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Ackerman's *Brown*

ABSTRACT. This essay contends that, despite its revisionist ethos, Professor Ackerman's *We the People: The Civil Rights Revolution* is conventional in its assessment of *Brown v. Board of Education*. Ackerman praises *Brown* as "the greatest judicial opinion of the twentieth century." But the Supreme Court in *Brown* evaded offering a candid explanation of the white supremacist purpose animating de jure racial segregation. Absent from the most honored race relations decision in American constitutional law is any express reckoning with racism.

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INTRODUCTION

The judicial decision that Professor Bruce Ackerman discusses most intensively in his sprawling, creative, and instructive account of the civil rights revolution¹ is *Brown v. Board of Education*.² In *Brown* and its companion case, *Bolling v. Sharpe*,³ the Supreme Court invalidated government action authorizing or requiring the racial separation of pupils in primary and secondary public schools. I pose four questions about *Brown*, relating my answers to Professor Ackerman's analysis.

I. WHAT DID BROWN SAY?

According to Professor Ackerman, Chief Justice Earl Warren's opinion for the Court in *Brown* deployed "judicial situation-sense" to tell "the common-sense truth," which was that white "southerners were humiliating black children by refusing to allow them to attend common schools with their white peers."⁴

Is that characterization a realistic portrayal or translation of Warren's *Brown*? I think not. Warren penned an opinion that, with regard to the regulation of race relations, said as little as possible beyond concluding that "in the field of public education the doctrine of 'separate but equal' has no place" and that "[s]eparate educational facilities are inherently unequal."⁵ Conspicuously absent from the opinion is any account of white Southerners' humiliating black children. This omission was deliberate. Warren wrote privately that he sought to craft an opinion that was "*short*, readable by the lay public, non-rhetorical, unemotional, and, above all, non-accusatory."⁶ Warren succeeded. His *Brown* opinion manages to invalidate de jure segregation

1. See 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014).

2. 347 U.S. 483 (1954).

3. 347 U.S. 497 (1954). The disputes resolved by *Brown* arose in states and were decided by application of the Fourteenth Amendment. The dispute resolved by *Bolling* arose in the District of Columbia, a federal jurisdiction rather than a state, and was decided by application of the Fifth Amendment. Although the cases are separate and involved somewhat different analyses, I shall refer to them as one, under the rubric of *Brown*, unless I indicate differently in the pages that follow.

4. 3 ACKERMAN, *supra* note 1, at 133.

5. *Brown*, 347 U.S. at 495.

6. JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 68 (2001) (emphasis added).

without castigating or indeed even mentioning the officials who imposed Jim Crow oppression.

To be sure, Warren's opinion deals very differently with segregation than previous opinions of the Court. In *Plessy v. Ferguson*,⁷ the Court's most influential affirmation of segregation's constitutionality, a majority of the Justices scoffed at the idea that a governmentally imposed regime of separate but equal facilities could reasonably be viewed as an unfriendly, indeed stigmatizing, form of discrimination *against* blacks. According to the *Plessy* Court, if blacks felt insulted by the requirement of a separation of the races, the insult arose "not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."⁸ Subsequently, scores of jurists, including some of the most esteemed of the twentieth century, complacently affirmed the baleful notion of separate but equal, accepting the blatant lie that state-mandated racial separation could somehow be squared with equality before the law.⁹ By contrast, Warren's *Brown* gave no rhetorical support to segregation.

Still, the Chief Justice's description of segregation in *Brown* is strikingly wan. It says remarkably little about segregation's origins, ideology, implementation, or aims. A reader of *Brown* alone, with no knowledge of American race relations, might well be mystified by the hurt and anger of those protesting against segregation, simply because Warren's opinion is so diffident. Warren avers that "[t]o separate [blacks] 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."¹⁰ He embraces the finding of a lower court that "the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."¹¹ He also asserts in *Bolling v. Sharpe* that "segregation is not reasonably related to any proper governmental objective."¹² But Warren's opinion says nothing about the aims of segregation. He

7. 163 U.S. 537 (1896).

