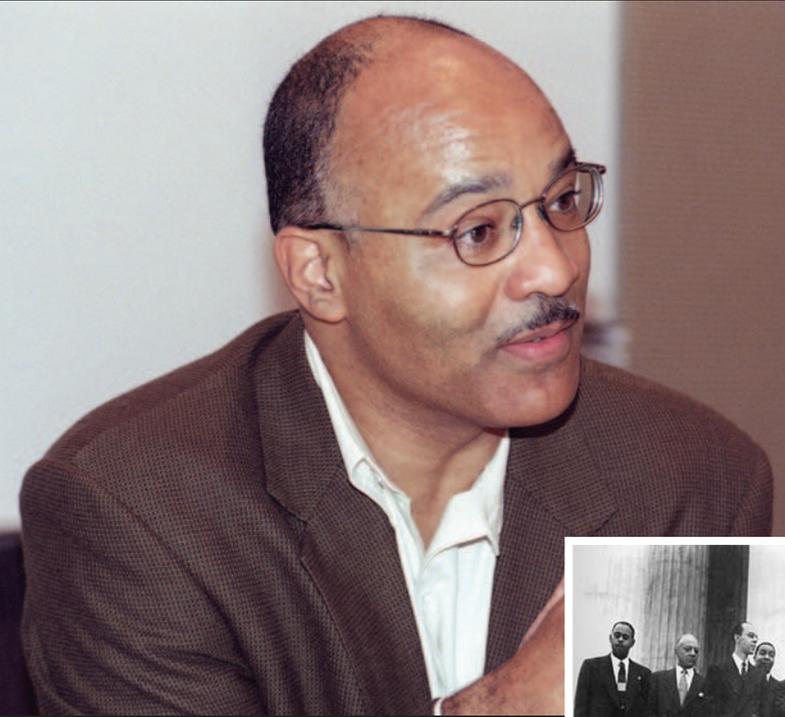


Brown v. Board of Education



50 Years Later

“We conclude that, in the field of public education, the doctrine of ‘separate but equal’ has no place.”

—Chief Justice Earl Warren, in the unanimous decision issued May 17, 1954

A lawyer who helped argue the landmark case weighs its meaning with three Stanford Law School professors.



his year’s 50th anniversary of *Brown v. Board of Education* demands reflection. The

Supreme Court’s landmark decision struck down racial segregation in public schools and marked a turning point in the assault on Jim Crow apartheid.

Jack Greenberg, then a young assistant counsel at the NAACP Legal Defense and Educational Fund (LDF), was one of a half-dozen lawyers who argued before the Supreme Court in the five consolidated cases now known as *Brown*. He later succeeded Thurgood Marshall as LDF’s director-counsel and now serves as a professor at Columbia Law School. A pivotal player in the civil rights movement, Greenberg wrote a personal history of the LDF, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution*, which was first published in 1994 and is being reissued this year with additional material.

In December 2003, Greenberg spoke at a Stanford Law School event sponsored by the School’s chapter of the American Constitution Society. Before his talk, *Stanford Lawyer* organized a roundtable with Greenberg and three Stanford Law School faculty members: R. Richard Banks (BA/MA ’87), Associate Professor of Law, a leading scholar on racial discrimination, criminal justice, and affirmative action; Pamela Karlan, Kenneth and Harle Montgomery Professor of Public Interest Law, one of the nation’s foremost constitutional litigators, who also began her legal career at LDF; and William Koski (PhD ’03), Associate Professor of Law, a practicing lawyer and education policy scholar who runs the Law School’s education law clinic.

Rick Banks: One of the criticisms of *Brown* is that it catalyzed the resistance. Sometimes I wonder what would have happened had the state not appealed—had there not been a *Brown* at all.

Jack Greenberg: American politics, with regard to race, was a frozen sea. It was under the control of the Eastlands and Talmadges and Bilbos and Russells [powerful Dixiecrat senators]. Nothing was going to change them or dislodge them from power. Blacks couldn’t vote.

CLOCKWISE FROM TOP LEFT:
SLS Professors R. Richard Banks, Pamela Karlan, and William Koski; and Columbia Law Professor Jack Greenberg.

(PHOTOS: STEVE GLADFELTER)

CENTER:
Members of the plaintiffs’ legal team in the *Brown* cases: John Scott, James Nabrit, Spottswood Robinson, Frank Reeves, Jack Greenberg, Thurgood Marshall, Louis Redding, Simpson Tate, and George Hayes. (LDF)

The metaphor I use is that *Brown* was like an icebreaker. It broke all that up. In retrospect, *Brown* wasn't a school case; it was a case that transformed the politics of America.

Pam Karlan: What's interesting is the legal team's decision to pursue such a change with schools cases, rather than voting rights litigation, or housing or employment cases.

