In the Names of Justices: The Enduring Irony of Brown v. Board

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When the United States' seat of government moved from New York City to Washington, no allowance had been made for housing the Supreme Court. This was hardly an oversight. Implicit in the omission was the understanding that amongst the coequal branches of government, some were more equal than others. The incident lent greater force to Alexander Hamilton's argument, put forward in the *Federalist*, that the judiciary "is beyond comparison the weakest of the three departments of power" and "will always be the least dangerous to the political rights of the Constitution."[1] For a time, Hamilton's perspicuity was borne out both in theory and practice.

That time has long since passed. Whatever may be the merits of Hamilton's argument on theoretical grounds, there is no doubt that in practice, the Court has ceased to play the passive part it had been assigned. Just how forcefully the Court's passivity and with it, its tertiary role, have been repudiated can be gleaned in the pronouncements of the modern court: "the federal judiciary is *supreme* in the exposition of the law of the Constitution;"[2] "the *ultimate* interpreter of the Constitution."[3] When one considers that these pronouncements come from the very institution that the nation's first chief justice refused to be a part of, precisely because it lacked sufficient "energy, weight and dignity,"[4] one begins to grasp the magnitude of the change. Once an office that, as Hamilton put it, enjoyed neither force nor will, but judgment only,[5] the Court has become an entity that, in the words of a current Associate Justice of the Court, can "*yield*

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1 Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1999), 78: 433.

2 *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (emphasis added).

3 *Baker v. Carr*, 369 U.S. 186, 211 (1962) (emphasis added).

4 John Jay, the nation's first chief justice, "left the bench perfectly convinced that under a system so defective [the judiciary] would not obtain the energy, weight, and dignity which are essential to its affording due support to the national government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess." John Jay to John Adams, January 2, 1801 in *The Correspondence and Public Papers of John Jay*, ed. Henry P. Johnston (New York and London: G. P. Putnam's Sons, 1893), IV: 285.

5 Hamilton, et al., *The Federalist*, 78: 433.

better law"[6] and "decide a case in a way that *radically changes* the law."[7] Either Hamilton and Jay had misunderstood the nature of judicial power or, since their day, that power has changed, not merely in degree, but in kind.

The evolution of the Court, protracted as all evolutions tend to be, has advanced precipitously of late. While John Marshall's role in defining the Court was monumental and while his celebrated dictum in *Marbury v. Madison* (1803) is adduced frequently by those who champion an activist court, judicial activism is a thoroughly modern phenomenon, one that scarcely was inchoate by the end of the nineteenth century and one that did not see its full apotheosis until the latter part of the twentieth. Indeed, in the first seventy years of this nation's history, on only two occasions did the Supreme Court see the need to strike down a federal statute (*Marbury v. Madison* (1803) and *Dred Scott v. Sanford* (1857)). In the final four decades of the nineteenth century, twenty statutes were struck down. This seemingly gross disparity would be eclipsed by the thirty statutes that were struck down in the final decade alone of the twentieth century.[8]

Judicial supremacy's incunabulum is not difficulty to descry. While the apperception of cause and effect in the social sciences may be wanting in the precision that is enjoyed in the physical sciences, the prevailing consensus on the matter leaves one rather assured in identifying the occasion. The year was 1954; the case, *Brown v. Board of Education*.

Activism alone does not account for what distinguishes the post-*Brown* Court. To be sure, the Court experienced a rather extended period of activism that began shortly before the turn of the twentieth century. During this period, the Court routinely struck down attempts to regulate economic affairs in its effort to protect and promote its understanding of *laissez faire* capitalism. But although the Court undoubtedly was active during this time, its activism remained fairly circumscribed, rarely impinging on issues that were unrelated to economics. Beginning with *Brown*, this constraint is, at least tacitly, disregarded; in time, it will be renounced unreservedly. "By the 1970's, it almost seemed as if it were difficult to find an issue in which some federal judge somewhere might not intervene to lay down 'the law.'"[9] What distinguishes the activism of the post-*Brown* Court is that seemingly no matter lies beyond the Court's purview. It is this aggrandized

[6] Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Alfred A. Knopf, 2005), 6 (emphasis added).
[7] *Id.* p. 119 (emphasis added).
[8] Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004), 213.
[9] Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (New York: Basic Books, 1986), 7.

scope of review[10] and the marginalization of the Constitution that often comes with it, that distinguishes the modern period of the Court from all earlier periods.

