From Chains to School Rooms, To . . .

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Black Americans had to wait 97 years from 1857 to 1954 to receive judicial notice that discrimination constitutes a per se violation of the equal protection clause. Those intervening years witnessed a dramatic change in judicial opinion, as expressed by Chief Justice Taney in the infamous Dred Scott case and Chief Justice Warren in Brown v. Board of Education. These two cases and two Chief Justices will herein be compared and contrasted with a brief examination of their respective histories. An attempt will be made to seek out the rationale for the actions and reasoning of each Chief Justice. We shall begin with the history of each case in chronological order and then discuss comparisons.

Most school children at an early age are familiarized with the facts concerning Dred Scott. In this instance, those facts will be included and the role of Chief Justice Taney examined.

Dr. John Emerson bought in 1833 a slave named Dred Scott. The seeds of controversy were sown when Emerson and Scott left Missouri, a slave state, and moved to Emerson's army post in Rock Island, Illinois.\(^1\) In 1836 Scott married Harriet, a slave owned by Major Taliaferro. They had two daughters, Eliza and Lizzie. Emerson was assigned in April or May 1836 to Fort Snelling in what is now Minnesota.\(^2\) The military post was included in the area covered by the
Missouri Compromise and the Northwest Territory Ordinance of 1787. Dred and Harriet Scott left Fort Snelling April 1838 and returned to Missouri. The next important date in this case occurred when Dr. Emerson died December 30, 1843 which set in motion Scott's quest for freedom. Scott first tried unsuccessfully to purchase his freedom from Emerson's widow. A series of lawsuits then ensued beginning April 6, 1846 in a St. Louis Circuit Court when Scott sued for freedom on the basis of his residence in Illinois and the Louisiana territory. The jury verdict favored Mrs. Emerson. January 12, 1850 Scott had a retrial, with a verdict in his favor. The Missouri State Supreme Court then ruled for Mrs. Emerson on April 10, 1852. As a change of tactics, assault charges were brought against John Sanford, Mrs. Emerson's brother. Mrs. Emerson had moved to Massachusetts and remarried. Controversy has surrounded these circumstances as has the Supreme Court decision. Vincent Hopkins believes Mrs. (Emerson) Chaffee no longer had legal authority over Scott as a result of her re-marriage. Don Fehrenbacher does not agree with this analysis. In his view, Emerson's will gave his wife complete authority over his possessions. He could not find any evidence that Mrs. Chaffee sold Scott to her brother either, but did not dismiss the possibility. Fehrenbacher held two views: either Sanford owned Scott and his family; or he acted as his sister's agent, even to the extent of being sued.
Since Sanford was a resident of New York, suit was instigated under the diverse-citizenship clause, Art. III, Sec. 2 in the United States Circuit Court and Scott claimed to be a citizen of Missouri. Judge Wells heard the case. Sanford challenged the court's jurisdiction in a plea in abatement by saying Scott was a descendant from slaves of "pure African blood" and could not be a citizen. Wells demurred the plea and the trial proceeded. The verdict was for Sanford on the basis that Scott had not been assaulted, and he was found to be a slave. Scott appealed to the Supreme Court of the United States on a writ of error.

Before the case was argued, Congress repealed the Missouri Compromise and enacted the Kansas-Nebraska Act on May 30, 1854. The case was argued for Scott by Montgomery Blair. It was heard twice, the first time on February 11, 1856. Reargument was ordered so that the presidential election would proceed without the influence of a Court decision. The second proceedings occurred December 15, 1856 with the assistance of George Curtis, brother of Justice Curtis. At first, the Court decided to settle the case on its merits, or that Scott was a slave according to Missouri law. The opinion of the Court would have been written by Justice Nelson. According to most authorities, the opinions of the two dissenters, McLean and Curtis caused the assignment of the opinion to change from Nelson to Taney. Once more Fehrenbacher disagrees. He believes that dissenting and concurring
opinions which discussed issues raised in oral argument forced the opinion of the Court to answer and refute them. Plus he feels it was an opinion Taney "wanted to write all along." Pressure was also applied by President-elect Buchanan on members of the Court. Correspondence passed between Catron, Grier, Taney and Buchanan on the case's progress. The final result is known by all. March 6, 1857 the opinion was read. Taney declared blacks historically were never thought to have state of federal citizenship, although a state could grant such rights. He declared the Missouri Compromise invalid, the first time the Court had done so since Marbury v. Madison, and Scott was not free. Congress was said to have no power to exclude slavery from the territories.

The two dissenters had their opinions published before the official opinion was ready. So Taney withheld publication and added his own evidence to refute Curtis.

