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# WHAT DID *BROWN* DO? A LEGAL AND PERSONAL JOURNEY

by JONATHAN BAUM

*Brown v. Board of Education* was more than just a legal ruling; it was a social watershed. *Brown* struck down state laws that had mandated racial segregation in schools because such separate educational facilities were inherently unequal.<sup>1</sup> The legacy of *Brown* is inspiring but complicated. More than fifty years later, each of us is left asking: “What Did *Brown* Do?” As a student and practitioner of civil rights law and as the product, and then a steward, of a racially integrated school system, I bring to this question two different perspectives.

I have practiced civil rights law for more than twenty-five years and most recently co-authored an amicus brief, on the losing side, in *Parents Involved in*

*Community Schools v. Seattle School District No. 1*. As I will discuss, the United States Supreme Court's 2007 decision in *Parents Involved* represents the ultimate retreat from the promise of *Brown*. We have gone from "you must desegregate your schools" in 1954, to "you need not desegregate your schools if the segregation is only 'de facto'" in the 1970s, to "you are forbidden to desegregate your schools if the segregation is *de facto*" in 2007.<sup>2</sup>

My personal journey through this period began with my enrollment, in 1966, as an elementary school student in the Evanston public schools precisely because that school system was committed to racial integration. More recently, my journey has continued as a member of the Board of Education for that same school district, from 2003 to 2007, struggling to preserve a commitment to racial integration from assaults both legal and political.

An examination of what *Brown* "did" really must begin with the question; what was it supposed to do? There are sharply divergent views on this, even on the United States Supreme Court. As reflected in the *Parents Involved* opinions, Chief Justice Roberts and Justices Alito, Scalia, and Thomas believe that *Brown* was supposed to end the assignment of children to schools on the basis of their race, no more and no less.<sup>3</sup> Justices Breyer, Ginsburg, Souter, and Stevens believe, on the other hand, that *Brown* sought racially integrated schools, because, in the words of Justice Thurgood Marshall, "unless our children begin to learn together, there is little hope that our people will ever learn to live together."<sup>4</sup> Finally, still others believe that the objective of *Brown* was even more ambitious: to improve the quality of education afforded to all children, especially those of minority races.

In the first decade after *Brown* was handed down, none of these three objectives were achieved in any substantial measure. There was the occasional, highly publicized integration of a previously segregated school system, Little Rock, Ark., being perhaps the most famous, but the vast majority of minority children remained locked in racially isolated schools.<sup>5</sup> This began to change in 1964, with the passage of the Civil Rights Act.<sup>6</sup> This law gave willing national administrations the "stick" of withholding federal aid to force desegregation plans on recalcitrant school systems.<sup>7</sup> This change in the law, coupled with a growing popular commitment to racial integration, produced tremendous reductions in school segregation in that first decade.<sup>8</sup> Many more children were attending school with children of races different from their own.<sup>9</sup> In addition to those communities forced to desegregate their schools, many communities

around the nation, inspired by the promise of *Brown*, began to voluntarily racially integrate their schools.<sup>10</sup> One such community was Evanston, Ill.

My family moved to Evanston when I was in fourth grade. My parents specifically chose Evanston because they wanted my siblings and I to attend integrated schools. In 1967, the Evanston public schools, which never engaged in segregation by law, nevertheless undertook a voluntary desegregation plan.<sup>11</sup> Evanston was, and still is, like most American communities, racially segregated in its housing patterns. The “attendance areas” for most of the district’s schools were virtually all white, while a few were virtually all black. The school authorities of Evanston understood that if they simply honored this “natural” separation of the races, they would be acquiescing in racially segregated schools in perpetuity. The school authorities therefore began a long-term effort to achieve what is disparagingly referred to by critics of integration efforts as “racial balance.” They began by closing the main “black” school and reassigning its students to previously “white” schools. In subsequent years, they adopted a “60 Percent Guideline,” a goal (not a rigid quota) that no school’s population be more than 60 percent of any one race.<sup>12</sup> They employed specific measures to achieve that goal, most notably: (1) periodic redrawing of the attendance areas of the various schools, (2) the granting (or withholding) of permissive transfers to schools in attendance areas other than that in which the applicant child resided, and (3) establishment of magnet schools.<sup>13</sup> Admission to the magnet schools was not merit-based but by lottery, but the lottery results were “tweaked” depending on whether the particular applicant would help or hinder both the sending and receiving school in complying with the 60 percent guideline.<sup>14</sup>

