The Journal of Law and Education

Volume 4 | Issue 1 Article 8

1-1975

A Court that Dared the Unknown

John P. MacKenzie

A Court that Dared the Unknown†

By John P. MacKenzie*

"Somewhere, sometime to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance."

So said John W. Davis, lawyer for a South Carolina school district and courtroom spokesman for the status quo in Southern race relations. He was telling the Supreme Court that whatever it might think the 14th Amendment meant in 1953 and 1954, the justices should be guided by the pronouncements of 1896 and subsequent years approving "separate but equal" as a constitutional doctrine.

When the Supreme Court handed down its famous and unanimous desegregation decision of May 17, 1954, there were more causes won and lost than Davis' or that of his opponent, Thurgood Marshall. Seen across two decades, the decision appears to have been the breakthrough for an entirely new judical approach, a major resstructing of American government. The judicial branch has not been in "repose" since then.

In the longer view, the rule of *Brown v Board of Education,* coming on the heels of decisions opening up state-financed college and professional education to blacks, was an evolutionary, logical next step and nothing radical. The major new element was that the court had lost its fear of the unknown.

Fear of breaking the 1896 precedent of *Plessy v Ferguson* was partly rooted in respect for the past and partly in fear for the future. What social upheavals would desegregation cause, what violent reactions, what administrative nightmares would the judiciary be calling down upon itself?

Other Battles

Once engaged in the battles over racial justice, the Warren Court looked upon other battlefields with less awe. The "political thicket' 'appeared more manageable and the justice saw legislative apportionment not as a "political question" but as a denial by politicians of the political rights of Americans. Looking under the rocks of the criminal justice system, the court found violations of the constitutional rights of individuals and hastened to outlaw them.

To the John Davises and others the court had slipped its moorings and was

---

* MacKenzie is The Washington Post's Supreme Court reporter and author of the forthcoming book, "The Appearance of Justice."

† Reprinted with permission of the Washington Post.

so "activist" that a judicial dictatorship seemed imminent. But to a host of other Americans, the court was opening a new avenue of redress for disadvantaged and forgotten citizens.

Richard M. Nixon, who as vice president had hailed *Brown* as the work of "our great Republican Chief Justice," was anxious as President to call a halt to the activism and restore what he called "strict construction" of the Constitution. But three of his four appointees ended up voting to uphold federal court judgments against state anti-abortion laws. And Chief Justice Warren E. Burger led a charge into the religious arena, proclaiming that the only "entanglement" to be feared was government aid entangling the state and religion.

Warning Signals

To be sure, Burger's principal aim has been in the opposite direction, to disengage the judiciary from some of the old conflicts and try to avoid new ones. He stated his perspective clearly shortly before his elevation to the highest court. Complaining about the inexorable development of Fifth Amendment law in case after case, he argued that it was "all too much of a good thing, this criminal law trend." The higher courts, in their concern for the individual, started down a road in which each step is a logical extension of the step immediately preceding it, "but when you get to the end of that road and look back, often you find you have arrived at a place you hadn't intended to go at all."

The court under Chief Justice Earl Warren did indeed seem to start things without being sure where they would end, confident that if one case led to another, it would still be sitting and capable of handling the next case justly. It approached the *Brown* case that way over Davis' warnings of a future with overtones of racial "quotas" and white flight.

If Clarendon, S.C., School District No. 1 desegregated perfectly and uniformly, he told the court, "if it is done on a mathematical basis, with 30 children as a maximum . . . you would have 27 negro children and 3 whites in one school room. Would that make the children any happier? Would they learn any more quickly? . . . Would the terrible psychological disaster being wrought, according to some of those witnesses, to the colored child be removed if he had three white children sitting somewhere in the same school room? . . . You say that is racism. Well, it is not racism . . ."

Justice Felix Frankfurter raised similar warning signals, questioning whether the racial isolation of the urban ghetto would not frustrate effective remedies. But he, like the other eight justices, came down hard on the threshhold question—was there a violation of constitutional rights?—and answered that question first. Implementation plans could be tackled in another round of argument. In 1955, the announced "all deliberate speed" enforcement formula amounted to another postponement for much of the Deep South.

Justice Hugo L. Black disclosed shortly before his death that he favored instant system-wide enforcement in every district where segregation was under legal attack. Retired Justice Tom C. Clark said recently that he regretted the courts' collective lack of foresight in failing to decree grade-a-year compliance

starting with kindergarten. The justices must have explored these routes and many others before settling on postponement. But if they had taken on the whole problem at once, would they have made the initial constitutional judgment about segregation?

How Much Equality

Similarly, the court began its reapportionment adventure by declaring that the courts were open to challenges by citizens under-represented in their legislatures. The precise standards could come later. When they came and they amounted to "one man, one vote," critics complained that the courts should not apply a rigid mathematical formula but instead should permit deviations based on how judges measured political factors such as geography, population distribution and even competing "interest groups." The irony was that such a measurement would carry judges even deeper into the political thicket.

Criminal law, as Burger observed, developed in similar fashion. In 1964 the court threw out a confession obtained from Danny Escobedo when police cut him off from his lawyer. This opened up yet another question: What about equal justice for the arrested suspect too poor to hire his own counsel, a question settled in favor of the defendant in the even more controversial 1966 *Miranda v Arizona* decision.

Equality, the most sought-after constitutional principle of the Warren Court from *Brown* forward, was a hard idea to contain. Paul A. Freund told his Harvard law students it was like a boy who said he knew how to spell "banana" but didn't know where to stop. In racial matters it met with massive resistance but the idea marched on so relentlessly that miscegenation laws, long a symbol of deep-seated racism, died a quiet and almost natural death in 1967 again with no justice dissenting.

The 9-to-0 voting pattern that held firm through Little Rock in 1958 and even the intransigence of school officials in Prince Edward County, Va., in 1964, remained intact through 1968 when the court, tired of a case-by-case desegregation process that was not working, gave full force to the principle that only effective remedies would be approved. Segregation was to be eliminated "root and branch," in Justice Black's phrase, and the South must produce not white or black schools but "just schools."

Only after President Nixon had appointed four justices was there a full-throated dissent on school desegregation and even then, in 1973, the vote to extend key principles of equal protection to Northern school systems was 8 to 1. Also by then, the nature of the problem was changing and new civil rights claims, such as that of "reverse discrimination" through racial quotas, were becoming more insistent.

A Partial Halt

Now a new majority has moved to cut down the growth of new ideas of equality. The court has refused to extend constitutional protections against

discrimination in housing beyond race into the field of bias against the poor. It has declared itself helpless and disinclined to intervene where states parcel out school money unequally among districts. Blacks and urban whites trying to recapture whites who have fled to suburban Detroit schools will be lucky to survive the current round in the high court.

But the effort to wind down the judiciary's "activism" does not appear likely to succeed completely. One reason is that the newly constituted court has maintained much of its commitment to racial equality and displayed a willingness to enforce that commitment. Another reason is that legislatures, some of them energized by reapportionment, are creating and safeguarding new rights and remedies which the courts must enforce.

Furthermore, there are increasing signs of public acceptance of a full partnership in government for the judiciary. Last fall many Americans were saying it was the high court's "duty" to decide the question of subpoenas for White House tape recordings. Suggestions of a role long undreamed of for the courts—judicial review of a congressional impeachment verdict—have been raised by a lawyer for "strict constructionists" John Ehrlichman and H. R. Haldeman. The very fact that the Supreme Court has never flatly ruled on the question is an invitation to more judicial business and only the Supreme Court can say the review power doesn't exist.