The newspaper attacks and comparisons with Curtis' opinion upset Taney. He supposedly said to the clerk: "The opinion of the court has been greatly misunderstood and grossly misrepresented in publications in the newspapers." This caused bad feelings between Curtis and Taney which resulted in a bitter correspondence between the two. Curtis resigned from the bench on the pretext that he needed more money.

Comparisons of newspaper accounts and the final
published opinion show that Taney did add about 18 pages or increased the opinion 50 per cent to refute Curtis and McLean.\textsuperscript{20}

Theories abound as to why Taney wrote as he did. One thing which did emerge clearly was that the opinion was supported variously by six other men. His brethren supported and encouraged such an opinion. Many people had previously encouraged a court opinion upon the subject. The justices themselves mistakenly thought they would solve the slavery question. The election of Buchanan, a known anti-abolitionist also supported their decision.

For years after, the Court was weakened and Taney's reputation soiled by one single opinion. The actual opinion has been criticized as illogical, inconsistent and biased. According to others, it merely reflected his devotion to the land in which he was born. He shared and supported a Southern way of life. He saw the South beginning to take a submissive role to the North, to slip into a second place slot. He blamed it on the strife generated by abolitionists. So he sought in the opinion to take away northern ammunition or propaganda by declaring the Missouri Compromise unconstitutional. If it was necessary to preserve the South by protecting slavery he would do so. Personally, he had freed his own slaves 30 years previously.\textsuperscript{21} He was the product of an aristocratic Southern family with a planter's distrust of mercantile people.\textsuperscript{22}
According to Edward S. Corwin, Taney followed in Marshall's footsteps. Congress had authority over territories if it could acquire it. While the land was still considered to be territory, Congress was bound by the Constitution to act for all the people. Plus the Missouri Compromise violated the due process clause of the Fifth Amendment.  

While most school children have to be told about the Dred Scott case, Brown v. Board of Education has a continuing impact on their lives today. In fact, the decision seems forgotten because of the changes, such as busing and integration, which followed. Time has granted Dred Scott the opportunity of hindsight, perspective and revision. Brown is still too new and we are grappling with it's effects.

Historically, Brown, as did Dred Scott, took a long time to reach the Supreme Court. The decision actually consists of four additional cases from Delaware, South Carolina, Virginia and the District of Columbia. They were consolidated under one name, now known as Brown v. Board of Education. Only in Kansas were the school physical facilities approximately equal. This was not true in South Carolina, Virginia or Delaware. In every case except Delaware, blacks lost their bid for admission to all white schools. Delaware on April 1, 1952 upheld the "separate but equal" doctrine by saying school facilities were unequal and ordered blacks to be admitted. The fifth case, Bolling v. Sharpe, involved federal authorities in the District of Columbia. Segregation
had been permitted to exist for years and it was challenged as violating the Fifth Amendment. 25

At the first oral argument before the Supreme Court, blacks were principally represented by Thurgood Marshall, chief counsel for the NAACP. John W. Davis argued to uphold Plessy v. Ferguson. 26

The Court could not agree on the disposition of the case so mainly through Frankfurter's efforts, the cases were to be reargued to answer five questions. Reargument occurred October 12. Fortunately or unfortunately, history was changed when Chief Justice Vinson died September 1953. As his replacement, President Eisenhower appointed Earl Warren, thereby making possible one of the most momentous Supreme Court decisions in this century. The time between the second hearing and the announcement of the decision was spent arriving at a consensus. No vote was taken until late February or early March, so as to work out difficulties and free the justices from the necessity of defending positions. The result was unanimity. 27

Some speculation exists whether or not Jackson and Frankfurter wrote either concurring or dissenting opinions. Jack Harrison Pollack seemed to believe Frankfurter had written a concurring opinion. 28 On the other hand, Richard Kluger believes this is not true. Frankfurter was the main force which saved the Court from issuing an earlier split opinion. Kluger said Frankfurter helped
Warren unify the Court. The rumors about a concurring opinion surfaced because Frankfurter had typed up a paper listing his ideas. Reportedly, Frankfurter had a habit of setting his thoughts down in such a manner. Kluger insists Frankfurter had no intention of filing another opinion. On the contrary, only last ditch efforts stopped Reed from dissenting.  

The strength of the May 17, 1954 decision was greatly increased by the unanimous vote. Most people believe this would not have been possible without Earl Warren. His personality, diplomacy and political experience helped heal rifts in the split Court. It was said that his family and childhood experiences taught him the principle of fair play. Others hypothesized that his immigrant parents' beliefs in education as a tool to upward mobility influenced Warren. Plus, Warren was credited as not believing in judging a person on the basis of race.  