I attended these racially integrated schools, as my children do now. I can only answer the specific question, “What did *Brown* do for you?” by quoting from Justice Stevens’ dissenting opinion in *Parents Involved*: “While the focus of our opinions is often on the benefits that minority schoolchildren receive from integrated education,” he wrote, “children of all races benefit from integrated classrooms and playgrounds.”<sup>15</sup> I am certain that I am a better person, a better parent, a better neighbor, a better boss and a better citizen by virtue of having been educated in racially integrated schools.

In the meantime, as Evanston was voluntarily desegregating, a backlash set in against school desegregation nationally. Fueling this backlash was the fact that the effort to desegregate schools had moved out of the narrow confines of the

“peculiar” south to the large urban school systems in the rest of the nation. Prominent national politicians rode this anti-integration wave, segregated school systems were no longer threatened with the loss of federal funds, and the United States Supreme Court itself retrenched. In a series of decisions culminating in *Milliken v. Bradley*, a new Supreme Court majority vigorously embraced the distinction between “*de jure*” segregation, children of different races going to different schools because of an explicit legal requirement, and “*de facto*” segregation, children of different races going to different schools as a result of “natural forces” such as housing patterns.<sup>16</sup> *De jure* segregation had to be rectified; *de facto* segregation did not.<sup>17</sup> So, in *Milliken*, a federal court could not impose a desegregation plan involving reassignment of children in the Detroit school district (virtually all black) together with children from the surrounding suburban school districts (virtually all white), because the suburban districts had not previously segregated black children, there were none, by law.<sup>18</sup> That this made it impossible to racially integrate the Detroit schools was a consequence the Court’s majority was willing to accept.

*Milliken* was the beginning of the end for efforts to achieve racial integration of the schools through judicial remedies. Court rulings like *Milliken* and a retreat in American public opinion from the ideal of racial integration combined to not only stall, but actually roll back, the promise of *Brown*. Since the mid-1970s, nationwide the percentage of minority children attending racially segregated schools has consistently increased and continues to do so.<sup>19</sup>

Still, there was Evanston and numerous other communities like it around the nation. These were communities, some with a prior history of *de jure* segregation, some without, with a local commitment to racially integrated schools, regardless of the retreat from the promise of *Brown* by the Court and the national public.

In 2003, I was elected to the Board of Education of the Evanston school district I had attended and to which I now send my children. I ran for the Board principally because I saw the district’s commitment to racial integration under attack, not from court decisions but from local political forces. A group of older African-American activists had begun a campaign to eliminate the 60 percent guideline and re-establish a “neighborhood” school in Evanston’s virtually all-black Fifth Ward. These activists, almost none of whom actually had children in the schools, waxed nostalgic about the “sense of community” in the segregated school that had been closed in order to bring about racial integra-

tion. Most important, to focus on the precise topic of this program, these activists had concluded that *Brown*, or racial integration, had not “done anything” for their community. While having white children sit beside black children in Evanston classrooms might please the sensibilities of Evanston’s largely liberal white population, they complained, racial integration had failed to eliminate the huge “achievement gap,” as reflected on standardized tests, between children from Evanston’s predominantly low-income black families and its almost-exclusively college-educated white ones. Overlooked, however, was the fact that African-American students in Evanston performed significantly better on standardized tests, had a higher graduation rate, and were more likely to go to college than African-American students in Illinois or the nation as a whole.<sup>20</sup>

To illustrate how law and local politics can overlap, the Evanston activists’ critique of racial integration in the schools was echoed by United States Supreme Court Justice Clarence Thomas. Justice Thomas wrote in his *Parents Involved* opinion that, “nothing but an interest in classroom aesthetics and a hypersensitivity to elite sensibilities justifies the school districts’ racial balancing programs.”<sup>21</sup> Studies of the impact of racial integration on African-American student achievement, Justice Thomas noted, correctly, were divided on its value.<sup>22</sup> “Given this tenuous relationship between forced racial mixing and improved educational results for black children,” Justice Thomas concluded, it cannot be “plausibly maintained” that “an educational element supports the integration interest, let alone makes it compelling.”<sup>23</sup> Indeed, the push for racial integration was, in the view of Justice Thomas and the Evanston activists, not merely unnecessary but insulting. Justice Thomas wrote, “[t]here is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment.”<sup>24</sup>

