Substituting Symbol for Substance: What Did *Brown* Really Accomplish?

by
Gerald Rosenberg,
University of Chicago

On May 17th, 1954, the Supreme Court issued perhaps the twentieth century's most celebrated decision. Fifty years later, the importance of *Brown* is unquestionable, as this Symposium, and countless fiftieth anniversary conferences, panels, and symposia, attest.[1] For decades commentators have celebrated *Brown* as "a revolutionary statement of race relations law" (Carter 1968, 237) through which the Supreme Court "blazed the trail" of civil rights (Spicer 1964, 176). Being "nothing short of a reconsecration of American ideals" (Kluger 1976, 710), *Brown,* it is claimed, "profoundly affected national thinking and has served as the principal ideological engine" of the civil rights movement (Greenberg 1968, 1522). *Brown* has long served as the "symbol" of the courts' ability to produce significant social reform (Neier 1982, 57), the "principal inspiration to others who seek change through litigation" (Greenberg 1974, 331). As Wilkinson puts it, "*Brown* may be the most important political, social, and legal event in America's twentieth-century history" (1979, 6). It has served, Robert Cover tells us, as a "paradigmatic event" (1982, 1316).

Despite its enduring importance, major claims made about *Brown* are highly questionable: that the decision made a difference in ending race-based segregation in public schools in particular, and racial discrimination more broadly, or that it had the effects claimed by the authors quoted above. These are emphatically empirical questions, not matters of ideology, or fervent wishes for a better world. Nor are they questions of whether the decision *should have* found racial segregation in public schools unconstitutional. They are questions about what *Brown* actually accomplished. And the answer is, "not very much."

In asking these questions, I don't mean to slight the dedication and commitment of the civil rights lawyers of the twentieth century. Thurgood Marshall, Jack Greenberg, and others, dedicated their careers, and sometimes their lives, to a principled belief in justice for all. I challenge neither their commitment nor their principles. One may ask, however, whether litigation was the right strategic choice to further their goals, and whether their understanding of the strengths and weaknesses of courts as agents of social change was subtle enough to guide them to the best strategy for change.

Underlying these questions about *Brown* is a broader one about the role of the Supreme Court in the larger society. Since the mid-twentieth century, there has been a prevalent belief that courts can further the interests of the relatively disadvantaged. Starting with civil rights and spreading to issues raised by women's groups, environmental advocates, political reformers, and others, American courts seemingly have become important producers of political and social change. Indeed, for many, part of what makes American democracy exceptional is that it includes the world's most powerful judicial system protecting minorities and defending liberty, sometimes in the face of opposition from the democratically elected branches.

In this short article I can only sketch out the briefest of answers to the question of whether *Brown* made a major contribution to civil rights and, more generally, whether U.S. courts can produce significant social reform. Readers who wish to see a more fully developed argument might consult *The Hollow Hope* and other related work of mine.[2]

Measuring *Brown's* Efficacy

The *Brown* decision may have made a major contribution to furthering civil rights in two ways. First, and most straightforward, it could have directly ended race-based segregation in public schools. Second, perhaps more subtly, the decision could have indirectly contributed to change. *Brown* could have inspired individuals to act or persuaded them to examine and change their opinions about racial discrimination. The decision might have given salience to civil rights, in effect placing it on the political agenda. It might have provided legitimization to the civil rights movement and created pressure for government action. In other words, *Brown* might have served as a powerful symbol and resource for change.

Given the praise accorded to the *Brown* decision, examining its actual effects produces quite a surprise. The surprise is that a decade after *Brown* virtually nothing had changed for African-American students living in the 11 states of the former Confederacy that required race-based school segregation by law. For example, in the 1963–1964 school year, barely one in 100 (1.2%) of these African-American children was in a non-segregated school. That means that for nearly 99 of every 100 African-American children in the South a decade after *Brown,* the finding of a constitutional right changed nothing.

