

Introduction

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In 1938, in his famous footnote in the *Carolene Products* case, Justice Harlan Fiske Stone suggested that while economic regulation should receive only a simple review by the courts, those laws restricting civil liberties or affecting “discrete and insular minorities” required a more exacting scrutiny. Much of the history of the Court in the six decades since that case has revolved around the Court’s response to the pleas of minorities for the equality promised to them in the Fourteenth Amendment’s Equal Protection Clause.

No minority has suffered more in American history than African-Americans, those brought here against their will to be slaves in the English colonies and their descendants. Despite the promise of emancipation contained in the Civil War amendments, blacks suffered continuing discrimination after the end of Reconstruction. The South’s efforts to create a segregated society received the Court’s imprimatur in *Plessy v. Ferguson*, a decision that, however justifiable at the time, has been roundly criticized as wrongly decided by commentators covering the whole range of the jurisprudential spectrum.

Yet the abandonment of *Plessy*’s separate-but-equal doctrine also constitutes one of the

great chapters in American political and constitutional history. The role of the Supreme Court in declaring, as Chief Justice Earl Warren did in *Brown v. Board of Education*, that segregation based on race is wrong, surely stands as one of the noblest moments in the Court’s commitment to equal justice under law.

The road since *Brown* has not been smooth, and there are many people who believe that we as a society should be further along the road to real equality, that the Court should have done more to quash not only de jure segregation but also the badges of discrimination that remained. But this view misinterprets the role of the judiciary in a government of separated powers within the federal system.

The articles in this issue of the **Journal** are derived from one of the most important and popular educational activities of the Society, its annual lecture series held in the courtroom of the Supreme Court. Each year we are pleased to publish these lectures and thus make them available to a wider audience. Our only regret on this issue is that Professor William Van Alstyne was unable, due to other commitments, to revise his talk on the pre-*Plessy* era and get it to us in time for publication; we hope to be able to carry that article in a future issue.

Post-*Plessy*, Pre-*Brown*: “Logical Exactness” in Enforcing Equal Rights

ANDREW KULL¹

I.

In May 1896, the Supreme Court of the United States held in *Plessy v. Ferguson*² that a Louisiana statute requiring that black and white railroad passengers be transported in “equal, but separate” cars was consistent with the Fourteenth Amendment’s guarantee of the equal protection of the laws. Actually the majority opinion implied much more than this. The message of *Plessy*, if you read it carefully, was not just that a law requiring segregated transportation facilities was constitutional; nor did the Court remotely suggest that whatever was separate had to be precisely equal. What the Court said, and meant, was that a racial classification was like any other classification under the Fourteenth Amendment—it was constitutional if reasonable—and that a law separating the races was, in the nature of things, an appropriate exercise of the state’s police power.³

Alone in dissent, the first Justice John Marshall Harlan protested that the Constitution prohibited any law drawing a racial distinction: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.” *Plessy* has been regarded ever since as the case confirming the legality of segregation, and Harlan’s dissent as its quintessential refutation. This dual landmark of constitutional law was reported by *The New York Times* as a brief item

in its regular weekly column of railroad news—as Professor Lofgren discovered—“sandwiched between reports of another Supreme Court railway decision, which overturned an Illinois law ordering minor rerouting of interstate passenger trains, and a request by the receivers of the Baltimore & Ohio for authority to issue new improvement bonds.”⁴

In May 1954, the Court held in *Brown v. Board of Education* that racially segregated

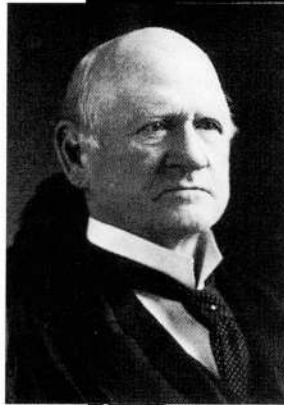
public schools violated the Equal Protection Clause.⁵ The opinion by Chief Justice Earl Warren put the decision on the narrowest possible ground, short of naked fiat: it dealt with *Plessy* by saying that *Plessy* was a case about railroads, not schools. This time the country was intensely interested. Informed observers immediately inferred that the Court had reached conclusions about government-sponsored race classifications going much further than any it was prepared to announce. An editorial in the next Sunday's *New York Times* explained that the decision in *Brown* had made Justice Harlan's dissent in *Plessy* "in effect . . . a part of the law of the land." This was exactly what the Court had been careful not to say, but it was true, and it would remain true for more than a decade thereafter.⁶

Juxtaposing these two cases in a constitutional law casebook or a lecture series carries several perfectly natural implications. The distance between them seems to define a period, post-*Plessy* and pre-*Brown*, that can conveniently be called "the 'separate but equal' era."⁷ One of the Court's most reviled decisions (*Plessy* ranks with *Dred Scott* in this regard) is implicitly answered by the decision that is the most revered in the history of the Court. If we assume that this transformation in doctrine is like the other long-running stories in constitutional history—the expansion of the Commerce Clause, or the incorporation of the Bill of Rights—we might expect to find a course of decisions by which the old view of equal protection is criticized, reworked, and reformed to yield, eventually, the new understanding. Actually we find no such thing.

I have three ideas to propose about this post-*Plessy*, pre-*Brown* interval, and the first is in some sense to quarrel with the topic. *Plessy* does not begin a period, and *Brown* does not end one. Rather, these famous decisions are emblematic of two adjacent periods in the constitutional history of race: 1937, the year of the Court-packing crisis, marks a symbolic dividing line. The first of the two periods begins not in 1896 but in 1883, with *The Civil Rights*

*Cases*⁸—when the Court held that the Civil Rights Act of 1875 (prohibiting segregation in transportation and public accommodations) was unconstitutional because it was beyond the power of Congress to enact. The Fourteenth Amendment restricts states, not individuals ("No state shall make or enforce any law. . ."). The Court held in 1883 that the congressional power to enforce this prohibition on the states did not carry with it the power to legislate directly concerning the rights and duties of individuals. This, of course, was the formal announcement of the "state action doctrine"—a problem to which we shall return shortly. But for our purposes just now, defining periods, the 1883 decision was an announcement that the Court would not thereafter go out of its way to interpret the Fourteenth Amendment in a manner that was helpful to the cause of racial equality. The former slave, wrote Justice Joseph P. Bradley, must finally "[take] the rank of a mere citizen, and [cease] to be the special favorite of the laws."⁹ This meant, so far as his constitutional protection was concerned, that he must henceforth be content with what the text of the amendment necessarily required. Congress in 1866 had been careful to draft the Fourteenth Amendment in such a way that what it necessarily required was relatively little.¹⁰

By contrast, the period that followed—starting around 1937—was one in which the civil rights plaintiff did for a time become, as Justice Bradley would certainly have complained, "the special favorite of the laws." It was a "civil-rights era" of approximately thirty-five years, lasting into the mid-1970s, during which the Court was visibly unwilling that the cause of civil rights for racial minorities should be seen to be defeated in any significant case that came before it.¹¹ To this end the Court was fully prepared to set aside history and precedent,¹² to overturn or manipulate settled doctrine,¹³ to decide cases without giving reasons,¹² to create new constitutional rights,¹⁴ or—in *extremis*—to refuse to decide cases that it found no means to decide as it wished.¹⁵ *Plessy* was a routine case and a foregone conclusion under



Plessy v. Ferguson got more play in the local Louisiana newspaper (right) than in *The New York Times*, which treated it as a brief item in its regular column of railroad news. The lone dissent of John Marshall Harlan (inset) would not become the law of the land for more than a half-century later.

The public order committee met last night and passed upon some minor matters.

JIM CROW LAW.

UPHELD BY THE UNITED STATES SUPREME COURT.

Statute Within the Competency of the Louisiana Legislature and Railroads—Must Furnish Separate Cars for Whites and Blacks.

Washington, May 18.—The Supreme Court today in an opinion read by Justice Brown, sustained the constitutionality of the law in Louisiana requiring the railroads of that State to provide separate cars for white and colored passengers. There was no interstate commerce feature in the case for the railroad upon which the incident occurred giving rise to case—*Plessy vs. Ferguson*—East Louisiana railroad, was and is operated wholly within the State, to the laws of Congress of many of the States. The opinion states that by the analogy of the laws of Congress, and of many of states requiring establishment of separate schools for children of two races and other similar laws, the statute in question was within competency of Louisiana Legislature, exercising the police power of the State. The judgment of the Supreme Court of State upholding law was therefore upheld.

Mr. Justice Harlan announced a very vigorous dissent saying that he saw nothing but mischief in all such laws. In his view of the case, no power in the land had right to regulate the enjoyment of civil rights upon the basis of race. It would be just as reasonable and proper, he said, for states to pass laws requiring separate cars to be furnished for Catholic and Protestants, or for descendants of those of Teutonic race and those of Latin race.

Are You One

Of those unhappy people who are suffering with weak nerves, starting at

There are the usual nervous seekers here. They have New Orleans and from of the State. Some of them fully in the interest of it tion in the last light, others probably who are office who did not become the administration until certain that Governor F continued in the chair.

Senator Romain and other members of the Lea of the gentlemen from the voted against the Demo proposition to go behind were on the platform participated in the ceremony to the inauguration error. That was all very way, but it is to be questioned the action of the representatives attended the Old Fellowship will dovetail with the yesterday.

It is said that when it comes up for consideration an attempt will be made to tax the sawmills on the tax the existing law sawmill from taxation. The sawmills fostered by wise legislation to be one of the most important industries of the State, and no industry promise of continued Whether or not the legislature take kindly to the proposition the lumber mills on the cult now to say.

Ex-Representative King here for a few days ago. He has had to be re-interviewed. When Mr. King was in the Legislature he was content in public with a dainty life but now he sports a luxu

Col. I. D. Moore is here Price in being elected to Col. Moore has had the chance to meet many of his friends. He is canvassing for himself usually runs in hard luck gets beaten, but he has a great deal of winning the fights it gets for others; and he has usually successful when he has handled any of Mr. Price's friends. Mr. Price will not be friends to look after his in

case was called to-day stenographer in court, able noted this as being a t, as Mr. Borden should been on hand.

THE CITY HALL.

Mr. Murphy Promulged Few Appointments—Committee Meeting.

In a communication to the committee, notified that body that the bid of a school building on between Lafayette and Cy examined. The bid of O'Neill was \$25,840 and that of John Mc-25,482. As the specifications of the contract to the low-bidder recommended that the bid be accepted.

In papers it was made to appear a clerical error and transposition McNally's bid was for \$25,947, a mistake was suggested. It may be the bid of McNally while very that of the other bidders, does price of filling, but inasmuch as the school is intended to be quires grading, this item is not very important.

was sent to the Criminal Sheri

the first of these constitutional regimes. *Brown* was anything but a routine case, but its outcome was equally a foregone conclusion, under the second.

The dramatic advance of civil rights on the agenda of the Supreme Court coincides with a revolution in constitutional law that we already know about: the Court-packing crisis, the abandonment of federalism, the (temporary) surrender of substantive due process. My idea about what happened is very simple. For the remade Supreme Court that emerged from the constitutional crisis of 1937, putting the Court and the Constitution on the side of racial equality was a matter of first priority. The political convictions of the new majority coincided, as it happened, with the need to identify and assert a new institutional role. The Supreme Court had just been forced to surrender what had been, for 150 years, its central constitutional responsibility—the role of “umpire to the fed-

eral system,” or guardian of state prerogatives against expansive national power—and it was publicly mulling over the question of what to take up next. The self-conscious choice of a new role for the Court appears in the famous *Carolene Products* footnote in 1938, where Justice Harlan Fiske Stone suggested that the Court might properly devote special attention to the rights of “discrete and insular minorities”—particularly where those rights were unlikely to be vindicated by ordinary political processes.¹⁶

A post-1937 majority that had decided to make constitutional adjudication into an instrument of racial equality faced obstacles of two kinds. There were problems of constitutional doctrine, and problems of political means—meaning simply, the problem faced by any court of enforcing compliance with its mandate. Under the heading of doctrine, the two biggest roadblocks were “separate but equal”

and “state action.” The obstacle on the political side was the obvious difficulty of calculating how far and how fast the Court might go in ordering a change in the country’s racial arrangements without provoking successful resistance. The evidence suggests that it was primarily this practical question of judicial power, rather than the doctrinal difficulties, that gave the Court reason to hesitate.

The very first segregation case of this new era, *Missouri v. ex rel Gaines v. Canada*,¹⁸ in 1938, about a whites-only law school at the University of Missouri—shows that *Plessy v. Ferguson* was no longer persuasive to a majority of the Court as a reading of the Fourteenth Amendment. Hindsight makes it easier to come to this conclusion, but we can see it even if we limit our view to 1938.

The University of Missouri had never admitted a black student. Lloyd Gaines applied for admission to the law school and was rejected because of his race. Missouri had an all-black university—Lincoln University—that had no law school. The State of Missouri claimed that it was ready to start a law school at Lincoln as soon as there was a demand for one, but no one had ever applied to study law at Lincoln. In the meantime, a Missouri statute provided that if a black student wanted to study a subject not offered at Lincoln, the state would pay his tuition at the university of any adjoining state to which he might be admitted. The Supreme Court held that this was not good enough: white students were able to study law without going out of state, and black students were entitled to the same treatment.

The result in *Gaines* seems so obvious today that we will miss the real implications of the decision unless we can see it from the defendant’s point of view—the way a segregationist would have seen it. The implication of *Plessy* was that there was nothing intrinsically wrong with a racial classification; more specifically, that racial segregation was a legitimate legislative purpose, a reasonable exercise of the police power. If those propositions were still valid in 1938, it was hard to see why

Missouri was not making a reasonable accommodation for Lloyd Gaines by offering to pay his tuition out of state. Of course he was not given the same treatment as a white law student. But that is not a sufficient objection, because our constitutional entitlement to the equal protection of the laws does not mean that we are entitled to the same treatment our neighbor receives. It turns out that “equal protection” is not really about treating people the same, but about the reasonableness of the lines that the government inevitably draws in treating people differently. A racially segregated state university system is unacceptable and unconstitutional today because we have rejected the idea that a racial classification, drawn for the purpose of segregation, is a permissible exercise of legislative power. That means rejecting *Plessy*, at least in its broader implications. And that means that the Court rejected *Plessy* in 1938, though of course it did not say so at the time.

With the second of the two doctrinal roadblocks, the problem of “state action,” the post-1937 shift was just as abrupt. Judged by both text and history, “state action” is a real and significant limitation on the reach of the Fourteenth Amendment. This is something the Court has never denied. One of the distinguishing features of the post-1937 civil rights era, however, is the Court never found that discriminatory conduct was *not* state action in any case it agreed to decide.

The first example of the new approach came in the “white primary” cases. Black registered voters in Texas were not allowed to vote in the Democratic primary. This was a blatant violation of the Fourteenth and Fifteenth Amendments, if the discrimination was the action of the state; but a series of well-known Supreme Court decisions had marked out what seemed to be a clear distinction. If the Texas Democrats themselves, without state intervention, decided that only white Democrats should choose the party’s nominees, there could be—the Court had made clear—no constitutional objection. Liberals and conservatives on the



The author argues that the *Jones & Laughlin Steel* case of 1937 paved the way for *Shelley v. Kraemer* (1948), because the Commerce Clause and “state-action” controversies ultimately turned on the same issue: the allocations of political authority between state and federal governments. *Shelley* declared unconstitutional “restrictive covenants”—agreements among home owners that they would not sell or rent to a non-white. Pictured in their St. Louis home are the plaintiffs in that case, J.D. and Ethel Lee Shelley, and their children.

Court split sharply at earlier stages of the white primary controversy, but the decision to draw the line here—putting the internal procedures of a political party in the private rather than the public sphere—won unanimous support in *Grovey v. Townsend* in 1935.¹⁹ The line so carefully drawn was then unceremoniously erased in *Smith v. Allwright* only nine years later: this time the vote was nearly unanimous the other way.²⁰ Justice Owen J. Roberts, dissenting, protested that the decisions of the Court were being put in “the same class as a restricted railroad ticket, good for this day and train only.”²¹

Justice Roberts was right when he complained that nothing in the constitutional analysis had changed in the intervening nine years. What was different was the relative weight of the competing political principles involved. We tend to think of “state action” as a purely negative concept, a reason for not doing something,

but the idea has a positive side to it as well: it affirms the existence of a private sphere of activity in which the laws of the states, and not the federal judiciary, retained paramount authority. As late as 1935, the Court was unanimously agreed on the importance of maintaining this public/private distinction, with its implications for federalism, even at the cost of a political outcome—the exclusion of black voters from any real participation in Texas politics—that many members of the Court in *Grovey v. Townsend* undoubtedly found repugnant. Nine years later, the balance between these competing principles was altogether different. The values of federalism protected by “state action” had been in eclipse since 1937. And on the other side of the scale—given the overtones for domestic politics of our wartime ideology—a political outcome that had been repugnant in 1935 had become literally intolerable.

*Shelley v. Kraemer*²² offers an even better example, because the state action issue here was not nearly as close as in the white primary cases. The question was the status of a “restrictive covenant” on a piece of real estate—in this case, a prohibition on occupancy “by people of the Negro or Mongolian Race.” This was a covenant “running with the land” and validly attached, under Missouri law, to a piece of property in St. Louis. Neither the City of St. Louis nor the State of Missouri could have imposed racial zoning by statute or ordinance, but it was settled law that there was no constitutional objection to a private restriction. Conceding that the covenant itself might be valid, the Court in *Shelley v. Kraemer* made restrictive covenants effectively illegal by holding that the *judicial enforcement* of such a covenant would be unconstitutional state action.

The difficulty here is very substantial. If judicial enforcement of a real property covenant is state action, it is hard to see why the enforcement or protection of any other property right is not also state action. (A law school hypothetical would ask what happens if as a private landowner I choose to prosecute trespassers of one race and not another. That hypothetical became a real-life question, one that the Court was unable to resolve, in the series of sit-in cases that arose in the early 1960s.²³)

Because *Smith v. Allwright* and *Shelley v. Kraemer* are decisions that stretched the settled conception of state action to meet a political imperative, they bear a certain resemblance to the *Jones & Laughlin Steel* case²⁴ of 1937—if we can take *Jones & Laughlin* to symbolize the point at which the Court officially renounced its opposition to expanding federal regulation on Commerce-Clause grounds. The problem of defining the internal limits to the commerce power resembles the problem of defining state action in a number of respects. Both issues turn on a fundamental constitutional distinction that is clear at its core but is difficult or impossible to enforce at the margin. Both issues relate directly to the question of federalism, meaning the allocation of po-

litical authority between state and national governments. (“State action” is essentially a federalism question, as I have suggested, because if the Court imposes constitutional restraints on private conduct it is exercising the general legislative power that the Fourteenth Amendment had left with the states.) Both issues turned on a question of abstract constitutional principle, and in both cases the central interest protected by the abstract principle was the political position of the states in the federal system. Yet in both settings, the practical controversy at hand—economic regulation in one case, racial equality in the other—was one in which dominant public opinion was looking to the federal government for a solution, and not to the states. The cases are not usually discussed in the same lecture, but I think it is not too fanciful to suggest that *Jones & Laughlin* made *Shelley v. Kraemer* substantially easier—not to mention *Brown* itself.

II.

The most interesting academic debate currently being pursued on the topic of *Brown v. Board of Education* is not about the constitutional legitimacy of the decision, but about how much difference it actually made. Michael Klarman, of the University of Virginia Law School, reminds us of the significance of *non-judicial* developments affecting the status of black Americans at midcentury:

There exists a widespread tendency to treat *Brown* as the inaugural event of the modern civil rights movement. Nothing could be farther from the truth. The reason the Supreme Court could unanimously invalidate public school segregation in 1954 . . . was that deep-seated social, political and economic forces had already begun to undermine traditional American racial attitudes. . . . [T]he same underlying forces that made *Brown* a realistic judicial possibility in 1954 also rendered it unnecessary from the

point of view of long-term racial change.

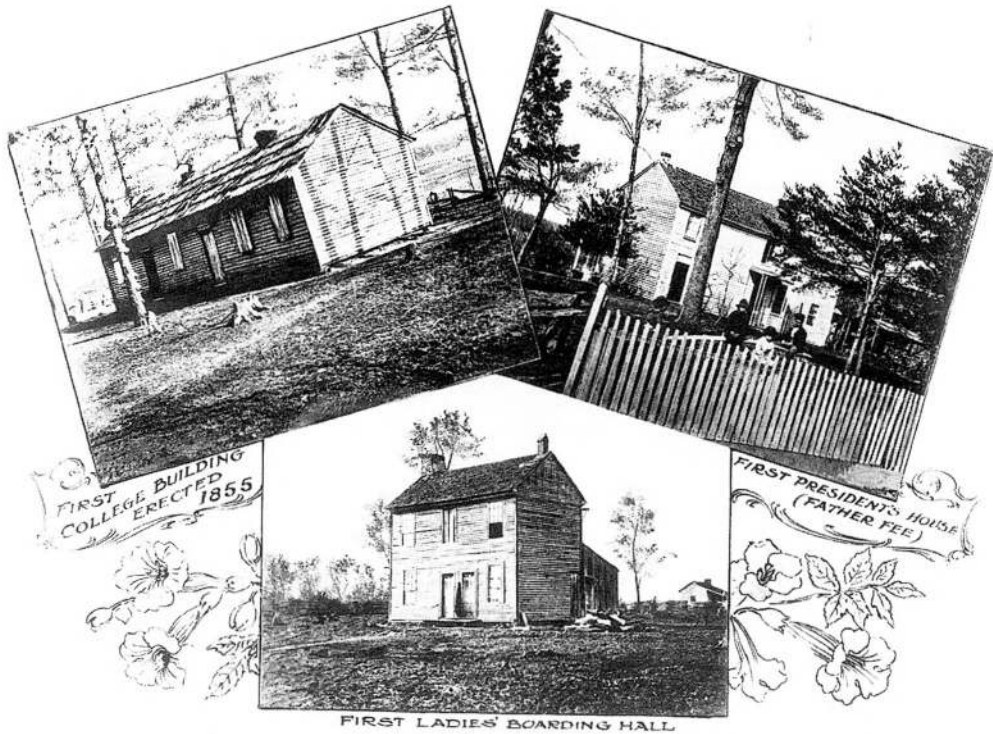
The factors that Klarman proceeds to identify include “World War II, the ideological revulsion against Nazi fascism, the Cold War imperative, the growing political empowerment of northern blacks, the increasing economic and social integration of the nation, and changing southern racial attitudes.”²⁵

The Court’s decision in *Brown* and its presumed consequences stand today as the cornerstone of the Supreme Court’s political influence, indeed of our whole conception of the function of American constitutional law; so Professor Klarman’s suggestion that we reconsider the relations of cause and effect surrounding *Brown* has been received in some quarters as a form of *lèse-majesté*. The debate over the practical significance of *Brown* and its measurable consequences lies outside my assigned topic, and I will not pursue it here. But that debate is part of a broader puzzle, about the workings of judicial power in our political system, which forms one of the pervasive themes in the case law of our post-*Plessy*, pre-*Brown* interval. The cases remind us of certain fundamental constraints on the Court’s power to make things happen.

This theme is announced very early in the century in the context of voting rights. The case is *Giles v. Harris* in 1903.²⁶ Black citizens of Alabama alleged that they had been excluded from registering to vote, solely because of race, pursuant to a scheme designed to eliminate black voters. Of course the allegations were true (this was 1903); of course there was state action; of course there was a violation of the express terms of the Fifteenth and Fourteenth Amendments. But what exactly would we have the Supreme Court do about it in 1903, even judged with the benefit of hindsight? *Giles v. Harris* is an extraordinary case because Justice Holmes, with his characteristic impatience and lack of tact, described candidly why the Court was refusing to issue an injunction:

The bill imports that the great mass of the white population intends to keep the blacks from voting If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the Government of the United States.²⁷

Present-day biographers and commentators quote these words of Holmes with reactions that range from dismay to outrage. I call them to your attention, on the contrary, because from our privileged perspective at the end of the twentieth century we can see that Holmes’ description of the judicial dilemma was extraordinarily prescient. Of course a more liberal court in 1903 could have given the plaintiffs in *Giles v. Harris* what Holmes contemptuously called “a name on a piece of paper.” The Court post-1937 did everything it could, ruling in *Smith v. Allwright* that the Texas Democratic Party was an agency of the state, even managing to find in *Terry v. Adams*²⁸ that a local political club violated the Fifteenth Amendment when it excluded blacks from its slate of recommended candidates. Of course the white primary cases made a difference. But judicial decrees could not finally remedy what Holmes called the “great political wrong”: massive disfranchisement, on the basis of race, in defiance of the Fifteenth Amendment. They could not do so, because the wrong was accomplished—as it had been accomplished in *Giles v. Harris*—by the discriminatory administration of voter registration. That wrong could be remedied, as



The Court in *Berea College* (1908) did not even mention *Plessy v. Ferguson* (1896) because it did not treat the later case as a segregation case at all. Berea College was a small, private institution in rural Kentucky that taught black and white students together until the Kentucky legislature passed a statute outlawing the practice. The Supreme Court upheld this segregation law against a constitutional challenge, but on a narrow, almost painfully artificial ground. Berea College was a Kentucky corporation, and the Supreme Court ruled that the state was merely exercising its power to limit the activities of corporations it had chartered.