What of the social benefits of racial integration and the interest in producing an educational environment that reflects the pluralistic society in which our children will live? Justice Breyer denominates this as the “democratic element” supporting desegregation.<sup>25</sup> Justice Thomas perfunctorily dismisses this: “Students of different races within the same school may separate themselves socially” anyway, and besides, “[s]ome studies have found that a deterioration in racial attitudes seems to result from racial mixing in schools.”<sup>26</sup>

Once on the Evanston Board of Education, I succeeded in pushing through a reaffirmation, albeit a tepid one, of the 60 percent guideline. The idea of a new

Fifth Ward school was shelved because there was no money to build one and the existing schools had excess capacity anyway. However, the notion that there was a conflict between racial integration and African-American student achievement would not go away. In my third year on the Board, the same group of activists began lobbying for the establishment of classrooms with an “African-Centered Curriculum,” (ACC), at existing Evanston schools.<sup>27</sup> It was only by black students learning together, immersed exclusively in the culture that was uniquely theirs, the activists argued, that they could achieve their full academic potential.<sup>28</sup>

Invoking the school district’s mission statement, which committed the district to “integrated education” and a “multicultural” curriculum, I opposed the ACC program.<sup>29</sup> I enlisted the support of nationally-renowned educator Jonathan Kozol, author of *Savage Inequalities* and other books on race and education.<sup>30</sup> Mr. Kozol wrote a public appeal to my fellow Board members praising Evanston as “a rare and distinguished exception to the present very dangerous pattern of resurgent racial segregation in the nation’s public schools.”<sup>31</sup> He urged the Board members to “resist this betrayal of *Brown v. Board of Education*.”<sup>32</sup> He wrote, “I would be heartsick to have to report to my friends among the education leaders of this country that Evanston has chosen to give up the ethical distinction for which it is renowned.”<sup>33</sup> Mr. Kozol concluded bluntly, “I beg you not to do this.”<sup>34</sup>

The debate in the community grew quite heated. Some African-American parents contacted me privately to express their opposition to ACC but declined to go public with their views for fear of “breaking ranks.” To my shock and dismay, I was loudly and repeatedly denounced as a “racist” which is, of course, the sharpest sword you can brandish against a white person in a liberal community like Evanston. My fellow white Board members expressed their fears about being similarly labeled, and the Board approved the ACC on a five-to-two vote.

Coincidentally, at the same time as I was fighting the racial integration battle locally, I was also fighting it as a civil rights lawyer nationally. I joined a group of attorneys in my firm who prepared an amicus brief for the Anti Defamation League (ADL) in the *Parents Involved* case.<sup>35</sup> The issue presented in *Parents Involved* was whether the Seattle, Wash., and Louisville, Ky., school districts were barred by the Equal Protection Clause from using race as a factor in magnet school admissions in order to maintain racially integrated schools in

the face of racially segregated housing patterns.<sup>36</sup> The position of the ADL in this litigation, supporting the two school districts, was noteworthy because ADL has been most prominent for its strong and persistent opposition to the use of racial quotas.<sup>37</sup> But ADL recognized the difference between the use of race to bring our children together and the use of race to keep them apart.<sup>38</sup> ADL came to appreciate the “compelling interest” in children of different races learning together in part from its experience operating the “A World of Difference Program,” in which thousands of teachers and peer trainers have brought literally millions of children of all races together in workshops teaching the values of tolerance and diversity.<sup>39</sup>

