The Influences of Legal Realism in *Plessy*, *Brown* and *Parents Involved*

"Brown is not an example of the Court resisting majoritarian sentiment, but. . . converting an emerging national consensus into a constitutional command" (Klarman, 2002, p. 29).

Constitutional theory provides the framework by which the justices may reason, contest and understand the legal question at hand; but, determining which theory to use may be the most challenging component of any case. The quintessential case by which the relationship between the constitution and jurisprudence may be measured is *Brown v. Board of Board of Education of Topeka* (1954). This paper will explore the merits of the theory of legal realism in *Brown's* lineage including *Plessy v. Ferguson* (1896) and *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), as well as how this theory serves as the change agent for the embedded legal justification of segregation.

Normative theories reject the notion that the constitution is subject to external influences, yet it is a fundamental flaw to believe that the framers themselves were not stewards of their own time. Just as resting an opinion on the "'phraseology of the Constitution' itself neither supports nor disavows it" (Bickel, 1986, p.12), following history for the sake of consistency cannot be the sole justification for a ruling (Holmes, 1881). Thus, finding its roots in Holmes' rejection of formalistic law (Fisher, Ho owitz & Reed, 1993), the constitutional theory of legal realism as made popular by Karl Llewellyn posits that even the prescribed and mechanistic nature of the law is still exposed to a judge's bias, as well as their understanding of politics, sociology, and economics (Baker, 2004). Legal realism yields practical results, not principled justifications.

This positive theory, which seeks to remedy substantive rights (Llewellyn, 1930), acknowledges empiricism while allowing room to be influenced by a number of factors including ethical, prudential and doctrinal modalities (Bobbit, 1999). Legal realism does not

discredit *stare decisis*, rather, it depends on it. In order to remain credible, the Court must be consistent with its former self, as well as the relationship between function and process (Post, 1995). Strauss (1999) argues that *Brown* can only be reconciled through a theoretical basis that values precedent. *Plessy v. Ferguson* predates legal realism, but demonstrates a primitive attempt by the justices to correct an imbalanced social construct through the adoption of the *separate but equal doctrine.* In his *Plessy* (1896) dissent, Justice Harlan states, "However apparent injustice of such legislation may be, we have only to consider whether it is consistent with the constitution of the United Sates" (p. 1144), but continues to argue that "our constitution is color blind, and neither knows nor tolerates classes among citizens. In respect to civil rights, all citizens are equal before the law. . . and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved" (p. 1146). Harlan's crisis of conscious is clear, grappling with the conflicting modalities of textual construction and ethics (Bobbitt, 1999), a struggle, perhaps, beyond his time. *Plessy* may have established the concept of *separate but equal*, but it also created the opportunity by which *Brown v. Board II* could unanimously be ruled: the unconstitutional premise of *de jure* racial segregation as demonstrated by its social impacts on public education.

This is not to say that *Brown* was decided upon a single premise or constitutional theory. Justice Jackson's critique of the NAACP's case as "'sociology,' not law" (Klarman, 2002, p. 9), refutes legal realism and reflects the values of originalism and normative theories' need for judicial restraint. Originalism alone cannot validate *Brown* as it refutes *Plessy*. However, Ackerman's counter argument successfully supports the unanimous opinion through the union of legal realism and the living constitution, a theory in itself that may be a form of originalism (Price, personal communication, April 2015):

> The Constitution is effectively amended by "the People" in moments of heightened political awareness. . . The original Constitution was not adopted according to the procedures specified in the Articles of Confederation. Anyone who accepts the legitimacy of the Constitution and the Civil War Amendments—and essentially everyone does—must accept that Article V of the Constitution, which specifics how the Constitution is to be amended is not exclusive and that the Constitution can be amended in other ways (Strauss, 1991, p. 585-586).

The constitution should be seen and an inerrant, static document, but rather understood as byproduct of majoritarianism, and allows for Justice Warren to make the compelling, legal realism argument for the need to examine the "effect of segregation itself on public education" (Balkin, 2001, p. 9).

