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The Darker Face of Brown - The Promise and Reality of the Decision Remain Unreconciled Brown at 50: A Symposium

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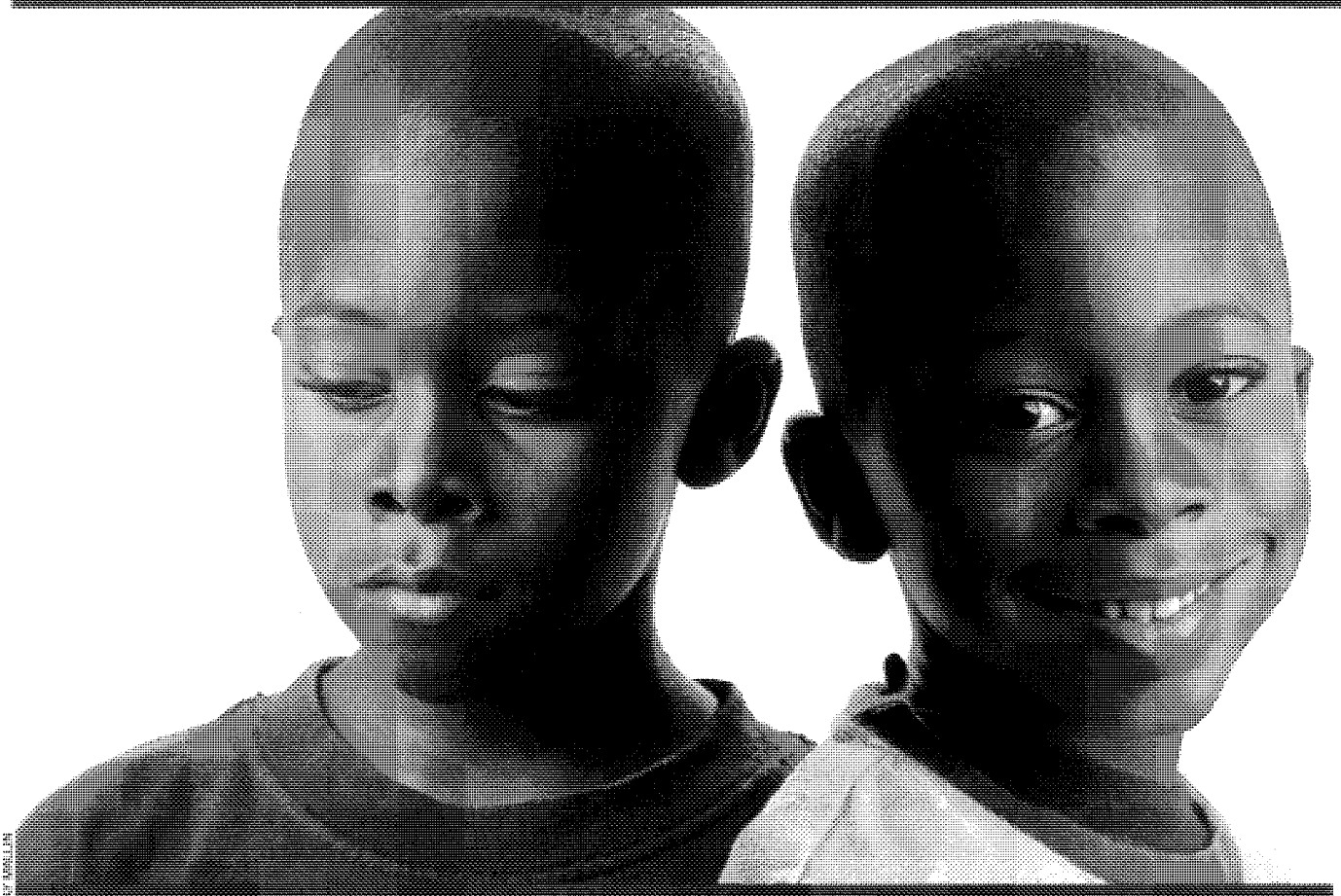
The darker face of *Brown*



The Promise and Reality of the decision remain unreconciled

The great American Creed shall remain an empty promise so long as the nation refuses to honor the high road offered by the majestic anticaste moorings of *Brown*.

Brown has two faces: a face of joy, hope, and the promise of equal educational opportunity for every child and a face of despair, hoplessness, and racialized educational caste for American children with darker skin.