8. *Id.* at 551.

9. See, e.g., *Lum v. Rice*, 275 U.S. 78 (1927). In a unanimous ruling written by Chief Justice William Howard Taft, the Supreme Court upheld the judgment of the Mississippi Supreme Court that people of Chinese ancestry could be assigned to schools reserved to "colored" students under the state law governing racial segregation in public schooling. The Court evinced no disquiet whatsoever with racial segregation. Justices Oliver Wendell Holmes, Jr., and Louis Brandeis were among those who voted to affirm that judgment.

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

11. *Id.*

12. 347 U.S. 497, 500 (1954).

concludes that it has baleful effects but avoids mentioning whether those consequences were intentional. Because Warren insisted upon writing an opinion that was non-accusatory, he omitted a central aspect of the segregation story: the reason why white supremacists desired to separate whites and blacks pursuant to the coercive force of state power. *Missing from the most honored race relations decision in American constitutional law is any express reckoning with racism.*¹³

Dissenting in *Plessy*, Justice John Marshall Harlan did reckon with segregation's racism. Harlan's observation with respect to public railway coaches was applicable to public school classrooms as well: "What can more certainly arouse race hate . . . than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?"¹⁴ Appropriately mocking segregation's "thin disguise" of delusive symmetry, Harlan remarked that "[e]veryone knows that [segregation] had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by . . . white persons."¹⁵ Harlan pointed out that segregation was something done by whites to blacks (and other racial minorities). Harlan recognized that segregation was a deliberate negation of racial equality and a deliberate assertion of racial superiority. Harlan noted that segregation was meant to "protect" whites from the supposedly contaminating influence of colored people. None of these points is driven home, or even much hinted at, in Warren's non-accusatory opinion. The Chief Justice never even cites Harlan's dissent.

II. HOW SHOULD WE ASSESS THE *BROWN* OPINION?

Professor Ackerman is unstinting in his praise of Warren's *Brown* opinion. It is, he writes, "the greatest judicial opinion of the twentieth century."¹⁶

13. The writing that brings out this point most strikingly is the single best article written thus far about the unconstitutionality of racial segregation, Charles L. Black, Jr.'s justly celebrated *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421 (1960).

14. *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896).

15. *Id.* at 557.

16. 3 ACKERMAN, *supra* note 1, at 317. Elsewhere Professor Ackerman writes that "there is great wisdom in Warren's opinion," *id.* at 128, that *Brown* "marks the greatest moment in the history of the Court," *id.*, that the Court displayed "great effort of constitutional leadership in *Brown*," *id.* at 322, that *Brown* represented the Warren Court's "greatest success in judicial leadership," *id.* at 324, and that the idea voiced in the *Brown* opinion constituted a "great jurisprudential theme," *id.* at 338.

Whether Ackerman is correct depends on what he means by "greatest." He is probably correct if by greatness he refers to consequentiality. Among other things, *Brown* invalidated deeply entrenched state laws that blanketed the South, reflected and reinforced the civil rights movement, won for the Court tremendous prestige in large areas of the country and internationally, generated a backlash that transformed Southern politics, and recast senatorial confirmation of judicial nominees.

I suspect, however, that in describing Warren's opinion as "the greatest" of the twentieth century, Ackerman means to do more than comment on its ramifications. He probably intends also to laud its legal, moral, political, and intellectual character. But here we encounter a problem: Warren's opinion is deficient in important respects. For one thing, the opinion is unclear regarding the precise basis on which the Court invalidated *de jure* segregation in public primary and secondary schools. Was the key the social significance of the activity in question—schooling? Was it the psychological effect of segregation on the black schoolchildren? Was it that segregation stemmed from purposeful government action? Or was it racial separation *per se*? The Delphic ambiguity of the *Brown* opinion has generated a remarkable catalogue of commentary and launched thousands of contentious discussions in law school classes. If clarity of exposition and thoroughness of explication are elements of greatness in a judicial opinion, however, then Warren's *Brown* is ineligible.