While the ADL may have come to appreciate the difference between employing race to include and employing race to exclude, such an awareness was noticeably lacking in the highest court in the land. Foreshadowing the ultimate result in *Parents Involved*, Chief Justice Roberts engaged, at oral argument, in a remarkable exchange with the attorney for the Seattle school district. When the attorney made the point that students denied admission to a magnet school in order to maintain racial integration were not thereby deprived of a quality education because they could still go to one of the district’s other schools, the Chief Justice asked: “How is that different from the separate but equal argument? In other words, it doesn’t matter that they’re being assigned on the basis of their race because they’re getting the same type of education.”<sup>40</sup> It was different, the Seattle attorney responded, “because the schools are not racially separate. The goal is to maintain the diversity that existed within a broad range in order to try to obtain the benefits that the educational research shows flow from an integrated education.”<sup>41</sup> However, the Chief Justice persisted: “I mean, everyone got a seat in *Brown* as well; but because they were assigned to those seats on the basis of race, it violated equal protection. How is your argument that there’s no problem here because everybody gets a seat distinguishable?”<sup>42</sup> Obviously exasperated with the moral obtuseness of the Chief Justice, the Seattle attorney responded bluntly: “Because segregation is harmful. Integration, as this Court has recognized in *Swann*, in the first Seattle case, has benefits.”<sup>43</sup> It is a sad day when the Chief Justice of the United States has to be reminded that integration is good and segregation is bad.

On May 15, 2007, I ended my term on the Evanston Board of Education, with the future of racial integration in its schools, as a local political matter, very much up in the air. Then, on June 28, 2007, the United States Supreme Court gave vital aid and comfort to those who want to retreat from the prom-

ise of *Brown*.<sup>44</sup> In its decision in *Parents Involved*, the Court held, by a five-to-four vote, that the Seattle and Louisville school districts had, indeed, violated the Equal Protection Clause by using race as a factor in school assignment in order to maintain racially integrated schools.<sup>45</sup> The Court held that these locally-adopted voluntary integration plans were subject to “strict scrutiny,” which meant that, in order to survive, they had to be “narrowly tailored” to serve a “compelling state interest.”<sup>46</sup> Four justices held that maintaining racially diverse schools simply was not “compelling,” so no race-conscious measures could be employed in service of that goal, end of case.<sup>47</sup>

Justice Kennedy, on the other hand, said that “a compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population.”<sup>48</sup> Unwilling to go as far as his four brethren, Justice Kennedy admonished that “to the extent that the plurality opinion suggests that state and local authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.”<sup>49</sup>

Nevertheless, Justice Kennedy provided the crucial fifth vote to invalidate the Seattle and Louisville plans, because he concluded that they were not sufficiently “narrowly tailored” to serve even a compelling interest in racially diverse schools.<sup>50</sup> Specifically, he said that school districts may not advance their interest in racially integrated schools by assigning specific students to specific schools (or barring them from others) because of their race.<sup>51</sup> This leaves open, in Justice Kennedy’s view, numerous other ways school districts can “pursue the goal of bringing together students of diverse backgrounds and races.”<sup>52</sup> Justice Kennedy even provides a list of such “constitutionally permissible” alternatives: “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.”<sup>53</sup> Pretty weak medicine for curing entrenched racial segregation.

What does this mean for Evanston? Within weeks after the *Parents Involved* decision, the school district was threatened with a lawsuit challenging its use of race as a factor in magnet school admissions. With the commitment to racial integration so diminished already, the school board had little difficulty in quickly ending this “offensive” use of race. There was discussion of perhaps substituting the more constitutionally acceptable factor of “socioeconomic sta-

tus” for race, but this was deemed too troublesome a can of worms to open. Will race continue to be a factor in drawing Evanston attendance zones, a tool Justice Kennedy left the district with? This is doubtful, as schools in Evanston have been drifting outside the 60 percent guideline for years, some dramatically so, and there doesn’t appear to be any interest in redistricting to address this.

So, the bottom line more than fifty years after *Brown* is that it has been hollowed. Both courts and public officials continue to give lip service to “the value of diversity,” but the fact is that the United States Supreme Court has systematically reduced the number of weapons in the arsenal of a school district that wants to maintain racially integrated schools, and even in communities like Evanston, there is a diminished political will to use the few that remain. Perhaps the most honest answer, then, to the question, “What Did *Brown* Do For You?” is that whatever it was going to do, it has done.

