Brennan and the Struggle for Civil Rights

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Although the Justice was not on the Court at the time of Brown v. Board of Education, he soon made clear his commitment to that decision and the reforms it required. He was the one responsible for the stirring language of Cooper v. Aaron and the Court’s resolution, in the face of the Little Rock crisis, to make Brown a “living truth.”

I began my clerkship in the summer of 1965, soon after the enactment of the Civil Rights Act of 1964 and Voting Rights Act of 1965. The Justice was a leading member of the dominant majorities that promptly sustained these measures. The Justice understood, moreover, perhaps better than any of his colleagues, that radical social change can only be accomplished by the coordination, and not the separation, of powers. To this end, he forged in his opinions in United States v. Guest and Katzenbach v. Morgan, constitutional doctrine that, in effect, extended to the political branches an invitation to step forward and assume a position of leadership in filling two important gaps — housing and racially-based violence — that had remained even after the passage of the 1964 and 1965 Acts. In April 1968, the President and then Congress accepted this invitation and passed the Civil Rights Act of 1968 to achieve that purpose.

The Justice was also clear in his commitment to a robust understanding of equal protection. He attributed to the state practices that others might be
tempted to categorize as the work of private actors. He also looked to the impact or effect of state practices and the way that they contributed to the emergence of what is known these days in academic circles as the antisubordination principle. For him, equal protection not only barred measures that, in the style of Jim Crow, drew a distinction between whites and blacks, but also those that systematically worked to the disadvantage of blacks and thus tended to perpetuate their subordination. On this point he was absolute. In *Green v. New Kent County*, the Justice wrote an opinion striking down a student assignment plan that extended to all students freedom of choice and construed *Brown* to require assignment plans that would ensure there be no white schools, no black schools, just schools.

This particular understanding of equal protection received its most significant articulation in two decisions the Court handed down in 1971 — *Swann v. Charlotte Mecklenburg* and *Griggs v. Duke Power Company*, the first in education and the second in employment. Both opinions were signed by the new Chief Justice, but my impression is that Justice Brennan played a crucial role in the formation of the prevailing majorities and the process of drafting the opinions. The Justice was distinguished, not just by the depth of his commitment to equality, but also by his willingness to work from within. Although, as we all know, Justice Brennan took special delight in being able to speak for the Court, his paramount commitment was to advance the law.

By the mid-1970s, however, the Justice faced a new reality. The institution of which he was part — the Warren Court — dissolved, and in its place a new Court emerged. It was led by William Rehnquist, first as an Associate Justice and then as Chief Justice, who set the agenda for the new
majority and devised strategies to overrule or dilute doctrine that Brennan had labored so mightily to create. In the end, *Brown* remained on the books, but it was drained of any generative meaning. In the 1972 decision in *Moose Lodge*, the state action requirement was resurrected with a vengeance. Two years later, in the Detroit school desegregation case, *Milliken v. Bradley*, a majority of the Justices repudiated *Swann* by circumscribing the judiciary's remedial powers to dismantle the dual school system. To achieve that result, the Court had, in one way or another, to discard the approach to equal protection that emphasized the consequences of the law and its impact on blacks. On this doctrinal issue, it was explicit in 1976 in *Washington v. Davis*. The antisubordination principle was preserved, but only as an artifact of statutory interpretation, confined to Title VII of the Civil Rights Act of 1964. The Constitution, according to the new majority, does not protect against practices that perpetuate racial inequality, but instead only proscribes intentional discrimination.

From the mid-1970s until his retirement in 1990, the Justice assumed a new role on the Court — he turned from spokesperson to critic — he became a conscience of the Court, reminding his colleagues of all that would be required to make *Brown* a “living truth.” Sometimes, as in *Bakke*, his passionately expressed disagreement with the majority provided a much needed gloss to the reluctant half-steps taken by those chosen to speak for the Court. Other times, his protests were heralded in the halls of Congress, and inspired the legislators to push back, as they did in the Pregnancy Discrimination Act of 1978, the Voting Rights Act of 1982, and the Civil Rights Act of 1991, against the assault by the Court on the approach to equality he saw rooted in *Brown*. On rare occasions, the Justice was able, once again, to
give majority status to an understanding of equality that emphasized results or effects, and banned practices that systematically tended to subordinate a disadvantaged group. The most notable instance occurred on June 15, 1982.

The case, *Plyler v. Doe*, arose from a Texas statute that authorized local school districts to deny enrollment to children that had not been “legally admitted” to the United States. To ensure that the local school board exercised this authority, Texas provided that state funds would be denied any local school district for the education of such children. The Court struck down the Texas statute, not on the ground that it embodied a forbidden or suspect classification (to wit “legally admitted”), but rather because it created “the specter of a permanent caste of undocumented resident aliens,” an “underclass” or “a shadow population of illegal migrants.”

These are Justice Brennan’s words, speaking for a majority, and to this very day remain a bastion — a lonely but strong bastion — of protection for those who fear the wrath of the anti-immigration sentiment that so pervades politics today. A concurring opinion by Justice Powell, emphasizing the particular “innocence” of those targeted by this measure, may have muffled, but did not diminish the extraordinary achievement and extraordinary significance of the Justice’s opinion in *Plyler v. Doe*.

The Justice stepped down from the Court just as the transformative process known as the Second Reconstruction was drawing to a close. This process began in 1954, and was endowed with great energy and vitality during the 1960s. Starting in the 1970s, resistance grew, and for the next two decades those who sought a true and substantive equality were on the defensive, struggling to preserve the gains of an earlier time.
Now that it has ended, the Second Reconstruction must be given its due and credited with notable achievements. Blacks gained access to countless citadels of white privilege and power, and in time, we saw the emergence of what is now referred to as the Black middle class. This historic development was dramatically represented by the events of November 4, 2008, when Barack Obama was elected President of the United States. The Justice did not live to witness this transcendent event. But I am sure — certainly from the vantage point of 1965 — that he would have marveled at it and might even have experienced a tinge of pride.

Of course, the Justice was only one of nine, and the Court did not act alone. The achievements of the Second Reconstruction were the work of many institutions, public and private, and they were aided by a broad mobilization of ordinary citizens, some white, most Black, known as the Civil Rights Movement. Yet I would insist — I still insist — that it was the Supreme Court that was the primary catalytic agent and the chair of the steering committee guiding this transformative process. It was the Court that issued the initial edict for change. It was the Court that supported and encouraged the participation of the political branches. And it was the Court that extended its protective cloak to the activists on the front lines. By forging the rule of law into an instrument for eradicating caste structure, the Court became a beacon of hope for all those who sought to bring an end to institutions and practices that long disfigured American society.

Although there is good reason to be proud of the accomplishments of the Second Reconstruction and the Justice’s role in it, the Justice would also be the first to acknowledge that much work remains to be done. He would feel
the suffering of that segment of the black community that continues to shoulder the twin burdens of racism and poverty. He would be concerned about the dangers other disadvantaged groups — for example, immigrants and refugees — face in being treated as pariahs. He would be troubled by the growing concentration of wealth in the hands of a few — the one percent — and the emergence in America of a new propertied aristocracy.

These inequalities – and countless others — are pervasive. They are also deeply entrenched and for that reason call for a bold and brave and sustained program of reform — maybe even a Third Reconstruction. I do not know how such a program might come into being or exactly what it would entail. I am confident, however, that for it to have any measure of success, the agents of change will have to enlist the support of the Supreme Court, for it alone has the capacity to endow the struggle for equality with the imperative of the rule of law. Mindful of this reality, I often wonder — when, oh when, will a new Brennan arise and take his place on the Court?