Arguably "the most celebrated constitutional decision of the U.S. Supreme Court,"[11] *Brown* is also one of the more problematic, precisely because it is so celebrated. A commensurately poorly reasoned decision that did not redress an odious societal ill would have been condemned to oblivion, ridicule, or, perhaps, infamy. By fighting for justice, not in the legal or constitutional sense, but in the social or political sense, the *Brown* Court inspired succeeding justices to take it upon themselves to combat the inequities and iniquities of society. Henceforth, morality not the Constitution would be their highest authority; their highest duty no longer to expound the latter, but to dispense the former. A judiciary thusly inspired is especially pernicious to a free people for the obvious reason that there is no effective limit to the court's scope of review. Wherever there are injustices to be found or, rather, perceived, there the court can claim jurisdiction. But more fundamentally, a court that metes out the moralism of its day can afford no permanence to the judgments it hands down. If evidence of this is required, one need only look to *Brown*.

No list of landmark Supreme Court cases would be complete without *Brown*. Indeed, to situate it anywhere far from the top would be injudicious. While it has been argued that

[10] "The last two decades have been a period of considerable expansion of judicial responsibility in the United States. Although the kinds of cases judges have long handled still occupy most of their time, the scope of judicial business has broadened. The result has been involvement of courts in decisions that would earlier have been unfit for adjudication. Judicial activity has extended to welfare administration, prison administration, and mental hospital administration, to education policy and unemployment policy, to road building and bridge building, to automotive safety standards, and to natural resource management.

In just the past few years, courts have struck down laws requiring a period of in-state residence as a condition of eligibility for welfare. They have invalidated presumptions of child support arising from the presence in home of a 'substitute father.' Federal district courts have laid down elaborate standards for food handling, hospital operations, recreation facilities, inmate employment and education, sanitation, and laundry, painting, lighting, plumbing, and renovation in some prisons; they have ordered other prisons closed. Courts have established equally comprehensive programs of care and treatment for the mentally ill confined in hospitals. They have ordered the equalization of school expenditures on teachers' salaries, established hearing procedures for public school discipline cases, decided that bilingual education must be provided for Mexican-American children, and suspended the use by school boards of the National Teacher Examination and of comparable tests for school supervisors. They have eliminated a high school diploma as a requirement for a fireman's job. They have enjoined the construction of roads and bridges on environmental grounds and suspended performance requirements for automobile tires and air bags. They have told Farmers Home Administration to restore a disaster loan program, the Forest Service to stop the clear cutting of timber, and the Corps of Engineers to maintain the nation's non-navigable waterways. They have been, to put it mildly, very busy, laboring in unfamiliar territory." Donald L. Horowitz, *The Courts and Social Policy* (Washington, DC: The Brookings Institution, 1977), 4-5.

[11] Michael Uhlmann "The Road not Taken: Brown v. Board of Education at 50," *Claremont Review of Books* 4, no. 3 (Summer 2004), http://www.claremont.org/writings/crb/summer2004/uhlmann.html.

its "most significant result… may have been to encourage judicial activism,"[12] it is indisputable that *Brown* impacted far more than the future trajectory of the Court. As one author stated, "*Brown* may be the most important political, social, and legal event in America's twentieth century history. Its greatness lay in the enormity of injustice it condemned, in the entrenched sentiment it challenged, in the immensity of law it created and overthrew."[13] Even those inclined to regard this statement as an overstatement should acknowledge that there is more than a modicum of truth contained therein.

However considerable its historical significance may be, one should be wary of overestimating its initial influence. The lack of both purse and sword putatively render the Court relatively impotent, leaving it largely dependent on the other branches to uphold and implement its pronouncements. Therefore, it comes as little surprise that in practical terms, the immediate impact of *Brown* was rather limited. In the decade following *Brown*, "the courts contributed virtually *nothing* to ending segregation of the public schools in the Southern states."[14] The Court played no palpable part in Little Rock in 1957 nor in the passing of the Civil Rights Act in 1964 nor the Voting Rights Act the following year. In short, "before Congress and the executive branch acted, courts had virtually no direct effect on ending discrimination in… education."[15] But while its direct effect may have been inconsequential, the Court's indirect influence very well may have been inestimable.

