

BROWN'S LEGACY: LOOKING BACK, MOVING FORWARD

Honorable Wilhelmina M. Wright[†]

It is indeed a pleasure to be here today to receive such a warm welcome from colleagues and friends and to gather at this annual event in honor of Lena O. Smith, a courageous legal pioneer who continues to inspire us to be fearless when confronting professional and personal challenges every day and to find both strength and joy in coming together as a community.¹

Long before I knew any lawyers, long before I dared to dream of becoming a lawyer, I knew about the *Brown* decision² and I knew it was relevant to my life. Some here can remember the sense of victory and vindication felt upon hearing news of the *Brown* decision. Others of us are too young to remember, but nevertheless know the decision well and rank it among the other landmark decisions of our nation's history. But *Brown* is unlike other twentieth-century landmark decisions such as *Miranda*³ and *Gideon*,⁴ which guarantee fundamental rights of fairness and ensure that our system of justice fulfills certain constitutional guarantees. Unless we are lawyers practicing in the criminal arena, or judges deciding criminal cases, we most likely do not have personal experiences with these cases and their legacy. But *Brown* is different. Regardless of our race, regardless of whether we are members of the legal profession, regardless of whether we have lived our entire lives in Minnesota or we grew up in the South or

[†] Minnesota Court of Appeals Judge. B.A., Yale College, 1986; J.D., Harvard Law School, 1989. The author would like to thank Scott Moriarity for his research assistance and Clifford M. Greene, Robin Wolpert, and William H. Wright II for their helpful comments and suggestions.

1. This keynote speech was delivered at the Lena O. Smith Luncheon on May 7, 2004. Lena O. Smith was the first African-American woman to practice law in Minnesota. In 1921, she graduated from Northwestern College of Law, a predecessor of William Mitchell College of Law. See generally Ann Juergens, *Lena Olive Smith: A Minnesota Civil Rights Pioneer*, 28 WM. MITCHELL L. REV. 397 (2001).

2. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

3. *Miranda v. Ariz.*, 384 U.S. 436 (1966).

4. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

other regions of the country, *Brown* has affected the lives of each of us in this room. We need not look far to see evidence of *Brown's* legacy.

Look around your table, look around this room, look around the boardrooms, courtrooms, law schools, offices, and civic organizations that we occupy. If you are African American, I dare say that *Brown* played a role in your gaining access to these institutions.⁵ If you are not African American or a person of color, that these institutions and your personal relationships enjoy the strengths and other benefits that diversity offers is directly attributable to *Brown*. We would not gather together today, in this way, but for the *Brown* decision.

But it is not enough to say, "Look at how far we have come since *Brown*." *Brown* holds a much more powerful significance in illuminating what we are capable of achieving in the future. *Brown's* history encompasses two stories that are particularly significant to me because they exhibit the strengths of a constitutional democracy.

As lawyers, we spend a great deal of time lauding the court for its unanimous decision that declared separate inherently unequal and revealed the devastating lie on which Jim Crow laws, racially restrictive covenants in housing, and other social and political manifestations of racial segregation were founded.⁶ The courage to speak the truth, a truth that was politically and socially unpopular in many bastions of power, is one part of *Brown's* rich history.⁷ It teaches a timely lesson about the importance of adjectives.

Adjectives? Yes. Let me explain. We often pride ourselves in living in a democracy. We herald our elections, and rightly so. The power of the vote is critical. Majority rule seems eminently fair. But *Brown* shows us that we live in a constitutional democracy. And without the adjective "constitutional" modifying our "democracy," neither Thurgood Marshall and his legal team, nor Linda Brown and the other children who received better educational opportunities despite living in a region where racial segregation was politically popular, would have had anything to celebrate fifty

5. See Yale Kamisar, *The School Desegregation Cases in Retrospect, Foreword to ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952-55*, at xxiii-xxvii (Leon Friedman ed., 1969).

6. See Richard Brust, *The Court Comes Together*, A.B.A.J., Apr. 2004, at 40, 42-43.

7. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 302-04 (2004).

years ago.

No doubt, Chief Justice Earl Warren and the associate justices were labeled by some as “activist” for the *Brown* decision,⁸ which overturned the well-established precedent of *Plessy v. Ferguson*.⁹ Yet their decision, and the power to make it, were derived from the most fundamental aspects of our *constitutional* democracy, the creation of an independent judiciary guided by constitutional principles. These justices struggled against prejudging the case based on the political climate or social norms. They looked to the very document that they had sworn to uphold. Applying the constitution and its principles of equality, they decided *Brown*.