Holmes predicted, only by supervising or replacing the administrators and by removing, so far as possible, the possible grounds of discrimination. This was exactly the relief that was finally given by the Voting Rights Act of 1965—in Holmes' words, "by the legislative and political department of the Government of the United States."

Holmes' dark vision in *Giles v. Harris* should make us think about two constraints on constitutional adjudication that explain a great deal about the course of Supreme Court decisions post-*Plessy* and pre-*Brown*. The first of these constraints is the sheer political necessity of avoiding the issuance of a mandate that can be successfully disobeyed. The problem is epitomized by Andrew Jackson's remark—supposedly uttered during a fight with the Court

over Georgia's treatment of the Cherokee Indians in 1832—"Well, John Marshall has made his decision, now let him enforce it."²⁹ The Court's ultimate authority as expositor of the Constitution depends entirely, in our system, on the loyalty and acquiescence of the political branches. A Supreme Court that finds itself too far out in front, or that lags too far behind, will see its constitutional mandate ignored, defied, or repudiated. This is what almost happened in 1937 on the great question of federalism, and the Court was determined not to run any such risk again—for desegregation or any other cause. This is why the constitutional history that forms the prologue to *Brown* is preoccupied, not with questions of constitutional principle, but with judicial strategy and tactics; why the Court refused to take up the question of

school segregation until it was convinced, in Justice Frankfurter's words, that public opinion had finally "crystallized against it";³⁰ why even then the Court hesitated—until it realized that it could declare a new rule of equal protection without having to enforce it. The Court waited until May 1955 before it announced that the school segregation cases would be remanded to the district courts, with instructions that they find the means to enforce the plaintiffs' constitutional rights "with all deliberate speed."³¹

A second major constraint on constitutional adjudication brings us back to the problem of state action. Discrimination in voting rights and school segregation presented problems that were subject to constitutional law—if not always subject to judicial remedy—because they resulted from the action of the state. Beyond this legal discrimination, however, lay all the rest of social relations, where the fact of racial inequality was reflected and reinforced by private choice.

By an expansive reading of what constituted state action, the Court might prohibit the judicial enforcement of a restrictive covenant, as it did in *Shelley v. Kraemer*; but a private refusal to sell real property is wholly self-enforcing. The refusal to sell can only be made illegal by legislation that constrains the private actor's usual freedom of choice: in this case, the federal Civil Rights Act of 1968 or comparable state legislation. In the case of employment discrimination—an even greater barrier to social and economic equality than segregated housing—the inherent limits to the judicial mandate were just as plain. The constitutional guarantee of equal protection or privileges and immunities conveyed no protection against a private entity's racially motivated refusal to make a contract. Like the Civil Rights Act of 1866, the Fourteenth Amendment undoubtedly secured to all persons "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens"—but that is only the right to make an enforceable contract with someone who wants to make one with you.³² With employment as

with housing, it would take plenary legislative authority to constrain a self-enforcing private choice: in this case, Title VII of the Civil Rights Act of 1964.

Now by 1964, when it finally decided to act in this area, Congress possessed plenary legislative authority over the employment relationship—because the constitutional revolution of 1937 had changed the old enumeration of powers, granting the federal government full legislative authority at least in matters of economic regulation. (If the Civil Rights Act of 1964 had been enacted in 1934, it would have been held unconstitutional.) A case could be made that the Supreme Court's most important contribution to this century's unfinished revolution in racial equality was not *Brown v. Board of Education* but *NLRB v. Jones & Laughlin Steel*.

Looking back on it now, a generation after the modern civil-rights statutes were put in place, we can see that the fight over the state-action doctrine was a struggle by the Court to escape certain inherent limitations that distinguish the judicial from the legislative function. The Court took up an argument that was logically and historically awkward—attempting to cast the discriminatory choices of private actors as discrimination by the state—because it was determined to advance the cause of racial equality before Congress was ready to do so. Yet where the Court moved too far ahead of Congress, it laid claim to ground that it lacked the forces to occupy; with the result that this territory was not really gained for the cause of civil rights until it was retaken, in the 1960s, by "the legislative and political department of the Government of the United States." As Justice Holmes had pointed out in 1903, there was really no other way to do it.

III.

One of the characteristic features of the post-*Plessy*, pre-*Brown* interval is the Court's occasional willingness to declare constitutional law exceeding the reach of its mandate. This

means, of course, that in evaluating the accomplishments of the Court in the area of race we must try to measure the influence of the Court's pronouncements as distinct from the immediate force of its decrees. The pros and cons of "all deliberate speed" make this a familiar controversy for the civil-rights era at midcentury, but we encounter the same problem, very unexpectedly, in our earlier period as well. The first two decades of the twentieth century saw cases in which the Court clearly went out of its way to suggest the existence of constitutional principles of equality and nondiscrimination that it was not yet prepared, perhaps not yet even inclined, to enforce. Let me describe the three instances that I find most intriguing.

The first episode is a dog that did not bark: This was the Court's treatment of the *Berea College* case in 1908.³³ Berea College was a small, private institution in rural Kentucky that taught black and white students together. The Kentucky legislature passed a statute outlawing the practice. The Supreme Court upheld this segregation law against a constitutional challenge, but on a narrow, almost painfully artificial ground. Berea College was a Kentucky corporation, and the Supreme Court ruled that the state was merely exercising its power to limit the activities of corporations it had chartered. To judge by the majority opinion, in other words, this was not a segregation case at all.

Why did the Court in *Berea College* not even mention *Plessy v. Ferguson*? Narrowly construed, the decision twelve years earlier had been about segregated railroad cars, not segregated education. But nobody construed it that narrowly. As I suggested at the outset, *Plessy* taught that the Fourteenth Amendment imposed no special barrier to a legislative classification on racial lines; moreover, that a law separating the races might be a reasonable and valid exercise of the police power. In upholding the validity of the Berea College statute, the Supreme Court of Kentucky read and cited *Plessy* in exactly this way.³⁴ When the College appealed, the state pressed the same argument before the U. S. Supreme Court. Since the Court

had decided to let the Kentucky result stand, why not adopt the Kentucky reasoning as well?

Berea College draws our attention to a curious and significant fact about *Plessy v. Ferguson*. On the narrow issue of segregating railroad passengers, and on this issue alone, *Plessy* was treated as authoritative.³⁵ But the avowed reasoning of the majority opinion—and, I would argue, the plain meaning of the decision to anyone who read it in May 1896—proved to have no vitality whatsoever in the Court that had issued it. Apart from two railroad cases, no subsequent decision by the United States Supreme Court ever referred to *Plessy v. Ferguson* as a guide to the meaning of the Fourteenth Amendment. It is true that the Court before 1937 showed no inclination to revisit the question of segregation in transportation and public education, the two areas where segregation had been the status quo well before *Plessy*.³⁶ But the Court never once referred to *Plessy* as authority to support either another form of segregation or any other type of racial discrimination. *Berea College* is interesting because the Court so noticeably kept its distance from the reasoning the Kentucky judges had enthusiastically embraced—going out of its way to avoid reaffirming what it had said only twelve years earlier.

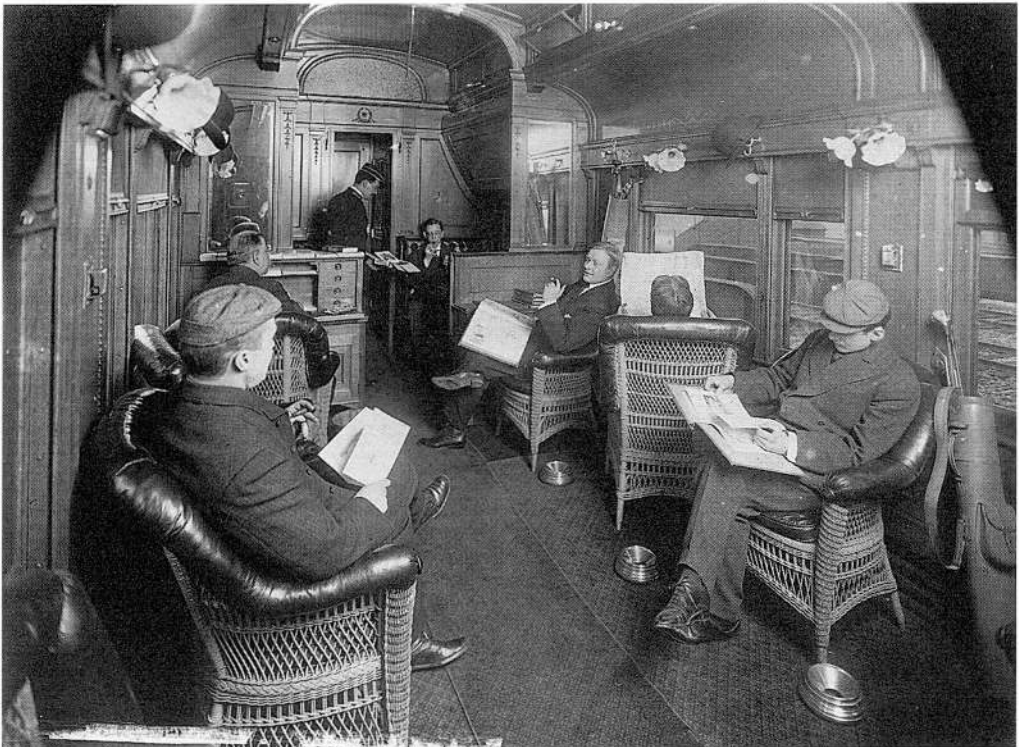
My second example is *McCabe v. Atchison, Topeka & Santa Fe Railway*,³⁷ decided in 1914. Here the Court considered an Oklahoma statute of the *Plessy* kind, mandating separate but equal facilities for black and white railroad passengers. But the Oklahoma law had a peculiarity: it provided that first-class accommodations, in sleeping and parlor cars, might be provided exclusively for passengers of one race, with no equivalent provision for the other. By a vote of 5-4, in an opinion by Justice Charles Evans Hughes, the Court declared this law unconstitutional. The railroad tried to justify the reasonableness of the statute by pointing to the relative lack of demand among black passengers for first-class accommodations: a separate black Pullman car would have run empty most of the time. Hughes de-

clared such considerations irrelevant, on the ground that “it is the *individual* who is entitled to the equal protection of the laws.”³⁸

McCabe was not a ruling against segregation, in practical effect: Railroads could still create a “separate but equal” Pullman or dining car by installing a curtain or a removable partition at one end of the car. And yet the decision carried extraordinary implications. Part of what makes the case extraordinary is that Hughes’ opinion, for a narrow majority of the Court, was transparently *obiter dictum*. After giving what was in effect an advisory opinion about the constitutionality of the Oklahoma statute, the Court announced that the case would be dismissed because the plaintiffs had no standing to sue. (They had not bought tickets since the effective date of the law.) Obviously, the Court’s 5-4 majority was going far

out of its way to make a point. What was the point? Hughes’ opinion in *McCabe* meant more than it said, because what it said cannot be taken at face value. It is simply not true that “it is the individual that is entitled to the equal protection of the laws,” if that means that each of us has a constitutional claim to whatever benefits the law may provide to others. *McCabe* makes sense only if we understand it to mean something quite different: that a law requiring racial segregation is constitutionally permissible only if the segregated facilities are kept rigorously equal. But that is a strained reading of *Plessy*, very different from the rule that was actually announced in 1896—which was that a segregation law would be constitutional so long as it was reasonable in the eyes of the Court.

I do not wish to overstate the point. The decision in *McCabe* does not begin to prove



A majority of the Justices showed their discomfort with *Plessy* in the 1914 *McCabe v. Atchison, Topeka & Santa Fe Railway* decision in which the Court struck down an Oklahoma statute mandating separate-but-equal facilities for black and white railroad passengers. The constitutional flaw in the statute was a rule that first-class accommodations, such as those shown above, might be provided exclusively for passengers of one race, with no equivalent provision for the other. The railroad tried to justify the reasonableness of the rule by pointing to the relative lack of demand among black passengers for first-class accommodations: a separate black Pullman car would have run empty most of the time.



In writing about the meaning of the Fourteenth Amendment in 1917, Justice William Rufus Day cited an 1880 case, *Strauder v. Virginia*, that held the exclusion of blacks from jury selection unconstitutional. "What is [the Fourteenth Amendment]" he read, "but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?" Pictured is an all-white, all-male jury in New York in 1869.

that five members of the Court, had they had the power to do so, would have outlawed all forms of segregation in 1914. And yet the decisions in *Berea College* and *McCabe* show us something extremely interesting. Not two decades after *Plessy*, more than half the members of the Supreme Court had shown themselves to be uncomfortable with the reasoning of the case that was the leading authority for the legality of segregation under the Fourteenth Amendment. At a bare minimum, I would argue, the Hughes opinion in *McCabe* is a statement that a racial classification is *not* like any other classification, constitutionally valid if reasonable. On the contrary, Hughes and his colleagues treat a racial classification as inherently suspect—though without acknowledging any such judgment.

Justice Holmes, who saw precisely what Hughes was up to, accused him in correspondence of insisting on "logical exactness" in

enforcing equal rights.³⁹ This was not meant as a compliment. The usual test of equal rights incorporates what might be called a rule of reason: the standard guarantee of the Fourteenth Amendment is not that all persons be treated identically in all circumstances, but that legislative classifications resulting in different treatment be drawn on reasonable lines. *Plessy* applied this rule of reason to the question of racial segregation, treating it as self-evident that, for purposes of a statute regulating railroad passenger facilities, the race of the passenger was a meaningful distinction. Hughes reached his result in *McCabe* by tacitly rejecting this rule of reason where a racial classification was concerned.

Whether the Hughes approach is called "logical exactness" or "stricter scrutiny," the result is that a racial classification is, to some extent at least, disfavored. Because *Plessy* had implied just the opposite, *Plessy* was, to that

extent, tacitly disapproved. To find these implications in a Supreme Court opinion written in 1914—an opinion that five members of the Court persisted in issuing, while admitting that they had no case or controversy to decide—has to make us rethink what we think we know about “the era of separate but equal.”

The last of my three instances is the Court’s unanimous opinion in *Buchanan v. Warley*⁴⁰ in 1917. The case arose from a growing movement in southern and border-state cities to reinforce racially segregated housing patterns by municipal ordinance. Louisville, Kentucky, had adopted an ordinance with typical provisions: a house on a city block predominantly occupied by white residents could not be sold to a black purchaser, and vice-versa. In a unanimous opinion by Justice Day, the Court in *Buchanan v. Warley* held that this ordinance violated the Fourteenth Amendment.

Buchanan was (among other things) a case about the right of an owner to dispose of his property, and it is reasonable to surmise that the decision would not have been unanimous if the case had lacked this implicit appeal to substantive due process. The rights of the aggrieved property owner are mentioned in the opinion, but they are not the basis on which Justice Rufus Day placed the reasoning of the Court.

The Fourteenth Amendment, the Court declared in 1917, “ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. *What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?*”⁴¹

Justice Day was reading from *Strauder v. Virginia*,⁴² a case decided in 1880 about racial discrimination in selecting juries; but he spoke

in the present tense, about the meaning of the Constitution in 1917. It was an extraordinary thing to say. If the Fourteenth Amendment *declares that the law in the States shall be the same for the black as for the white*, many people would conclude that it prohibits not only Louisville’s housing ordinance but every other form of segregation as well. Even if we give the words the most modest interpretation they will bear, they still imply that constitutional law in 1917—meaning the practical reality of the Court’s mandate at the time—fell somewhere short of the constitutional command.

The suggestion that the Constitution sometimes requires more than the Court can yet deliver is the same that we see in the words of Chief Justice Stone in 1943, when he declared—in the bitterly ironic context of the Japanese Relocation Cases—that “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people.”⁴³ We see it again in 1955, when the Court conceded that the Fourteenth Amendment rights of black schoolchildren could only be enforced in an indefinite future, “with all deliberate speed.”

An implicit if intermittent promise of future mandates forms one of the primary stories of the interval between *Plessy* and *Brown*. A later generation of civil-rights lawyers would find these implications in *McCabe*’s unstated but unmistakable hostility to Jim Crow practices; in *Buchanan*’s evocation of an older nondiscrimination principle as the basis for a decision against segregated housing; in the seemingly unequivocal denunciation of “Distinctions between citizens solely because of their ancestry,” even as such distinctions were being reluctantly upheld. Given the helpful fact that the original, expansive reasoning of *Plessy* had never reappeared in any subsequent decision of the Court, these recurring intimations over the years were what permitted the civil-rights forces, in the years immediately preceding *Brown*, to argue that *Plessy* had long since been abandoned, and that not only segregation but any legally-imposed racial classification had

become plainly unconstitutional. So in their final consolidated brief in the School Segregation Cases, filed on the eve of the *Brown* decision in late 1953, the lawyers for the NAACP Legal Defense Fund, led by Thurgood Marshall, summarized their principal argument by stating that "Distinctions drawn by state authorities on the basis of color or race violate the Fourteenth Amendment." They reiterated in closing: "[T]hat the constitution is color blind is our dedicated belief."⁴⁵

Throughout the interval between *Plessy* and *Brown* it was Justice Harlan's dissenting opinion, and not the reasoning of the *Plessy* majority, that represented the meaning of racial equality for anyone who cared about racial equality. The majority in 1896 had shown how easily the command of equal protection might be accommodated to the existing state of race relations in America; Harlan's dissent anticipated a time when the Court might seek to change them. The constitutional law of race between *Plessy* and *Brown* reminds us that the political significance of constitutional doctrine sometimes falls short of the Court's mandate, and sometimes outruns it. This makes the question of the Court's influence a more complex and a more interesting one than if the Justices could simply tell us what to do.

ENDNOTES

¹ Readers familiar with the literature will recognize in the present essay the influence of two historians in particular: Benno C. Schmidt, Jr., and Michael J. Klarman. Professor Schmidt's studies of the Supreme Court's race-related cases in the Progressive Era are collected in Alexander M. Bickel & Benno C. Schmidt, Jr., **The Judiciary and Responsible Government 1910-21** [vol. 9 of the Holmes Devise History of the Supreme Court of the United States] chs. viii-x (1984). Professor Klarman is currently at work on a comprehensive study of the period that is the subject of this essay, tentatively titled **Neither Hero Nor Villain: The Supreme Court, Race, and the Constitution in the Twentieth Century**. For some of his preliminary conclusions see Klarman, "An Interpretive History of Modern Equal Protection," 90 *Mich. L. Rev.* 213 (1991); "Brown, Racial Change, and the Civil Rights Movement," 80 *Va. L. Rev.* 7 (1994); "Civil Rights Law: Who Made It and How Much Did It Matter?," 83 *Geo. L.J.* 433 (1994); "Race

and the Court in the Progressive Era," 51 *Vand. L. Rev.* 881 (1998); "The *Plessy* Era," 1998 *Sup. Ct. Rev.* 303.

² 163 U.S. 537 (1896).

³ See Andrew Kull, **The Color-Blind Constitution** ch. 7 (1992).

⁴ Charles A. Lofgren, **The *Plessy* Case: A Legal-Historical Interpretation** 197 (1987).

⁵ 347 U.S. 483 (1954).

⁶ See Kull, *supra* note 3, chs. 9-10.

⁷ Gerald Gunther & Kathleen M. Sullivan, **Constitutional Law** 671 (13th ed., 1997).

⁸ 109 U.S. 3 (1883).

⁹ *Id.* at 25.

¹⁰ See Kull, *supra* note 3, ch. 5.

¹¹ The close of what is here called the Court's "civil-rights era" is marked by the decisions in *Milliken v. Bradley*, 418 U.S. 717 (1974) (declining to consolidate school districts as a remedy for racially identifiable school systems), and *Washington v. Davis*, 426 U.S. 229 (1976) (finding the "disparate impact" of government policy insufficient to establish a violation of equal protection).

¹² See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

¹³ See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948) (judicial enforcement of private restrictive covenant as prohibited state action).

¹⁴ See, e.g., *Mayor & City Council of Baltimore v. Dawson*, 350 U.S. 877 (mem.) (1955) (segregation of public beaches and bathhouses); *Holmes v. City of Atlanta*, 350 U.S. 879 (mem.) (1955) (municipal golf courses); *Gayle v. Browder*, 352 U.S. 903 (mem.) (1956) (city buses).

¹⁵ See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (freedom of association protected by First and Fourteenth amendments).

¹⁶ See, e.g., *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749, vacated and remanded, 350 U.S. 891 (1955), reinstated and aff'd, 197 Va. 734, 90 S.E.2d 849, app. dismissed, 350 U.S. 985 (1956) (declining to pass on constitutionality of a statute prohibiting interracial marriage).

¹⁷ *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4 (1938).

¹⁸ 305 U.S. 337 (1938).

¹⁹ The sequence of cases is *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Grove v. Townsend*, 295 U.S. 45 (1935).

²⁰ 321 U.S. 649 (1944).

²¹ *Id.* at 669.

²² 334 U.S. 1 (1948).

²³ See, e.g., *Bell v. Maryland*, 378 U.S. 226 (1964); *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964).

²⁴ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

²⁵ Klarman, *supra* note 1, 80 *Va. L. Rev.* at 13-14.

²⁶ 189 U.S. 475 (1903).

²⁷ *Id.* at 488.

²⁸ 345 U.S. 461 (1953).

²⁹ 1 Charles Warren, **The Supreme Court in United States**

History 759 (rev. ed. 1926).

³¹Frankfurter's remark, quoted in a memorandum by Justice Douglas, was made in a Supreme Court conference in 1960. See Klarman, *supra* note 1, 83 *Geo. L.J.* 433, 455 & n.107.

³²*Brown v. Board of Educ.* (Brown II), 349 U.S. 294, 301 (1955).

³³The Court's holding to the contrary in a case involving housing discrimination, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), is singularly unpersuasive. The Civil Rights Act of 1968, forbidding racial discrimination in housing, had been enacted shortly before the decision was announced. *Jones* reveals the determination of a majority of the Court, at the height of the Court's civil-rights era, not to relinquish its place in the vanguard even to a coordinate branch of the federal government.

³⁴*Berea College v. Kentucky*, 211 U.S. 45 (1908).

³⁵*Berea College v. Commonwealth*, 123 Ky. 209, 94 S.W. 623 (1906).

³⁶*Chesapeake & O. Ry. v. Kentucky*, 179 U.S. 388 (1900); *Chiles v. Chesapeake & O. Ry.*, 218 U.S. 71 (1910).

³⁷*Gong Lum v. Rice*, 275 U.S. 78 (1927), which assumes (without directly addressing) the constitutionality of segregated schools, cites *Plessy* merely for its cross-reference to the earlier state cases on school segregation.

³⁸235 U.S. 151 (1914).

³⁹*Id.* at 161-62.

⁴⁰Holmes' letter to Hughes has not survived, but its content may be inferred from Hughes' reply. This letter is reproduced among the illustrations to Bickel & Schmidt, *supra* note 1, following page 592.

⁴¹245 U.S. 60 (1917).

⁴²*Id.* at 77 (emphasis added).

⁴³100 U.S. 303 (1880).

⁴⁴*Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

⁴⁵Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument, *Brown v. Board of Educ.* et al. (Oct. Term 1953), at 16, 65.

