619, 660–702. *See generally* DICKSON, *supra* note 13, at 644–71.

287. KLARMAN, *supra* note 140, at 298.

288. DICKSON, *supra* note 13, at 660.

289. KLARMAN, *supra* note 140, at 301.

290. SCHWARTZ, *supra* note 40, at 73.

291. KLUGER, *supra* note 11, at 659; SCHWARTZ, *supra* note 40, at 72.

292. SCHWARTZ, *supra* note 40, at 112–13.

Warren brought at least three resources to his job which helped move *Brown* to a unanimous decision. First, he lacked the baggage that compromised his predecessor's ability to lead the Court.[293] On the contrary, many on the Court were predisposed toward Warren.[294] In the early days of his tenure, all of his colleagues sought to win his favor. Second, he had enormous leadership skills. Finally, Chief Justice Warren was to become a strong advocate of the position the Court adopted in *Brown*.

Chief Justice Warren's statement at the December 12, 1953 conference struck two notes that resonated with the Brethren and set the tone for the course followed. First, he cast *Brown* as a moral issue that "went straight to the ultimate human values involved."[295] *Plessy*'s separate but equal doctrine, said Warren, rested "upon the basic premise that the Negro race is inferior,"[296] a notion Warren rejected. As such, Warren moved the discussion from conventional legal arguments, where plaintiffs' case was more challenging, to a moral plane where it was compelling. Second, Chief Justice Warren indicated a sensitivity to Southern sensibilities. He recognized that "the time element" was important, that Court action should be done "in a tolerant way," a sentiment he repeated.[297]

Chief Justice Warren's statement eliminated any doubt regarding the outcome. His made five clear votes to overturn segregation. Others on the Court felt pressure to make the decision unanimous to help avert resistance. Moreover, Professor Klarman suggests that Warren's stance reduced the bargaining power of Justices Frankfurter and Jackson and may have induced them to subordinate their legal doubts to their political and moral preferences.[298] By the end of the conference, Professor Schwartz concludes plaintiffs had at least six votes (Warren, Black, Frankfurter, Douglas, Burton and Minton) and two others (Jackson and Clark) were within reach depending on the opinion written.[299] Warren regularly spoke with his colleagues and frequently lunched with the lone holdout, Justice Stanley Reed, and those most likely to influence him. Although Reed initially planned to dissent, Warren apparently persuaded him over time that a dissent would not be "the best thing for the [C]ountry."[300] The Court anticipated a hostile response from some circles and thought a unanimous result would mitigate that reaction. "It was necessary, therefore, if ever it had been, to exert to the utmost the prestige, the oracular authority of the institution," wrote Alexander Bickel, law clerk to

293. *Id*. at 72–75.
294. *See* KLUGER, *supra* note 11, at 660–61.
295. SCHWARTZ, *supra* note 40, at 87.
296. DICKSON, *supra* note 13, at 654.
297. SCHWARTZ, *supra* note 40, at 87–89.
298. KLARMAN, *supra* note 140, at 302–03.
299. SCHWARTZ, *supra* note 40, at 89.
300. *Id.* at 94.

Justice Frankfurter during the 1953–54 term.[301] "To this end, it was desirable that the Court speak unanimously, with one voice from the deep."[302]

The opinion reflected some of these strategic decisions. Warren assigned the opinion to himself, a choice which signified the importance of the case and allowed him to control its content. The opinion was unusually short and written in an accessible style. It avoided condemnatory language, focused narrowly on education, and provided little in the way of rationale. These features probably helped secure the unanimous result behind a single opinion. Although Justice Jackson considered writing a concurrence, a March 30, 1954, heart attack hospitalized him.

VIII. THE REMEDY

In virtually all cases, the Supreme Court announces a remedy in the same opinion that addresses the merits. *Brown* was different. The Court deferred a decree. The "variety of local conditions" made formulating decrees "problems of considerable complexity."[303] The Court instead asked the parties to present yet more argument on Questions 4 and 5[304] from its order of June 8, 1953.[305] Moreover, the Court invited the Attorney General to participate and allowed Amicus briefs by attorneys general from states allowing or requiring segregated schools.[306] The Court's ultimate decree did not issue for more than a year, a delay due in part to the death of Justice Jackson and appointment of Judge John Harlan to succeed him.

301. Bickel, *supra* note 172 at 2.

302. *Id.*

303. 347 U.S. at 495.

304. *Id*. at 495–96. The questions read:

> 4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?
>
> 5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b), (a) should this Court formulate detailed decrees in these cases; (b) if so, what specific issues should the decrees reach; c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees; (d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

Id. at 496 n.13.

305. 345 U.S. 972 (1953).

306. *Brown*, 347 U.S. at 495–96.

Just as *Brown* was a major victory for the plaintiffs, *Brown II* was a disappointment. The Court had agreed on two values—school segregation was unjustifiable but it must be implemented with tolerance for Southern sensibilities. *Brown I* had vindicated the first principle to avoid harming black children. Now *Brown II* demonstrated the Court's sensitivity to the South.