> Brown was the first case in which the Court clearly threw its weight against the Jim Crow system of segregation. Even if one discounts the practical impact of the Court's own efforts, Brown and its progeny were thus significant (indeed, perhaps indispensable factors) in creating the moral and political climate that produced the Civil Rights Act of 1964 or the Voting Rights Act of 1965 - two statutes which have produced undeniable real world changes."[16]

Though there was a monumental incongruity between what the Court decreed and what actually transpired, one would be hard pressed to argue that the civil rights movement did not benefit all the same. The absence of any tangible achievements resulting from the Court's inability to enforce its decision was far less inimical than the symbolic effect

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[12] Herman Belz, *A Living Constitution or Fundamental Law? American Constitutionalism in Historical Perspective* (Lanham, Maryland: Rowman & Littlefield, 1998), 9.
[13] Wilkinson, Harvie J., III, *From Brown to Alexander: The Supreme Court and School Integration, 1954–1978* (New York: Oxford University Press, 1979), 6.
[14] Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: The University of Chicago Press, 1993), 52.
[15] *Id.*, p. 70.
[16] Earl Maltz, "Brown v. Board of Education and 'Originalism'" in *Great Cases in Constitutional Law*, ed. Robert George (Princeton, NJ: Princeton University Press, 2000), 140.

that would have resulted from a different ruling, namely one that found *de jure* segregation constitutional.[17]

This renders *Brown* an especially intriguing decision. In contrast to later landmark cases, most notably *Roe v. Wade* (1973), the decision of *Brown* has been heralded, and with near unanimity no less, as a prodigious moral triumph in American history. Far from eliciting any analogous consensus, Roe – more than any other contemporary decision – has rent the nation and has done so, it would seem, irremediably. Yet *Brown*, no less than *Roe* has been the subject of immense criticism. The 1954 landmark decision has been lambasted by scholars, regardless of their political leanings. Members of the left, no less than those of the right, have demonstrated serious misgivings about the reasoning of the Court.[18] In short, it would appear that the Court reached the right decision though not for the right reason(s).

Supposing this to be true, important questions arise. To put it broadly and simply, do the ends justify the means? Is it justifiable, as one current Supreme Court Justice has argued, for judges to employ "consequences as a yardstick" to measure the rectitude of their decisions; to be concerned more with the repercussions of their decisions than the logic employed to reach them?[19] When grievous and pervasive injustices plague society, should the Court assume the responsibility of righting those wrongs, particularly when both Congress and the President neglect to do so? Similarly, are the courts justified in actualizing the people's will, especially when their will is being ignored or obstructed by the elected branches? Would the principle of representative democracy be subverted by such measures, or do the courts, precisely because of their insularity and removal from the electoral process, have a unique opportunity and, indeed, responsibility to educate the people and teach them right from wrong? Is the Court, as the law clerk to Justice Felix Frankfurter understood it, "a great and highly effective educational institution[?]"[20] And should "constitutional text and tradition… be disregarded if they stand in the way of achieving social justice[?]"[21] An affirmative answer to these questions, in effect, vindicates the Court, however shoddy its jurisprudence may be.

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[17] On the absence of tangible achievements, see Rosenberg (1993), especially Chapter 2. "The statistics from the southern states are truly amazing. For ten years, 1954-1964, virtually *nothing* happened. Ten years after *Brown* only 1.2 percent of black children in the South attended school with whites. Excluding Texas and Tennessee, the percent drops to less than one-half of one percent (.48 percent)." Rosenberg, *The Hollow* Hope*,* 52.

[18] See, for example, *What 'Brown v. Board of Education' Should Have Said*, ed. Jack M. Balkin (New York: New York University Press, 2002).

[19] Breyer, *Active Liberty*, 115.

[20] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1986), 26.

[21] Uhlmann, "The Road not Taken: Brown v. Board of Education at 50."

