

A Noble Judicial Coup?

BY RICHARD E. MORGAN

Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy, by James T. Patterson. Oxford University Press, 285 pages, \$27.50

BY THE 1950S, BREAKING THE COLOR barrier had become a moral imperative in America. Chief Justice Earl Warren's 1954 opinion in *Brown v. Board of Education*, whatever its shortcomings, provided a benchmark in constitutional law that was used to strike down not merely school segregation but the entire constitutional underpinnings of Jim Crow.

Today, scholars generally agree that the heavy lifting of desegregation came in the '60s, after the Civil Rights Act (1964), the Voting Rights Act (1965), and the Elementary and Secondary Education Act (1965) gave new enforcement weapons to the executive branch. But without the reversal of 70 years of precedent that was accomplished on the authority of *Brown*, the stage would not have been set for the later achievements of the civil rights movement.

Brown added to the momentum of civil rights in another important way as well. Arriving at the very beginning of the television era, the scattered early efforts to enforce *Brown* across the South gave rise to a series of disturbing images of composed black children facing hateful white mobs. The effect was stunning. As James T. Patterson, Ford Foundation Professor of History at Brown University, writes in his new study of *Brown*, "Most white Americans in 1950, as in the past, did not much bestir themselves to better the plight of blacks. But seeing the ugly Southern backlash against *Brown* raised national consciousness in a way that a library of written description and exhortation could never have."

Patterson's book is richly illustrated, and vividly populated with heroes and villains. But the book is subtitled, "A Civil Rights Milestone and its Troubled Legacy," and there are several distressing aspects of that legacy which receive little or no attention. Patterson artfully dances around the fact that *Brown* was handed down without any firm constitutional foundation and that Earl Warren's opinion made no effort to supply one.

The constitutional question was simple: could the Fourteenth Amendment, adopted in 1868, reasonably be understood as commanding that pupils not be assigned to public

schools based on race? Or to put the matter somewhat more generally, was it the case that the Constitution, as amended, forbade government to discriminate among persons on the basis of race in the delivery of public services? The answer of the specialized literature is overwhelmingly "no" to both. As one commentator recently put it (at the beginning of a doughty but ultimately unpersuasive effort to demonstrate the contrary) "in the fractured discipline of constitutional law, there is something very close to a consensus that *Brown* was inconsistent with the original meaning of the Fourteenth Amendment, except perhaps at an extremely high and indeterminate level of abstraction." Why does this continue to matter?

First, because legal insiders understood *Brown* at once, for what it was — a kind of noble judicial coup. However distasteful, Jim Crow by 1954 had become a major feature of the American social and legal landscape, assumed to be constitutional for the better part of a century. In effect, Chief Justice Warren claimed for the Court the ability to revise the Constitution based on a bold understanding of what the times demanded, backed up by the authority of modern social science. It was a message that inspired and mobilized an entire generation of young lawyers. If the Court could free itself from history and precedent to work this kind of change, what other marvelous reforms might it undertake?

Moreover, it was in the course of enforcing *Brown* in 1958 that a unanimous Court in *Cooper v. Aaron* advanced sweeping new claims for its own authority. The Court's decisions, it proclaimed, were to be regarded as the supreme law of the land, binding on all state officials by virtue of the supremacy clause of Article VI. To add gravity to this amazing dictum, John Marshall's opinion in *Marbury v. Madison*

was brazenly reinterpreted in order to prove that the Court's opinions were as authoritative as the Constitution itself. The scholarly community reacted with muted shock and surprise. But far from retreating from the claims made for themselves in *Cooper*, the justices since have repeatedly underscored them.

Let us be clear: what we face today is nothing less than a fundamental alteration in the nature of American governance, with unelected judges assuming control over many of our most contested policy issues. We can no longer give an account of ourselves in thorough-going republican terms, at least not with a straight face. An honest account must recognize that we have become a mixed regime, with a substantial aristocratic or pseudo-aristocratic dimension. This is part of *Brown's* troubling legacy.

Second, *Brown* proved to be a thoroughly inadequate text for the multiple uses to which it was put. Everything was desegregated on the authority of *Brown*. In the years after 1954, the Court decided cases on the constitutionality of state-sanctioned segregation of city golf courses, swimming pools, restaurants, and public buildings. In each instance the Court's answer was the same: unconstitutional, no opinion, "see *Brown v. Board of Education*."

But, of course, if one did consult *Brown*, what one discovered was the famous holding of the case: separate but equal has no place in education. Patterson repeatedly refers to *Brown* as overruling *Plessy v. Ferguson* (the 1896 case establishing the separate-but-equal precedent). But it certainly did not do so on the basis of Warren's opinion, which appears simply to create an exception to *Plessy* in the area of education. Where was the broader principle that rendered unconstitutional all state-commanded racial segregation?