Yet *Brown* shows us that judicial power is not unlimited. Indeed, *Brown* is the quintessential example of Alexander Hamilton’s vision of the judiciary set forth in Federalist 78.¹⁰ Without the power of the purse or the power of the sword, the *Brown* court was required through its morally persuasive tone and its unanimity to persuade southern officials to carry out the court’s mandate. Thus, *Brown* not only symbolizes the capacity of judicial independence to produce such a decision, it also illustrates the limits of judicial power.¹¹

A celebration of *Brown* is necessarily a celebration of our United States Constitution, which was crafted with a revolutionary vision of equality that was ahead of its time and that came closer to reality fifty years ago.

The second lesson of *Brown* is the ability of that revolutionary vision to inspire everyday people to take up the mantle of equality with the faith and expectation that America is capable of being “as good as its promise.”¹² *Brown*’s catalyst was that universal desire of *every* parent—the simple desire of mothers and fathers who want a better life and better opportunities for their children than they had themselves. These parents and their children saw the incongruity between the constitutional promise that “all men are created

8. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 308-12, 334 (1976).

9. 163 U.S. 537 (1896).

10. See THE FEDERALIST NO. 78 (Alexander Hamilton) (“The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of society; and can take no active resolution whatever. It may truly be said to have neither FORCE NOR WILL, but merely judgment.”)

11. See Cass R. Sunstein, *Did Brown Matter?*, THE NEW YORKER, May 3, 2004 at 102, 105-06 (book review).

12. Barbara Jordan, Harvard University Commencement Address (June 16, 1977).

equal” and the reality of legislated, codified inequality in education and every other aspect of their daily lives. Rather than simply being angry or despondent, they were inspired.

At first blush, the desire of these parents conflicted with the means to achieve that desire. Along with that parental desire for better opportunities comes a protective instinct. The legal strategy, if won, would place their children on the front lines of racial hatred from Kansas, Arkansas, and Virginia, to Boston, Dayton, and Detroit. These children would be called upon to do what we from the South call “grown folks’ business.” And like other children that they inspired, from Birmingham, Alabama to Johannesburg, South Africa, these children brought to the front line their innocence, their grace, their dignity, and their questioning eyes that spoke to the hearts and minds of a nation, while living in the midst of the “agonizing loneliness that characterizes the life of the pioneer.”¹³

Picture, in your mind’s eye, six-year-old Ruby Bridges, who caught the attention of Norman Rockwell, that great chronicler of American culture. Picture her in her starched white dress and hair ribbon, surrounded by four United States Marshals who were twice her size, as she climbed the steps of William Franz Elementary School in New Orleans, the elementary school that she single-handedly desegregated. She personifies the unwavering strength of our Constitution’s protection of those who are perceived as powerless. When I see pictures of Ruby Bridges or Ernest Green and the other Little Rock Nine who integrated schools in the midst of violent protests, I remember Anna Julia Cooper’s words, “When and where I enter, in quiet undisputed dignity . . . without violence, or special patronage, then and there the whole race enters with me.”¹⁴

Mr. and Mrs. Brown, Mr. and Mrs. Bridges, and the other parents whose names history does not remember, with their unflagging determination, with their “eyes on the prize,” were twentieth century patriots who were courageous in their willingness to sacrifice the false comfort of acquiescence for a dream of liberty and equality first articulated by the revolutionary founders of this country—founders who, because of the limits of their culture and experience, never imagined that their vision of America would

13. Martin Luther King, Jr., *Letter from Birmingham Jail* (Apr. 16, 1963), available at http://www.stanford.edu/group/King/popular_requests/frequentdocs/birmingham.pdf.

14. ANNA JULIA COOPER, *A VOICE FROM THE SOUTH* 31 (1892).

inspire Linda Brown, Ruby Bridges, and their families to ask the courts to make good on the promises of a constitutional democracy.