Though decided in 1954, *Brown v. Board of Education* first reached the Court in 1952 at which time Fred Vinson was its Chief Justice. After the first round of arguments and briefs, the Court was deeply divided over whether *Plessy v. Ferguson* (1896) could be overturned and segregation in public schools outlawed. It was believed that four of the justices, among them the Chief Justice, were prepared to uphold the ruling of *Plessy*. "All of the justices knew that a 5-4 or 6-3 decision that overturned *Plessy* would be a recipe for major civil unrest."[22] The presumption was that a divided Court on so divisive an issue merely would affirm, and thereby exacerbate, the entrenched racial discords that already sundered the nation. In light of this, the Court decided to hold the case for further briefs and arguments. Specifically, the Court was concerned with the original understanding of the Fourteenth Amendment and what remedies would follow a ruling that overturned *Plessy*. While the Court bided its time, Vinson passed away and Earl Warren became the fourteenth Chief Justice of the United States. With Vinson gone and Warren in command, internal divisions were overcome and the unanimity that had been longed for was secured.

Chief Justice Warren's unanimous opinion appears a rather curious one. As a reporter for the *New York Times* noted the day after the case was decided, "[it] reads more like an expert paper on sociology than a Supreme Court opinion."[23] A pithy decision that is exceeded in length by its own footnotes, perhaps what is most striking about the ruling is the Court's pervasive reliance on psychology and its pronounced disregard of precedent, law and the Constitution. In the end, its most glaring weakness is that it provides no legal, historical or constitutional foundation.

After recapitulating the facts of the case, Warren turns his attention to the Fourteenth Amendment. "The plaintiffs contend that segregated public schools are not 'equal' and cannot be made 'equal,' and that hence they are deprived of the equal protection of the laws"[24] guaranteed under the 1868 amendment. Warren points out that the Court, in light of the complexity of the question with which it was confronted, had ordered a second round of oral argument "devoted to the circumstances surrounding the adoption of the Fourteenth Amendment." Although reargument "covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment," the Court concluded that the findings were "not enough to resolve the problem."[25] A more candid court might have appended to that conclusion, "as we would like to resolve it."

[22] Maltz, "Brown v. Board of Education and 'Originalism'," 138.
[23] James Reston, "A Sociological Decision," *The New York Times*, 18 May, 1954.
[24] *Brown v. Board of Education*, 347 U.S. 483, 488 (1954).
[25] *Id.* 489.

Having concluded that what those in Congress and the state legislatures had intended cannot be deciphered from the arguments they put forth, the Court points to "[a]n additional reason for the inconclusive nature of the Amendment's history with respect to segregated schools[:] the status of public education at that time."[26] In the South, education generally was a matter that belonged to the private rather than the public domain[27] and, moreover, almost exclusively was reserved for white children. Though public education in the North had "advanced further," it still was a rather primitive business, the standards of which "did not approximate [to] those existing today." From this the Court concludes that "it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education."[28] What is surprising, at least for the reader of this pronouncement, is the prevaricative tenor of the Court's argument.

Without a doubt, the history of the Fourteenth Amendment is tortuous and what its original intention was remains a greatly contested issue. The meaning of the text itself is not immediately clear from a reading of it. The Constitution does not make known what are "the privileges or immunities of citizens of the United States" nor is there any explanation of what constitutes "the equal protection of the laws." Moreover, the congressional debates on the Amendment are rife with "contradictory statements about the meaning of different clauses, not just between the amendment's sponsors and opponents, but among its sponsors as well."[29] The only sure conclusion that Justice Jackson could divine from its legislative history was that "it was a passionate, confused and deplorable era."[30] Yet even in the face of this uncertainty, it would be wrong to deduce that nothing decisive could be determined. What is troubling about the Court's tabling of the Amendment's history is that for all the obfuscation surrounding it, there were some details about which there could be no dispute. Perhaps the most important of these, with respect to the matter at hand, concerned not so much the words of Congress, but its deeds.

It is well known that the very same Congress that passed the Reconstruction amendments maintained segregated schools in the nation's capital. Indeed, not only were segregated schools in Washington upheld by Congress at that time, but they

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[26] *Id.* 489.

[27] On the state and development of public schooling in nineteenth century America, see Elmer Brown, *The Making of Our Middle Schools: An Account of the Development of Secondary Education in the United States*, especially Chapter XIV pp. 297-322, as well as Appendix D: "The First Public Hich Schools in the 160 Cities now having over 25,000 Population," pp. 519-522. The overwhelming majority of the cities listed did not have public high schools prior to the Civil War. The lateness with which public high schools were established in the south is especially evident, e.g. Atlanta, GA (1872), Knoxville, TN (1875), and Birmingham, AL (1883).

[28] *Brown v. Board of Education*, 347 U.S. 483, 490 (1954).