A Time to Lose

Paul E. Wilson

It has been a long time since I first came to this chamber to speak about *Brown v. Board of Education of Topeka*.¹ In 1952, I stood facing this Bench and urged that a Kansas statute that permitted racial segregation in some of the state's public schools was not unconstitutional. I lost. This evening I have a different purpose. I have no case to argue, no ax to grind. I shall not talk about constitutional law. My remarks will be personal and anecdotal – some even trivial. They will concern matters not written about by scholars, but they will reflect some of my recollections about *Brown*.

In Richard Kluger's book, **Simple Justice**, the author introduces me by writing, "By Eastern standards, Paul Wilson was a hayseed. His background and practice did not seem to qualify him very well. . . as a reluctant dragon [in] defending his state's Jim Crow public schools."² I do not take exception to Mr. Kluger's assessment. I was a country lawyer. I had practiced in the county seat of the rural Kansas county where I was born. My clients there were farmers and tradespeople and the proprietors of small businesses, most of whom found litigation distasteful. I served as prosecuting attorney but my constituents were law

abiding people and serious crime was minimal. Felony prosecutions were rare. Racial discrimination cases were unknown because there was no one to discriminate against. We were all white. My courtroom experience was largely limited to the local county and district courts. I had never argued an appeal, either on the federal or state level. After four years, I had left this prairie nirvana to become an assistant state attorney general. My objective was twofold. I had an interest in state politics and wanted to extend my statewide acquaintance. Also, I wanted to broaden my professional experience. Particularly, I wanted to get some experience as

an appellate lawyer. A year later I made my first argument before an appellate court. The court was the Supreme Court of the United States. My case was *Brown v. Board of Education of Topeka*.

In the language of civil rights, *Brown v. Board of Education of Topeka* means not a single case, but the rule drawn from the consolidation of four, or perhaps five, cases. During the second week in December 1952, the Supreme Court heard appeals from the states of Kansas,³ South Carolina,⁴ Virginia,⁵ Delaware,⁶ and from the District of Columbia.⁷ Although each was a separate case and was appealed on its own discrete record, all raised the issue of the constitutionality of laws requiring or permitting racial segregation in the public schools. The four state cases were decided in a single opinion bearing the caption *Brown v. Board of Education of Topeka*. Kansans are often embarrassed that their state is so conspicuously known as a place where racial discrimination was sanctioned by law. They ask why couldn't it have been South Carolina or Virginia where the issue was more critical and the impact of the decision was greater. The answer is that the Kansas case was the first docketed for argument in the Supreme Court. It was not the first to be appealed. The South Carolina case was appealed earlier but was returned to the trial court for further proceedings. Meanwhile, the *Brown* appeal reached the Supreme Court and was assigned a place in the docket. Thus the free state of Kansas and not Clarendon County, South Carolina, became identified as the place where public school segregation made its last stand. My remarks here will be limited to the Kansas case.

In 1951, the laws of Kansas prohibited racial discrimination in the public schools, except in cities of the first class where boards of education were empowered, not required, to segregate in the elementary grades only.⁸ Cities of the first class are those with 15,000 or more inhabitants. In 1951 there were twelve such cities. The elementary grades were grades one through six. Of the twelve cities affected



Paul Wilson was a country lawyer from rural Kansas who became an assistant attorney general because of his interest in state politics and his desire to gain experience as an appellate lawyer. A year later he made his first argument before an appellate court. The case was *Brown v. Board of Education* and the court was the Supreme Court of the United States. He bought a new blue wool suit (pictured) to argue the case on the lay-away plan because he could ill-afford an unplanned expenditure of \$45. The suit now hangs in the Kansas Museum of History.

by the statute, one had never segregated its schools, two had abandoned their earlier policies of segregation, and three others were in the process of desegregating. Thus, in only six districts of the state were there established policies of segregation with no plan for abandonment. Topeka was one of those cities. Its schools were governed by a board of education of six elected members.

In 1951, there were twenty-two elementary schools in Topeka—four were for African-American students only and the rest were almost, but not quite, lily white. Hispanics, Native Americans and other non-African children attended the white schools. The external facilities of all schools were substantially equal, the only difference being that transportation was provided for students attending the black

schools and was not provided for the whites.

In the fall of 1950, Oliver Brown, who lived in a racially mixed neighborhood, attempted to enroll his eight-year-old daughter, Linda, in their neighborhood elementary school. The child was denied admission solely because of her color. Instead, she was assigned to attend an all-black school twenty-two blocks away. Other families were experiencing similar rejections as part of a coordinated effort. With the support and assistance of the NAACP, the aggrieved families prepared and filed a lawsuit claiming that the segregation policy of the board of education and the state statute permitting it, violated the Equal Protection Clause of the Fourteenth Amendment. Thirteen parents representing twenty children joined as plaintiffs. The names of Oliver and Linda Brown appeared first on the caption of the complaint. Because of this fortuitous circumstance, Linda Brown has become an icon of the civil rights movement while the names of the other plaintiffs are seldom remembered.

The defendants named in the complaint were the Board of Education, the Superintendent of Schools, and the principal of the school that rejected Linda Brown's application. The state of Kansas was not sued. Still, the heart of the plaintiff's claim was the unconstitutionality of a state statute. At the urging of the Board of Education, the Governor and other state and local officials, the Attorney General, whose personal sympathies were with the plaintiffs, reluctantly intervened on the state's behalf less than two weeks before the date set for trial. The state's answer denied that the state statute was unconstitutional. It neither admitted nor denied the plaintiffs' claims concerning the Topeka school system. The case was tried in Topeka before a three-judge federal court in midsummer 1951. An Assistant Attorney General was present at the trial but his role was passive. He produced no evidence, examined no witnesses nor made any argument. Judgment was for the defendants. The court found that the facilities for the education of black and white children were substantially equal and that

under the rule in *Plessy v. Ferguson*⁹ there was no denial of equal protection. But the court added as its Finding of Fact no. 8:

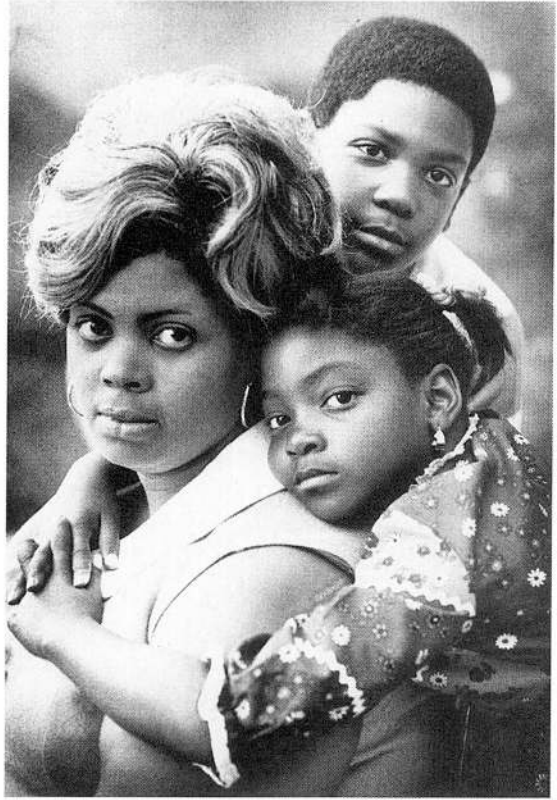
Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.¹⁰

This finding was a gratuitous one, irrelevant in view of the court's narrow interpretation of *Plessy*. But as I have later realized, the judges, who had no sympathy for separate but equal, were deliberately laying the foundation for reversal on appeal. In due time, the decision was appealed to the Supreme Court and assigned a place on the October 1952 docket.

I became an assistant attorney general in December 1951. The *Brown* case was among my early assignments. As the Attorney General discussed the case with me, he explained that he wanted me to become familiar with the case and prepare a suggested draft of the state's brief. He stated that he expected to make the oral argument to the Court but that I should accompany him to Washington, sit at the counsel table, and be admitted to the Supreme Court Bar. The suggestions pleased me and I set about my task.

When I was satisfied that I understood the case and the issues it raised, I began to prepare for briefing. As I came to understand the law, it supported our position. The precedents were abundant. History, the traditions and attitudes of our culture, were on our side. The law, I felt

Oliver Brown attempted to enroll his daughter, Linda (pictured with her own children), in the neighborhood school, but Linda was denied admission because she was black. Instead, she was assigned to attend an all-black school twenty-two blocks away. Brown and other aggrieved families who had faced similar rejections filed a lawsuit claiming that the segregation policy violated the Equal Protection Clause. In all there were thirteen parents representing twenty children as plaintiffs, but the Brown's names appeared first on the caption of the complaint.



could not permit us to lose but as I reflected on the problem I also thought we probably would not win. Whether precedent and tradition of the law would prevail over the twentieth-century conscience was the question the Court would decide. It might find that the separate-but-equal concept had outlived its usefulness.

Along with my substantive preparation, I undertook to learn something of Supreme Court procedure and protocol. I read Stern and Gressman on **Supreme Court Practice**, then a single, not-very-thick, volume. I read about Courtroom decorum—where I should sit, when I should stand, how I should address the court, what I should wear. It was the matter of proper garb that gave me pause. I was pleased to learn that the traditional formal dress was no longer required but a little disturbed to read that the acceptable alternative was a conservative business suit “in a dark color in keeping with the dignity of the court.” My dark suit had been purchased several years before and no longer

fit. My more recent purchases had been a tan gabardine, a pepper and salt tweed, and miscellaneous sport jackets and trousers. These served well in Kansas, but I had a date in the Supreme Court and nothing to wear. Seeking assistance, I went to the Palace Clothing Store, then the Topeka counterpart of Brooks Brothers, where I found a midnight-blue suit of worsted wool; a perfect fit. I was assured by the salesman that a garment of that quality was a bargain at forty-five dollars. But this only partially solved the problem. In 1951 the state of Kansas was not a lavish paymaster. With house payments, a car payment, a wife, three children, and a household, I could ill-afford an unplanned-for expenditure of forty-five dollars. The era of the credit card had not yet arrived. Hence, this solution. With a five dollar deposit, the suit was removed from the display rack and laid away to be picked up and paid for when I needed it. Eventually I wore the suit during the argument. Forty-six years later, my blue suit, in

good condition and an approximate fit, reposes in the Kansas Museum of History to remind posterity of the time, place, and by whom it was worn. This is hardly the kind of immortality to which I aspired, but, I suppose, it beats oblivion.

When I advised the Attorney General that I was ready to commence composing the brief, he told me to wait. It was his thought that as the Board of Education was the principal defendant and we were in the case for a limited purpose, our effort should be coordinated with the board's and we should not proceed until its position was known. But the board had not determined its position. As public school segregation began to attract national interest and publicity, Kansans who had been largely indifferent began to inquire why the free state of Kansas would stand before the Supreme Court to defend a scheme based on an assumption of

racial inequality. Some, I think, were merely embarrassed. Others, on reflection, could find no justification for the Topeka board's policy. The position of the state and the policy of the board were becoming politically unpopular and both the board and the Attorney General were politically sensitive. To an observer it was clear that their enthusiasm for their lawsuit was waning. But neither seemed to know what to do. In consequence, neither did anything.

In April 1952, three incumbents stood for reelection. All were defeated. While segregation had not been an overt issue in the campaign, the vote was a clear repudiation of the status quo. And the result of the election was that a majority of the board's members did not favor the position it was defending in the appeal.

For me, the summer was a season of uncertainty. We received and studied the briefs



Seasoned advocate John W. Davis moved for Wilson's admission to the Supreme Court Bar and coached him on his arguments. Davis made his 140th—and last—Supreme Court argument in *Briggs v. Elliot* (representing South Carolina in one of the many companion cases to *Brown*) for which he received neither a retainer nor a fee.

and other documents filed by the appellants as well as the responses of South Carolina and Virginia. A dozen organizations, with our consent, filed briefs as friends of the Court. None of them were our friends. The most unkind cut of all came when the Attorney General of the United States appeared with a brief suggesting that the separate-but-equal doctrine be reexamined and overruled.

Toward the end of summer, the new board members took office. The superintendent of schools resigned and the board fired the law firm that had successfully represented it in the trial. A new attorney was employed and there were rumors that the board would not resist the appeal. Although I had begun to be concerned about our position, the Attorney General continued to say that in due time we would move. As late as September 10, he wrote to Governor Byrnes of South Carolina that "we shall defend in every way the validity of our state statute."¹¹ Still I knew he was struggling to reconcile his sense of official duty and his understanding of the law with his personal lack of sympathy for the traditional Topeka policy and his political aspirations. Meanwhile, I waited and wondered. Arguments in the Kansas, South Carolina, and Virginia appeals were originally scheduled to commence on October 14. Early that month the date was continued to December 8.

On October 6, the board of education announced that it would make no defense in the Supreme Court. It instructed its attorney to advise the Court that Topeka would not appear. Upon learning of the board's decision, the Attorney General announced that he had changed his mind and that the state would make no appearance. He reasoned that the board was the principal defendant, that the policy under attack had been established and enforced by the board, that the board had power to discontinue its segregated schools, and that if the board was unwilling to defend the policy that it and its predecessors had enforced for nearly a century, the state ought not to assume that burden. Moreover, election day was only a month away and

the General was running for re-election.

My views were somewhat different. I felt that as members of the bar representing a party before the Supreme Court of the United States, we had a duty to make some response – either to defend the trial court's decision or admit that it was wrong. I found it hard to reconcile our inaction with my notions of professional responsibility. Besides, I had a new blue suit on layaway at the Palace with apparently no place to wear it. The General was adamant. He listened to me patiently and said we would not appear.

As we procrastinated, our eastern counterparts, particularly those in South Carolina and Virginia, became restive. Their frequent letters and phone calls were referred to me, and I didn't know what to say. *Brown* would be the first of the cases called for argument. They were concerned with the impact that a default by Kansas might have on their cases. When they learned of the decision not to appear, their concern deepened. The pressure became more intense. Virginia offered to send lawyers to Topeka to assist in preparing a brief. But the Attorney General said no. Kansas would not appear. Then, on November 24, the Supreme Court on its own motion entered an order that required that we evaluate our position. The Court's order took notice of the pendency of the case, the decision of the board not to appear, and the failure of the state to respond. The order continued, "Because of the national importance of the issue presented and because of its importance to the state of Kansas, we request that the state present its views at oral argument."¹²

The Attorney General was out of the office when we learned of the court's order. I spoke with him by telephone but because of the intervening Thanksgiving holiday we were not able to discuss the matter until the 28. By that time he had decided that we were obliged to defend the constitutionality of the statute. After reviewing the file he returned it to me with the admonition "Do what you can with the damn thing." I had already begun to as-

semble the material for a brief and, with the General's approval, I started writing. I had ten days to write the brief, have it printed, filed and served on opposing counsel. This was in the pre-computer era when procedures were less streamlined than now, and I, a somewhat bewildered country lawyer, was in charge. Four days later, the board relented a bit and allowed its attorney to collaborate with me and to join in submitting the brief.

On the afternoon of December 4, the brief was ready and I took it to the General for his approval. He thought it adequate and wanted to discuss our further action. While writing the brief I had assumed that in spite of his personal views, the General would appear for the state or, perhaps, waive oral argument. But on that Thursday afternoon, I learned that his thoughts were different. He told me that he felt the state ought to be present for argument, that his schedule would not permit him to be in Washington at that time, and that I was familiar with the case so he wanted me to make the state's argument. It was then Thursday afternoon. I would have a weekend to prepare. As I think about the events of that Thursday afternoon, I sometimes recall something that I first read in my college Shakespeare course sixty-five years ago: "Some [men] are born great; some achieve greatness; and some have greatness thrust upon them."

My first act was to visit the Palace and pick up my blue suit. Then I called the Clerk of the Supreme Court to report that I would be present at the docket call. After that were the logistical arrangements. In Washington, I would stay at the Carlton, now the Sheraton-Carlton. I would travel to Washington by train. The twenty-six hour train ride alone would give me the opportunity to think and to plan an argument. Saturday at noon, I boarded the east bound Santa Fe Chief.

My argument, as I thought it through, would not be very imaginative. We would not urge or approve segregation as a matter of policy. We would only assert that the statute permitting it was not unconstitutional. I would

argue precedent, of which there was an abundance on our side. I would argue history and tradition and the need for stability in the law. I would point out that implicit in the laws passed by more than a score of legislatures including the Congress of the United States was reliance on the Court's prior interpretation of the Equal Protection Clause. I would argue for the right of the sovereign state of Kansas and its local governments to fix policies for the management of their local schools. Then I would say that if the state's public schools were to be within the purview of the Fourteenth Amendment, under Section 2 it would be for Congress, not the judiciary, to prescribe standards. To rebut Finding no. 8 that segregation was harmful to black children, I would argue that the evidence did not support the finding and that, in any case, there was no evidence to show that any of the plaintiffs had suffered or was in jeopardy of irreparable injury; that mere membership in a class does not entitle one to injunctive relief.

By the time the train reached Harper's Ferry, I knew what I wanted to say to the Court. As we headed toward Washington, I relaxed, subconsciously wishing that the train ride would go on forever. It didn't. I left the train at Washington's Union Station and as I waited to retrieve my luggage, I bought a newspaper. The banner headline read "Legal Giants to Vie in Segregation Case." That, I thought, is my case, and I was a little surprised to be so described. As I read the story, I found that the writer had in mind John W. Davis and Thurgood Marshall, who would argue the South Carolina case. Kansas and its counsel were barely mentioned. Another story, which identified me by name, suggested that the Kansas case might be the most difficult to decide since in Kansas the physical facilities had been found equal, but the court had made the further finding that segregation was detrimental. Only the Kansas case presented the issue of constitutionality of segregation per se.

After checking into my hotel, I delivered copies of my brief and met Mr. Robert Carter



Robert L. Carter (far right), who presented the government's arguments for the Kansas case, was Wilson's adversary before the Bench. Carter was deputy to Thurgood Marshall (with his arms around Roy Wilkins and Walter White) at the NAACP, and later became a federal judge. They are pictured here celebrating their victory in *Brown*.

who would be my adversary in the Supreme Court. There I also met Thurgood Marshall and a dozen other lawyers whose names have been prominent in civil rights history. These were gracious and agreeable men. They were confident they would win. Later that evening, I met the lawyers who would sit on my side of the table. They too were gracious and agreeable men who expected to win. I learned from them that the arguments had been postponed until Tuesday. This would give me an extra day for preparation.

Monday, I found the courthouse, filed my brief, and met Mr. Willey, the Clerk, who showed me the courtroom. In the evening, I met in a strategy session with the other attorneys who would sit on my side of the table. This was a high point in the experience. Then I met and talked with John W. Davis who would argue for South Carolina. Mr. Davis, sometimes said to have been the greatest appellate advocate of this century, was a friend of South Carolina's

governor and was representing the state without retainer or fee. For several minutes, perhaps half an hour, he talked with me about the case, discussing my oral presentation, anticipating questions, and suggesting answers that might please the court. He spoke with no impatience or condescension. He made me feel important. Near the end of our conversation he offered to act as my sponsor and move for my admission to the Supreme Court Bar. I gratefully accepted his offer.

On the next day, as the time for argument approached, the attorneys moved to their positions. I sat immediately left of the podium, where I waited to make my first appellate argument. To my immediate left sat Mr. Davis, who would make his 140th Supreme Court argument. To his left were the other distinguished lawyers who would argue for their states. Robert Carter, my adversary, sat next to the podium on the right. Next to him was Thurgood Marshall and beyond him were other lawyers

who have made history. When the arguments began, Mr. Carter spoke first. When he had finished, the Chief Justice, with a disarming smile, addressed me as General Wilson. I stood and spoke and I think I was generally coherent.

I was able to present the argument that I had planned en route. Five Justices interrogated me. None seemed hostile; indeed, most were helpful in developing my argument. In response to a question by Justice Felix Frankfurter, candor required me to say there would be no serious consequences in Kansas if the segregation law were struck down. When I had spoken for a little more than half an hour, the Justices stopped asking questions, which I took as a signal that they had heard enough. So I sat down feeling that I had said all that could be said for Kansas and that I had said it as well as I could.

Richard Kluger, who read the transcript twenty years later, described my argument as perfectly able but somewhat simplistic.¹³ I suspect I agree with Mr. Kluger. To me, *Brown* was a fairly simple case. Notwithstanding my personal misgivings about segregated schools in mid-twentieth century Kansas, to me it was clear that it was permitted by law. As I saw it, my oath and my duty was to uphold the law. Moral and social issues were to be decided by others. I don't know how I would stand today. I hope that age has not diminished my commitment to duty. But time and reflection may have mellowed my perception.

The Kansas case was only a preliminary. The South Carolina case featuring Thurgood Marshall and John W. Davis was the main attraction. I sat through those arguments, which must be ranked as one of the great debates in Supreme Court history. When the argument ended, I took the train home to wait. When the word came, it was different from what I had expected. The cases would be restored to the docket for re-argument. Counsel would give special attention to the Fourteenth Amendment's impact on segregated schools intended by the Congress that proposed and the legislatures that ratified it.¹⁴

This time there was no procrastination or equivocation. Kansas would respond. The Board of Education would proceed independently and would not defend against the claims of unconstitutionality. With plenty of time and the help of a law professor from Washburn, we prepared what I thought to be a good brief and filed it on time. We found no evidence that either Congress or the ratifying legislatures intended that the Fourteenth Amendment would preclude segregated schools. We found some evidence that it did not. We also pointed out the desegregation occurring in Kansas communities. Kansas, we argued, could take care of its own problems if permitted.

With the brief completed, I turned my attention to the oral argument. I did not often write speeches, but this time was special. I carefully wrote my tentative argument and placed the manuscript in a loose leaf binder carefully indexed and tabbed. Then I was ready.

During the late summer, other events occurred that were to have impact on the case. The first was the death of Chief Justice Fred Vinson and the appointment of Governor Earl Warren of California as his successor. My southern associates were disturbed. They had regarded the deceased Chief Justice, a Kentuckian, as their friend. They were dubious about the new appointee. Then, in Topeka, the board of education announced that it would terminate segregation "as rapidly as practicable."¹⁵ This raised a question of mootness. I thought the case was not moot. Topeka had not conceded that the plaintiffs' claims were valid. Its elementary schools were still segregated. The board's resolution was only a promise to end segregation at some indefinite time in the future. Mr. Carter agreed with me. So our preparation had continued with scant attention to mootness.

I again traveled to Washington by train. This time I was accompanied by my wife and our six-month-old son. We again stayed at the Carlton. Upon arriving, we found that the order of argument had been rearranged. The South Carolina and Virginia cases had been

consolidated and would be argued first, followed by a statement by the Attorney General of the United States, then Kansas, Washington, D.C., and Delaware.

When the Court assembled with the new Chief Justice presiding. I sat spellbound while the consolidated South Carolina—Virginia arguments were heard. I then heard Mr. Rankin, who appeared for the Department of Justice, argue that public school segregation was unconstitutional. Then it was Kansas' turn. Mr. Carter had spoken only a few words when Justice Frankfurter asked, "Isn't this case moot?" With Mr. Carter, the Justices pursued the mootness issue for several minutes. Finally, Mr. Carter asked leave to yield to the state (me) to hear what I had to say. I was embarrassed. There was nothing in my prepared argument about mootness. There was no one to whom I could yield. Thus, instead of going for the jugular vein, I began my argument with an extemporaneous effort to stay in Court. My reasoning did not satisfy Justice Frankfurter. He continued to pursue the matter. After several minutes and growing despair, the Chief Justice came to my rescue. He thought the case was not moot and directed me to proceed. I did proceed, but not with the speech I had prepared. I had begun to sense that the Court saw my argument as a mere rehash of arguments they had already heard, so I abbreviated, summarized and passed over points that were relevant but not critical, and as the Justices began to yawn, I picked up my carefully prepared speech and withdrew. Forty years later, I deposited my *Brown* papers in the library at my university. Among these contributions to future generations of scholars is the transcript of my speech that was never spoken.