Like any celebration of a landmark event, be it the anniversary of the United States Constitution or legal decisions, such as *Brown*, that interpreted the Constitution, we are also called upon to consider whether the expectations of the landmark event have been fulfilled. Important and salient commentaries have shown us that after the period of massive resistance when my school district and many others in the South closed down rather than implement *Brown*, and after the implementation of court-ordered and voluntary desegregation plans around the country, many of our nation's public schools are racially and economically isolated today.¹⁵ And the achievement gap between African-American children and white children is a travesty that threatens the strength and vitality of both capitalism and democracy in America.¹⁶ If viewed today as a snapshot, *Brown's* promise at best may be perceived as yielding disappointing results—an unfulfilled dream. If viewed as a motion picture, a process with evolving potential, *Brown* at fifty is a call to action.

I am reminded of Justice Thurgood Marshall's speech at a celebration of the 200th Anniversary of the United States Constitution when he said:

The focus of this celebration invites a complacent belief that the vision of those who debated and compromised in Philadelphia yielded the 'more perfect Union' it said we now enjoy If we seek, instead, a sensitive understanding of the Constitution's inherent defects, and its promising evolution through 200 years of history, the celebration . . . will, in my view, be a far more meaningful and humbling experience. We will see that the true miracle was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making, and a life embodying much good fortune that was not.¹⁷

15. See DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 127-29 (2004); GARY ORFIELD & CHUNGMEI LEE, *BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE?* 2-3 (2004).

16. See PETER IRONS, *JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE BROWN DECISION* 312-15 (2002).

17. Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association ("The Bicentennial Speech") (May 6,

A celebration of *Brown* invites a similar recognition of its life, not merely its birth. We have already recognized today the evident progress that *Brown* has achieved. But there is unfinished business that each of us must attend to. Because while *Brown's* focus was securing equality in public education for schoolchildren, *Brown's* broader impact is felt in its potential to continue to improve our community. Harvard Law School Professor Charles Ogletree recently stated that the successful implementation of the *Brown* decision has been challenged not only by white flight, but also by black middle-class flight.¹⁸

The unfinished business of *Brown* calls on each of us here to break down the barriers to reaching across racial and socioeconomic differences if we truly believe in the ideal and the benefits of a fully integrated society. And while that is a challenging proposition, it is far less daunting than sending your six-year-old daughter, who is full of hope and excitement about first grade, through the gauntlet of racial epithets and angry threats, to a classroom where, because of her race, she is the *only* student, day after day, for nine months, so that she and others like her might have better opportunities.¹⁹

When we create a foundation or a scholarship to educate disadvantaged youth, when we go to an elementary school to mentor and read to a student, when we go out of our way to make sure a child without the means can pay for equipment and transportation to participate on a sports or academic team, when we challenge a teacher or a school district, not for the mistreatment of our children of privilege, but for the mistreatment of someone else's child, when we serve on the school board or in other positions of leadership and make sure that voices and experiences different than our own are heard and represented, when we engage in the hard work of friendships beyond our comfort zone and encourage others to do the same, we are carrying out *Brown's* mandate. Then we, like the Brown family and the Bridges family and the communities that supported them, are guaranteeing better opportunities for our own *as well as for others*.

Those who compare the *Brown* decision to a silver bullet

1987), available at http://www.thurgoodmarshall.com/speeches/constitutional_speech.htm (last visited Oct. 3, 2004).

18. CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION 297 (2004).

19. See RUBY BRIDGES, THROUGH MY EYES 18, 22, 24 (1999).

cannot be anything but disappointed. But that disappointment arises from a misunderstanding of *Brown's* promise. *Brown* did the tough work of dismantling legislated racism, *de jure* segregation and inequality. It takes us, as communities of people of courage and good will, to do the tough work of dismantling *de facto* segregation, inequality and the misunderstandings they breed, which also are damaging to the hearts and minds of all of us who seek the benefits of a constitutional democracy.

So in honor of *Brown* at fifty, let us be guided by Justice Harry Blackmun's words spoken at the ceremony held on the occasion of his retirement from the United States Supreme Court. He said:

Let us hope that, in the years far down the line, when history eventually places us in such perspective as we deserve, it at least will be able to say: '*They did their best and did acceptably well.*' If that comes to be said, it is because of your cooperation, your understanding, your patience, and your acknowledgement that ours is a common, not an individual task, and that we strove, in our small ways and with our limited capabilities, for the righting of injustices of both ancient and current origins.²⁰

Thank you.

20. Letter from Harry Blackmun to the U.S. Supreme Court (June 22, 1994), in 512 U.S. at ix (emphasis added).