By the 1972–1973 school year, however, change did occur. In that school year over 91% of African-American children in the South attended an integrated school. Change

https://doi.org/10.1017/S1049096504004093 Published online by Cambridge University Press

came to Southern school systems in the wake of congressional and executive branch action. Title VI of the 1964 Civil Rights Act permitted the cut-off of federal funds to programs that practiced racial discrimination and the 1965 Elementary & Secondary Education Act provided a great deal of federal money to poor school districts, many in the South. By the 1971–1972 school year, for example, federal funds comprised from between 12% and 27.8% of Southern state school budgets, up from between 4.6% and 11.1% in the 1963–1964 school year. This combination of federal funding and Title VI gave the executive branch a tool to induce desegregation when it chose to do so. When the U.S. Department of Health, Education, and Welfare threatened to cut off federal funds from school districts that refused to desegregate, dramatic change occurred. By the 1972–1973 school year, over 91% of African-American school children in the 11 Southern states were in integrated schools, up from 1.2% in the 1963–1964 school year. With only the constitutional right in force in the 1963–64 school year, no more that 5.5% of African-American children in any Southern state were in school with whites. By the 1972–1973 school year, when economic incentives were offered for desegregation and costs imposed for failure to desegregate, in no Southern state were fewer than 80% of African-American children in integrated schools. It was the actions of the Congress and the executive branch and not the courts that led to desegregation.[3]

Regarding indirect effects, little or no evidence supports the claims that *Brown* gave civil rights salience, pressed political elites to act, pricked the consciences of whites, legitimated the grievances of blacks, or inspired the activists of the civil rights movement. For example, press coverage of civil rights did not increase in a sustained way until the 1960s. In passing civil rights legislation Congress responded not to *Brown* but to electoral concerns in the 1950s, enhanced by the civil rights movement of the 1960s. Similarly, presidential action responded to credible threats of violence, not constitutional statements of principle. There is no evidence that *Brown* influenced public opinion nor, surprisingly, is there much evidence supporting the claim that *Brown* instigated the civil rights movement. That movement, particularly the courageous actions of the Student Non-Violent Coordinating Committee, the Southern Christian Leadership Conference (Dr. King's organization), and the Congress of Racial Equality was independent of *Brown,* spurred on by the Montgomery bus boycott, Dr. King's Ghandi-inspired Christian non-violent movement, and emerging African liberation movements. Indeed, all three groups were hostile to litigation as a strategy for change, a position that often brought them into conflict with the National Association for the Advancement of Colored People (NAACP) and its litigation-based strategy. The evidence suggests that *Brown*'s major positive impact was limited to reinforcing the belief in a legal strategy for change of those already committed to it.

Why Wasn't *Brown* Implemented?

These findings raise two questions. First, why was the *Brown* decision not implemented? Second, why, given the lack of implementation, do we hold *Brown* in such high regard? The answer to the first question, in a nutshell, is that there was no political pressure to implement the decision and a great deal of pressure to resist it. On the executive level, there was little support for desegregation until the Johnson presidency. President Eisenhower steadfastly refused to commit his immense popularity or prestige in support of desegregation in general or *Brown* in particular. As Roy Wilkins, executive secretary of the NAACP put it, "if he had fought World War II the way he fought for civil rights, we would all be speaking German today" (1984, 222). Although President Kennedy was openly and generally supportive of civil rights, he, too, took little concrete initiative in school desegregation and other civil rights matters until pressured by events.

Civil rights were not supported by other national leaders until late in the Kennedy administration. In March 1956, Southern members of Congress, virtually without exception,[4] signed a document entitled a "Declaration of Constitutional Principles," also known as the Southern Manifesto. Its 101 signers attacked the *Brown* decision as an exercise of "naked power" with "no legal basis." They pledged themselves to "use all lawful means to bring about a reversal of this decision which is contrary to the Constitution and to prevent the use of force in its implementation."[5] This unprecedented attack on the Court, coupled with presidential inaction, signaled that pressure from Washington to implement the Court's decisions in civil rights would not be forthcoming.

On the state and local level, there was even less support. A study of the 250 gubernatorial candidates in the Southern states from 1950 to 1973 revealed that after *Brown* "ambitious politicians, to put it mildly, perceived few incentives to advocate compromise" (Black 1976, 299). This perception was reinforced by Arkansas Governor Orval Faubus's landslide reelection in 1958, after he repeatedly defied court orders and acted to prevent the desegregation of Central High School in Little Rock, demonstrating the "political rewards of conspicuously defying national authority" (Black 1976, 299). Throughout the South, governors and gubernatorial candidates called for defiance of court orders. Political support for desegregation was virtually non-existent.