It was only in the last of the desegregation cases, *Loving v. Virginia*, which

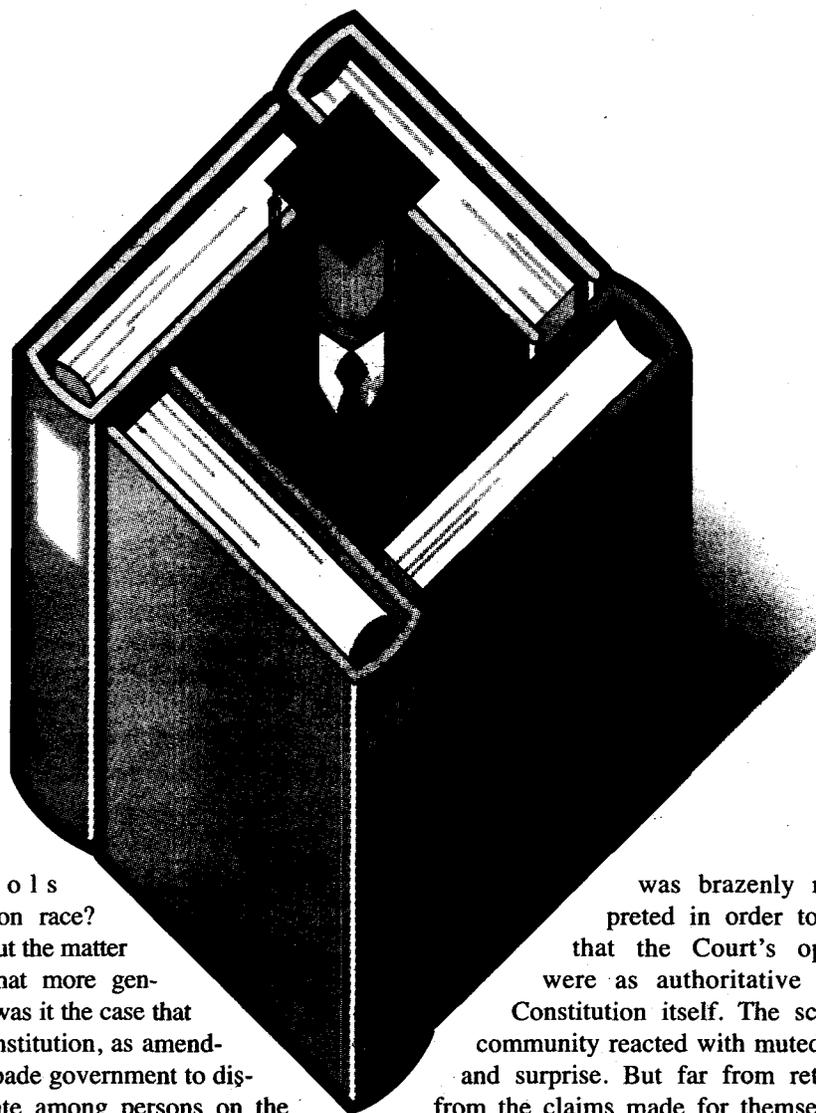
struck down that state's anti-miscegenation law in 1967, that the Court attempted to offer something more than "see *Brown*." Again, Warren wrote the opinion, sketching what remains the Court's operational test for unconstitutional racial discrimination. In this formula, as it has developed over the years, race is a "suspect classification"; any government decision taking race into account must be subject to strict judicial scrutiny. This, in turn, means that for a governmental decision based on race to survive, it must be in the service of a compelling state interest; there must be no alternative means by which that interest can be safeguarded, and the program employing racial discrimination must be narrowly tailored to secure just the necessary degree of protection for the compelling interest.

This test is an intellectual disaster. The categories (compelling interest, available alternatives, and tailoring of program) are not legal categories at all, but essentially political judgments about wise public policy. That is why the strict-scrutiny standard remains essentially mysterious. The Court will swing back and forth in cases involving racial preferences in areas such as university admissions, government contracting, and legislative districting, depending (right now) upon the vote of Sandra Day O'Connor, who alone (perhaps) understands what she means by the key terms.

SADLY, THE HISTORICAL MOMENT HAS passed. Consider how much better off we would be today with a constitutional amendment modeled on Justice John Marshall Harlan's marvelous dissent in *Plessy* which declared that, "Our Constitution is color blind, and neither knows nor tolerates classes among citizens." Such an amendment would bar government at any level from making decisions that either advantage or disadvantage persons based on race. This would finally complete the work of Reconstruction, align the text of the Constitution with our national ideals, and bury Jim Crow the way he should have been buried in the first place — by votes in legislative assemblies. By using Earl Warren's *Brown* opinion in the way it did, as the *Urtext* of American desegregation, the Supreme Court relieved Americans of the necessity (or, better, the duty) of doing unambiguously what was left undone in 1868.

Instead of a clear constitutional provision, what we have today at the heart of our race-relations law is a muddle. What's most troubling about James Patterson's book is that he is not troubled by this fact at all.

