

Getting to *Brown v. Board of Education* Through Judicial Restraint

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This year's Law Day theme commemorates the 50th anniversary of *Brown vs. Board of Education*, the 1954 Supreme Court decision that overruled *Plessy vs. Ferguson*, the 1896 Supreme Court decision that had held as constitutional "separate but equal" facilities in public transportation. Although the result in *Brown* was commendable, the court used the same means of judicial activism that the *Plessy* court had used to uphold the "separate but equal" doctrine.

In an 8-to-1 opinion, the *Plessy* court, in an exercise of judicial activism, ruled that the states can constitutionally provide for equal, but racially segregated, accommodations in public transportation. That court stated, "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. ... Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. ... If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane."

A half-century later, in an unanimous opinion, the *Brown* court, while deliberately engaging in judicial activism, ruled that racially separate public schools cannot be equal.

Judicial activism is results-oriented judging, where a court bases decisions on its personal opinion of what is fair or just or reasonable, rather than on the law as written. Having chosen the outcome, the trick is for the activist court to then find a way to legally justify the result. Typically, judicial activism is based on improper considerations of non-constitutional theories, the creation of new rights not expressly granted or preserved by the constitution or statute, or the invalidation of laws because the judge views them as being bad policy, rather than being in conflict with express written laws or constitutional provisions.

The opposite of judicial activism is judicial restraint, where the constitution and laws lead inevitably to the correct result. Activism and restraint both refer to the *process* or *method* a judge uses to reach a particular decision; they do not refer to the political ramifications of that decision. Therefore, judicial activism and judicial restraint are neither inherently conservative nor inherently liberal. Judges who are political conservatives can engage in judicial activism to further their agenda, just as judges who are political liberals can engage in judicial restraint out of respect for the law. Where the outcome of a case depends on the political preferences of the particular judge or group of judges assigned to the case rather than the law, it makes us a nation of men, not laws, and puts freedom at risk.

Plessy was decided without deference to the plain meaning of the post-Civil War constitutional amendments, which removed the race line from our governmental systems, requiring the law in the states to be the same for the black as for the white, both standing equal before the laws, and without discrimination on the basis of color. The *Plessy* court applied its own political preferences and failed to apply the actual constitutional language of the 13th, 14th,

and 15th Amendments. *Plessy* ignored several cases decided in the prior two decades, which consistently (and with restraint) interpreted the amendments to forbid segregation in other public spheres, such as jury service.

Section 1 of the Fourteenth Amendment states: “All persons born or naturalized in the United States ... are citizens No State shall make or enforce any law which shall abridge the privileges or immunities of citizens ...; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Brown also was decided without deference to the language of the constitutional amendments. Instead, that court professed that it was obligated to engage in an exercise of judicial activism. “In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” I contend that it did not have to be activist – the Warren court did not have to disregard longstanding principles of judicial restraint to achieve the same result. The court in *Brown* chose to run the circuitous route of analyzing the changing value of public education over the previous century to its full development and present status throughout the nation (and not in light of conditions prevailing at the time of the adoption of the amendment), and then imposed its brand of fairness, justice, and reasonableness in the case. That it achieved the correct result is small consolation for the activist method employed by the court.

Justice Harlan wrote the lone dissent in *Plessy*. Harlan chastised the court for its activism in enlarging the function of the court and interfering with the will of the people as expressed by the legislature in the post-war amendments. “There is a dangerous tendency in these latter days to enlarge the function of the courts, by means of judicial interference with the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristic that the three departments of government are co-ordinate and separate. Each must keep within the limits defined by the constitution. And the courts best discharge their duty by executing the will of the law-making power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives.”

The Warren Court in *Brown* could have written the *Brown* opinion thus, while holding true to the judiciary’s role as the interpreter and applier, rather than as maker, of the law. An example of what such an opinion might have looked like follows.