The opacity of Warren's opinion has facilitated the use of *Brown* as a Rorschach test that provokes and allows observers to cast upon it a wide array of competing interpretations. One aspect of the case that should be clear, however, is that segregation represented a deliberate, self-conscious effort to privilege whites while disadvantaging people of color. Yet Warren's opinion veils that obvious and fundamental feature of the controversy. Warren's *Brown* portrays segregation without segregationists, stigma without stigmatizers, an injustice without perpetrators of the wrong.

I am not condemning Warren. Perhaps he was right to engage in strategic obfuscation. Perhaps he was prudent to avoid candor about the segregationists. Perhaps he was wise to pull his punches to secure unanimity. But even if we agree with his rhetorical strategy, we ought to recognize its price: continued denial of the full ugly story of racism in America. Warren's *Brown* opinion glosses over the realities of segregation. If candor, clarity, and comprehensiveness are essential features of "greatness" in a judicial opinion, then for yet another reason the *Brown* opinion is ineligible for that honorific distinction.

As with other positive developments in the law of American race relations, the fact that *Brown* was conceived in compromise has largely been forgotten. Grateful for any relief from racism, we overlook the limitations of reforms we

revere despite their deficiencies. The Emancipation Proclamation is often celebrated for having “freed the slaves,” though it left unaffected the legal status of around eight hundred thousand of those slaves. Justified by President Abraham Lincoln only as a weapon of war, the Emancipation Proclamation makes no mention of the blessings of liberty or the curse of bondage.¹⁷ The Fourteenth Amendment, often unequivocally lauded nowadays, was a keen disappointment to many advocates of African-American advancement in that it merely imposed a political penalty for racial disenfranchisement but permitted the states to continue racial exclusion at the ballot box.¹⁸ The Fifteenth Amendment, often unconditionally celebrated now, was among the narrowest of the constitutional voting rights provisions under consideration in 1870. Even as it was being framed, the Fifteenth Amendment was understood to be easily evaded.¹⁹

Warren’s *Brown* is sometimes lionized in ways that prompt one to wonder whether its most enthusiastic celebrants have actually read the opinion. Professor Ackerman is right when he complains that even leading academic

17. The Emancipation Proclamation freed slaves only in jurisdictions in rebellion against the United States. It left unaffected some eight hundred thousand slaves. It did not free those held in bondage in the four slave states that remained in the Union—Missouri (the locus, ironically, of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)), Delaware, Kentucky, and Maryland. Richard Hofstadter famously quipped that the Emancipation Proclamation displayed all of the “moral grandeur of a bill of lading.” RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION* 131 (1948). On the other hand, the Emancipation Proclamation did free over three million slaves, making it—in the words of Charles and Mary Beard—“the most stupendous act of sequestration in the history of Anglo Saxon jurisprudence.” CHARLES A. BEARD & MARY R. BEARD, *THE RISE OF AMERICAN CIVILIZATION* 100 (1927).
18. Wendell Phillips, for example, condemned the Fourteenth Amendment as “a fatal and total surrender.” ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877*, at 255 (1988). Phillips was referring to Section Two of the Fourteenth Amendment, which provides for a reduction in congressional representation in proportion to the number of male citizens denied suffrage:

Representatives shall be apportioned among the several States according to their respective numbers. . . . But when the right to vote at any election for the choice of electors . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2.