When the arguments ended I again returned to Topeka and waited. The answer came on May 17, 1954. The world knows what it was. Kansas along with its sister states lost. Most interested Kansans were pleased. The plaintiffs were jubilant. Members of the Board of Education praised the opinion. The Governor expressed satisfaction. The Attorney Gen-

eral, whose name appeared above mine on the Kansas brief, wrote to the Chief Justice congratulating him on the Court's wise and courageous opinion. My own feelings were mixed. I could not disapprove the result. Early in *Brown* I concluded that there was no moral, social, or economic justification for segregated schools in Kansas in 1951. I agreed that the law should reflect the common idea of justice. I also thought it was the responsibility of the state legislature and the Board of Education to put their houses in order. It was a little saddening that they did so only when ordered by the Supreme Court. Such lethargy diminishes the stature of state and local government. Also, I had been a loser in an adversarial proceeding, and fifty-nine years as a lawyer have taught me that losing is less fun than winning.

There was a third argument in the spring of 1955. Often called *Brown II*, the concern was how and when the decision of 1954 would be implemented. In Kansas, there was no longer a controversy. The main issue was settled and Topeka and other Kansas cities were moving forward with desegregation plans. This time I went to Washington with the Attorney General, he to make the oral argument and I to carry his papers. From this round of arguments came the order to desegregate "with all deliberate speed."¹⁶

Although Topeka readily accepted the *Brown* decision in principle, problems arose with its implementation. There was protracted litigation and the district court still retains jurisdiction. However, after nearly forty-eight years and twenty million dollars, Topekans are in agreement that the mandate of *Brown* has been fully complied with and the court's supervision is about to end. The motto of our state is *ad astra per Aspera*—"to the stars through difficulties." Stated differently, we often do things the hard way but we eventually succeed.

I did not participate in the case after *Brown II* so my story should end here. But before I stop, I ask license to make one further statement. I have been often asked whether I regret

my role in *Brown*. The answer is, "I do not." *Brown* gave me the opportunity to represent my state before the Supreme Court of the United States, an honor that does not often come to a country lawyer. Here the Court was being asked to decide one of the most important issues of the century—to reverse a trend that was supported by precedent, by history, and by the traditional attitudes of our society. To decide the issue correctly, the Court had to be fully informed. Kansas had an important contribution to make to the case. Located in the heart of America, Kansas was different. Its history, traditions, and culture were different from those of the other states. Its laws were different and had been enacted in a different environment. These were considerations that the Court needed to complete its record, and had specifically requested. I said all that could be said for Kansas, and I said it as well as I could. So I have no regrets. Besides, had it not been for *Brown*, I would not have been invited to speak to you on this very pleasant occasion.

Endnotes

- ¹ 347 U.S. 483 (1954).
- ² Richard Kluger, *Simple Justice* (New York, Alfred A. Knopf, 1976) 548.
- ³ *Brown v. Board of Educ.* 98 F. Supp. 797 (Kan. 1951).
- ⁴ *Briggs v. Elliott*, 98 F. Supp. 529 (E.D.S.C. 1951); 103 F. Supp. 920 (E.D.S.C. 1952).
- ⁵ *Davis v. County School Board of Prince Edward County, Virginia*, 103 F. Supp. 337 (E.D. Va. 1952).
- ⁶ *Gebhart v. Belton* (S.C. Del.), 91 A. 2d 137 (1952).
- ⁷ *Bolling v. Sharpe* (Cert. to U.S.C.A., D.C. Cir.) 347 U.S. 497 (1954).
- ⁸ General Statutes of Kansas, 1949, 72-1724.
- ⁹ 163 U.S. 537 (1896).
- ¹⁰ Transcript of Record, *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, Case No. T-316 Civil, United States District Court, District of Kansas, 245-246 (print ed.).
- ¹¹ Letter, Fatzer to Byrnes, Sept. 10, 1952.
- ¹² 344 U.S. 141 (1952).
- ¹³ See Kluger, *supra*, 565-71.
- ¹⁴ 345 U.S. 972 (1953).
- ¹⁵ *Topeka Daily Capital*, September 6, 1953, 1.
- ¹⁶ 349 U.S. 294, 301 (1955).

If . . .

JACK GREENBERG¹

When I received the invitation to deliver the lecture, upon which this article is based, for the Supreme Court Historical Society and to talk about *Brown v. Board of Education*,² I accepted quickly, reason clouded by the prospect of once more standing up to speak in the Court, particularly without having to endure tough questions from the Bench. But a sense of pleasure quickly turned to dismay when I began to wonder what in the world to say that had not already been said. A quick computer search turned up more than 1,000 articles that dealt with *Brown* and scores of books devoted in whole or part to the case.

Justifying a Counterfactual History

I decided to talk about what I think might have happened if we had lost the case, something I have thought about from time to time. Speculation about consequences is commonplace. Supreme Court opinions, often dissents, theorize about what will happen because the Court has come to a decision that the dissent opposes. In *Plessy v. Ferguson*,³ which enshrined the separate-but-equal doctrine in constitutional law in 1896, the point at which the *Brown* story may be said to have begun, Justice Harlan's dissent predicted the aftermath of the majority decision.⁴

What can more certainly arouse race hate, what more certainly create and perpetuate feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior

and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?⁵

In a comprehensive discussion of *stare decisis* in *Planned Parenthood v. Casey*,⁶ Jus-

tices Sandra Day O'Connor, Anthony Kennedy, and David Souter discussed whether precedent should be overruled as turning, in part, on an assessment of consequences. They wrote of "gaug[ing] the respective costs of reaffirming the overruling of a prior case."⁷

And, indeed, in deciding *Brown* itself, as the Justices conferred on whether to affirm or overrule *Plessy*, they considered potential after effects. Some of them spoke of the possibility of violent resistance and that public schools in the South might be closed.⁸ The brief for the United States as *amicus curiae* made a moral argument resting on prediction of consequences, that racial segregation "undermine[s] the foundations of a society dedicated to freedom, justice, and equality."⁹ It quoted Secretary of State Dean Acheson, who had referred to Soviet propaganda that disparaged the United States and the hostile attitude of otherwise friendly peoples toward the United States generated by our racial practices.¹⁰ In view of the foregoing, I hope that my fictional account is within the parameters of acceptable jurisprudential discussion.

My mythical account will describe the imaginary development of race relations and related constitutional law in the United States from 1953 to 1973, if *Brown* had been decided adversely to the plaintiffs. True *Brown* was decided in 1954 on the merits only after it had been argued twice; it was argued one more time on the procedure for implementation, decided in 1955. My scenario assumes a decision adverse to plaintiffs in 1953 following only one argument. I think that my imagined 1953 outcome and what follows is plausible and rooted in known events and patterns of conduct of institutions, governmental bodies, and people. In supporting my conjectures I will alternate between speculating about what might have happened and describing true historical events that lend that narrative plausibility. As my invented history advances further in time from 1953, the year of the make-believe *Brown* decision against plaintiffs, the events that I conjure up will become less credible be-

cause the interacting factors will have increased exponentially in number.

The Effort that Led to *Brown*

I start with the real life campaign of the NAACP and the NAACP Legal Defense Fund that culminated in the true *Brown* decision in 1954, because it has within it the seeds of both the true and fictional histories. It was the product of a remarkable planning paper by Nathan Margold, commissioned by Charles Houston, that was the foundation of a campaign commenced in the early thirties.¹¹ The Margold Report, as it was called, rejected a proposal to file lawsuits to equalize black and white schools in seven school districts—all the cases the organization could afford to fund—on the ground that too many cases would be required to achieve and maintain tangible equality in segregated systems and that, if those seven suits were won, continuous litigation would be needed to maintain equality even in those districts. It proposed, instead, a frontal attack on school segregation per se, that it called the "very essence of the existing evils," making the central argument that, historically, segregation always has been accompanied by inequality and, therefore, was unconstitutional under the doctrine of *Yick Wo v. Hopkins*.¹² In that case the Court held that where the San Francisco ordinance, that prohibited operating laundries in wooden buildings, had almost always been applied to require closing Chinese-owned laundries—which nearly always were in such buildings—it was just as unconstitutional as if the discrimination had been written into the law.

As it turned out, while following Margold's plan at first, Houston and Thurgood Marshall, who succeeded him in directing the campaign, veered off into a somewhat different direction. Litigation against all white state universities took precedence: there was no accredited state university in the South (except Howard University in Washington, D.C., which, while in the South, was not a *state* university; moreover, some parts of it were not yet accredited)



The author, Jack Greenberg, stands at center with part of the plaintiff's legal team in *Brown*: (left to right) John Scott, James M. Nabrit, Jr., Spottswood W. Robinson III, Frank D. Reeves, Greenberg, Thurgood Marshall, Louis L. Redding, U. Simpson Tate, and George E.C. Hayes. Robinson, Redding, and Nabrit joined Marshall and Greenberg in arguing the case before the Supreme Court.

where blacks could obtain the Ph.D., a law, or other professional degree except for Meharry, in Nashville, Tennessee, where blacks could earn the M.D. It was easier to establish inequality where the black half of the equation was zero. Moreover, a handful of mature university students presented less of a social threat to the segregationist white South than large numbers of black and white boys and girls attending integrated schools, and, therefore, courts might be less reluctant to order admission of blacks to higher education than to primary and secondary schools. And, opening professional schools would augment the almost nonexistent Southern professional leadership class. So, in 1936 the NAACP brought and won *Pearson v. Murray*¹³ in the Maryland state courts that ended segregation at the University of Maryland law school. In its minimalist response that presaged the response of universities across the South, Maryland opened its law school to blacks, but kept other parts of the university all white until forced to admit blacks by lawsuits

extending well into the fifties. In 1939, the Houston-Marshall team won a case against the University of Missouri law school in the Supreme Court of the United States,¹⁴ but the University did not desegregate any other division without further litigation; no other state followed the decision. In time it was necessary to bring suit—in cases that lasted into the early sixties—against every southern state system of higher education, other than Arkansas, where threat of suit sufficed, to force admitting black applicants.¹⁵

In 1950 the Supreme Court of the United States decided *Sweatt v. Painter*¹⁶ and *McLaurin v. Oklahoma*.¹⁷ Both decisions were based on reasoning with far reaching consequences; they factored intangibles in the educational process into the equality measuring formula, weighing the value of being educated in classes with members of the majority, more powerful, group of white students, developing relationships with them, the prestige of institution, and so forth. *Sweatt* and *McLaurin*

led decisively away from the rationale of *Yick Wo*, to the formulation argued in *Brown* and accepted by the Court, that the psychological and educational effects of schooling in a segregated setting amounted to inequality per se.

The Court's *imaginary* pro-segregation opinion in *Brown*,¹⁸ which I conjecture having been handed down in May 1953, and which I have cobbled together, from the briefs of the states, records of the Court's conferences, other Court materials, and scholarly articles, did not follow through on the implications of *Sweatt* and *McLaurin*, as the real *Brown* decision did. It distinguished them as having dealt with small numbers of students in higher education at institutions they had selected voluntarily. It rested first on *stare decisis*, citing the long-standing doctrine of separate but equal, embodied in *Plessy v. Ferguson*, which had been decided in 1896. It pointed out that in 1927, in *Gong Lum v. Rice*,¹⁹ the Court, on which sat three of the most highly respected Justices in our history, Oliver Wendell Holmes, Jr., Louis D. Brandeis, and Harlan Fiske Stone, unanimously had upheld the applicability of *Plessy* to elementary and high school education. It argued that for generations the states had organized their educational systems on the authority of *Plessy* and *Gong Lum*. Even if one were to look behind those opinions to the original meaning of the Equal Protection Clause of the Fourteenth Amendment, it was impossible to ignore that the Congress that adopted it had maintained segregated schools in the District of Columbia and that among the ratifying states were some that had segregated schools themselves.

Concerning plaintiffs' social science testimony and references, upon which they relied to demonstrate the harmful psychological and educational consequences of segregation, the fictional *Brown* Court addressed the testimony of Dr. Kenneth Clark, whom plaintiffs had called as a witness, which had been based on interviews he conducted in the course of social science studies and of children who attended school in some of the defendant districts. The Court wrote that the sample was too small, its

terminology unclear, and his conclusions were predetermined. The opinion remarked that in Clark's projective tests of school children, whether a child chose a white or black doll that he displayed to them, Clark concluded that segregation either made them pathologically conscious of race or forced them to evade reality. The fictional Court argued also that to base a decision on social science testimony risked the possibility of creating constitutional doctrine that could shift continuously according to evidence that happened to be presented.²⁰

The imaginary opinion addressed the argument made by the United States as *amicus curiae* that racial segregation harmed this country in its foreign relations, observing that, even assuming it were true, the conduct of foreign affairs was confided to the executive branch. The Court was precluded from basing a decision on the consequences it might have for foreign policy.



George W. McLaurin (foreground with his back to the camera), the first black person to attend graduate school at the University of Oklahoma, was forced to sit at a desk for blacks. His equal protection case, *McLaurin v. Oklahoma*, went before the Supreme Court in 1950 and generated one of two decisions that year holding that the psychological effects of schooling in a segregated setting amounted to inequality per se.

Psychologist Kenneth Clark, who served as a witness in *Brown*, conducted projective tests with school children. He concluded that segregation either made them pathologically conscious of race or forced them to evade reality.



The opinion concluded, in language that I have taken from Herbert Wechsler's article, "Towards Neutral Principles of Constitutional law": "[g]iven a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, ... there [is no]... basis in neutral principles for holding that the Constitution demands that the claims for association should prevail."²¹

Plaintiffs' Legal Strategy Changes

The fictional account continues. Following the make-believe *Brown* opinion, Roy Wilkins, secretary of the NAACP, announced that it "regretted ... that the Court has not abolished governmentally-imposed segregation, but ... [we pledge ourselves to] continue to press our fight for integration and equality until it is won." This is adopted from a draft press release that would have been issued if the case had been lost.²² Thurgood Marshall issued a similar statement. At the same time he convened a conference of his advisers to plan next steps.

Together they resolved that they had no

alternative but to file cases that sought as relief the equalization of schools within a segregated system. Although, from the time of *Plessy*, equalization litigation had failed to equalize schools, they would try again. While their ultimate goal remained integration, maybe the high cost of equalization would exert pressure toward consolidating black and white systems.

By 1952 Southern states were spending on black schools only 80% of their expenditure for white schools. Years before, the discrepancy had been greater. The current deficit rested on a base of even greater inequality that had developed over generations. Some black schools were no more than tar paper shacks. Outdoor plumbing was not uncommon. White school libraries had almost five books per child; black school libraries had fewer than two. Several classes commonly were combined in a single classroom. When South Carolina first faced the *Brown* litigation, it floated a bond issue of \$75,000,000 with a 3% sales tax to support it, from which it intended to equalize black schools.²³ As things turned out, following make-believe *Brown*, with the threat of desegregation no longer looming, anti-tax

sentiment outweighed the pressure to equalize, and the equalization movement wound down.

In September 1954, Marshall and company—fictionally—filed suits in the United States District Court in Macon, against the Georgia State Board of Education alleging that Macon and all other school districts within the state funded black schools at a level substantially below that of white schools. There followed a minuet common in civil rights litigation of that period. The state moved that the court abstain on the ground that the statutes in question had not yet been construed by a state court.²⁴ It prevailed on that motion and in the state court moved for dismissal on the ground that plaintiffs had not exhausted their administrative remedies.²⁵ The state court agreed and dismissed. Plaintiffs then pursued administrative complaints before the local and state boards, both of which denied relief. Finally, after endless motions and maneuvering, in which the state statutes were construed and plaintiffs exhausted administrative remedies, by 1957 there was a three-week trial in federal court. Plaintiffs demonstrated that statewide and within individual districts black schools were inferior to white schools.

Without tracing all the steps, plaintiffs lawyers ultimately, in 1960, won an imaginary decision in the Court of Appeals for the Fifth Circuit that the Macon schools for black children were manifestly inferior to those for whites. The district court then entered an order requiring local and statewide authorities to raise and spend the funds necessary to equalize black and white schools. This Court denied certiorari.

Legal Defense Fund lawyers faced two major hurdles: to turn the decision into real gains for black students in Macon and to replicate the decision across the South. I base my fictional account on what has happened during more than two decades of recent school equalization litigation in state courts. Those cases followed this Court's decision in *San Antonio School District v. Rodriguez*,²⁶ which

held that there is no right under the federal Equal Protection Clause to equal school funding, leaving to proponents of equal school funding the alternative of turning to state courts. There, on state constitutional grounds, they won as many as fifteen cases in which state courts—in the true history of that effort—held that their constitutions mandated equal funding for all schools.²⁷ But equalization rarely, if ever, occurred.²⁸

It is not much of a stretch to assume that, in my imaginary history, in southern states, where the equalization issue was bound up with issues of racial equality, an order to equalize schools would fare no better. In most places throughout the South blacks could not vote except with great difficulty and often not at all. There would have been little political will to spend the requisite amount of money for black schools. The imagined controversy bundled together enough racial prejudice with the familiar reluctance to increase taxes to ensure legislative inaction.

Just as Southern state universities failed to comply with the Supreme Court's decisions of 1939 and 1950 without suit, no school district, including those in the Fifth Circuit, complied with the Court of Appeals equalization decision without first being sued. Foot dragging; convoluted, baffling debates over measurement of money spent per student; capital versus current expenditure; inflation; depreciation; insurable versus appraised value and so forth; assertions of states' rights and federalist doctrine as they related to education; procedural wrangles, rather than express defiance, characterized the resistance. In the final analysis, legislatures had to appropriate and they did not.

In the real history, not until 1965 did the Department of Justice get authority to sue to enforce the Equal Protection Clause.²⁹ In my fictional history, the Department of Justice did not get the right to sue for school equalization until later than that because the impetus to act was weaker than in the true history, in which *Brown* was flouted openly. Therefore, all civil



The Freedom Rides, blacks and whites traveling on interstate buses and seated in seats reserved for a race other than theirs, started as a commemoration of *Brown*. If the *Brown* decision had gone the other way, the author argues, then *Gayle v. Browder*, which had been filed to enjoin the law that required segregation on intrastate buses, would have had to reaffirm *Plessy v. Ferguson* and allow the segregation to continue.

rights suits had to be filed by private lawyers. But Southern white lawyers, with rarest of exceptions, did not bring civil rights cases for fear of affecting their practices adversely. Black lawyers were few and far between, and in some states, such as Delaware, Alabama, and Louisiana, for decades there was only a single black lawyer in the state. Following *Brown*, Southern states launched fierce attacks on civil rights lawyers, which required them to spend a great deal of time defending themselves. Moreover, not many Southern black lawyers were familiar with sophisticated constitutional litigation. They also had to spend most of their time earning a living.

Nevertheless, the small band of Southern black lawyers working with the Legal Defense Fund filed several dozen cases across the South and won several dozen judgments that had to be enforced against reluctant districts.

The Effect on Black Protest

Black protest, a constant theme through-

out American history, has continuously interacted with legal and social developments. Two contradictory strains have characterized it: integrationist and separatist.³⁰

In real life, as well as fictionally, mainstream civil rights groups depended for progress not only on lawsuits and protests, but also on legislation. In real history they, in combination with other forms of protest, produced the powerful civil rights acts of the mid-sixties. In fictional history I will suppose that even a hobbled civil rights movement, bereft of the legal and moral force of the *Brown* decision, also would have brought about enactment of some civil rights laws. But they would not have been as effective as those enacted in 1964 and later in that decade.

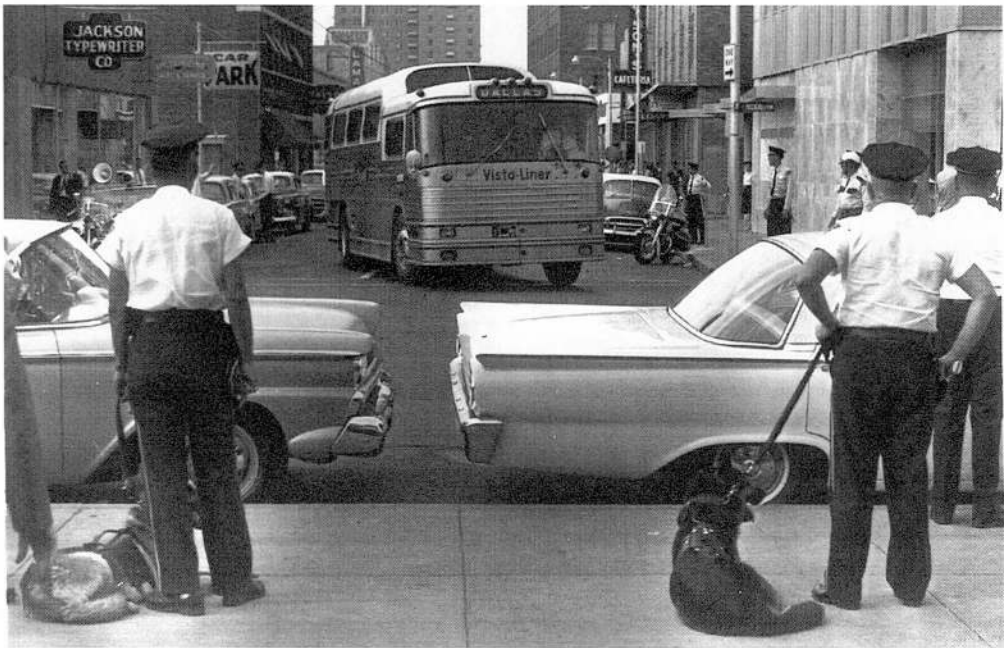
At this point, a counterfactual historian cannot confidently speculate about the nature and extent of protest and reactions following the imaginary *Brown* decision. But it seems likely that peaceful, nonviolent, integrationist protest would have been set back. Separatism,

punctuated by violence, would have gotten the upper hand. This was Martin Luther King's view,³¹ expressed in his Letter from the Birmingham Jail. He warned that if the nonviolent movement were to meet with failure "then millions of Negroes will, out of frustration and despair, seek solace and security in black-nationalists' ideologies—a development that would inevitably lead to a frightening racial nightmare."³²

The real *Brown* decision inspired much of the protest that followed it. The following is true:

Four days after *Brown* a civil rights leader in Montgomery threatened a boycott if humiliating seating policies aboard city buses were not improved.³³ Rosa Parks, whose refusal to be segregated aboard a Montgomery bus in December 1955, and subsequent arrest sparked the Montgomery bus boycott, has written that after *Brown*, "African Americans believed that at last there was a real chance to change the segregation laws."³⁴ She and her husband were members of the NAACP; she became its secretary in Montgomery³⁵ and as a matter of

course received its materials that referred often to *Brown*. Martin Luther King held prayer pilgrimages on May 17 each year, the anniversary of the true *Brown* decision.³⁶ Inspired in part by *Brown*, sit-in demonstrators began their protests in 1960 by refusing to move from lunch counter seats where they were denied service because of race.³⁷ The freedom rides started as a commemoration of *Brown*,³⁸ blacks and whites protested by traveling on interstate buses, seated in seats reserved for the race other than theirs, starting out in Nashville on May 4, 1961, with the aim of arriving in New Orleans on May 17. During the period that began with *Brown*, through the emergence of dissonant protest in the sixties, the NAACP was the largest civil rights organization, with membership that—while it had its ups and downs³⁹—was always in the hundreds of thousands and concentrated in the South. Its publications repeatedly addressed school segregation and other segregation disputes. Many of the earliest demonstrators were NAACP youth and college chapter members who either acted for the organization



A freedom riders bus was greeted in Jackson, Mississippi, by police and their dogs in 1961. There were no incidents of violence, but the "riders" were arrested and jailed. Freedom riders in Southern states were arrested and convicted by the hundreds but were exonerated on appeal. They would have remained in jail if *Brown* had been won by the states.

or, believing it was not sufficiently aggressive, acted on their own. Clearly, this group was suffused with the *Brown* story.

In this real history, following Rosa Park's arrest, black citizens of Montgomery, led by Martin Luther King, boycotted city buses. The city retaliated by criminal prosecutions and a suit to enjoin the protesters. The boycott and the cases that sought to prohibit it were resolved in favor of the boycotters when the Supreme Court, in November 1956, affirmed a three judge federal court decision in *Gayle v. Browder*,⁴⁰ which merely cited *Brown v. Board of Education*, and other cases.