At the prodding of state leaders, state legislatures throughout the South passed a variety of pro-segregation laws. By 1957, only three years after *Brown,* at least 136 new laws and state constitutional amendments designed to preserve segregation had been enacted (Orfield 1969, 17–18). In 1960–1961 alone, the Louisiana legislature met in one regular and five extraordinary sessions to pass 92 laws and resolutions to maintain segregated public schools. As the Southern saying went, "as long as we can legislate, we can segregate" (Rodgers and Bullock 1972, 72). Similarly, school boards refused to follow *Brown*. In the five Deep South states of Alabama, Georgia, Louisiana, Mississippi, and South Carolina, not one school-board member or superintendent openly advocated compliance with the Supreme Court decision (Sarratt 1966, 99–100). And despite *Cooper v. Aaron,*[6] and the sending of federal troops to Little Rock in 1957, as of June 1963, only 69 out of 7,700 students at the supposedly desegregated, "formerly" white, junior and senior high schools of Little Rock were black (Brink and Harris 1963, 41). Public resistance, supported by local political action, can almost always effectively defeat court-ordered civil rights.

Along with opposition to desegregation from political leaders at all levels of government, there was hostility from many white Americans. For example, in December 1958, when Gallup asked its usual question about the most-admired men in the world, Governor Orval Faubus of Arkansas, who had repeatedly defied court orders a year earlier was among the 10 most frequently named (Gallup 1972, vol. 2: 1548). Law and legal decisions operate in a given cultural environment, and the norms of that environment influence the decisions that are made and the impact they have. In the case of *Brown* and civil rights, decisions were announced in a culture in which slavery had existed and apartheid did exist. Institutions and social structures throughout America reflected a history of, if not a present commitment to, racial discrimination.

https://doi.org/10.1017/S1049096504004093 Published online by Cambridge University Press

Cultural barriers to civil rights had to be overcome before change could occur. And courts do not have the tools to tear down these barriers.

One of the important cultural barriers to civil rights was the existence of private groups supportive of segregation. One type, represented by the Ku Klux Klan, White Citizens' Councils, and the like, existed principally to fight civil rights. Either through their own acts, or the atmosphere these groups helped create, violence against blacks and civil rights workers was commonplace throughout the South. Spectacular cases such as the murder of Medgar Evers, the attacks on the freedom riders, the Birmingham Church bombing that killed four black girls, and the murder of three civil rights workers near Philadelphia, Mississippi, are well known. But countless bombings and numerous murders occurred throughout the South (Peltason 1971, 5; Southern Regional Council 1964, 7–17). During the summer of 1964 in Mississippi alone there were 35 shootings, 65 bombings (including 35 churches), 80 beatings, and 6 murders (Garrow 1978, 21; McAdam 1988, 257–82). It was a brave soul indeed who worked to end segregation or implement court decisions amidst so much segregationist opposition.

To make matters worse, while there is little evidence that *Brown* helped produce positive change, there is some evidence that it hardened resistance to civil rights among both elites and the white public. In the wake of *Brown* white groups intent on using coercion and violence to prevent change grew. Resistance to change increased in all areas, not merely in education but also in voting, transportation, public places, and so on. *Brown* "unleashed a wave of racism that reached hysterical proportions" (Fairclough 1987, 21).[7] By stiffening resistance and raising fears before the activist phase of the civil rights movement was in place, *Brown* may actually have delayed the achievement of civil rights.[8]

In sum, *Brown's* constitutional mandate that racial segregation in public schools end confronted a culture opposed to that change. The American judicial system, constrained by the need for both elite and popular support, was unable to overcome that culture.