19. See WILLIAM GILLETTE, *THE RIGHT TO VOTE: POLITICS AND PASSAGE OF THE FIFTEENTH AMENDMENT* 25 (1965); ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 93-104 (2000).

interpreters do not seem to take Warren's text seriously. They fail, he notes, "to study Warren's words with care—choosing to see the opinion as a way-station to some far more glorious principle."²⁰ *Brown's* message, he insists, "deserve[s] to be considered carefully *in its own terms*."²¹ The irony is that Ackerman replicates the error he identifies. He does not so much explain what Warren actually wrote as use bits of what the Chief Justice wrote to construct a platform for launching his own anti-humiliation principle—a praiseworthy theory to be sure, but not one that Warren authored.

The *Brown* opinion contains, according to Ackerman, a "single master insight[:] . . . the distinctive wrongness of institutionalized humiliation."²² What the Court announced to governments in America, he claims, is that "[t]hou shalt not humiliate."²³ Ackerman's portrayal of a *Brown* anti-humiliation principle, however, fails to account for at least two important features of the Court's conduct. First, with respect to enforcement of *Brown*, the Warren Court was egregiously permissive for at least a decade. In *Brown II*,²⁴ where the Court initially posited the ground rules for administering *Brown I*, the Court did not demand that the aggrieved black children be released immediately from the confines of segregation. All the Court required was "a prompt and reasonable start"²⁵ and, thereafter, desegregation with "all deliberate speed."²⁶ The commandment "Thou Shalt Not Humiliate" would seem to entail something more urgent than the permissive timetable of "all deliberate speed."

Second, as Ackerman recognizes, the *Brown* opinion invalidated narrowly de jure segregation in public primary and secondary schooling; it did not gesture broadly toward the proscription of segregation in other spheres of social life—transportation, recreation, marriage. The end of de jure segregation would come to those realms only after many difficult campaigns in the decade and a half following *Brown*.²⁷

20. 3 ACKERMAN, *supra* note 1, at 240.

21. *Id.* at 242.

22. *Id.*

23. *Id.* at 298.

24. *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

25. *Id.* at 300.

26. *Id.* at 301.

27. See, e.g., *Gayle v. Browder*, 352 U.S. 903 (1956); *Holmes v. Atlanta*, 350 U.S. 879 (1955); *Mayor & City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955).

III. WHAT WAS THE RELATIONSHIP OF THE *BROWN* OPINION TO THE CIVIL RIGHTS ACT OF 1964?

Having posited that *Brown* announced an anti-humiliation principle, Ackerman maintains that important political actors embraced that principle, internalized its lesson, and spread its message beyond courtrooms to other lawgiving forums, most importantly Congress and the presidency. “Over the course of a decade,” Ackerman writes, “the initial rendering of [the anti-humiliation] principle in *Brown* moved far beyond the ambit of courts to gain deliberate assent by leading representatives of the American people”²⁸ I am not persuaded, however, by Professor Ackerman’s suggestion that *Brown* was a Bible containing gospel that was translated into legislation through the ministrations of Martin Luther King, Jr., Lyndon Johnson, Hubert Humphrey, and Everett Dirksen. *Brown* is surely among the score of important developments that mirrored and reinforced the broad current of racial liberalism that animated and shaped the Civil Rights Act. But Ackerman insists upon claiming for *Brown* more than that: “*Brown* not only represents the unanimous judgment of the Supreme Court at a great moment in its history; it expresses the animating logic for the landmark statutes supported by the American People at one of the greatest moments in their history.”²⁹ Warren’s opinion, Ackerman maintains, is the “key” that unlocks the mystery of “the distinctive character of solemn commitments endorsed by the American people in the landmark statutes”³⁰ of the Second Reconstruction. To Ackerman, *Brown* did more than *express* the anti-humiliation principle; it *taught* that principle in an effective way that caught on with influential actors who spread the gospel. According to Ackerman, “*Brown*’s common-sense prose served to anchor the next decade’s constitutional debate—serving as a target for opponents as well as a rallying point for defenders.”³¹

Where, however, is the evidence that *Brown* served “to anchor” debate over the Civil Rights Act of 1964? Ackerman does not show Martin Luther King, Jr., Hubert Humphrey, or Everett Dirksen alluding to *Brown* or paying homage to it as they championed the Civil Rights Act. What they declared was consistent with *Brown*, but what they declared was also consistent with other notable statements, including *To Secure These Rights: The Report of the President’s Committee on Civil Rights*, which was submitted to President Harry S. Truman

28. 3 ACKERMAN, *supra* note 1, at 137.