But, in my fictional history, *Brown* was a case that as recently as 1953 had reaffirmed *Plessy v. Ferguson*. So, fictionally, the District Court's 1955 decision would have had to uphold segregation, citing *Plessy* and *Brown*, which, of course, had been a reaffirmation of *Plessy*. The Supreme Court, fictionally, if it were to follow precedent, would have had no alternative to affirming the District Court's decision. *Gayle v. Browder*, which had been filed to enjoin the law that required the segregation that was the subject of the boycott and which, of course, was about intrastate bus travel, could do no less than reaffirm *Plessy*, as close to being on all fours with it as a case could be. It would have defied conventional legal reasoning to have held in 1953 that *Plessy*, which had (fictionally, in imaginary *Brown*) required affirming school segregation, would not control another intrastate travel case, closer to it on the facts than even *Brown*.

The city then was free to proceed with its suit against the boycott. It successfully prosecuted Martin Luther King, who was found guilty and fined. The boycott ended in a compromise that at early stages of the protest had been under discussion between the protesters and the city: blacks would be seated from the back of the bus forward and whites from the front toward the back. In the imagined history, Martin Luther King was the leader of a group that won a questionable victory marred by acceptance of segregation.

It was not until 1960 in the true history that the spirit of the Montgomery bus boycott spread across the South. The new movement might be classified into three components: sit-ins, which were a spontaneous student movement; freedom rides initiated by CORE; marches and demonstrations, the best known of which were led by Martin Luther King.⁴¹ The nearly uniform segregationist response was to arrest and prosecute the protesters. This Court invalidated almost all sit-in convictions, either as having been based on no evidence, citing *Thompson v. Louisville*,⁴² or as having been based on statutes that did not give fair warning⁴³ or as constituting enforcement of segregation laws in violation of *Brown*.⁴⁴ But, in a fictional world in which *Plessy* retained vitality, prosecutions for violation of segregation laws would have been upheld. In an effort to preserve segregation, states and cities that would have lost their sit-in cases on no-evidence or no fair-warning grounds began to prosecute only for violation of segregation laws. Where segregation in public accommodations had been maintained by custom and enforced by trespass and breach of the peace laws, states and local governments enacted public accommodations laws that required segregation. Lest this reaction seem implausible today, we must remember that Lester Maddox, a restaurant owner who forcibly barred black people from his Pickrick restaurant in Atlanta and threatened them with pick axe handles, was elected governor of Georgia from 1967 to 1971 (thirteen to seventeen years after the true *Brown* decision) on the strength of his resistance to the Civil Rights Acts.

Freedom rides, following which demonstrators had been convicted by the hundreds but were exonerated in the real world by this Court on appeal,⁴⁵ met a mixed fate in the imagined world.

Protest marches and demonstrations were treated differently. Protected by the First Amendment, most were sheltered against prohibition by the state. But, in my imagined world of *Brown* having been lost, the protest move-

ment was diminished by the courtroom defeats of many sit-in demonstrators and freedom riders.

In real life, Black Panthers, Black Muslims led by Malcolm X, SNCC and other separatist, threatening groups had begun to emerge following the actual *Brown* decision.⁴⁶ Their activity and numbers were much greater following the pretended lost *Brown*. Peaceful protest offered less promise, violent challenges were more attractive. The true history was that in the late 1950s, in Monroe, North Carolina, Robert Williams formed a black rifle club and self-defense force.⁴⁷ Blacks in Louisiana formed the Deacons for Defense and Justice, an armed group that protected civil rights workers.⁴⁸ In 1964-1965 major riots erupted in several cities. The Watts riot broke out in 1965. In 1966 there were twenty-one major riots in a dozen cities.⁴⁹ By 1967, the Kerner Commission concluded, over the past several years there had been seventy major riots,⁵⁰ generally precipitated by police arrest of a black suspect followed by allegations of brutality. A cross section of the working-class community participated in these events: half to three-quarters of those arrested were skilled and semi-skilled workers.⁵¹

Still recounting the events of real life, the black power movement began its rise. Stokely Carmichael recruited blacks in Alabama. Under Carmichael, SNCC broke away from Martin Luther King and forced the resignation of now Congressman John Lewis, who was an advocate of nonviolence and integration, SNCC expelled whites, called for the overthrow of capitalism, and advocated guerrilla warfare. The Lowndes County Freedom Organization was established as a political party and adopted the symbol of the black panther. Armed Panthers disrupted a session of the California legislature in 1967 and recruited a thousand members in twelve new chapters.⁵²

Still recounting true history: Around the same time Malcolm X began to advocate violent resistance and black separatism in northern inner-cities.⁵³ These tumultuous events oc-

curred in an environment of social disorganization manifested in campus riots and antiwar demonstrations.

In real life the revolutionary, violent separatists protest began to fade around the end of the decade. Robert Williams fled to Cuba and then to China.⁵⁴ By 1971 SNCC had all but disappeared. The Panther party collapsed and separatist violence faded, in part because of vigorous police and FBI attacks, in part because peaceful integrationists and mainstream civil rights organizations had produced some progress.⁵⁵ But, in my imaginary scenario, in which equality under law remained an apparently unattainable dream, the separatist, violent manifestation of black discontent persisted.

On the Legislative Front

More difficult than divining what might have happened in the courts if *Brown* had been decided adversely to plaintiffs is conjuring up a counterfactual description of the political forces that led to the Civil Rights Act of 1964. The NAACP was primarily a political organization and, particularly in view of the discouraging returns from the courts in my fictional account, it looked to Congress to accomplish its aims. In the real world, however, it had never been able to win even passage of an antilynching bill. The Congress was dominated by Southern Democrats elected by virtually all white constituencies. These Congressmen and Senators, 100 of whom, in response to the real *Brown* decision, signed the Southern Manifesto, denouncing this Court, were able to block civil rights proposals by means of committee membership and numbers sufficient to mount successful filibusters.⁵⁶

The first effective civil rights legislation following that enacted at the end of the Civil War, in fact, was first enacted in 1964 followed by the Voting Rights Act of 1965. Passage of these laws was hardly a foregone conclusion. In the true history of the times the 1964 bill was introduced by President Kennedy in 1963, partly, in reaction to the protests led by Martin



If Martin Luther King (left) had failed in his Montgomery, Alabama, bus boycott, as he had in other cities, the author argues that it might have had a debilitating effect on his leadership. Malcolm X (right) and the separatist movement may have benefitted politically from King's inability to achieve his immediate goals.

Luther King in Birmingham. Local authorities had reacted by attacking the protestors with fire hoses and police dogs, creating images that provoked outrage throughout the world. Martin Luther King channeled public sentiment into support for civil rights legislation by leading the famous March on Washington, which culminated in his great "I Have a Dream" speech. President Kennedy went on national television, calling on the nation to take a clear moral stand against segregation and discrimination and introduced into Congress what later became the Civil Rights Act of 1964. But, as introduced, the administration bill did not, for example, contain Title VII, the Equal Employment Opportunities Act,⁵⁷ because the administration believed the proposal had no chance of enactment. Kennedy feared that the legislation risked failure of passage at the hands of a Southern filibuster. The bill was going nowhere until November, when President Kennedy was assassinated. The Act received its final impetus that led to passage from the nation's emotional reaction to the assassination.

Fictionally, King's mastery of public protest had been impaired by his ineffectual leadership in the Montgomery bus boycott. It should be remembered that he was not always successful. In Albany, Georgia; Selma, Alabama; St. Augustine, Florida; and later in Chicago, among other places, King failed in the sense of not having achieved his immediate goals, although he added to the total fund of discontent with the regime of segregation.⁵⁸ Further lack of success debilitated his leadership in the fictional history.

The International Dimension

International relations and black protest intersected. As the civil rights movement was weakened by the defeat in fictional *Brown*, a barrage of criticism from around the world over the status of its black citizens hit the United States. In the true history the NAACP filed a petition in the UN that addressed how the United States treated black people.⁵⁹ In that history Malcolm X also denounced what he called

exploitation of colonized populations in Africa, Asia, and Latin America and developed contacts with the Organization of African Unity.⁶⁰ In fact, also, some protestors, who were separatists advocating or engaging in violence, sought to identify themselves with communist regimes. Bobby Seale sold copies of quotations from Chairman Mao and used the funds to buy firearms.⁶¹

Panther classes actually used Mao's writings that taught how to structure chains of command and to use weapons. After Robert Williams fled to Cuba and China he broadcast Radio Free Dixie from both countries. Panthers and SNCC leaders regularly denounced capitalism. In true history the Soviets subsidized the American Communist Party. It is, therefore, reasonable to imagine that in the made-up history, the Soviet Union capitalized on the affinity of separatist, violent protestors, for communism and anticapitalism. They pursued that course by funneling money to the Panthers and, just as they had armed insurrectionists opposed to the United States around the globe, they sent weapons as well. Their fictional funding of Panthers built on their experience in actually funding, training, and arming the African National Congress in its struggle to overthrow apartheid in South Africa. This, in the imagined world, made the Panthers a far more formidable threat than they were in actual history and, fictionally, Panthers frightened whites across the United States by claiming responsibility for bombing public buildings. Their militancy further weakened the NAACP and SCLC, which had produced little to attract the black population at large. It stoked the flames of racial prejudice among threatened whites.

As a means of persuading third world countries to spurn Soviet overtures to enlist them against the United States, one component of U. S. foreign policy since the end of the Second World War had been to urge its allies to liberate their colonies. But, following counterfactual *Brown*, denouncing United States's racial practices became a central fea-

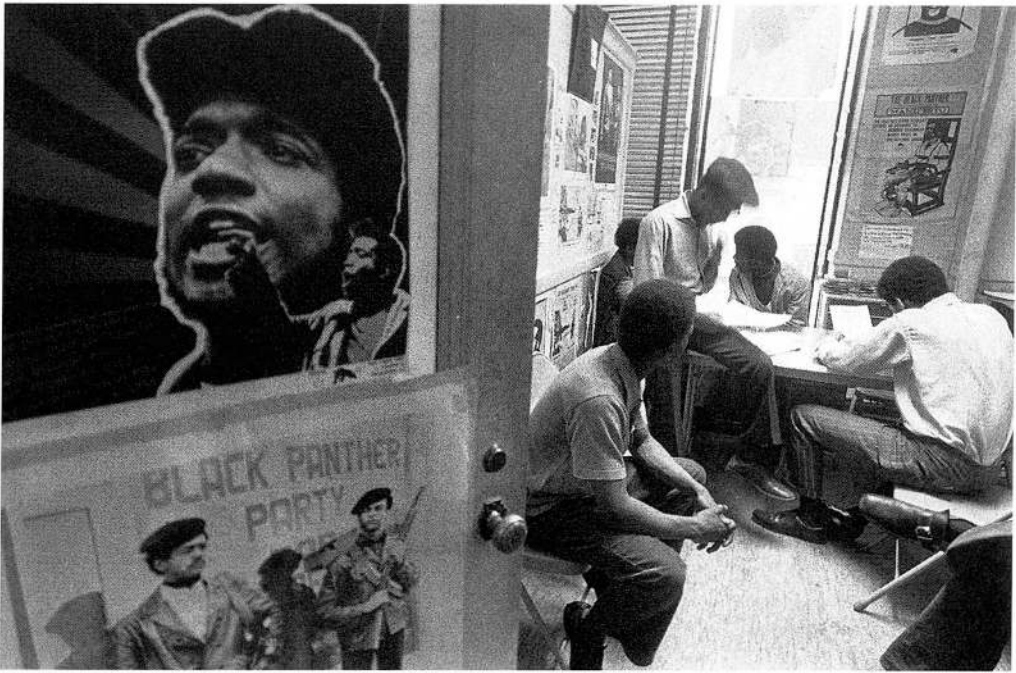
ture of opposition to American foreign policies among third world nations and European countries with strong communist movements. The black citizens of Rhodesia, Kenya, Ghana, Senegal, Cote D'Ivoire, Mozambique, and other colonies were agitating, even revolting to be freed from England, France, Belgium, and Portugal. As we used public and private pressure to move these nations to free their colonies their governments and media retorted that our black citizens were in a virtual state of colonialism themselves.

With Greece's anticommunist government and, therefore, its allegiance to the West hanging by a thread, Greek newspaper editorials castigated the United States for racial discrimination and segregation. The Soviet Union maintained a drumbeat of propaganda directed at race relations in the United States, and secured a General Assembly condemnation of this country's racial practices.⁶² When the United States denounced the crimes of Stalin, Khrushchev, and the Soviet regime, the stock retort referred to our race relations. That line played well in Asia, Africa, and Latin America where people identified with Americans with darker skin color.

When Gamel Abdul Nasser nationalized the Suez Canal in 1956, Great Britain, France and the United States opposed him. Third world countries rallied to his support and prominent among their denunciations of the United States was that our Supreme Court had upheld segregation in the fictional 1953 *Brown* case. The United States had to worry about the anti-American rhetoric of The Red Brigades in Italy, the Baader-Meinhof Gang in Germany, as well as Leftist parties in Chile, Nicaragua, El Salvador, Argentina, Bolivia, and Honduras. Our racial segregation was grist for anti-American mills.

1973: Black Plaintiffs Sue for Desegregation Again

I move forward twenty years from the faux *Brown* decision to 1973. It is virtually impossible to describe race relations and constitu-



The author imagines that the Soviet Union might have capitalized on the affinity of separatist, violent protestors, for communism and anticapitalism. The USSR might have funneled money and weapons to the Black Panther Party (pictured), making it a far more formidable threat than it actually was. The civil rights movement could have shifted from one that peacefully sought legislative and social change into the hands of militants with ties to adversaries to the United States.

tional law two decades after an imaginary decision reaffirming *Plessy*. Because my 1953 counterfactual history first guessed about law and society only a few years after a known world, my description of imaginary black protest, international relations and the constitutional implications of fictional *Brown*, while not inevitable, is plausible. But, guesses about two decades later would have to be imagined happenings constructed on an imagined scene. I won't venture guesses about whether Thurgood Marshall was on the Court in 1973 or remained at the Legal Defense Fund to pursue the war on segregation. I won't guess about the black vote and whether it could have made a difference in Congress by that time. The Viet Nam war, recessions and/or prosperity, might have mattered in my imagined world but so many variables might have affected it that I won't begin down that path.

I can, however, offer only one scenario with some confidence, although as with other imag-

ined events, some uncertainty: in a case I will call *Black v. Board of Education*, NAACP Legal Defense Fund lawyers returned to the original Margold plan. They commissioned studies comparing black and white schools in all states that had laws requiring school segregation. The black schools invariably were tangibly inferior to white schools. Court orders in nearly fifty cases decided between 1953 and 1973 had not achieved equality. Compelled improvements were ephemeral. Some schools were equalized, but in a few years the black schools became once more inferior.

Plaintiffs appealed five consolidated cases from five states to the Supreme Court of the United States. They argued that a segregated school system was unconstitutional under the doctrine of *Yick Wo v. Hopkins*.⁶³ This time the Court found the case for desegregation compelling. While the imagined *Brown* decision had upheld segregation in 1953 on the authority of *Plessy*, the Court was not obliged to follow it

on a record that demonstrated violation of standards demanded by *Yick Wo*. The Justice held they could not be blind as judges to what they knew as men and women.⁶⁴ They knew what else was going on in the world around them. The black community had become even more alienated from the white population than two decades earlier. Separate, unequal education had consequences outside the classroom. Black children were not being educated to function in the modern world. The nation suffered from a diminished work force. The civil rights movement had shifted from one that peacefully sought legislative and social change into the hands of militants with ties to adversaries of the United States. The country was being debilitated by a chronic low level fever of racial conflict. These factors did not fit neatly into conventional categories of constitutional interpretation, but they contributed to a sense of comfort with the decision that rested on *Yick Wo*.

In response to the decision in *Black v. Board*, the political environment became hos-

tile as it did following the true *Brown* decision in 1954. One hundred Southern Congressmen and Senators signed a Southern Manifesto that denounced this Court for overstepping its bounds. As they did following *Brown*, every Southern state adopted resolutions of interposition and nullification. And, as following *Brown*, they set up State Sovereignty Commissions to combat desegregation and filed proceedings of various sorts against the NAACP and the Legal Defense Fund and lawyers involved in school segregation cases. While civil rights lawyers and organizations ultimately defeated these criminal prosecutions, injunctive actions, disbarment proceedings, legislative investigations, and other attacks, they consumed their energies in defending themselves rather than fighting for desegregation. Legal scholars spun out articles arguing that the Court misunderstood and misapplied *Yick Wo*. And so forth.

I won't guess about whether there was a second decision on implementation as there was with the 1954 *Brown* case. I will offer the



Had *Brown* upheld segregation and Congress not have passed a legislative remedy, black schoolchildren such as these could have become even more alienated from the white world and been unable to function in the modern work world.

guess, however, that whatever the implementation formula, desegregation proceeded slowly. The segregating districts would not desegregate without suit. There were not enough black lawyers in the South to sue all the offending districts. Plaintiffs were intimidated from suing by fear of reprisal. They had few lawyers and those whom they might have enlisted were busy defending themselves. The federal government did not immediately obtain authority to sue, and when it did, used it only occasionally.

But, in time the country accepted the decision. In time, but certainly not immediately, no politician, including those who had opposed desegregation, dared argue it was wrong. Some scholars said the reasoning was wrong but the result right. Others said both were right. The country then began the long upward climb toward racial equality that began following the Civil War but had been interrupted too many times.⁶⁵

Consequentialism in Constitutional Interpretation

Aesop ended his stories with a reflection and a moral. Apart from being a story that might amuse some listeners is there any moral to be learned from this fable? If we accept that the price of ruling against plaintiffs might have been the fictional country described above, would that have been adequate reason to decide for plaintiffs? Is consequentialism a respectable mode of constitutional interpretation? We start with the fact that, as demonstrated at the beginning of this talk, some opinions, in arguing for the conclusions to which they came, have adverted to the consequences of decisions. A conventional mode of argument, engaged in by counsel, as well as judges, presents a parade of horrors that might ensue for one outcome or another. But, pure consequentialism, while important in legislative decision making, is the antithesis of what should motivate courts, which are supposed to take the law as they find it and apply it to cir-

cumstances before them. Courts, we believe, find the law in text, precedent, legislative history, evidence in the record, and so forth. They would be taking on legislative functions, it is said, if they were “result oriented.” But, particularly when conventional legal materials can be mustered on either side of an issue, when pros and cons are in balance, why not turn to consequences? This is what apparently happened in *Brown* when standard criteria for deciding cases more or less balanced each other out. Consequentialism in *Brown* was not a solitary consideration.

Conventional theories of interpretation could have led to conflicting conclusions. Without trying to be exhaustive, there is a handful of such theories.⁶⁶ They include (a) deciding solely on the basis of plain meaning of the text as found in (i) the original understanding of framers and ratifiers, or (ii) as understood in present-day parlance; (b) constitutional intent as derived from legislative history; (c) arguments based on constitutional theory of (i) the provision under consideration or (ii) the constitution as a whole; (d) arguments from precedent; (e) arguments from moral or policy considerations and, most important, a combination of all of these. While these approaches alone or together need not have added up to a result in which *any* outcome would have been legitimate, *Brown* was a case where consequentialism could have decisively tipped the balance in favor of plaintiffs.

Consider conventional constitutional interpretation. Plain language leads to no certain conclusion. “Equal protection of the laws” considered as text only, apart from historical or contemporary context, is susceptible of meanings that are compatible, on the one hand, with enforced separation in schools and, on the other, with holding that school segregation is impermissible. “Equal protection” considered in terms of “original understanding” also may be interpreted both ways. Many in the Congress that adopted the Amendment, and in the ratifying states, thought that the equal protection clause would forbid school segregation. But the

Congress that adopted the Fourteenth Amendment maintained separate schools in the District of Columbia and succeeding Congresses continued to fund those schools until 1954 when *Bolling v. Sharpe*, *Brown's* companion case from the District, that was decided along with *Brown*, held segregation in the District unconstitutional. Some ratifying states segregated schools at the time of ratification, too.

The framers intent may be understood two ways, depending on the level of generality an interpreter might choose. It was arguable that while the framers did not intend to abolish school segregation in 1868, they did intend to prohibit any discrimination in important aspects of life. In essence, that is what the 1954 decision decided: school segregation may have been constitutional in 1868 but not in 1954 because schools did not have the importance in 1868 they had achieved by 1954.

Arguments based on precedent would face contradictory cases: *Plessy* mandated segregation on railroads; *Gong Lum* upheld classifying a Chinese child with blacks in a segregated schools system. Those precedents strongly suggest that school segregation was constitutional. On the other hand, *Sweatt* and *McLaurin* prohibited segregation in graduate and professional schools on the basis of a theory that included intangible factors in the educational equality measuring equation. To follow those precedents would strongly suggest that elementary and high school segregation was unconstitutional as well. But, those cases—the ones upholding segregation and others that condemned it as unconstitutional—were distinguishable from the situation facing the Court in *Brown*. *Plessy* was a travel case. It didn't address education, although it cited school cases in support of its conclusion. *Gong Lum* merely held that the state could classify a Chinese student—who didn't object to segregating blacks and whites—with blacks; she wanted to go to school with whites and so it could be said that the decision didn't pass upon the constitutionality of segregation. On the other hand, if the state had power to make that classification it

implicitly could separate blacks from whites. *Sweatt* and *McLaurin* might be distinguished on the ground that they dealt with higher education, which is in many ways different from elementary and high schools.

Arguments based on constitutional theory also faced ambiguity. On the one hand, education is singularly a concern of local and state government. Consideration of federalism counsel that the national government and the Supreme Court leave it to them. On the other hand, the Fourteenth Amendment was adopted precisely to override state and local decisions that disadvantage persons because of their race.

The moral and value approach would sum up arguments to the effect that separating persons on the basis of race is morally unacceptable. Virtually everybody agrees that to segregate black citizens stigmatizes and disadvantages them. But, on the other hand, while few persons embrace the position, to prohibit segregation would—to pursue Herbert Wechsler's "Neutral Principles" argument—in effect be committing a morally opprobrious act by forcing unwelcome association on those who were opposed to it.

Would not a Court be conflicted in facing all these pros and cons of conventional interpretation? Might it not have contemplated, in weighing the mix of arguments, that even though they were somewhat in balance, the issue should be resolved by deciding against the constitutionality of segregation, because failing to do so would consign the nation to incalculable harm at home and abroad, while deciding to prohibit racial segregation would open the door to the possibility of creating a safer, healthier nation?

It's easy with hindsight. But with that hindsight I have concluded that true *Brown* was rightly decided and legitimately so within conventional canons of interpretation. And, in my faux *Brown* history, that case was wrongly decided, which is why in 1973 the Court adopted another legal theory and came to the opposite conclusion in the imaginary decision in *Black v. Board of Education*.

ENDNOTES

¹ I am grateful to Javier Shiffrin, Columbia Law School '00 and Erez Libermann, Columbia Law School '99 for assistance in preparing this article which I delivered at the Supreme Court on November 4, 1998, and to Barbara Black, Stanley Corngold, Michael Dorf, Marvin Frankel, Deborah Greenberg, Louis Henkin, Henry Monaghan and John Manning for their helpful observations.

² *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

³ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁴ I sketched a brief speculation about what might have occurred in Jack Greenberg, *Crusaders in the Courts*, 12-13 (1994).

⁵ *Plessy v. Ferguson*, 163 U.S. 537 (1896) at 560. Harlan wrote also: "[T]he judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case. [It] will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution...." *Id.* at 559-560.

⁶ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

⁷ 505 U.S. at 854, adverting to "the consequences of overruling...." *Id.*; "the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case...." *Id.* at 856; "the Court lost something by its misperception, or its lack of prescience [in *West Coast Hotel v. Parrish*]" *Id.* at 862. "Each case [*Brown v. Board of Education* and *West Coast Hotel v. Parrish*] was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive." *Id.* at 863.

It may be impossible to discuss Justice Scalia's dissent in *Morrison v. Olsen*, 487 U.S. 654 (1988), without appearing to be commenting on contemporary political events (i.e., the Clinton impeachment proceedings), but it would be overlooking a singular episode of judicial clairvoyance not to mention that Justice Scalia predicted with considerable foresight events that have occurred in our present-day Independent Counsel's investigation of the President. Justice Scalia envisioned selecting "a prosecutor antagonistic to the administration..." *Id.* at 730, and "... should the independent counsel or his or her staff come up with something beyond [the investigation's original] scope, nothing prevents him or her from asking the judges to expand his or her authority or, if

that does not work, referring it to the Attorney General, whereupon the whole process would recommence...."