Critics

Brown has become a sacred cow and my finding of its lack of efficacy has troubled some and incensed others.[9] For example, some critics allege that the impact of the Court can't be measured, and that the data I present are merely suggestive, at best. While there is some truth to this, it is mostly wrong, and partly misleading. It is mostly wrong because a variety of impacts are empirical and thus measurable. These include the actual number and rate of African-American children in school with whites, the actual number and content of media stories about *Brown* and civil rights, the number and timing of civil rights demonstrations, and so forth. What social scientists cannot do is understand precisely what people are thinking and why. Thus, it is possible that even though there is no evidence supporting the claim that *Brown* had important, positive effects, the fault is with the measurement, not the effect. This is possibly correct, but not without its own problems that make the criticism misleading. First, in all the most obvious places to find such evidence, the evidence that can be found either does not support the claim of *Brown*'s causal influence, or cuts against it. This suggests that any unmeasured effects, at the very best, are quite weak. Second, because some of the data are merely suggestive and not definitive, it does not follow that *Brown* had an important impact. The argument seems to go something like this: (1) *Brown* had inspirational impact; (2) we cannot measure that impact because we lack sufficiently honed measures; (3) therefore *Brown* had inspirational impact. But this is argument by assertion, with point 3 (conclusion) being merely a particularized restatement of point 1 (the thesis) with no support from point 2 (evidence). That kind of logic dismisses empirical investigation by fiat. It is ideology, not social science.

Some critics have also alleged that Supreme Court decisions like *Brown* are only one resource among many and to expect major change to follow from them is to create a straw person argument. Perhaps this is correct, but it is not I who have made the claim of judicial efficacy! The Supreme Court in general, and *Brown* in particular, is credited with enormous power and influence. The quotations that fill the first paragraph of this essay could be replicated many times over. The straw person argument against the findings presented here often amounts to little more than post hoc rationalization for judicial inefficacy.

Yet another criticism deals with timing. *Brown* said desegregate and sometime later some desegregation occurred. As Erwin Chemerinsky puts it, "Change is often a long-term process" (1998, 191–204). Thus, the argument goes, it is immaterial that no change occurred over the first decade or more. But this is problematic for several reasons. First, given enough time lots of things are bound to occur that do not result from the event in question. There was a substantial time lag between the decision and more than token desegregation. This allowed all sorts of other influences independent of *Brown* to play a role. In the case of desegregation and civil rights, the principal factor was the civil rights movement. Second, this argument is made entirely at a macro level. It lacks the micro connections that show how *Brown* influenced people to act and how those acts led to school desegregation and civil rights more generally. Arguments that change takes time explain nothing because they explain everything.

Overall, a general notion that many critiques of my argument seem to have goes something like this: "Look, *Brown* happened; it had to matter." The problem with this critique is that many events happen in the world that exert little or no causal influence on later events. Of course law matters, and of course people reacted to *Brown*, but it doesn't automatically or necessarily follow that *Brown* furthered the cause of civil rights. Such a claim assumes the importance of a particular institution, and particular outcomes of that institution, rather than treating the importance of that institution and outcomes as a question for empirical investigation. In the case of *Brown,* this argument uncritically credits the Supreme Court with a degree of influence and power that it lacks.

Substituting Symbol for Substance

Given *Brown's* lack of impact, why is it widely held in such high regard?[10] We celebrate *Brown* for two reasons. The first is that since the mid-1960s the U.S. has become officially committed to a non-segregated society. *Brown* stands as a constitutional symbol of that commitment. This is a noble vision, one of which Americans can be proud. The second reason is much less noble. The celebration of *Brown* serves an ideological function of assuring Americans that they have lived up to their constitutional principles without actually requiring them to do so. Today, *Brown* and *de facto* segregation live side-by-side. The danger of celebrating a symbol is that it can lead to a sense of self-satisfaction and an unwillingness to examine practice. *Brown,* then, can be seen as "little more than an ornament, or golden cupola, built upon the roof of a structure found rotting and infested, assuring the gentlefolk who only

https://doi.org/10.1017/S1049096504004093 Published online by Cambridge University Press

pass by without entering that all is well inside" (Tigar 1970, 7).[11] So, in the end we celebrate *Brown* not because of what it did but because of what we officially state it should have done. And this celebration relieves us of the obligation to confront the systematic racial biases that permeate American society. It encourages us to look to legal solutions for political and cultural problems. In this way, *Brown* serves a deeply conservative function of diverting resources away from substantive political battles, where success is possible, to symbolic legal ones where it is not.

None of this means that *Brown* was wrongly decided. In a nation built on slavery, degraded by Jim Crow, and based on a deep-seated belief in white racial superiority, racial segregation denies equal protection. Nor does it mean that law is irrelevant or that courts can never further the goals of the relatively disadvantaged. For the civil rights movement, for example, courts played an important role in keeping the sit-in movement going, ending the Montgomery bus boycott by providing the boycotters with leverage they could use, and threatening to cut off federal funds under Title VI. But in each case courts were effective because a political movement was forcing change. The analysis does mean that courts acting alone, as in *Brown,* are structurally constrained from furthering the goals of the relatively disadvantaged.