In his *Plessy* dissent, Justice John Marshall Harlan said "There is no caste here. Our Constitution is color-blind and neither knows nor tolerates classes among citizens."

by BRYAN K. FAIR

For many people, *Brown v. Board of Education*[1] is the most significant U.S. Supreme Court decision of the 20th century. As I mark its 50th anniversary, I am filled at once with exuberance and frustration because *Brown* is vexing, like so much of American law, appearing to give substantive reform with one hand only to take it away with the other.

Brown has two faces. One is a face of joy, hope, and the promise of equal educational opportunity for every child. The other is of continuing despair, hopelessness, and racialized educational caste for American children with darker skin. The reality is that constitutional amendments and federal statutes proscribing discrimination and assuring equal protection of the laws have had the most modest substantive impact, giving little relief from discrimination or inequality. These two aspects of *Brown*, its promise and the reality, remain unreconciled throughout the country after a half-century of litigation.

In *Brown*, on the one hand, I am reminded of Justice John Marshall Harlan's majestic promise in his *Plessy* dissent: "There is no caste here. Our Constitution is color-blind and neither knows nor tolerates classes among citizens."[2] Of course, Justice Harlan was simply wrong. From the beginning of the American experiment, caste was extant: masters, indentured servants, subdued Native tribes, and slaves defined the society. Moreover, the Crowns and merchants of Europe sought to exploit labor and to extract the Americas' resources for their personal economic gain. And that pattern of avarice and exploitation has caused caste throughout every corner of the world, including the ghettoes, barrios, and slums across the United States and its territories. Nonetheless, Justice Harlan's rhetorical panache provided a place for the aspirations of those mired in caste. In his declaration of the anticaste principle, he presented a constitutional pathway up from and out of cumulative racial caste.

On the other hand, as I reflect on *Brown*'s legacy, I also recall Justice Harlan's admonition, "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time. . . ."[3] In Justice Harlan's declaration of racial supremacy, I locate one of the worst traditions of American law. Harlan was not wrong here, but he did not explain how whites had misused the law to abuse the civil rights of colored people to establish white supremacy. He

1. *Brown v. Board of Education.*, 347 U.S. 483 (1954) [*Brown I*] and *Brown v. Board of Education.*, 349 U.S. 294 (1955) [*Brown II*].
2. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
3. *Id.*

did not mention the legalized thefts and government-sponsored brutality against Native tribes, slaves, mulattos, free persons of color, Chinese and Japanese aliens, or Mexicans. He did not recall the links among Manifest Destiny, American imperialism, and white supremacy.

White supremacy could not exist without its codification in law. The fallacy of white superiority would be obvious without the manipulation of the law. White hegemony is a consequence of discriminatory laws, not evolution. It is now impossible to know what might have become of the American experiment, absent misuse of the law. But there are good reasons to believe things would be quite different.

Hope and promise

One face of *Brown* rests on a theory of equal citizenship and dignity of all persons. *Brown* overruled *Plessy*'s lie, heralding a new promise of equal educational opportunity never achieved in the era of separate but equal. *Brown* held that separate educational systems for white and colored children were inherently unequal, violating the equal protection guarantees of the Constitution.[4] The Court underscored the importance of equal educational opportunity in the life of every child and the permanent status injury to colored children from state-sponsored segregation.[5] The Court recognized the implicit stamp of inferiority imposed on colored children in a system that declared they were unfit to associate with white children.[6] Most of all, the Court imposed on school officials an affirmative duty to remedy their constitutional violations, every root and branch.[7] This aspect of *Brown* reaffirms Justice Harlan's anticaste declaration.

Likewise, this face of *Brown* is Charles Sumner's heir. As chief proponent of the 14th Amendment, Sumner declared his primary goal for that amendment was to dismantle black caste.[8] Sumner detested what he called the essence of white supremacy: "I am white, get away."[9] So, when Justice Harlan exclaimed, "There is no caste here," he was affirming the anticaste moorings of the 14th Amendment so ably championed by Sumner. Sumner and Harlan understood there was no constitutional distinction between whites telling colored people to get away from the white sections of trains or buses and whites telling colored people to get away from public schools.

This anticaste principle is noble and heroic. It pledges corrective justice no matter how long delayed. It insists that the law can do for equality what it did so effectively and long for inequality.