[29] Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law*, 124.

[30] Uhlmann "The Road not Taken: Brown v. Board of Education at 50."

moreover were approved by every succeeding Congress for decades thereafter. That is not to say the practice should have been maintained simply because it had been approved in the past. Reform inescapably would be precluded by a perspective so parochial. But what it does suggest, rather forcefully, is that with respect to its intended effect on public education, the history of the Fourteenth Amendment is not nearly as incomprehensible as the Court had contended. In light of the fact that the same Congress that gave birth to the Amendment sustained racially segregated schools, it is reasonable to infer that the Amendment was not intended to ban segregation in public education. That the Court outright ignores this detail should give pause to all those who celebrate its ruling.

The Court's perfunctory dismissal of *Plessy* is no less troubling. The 1896 landmark decision had established the "separate but equal doctrine." Homer Plessy was, in the now antiquated parlance of the times, an octoroon, being one-eighth black and seven-eighths white. Under Louisiana law, this rendered him black. When Plessy refused to relinquish his seat in the "White" car and transfer to the "Colored" car of the East Louisiana Railroad, he was jailed. Plessy challenged the law, arguing that the Separate Car Act violated the Thirteenth and Fourteenth Amendments and therefore was unconstitutional. In a 7-1 decision authored by Justice Henry Billings Brown, the Court averred that it was "too clear for argument" that the Separate Car Act did not violate the Thirteenth Amendment, which had abolished slavery, not legal distinctions between the white and black races. More importantly with respect to Brown, the *Plessy* Court claimed that so long as the facilities provided to each race were equal, segregation did not violate the Equal Protection Clause. According to Justice Brown, the "underlying fallacy of the plaintiff's argument" was that it relied on "the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[31] Whatever the merits of this decision may be, and there may not be any, by the time *Brown* was decided, *Plessy* had been on the books for more than half a century. To overturn such a longstanding precedent, one would think a coherent legal theory would be needed.

The *Brown* Court was well aware that with respect to the case that had been brought before it, the "separate but equal doctrine," as it originally was understood, had not been violated. As Warren acknowledged, "there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors."[32] Confronted with these findings, it would seem that the Court had but two choices: rule

[31] *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).
[32] *Brown v. Board of Education*, 347 U.S. 483, 492 (1954).

against the plaintiffs or overturn the ruling of *Plessy*. Remarkably, the Court did neither.[33] Like the history of the Fourteenth Amendment, *Plessy* proves problematic for the members of the Court, not because of its incoherence or inscrutability, but because it impedes their ambition, namely the abolition of segregation in public education. Rather than resolving the problems that are raised by *Plessy* and the Fourteenth Amendment, the Court circumvents them altogether. "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written." [34] Having dismissed both history and precedent, one cannot help but wonder with what recourse the Court is left. Though the Court's solution is bewildering, it is far less so in light of everything that paved the way for it.

It must be kept in mind that the Court was set on reaching a particular goal; just how that goal would be reached was a matter of ancillary importance. Thus, with the acknowledgment that all significant "tangible factors" have been, or are in the process of being, equalized, comes the following declaration: "Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases."[35] This conclusion hardly follows from the premise, unless, of course, the Court was bent on promulgating a particular pronouncement. In other words, given that the decision, in effect, would be the same no matter what the facts were, the Court, according to its own discretion, could discount those facts that threatened to occlude its course. Because the tangible factors clearly do not support the result the Court desires, intangible factors are considered in their stead.

In what is perhaps the most widely quoted portion of the opinion, the Court concluded "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[36] From this oft cited passage alone, it is not clear why separate educational facilities are inherently unequal. The wherefore is provided earlier. According to the Court, "to separate [school 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."[37] This is a rather peculiar conclusion to be reached by a group of justices whose expertise is in interpreting the law and expounding the Constitution. The Court acknowledges that it did not arrive at this insight without help and that the finding is not without foundation. In the eleventh footnote of the opinion, the Court cites a number of works that bear titles such as *Personality in the Making*, "The Psychological Effects of Enforced Segregation: A Survey of Social Science

[33] By avoiding "the inconvenience of having to address its prior precedent… *Plessy* was inferentially, but not explicitly overruled." Uhlmann, "The Road not Taken: Brown v. Board of Education at 50."
[34] *Brown v. Board of Education*, 347 U.S. 483. 492 (1954).
[35] *Id.*, 492.
[36] *Id.*, 495.
[37] *Id.*, 494.