Brown's meaning and effect have been called political and it is cited as a sociological decision. Whatever it is called, it's effect has been widespread. Previous rulings in this area affected only a few people. Brown outlawed segregation in elementary, junior and senior high schools. The decision was also important because it nullified the "separate but equal" doctrine and was followed by legislative support and encouragement in the form of the Civil Rights Act of 1957, 1960, 1964, 1965, 1968 and 1972.  

The states primarily affected by the decision were
Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and W. Virginia. In actuality, its effect has been felt everywhere. 33

A number of interesting things come to mind after investigating these two well-known cases. First, there is a striking dissimilarity between the two Chief Justices and their Presidents. Taney, at 80 years old, was nearing the end of an illustrious career. He was in bad health, and some have said he was getting senile. This was refuted by his colleagues on the bench. On the other hand, Warren was at the beginning of his equally illustrious career and in the prime of life. The Dred Scott decision blemished for a long time what had previously been a brilliant sojourn at the bench. Brown was the opening salvo of a long line of similar decisions. Taney's court witnessed a virtual return to seriatim opinions. He did get a majority of the Court to agree with his opinion, but every justice but one either wrote concurring or dissenting opinions. The Taney Court was fragmented and divided so badly that one justice resigned. The Warren Court has been lauded for it's unanimity.

President Buchanan was very involved in the outcome of Dred Scott through correspondence, persuasion and the
very fact of his election. In direct contrast, Eisenhower did nothing, before or after to support or implement the Brown decision.

At the same time, Dred Scott and Brown do have some things in common. Both were the culmination of preceding events and cases. Neither Chief Justice would have prevailed without the agreement of their brethren. The Chief Justice does not operate in a vacuum, and that includes the prevailing sentiment of the time. Each case was and continues to be controversial. Dred Scott was responsible for the passage of the Fourteenth Amendment; Brown, the passage of numerous Civil Rights Acts. The cases were argued twice. Dred Scott was reheard because of the Presidential election and Brown was reargued to help a divided court settle its serious questions.

The one great link between the two is that the Court in Dred Scott took judicial notice of the inferiority of blacks, then lent it's legal sanction and approval to that status. Brown was the Court's announcement that the times had changed and that that badge of inferiority was inconsistent with our Constitution. In spite of past amendments nullifying the effect of Dred Scott, it took Brown to finish the job.

These two cases mark a watershed in American judicial history. They exemplify how individuals, and environments shape opinions and how those opinions in turn change our
lives. They showed the strength and weakness of our least democratic branch.

They are memorable for what they said, and for what was said and done because of them. To study Dred Scott and Brown is to get an appreciation of the American system and how it reacts to the Court's dictates, including obedience, implementation or disobedience and nonimplementation.

What is most striking is the evolution of opinion and history which led us from a courtroom declaring slaves to be slaves forever to a modern school room where black and white sit freely together.
Appendix

While reading the actual decision, the language used by Taney and Warren was striking. Each Chief Justice spoke the exact opposite and provided an excellent example of their opposing viewpoints. Excerpts from those opinions are included here as a point of interest.

Dred Scott v. Sandford

The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States.

...We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remain subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

The legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted.... and it is hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized, whom, as we are bound, out of respect to the State sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation....

It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go
where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. 34

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made of it. This opinion was at that time fixed and universal in the civilized portion of the white race. 35

_ Brown v. Board of Education of Topeka_

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.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs, and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. 36
Notes


5 Hopkins, p. 6.

6 Hopkins, pp. 10-23.


8 Fehrenbacher, p. 276.

9 Hopkins, pp. 24-25.

10 Warren, p. 281.


14 Fehrenbacher, pp. 310-311.
18 Swisher, The Taney Period, p. 634.
19 Swisher, The Taney Period, p. 637.
20 Fehrenbacher, p. 320.
21 Carl Swisher, Roger B. Taney (New York: Macmillan
22 Swisher, Roger B. Taney, p. 584.
23 Stanley Kutler, The Dred Scott Decision: Law or
24 Richard Funston, Constitutional Counter-revolution?
   The Warren Court and the Burger Court: Judicial Policy
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26 Jack Harrison Pollack, Earl Warren: The Judge Who
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27 Richard Kluger, Simple Justice: The History of
   Brown v. Board of Education and Black America's Struggle
28 Pollack, p. 175.
29 Kluger, Simple Justice.
30 Pollack, p. 176.


35 Fehrenbacher, p. 347.

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