Greenberg: Well, civil rights lawyers had been bringing successful voting cases since *Guinn v. United States* [238 U.S. 347 (1915)]. Still nobody was voting.

There were the restrictive covenant cases. But they didn't integrate any housing at all—and still haven't.

Integrating housing or employment or public accommodations raised issues under the state action doctrine. In those areas, there's no state action of any meaningful consequence. There was no way of really getting at the employment, housing, public accommodations, or voting that made a difference.

Bill Koski: Yet one of the enduring effects of the case is the idea that once a state undertakes to provide education, it has to do so on an equal basis. As a result, many of us think that there's something special—something unique—about education as a state function, that it should be provided equally to all folks. And what, I wonder, is the remedy...

Greenberg: Apart from desegregation?

Koski: Right. Because as the remedy was developed in the desegregation cases, it became harder and harder to integrate—to create racial balance in the schools. In the North and the West, there was white flight and residential segregation.

So the legacy of *Brown* became, at least in many of those cases, one of providing equality of educational resources.

It was making sure that the inner-city schools were as well resourced as the suburban ones . . . or providing some sort of remedial education for kids who had suffered under a segregated regime—remedies along the lines of *Milliken II* [*Milliken v. Bradley*, 433 U.S. 267 (1977)]. Even today, the litigation we see around school finance—even in cases about kids with disabilities—is much more about ensuring equal or adequate resources.

Are we taking this in the right direction by looking at resource equality, or should we be thinking about racial balance and integration?

Greenberg: You can only go where you can go. People are going down the route of the school equalization cases because the integration cases have run into the *Milliken I* [*Milliken v. Bradley*, 418 U.S. 717 (1974)] barrier and the *Dowell* [*Board of Education v. Dowell*, 498 U.S. 237 (1991)] barrier. States are now doing something about equalizing preschool. Okay, that's good. Maybe that's the best you can expect. [Former New Jersey Governor] Jim Florio took education reform seriously and he got run out of town.

Nobody ever went broke betting on the generosity of the American people.

Karlan: Still, anybody who says that *Brown* hasn't made a difference can't possibly ever have been south of the Mason-Dixon line. I remember the first time I went down as an intern for LDF to Birmingham, Alabama, which was in 1981. I was there to work on a case with a cooperating lawyer, Demetrius Newton, who had lived in an area that was called Dynamite Hill because there had been so many bombings.

After I had been there about four or five days he said, "Why is it you keep drinking out of that hose over there?" In the building there was a regular water fountain, and then there was this hose with a bucket and the water was always dripping. I said, "Well, I figured the water fountain wasn't working, and that's why you had this other thing in the building." He began to laugh. He said, "That's just a relic from when there were separate water fountains—nobody drinks out of that thing anymore."

It had never occurred to me when I was in that building that people who started elementary school when I had wouldn't have seen any desegregation until fifth grade. Yet by the time I went there, it had changed in some fundamental ways. Now, as a result of voting rights litigation we did at LDF—and which I continue to do today as a cooperating attorney—Alabama has more black elected officials than virtually any other state.

Banks: I didn't live through the *Brown* era, but I have heard many stories from my relatives that attest to quite a remarkable pace of change. I mean, most of my family came north from the segregated South, from Alabama and from Georgia. And mostly they came north because of terrorist-type activities in the South. They lived under a set of conditions that are almost unimaginable today.

The great irony, though, is that many people have now moved back to the South because they found conditions in the South to be more amenable than conditions in such cities as Cleveland, Detroit, and Baltimore. It is quite a remarkable change.

Karlan: That's not the only irony. Much of the *Brown*-era litigation was an appeal to federal courts, and now we see much of the real action in state courts instead.

Greenberg: But what is this real action? There have been about 40 cases in the state courts about the right to a decent public education and about 20 victories. But the prayer for relief has now been scaled back from "equality" in education to "adequate" education.

Koski: It's interesting you call that a scaling back because some view the change as ramping up: requiring a high level of adequacy for all kids, as opposed to what California now guarantees, which is bare minimal equality.

Greenberg: I guess it depends on what you mean by adequacy. The New York appellate division says adequacy means you have to be able to read at an eighth-grade level. Maybe in some places adequacy can be more. Integration isn't the only remedy. Look at *Jenkins* [*Missouri v. Jenkins*, 515 U.S. 70 (1995)] in Kansas City: \$2 billion was put in there, and by any measure of educational attainment, nothing changed. Look what happened in *Milliken*. It was certainly many tens of millions spent and nothing changed. If you don't have the same educational standards for everybody and people going to school together, spending money alone doesn't make a lot of difference.