29. *Id.* at 133.

30. *Id.* at 317.

31. *Id.* at 134.

in 1947.³² That *Brown* exerted a formative influence over the champions of the Civil Rights Act is certainly plausible. But did it actually do so? This is an empirical question that Ackerman elides with an assumption.

That Ackerman gives such a prominent role to *Brown* in the Civil Rights Act drama is ironic given that one of the key and commendable aims of his book is to recalibrate the perspective of legal academics, draw them away from their parochial over-emphasis on the judiciary, and banish, or at least moderate, “great case-ism” – the habit of seeing the history of America’s legal development as mainly and merely an accretion of Supreme Court rulings. Ackerman’s discussion of *Brown*, however, is great case-ism with a vengeance. He assumes that Warren’s opinion was prominently on the minds of the key supporters of the Civil Rights Act. But he does not show that it was. Senator Humphrey did not draw upon Warren’s *Brown* in making the case for the Civil Rights Act. He did not have to. The sensibility, commitment, and understanding that fired and guided the Senator’s advocacy for the Civil Rights Act predated *Brown*. One can see those qualities in, among other statements, the impassioned speech that Humphrey (then the Mayor of Minneapolis, Minnesota) delivered at the 1948 Democratic National Convention.³³ Prevailing over the most established figures in the Democratic Party and facing down its segregationist wing, Humphrey succeeded in establishing a party platform regarding civil rights that anticipated the ethos of the Second Reconstruction six years before *Brown*.

IV. WHAT ROLE SHOULD *BROWN* PLAY IN PROGRESSIVE MOVEMENTS?

Because *Brown* has become iconic, a landmark that cannot be questioned seriously outside of academia without risk of severe self-discrediting,³⁴ activists

32. PRESIDENT’S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS (1947).

33. See TIMOTHY N. THURBER, *THE POLITICS OF EQUALITY: HUBERT H. HUMPHREY AND THE AFRICAN AMERICAN FREEDOM STRUGGLE* 62 (1999) (“There will be no hedging—no watering down—of the instruments of the civil rights program. To those who say we are rushing this issue of civil rights—I say to them, we are 172 years late! To those who say that this bill of rights program is an infringement of states’ rights, I say this—the time has arrived for the Democratic party to get out of the shadow of states’ rights and walk forthrightly into the bright sunshine of human rights.” (quoting Mayor Hubert Humphrey, Address at the Democratic National Convention (July 14, 1948))).

34. See Jack M. Balkin, *Brown as Icon*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 3, 4 (Jack M. Balkin ed., 2001) (“No federal judicial nominee and no mainstream national politician today would dare suggest that *Brown* was wrongly decided.”); see also Michael J. Klarman, *Brown v. Board of Education: Facts and Political Correctness*, 80 VA. L.

of various stripes strive mightily to stamp upon it their version of its meaning. Professor Ackerman attempts to make *Brown* maximally usable for progressives by making a virtue of the problem with the opinion that I previously noted: the omission of the white supremacist perpetrator from the story of segregation. By minimizing that omission, Ackerman broadens the scope of the *Brown* opinion by making liability for institutionalized humiliation turn not on the presence of a bigot—a figure of thankfully decreasing prevalence—but instead on the presence of social conditions that can be deemed to injure illicitly the hearts and minds of members of vulnerable groups. Ackerman tries to renovate Warren’s *Brown* to make it useful in the fight against institutionalized as well as personalized racism, and further, the fight against all manner of oppression (including racial oppression). Hence Ackerman writes that