⁸ On the Court's conferences and thinking of individual Justices, see Mark V. Tushnet, *Making Civil Rights Law* (New York: Oxford U. Press, 1994): e.g., 1991 (possible abolition of public education); 192 (violence); 229 (resistance; the end of Southern liberalism).

⁹ See Mary L. Dudziak, "Desegregation as a Cold War Imperative," 41 *Stan. L. Rev.* 61, 110 (1988).

¹⁰ Summarized in Jack Greenberg, *Crusaders in the Courts*, 164-165 (1994). The oral arguments also spoke of possible violence. *Id.* at 171.

¹¹ **The Margold Report**, Nathan Margold, **Preliminary Report to the Joint Committee Supervising the Expenditure of the 1930 Appropriation by the American Fund For Public Service to NAACP**, excerpts in Greenberg, *supra* note 4, at 55-59.

¹² *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

¹³ *Pearson v. Murray*, 169 Md. 478 (1936).

¹⁴ *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938).

¹⁵ See Greenberg, *supra* note 4, at 89, 90. Suits were brought in Maryland, see e.g., *McCready v. Byrd*, 195 Md. 131 (1950); Louisiana, see e.g., *Constantine v. Southwestern Louisiana Institute*, 120 F. Supp. 417 (W.D. La. 1954); North Carolina, see e.g., *Epps v. Carmichael*, 93 F. Supp. 327 (M.D. N.C. 1950); Georgia, see e.g., *Holmes v. Danner*, 191 F. Supp. 385 (M.D. Ga. 1960); and Virginia, see e.g., *Swanson v. University of Virginia*, Civil Action No. 30 (W.D. Va. September, 1950). *Id.*

¹⁶ *Sweatt v. Painter*, 339 U.S. 629 (1950).

¹⁷ *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

¹⁸ Chief Justice Vinson wrote the (imaginary) opinion. Justice Reed concurred, pointing out the antiquity of the *Plessy* doctrine and that educational systems had been organized according to its rule for almost three generations. He believed that uprooting *Plessy* would be highly disruptive. Justice Jackson voted with the majority, but wrote a concurrence that called attention to section five of the Fourteenth Amendment and observed that the plaintiffs were seeking a remedy that would require a drastic departure from precedent and from existing social practice. This was a change so profound that it should best come from Congress.

¹⁹ *Gong Lum v. Rice*, 275 U.S. 78 (1927).

²⁰ This argument is taken from Edmond Cahn, "Jurisprudence," 30 *NYU L. Rev.* 150, 150-69 (1955).

²¹ See Herbert Wechsler, "Towards Neutral Principles in Constitutional Law," 73 *Harv. L. Rev.* 1, 31-35 (1959).

²² See, Tushnet, *op cit* at 216, quoting a draft press release that would have been issued if the case had been lost.

²³ *Southern School News*, Vol. 1, No. 1, p. 12.

²⁴In *Gebhart v. Belton*, the Delaware portion of *Brown*, plaintiffs first filed in federal court, but defendants objected that the school segregation statute had not been construed by the state courts. Plaintiffs withdrew the complaint and refiled in state court, which decided the case. See **Crusaders in the Courts**, note 4 *supra*, at 135-136.

²⁵For a similar argument made by defendants in school equalization litigation, see *Jenkins v. Missouri*, 593 F. Supp. 1485, 1488 (1984). For more on administrative remedies in early civil rights litigation, see Jack Greenberg, **Race Relations and American Law**, 63-66 (New York: Columbia U. Press, (1959).

²⁶*San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

²⁷See *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 398 n.6 (Tex. 1989); see also, e.g., *Pauley v. Bailey*, 255 S.E. 2d 859 (W.Va. 1979); *Washakie v. Herschler*, 606 P.2d 310 (Wyo. 1980); *Horton v. Meskill*, 376 A.2d 359 (Ct. 1977). Since *Kirby*, further success has also been achieved in state courts. See e.g., *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998); *Pinto v. Alabama Coalition for Equity*, 662 So.2d 894 (Ala. 1995); *DeRolph v. Ohio*, 677 N.E.2d 733 (Ohio 1997); *McDuffy v. Secretary of the Executive Office of Ed.*, 615 N.E.2d 516 (Mass. 1993); *Rose v. Council for Better Ed.*, 790 S.W.2d 186 (Ky. 1989); *Brigham v. Vermont*, 692 A.2d 384 (1997).

²⁸*Abbott v. Burke*, 710 A.2d 450, 454 (N.J. 1998) (Calling the equal funding efforts in New Jersey a "generational struggle" beginning in 1970). For a brief history of the *Abbott v. Burke* litigation see Timothy D. Lynch, "Education as a Fundamental Right: Challenging the Supreme Court's Jurisprudence," 26 *Hofstra L. Rev.* 953, 980-84 (1998). See also Maria Newman, "State Will Increase Aid to Most, But Not All, Schools," *N.Y. Times*, Jan. 27, 1999, at B5.

²⁹Civil Rights Act of 1964, tit. IV, §2000c-6(a) (1994). Geoffrey Stone *et al.*, eds., **Constitutional Law** 537 (Boston: Little, Brown, 1996) ("Title VI authorized the Attorney General to institute desegregation suits in the name of the United States, thereby ending the need to rely on individual law suits by private plaintiffs.")

³⁰Separatist or black nationalist protest in the twenties was headed by Marcus Garvey's movement to return to Africa; in the sixties by the Student Non-Violent Coordinating Committee, which, in its final manifestation, was led by Stokely Carmichael, Black Panthers and its leaders like Bobby Searle and Eldridge Cleaver, and Black Muslims led by Elijah Mohammed, Malcolm X (who later, apparently, moved away from separation) and Louis Farrakhan. Both integrationist and separatist movements have been conducted with a range of activism, from peaceable and nonviolent to threatening and violent. But, generally, those advocating integration have been nonviolent, although occasion-

ally their activism has veered out of control. Most of the riotous protests has been the work of separatists, although a great deal of black separatist sentiment, while strident and threatening, has not been physically destructive. There also has been nihilistic rioting not readily classifiable as integrationists or separatists, usually a spontaneous reaction to an actual or perceived act of racial abuse. For accounts of the integrationist movements, see, e.g., August Meier and Elliott Rudwick, **C.O.R.E.: A Study of the Civil Rights Movement, 1942-1968** (New York: Oxford UP, 1972); Jerome Skolnick, **The Politics of Protest** (Washington, D.C., GPO, 1969); Robert Weisbrot, **Freedom Bound: A History of America's Civil Rights Movement** (New York: W.W. Norton, 1990). For accounts of the separatist movements, see e.g., Benjamin Muse, **The American Negro Revolution: From Nonviolence to Black Power, 1963-1967** (Bloomington, Indiana UP, 1968); Herbert H. Haines, **Black Radicals and the Civil Rights Mainstream, 1954-1970** (Knoxville: University of Tennessee Press, 1988); Peter B. Levy, ed. **Documentary History of the Modern Civil Rights Movement** (New York: Greenwood Press, 1992), p. 192. For biographies of Whitney Young (Urban League) and Roy Wilkins (NAACP), see Dennis C. Dickerson, **Militant Mediator: Whitney M. Young, Jr.**, (Lexington: UP of Kansas, 1998), Nancy J. Weiss, **Whitney M. Young, Jr. and The Struggle for Civil Rights** (Princeton: Princeton UP, 1989), and Roy Wilkins, **Standing Fast: The Autobiography of Roy Wilkins** (New York: Viking Press: 1982).

³¹For more on Martin Luther King, Jr., see David Garrow, **Bearing the Cross** (New York: William Morrow, 1986) and **Taylor Branch, Parting the Waters** (New York: Simon and Schuster, 1988).

³²Martin Luther King, "The Negro is Your Brother" [Letter from Birmingham Jail] as published in 212 *Atlantic Monthly* 78,86 (August, 1963).

³³David J. Garrow, "Hopelessly Hollow History: Revisionist Devaluing of *Brown v. Board of Education*," 80 *Va. L. Rev.* 151, 155 (1994).

³⁴Rosa Parks, **Rosa Parks: My Story**, 100 (New York: Dial Books, 1992).

³⁵*Id.* at Chapters 4 and 6.

³⁶See Branch, *supra* note 31, at 427.

³⁷See Greenberg, *supra* note 4, at 271 n.271 at 563. (Franklin McCain conversation with author July 13, 1993).

³⁸See Branch, *supra* note 31, at 427; James Farmer, **Lay Bare the Heart**, ch. 17 (New York: Arbor House, 1985). For a discussion of the freedom rides, see, generally, August Meier and Elliott Rudwick, **C.O.R.E.: A Study in the Civil Rights Movement, 1942-1968** (New York: Oxford UP, 1973).

³⁹See Greenberg, *supra* note 4, at 14-16. The NAACP was founded in 1909 in reaction to a lynching in Spring-

field, Illinois, *Id.* In 1940 the membership had reached 50,000 members and continued to grow; by 1947 the membership was 369,000. However, due to increased membership fees and other factors, membership fell to 149,000 in 1950. Today, membership exceeds 500,000. "What You Should Know About the NAACP" <http://www.naacp.org/about/factsheet.html> (checked Jan. 31, 1999).

⁴⁰*Gayle v. Browder*, 352 U.S. 903 (1956).

⁴¹See generally, August Meier and Elliott Rudwick, **C.O.R.E.: A Study in the Civil Rights Movement, 1942-1968** (Oxford: Oxford UP, 1973).

⁴²*Thompson v. Louisville*, 362 U.S. 199 (1960).

⁴³*Bouie v. City of Columbia*, 378 U.S. 347, (1964).

⁴⁴*Bell v. Maryland*, 378 U.S. 226 (1964).

⁴⁵In the real world, state imposed segregation aboard interstate carriers had years earlier been held unconstitutional in 1946 under the Interstate Commerce Clause and in 1950 as a violation of the Interstate Commerce Act. See Catherine A. Barnes, **Journey from Jim Crow: The Desegregation of Southern Transit** (New York: Columbia UP, 1983). Those rulings were flouted routinely, sometimes by being simply ignored, other times by convoluted efforts to distinguish the cases. But in an imaginary post-*Brown* world in which plaintiffs had lost, prosecutions of protesters for violation of segregation laws in bus (as well as train and airport) terminals could sometimes be upheld as a valid exercise of state power to require racial segregation, that would not have been impaired by interstate commerce constitutional requirements. While the Commerce Clause and Interstate Commerce Act might, in these circumstances, be inapplicable to terminals if defendants were intrastate passengers, as *Plessy* was or, if interstate travelers, on the esoterica of whether a terminal was owned by the state, a bus terminal was owned by a carrier (*cf.* Interstate Commerce Act, Ch. 104, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.)), or not, and so forth, the distinctions became so esoteric that ordinary passengers segregated themselves or law enforcement officials felt that they had the power to require segregation. See *Boynton v. Virginia*, 364 U.S. 454 (1960).

⁴⁶See Benjamin Muse, **The American Negro Revolution: From Nonviolence to Black Power 1963-1967** (Bloomington: Indiana UP, 1968).

⁴⁷See Herbert H. Haines, **Black Radicals and the Civil Rights Mainstream, 1954-1970** (Knoxville: University of Tennessee Press, 1988) p. 47.

⁴⁸*Id.*, p. 54.

⁴⁹*Id.*, p. 52.

⁵⁰It cited as causes, poor and segregated housing, discrimination in employment, occasional brutal law enforcement, and inferior education. Eighty-three lives had been lost, 1,897 people were injured, 16,389 were arrested, property damage amounted to \$664 million. For additional

riot statistics, see Benjamin Muse, *supra*, note 46 at 295.

⁵¹Jerome Skolnick, **The Politics of Protest** (New York: Ballantine Books, 1969) p. 148.

⁵²See Herbert H. Haines, *supra* note 47 at 55; Robert J. Brisbane, **Black Activism: Racial Revolution in the United States, 1940-1970** (Valley Forge, Judson Press, 1974). Harry S. Ashmore, **Civil Rights and Wrongs: A Memoir of Race and Politics, 1944-1994** (New York: Pantheon Books, 1994) pp. 186-187; Hugh Pearson, **Shadow of the Panther: Huey Newton and the Price of Black Power in America** (Reading, Mass.: Addison-Wesley Publishing Co., 1994) p. 130.

⁵³See Jerome Skolnick, *supra* note 51, at 129.

⁵⁴See Herbert Haines, *supra* note 47, at 55-96.

⁵⁵See Hugh Pearson, *supra* note 52 at 206-209.

⁵⁶Indeed, when, during the Second World War, Eleanor Roosevelt urged the President to push for passage of anti-lynching legislation, he replied that it would alienate southern legislators, whose support he needed for the war effort. See Walter White, **A Man Called White: The Autobiography of Walter White** (New York: Viking Press, 1948) p. 107. By the mid-fifties, in the real world, there still had been no civil rights legislation enacted except for a virtually meaningless voting rights law passed in 1957. See Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of U.S.C.); see also Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified in scattered sections of U.S.C.).

⁵⁷Denton L. Watson, **Lion in the Lobby: Clarence Mitchell, Jr.'s Struggle for the Passage of Civil Rights Laws** (New York: William Morrow, 1990) p. 553.

⁵⁸See *e.g.*, Garrow, *supra* note 31, at 173-230 (discussing the failed attempts at Albany). So, it is likely that in a counterfactual world in which protest lacked the moral energy it absorbed from the *Brown* decision and when King's public persona was weaker than in real life, an imagined 1964 Civil Rights Act would have been weaker than the real law. Almost surely, Title VII would not have been part of it. Title VI enforcement, by which the federal government was prohibited from giving federal funds to civil rights violators, might not have been enacted and the public accommodation section might not have been as comprehensive as it is.

⁵⁹NAACP petition to U.N. See Donald R. McCoy & Richard T. Ruetten, **Quest and Response: Minority Rights and the Truman Administration** (Lawrence, Kansas: UP of Kansas, 1973) p. 67. See also Mary L. Dudziak, "Desegregation as a Cold War Imperative," 41 *Stan. L. Rev.* (1988) pp. 61-121.

⁶⁰See Haines, *supra* note 47, at 59.

⁶¹See Ashmore, *supra* note 52, at 203-204, 186-187.

⁶²In fact, prominent editorialists, in Greece and other countries wrote about U.S. racial segregation. See Dudziak,

"Desegregation as a Cold War Imperative," 41 *Stan. L. Rev.* (1988), pp. 61-84, 87, and the Soviet Union, before the General Assembly, regularly denounced American hypocrisy. *Id.*, p. 111.

⁶³*Yick Wo v. Hopkins*, 118 U.S.D. 356 (1886).

⁶⁴*Davis v. Schnell*, 81 F. Supp. 872 C.S.O. Ale. 1949 aff'd, 336 U.S. 933 (1949), quoting in part from *United States v. Butler*, 297 U.S. 1, 39 (1936).

⁶⁵Gerald N. Rosenberg, *The Hollow Hope* (Chicago: University of Chicago, 1991) ch.4, suggests a very different scenario, which I find unpersuasive. He thinks that *Brown* made little or no difference in the evolution of civil rights in society or by playing a meaningful role in passage of civil rights legislation. ("... there is little evidenced that *Brown* helped produce positive change. . . ., *Id.*, at p. 155.) But, if we accept, as he does, that "... civil rights marches and demonstrations affected both white Americans and elites and provided a major impetus for civil rights legislation[,] at p. 133, and that the civil rights movement—e.g., the Montgomery bus boycott, sit-ins, freedom rides, demonstrations led by Martin Luther King, Jr.—contributed importantly to passage of that legislation and the societal changes it brought about, his conclusion is refuted by the many manifestations of the movement sketched in part *supra*, at pp. 188-190. Those events (summarized here) were linked directly to *Brown*, i.e., Rosa Parks' assertion that after *Brown* there was a chance to end segregation; her and her husband's position as NAACP officials; the boycott's successful conclusion that was secured by *Gayle v. Browder*, which rested on *Brown*; Martin Luther King's prayer pilgrimages to commemorate *Brown*'s anniversary; Freedom Riders' first ride scheduled to arrive at destination on May 17, *Brown*'s anniversary; sit-in demonstrators inspired by *Brown*.

He writes that the press gave little attention to civil rights, but acknowledges the public prominence of such events as violence in Clinton, Tennessee, and Little Rock, observing that those events, not "Court action," at p. 113, were responsible for press attention to the subject. He fails to mention that events in Clinton and Little Rock and similar outbreaks in many other places expressed resistance to integration that could not have existed without *Brown*.

He cites "a book-length compilation of studies of the black press in the eleven Southern states and Missouri [that] had only six references to *Brown*," at p. 133, as if it is customary for newspapers to cite cases, but doesn't mention the numerous references in the black press

to efforts to desegregate schools and other places, and resistance to those efforts, that would not have occurred without *Brown*. Many articles published in black newspapers dealt with civil rights efforts and aspirations, attacks on the NAACP and other civil rights advocates between 1955 and 1960 all of which can be traced to *Brown*, even though the case itself may not have been cited. It would be too tedious to list the innumerable articles in the black press and other black publications that dealt with segregation and efforts to end it, all of which in some way connected with *Brown*. *But see* (selected at random) e.g., "High Court Edict Analyzed by Wilkins and Marshall," *Chicago Defender*, Aug. 13, 1955, supplement A at 16A; Judge Irvin C. Mollison, "Judicial Decision and Political Theory Are Finally Hand in Hand," *Chicago Defender*, August 13, 1955, Supplement A at 13 B; "High Court Weighs 5 Key Cases Involving Integration's Future," *Pittsburgh Courier*, Oct. 19, 1957, at 3; "Text of Supreme Court Opinion on School Segregation Cases," *Virginia Education Bulletin*, May-June 1955, at 169; "Text of United States Supreme Court Decision of May 31, 1955, Implementing its Historic Decision of May 17, 1954" *Crisis*, June-July, 1955 at 325-28; William M. Boyd, "The Second Emancipation," 16 *Phylon*, (1955), at 77-86; "The Desegregation Decision [May 17, 1954] One Year Afterward," 24 *Journal of Negro Education*, Summer 1955 (whole issue); Robert F. Drinan, "The American Judiciary and the Negro," 32 *Interracial Review*, Feb. 1959, at 26-27; Earl Brown, "Modern Civil War," *New York Amsterdam News*, Jan. 28, 1956, at 20. "Supreme Court's Decision Will Stand, Brownell Says," *Atlanta Daily World*, Mar. 27, 1957, at 1 (discussing Attorney General Brownell's Statements that *Brown* will stand the test of time); "Court Refuses to Dismiss Suit on Anti-NAACP Laws," *Atlanta Daily World*, Mar. 27, 1957, at 1 (stating that a three-judge court refused to dismiss the NAACP's suit against a Virginia law that would compel the NAACP to reveal the names of its member and donors); Gene Schroeder, "Tension Seen Lessening in Little Rock as 9 Students Enter Class," *Atlanta Daily World*, Oct. 5, 1957, at 1.

⁶⁶*See, generally*, Richard H. Fallon, "A Constructivist Coherence Theory of Constitutional Interpretation," 100 *Harv. L. Rev.* 1189 (1987). *See also* Philip Bobbit, *Constitutional Interpretation* (1991) (discussing a prudential form of interpretation, resembling what I call "consequential"). *See also* Michael Dorf, "The Limits of Socratic Deliberation," 212 *Harv. L. Rev.* 4, 51-83 (1998) (describing common theories of constitutional interpretation and providing his own theory of "provisional adjudication").

African-American Rights After *Brown*

GERALD N. ROSENBERG

The preceding chapters in this volume have focused on the U.S. Supreme Court and African-American rights in the years prior to the mid-twentieth century. That history shows the Court at its worst and at its best—as perpetuating racism and striving to overcome it. In this chapter, I will step back and ask if the Court’s attempts to overcome racism made much difference to the lives of African-Americans. In particular, I will focus on the Court’s 1954 decision, *Brown v. Board of Education*,¹ which unanimously struck down race-based segregation in elementary and secondary schools as violating the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. *Brown* is an apt case for focus on the Court’s contribution to change because it has received praise across the legal spectrum and is celebrated by scholars and social critics as a landmark. As the legal historian Michael Klarman puts it, “constitutional lawyers and historians generally deem *Brown v. Board of Education* to be the most important U.S. Supreme Court decision of the twentieth century, and possibly of all time.”²

The question I address in this article is whether the decision in *Brown* made the contribution to American society that this comment suggests. In asking this question, I mean to disparage no one. Civil rights lawyers like Thurgood Marshall, Jack Greenberg and countless others dedicated their careers, and sometimes their lives, to a principled belief in justice for all. My question does not challenge their

commitment nor their principles. It does ask whether litigation was the right strategic choice to further their goals, whether their understanding of the strengths and weaknesses of courts as agents of social change was subtle enough to guide them to the best strategy for change.

Underlying this question about *Brown* is a broader question about the role of the Supreme Court in the larger society. Since the mid-

twentieth century, there has been a belief that courts can act to further the interests of the relatively disadvantaged. Starting with civil rights and spreading to issues raised by women's groups, environmental groups, political reformers, and others, American courts seemingly have become important producers of political and social change. Cases such as *Brown* and *Roe v. Wade*³ are heralded as having produced major change. Further, such litigation has often occurred, and appears to have been most successful, when the other branches of government have failed to act. Indeed, for many, part of what makes American democracy exceptional is that it includes the world's most powerful court system, protecting minorities and defending liberty in the face of opposition from the democratically elected branches. Americans look to activist courts, then, as fulfilling an important role in the American scheme.

Courts, many also believe, can bring heightened legitimacy to an issue. Courts deal with rights. Judges, at their best, are not politically beholden nor partisan. Rather, they are independent and principled, deciding not what policy they want but rather what the Constitution requires. This gives judicial decisions a moral legitimacy that is missing from the actions of the other branches. Court decisions can remind Americans of our highest aspirations and chide us for our failings. Courts, Bickel suggests, have the "capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry."⁴ For Rostow, the "Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar."⁵ Bickel agrees, viewing courts as "a great and highly effective educational institution."⁶ Courts, one commentator put it, can provide "a cheap method of pricking powerful consciences."⁷

In the confines of a single chapter, I can do little more than sketch out an answer to the question of whether *Brown* made a major contribution to civil rights. Readers who wish to see a more fully developed argument might con-

sult *The Hollow Hope* and other work of mine.⁸

Reasons for Caution

Before uncritically accepting this view of the Court as correct, there are at least three reasons to be skeptical. First, it is almost entirely lawyers who make this argument. Although lawyers may be no less self-critical than other professionals, they may be no more self-critical either. That is, they may have deep-seated psychological reasons for believing in the importance of the institutions in which they work. This may lead to overvaluing the contribution of the courts to furthering the interests of the relatively disadvantaged.

Second, there is an older view of the role of courts which sees them as much more constrained. Under this view, courts are the least able of any of the branches of government to produce change because they lack all of the necessary tools to do so. They are the "least dangerous branch" because they lack budgetary or coercive power. That courts are uniquely dependent on the executive branch is a view that was most forcefully argued over two hundred years ago by Alexander Hamilton in *Federalist 78*. Hamilton wrote: the judiciary "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment of and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."⁹ As President Jackson reportedly commented in response to *Worcester v. Georgia*,¹⁰ a decision with which he disagreed, "[Chief Justice] John Marshall has made his decision, now let him enforce it." This view suggests that Court decisions furthering the interests of the relatively disadvantaged will only be implemented when the other branches are willing to do so.

The third reason for skepticism about the role of courts as producers of progressive change comes from several decades of public opinion research. If courts are dependent on

public and elite support for their decisions to be implemented, as Hamilton suggests, this requires both public knowledge of Court decisions and a public willingness to act based on them. Proponents of an activist, progressive Court assume this. According to one defender of the claim, "without the dramatic intervention of so dignified an institution as a court, which puts its own prestige and authority on the line, most middle-class Americans would not be informed about such grievances."¹¹ However, decades of public opinion research paint a mixed picture, at best. In general, only about 40% of the American public report having read or heard something contemporary about the Court.¹² As an example, in 1966, despite important Supreme Court decisions on race, religion, criminal justice, and voting rights, nearly half of respondents could not recall *anything at all* that the Court had done recently.¹³ And when prompted with a list of eight "decisions," four of which the Court had recently made and four of which it had never made, and asked to identify which, if any, the Court had made, only 19% of a 1966 sample made five or more correct choices.¹⁴ In 1973, 20% of respondents to a Harris poll identified the Court as a branch of Congress, as did 12% of respondents with college degrees. In a culture in which personality is important, the public, too, is quite ignorant of the Justices' identity. In a 1989 *Washington Post* poll, for example, 71% of 1,005 respondents could not name any Justice while only 2% could correctly name all nine. Somewhat humorously, while 9% named the distinguished Chief Justice of the United States (Rehnquist), a whopping 54%, six times as many respondents, correctly identified the somewhat less distinguished "judge of the television show 'The People's Court'" (Judge Wapner).¹⁵ The Supreme Court is not in the forefront of the consciousness of most Americans.