Karlan: Voting rights litigation is starting to present the same conundrum as the education cases following *Brown*. We're now finding ourselves trying to defend the cases that we won in the 1980s, in the same way that school desegregation decrees were defended. A lot of what we are spending our time doing is saying to courts essentially, "Look, we want you to just clear out a little more space so we can negotiate this politically, because our clients are very politically savvy and they've got representation in the state legislature." What we want the courts to do now is, in some sense, to give us the room to do that kind of negotiating.

Today's litigation under the Voting Rights Act is raising this challenge: Has politics matured and become sufficiently fluid that some of the remedies that we won in 1965 or in 1982 need to be rethought? There's a natural resistance to giving up any gains you already have. How do you make the appropriate trade-offs?

Of course, when the Voting Rights Act was passed, there were no trade-offs to be made. Either the black community was to be given straightforward power by giving black voters districts in which they were in the majority or they were going to get nothing. Now it's much more complicated.

Banks: The question I think we're raising in a lot of ways is where to go from here. Litigation has to be combined with other advocacy strategies. Pam, you're suggesting that maybe one approach is to use litigation and other advocacy strategies to make room for politics to work. That's interesting, because that issue is raised in the criminal context as well. There are a number of people who argue that maybe we should rethink some of the old criminal procedure rulings and create room for politics to work now that we do have many more black office holders and minorities who are in politically powerful positions. So it seems like that view is emerging from a number of different areas.

Koski: You read, certainly since about 1990, a lot of the social research on the efficacy of litigation, and it's very easy to trash litigation as a strategy for reform because the bar often gets set pretty high. You have a goal with litigation of desegregating all the schools so that black and white kids will be going to school together. But I think we have to look more subtly at the role of litigation as one of the many advocacy tools available to us and think more subtly about the places where litigation can serve as a catalyst. Litigation can serve as cover for others to do the things that they otherwise would want to; litigation can be educational.

Banks: That's a great point. Litigation is clearly most useful in combination with other approaches, and it can catalyze social movements. It can be very effective in that way.

What I wonder about is the extent to which litigation actually educates people in the sense not merely of bringing the situation to light, but also altering their values in some way. That's the claim made about *Brown*.

Karlan: It's interesting, because a couple of months ago I saw Fred Gray, who was the local lawyer for Martin Luther King in Montgomery. He was asked about the effect of *Brown*, and he explained, "We don't view it as a schools case." He moved to Alabama in the summer of 1954 to start practicing law, and he said *Brown* made a difference to his thinking about what would be possible for his clients.

Audience member: But don't some scholars contend that the civil rights movement came to rely too heavily on litigation as a means for change because of its success with *Brown*?

Greenberg: If anything it was to the contrary. The sit-in demonstrators—they didn't want anything to do with the lawyers. They went to jail. They wanted to stay in jail. So

there was no litigation. The people who went off on the Freedom Rides, they never talked to a lawyer before they did that. Martin Luther King called me in to represent him—this was after a long spell of getting into a lot of trouble. So I think that's not true at all.

I think it was a salutary development that the lawyers essentially created situations in which people could act and accomplish something. Once the movement got going, the movement was dominant.

Karlan: Do you think the meaning of *Brown* has been hijacked? Everybody uses *Brown*.

Greenberg: When you see a Supreme Court decision upholding school vouchers in Cleveland [*Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)], all the editorials said, "This is a new *Brown v. the Board of Education*."

Karlan: Here's one of the places where I see the misuse of *Brown*, and it just drives me crazy: We were at the Supreme Court defending majority black congressional districts. The conservative members of the Court say, "You can't deliberately take race into account in drawing congressional districts because *Brown* tells us that race consciousness is evil." Conservatives will say the meaning of *Brown* is "No affirmative action or no race-conscious redistricting."

Of course, ***Brown wasn't just about de jure segregation. It was about the hearts and minds of students and their having opportunities later in life that are as broad as anyone else's.*** Minority voters need to have an equal opportunity to elect candidates who represent their interests. To paraphrase my old boss Justice Blackmun in *Bakke* [*Regents v. Bakke*, 438 U.S. 265 (1978)], sometimes to get beyond race we have to take race into account.

Koski: One person might say *Brown* is about an anti-caste rationale: we do not want to subordinate any group. Another person, like me, might say, no, it's about education and the centrality of education to American citizenship. It's a bit of a Rorschach depending on who's reading it and who's applying it.

Karlan: Jack, when you argued *Brown*, did you have any idea how long it would take to get black students into all-white southern schools?

Greenberg: We had some conception. Look at what had happened with all the university cases. If you sued the University of Maryland in Baltimore, they said that it didn't apply to the University of Maryland in Annapolis. State authorities took the position that the judgment applied only to the particular plaintiff and the particular defendant in the case. So you just had to keep suing them. But I don't think anybody anticipated that the South would engage in what came to be called "massive resistance" or that there would be a campaign to "impeach Earl Warren" or that states would pass statutes to outlaw the NAACP or to disbar civil rights lawyers. Nobody anticipated that.