Opinion," and "What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?" The most famous of these is Kenneth B. Clark's "Effect of Prejudice and Discrimination on Personality Development," which is better known by its more euphemistic appellation, the "doll test."[38] Equipped with such scholarly and scientific works, the Court concludes that "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected."[39] Thus, in the end, the Court's opinion is not so much that *Plessy* was bad law, but that it was bad psychology.

Does this make *Brown* a bad opinion? By its very nature, a court opinion that disregarded history and precedent and relied instead on psychological factors would be, at a minimum, dubious. "It is emphatically the province and the duty of the judicial department to say what the law is,"[40] not to expound the latest trends in psychology. But *Brown* was not just any case. Setting aside all the quibbling about its immediate practical effects, symbolically, Brown was, and still remains, a profoundly important decision. The judiciary stood up and defended social justice at a time when no other branch would. Thus, in determining whether or not it was a bad opinion, the questions broached earlier should not be ignored. In short, does the rectitude of the decision redress the fallacies contained therein?

In asking this, another question immediately presents itself: Was the Court left with no other recourse? Was the Court faced with the alternative of either writing a dubious opinion or supporting social injustice? Could the same goal have been reached by a more sound approach? It frequently is presumed that a more sensible answer to the problem(s) raised in *Brown* would have been to fashion an opinion that corresponded to Justice Harlan's dissent in *Plessy v. Ferguson* (1896). Providing the lone dissenting voice, Harlan predicted that the judgment made that day would "prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case." Harlan, a reformed slave-owner and champion of black civil rights, eloquently averred that

> 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

[38] Kenneth B. Clark, along with his wife, Mamie Katherine Phipps Clark, administered a series of tests in which black children were given a choice between two dolls that were identical, save for the fact that one was white and the other black. From a very early age, black children often showed a preference for the white dolls. From their studies, the Clarks concluded, "It is clear that the Negro child, by the age of five is aware of the fact that to be colored in contemporary American society is a mark of inferior status." Kenneth B. Clark and Mamie P. Clark, "Emotional Factors in Racial Identification and Preference in Negro Children," *The Journal of Negro Education* 19 (1950), 341-350.

[39] *Brown v. Board of Education*, 347 U.S. 483, 494-5 (1954).

[40] *Marbury v. Madison*, 5 U.S. 137, 137 (1803).

> constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guarantied [sic] by the spreme [sic] law of the land are involved. It is therefore to be regretted that this high tribunal… has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.[41]

However, the problem is that notwithstanding the rhetorical merits of his dissent, to say nothing of the loftiness of its sentiment, Harlan did not champion the notion that segregation necessarily violated the Constitution. In a number of cases, including one involving segregated schools, Harlan had countenanced race-based classifications.[42] Harlan understood what had been understood generally: the Fourteenth Amendment did not embrace the broad notion of colorblindness.[43]

This tension in Harlan's juridical philosophy need not have precluded the Warren Court from adopting a line of reasoning similar to the one Harlan used in his *Plessy* dissent. That celebrated dissent was not the only time in the Court's history that an exposition of the Constitution's color blindness had been postulated. In *Hirabayashi v. United States* (1943), Chief Justice Stone, delivering the opinion of the Court, declared that "distinctions between citizens solely because of their ancestry are by their very nature

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[41] John Marshall Harlan, dissent *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

[42] See, for example, *Cumming v. County Board of Education*, 175 U.S. 528 (1899).

[43] A careful reading of the *Plessy* dissent makes plain that what Harlan found to be "[in]consistent with the Constitution of the United States" was not segregation *per se*, but the infringement of particular "civil rights common to all citizens." A perfunctory reading would leave it at Harlan's early pronouncement: "In respect of civil rights common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights." But later pronouncements qualify this seemingly sweeping assertion. "If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each." *Plessy*, 557. And later: "The arbitrary separation of citizens on the basis of race while they are on a *public highway* is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds." *Plessy*, 563 (emphasis added).