This lack of knowledge is not limited to Americans in general, as was illustrated by a fascinating 1990 study reported in that great "scholarly" journal, *Spy Magazine*. In a cleverly designed study, the magazine called six Washington heavyweights claiming to be as-

sistants to five other famous Washingtonians and one Hollywood power broker. The magazine then timed how long it took for the phone calls to be returned. Those called included U.S. Secretary of Defense Dick Cheney; Ben Bradlee, editor of the *Washington Post*; Jack Kent Cooke, owner of the football team the Washington Redskins; and Marlin Fitzwater, Press Secretary to President Bush. The caller claimed to be either the individual or an aid to, among others, Georgette Mosbacher (wife of Cabinet Secretary Robert Mosbacher and renowned for throwing the best parties in Washington); Ben Bradlee, the *Washington Post* editor; Oliver North, William H. Rehnquist, and Senator Moynihan. The results were stunning. The caller claiming to be an aid to Georgette Mosbacher was put immediately through to the Secretary of Defense whose secretary "suggested interrupting a meeting" to reach him. President Bush's press secretary, Marlin Fitzwater, returned the call an hour later. Chief Justice Rehnquist, alas, fared much less well. His calls were returned, on average, two days later than Mosbacher's. Jack Kent Cooke's secretary asked what company "Mr. Lindquist" was with. Fitzwater's secretary apologetically asked "Who is he?" Upon being told that he was the Chief Justice of the United States, it still took Fitzwater four days to return the call.¹⁶

The point of this discussion is that there are good reasons to be wary of claims that the Court can further the interests of the relatively disadvantaged. Lacking the power to implement their decisions, courts are dependent on other elite institutions and the public at large. And given the findings of the survey literature, this is not a comforting thought for those who believe in the efficacy of the courts to further the interests of the relatively disadvantaged. With this background in mind, I return to *Brown*.

Examining the effects of *Brown* raises questions of how to deal with complicated issues of causation. Because it is difficult to isolate the effects of court decisions from other events in furthering the interests of the rela-

tively disadvantaged, special care is needed in specifying how courts can be effective. On a general level, one can distinguish two types of influence courts can exercise. Court decisions may produce significant social reform through a *judicial* path that relies on the authority of the court. Alternatively, court influence can follow an *extra-judicial* path that invokes court powers of persuasion, legitimacy, and the ability to give salience to issues. Each of these possible paths of influence is different and requires separate analysis.

The *judicial* path of causal influence is straightforward. It focuses on the direct outcome of judicial decisions and examines whether the change required by the courts was made. In civil rights, for example, if a Supreme Court decision ordering an end to public segregation was the cause of segregation ending, then one would see lower courts ordering local officials to end segregation, those officials acting to end it, the community at large supporting it, and, most important, segregation actually ending.

Separate and distinct from judicial effects is the more subtle and complex causal claim of *extra-judicial* effects. Under this conception of causation, courts do more than simply change behavior in the short run. Court decisions may produce significant social reform by inspiring individuals to act or persuading them to examine and change their opinions. Court decisions, particularly Supreme Court decisions, may be powerful symbols, resources for change. They may affect the intellectual climate, the kinds of ideas that are discussed. The mere bringing of legal claims and the hearing of cases may influence ideas. Courts may produce significant social reform by giving salience to issues, in effect placing them on the political agenda. Courts may bring issues to light and keep them in the public eye when other political institutions wish to bury them. Thus, courts may make it difficult for legislators to avoid deciding controversial issues.

In 1954, in *Brown v. Board of Education*,¹⁷ the U.S. Supreme Court found that state laws requiring race-based segregation in public el-

ementary and secondary schools violated the Equal Protection Clause of the Fourteenth Amendment. Overturning nearly sixty years of Court-sanctioned racial segregation, *Brown* is heralded as one of the U.S. Supreme Court's greatest decisions. In particular, *Brown* is the paradigm of the Court's ability to protect rights and bring justice to minorities. To the human rights activist Aryeh Neier, *Brown* is the great "symbol" of courts' ability to protect rights and produce significant social reform.¹⁸ For Jack Greenberg, long-time civil rights litigator, *Brown* is the "principal inspiration to others" who seek change and the protection of rights through litigation.¹⁹

Given the praise accorded to the *Brown* decision, examining its actual effects produces quite a surprise. The surprise is that a decade after *Brown* virtually nothing had changed for African-American students living in the eleven states of the former Confederacy that required race-based school segregation by law. For example, in the 1963-1964 school year, barely one in one hundred (1.2%) of these African-American children was in a nonsegregated school. That means that for nearly ninety-nine of every 100 African-American children in the South a decade after *Brown*, the finding of a constitutional right changed nothing. A unanimous landmark Supreme Court decision had no effect on their lives. This raises the question of why there was no change.

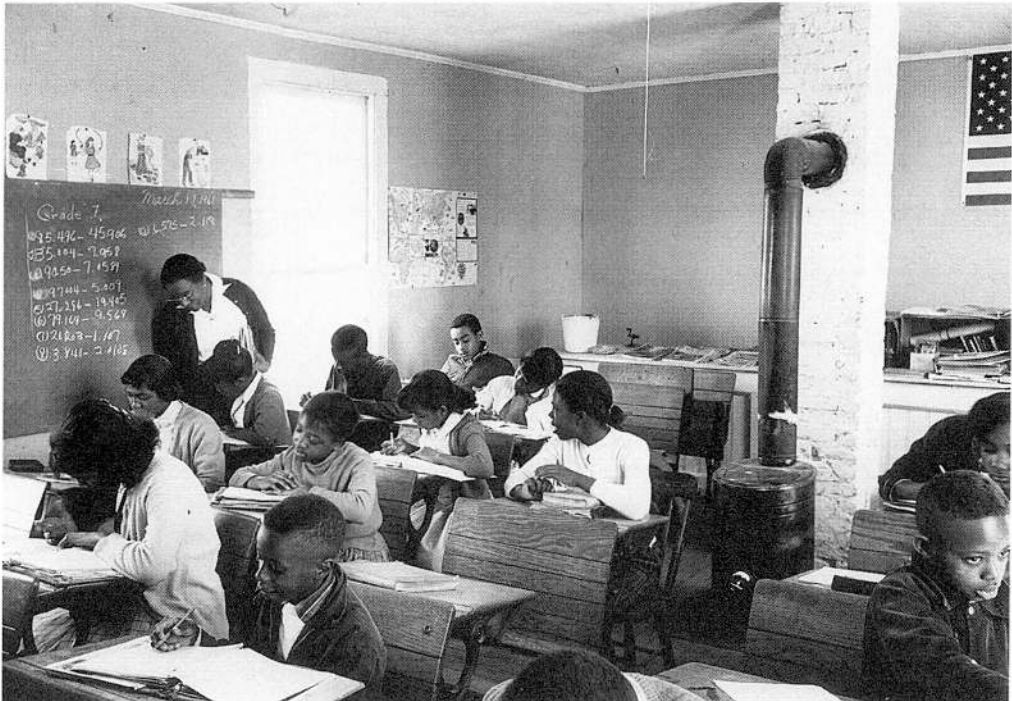
The answer, in a nutshell, is that there was no political pressure to implement the decision and a great deal of pressure to resist it. On the executive level, there was little support for desegregation until the Johnson presidency. President Eisenhower steadfastly refused to commit his immense popularity or prestige in support of desegregation in general or *Brown* in particular. As Roy Wilkins, executive secretary of the National Association for the Advancement of Colored People (NAACP), put it, "if he had fought World War II the way he fought for civil rights, we would all be speaking German today."²⁰ And Jack Peltason summed up Eisenhower's position this way: "Thurgood

Marshall got his decision, now let him enforce it."²¹ Although President Kennedy was openly and generally supportive of civil rights, he took little concrete initiative in school desegregation and other civil rights matters until pressured by events to do so. He did not rank civil rights as a top priority and, like Eisenhower before him, was "unwilling to draw on the moral credit of his office to advance civil rights."²²

Civil rights were not supported by other national leaders until late in the Kennedy administration. In March 1956, Southern members of Congress, virtually without exception,²³ signed a document entitled a "Declaration of Constitutional Principles," also known as the Southern Manifesto. Its 101 signers attacked the *Brown* decision as an exercise of "naked power" with "no legal basis." They pledged themselves to "use all lawful means to bring about a reversal of this decision which is contrary to the Constitution and to prevent the use

of force in its implementation."²⁴ This unprecedented attack on the Court demonstrated to all that pressure from Washington to implement the Court's decisions in civil rights would not be forthcoming.

If national political leaders set the stage for ignoring the courts, local politicians acted their part perfectly. A study of the 250 gubernatorial candidates in the Southern states from 1950 to 1973 revealed that after *Brown* "ambitious politicians, to put it mildly, perceived few incentives to advocate compliance."²⁵ This perception was reinforced by Arkansas Governor Orval Faubus's landslide reelection in 1958, after he repeatedly defied court orders to prevent the desegregation of Central High School in Little Rock, demonstrating the "political rewards of conspicuously defying national authority."²⁶ Throughout the South, governors and gubernatorial candidates called for defiance of court orders. Any individual or institution wishing



A decade after *Brown* virtually nothing had changed for African-American students living in the eleven states of the former Confederacy that required race-based school segregation by law. For example, in the 1963-1964 school year, barely one in one hundred of these African-American children was in a nonsegregated school. That means that for nearly ninety-nine of every 100 African-American children in the South a decade after *Brown*, the finding of a constitutional right to nonsegregated education changed nothing.

to end segregation pursuant to court order, that is, to obey the law as mandated by the Supreme Court, would incur the wrath of state political leaders and quite possibly national ones. The best they could hope for was a lack of outright condemnation. Political support for desegregation was virtually nonexistent.

At the prodding of state leaders, state legislatures throughout the South passed a variety of pro-segregation laws. By 1957, only three years after *Brown*, at least 136 new laws and state constitutional amendments designed to preserve segregation had been enacted.²⁷ These ranged from depriving policemen of their retirement and disability if they failed to enforce the state's segregation laws (Georgia), to denying promotion or graduation to any student of a desegregated school (Louisiana), to simply making it illegal to attend a desegregated school (Mississippi) to Virginia's massive resistance including closing public schools, operating a tuition grant scheme, suspending compulsory attendance laws, and building private segregated schools. In 1960-1961 alone, the Louisiana legislature met in one regular and five extraordinary sessions to pass ninety-two laws and resolutions to maintain segregated public schools. As the Southern saying went, "as long as we can legislate, we can segregate."²⁸

Along with opposition to desegregation from political leaders at all levels of government, there was hostility from many white Americans. Law and legal decisions operate in a given cultural environment, and the norms of that environment influence the decisions that are made and the impact they have. In the case of civil rights, decisions were announced in a culture in which slavery had existed and apartheid did exist. Institutions and social structures throughout America reflected a history of, if not a present commitment to, racial discrimination. Cultural barriers to civil rights had to be overcome before change could occur. And courts do not have the tools to do so. This is well illustrated in the decade after *Brown*.

One of the important cultural barriers to

civil rights was the existence of private groups supportive of segregation. One type, represented by the Ku Klux Klan, White Citizens' Councils, and the like, existed principally to fight civil rights. Either through their own acts, or the atmosphere these groups helped create, violence against blacks and civil rights workers was commonplace throughout the South. Spectacular cases such as the murder of Medgar Evers, the attacks on the freedom riders, the Birmingham Church bombing that killed four black girls, and the murder of three civil rights workers near Philadelphia, Mississippi, are well known. But countless bombings and numerous murders occurred throughout the South.²⁹ During the summer of 1964 in Mississippi alone there were thirty-five shootings, sixty-five bombings (including thirty-five churches), eighty beatings, and six murders.³⁰ It was a brave soul indeed who worked to end segregation or implement court decisions.

Another tactic used by white groups to fight civil rights was economic coercion. Since whites controlled the economy throughout the South, this was extraordinarily effective.³¹ In fact, so effective was this sort of intimidation that as late as 1961 *not a single* desegregation suit in education had been filed in Mississippi.³²

A totally different kind of private group resisted civil rights by simply ignoring court decisions and going about their business as if nothing had changed. Public carriers, for example, even when owned by non-Southerners, looked to the "segregationist milieu" in which they operated and thus took a "narrow view of desegregation decrees, implementing them minimally, if at all."³³

The cultural biases against civil rights that pervaded private groups also pervaded local governments. Court-ordered action may be fought or ignored on a local level, especially if there is no pressure from higher political leadership to follow the law and pressure from private groups not to. It was common to find, for example, that where bus companies followed the law and removed segregation signs in terminals, state and local officials put them back

up.³⁴ In the five Deep South states, as a matter of principle no school-board member or superintendent openly advocated compliance with the Supreme Court decision.³⁵ And despite *Cooper v. Aaron*,³⁶ and the sending of troops to Little Rock in 1957, as of June 1963, only sixty-nine out of 7,700 students at the supposedly desegregated, “formerly” white, junior and senior high schools of Little Rock were black.³⁷ Public resistance, supported by local political action, can almost always effectively defeat court-ordered civil rights.

In sum, in civil rights, court-ordered change confronted a culture opposed to that change. That being the case, the American judicial system, constrained by the need for both elite and popular support, constrained change.

The analysis above, however, omits one key institution and one key group: the judiciary, lawyers and their academic counterparts. The South, like the rest of the country, has both state and federal courts as well as lawyers. And the courts have a natural constituency in the American legal profession. Indeed, Justice Frankfurter believed that lawyers’ support of the Court’s decision in *Brown* would be decisive. As he put it in a letter to a friend, “it is the legal profession of the South on which our greatest reliance must be placed. . . because the lawyers of the South will gradually realize that there is a transcending issue, namely respect for law as determined so impressively by a unanimous court [in *Brown*].”³⁸ But Justice Frankfurter was to be doubly disappointed; both Southern lawyers and elite lawyers and legal academics throughout the country condemned the case or offered only the most tepid support.

Lawyers and the Legal Profession

While there were undoubtedly some white Southern lawyers who supported the Court, they were few and far between. Opponents, in contrast, were everywhere. And surprisingly, opposition was voiced not merely by white

Southerners but also by elite, Northern lawyers as well. A notable example was the American Bar Association (ABA), which is the nation’s major professional legal organization. Politically neutral, it claims the legitimacy of professional expertise. However, in the wake of *Brown*, it lent the pages of its journal, the *ABA Journal*, to condemnation of *Brown*, from the vicious to the technical. It published only the most tepid, rule-of-law, defenses of the decision. Not once, in either editorials or articles, was there an argument that *Brown* was morally, constitutionally, or substantively correct.

The ABA was not alone. In 1958, the Conference of Chief Justices of State Courts issued a report on the Court. While the body of the report was careful, the report finished with polemical conclusions that criticized the Supreme Court for legislating. “In the fields with which we are concerned [the report concluded]...the Supreme Court too often has tended to adopt the role of policy-maker without proper judicial restraint.”³⁹ The report continued, “it has long been an American boast that we have a government of laws and not men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast.”⁴⁰ The report was adopted by a vote of 36-8 and won praise in an *ABA Journal* editorial for its “attitude of careful study, calm deliberation and temperate statement.”

Elite legal academics also joined the fray. “[S]peaking the rhetoric of institutional legitimacy, a significant number of northeastern, white, liberal lawyers joined with white, southern, never-say-die segregationists in questioning the Court’s authority and legitimacy in *Brown*.”⁴¹ Although there was some support for the decision in law reviews immediately following *Brown*, it was found mostly in short pieces. In contrast, elite law reviews repeatedly blasted the Court. For example, the *Harvard Law Review* poured out a torrent of criticism, especially in its annual Forewords. *Brown* was criticized as poorly thought out, insufficient to

support other cases, and unprincipled. The most important article was undoubtedly written by Herbert Wechsler, a law professor at Columbia University in New York City. Giving the Holmes Lecture at Harvard, and appearing as the Foreword to the 1959 *Harvard Law Review*,⁴² *Brown* was criticized as unprincipled. *Brown* lacked a neutral principle, Wechsler argued, because separate but equal, if truly equal, was itself a neutral principle and there was no neutral way of deciding between it and equality. Wechsler's piece is the second most cited law review article in the period 1957 through March 1985! The popularity of his critique of *Brown* as unprincipled is a powerful indicator of the lack of support elite academic lawyers gave to *Brown*.

Local Courts

Judges seldom stepped in where politicians, lawyers, and the public at large were unwilling to go. The "fifty-eight lonely men" who served the federal judiciary in the South were being asked to dismantle a social system they had grown up with and of which they were a part. Even a judge as pro-civil-rights as John Minor Wisdom was sympathetic, finding it "not surprising that in a conservative community a federal judge may feel that he cannot jeopardize the respect due the court in all of his cases" by vigorously supporting civil rights.⁴³ Although there were some outstanding Southern federal judges such as J. Skelly Wright, John Minor Wisdom, Bryan Simpson, and Frank Johnson, there were also some who were not. For example, Judge Elliott (M. Dist. GA) stated that he did not want "pinks, radicals and black voters to outvote those who are trying to preserve our segregation laws."⁴⁴ Judge Cox (S. Dist. Miss.), speaking from the Bench in March 1964, referred repeatedly to black voter-registration applicants in derogatory language (as "a bunch of niggers") who were "acting like a bunch of chimpanzees."⁴⁵ It is important to note that both judges Elliott and Cox were Kennedy appointees. In the Dallas school desegregation case, started in 1955 and still pending in 1960,

in which the federal district court was reversed six times, Judge Davidson complained that the "white man has a right to maintain his racial integrity, and it can't be done so easily in integrated schools."⁴⁶

On the state levels judges were even more biased. Chief Justice J. Edwin Livingston of the Alabama Supreme Court, speaking in 1959 to several hundred students and business leaders, announced: "I'm for segregation in every phase of life and I don't care who knows it...I would close every school from the highest to the lowest before I would go to school with colored people."⁴⁷ Alabama circuit judge Walter B. Jones wrote a column in the *Montgomery Advertiser* that he devoted to the "defense of white supremacy." In June 1958 he told readers that in the case against the NAACP, over which he was presiding, he intended to deal the NAACP a "mortal blow" from which it "shall never recover."⁴⁸ It is no wonder, then, that despite clear Supreme Court rulings, Alabama was able to keep the NAACP in litigation for eight years and effectively incapacitated in the State. As Leon Friedman, who talked with scores of civil rights lawyers in the South concluded, "the states' legal institutions were and are the principal enemy."⁴⁹

The use of the courts in the civil rights movement is considered the paradigm of a successful strategy for social change. Yet, a closer examination reveals that courts had virtually *no direct effect* on ending discrimination in education. Courageous and praiseworthy decisions were rendered, and nothing changed. *Brown* and its progeny stand for the proposition that courts are impotent to further the interests of the relatively disadvantaged. *Brown* is a paradigm, but for precisely the opposite view.

This, however, is not the end of the story. By the 1972-1973 school year, more than 91% of African-American children in the eleven states of the former Confederacy were in a non-segregated school. Eighteen years after *Brown*, Southern school systems were desegregated. How did this occur?

Change came to Southern school systems



The landslide reelection of Arkansas Governor Orval Faubus in 1958, after he repeatedly ignored court orders to prevent the desegregation of Central High School in Little Rock, demonstrated that defying court orders paid off at the polls. The black students pictured above could only safely enter Central High School under the protection of the U.S. Army.

in the wake of congressional and executive branch action. Title VI of the 1964 Civil Rights Act permitted the cut-off of federal funds to programs receiving federal monies where racial discrimination was practiced, and the 1965 Elementary & Secondary Education Act provided a great deal of federal money to generally poor Southern school districts. By the 1971-1972 school year, for example, federal funds comprised from between 12% and 27.8% of Southern state school budgets, up from between 4.6% and 11.1% in the 1963-1964 school year. This combination of federal funding and Title VI gave the executive branch a tool to induce desegregation when it chose to do so. When the U.S. Department of Health, Education, and Welfare began to threaten fund cut-offs to school districts that refused to desegregate, dramatic change occurred. By the 1972-1973 school year, more than 91% of African-American school children in the eleven Southern states were in integrated schools, up from 1.2% in the 1963-1964 school year. With only the constitutional right in force in the 1963-1964 school

year, no more than 5.5% of African-American children in any Southern state were in school with whites. By the 1972-1973 school year, when economic incentives were offered for desegregation, and costs imposed for failure to desegregate, in no Southern state were fewer than 80% of African-American children in integrated schools. School desegregation occurred in the years 1968-72, then, because a set of conditions provided incentives for it and imposed costs for failing to desegregate. When those conditions were lacking, as in the first decade after *Brown*, constitutional rights were flouted. What a Court decision was unable to accomplish, federal dollars were able to achieve. The Supreme Court, acting alone, lacked the power to produce change.

Indirect Effects

The judicial path of influence is not the only way an institution can contribute to civil rights. By bringing an issue to light courts may put pressure on others to act, sparking change.

Thus *Brown* and its progeny may have been the inspiration that eventually led to congressional and executive branch action and some success in civil rights. According to one commentator, "*Brown* set the stage for the ensuing rise in black political activism, for legal challenges to racial discrimination in voting, employment, and education, as well as for the creation of a favorable climate for the passage of the subsequent civil rights legislation and the initiation of the War on Poverty."⁵⁰ Indeed, most commentators (and I assume most readers) believe this is the case and hold their belief with little doubt. As C. Herman Pritchett put it, "if the Court had not taken that first giant step in 1954, does anyone think there would now be a Civil Rights Act of 1964?"⁵¹

In the next few pages I examine these claims. What evidence exists to substantiate them? How important was *Brown* to the civil rights struggle? In examining these questions, it must be noted that social scientists do not understand well enough the dynamics of influence and causation to state with certainty that the claims of Court influence (or any other causal claims) are right or wrong. Similarly, social scientists do not understand fully the myriad of factors that are involved in an individual's reaching a political decision. Ideas seem to have feet of their own, and tracking their footsteps is an imperfect science. Thus, even if I find little or no evidence of extra-judicial influence, it is simply impossible to state with certainty that the Court did not contribute in a significant way to civil rights. On the other hand, claims about the real world require evidence. Otherwise, they are merely statements of faith.

Turning to the specifics, I have tried to delineate the links that are necessary for the Court to have influenced civil rights by the extra-judicial path. The bottom line, the last link, is that the action of the President and Congress resulted in change. That is, the passage of the 1964 Civil Rights Act brought about change. I have demonstrated this elsewhere⁵² and it is assumed to be true throughout this

chapter. The key question, then, is the extent to which congressional and presidential action was a product of Court action.

One hypothesized link postulates that Court action gave civil rights prominence, putting it on the political agenda. Media coverage of civil rights over time could provide good evidence to assess this link. A second link, put quite simply, is that Court action influenced both the President and Congress to act. The Court, in other words, was able to pressure the other branches into dealing with civil rights. A third hypothesized link proposes that the Court favorably influenced white Americans in general about civil rights and they in turn pressured politicians. By bringing the treatment of black Americans to nationwide attention, the Court may have fomented change. A final hypothesized link suggests that the Court influenced black Americans to act in favor of civil rights and that this in turn influenced white political elites either directly or indirectly through influencing whites in general.

Salience

When the Supreme Court unanimously condemned segregation in 1954, it marked the first time since 1875 that one of the three branches of the federal government spoke strongly in favor of civil rights on a fundamental issue. The Court, it is claimed, put civil rights on the political agenda. "*Brown*," Neier writes, "launched the public debate over racial equality."⁵³ One important way in which the political agenda is created is through the press. Thus, one way in which the Court may have given salience to civil rights is through inducing increased press coverage of it and balanced treatment of blacks.

Press Coverage

Overall, there is no evidence of such an increase or major change in reporting in the years immediately following *Brown*. In general, newspaper coverage of civil rights was poor until the massive demonstrations of the 1960s.