Brown II turned on three basic components. First, the Court recognized that "a variety of local problems" made school desegregation impervious to a single national remedy. The cases were accordingly remanded to local federal and state judges to implement desegregation.

Second, the courts were to be "guided by equitable principles."[307] The hallmark of equity was "practical flexibility" and balancing "public and private needs."[308] As such, the lower courts had a good deal of discretion and could consider, among other things, local "obstacles" to integration. Finally, desegregation need not occur at once. Rather, defendants were to "make a prompt and reasonable start" and it was to proceed with "all deliberate speed."[309]

Predictably, the Southern states had argued for delay. At oral argument they argued that school desegregation would lead to interracial marriage, sexual promiscuity and the spread of venereal disease from the black to the white population. They argued black children were intellectually inferior. One attorney suggested to Chief Justice Warren that the South would not comply with a Court decree. Citing their shattered state of mind, they proposed a veritable obstacle course of hearings at which those seeking desegregation would bear the burden of proof. The NAACP proposed that the process begin in fall 1955 and be completed a year later. The Government proposed an intermediate position. Citing the Court's reliance on psychological harm to black children, the Government argued that "[i]n similar fashion, psychological and emotional factors are involved."[310]

The remedy took the pressure off the South. Gradualism, not immediacy was the Court's timetable for desegregation. "All deliberate speed" was an oxymoron that signaled to the South that it could take its time. It did.

How might one account for the timidity of *Brown II* after the boldness of *Brown I*? To some extent the two were a package. The justices agreed to rule for the plaintiffs regarding the constitutional norm with the understanding that the remedy would be more modest. In some respects, the result reflected a familiar legal strategy—balance a victory on liability with a reduced remedy. The justices thought unanimity was important, yet part of its cost was a tolerant remedy.

307. Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955).

308. *Id.*

309. *Id.* at 300–01.

310. KLUGER, *supra* note 11, at 726–29.

The Court might also have been wary of issuing an order it could not enforce. The justices, like the lawyers, had studied the familiar account of *Marbury* in which Chief Justice Marshall avoided issuing an order to Secretary of State James Madison that he could not enforce. The Justice Department recommended a gradual approach, and President Eisenhower showed no disposition to crusade for school desegregation.

Brown I had met some Southern resistance. The justices no doubt feared violence would greet immediate desegregation. They may also have thought they could appease moderate Southerners with a more measured approach.[311]

Could the Court have followed a different course? Southern resistance was probably inevitable. Justice Black had favored limiting the decree to the named plaintiffs only, not classes of students. Yet he predicted that Southerners would "fight" and that there would "be a deliberate effort to circumvent the decree."[312] Although Professor Klarman regards *Brown* as "misguided," he argues that the justices should not be accused of calculating foolishly.[313] "They operated without the aid of historical hindsight, and their prediction that conciliation on their part would strengthen [S]outhern moderates and encourage compliance was plausible."[314]

Similarly, Judge Wilkinson argues that "[i]t was not hesitancy on the part of the Supreme Court that amplified the volume of [S]outhern protest in the years after *Brown*. The impulse of obstruction was too indigenous, too deeply embedded politically, historically, socially, psychologically, economically, sexually, and in every other way."[315] "Deliberate speed," Wilkinson argued, "tried to balance [in reasonable fashion] "the historical realities, to redeem the injustices of history without reopening its wounds."[316]

The Court did not show continuing leadership regarding school desegregation in the years immediately following *Brown*. By the same token, it had little power to order the South, and the President showed little disposition to help. A decade after *Brown* almost nothing had changed regarding desegregation of Southern schools. Black children entered segregated Southern public schools in 1955 and were still attending segregated schools a decade later. During this time, the Court largely absented itself from school desegregation cases. The Court assumed a more active role in the late 1960s. The Civil Rights Act of 1964 and subsequent legislation provided the Executive Branch with tools to persuade many districts to integrate. The Court ordered the time for deliberation finished and approved more aggressive

311. *See generally* KLARMAN, *supra* note 140, at 314 –16.
312. DICKSON, *supra* note 13, at 665.
313. KLARMAN, *supra* note 140, at 320.
314. *Id*. at 320.
315. WILKINSON, *supra* note 11, at 74.
316. *Id*. at 77.

instruments, like busing, to achieve integration. Substantial progress was made until the courts and political leadership retreated during the latter part of the Twentieth Century. The story of those cases, and their impact, provides a related, but separate, topic for constitutional law.

IX. CONCLUSION

This Essay has suggested some of the angles that might prove fruitful in teaching *Brown*. Many streams, some suggested in passing, run through *Brown*. *Brown* is our principal case about race and education but is also a springboard to other civil rights decisions in favor of blacks and other minorities. It was a reference point for the school desegregation cases of the 1960s and the following decades and of the affirmative action cases during the last quarter century. It was the paradigm for claims of rights by other disadvantaged groups. It provides a window into federalism and separation of powers issues and shows the possibilities, and limitations, of the judiciary to effect change. It provides a vehicle to test attitudes toward constitutional interpretation. Ultimately, it is a case about our aspirations for America and the distance between our ideals and reality.