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## NOTES

- 1 *Brown v. Board of Education*, 347 U.S. 483, 495 (U.S. 1954).
- 2 *Id.*; *Milliken v. Bradley*, 418 U.S. 717, 752 (U.S. 1974); *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738, 2768 (U.S. 2007).
- 3 *Parents Involved*, *supra* note 2 at 2768.
- 4 *Id.* at 2835 (citing *Milliken v. Bradley*, *supra* note 2 at 783).
- 5 *Congress Link: Major Features of the Civil Rights Act of 1964*, The Dirksen Congressional Center, (2006), [http://www.congresslink.org/print\\_basics\\_histmats\\_civilrights64text.htm](http://www.congresslink.org/print_basics_histmats_civilrights64text.htm).
- 6 *The Civil Rights Act of 1964*, Pub. L. No. 88-352 (July 2, 1964).
- 7 *Congress Link*, *supra* note 5.
- 8 *Id.*
- 9 *School Desegregation and Equal Educational Opportunity*, Civilrights.org, available at <http://www.civilrights.org/resources/civilrights101/desegregation.html>.
- 10 *Id.*
- 11 *Board Ponders Future of D65’s Racial Guideline*, EVANSTON REVIEW, June 6, 2002, available at <http://infoweb.newsbank.com/iw-search/we/infoWeb>.
- 12 *Id.*
- 13 *Supreme Court Ruling May Change Policy On Magnet School Selection*, EVANSTON REVIEW, July 5, 2007, available at <http://infoweb.newsbank.com/iw-search/we/infoWeb>.
- 14 *Id.*
- 15 *Parents Involved*, *supra* note 2 at 2798.
- 16 *Milliken*, *supra* note 2 at 752.
- 17 *Id.*
- 18 *Id.*
- 19 Kevin Drew, Harvard’s Civil Rights Project Tracks Schools and Desegregation, CNN.COM (May 17, 2004) available at <http://www.cnn.com/2004/LAW/05/15/harvard.report/index.html>.

- 20 Karen Berkowitz, *Achievement Gap Overshadows Gains*, EVANSTON REVIEW, Oct. 24, 2002, available at <http://infoweb.newsbank.com/iw-search/we/infoWeb>.
- 21 *Parents Involved*, *supra* note 2 at 2770.
- 22 *Id.* at 2821.
- 23 *Id.* at 2778.
- 24 *Id.*
- 25 *Id.* at 2779.
- 26 *Id.* at 2780.
- 27 *Parents Seek African Focus In Curriculum*, EVANSTON REVIEW, May 20, 2004, available at <http://infoweb.newsbank.com/iw-search/we/infoWeb>.
- 28 *Id.*; The absence of any research validating this theory was deemed inconsequential.
- 29 *Our Mission*, Evanston/Skokie School District 65, available at <http://www.d65.k12.il.us/>.
- 30 Jonathan Kozol, *Author Jonathan Kozol Asks D65 Not to Implement ACC*, EVANSTON ROUNDTABLE, Letters, Opinion, 7, (March 22, 2006).
- 31 *Id.*
- 32 *Id.*
- 33 *Id.*
- 34 *Id.*
- 35 Brief Amicus Curiae of Anti-Defamation League in Support of Respondents, *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct 2738, 5 (U.S. 2007) (No. 05-908, 05-915), 2006 WL 3486958.
- 36 *Parents Involved*, *supra* note 2 at 2746.
- 37 Brief Amicus Curiae of Anti-Defamation League, *supra* note 35, at 1.
- 38 *Id.* at 7.
- 39 *Id.* at 12.
- 40 Transcript of Oral argument, *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct 2738, 44 (U.S. 2007) (No. 05-908), 2006 WL 2486958.
- 41 *Id.*
- 42 *Id.* at 49.
- 43 *Id.*
- 44 *Parents Involved*, *supra* note 2 at 2738.
- 45 *Id.* at 2768.
- 46 *Id.* at 2751-2.
- 47 *Id.* at 2835.
- 48 *Id.* at 2797.
- 49 *Id.* at 2791.
- 50 *Id.*
- 51 *Id.* at 2792.
- 52 *Id.*
- 53 *Id.*