May 17, 2014

Remembering Justice Warren’s Surprising Legacy

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The school segregation cases were in limbo in 1953, and their outcome very much in doubt. The nation itself was divided. Nearly half the 48 states harbored schools that were segregated by law: Delaware was among the 17 that required segregated schools, and four others permitted it by local option.

The Supreme Court was divided, too. When the justices met after arguments in December 1952 to vote on the case, they achieved nothing but disensus. Some supported “separate but equal,” some opposed it and some were undecided.

It was an unlikely twist of fate that settled things on the court, and that promised—for a time—to settle them for the nation. The court’s most notable defender of the segregation doctrine was Chief Justice Fred Vinson, who, with fellow Kentuckian Stanley Reed, posed an intractable obstacle to change. But Vinson suffered a heart attack in the summer of 1953, and within minutes, was gone. Justice Felix Frankfurter, until then a cautious critic of segregation, called Vinson’s passing “the first solid piece of evidence that I have ever had that there is a God.”

Few opponents of segregation saw the hand of providence in the subsequent news: President Eisenhower would fill the Chief’s position with Earl Warren, the Republican Governor of California, who, as Attorney General of that state, had championed the mass internment of Japanese-Americans during World War II. With Warren in charge of the segregation cases, not much seemed likely to change.

Only those who really knew Earl Warren, or knew his record, would have expected what followed. As Governor, Warren had ended segregation in the California National Guard; as Chief Justice, Warren would ensure, as his first order of business on the court, an end to legal segregation in American schools.

The question presented by the segregation cases had confined lawyers and judges for nearly a century. But the new Chief Justice had no doubts about the answer. A new set of arguments in the fall of 1953 confirmed Warren’s impression of the dispute: The NAACP lawyers argued from the facts, from the science and from the law; the lawyers defending segregation relied on emotional appeals to tradition. Segregation emerged, in the end, as an idea gone bad. The Supreme Court held, by 5 votes to 3, that segregation was bad, and nothing less. That made it, he would explain later, “a comparatively simple case.”

The justices met to discuss the re-arguments in December 1953. Warren went first. He had concluded, he said, that segregation was rooted in a theory of black inferiority. If it was to be sustained, it had to be on that basis. Could the court, “in this day and age,” give Constitutional sanction to such a view? They did not vote at that first meeting.

Rather, Warren suggested they continue to discuss the case at their weekly conferences, toward the end of forging, over the course of the term, a clear consensus.

Through persistent and personal dialogue, Warren built that consensus. Tom Clark of Texas signed on to Warren’s draft opinion, and so, too, did Hugo Black of Alabama. Robert Jackson, torn by the case, was recovering from a heart attack; from his hospital bed, he gave his assent. The last hold-outs were Reed and Frankfurter, but they were finally won over. Warren concluded six months of congensial dialogue with a final reminder: “Stan, you’re all by yourself in this now. You’ve got to decide whether it’s really the best thing for the country.” Warren was right. Reed concluded; a solitary dissent, especially from a Southerner, would be poisonous. For the good of the country, Reed signed on.

The final opinion had to preserve this consensus. It also, Warren’s view, had to be clear in its convictions, but without being “accusatory,” and it had to be supported by solid legal reasoning, while being easy for everyone—not just lawyers—to understand.

To be sure, the decision had its critics. Some assail Warren’s “activism,” arguing—against all available evidence—that the state legislatures would have seen fit to desegregate the schools, sooner or later; if the court had left things alone. Other critics contend Warren’s opinion was too timid, arguments, for example, that the failure of the original Brown opinion to prescribe any remedies set the stage for much inaction and delay. But the criticisms seem unfair. The court could not sit forever on the sideline, not with Constitutional rights at stake, and the time for decision, as Warren put it, had “finally arrived.”

And it is by no means clear that Warren could have achieved more than he did. Resistance to the decision was sure to be great—and, indeed, exceed Warren’s expectations—and support was remarkably scant. Warren had been reminded of this latter truth shortly before the decision was announced. Attending a White House dinner, Warren was surprised to see, among the other guests, John W. Davis, chief attorney for the segregated states. At dinner’s end, Warren found himself in the company of the President, who took him by the arm and motioned in Davis’s direction: “These are not bad people.” Dwight Eisenhower said to the Chief Justice, “All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big overgrown Negroes.”

President Eisenhower never did state his support for the Brown decision. Warren was always convinced such a statement would have made a profound difference. The Congress, mean, rely on Elliott’s guidance, and act in support of the desegregation effort. By then, it might have been too late.

By 1968, Richard Nixon was charting his course to the White House through a “Southern strategy.” The “impeach Earl Warren” signs that littered Southern courthouses after Brown became moot after the election, when President Nixon happily accepted Warren’s resignation.

The Warren Court became the Burger Court, and then the Rehnquist Court, and then the Roberts Court. Through it all, Brown remained the law of the land. But much, undoubtedly, would change.

Earl Warren died on July 9, 1974. Just two weeks later, the Supreme Court ended the NAACP’s long run of success in segregation cases, in a 5-4 opinion authored by Chief Justice Burger. For the desegregation effort, it was the beginning of the end.

The segregated schools desegregated. Then started to re-segregate. They are not seeking a deal, and it is fair to ask whether they will ever desegregate again.

There was a dream embedded in Warren’s Brown opinion. Of a day, yes, when the schools would be integrated, but more than that of, of a day when black Americans would be permitted what was allowed, too grudgingly, to the Scotch and Irish, to Italians and Poles and Jews, to nearly all the other peoples from the four corners of the globe: full integration into American life.

If we went to school together, Brown imagined, then we would learn together—with and from one another. White supremacy could not survive that. Ignorance would yield to knowledge; caste to equality; love would supplant hate.

That was, and remains, the dream—of the day when the question of racial discrimination is finally settled, because it is settled right.

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Editor’s Note: Saturday is the 60th anniversary of the U.S. Supreme Court’s decision “Brown v. Board of Education,” the school desegregation cases.

Former U.S. Supreme Court Chief Justice
Earl Warren

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