Educational disadvantage

But *Brown* has another prevailing aspect, repeating a pattern of American law that is as old as the nation. The *Brown* Court failed to lay bare the white privilege inherent in all segregated school systems, whether *de jure* or *de facto*.[10] The Court did not discuss how segregation instilled visions of white superiority in so many children, nor did it identify the cumulative educational advantages received by white children attending better funded, better staffed, better equipped schools. *Brown*'s discourse rendered the cumulative educational advantages of whites legally invisible. Its magical language appeared to give so much, but in the end did not dismantle educational caste for millions of Americans with darker skin. In addition to ordering an end to segregation, the Court should have ordered every school district sponsoring segregation to eliminate all educational disadvantage caused by segregation policies.

This pattern has been a cornerstone of American law. Like the Declaration of Independence, the language in *Brown* suggested a commitment to equal citizenship and equal opportunity. Yet neither has proven available for the protection of all Americans. Like the U.S. Constitution, the language in *Brown* contains euphemistic clauses to disguise real motives and compromises regarding the sacrifice of the rights of colored people to benefit most white ruling elites. For example, although the Court trumpeted the importance of education, it failed to declare that every child had a fundamental right to educationally effective schools. Moreover, despite the constitutional violation, the Court left it to each school district to act with "all deliberate speed."[11]

Like Lincoln's Emancipation Proclamation, the language in *Brown* does not deliver the freedom of educationally effective schools to any colored children. And like the 14th Amendment's equal protection clause, the language in *Brown* does not ensure that the law of educational opportunity will extend to colored children on the same basis as white children. As with all the foundational documents of American law, *Brown*'s spirit was muted by those unwilling to extend the grace of the American Creed to colored children. Our rulers betrayed the Declaration of Independence, the U.S. Constitution, and the 14th Amendment. And they have betrayed *Brown*, translating it into constitutional oblivion and irrelevance.

Invoking ideals, not practices

I seek to re-center *Brown*'s anticaste moorings by heralding its equal citizenship values. When I honor *Brown*, I invoke the great American ideals, not its practices; I invoke the American promise and dream, not their betrayal. In *Brown*, the Court reminded the nation that colored children deserved what white children took for granted: to be treated by the government as equal citizens with equal status and equal educational opportunity. The Court said it was a betrayal of the Constitution to treat colored children as outsiders,

4. *Brown I*, 347 U.S. at 495.
5. *Id.* at 493-94.
6. *Id.* at 494.
7. *Brown II*, 349 U.S. at 299; *Green v. County Sch. Bd.*, 391 U.S. 430, 437-38 (1968); *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 15 (1971).
8. Bryan K. Fair, *The Anatomy of American Caste*, 18 ST. LOUIS U. PUB. L. REV. 381, 390 (1999), citing *Hearings on Amnesty Bill (Civil Rights Amendment)*, 42nd Cong., 2d Sess. (Jan. 15, 1872) (statement of Sen. Sumner), at 383.
9. *Id.* at 391-93.
10. *Brown I*, 347 U.S. at 494: "Segregation . . . in [p]ublic schools has a detrimental effect upon the colored children."
11. *Brown II*, 349 U.S. at 301.

unfit to associate with white children. The Court said the exclusion of colored children implied their civil inferiority, their caste.[12] Surely, the Court was correct that such a message by the government is inconsistent with the equality guarantee of the Constitution.

When I celebrate *Brown*, I salute the temerity of the families in all the consolidated cases who courageously stood with their lawyers against white supremacy and educational tyranny.[13] I commend the NAACP Legal Defense and Educational Fund and the brave public interest lawyers who faced down assertions of white entitlement. I give thanks to Charles H. Houston, Thurgood Marshall, Julius Chambers, Jack Greenberg, Elaine Jones, and Ted Shaw, and all the special counsel and scholars who have explained why white superiority is a legally constructed myth that undermines American nationhood.[14] I praise *Brown* as a repudiation of the nation's commitment to white hegemony. I honor *Brown* as a landmark victory, knowing no amount of resistance can unring its tone of equal educational opportunity.

Barely a shadow

Nonetheless, it is inescapable that *Brown*'s potential to dismantle educational caste in the United States has not been fully realized at any grade level. Racialized performance gaps are persistent. From early education through graduate or professional training, there are huge racial disparities in opportunities, achievement, and attainment.[15] School segregation is still a national crisis and shame. Educational opportunity depends more on gerrymandered zip codes and racialized property values than on capacity to learn. Many colored children receive neither an adequate nor equitable education, leaving them with little means to compete in the future. Moreover, modest performance gaps on standardized tests are used against colored children to track them into second-caste schools or classrooms throughout their training. And the nation's flagship colleges and universities remain closed to all but a handful of colored students.