[i]f taken seriously, the principles announced in Earl Warren’s great opinion have a broad reach: blacks and women, Muslim and Hispanic Americans, the mentally and physically disabled, gays, lesbians, and the transgendered—all these people often find themselves in conditions of institutionalized humiliation. They are all entitled to constitutional protection under *Brown*’s understanding of the Equal Protection Clause³⁵

The social injustice that Ackerman sees as the worst in our time, however, is the mistreatment of the undocumented: “If we look squarely at social reality, as *Brown* demands, no thoughtful American can ignore the daily humiliations heaped upon the eleven million undocumented immigrants who live among us.”³⁶ The only serious question, Ackerman maintains, is whether the Constitution allows today’s Americans to treat the undocumented in the same demeaning fashion in which Southerners treated blacks before the civil rights revolution. If the spirit of *Brown* survives “in the living Constitution, the answer must be no.”³⁷

I share Professor Ackerman’s outrage at the manifold injustices that blight our society and admire his commitment to inspiring and guiding progressive reforms that can suitably address these inequities. I disagree, however, with the way in which he enlists the *Brown* opinion in his project of creating a constitutional history usable for contemporary reformism. He both distorts the

REV. 185 (1994); Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383 (2000).

35. 3 ACKERMAN, *supra* note 1, at 335.

36. *Id.*

37. *Id.* at 336.

historic *Brown* opinion and leads current reformers astray. Ackerman puffs *Brown* up into an omnibus, all-purpose “promise” of social justice. This broad conception of *Brown*, however, is in sharp tension with the narrowness and diffidence of Warren’s *Brown*, that actual set of opinions in 1954 and 1955 that was non-accusatory, carefully delimited to public education, and accepting of “all deliberate speed.” Ackerman engages in wishful thinking, claiming that *Brown* promised more than it actually did. It invalidated de jure segregation in public schooling, and it created a basis on which, after much conflict, segregation was prohibited in virtually all areas of social life. That was a major undertaking. But it was an undertaking that did not embrace the whole project of racial justice (much less social justice). It did not embrace, for example, the problem of racial separation caused by racially stratified residential patterns (the issue of so-called de facto segregation), the problem of racial discrimination imposed by private as opposed to public actors (the issue involving public accommodations addressed by Title II of the Civil Rights Act of 1964), or the problem of rectifying the lingering disabilities inflicted by past oppression (the issue addressed initially by compensatory positive discrimination, also known as “affirmative action”).

I want to avoid any hint of churlishness here. The creators of *Brown*—the neglected named plaintiffs, their celebrated lawyers, the Justices who allowed themselves to break with tradition—all warrant congratulations, honor, and gratitude. The *Brown* opinion is a vehicle that carried essential freight. It was a crucial intervention that addressed an important problem—de jure segregation. But it should not be viewed as a vehicle that can carry all of the burdens of racial justice. Progressives ought to recognize its limitations and stop looking to *Brown* as an authoritative guide to solving problems beyond its borders.

In *The Civil Rights Revolution*, Professor Ackerman rightly urges avoidance of ancestor worship. The ancestors to which he refers are the framers of the First Reconstruction, the authors of the Thirteenth, Fourteenth, and Fifteenth Amendments. He suggests that we cease idolizing them and pay greater respect to the framers of the Second Reconstruction—the authors of *Brown*, the Civil Rights Act, the Voting Rights Act, and the Fair Housing Act. Both sets of framers did important work that moved America away from slavery, segregation, and other formalized patterns of racial subordination. But both sets of framers were also captives of their own contexts, forced to make compromises that we now all too often view uncritically as unequivocal victories. To address adequately the crises we confront will require more than habitual incantations to *Brown* and other landmarks of prior struggles. It will require forging altogether *new* laws, *new* doctrines, and *new* understandings pertinent to the demands of our own time.