Karlan: One of the things that I've been thinking about, especially because of the University of Michigan Law School affirmative action case last year [*Grutter v. Bollinger*, 123 S.Ct. 2325 (2003)], is the value of racial integration in elite institutions like law schools.

Banks: In the university context, it is startling how important test scores have become and the extent to which people see admission as an individual entitlement. And I hear echoes of this, maybe unfairly, in Thurgood Marshall's response at the oral argument in *Brown*: Let the dumb black kids go to school with the dumb white kids and the smart white kids go with the smart black kids. How do we determine this in a society where test scores are correlated with socioeconomic status and socioeconomic status is correlated with race?

Greenberg: Well, back then I don't think testing was as prominent as it is now.

Karlan: In the amicus brief we drafted for the Association of American Law Schools in *Grutter*, we use a striking fact from your recent article about affirmative action: for two or three consecutive years at Columbia Law School, the person who graduated first in the class had been let in off the wait list.

Greenberg: And I know a person who was admitted on the last day before classes began who later clerked at the Supreme Court.

Karlan: I found that striking because it was such a powerful illustration of two things: we've become so bound up in our admissions decisions by test scores, but so much of what we do as lawyers is not captured by those scores.

Koski: The tests aren't even intended to measure many of those skills.

Karlan: So much of where we are post-*Brown* is captured by two Nick Lemann books, *The Promised Land: The Great Black Migration and How It Changed America* and his history of the SAT, *The Big Test: The Secret History of the American Meritocracy*.

At the time of the Great Migration, blacks who moved north could hope that hard work in blue-collar jobs would provide economic mobility. Today, though, higher education is the route to the middle class, and standardized tests are the gateway to higher education. The testocracy makes so many of our problems seem intractable. Did the problems seem as intractable to you when you started working on these things as they sometimes seem to me?

Greenberg: People are attributing to us a sort of cosmic thinking that just wasn't there. We simply thought it wasn't right to segregate kids; that's all. But we saw what happened in university cases. The first one was won in 1935, actually in the state court, then in 1939 in the Supreme Court, and 1948 in the Supreme Court, and 1950 in the Supreme Court, and still in 1962 you had the James Meredith case [*Meredith v. Fair*, 305 F.2d 343 (5th Cir. 1962)].

The schools cases were not brought in anticipation that they would revolutionize the country. But they had a potential for doing more than, let's say, the housing or the public accommodations or the employment cases. So we went with them, (A) as a matter of principle, and (B) in kind of a patient way thinking little by little they would make a difference.

Karlan: Is the main function of integration to break up concentrated pockets of poverty, or is it something about racial integration that's transformative?

Koski: One might view integration, I suppose, as creating tolerance that we all have to live together, cutting across cultures and races. Equalizing resources is never going to touch that.

But if the goal of integration is to improve educational opportunities for all by tying the fortunes of white kids or wealthy kids with those of either minority or poor kids, then we have to think about whether we can accomplish that through improving the resources of those schools alone. Or are the politics such that we actually have to mix the kids together?

Greenberg: I think you have to mix the kids together.

Banks: What would lawyers at the time have said if presented with the possibility that wiping away de jure segregation would leave much segregation in its place because of resi-

dential patterns, jurisdictional boundaries, funding, and race and class being conflated?

Greenberg: I don't think we really thought ahead to all that. For example, at the beginning, litigators didn't foresee the barrier *Milliken* would create to desegregating metropolitan areas by reassigning students between urban and suburban schools.

Karlan: I guess so much of litigation is the art of the possible given the courts you have.

Greenberg: Well, that was the whole story of the sit-in litigation, from the beginning to end. We argued that the refusal to serve somebody a hamburger at a lunch counter was state action: a claim that the store owners wouldn't even own the lunch counter, except to the extent that the state creates property rights in the first place. And that's right, but the Supreme Court was not going to go down that line.

Banks: So much of this discussion is about what's possible: what courts will buy, and which arguments seem feasible, and whether there's a constitutional hook. But if we put that to the side, was there a feeling among many people that the evil was de jure segregation, was it that you were seeking racial integration, was it that you were seeking socioeconomic integration that would coincide with racial integration?

Greenberg: You ask me that not as a lawyer.

Banks: Not as a lawyer.

Greenberg: **I just thought it was wrong that people should be separated because of their race, no matter what it was caused by, whether social factors or economic factors.**

But I'm a lawyer. And what a lawyer gets a handle on is what the law does about it. I'm dealing with essentially what's possible. And that gets me back to *Brown*. I think *Brown* took the segregation issue and put it into the field of politics, where everything is possible.

Louis Trager (ltrager@comcast.net), a legal and communications-policy writer and editor in the East Bay, assisted in adapting the roundtable transcript for publication.