For Harlan, while racial segregation with respect to public transportation violated civil rights common to all citizens, segregation in schools did not. Thus, in his majority opinion in *Cumming*, Harlan concluded, "We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."[44] Though the Court actually upheld the constitutionality of President Roosevelt's orders and the implementation of the curfew that affected persons of Japanese descent, its justification for doing so was the gravity of the danger with which the nation was confronted at the time, namely that "of espionage and sabotage, in time of war and of threatened invasion."[45]

The principle recognized by Stone emerges again in *Missouri v. Jenkins* (1995), a case that post-dates *Brown*. Because of the significant connection between *Brown* and *Missouri*, it is worth reflecting on the latter case, so as to further illumine the former. Like *Brown*, the central issue of *Missouri v. Jenkins* revolved around segregation in public schools. The history of the case, which first arose in 1977 and had been before the same United States District Judge for seventeen years, is, not surprisingly, long-winded and involute. Its many twists and turns would require considerable space to document. Synoptically, in 1977 the District Court determined that the state of Missouri had not done enough to desegregate schools in the Kansas City, Missouri School District (KCMSD). The original plan involved bus transfers to balance out racial inequalities, but in time, the court issued a series of remedial orders that required significant increases in funding for inner city schools. The presumption was that by improving the quality of the schools, white students from the suburbs would be inclined to attend them. The state challenged the orders of the District Court and in a 5-4 decision, the Supreme Court ruled in favor of Missouri and overturned the ruling of the lower court, finding, in short, that the District Court had abused its remedial powers.

The particulars of the Court's logic need not be explicated here. With five separate opinions (three concurring, two dissenting), *Missouri v. Jenkins* provides enough subject matter to warrant a separate essay. What deserves attention in light of the present descant is Justice Thomas's concurring and, one might add, protracted opinion. While Justice O'Connor had used her concurring opinion to emphasize the narrowness of the Court's holding, Thomas's twenty-seven page opinion amounted to a general assault on desegregation jurisprudence. His remarks on *Brown* are particularly revealing, as it appears he understood the problem, and its appropriate remedy, better than the Court did in 1954.

> *Brown I*[46] did not say that "racially isolated" schools were inherently inferior; the harm that it identified was tied purely to de jure segregation, not de facto

[44] *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).
[45] *Id.* 100.
[46] *Brown I* refers to the 1954 decision and is distinguished from Brown II, which was decided the following year and addressed the question of relief. In the latter case, the Court famously ordered that schools should be desegregated "with all deliberate speed." *Brown v. Board of Education*, 349 U.S. 294 (1955).

> segregation. Indeed, *Brown I* itself did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental truth that the Government cannot discriminate among its citizens on the basis of race…. As the Court's unanimous opinion indicated: "[I]n the field of public education the doctrine of `separate but equal' has no place. Separate educational facilities are inherently unequal." Brown I, 347 U.S., at 495 . At the heart of this interpretation of the Equal Protection Clause lies the principle that the Government must treat citizens as individuals, and not as members of racial, ethnic or religious groups. It is for this reason that we must subject all racial classifications to the strictest of scrutiny, which (aside from two decisions rendered in the midst of wartime, see Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944)) has proven automatically fatal.
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> 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.[47]

Thomas, like Stone before him, understood what Warren ostensibly could not: in the eyes of the Government, its citizens are first and foremost citizens and only tangentially members of racial, ethnic, or religious groups. Thus, not only is *Brown* a poor opinion, but it is a needlessly poor opinion at that.

The *Brown* opinion affords many lessons that doubtlessly were not intended by those who appended their names to it. Not the least important of these is that psychology serves as a poor foundation for judicial decisions. For one, it is commonly understood that the social science evidence the Court relied on was rather shoddy, especially the leading piece of evidence, Kenneth Clark's "doll test."[48] But to leave it at this is to miss the larger point. The problem is not simply that the sociological and psychological evidence used in the case was flawed, but that such evidence, regardless of its accuracy,

[47] Clarence Thomas, concurring opinion, *Missouri v. Jenkins*, 515 U.S. 70 (1995).

[48] For a critical examination of Clark's study, see, for example, Edmond Cahn, "Jurisprudence," *New York University Law Review* 30 (1955), 151-169.

affords virtually no guarantees when it comes to constitutional matters. The behavioral and social sciences are innately labile. What is demonstrated to be true one day is shown to be false the next. The precipitous rise and fall of Freudian psychology serves as a powerful attestation to the verity of this phenomenon.[49] One never should lose sight of the fact that before *Brown*, the prevailing scientific views of the day often were used to legitimize segregation no less than they were used to delegitimize segregation in 1954.[50] Can a principle of justice that teeters upon such tenuous foundations really be just?