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Reds in the White House

BY WILLIAM P. HOAR

The Venona Secrets: Exposing Soviet Espionage and America's Traitors, by Herbert Romerstein and Eric Breindel. Regnery, 608 pages, \$29.95

WE MUST RESORT TO ALL SORTS OF stratagems, maneuvers, illegal methods, evasions, and subterfuge...to carry on Communist work," Lenin wrote in 1920.

You can't say we weren't warned. Yet Americans have hardly faced up to the amazing extent of Soviet penetration in the succeeding decades into all areas of our national life, especially their infiltration of the highest levels of U.S. government.

The Venona Secrets is one of several new books on Communist espionage written following the release, beginning in 1995, of previously classified coded cables from the 1940s between Moscow and Soviet agents in the United States. Although much of the decryption in the code-breaking effort that became known as Venona occurred before 1952, efforts at further cracking the traffic lasted until 1980. Researchers lately have compared this material with formerly top-secret records in Moscow also made available in recent years.

Liberals don't like what the Venona transcripts have confirmed: that Alger Hiss secretly received Soviet medals for his Yalta-related work as well as the thanks of military intelli-

gence in Moscow; that Whittaker Chambers and Elizabeth Bentley — the much-maligned former communists who turned against their comrades — were telling the truth; and yes, that the Rosenbergs were guilty as charged.

The Venona Secrets reviews a substantial number of these cases, ably interpreted by authors Herbert Romerstein, who was a professional member of the House Intelligence Committee and House Committee on Un-American Activities and later head of the Office to Counter Soviet Disinformation at the U.S. Information Agency, and the late Eric Breindel, the editorial page editor of the *New York Post* when he died in 1998. Unlike the authors of some of the competing academic histories, Romerstein and Breindel do not pull punches by trying to be non-judgmental — a major plus, since it really shouldn't hurt one's credibility to take a position against treason. They also surpass their competitors by going into greater detail about how the Soviet infiltrators operated.

The stakes in Cold War espionage were hardly small. Venona and other recent disclosures, as Romerstein and Breindel note, reveal that Stalin actually knew about the Manhattan Project before Harry Truman did. Soviet intelligence "was regularly reporting to the Kremlin on the top-secret British-American atom bomb project as early as 1941. Truman was not briefed on it until April 1945, shortly after he was sworn in as president."

Yet when President Roosevelt had been warned about subversives in his midst, he literally laughed it off. Still, this infiltration was no joke — as evidenced by, among others, Harry Dexter White in the

Treasury Department and Harry Hopkins as FDR's right hand.

Romerstein and Breindel devote an entire chapter to the ways that White helped set U.S. policy to benefit the Soviets. Officially the Assistant Treasury Secretary to Henry Morgenthau, White's influence made him the *de facto* secretary. It was he who authored the infamous Morgenthau Plan, essentially Stalin's scheme for the pastoralization of Germany.

The FBI had informed the Truman White House of at least 30 separate sources, including wiretap evidence, that supported the espionage case against White. But Truman tossed the proof aside and named White as executive director of the International Monetary Fund (where, as might be expected, he appointed additional Reds). *The Venona Secrets* exposes more, including details about Operation Snow, the Soviet manipulation of U.S. strategic policy by using White as an "agent of influence."

Even more than White, Harry Hopkins was assuredly a major-league agent. Author Robert Sherwood once wrote that Hopkins was "generally regarded as a sinister figure, a backstairs intriguer, an Iowan combination of Machiavelli, Svengali and Rasputin." This from a puff biographer!

Both friendly and critical biographers acknowledge that Hopkins, who lived in the personal quarters of the White House, became the most powerful man in FDR's Administration, progressing from his early role in managing national relief operations, to conducting a political purge of recalcitrant conservative Democrats, to becoming a confi-

dant of Churchill's and an intermediary with Stalin. President Roosevelt once commented that "Harry and Uncle Joe got on like a house afire. They have become buddies." And why not? Hopkins even ridiculed the notion that Stalin was a Communist.

While some who have studied the Venona documents grant Hopkins generous historical wiggle room as an "unconscious" agent, Romerstein and Breindel conclude that FDR's alter ego was a Soviet spy with many comrades in the administration.

As good as *The Venona Secrets* is, one wishes the authors hadn't tried so hard not to offend "respectable" opinion. Why go so easy on Harry Truman, for example? While Truman would compare Republicans to fascists for exposing corruption in his administration, he could also gush, after meeting with the Soviet dictator at Potsdam, that, "Stalin is as near like Tom Pendergast as any man I know," comparing the mass murderer with his old mentor, the boss of the Kansas City political machine.

Despite some flaws, however, *The Venona Secrets* does paint a precise, vivid, and decidedly ugly picture of what Moscow's agents were able to accomplish within the United States. Refreshingly, the spies are not shown as misguided dissenters or confused reformers but as deliberate agents of an evil enemy. Treachery deserves no less.

William P. Hoar is an author, magazine columnist, and managing editor of *Periscope*, the U.S. Naval Institute military database.



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