American courts are not all-powerful institutions. They were designed with severe limitations and placed in a political system of divided powers. To celebrate decisions such as *Brown* uncritically misunderstands both the limits of courts and the lessons of history, clouding our vision with a naive and romantic belief in the triumph of rights over politics. And while romance and even naiveté have their charms, they are best exhibited neither in courtrooms, nor in scholarship.

Notes

1. For example, both the Midwest Political Science Association Annual Convention and the American Political Science Annual Convention are organizing panels on *Brown,* the University of Virginia Law School as well as the Yale Law School in conjunction with the Howard University Law School are holding major conferences on *Brown,* the U.S. Supreme Court Historical Society is publishing a fiftieth anniversary book on *Brown,* etc.

2. Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press; 1991, 1993); "The Irrelevant Court: The Supreme Court's Inability to Influence Popular Beliefs about Equality (or anything else)," in *Redefining Equality,* eds. Neal Devins and Dave Douglas. New York: Oxford, 1998: 172–190; "Knowledge and Desire: Thinking About Courts and Social Change," in *Leveraging the Law: Using Courts to Achieve Social Change,* ed. David Schultz. New York: Peter Lang, 1998: 251–291; "The Implementation of Constitutional Rights: Insights from Law and Economics," *University of Chicago Law Review* 64 (1997): 1215–1224; "The Real World of Constitutional Rights: The Supreme Court and the Implementation of the Abortion Decisions," in *Contemplating Courts,* ed. Lee Epstein. Washington, D.C.: Congressional Quarterly Press, 1995: 390–419; "*Brown* is Dead! Long Live *Brown*!: The Endless Attempt to Canonize a Case," *University of Virginia Law Review* 80 (1994):161–171.

3. Courts, however, did play a role in enforcing congressional and executive branch action. My point is simply that without such action from non-judicial institutions little changed.

4. The only Southern senators not to sign the Manifesto were Johnson of Texas and Kefauver and Gore of Tennessee. And two North Carolina congressman who refused to sign, Charles B. Deane and Thurmond Chatham, lost their seats.

5. *Cong. Rec.* 12 March 1956: 4460 (Senate), 4515–16 (House).

6. 358 U.S. 1 (1958).

7. Legal Historian Michael Klarman argues that by creating the political space for rabid segregationists to win elections in the South, *Brown* actually contributed to civil rights. This "backlash thesis" asserts that the violent reaction to the civil rights movement unleashed by these segregationists brought racial discrimination to national attention and led to national civil rights legislation. Klarman admits that this chain of causation created by *Brown* is "strikingly indirect, and indeed almost perverse" (76). In contrast to the "backlash thesis," I argue that it was the civil rights movement, independent of *Brown,* that led to violent repression. See Klarman (1994), and my response (Rosenberg 1994).

8. A similar negative impact may have occurred with *Roe v. Wade* which, paradoxically, appears to have strengthened the apparent losers in the case, anti-abortion forces, and weakened the apparent winners. Another similar negative impact can also be seen in the adverse reaction to the Court cases in Hawaii and Vermont, and Massachusetts furthering the goals of same-sex marriage proponents.

9. See, for example, the critical essays in David Schultz, ed., *Leveraging the Law: Using Courts to Achieve Social Change* (Peter Lang, 1998).

10. I am currently working on a book manuscript that explores how *Brown,* and other famous cases, became invested with symbolic meaning.

11. Tigar wrote these words specifically about the Warren Court's criminal rights decisions but they are more generally applicable.

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https://doi.org/10.1017/S1049096504004093 Published online by Cambridge University Press

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https://doi.org/10.1017/S1049096504004093 Published online by Cambridge University Press

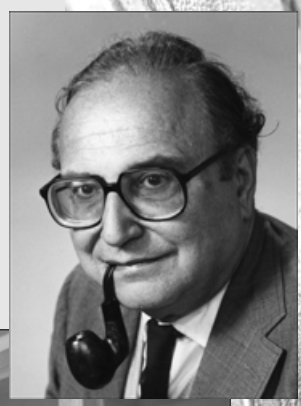
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