The intentions of the nine justices who occupied the Court in 1954 very well may have been beyond reproach, but their honorable intentions did nothing to prevent the establishment of a dangerous precedent. Poorly reasoned decisions such as *Brown* are little more than *ad hoc* assertions of power and though that power may have been exercised in the name of good on May 17, 1954, there is no guarantee that future justices

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[49] In this vein, one could consider Thomas Robert Malthus and his neo-Malthusian epigones, perhaps the most famous being Paul R. Elrich. Elrich's claim to fame, *The Population Bomb*, sold over two million copies and, in time, proved to be risibly inaccurate. Elrich's "scientific" prophecies included the deaths of hundreds of millions of people in the 1970's due to starvation and the inability of India to sustain itself beyond 1980. Paul Elrich, *The Population Bomb*, (New York: Balantine Books, 1968).

A more timely example, both because of the recent publication of the Fifth Edition of the *The Diagnostic and Statistical Manual of Mental Disorders* (DSM-V) and because of the debates surrounding gay marriage, concerns the dubious diagnostic abilities of the American Psychiatric Association, which, in 1968, designated homosexuality a disease. "The DSM-II (1968) made homosexuality a mental disorder, a decision revoked by vote in 1973. In the general excitement about that progressive decision, few noted that voting didn't seem to be the most scientific way of determining mental illness. Narcissistic Personality Disorder was voted out in 1968 and voted back in 1980; where did it go for 12 years? Doctors don't vote on whether pneumonia is a disease." Carol Tavris (May 17, 2013). "How Psychiatry Went Crazy." *The Wall Street Journal*. Retrieved from http://online.wsj.com/article/SB10001424127887323716304578481222760113886.html?mod=googlenews_wsj

[50] In this regard, consider the writings of the American psychologist, Lewis Terman, inventor of the Stanford-Binet IQ test. While addressing the low IQ test scores of two Portuguese boys, Terman observed:

> "It is interesting to note that. . .[these cases] represent the level of intelligence which is very, very common among Spanish-Indian and Mexican families of the Southwest and also among negroes. Their dullness seems to be racial, or at least inherent in the family stocks from which they come. The fact that one meets this type with such extraordinary frequency among Indians, Mexicans, and negroes suggests quite forcibly that the whole question of racial differences in mental traits will have to be taken up anew and by experimental methods. The writer predicts that when this is done there will be discovered enormously significant racial differences in general intelligence, differences which cannot be wiped out by any scheme of mental culture."
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> "Children of this group should be segregated in special classes and be given instruction which is concrete and practical. They cannot master abstractions, but they can often be made efficient workers, able to look out for themselves. There is no possibility at present of convincing society that they should not be allowed to reproduce, although from a eugenic point of view they constitute a grave problem because of their unusually prolific breeding." Lewis Terman, *The Measurement of Intelligence* (Boston : Houghton Mifflin Company, 1916) pp. 91-92.

will be animated by motives that are commensurately commendable. Anyone who has survived the twentieth century and has witnessed, from however afar, the advent of fascism and totalitarianism, as well as the recrudescence of barbarism in its many forms, should understand that progress is not ineluctable. A people that regards liberty as one of its unalienable rights should be wary of permitting a small cohort of unelected judges to perform as a "day to day constitutional convention"[51] where the collective will of those judges can be promulgated as law. It is not unreasonable to think that someday, a group of justices with intentions far less laudable than those who decided *Brown* will occupy the Court. One need not envision a group of brutal despots to be troubled by the prospect. Freed from the constraints that traditionally bound the Court, there will be little to restrain its members as they vie to turn their feelings and biases into law. Without any obligation to ground their opinions in the fundamental law of the land, the adduction of the latest scientific research will suffice. It would be more than a little ironic, and not altogether inappropriate, if one day a Court, bent on undermining or repealing some established notion of justice, cited *Brown* as precedent. But that is the enduring irony of *Brown*: Though there can be no caviling about the rectitude of the decision, the manner in which it was reached not only paved the way for future injustice, but itself was fundamentally unjust.

[51] Hugo Black, dissent *Griswold v. Connecticut*, 381 U.S. 479, 520 (1965).