Thus *Brown* is today barely a shadow of what it might have been. The current Rehnquist majority has missed no opportunity to interpret *Brown* in a way that abandons the same colored children whom a unanimous Court pledged to lift up 50 years ago. The Rehnquist majority has made it easier for local officials to avoid federal supervision of schools.[16] The Rehnquist majority has made it more onerous for plaintiffs to establish links between historic school segregation and school segregation today.[17] The Rehnquist majority has insisted that federal judges have quite limited equitable powers, restricted to the narrowest grounds of a constitutional violation, with no systemic reform capacity.[18] And the Rehnquist majority has held that the affirmative duty to dismantle the constitutional violation is only "to the extent practicable."[19]

Thus, the real meaning of *Brown* has been lost in its translation by the Rehnquist majority. *Brown* simply does not mean what the nation thought and celebrated 50 years ago. It does not guarantee equal educational opportunity. It does not ban extant racial segregation. That *Brown*'s anticaste moorings have been undervalued by the Rehnquist majority is especially ironic if it is correct that, as a law clerk in the 1950s for Justice Robert Jackson, Rehnquist wrote a memo to Justice Jackson recommending that the principles of *Plessy* should be affirmed in *Brown*.[20] Although Rehnquist has denied that the memo reflected his views, perhaps the most damning proof is *Brown*'s undoing on his watch. The Rehnquist majority has ignored the extensive roots and branches of segregation that still remain, discounting their connection to past segregation. And the Court has increasingly restricted the affirmative duty imposed on school officials to remedy the status injury to colored children caused by segregation.[21]

In the process, the Court has made American legal history irrelevant, rendering white educational privilege beyond serious critique or substantive reform. I am quite reluctant to criticize *Brown* because such critiques can so easily be misconstrued or misapplied. *Brown* was a great legal victory against racial oppression. It deserves reverence and praise, even if the Court might have gone further in explaining its rationale and scope. My critique is not of the *Brown* decision, but rather targets the sorry judges, legislators, and school officials who sought from the beginning to nullify its generative spirit. Rather than embrace *Brown*'s transformative power, its implicit declaration against white supremacy and its promise of equal dignity, those officials sought to close public schools, to re-route public funds to white flight private academies, to delay enforcement and constitutional compliance, and, generally, to resist *Brown*'s basic mandate for equal educational opportunity. With so many working against *Brown* for so long, it is no wonder why so little substantive progress has been made. Those officials have repeatedly violated their constitutional duty. They have stolen life opportunities and hopes and dreams of millions of American citizens. Many officials have proven to be enemies of equality and fairness, abusing the power of the law for personal gain. They have taken a constitutional mandate and turned it against those most in need of its benefits, repeating a pattern as old as the nation.

Institutionally, the U.S. Supreme Court deserves particular condemnation. By insisting on its "all deliberate

12. *Brown I*, 347 U.S. at 494-95.

13. *Brown* was a collection of five cases from Delaware, the District of Columbia, Kansas, South Carolina, and Virginia. *See Brown I*, 347 U.S. at 486.

14. Jack Greenberg, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (New York: Basic Books, 1994).

15. Glenn C. Loury, THE ANATOMY OF RACIAL INEQUALITY 174-204 (Cambridge, Mass.: Harvard Univ. Press, 2002).

16. *Oklahoma City v. Dowell*, 498 U.S. 237, 249-50 (1991).

17. *Freeman v. Pitts*, 503 U.S. 467, 491-92 (1992).

18. *Missouri v. Jenkins*, 515 U.S. 70, 98-101 (1995).

19. *Id.* at 86-90.

20. Richard Kluger, SIMPLE JUSTICE 605-09 (New York: NYU Press, 1975).

21. *Jenkins*, 515 U.S. at 86-90.

speed" language, the Court gave already recalcitrant officials a legal route to ignore *Brown* for almost two decades.[22] By not elucidating the white privilege inherent in segregation, the Court reified racial disparities in opportunity, performance, and attainment as normative. By failing to declare that education is a fundamental right, the indispensable ingredient to the exercise of all other fundamental constitutional rights, the Court virtually assured the permanence of racialized educational caste.