Yet legal realism is not seamlessly integrated into the fiber of the case, rather the justices' struggle to rectify their personal values with that of the law's is what makes the story of *Brown* so compelling. Even the most conservative justices, Frankfurter, Jackson and Vinson, were confronted with the ambiguity of the text and the tension between federal and state precedent, and therefore had to rely upon their personal convictions. Jackson's claim that the rationale for segregation is invalid in light of the character demonstrated by the black community over the past 60 years (Klarman, 2002) demonstrates this important shift from the modalities of textual and doctrinal to historical and ethical.

Brown should not be attributed to a few justices' change of heart, but perhaps a perfect storm of changes in the national climate, socio-political concerns, and Justice Warren's joining the Court. Coupled with the rising of the Civil Rights Movement, was the dominance of the Cold War and the need to separate America from the communist behaviors of the Soviet Union.

Balkin (2004) suggests that the confluence of these socio-political factors may have appealed to the elite nature of the court and therefore significantly influenced the Court to examine *Brown* from vantage point of foreign policy. Furthermore, the appointment of Warren, after the sudden passing of Vinson, may have allowed for his understanding of segregation as legal oppression of black Americans to influence the Court's understanding of the doctrine of *separate but equal* as a violation of the 14th amendment (Klarman, 2002). Warren's leadership led the Court to understand the need for unification among the justices as a means by which to reinforce the legitimacy of this social change and the raising of racial discrimination to the level of strict scrutiny.

Still, the limitation of legal realism is evident by the Court's opinion. Its reliance on real-world influences produced a real world solution, but failed to completely overturn *Plessy* (Balkin, 2004). Even in specifying that segregation is unconstitutional in public schools under the *Equal Protection Clause*, *Brown* still provides a great deal of ambiguity segregation in different context and systems. In an attempt to overcome such ambiguity, *Parents Involved v. Seattle* relies on *Brown* and *Grutter v. Bollinger* (2003) to address systematic integration as presumably prescribed by *Green v. School Board of New Kent County (1971)*.

Chief Justice Robert's plurality opinion maintains that the school district's failure to meet the strict scrutiny requirements of narrowly tailoring their interest in implementing racial quotas as means of ensuring a diverse classroom violates the *Equal Protection Clause.* This opinion, rendered through a minimalistic and textual approach, is limited in its scope and is successfully contested by Breyer's dissent. His claim that the Court cannot remedy the complexity of racial discrimination, regardless if it comes about *de jure* or *de facto,* is founded in his discussion of the Court's history and its application of the legal standard of strict scrutiny in educational

segregation cases. Justice Thomas' statement reinforces Breyer's argument that "it will always be important for students to learn cooperation among the races. If this interest justifies race-conscious measures today, then logically it will justify race-conscious measures forever. . . [thus, it] cannot justify government race-based decision making" (*Seattle*, 2007, p.21). He continues by parsing the compelling interest in such cases into three elements: correcting the social conditions and effects of segregation, rectifying its impact on the educational environment, and improving the learning environment by simultaneously valuing diversity and equality (Breyer, 2007).

Breyer, Stevens, Souter and Ginsburg do recognize the inherent tension of quota-based integration as another form of segregation, but attribute the great movement towards racial equality in the time since *Brown* to its use. Allowing school districts to create inclusive classrooms based on their primacy of knowledge about their communities, as supported through 50 years of precedent, may actually be the purest form of embodying the spirit of *Brown*. Thus, legal realism justifies segregation on the premise of the national trends towards holistic integration and the needs greater good to embrace diversity, while demonstrating the plurality's inadequate understanding of "the way to stop discrimination on the basis of race is to stop discriminating of the basis of race" (*Seattle*, 2007, p.14).

Therefore, as seen in *Plessy, Brown and Parents Involved,* the use of legal realism allows the Court to resolve the problem, not merely the symptoms. These cases also demonstrate that legal realism may not be a natural first choice constitutional theory for some contexts, but can be reinforced when supported by living constitution or used in contrast to normative theories. Without the application of modalities and precedent, this theory may only be reasonably applied as a judge's justification of his or her own worldview, but with support of *stare decisis,* legal realism can be a jurisprudential change agent.

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