What might have been

To understand the magnitude of the Court's retreat, one need only speculate briefly on what might have been had the Court demonstrated the same courage as the *Brown* plaintiffs. The Court could have used *Brown*'s anticaste principle to do so much more than desegregate public schools and open such public accommodations as municipal parks, swimming pools, and golf courses. The Court could have imposed a similar affirmative duty on government officials to dismantle caste for constitutional violations in voting, employment, and housing, as well. The Court could have held that the government had an affirmative obligation to dismantle every form of caste that it helped create, wherever it exists. There is no coherent constitutional reason to distinguish one form of caste from the others. The Court could have affirmed Justice Harlan's anticaste principle rather than his declaration of the normativity of white hegemony. The Court could have stated that white supremacy is not normal and that it has had the blessings and aid of all agents of American law to thrive and will need the same comprehensive antidote to end.

Again, there is another unmistakable pattern here. Just as Chief Justice Roger Brooke Taney closed the door on Americans with darker skin in *Dred Scott*,[23] and as Justice Henry Brown shunned the dignity and reputation of colored people in *Plessy*, the Rehnquist majority has had the last laugh, closing the most important door of all, resuscitating a legal regime under which colored people have no rights that whites are bound to respect and where colored people must cease being the special favorites of the law. Colored people, again, must forget the context of their lives, stay in their place, and abandon their hopes for corrective justice and reparations. The Rehnquist majority is not in session for such claims.

Undoing caste

My goal is to restore and reclaim *Brown*'s anticaste moorings, reminding readers of the five centuries it has taken to produce caste across the globe.[24] I seek to use the law to undo caste. I propose to re-assert the anticaste principle, contextually, and to use it for as long as it takes to dismantle every shade of caste, even if it takes another five centuries. I seek to persuade five members of the U.S. Supreme Court that the anticaste principle offers the most coherent reading of the Constitution's equality guarantee, whether the axis of caste is race, gender, age, disability, sexual orientation, wealth, or another common basis for invidious discrimination. Specifically, I seek to replace the antidiscrimination equality theory with a broader anticaste equality theory.

Unlike the antidiscrimination principle employed by the Rehnquist majority, which operates only prospectively in search of bad actors, the anticaste principle looks in both directions, contextually, at our past and its legacy, assigning to all agents of government remedial obligations for violating the equal citizenship principle, no matter how ancient. The anticaste principle says the government cannot make some of us strangers in our native land. The government cannot render some citizens insiders and some outsiders. The government cannot establish racial supremacy for some and racial inferiority for others. And where it has done so, it has a *continuing* affirmative duty to dismantle such caste, every root and branch. It has a constitutional obligation to lift those mired in caste up from their second-class status. And when it undertakes this constitutional duty, it cannot be said to violate anyone's constitutional rights since no provision of the Constitution gives any person a right to compel the government to maintain caste in violation of the equal citizenship principle.

The anticaste principle is countermajoritarian, protecting colored people from the tyranny of the majority. The anticaste principle is self-executing, circumscribing governmental power to impose caste. It also has a second face, requiring government to undo caste of its own creation. Every judge, legislator, and public school official is oath-bound to resist his or her worst impulses to establish caste. And when one fails, as so many have done, the anticaste principle compels that those excluded be lifted up to equal citizenship immediately and fully. Justice Harlan was right: *there is no caste permitted here.* The Constitution has not changed in relevant part since *Brown*. What has changed is the membership of the Court, as well as its interpretation of the Constitution's equality guarantee.

The great American Creed shall remain an empty promise so long as the nation refuses to honor the high road offered by the majestic anticaste moorings of *Brown*. And we shall not overcome, through *Brown* or otherwise, until the Court replaces its ineffectual antidiscrimination theory with the anticaste principle.

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22. *Brown II*, 349 U.S. at 301.
23. 60 U.S. (19 How.) 393 (1857).
24. Bryan K. Fair, NOTES OF A RACIAL CASTE BABY: COLOR BLINDNESS AND THE END OF AFFIRMATIVE ACTION (New York: NYU Press, 1997); Bryan K. Fair, *Re(caste)ing Equality Theory: Will* Grutter *Survive Itself by 2028?" in* University of Pennsylvania Symposium, *Race Jurisprudence and the Supreme Court: Where Do We Go from Here?* 6 U. PA. J. CONST. L. (2004); Bryan K. Fair, *Taking Educational Caste Seriously: Why* Grutter *Will Help Very Little*, 78 TUL. L. REV. 1 (2004); Bryan K. Fair, *The Anatomy of American Caste*, *supra* n. 8, at 381 (1999).