Numerous studies support this conclusion. C. A. McKnight, executive director of the Southern Education Reporting Service, found that in the years following *Brown* Supreme Court treatment of segregation received “minimum coverage.”⁵⁴ In 1956, Ralph McGill, editor of the *Atlanta Constitution*, chided newspapers for failing to do “a good job of presenting and interpreting the segregation controversy.”⁵⁵ This was particularly true in the South, where there was a “paucity” of coverage and where the wire services “seldom reported the story in its full dimensions and meaning.”⁵⁶ And *Time* magazine criticized Southern newspapers for doing a “patchy, pussyfooting job of covering the region’s biggest running story since the end of slavery.”⁵⁷ In general, the Southern press did not greatly increase or balance its civil rights coverage in response to the Court.

The most powerful way to determine if there was a sustained increase in press coverage of civil rights in response to *Brown* is to actually count press stories over time. The evidence shows that while press coverage of civil rights, as measured by the number of stories dealing with the issue in the *Reader’s Guide To Periodical Literature*, increased moderately in 1954 over the previous year’s total, by 1958 and 1959 coverage actually dropped below the level found in several of the years of the late 1940s and early 1950s! In addition, if one examines the magazines in America in the 1950s and early 1960s with the largest circulations, *Reader’s Digest*, *Ladies Home Journal*, *Life*, and the *Saturday Evening Post*, the same general pattern again repeats. And it was not until 1962 that *TV Guide* ran a story having to do with civil rights. Thus, press coverage provides no evidence that the Court’s decision gave civil rights salience for most Americans.

It is possible, of course, that the political agenda is formed more by elites than by ordinary citizens. Thus, it may be that the magazines most likely read by elites would provide increased coverage of civil rights in the wake of the Court’s decision. But this is not the case. The magazines most likely to be read by politi-



By the 1972-1973 school year, more than 91% of African-American children in the eleven states of the former Confederacy were in a nonsegregated school. The author makes the case that this desegregation did not occur through court battles but in the wake of congressional and executive branch action.

cal elites, *The New York Times Magazine*, *Newsweek*, *Time*, and the *New Republic*, show the same pattern. In fact, for each of these magazines there was as much, if not more, coverage of civil rights in several of the years of the 1940s as in 1958 or 1959. The same general pattern holds for civil rights coverage in *The New York Times* as measured by the proportion of pages in the *Times Index* devoted to discrimination. In 1952, there was actually more coverage than in 1954 or 1955. Further, coverage in the years 1954, 1955, 1958, and 1959 was barely equal to or actually less than the coverage allotted to civil rights in four of the years of the 1940s! Here again, there is no evidence that the Court’s action indirectly affected elites by putting civil rights on the political agenda through the press.

There was one media outlet that gave enor-

mous coverage to *Brown*; Voice of America! The decision was immediately translated into thirty-four languages and broadcast around the world. In poignant contrast, Universal Newsreels, the company that made news reports for movie theaters in the United States, never mentioned *Brown*.⁵⁸

In sum, press coverage of civil rights provides no evidence for the claim that the Court has important extra-judicial-effects claim. This finding is striking since *Brown* is virtually universally credited with having brought civil rights to national attention.

Elites

The extra-judicial-effects argument claims that the actions of the Supreme Court influenced members of Congress, the President, and the executive branch. The argument might be that because of the “deference paid by the other branches of government and by the American public”⁵⁹ to the Supreme Court, its decisions prodded the other branches of the federal government into action. Further, the argument might run that the Court’s actions sensitized elites to the legitimate claims of blacks. As Wilkinson puts it, “*Brown* was the catalyst that shook up Congress.”⁶⁰

Legislation

A sensible place to look for evidence of indirect effects is in the legislative history and debates over the 1957, 1960, and 1964 civil rights acts, and in presidential pronouncements on civil rights legislation. If Court action was crucial to congressional and presidential action, one might reasonably expect to find members of Congress and the President mentioning it as a reason for introducing and supporting civil rights legislation. While it is true that lack of attribution may only mean that the Court’s influence was subtle, it would cast doubt on the force, if not the existence, of this extra-judicial effect.

At the outset, the case for influence is supported by the fact that civil rights bills were

introduced and, for the first time since 1875, enacted in the years following *Brown*. While this makes it seem likely that *Brown* played an important role, closer examination of the impetus behind the civil rights acts of 1957, 1960, and 1964, does not support this seemingly reasonable inference. The 1957 and 1960 bills were almost entirely driven by electoral concerns. Republicans attempted to court Northern urban black voters and, at the same time, embarrass the Democrats by exposing the major rift between that party’s Northern and Southern wings.⁶¹ The press and political opponents understood the bills as a response to electoral pressures, not to constitutional mandates.

The story of the 1964 act is similar in that there is no evidence of Court influence and a great deal of evidence for other factors, in this case the activities of the civil rights movement. The Kennedy administration offered no civil rights bill until February 1963 and the bill it offered then was “a collection of minor changes far more modest than the 1956 Eisenhower program.”⁶² When a House subcommittee modified and strengthened the bill, Attorney General Robert Kennedy met with the members of the full Judiciary Committee in executive session and “criticized the subcommittee draft in almost every detail.”⁶³ The President specifically objected to the prohibition of job discrimination that became Title VII, the provision making the Civil Rights Commission a permanent agency, the provision empowering the attorney general to sue on behalf of individuals alleging racial discrimination, and the provisions mandating no discrimination in federally funded programs and allowing fund cut-offs.⁶⁴ It was not until the events of the spring of 1963 that the administration changed its thinking.

In Congress, there is little evidence that *Brown* played any appreciable role. The seemingly endless congressional debates, with some four million words uttered in the Senate alone,⁶⁵ hardly touched on the case. References to *Brown* can be found on only a few dozen out of many thousands of pages of Senate debate.⁶⁶ While much of the focus of the debate was on



President Johnson was the first President to speak movingly about civil rights because neither Presidents Kennedy nor Eisenhower were willing to commit the moral weight of their office to the issue. Yet in signing civil rights acts (such as the Voting Rights Act of 1965 above) Johnson did not mention Supreme Court decisions. Instead, he cited the violence that peaceful black protesters were subject to, the unfairness of racial discrimination, and the desire to honor the memory of President Kennedy.

the constitutionality of the proposed legislation, and on the Fourteenth Amendment, the concern was not with how *Brown* mandated legislative action, or even how *Brown* made such a bill possible. Even in the debates over the fund cut-off provisions, *Brown* was seldom mentioned.⁶⁷ This is particularly surprising since it would have been very easy for pressured and uncertain members of Congress to shield their actions behind the constitutional mandate announced by the Court. That they did not credit the Court with affecting their decisions prevents the debates from providing evidence for the indirect-effects thesis. Thus, there does not appear to be evidence for the influence of *Brown* on legislative action.

Reviewing the public pronouncements of Presidents Eisenhower, Kennedy, and Johnson on civil rights legislation, I do not find the Court mentioned as a reason to act. Neither Eisenhower nor Kennedy committed the moral weight of their office to civil rights. When they

did act, it was in response to violence or upcoming elections, not in response to Court decisions. While President Johnson spoke movingly and eloquently about civil rights, he did not mention Court decisions as an important reason for civil rights action. In his moving speeches to Congress and the nation in support of the 1964 Civil Rights Act and the 1965 Voting Rights Act he dwelt on the violence that peaceful black protesters were subjected to, the unfairness of racial discrimination, and the desire to honor the memory of President Kennedy. It was these factors that Johnson highlighted as reasons for supporting civil rights, not Court decisions.

In sum, I have not found the evidence necessary to make a case of clear attribution for the Court's effects on Congress or the President. Students of the Civil Rights Acts of 1957, 1960, and 1964 credit their introduction and passage to electoral concerns, or impending violence, not Court decisions. The extra-judi-

cial-effects claim is not supported with Congress or the President.

Whites

The extra-judicial-effects thesis views courts as playing an important role in alerting Americans to social and political grievances. The view here is that the Supreme Court “pricked the conscience”⁶⁸ of white America by pointing out both its constitutional duty and its shortcomings. “Except for *Brown*,” Aryeh Neier contends, white Americans “would not have known about the plight of blacks under segregation.”⁶⁹ For this claim to hold, in order for courts to affect behavior, directly or indirectly, people must be aware of what the courts do. While this does not seem an onerous responsibility, I have shown earlier in this chapter that most Americans have little knowledge about U.S. courts and pay little attention to them. The specific question this leaves unanswered is whether this holds true for a case such as *Brown*.

Public Opinion— *Brown* and Civil Rights

Surprisingly, and unfortunately, there appear to be no polls addressing awareness of *Brown*. There are, however, polls charting the reaction to *Brown* by Southerners over time. They show both very little support for desegregation and lessening support throughout the 1950s. By 1959, for example, support for desegregation actually dropped, with only 8% of white Southerners responding that they would not object, down from 15% in 1954.⁷⁰

If there is little evidence that *Brown* changed opinions about school desegregation in the South, perhaps it helped change white opinions more generally. It is clear that throughout the period from the beginning of the Second World War to the passage of the 1964 Act, whites became increasingly supportive of civil rights. Is there evidence that this change was the effect of Court action? The answer appears to be no. Writing in 1956, Hyman and Sheatsley

found that the changes in attitude were “solidly based” and “not easily accelerated nor easily reversed.”⁷¹ Further, they found that the changes were not due to any specific event, such as Kennedy’s assassination, or a Supreme Court decision. They found that changes in national opinion “represent long-term trends that are not easily modified by specific—even by highly dramatic—events.”⁷²

Another way of examining the indirect-effects claim on white Americans is to look at how the sensitivity of Americans to civil rights changed generally. According to one proponent of judicial influence, the “*Brown* decision was central to eliciting the moral outrage that both blacks and whites were to feel and express about segregation.”⁷³ If the Court served this role, it would necessarily have increased awareness of the plight of blacks. The evidence, however, shows no sign of such an increase. Survey questions as to whether most blacks were being treated fairly resulted in affirmative responses of 66% in 1944, 66% in 1946, and 69% in 1956.⁷⁴ The variation of 3% is virtually meaningless. By 1963, when Gallup asked if any group in America was being treated unfairly, 80% said no. Only 5% of the sample named “the Negroes” as being unfairly treated while 4% named “the whites.”⁷⁵ Most poignantly, in December 1958, when Gallup asked its usual question about the most admired men in the world, Governor Orval Faubus of Arkansas, who had repeatedly defied court orders a year earlier to prevent the desegregation of Central High School in Little Rock, was among the ten most frequently mentioned.⁷⁶ As Burke Marshall, head of the Justice Department’s Civil Rights Division put it, “the Negro and his problems were still pretty much invisible to the country...until mass demonstrations of the Birmingham type.”⁷⁷ These results, and the change over time, hardly show an America whose conscience is aroused. If the Court pricked the conscience of white Americans, the sensitivity disappeared quickly.

In sum, in several areas where the Supreme Court would be expected to influence

white Americans, evidence of the effect has not been found. Most Americans neither follow Supreme Court decisions nor understand the Court's constitutional role. It is not surprising, then, that change in public opinion appears to be oblivious to the Court. Again, the extra-judicial-effects thesis lacks evidence.

Blacks

The indirect-effects thesis makes claims about the effect of the Supreme Court on black Americans. Here, a plausible claim is that *Brown* was the spark that ignited the black revolution. By recognizing and legitimizing black grievances, the public pronouncement by the Court provided blacks with a new image and encouraged them to act. This assumption is virtually universal among lawyers and legal scholars, and representative quotations can be found throughout this chapter. *Brown* "begot," one legal scholar tells us, "a union of the mightiest and lowliest in America, a mystical, passionate union bound by the pained depths of the black man's cry for justice and the moral authority, unique to the Court, to see that justice realized."⁷⁸ Thus, *Brown* may have fundamentally re-oriented the views of black Americans by providing hope that the federal government, if made aware of their plight, would help. Black action, in turn, could have changed white opinions and led to elite action and civil rights. If this is the case, then there are a number of places where evidence should be found.

One area where this effect should be seen is in civil rights demonstrations. The evidence plainly indicates that civil rights marches and demonstrations affected both white Americans and elites and provided a major impetus for civil rights legislation. As Wilkinson puts it, "the Court sired the movement, succored it through the early years, [and] encouraged its first taking wing."⁷⁹ If this were the case, if, in the words of civil rights litigator Jack Greenberg, the direct-action campaign would not have developed "without the legal victories that we'd won earlier,"⁸⁰ then one would expect to see an increase

in the number of demonstrations shortly after the decision. However, there is almost no difference in the number of civil rights demonstrations in the years 1953, 1954, and 1955. There was a large jump in 1956, due to the Montgomery bus boycott. But then the numbers drop. For example, 1959 saw fewer civil rights demonstrations than in four of the years of the 1940s! And the number of demonstrations skyrocketed in the 1960s, six or more years after *Brown*. This pattern does not suggest that the Court played a major role. The time period is too long and the 1960s increases too startling to credit the Court with a meaningful effect.

The Montgomery Bus Boycott

The 1956 Montgomery bus boycott created worldwide attention. Coming just a few years after *Brown*, it is quite plausible that it was sparked by the Court. If this were the case, one might trace the indirect effect of *Brown* to Montgomery to the demonstrations of the 1960s to white opinion to elite action in 1964 and 1965 to desegregation of public schools in the early 1970s. The problem is that there does not appear to be evidence even for this tortuous causal chain. The immediate crisis in Montgomery was brought about by the arrest, in December 1955, of Mrs. Rosa Parks, a black woman, for refusing to give up her seat to a white person and move to the back of a segregated city bus. Parks was the fourth black woman arrested in 1956 for such a refusal.⁸¹ It is unclear why this particular incident sparked the boycott, although Parks was fairly well-known and commanded respect in the black community. Because the Montgomery bus boycott is mentioned by so many civil rights activists, and because it launched both Dr. King's and Reverend Abernathy's civil rights careers, it is worth examining briefly.

In the 1940s and early 1950s there were a number of black civil rights organizations in Montgomery. One of them, the Women's Political Council (WPC), began to focus on bus seg-

regation and lodged complaints with the city at the end of 1953 and again in the spring of 1954, before *Brown*. Before *Brown* the WPC had prepared for a bus boycott by preparing a notice calling on the black community to act and by planning the distribution routes. "On paper, the WPC had already planned for fifty thousand notices calling people to boycott the buses; only the specifics of time and place had to be added."⁸² The arrest of Rosa Parks provided the opportunity the WPC was waiting for.

There is another piece of evidence, as well, that suggests that *Brown* was not influential; the nature of the boycotters' initial demands. Despite the efforts of the WPC, and the evident anger of the black community, initially the boycotters did *not* demand an end to bus segregation. Rather, the principal demand called for modified seating by race, with blacks starting at the back and whites at the front. As late as April 1956 Dr. King was still willing to settle on these terms.⁸³ This led the NAACP to withhold support on the grounds that the demands

were too "mild."⁸⁴ As Abernathy puts it, "at first we regarded the Montgomery bus boycott as an interruption of our plans rather than as the beginning of their fulfillment."⁸⁵ Again, this suggests that a host of local factors provided the inspiration for the boycott.

Finally, four additional parts of the historical context suggest that *Brown* had little influence. First, the idea of a bus boycott was not new, having been used successfully by blacks in Baton Rouge, Louisiana, during the summer of 1953. Dr. Martin Luther King, Jr., the leader of the Montgomery bus boycott, knew the leader of that boycott, T. J. Jemison, from college days, and spoke with him early in the boycott.⁸⁶ From the Baton Rouge boycott, Abernathy notes, Montgomery's blacks took "considerable inspiration."⁸⁷ Second, Montgomery's blacks "did know that other cities in the Deep South, notably Mobile and Atlanta, had already conceded the 'first come, first served' principle."⁸⁸ Third, in November 1955, Representative Adam Clayton Powell visited



This sit-in in Greensboro, North Carolina, which took place in February 1960, started the sit-in movement of the 1960s. Ronald Martin, Robert Patterson, and Mark Martin, students at A&T College, staged a day-long sit-down strike at Woolworth's lunch counter when they were refused service because they were black. The white woman at left decided not to lunch at the counter with them. Within sixty days of Greensboro, sit-ins had spread to at least sixty-five Southern cities.

Montgomery and suggested that blacks use their economic power to force change. Characteristically, the flamboyant Powell took credit for instigating the bus boycott.⁸⁹ Finally, King specifically addressed the influence of *Brown* on the boycott. It was clear, he said, that *Brown* “cannot explain why it happened in Montgomery” and that the “crisis was not produced by...even the Supreme Court.”⁹⁰ Although Montgomery may have inspired blacks, there does not appear to be much evidence that the Court inspired Montgomery.⁹¹

Sit-Ins

Another possible way in which *Brown* may have sparked change is through providing the inspiration for the sit-in movement and the demonstrations of the 1960s. The decision might have given blacks new hope that the federal government would work to end discrimination. It might have confirmed their own belief in the unfairness of segregation. If this were the case, one might plausibly expect to find participants in, and students of, the demonstrations talking and writing about the Court’s decision as one reason for their actions. A review of biographies, autobiographies, and scholarly studies of the civil rights movement provides the evidence for assessing the claim.

The sit-in in Greensboro, North Carolina, in February 1960 started the sit-in movement of the 1960s. Organized by four black college students, it does not appear to have been Court-inspired. After Greensboro, the sit-ins spread quickly throughout the South. Within sixty days of Greensboro, sit-ins had spread to at least sixty-five Southern cities.⁹² For black students throughout the South, the inspiration was the action of other students, as well as Montgomery and King. Instead of looking to courts for inspiration and support, the demonstrators “appealed to a higher law” because they “weren’t sure about the legality” of their actions.⁹³ When black students from Atlanta joined the sit-ins, they took out a full-page advertisement in Atlanta’s newspapers listing

their demands and defending their actions. Entitled “An Appeal For Human Rights,” the detailed and lengthy list of grievances was supported by six separate justifications of the sit-ins. No mention of the Court, the Constitution, or *Brown* is found anywhere in the text.⁹⁴ The six-year time interval between *Brown* and the sit-ins, the lack of attribution to the Court, the crediting of several non-Court factors, and the rapidity with which the movement spread, all suggest it was unlikely that *Brown* played much of a role.

Why did the sit-ins work? Was it because white business owners, in the wake of *Brown*, saw the constitutional legitimacy of the protestors’ claims? The evidence does not support this conclusion. In most places businesses rejected the demands and refused to alter their practices. Constitutional principle did not appear to motivate them. Rather, they tried to outlast the demonstrators. However, sit-ins and ensuing black boycotts took their toll. In Greensboro, for example, Wolff writes of the “tremendous economic pressure put on the stores by the Negroes’ boycott, along with the reticence of whites to trade there because of fear of trouble.” The Woolworth’s store where the sit-ins started registered a \$200,000 drop in sales in 1960.⁹⁵ Economic pressure, not constitutional mandate, appears the best explanation for the success of the sit-ins.

Dr. Martin Luther King, Jr.

One possible way in which *Brown* might have ignited the civil rights movement is by inspiring Dr. King. His ringing denunciations of segregation, his towering oratory, and his ability to inspire and move both blacks and whites appear to have played an indispensable role in creating pressure for government action. Was King motivated to act by the Court? From an examination of King’s thinking, the answer appears to be no. King rooted his beliefs in Christian theology and Gandhian non-violence, not constitutional doctrine. His atti-

tude to the Court, far from a source of inspiration, was one of strategic disfavor. "Whenever it is possible," he told reporters in early 1957, "we want to avoid court cases in this integration struggle."⁹⁶ He rejected litigation as a major tool of struggle for a number of reasons. He wrote of blacks' lack of faith in it, of its "unsuitability" to the civil rights struggle, and of its "hampering progress to this day."⁹⁷ Further, he complained that to "accumulate resources for legal actions imposes intolerable hardships on the already overburdened."⁹⁸ In addition to its expense, King saw the legal process as slow. Blacks, he warned, "must not get involved in legalism [and] needless fights in lower courts" because that is "exactly what the white man wants the Negro to do. Then he can draw out the fight."⁹⁹ Perhaps most important, King believed that litigation was an elite strategy for change that did not involve ordinary people. He believed that when the NAACP was the principal civil rights organization, and court cases were relied on, "the ordinary Negro was involved [only] as a passive spectator" and "his energies were unemployed."¹⁰⁰ Montgomery was particularly poignant, he told the 1957 NAACP annual convention, because, in Garrow's paraphrase, it demonstrated that "rank-and-file blacks themselves could act to advance the race's goals, rather than relying exclusively on lawyers and litigation to win incremental legal gains."¹⁰¹ And, as he told the NAACP Convention on July 5, 1962, "only when the people themselves begin to act are rights on paper given life blood."¹⁰² King's writings and actions do not provide evidence for the Dynamic Court view that he was inspired by the Court.

Black Groups

The founding of the Student Non-Violent Coordinating Committee (SNCC), the Congress of Racial Equality (CORE), and the Southern Christian Leadership Conference (SCLC), the organizations that provided the leadership and the shock troops of the movement, could quite

plausibly have been inspired by the Court. Although SNCC was not founded until six years after *Brown*, and CORE was not revitalized until 1961, it may have taken that long for the effect to be felt.

However, it is quite clear that the Court played no role in inspiring these key groups of the civil rights movement to form. To the contrary, they were formed as an explicit rejection of litigation as a method of social change. The SCLC, for example, was founded in the winter of 1957. The moving force behind it was not the inspiration of *Brown* but an attempt to capitalize on the success of the Montgomery bus boycott.¹⁰³ The founding of SNCC in 1960 is similar and was aimed at helping students engaged in sit-ins to create at least some communication and organization network.¹⁰⁴ And CORE was founded in 1942 as a Gandhian-type movement of mass non-violent direct action.¹⁰⁵ As its Executive Director James Farmer told Roy Wilkins of the NAACP in response to Wilkins's opposition to the Freedom Ride, and preference for litigation, "we've had test cases and we've won them all and the status remains quo."¹⁰⁶ The point is that *Brown* is simply not mentioned as a source of inspiration.

If *Brown* is not mentioned by those who sat in, demonstrated, and marched, was anything? The answer is a clear yes. The participants pointed to a number of sources of inspiration for their actions. For some, the emergence of black African nations and the movements that accompanied their liberation had a "profound effect."¹⁰⁷ Over the twelve months from June 1960 to June 1961, eleven African countries gained independence. "We identified with the blacks in Africa," John Lewis of SNCC said, "and we were thrilled by what was going on."¹⁰⁸ Third-world liberation movements were also prominently mentioned by King in his classic **Letter From Birmingham Jail**.¹⁰⁹ For others, the Montgomery bus boycott was an "inspiration."¹¹⁰ James Forman, a powerful force in SNCC, credits the bus boycott with having a "very significant effect on the consciousness of black people" and a "particularly important

effect on young blacks.” Montgomery, Forman believed, “helped to generate the student movement of 1960.”¹¹¹ Participants in sit-ins also pointed to other sit-ins as inspiration, and to Dr. King, either by his actions or his writings.¹¹² *Brown* and the Supreme Court may have played a role in inspiring the activists of the early 1960s but they did not mention it in describing their inspiration for acting. And given the fact that they did point to other factors as inspiring them, the lack of attribution of *Brown* is all the more telling.¹¹³

In exploring the case for extra judicial effects with blacks, I looked for evidence in a variety of places, including the Court’s ability to inspire black activists, black protest activity, and black leaders. In none of these places was evidence found for the claim and in a number of places the evidence seems to contradict it. Again, the extra-judicial-effects thesis lacks support.

Before I sum up these findings, it is important to note that while there is little evidence that *Brown* helped produce positive change, there is some evidence that it hardened resistance to civil rights among both elites and the white public. I have documented how, throughout the South, white groups intent on using coercion and violence to prevent change grew. Resistance to change increased in all areas, not merely in education but also in voting, transportation, public places, and so on. *Brown* “unleashed a wave of racism that reached hysterical proportions.”¹¹⁴ On the elite level, *Brown* was used as a club by Southerners to fight any civil rights legislation as a ploy to force school desegregation on the South. In hearings and floor debates on the 1957 Civil Rights Act, Southerners repeatedly charged that the bill, aimed at voting rights, was a subterfuge to force school desegregation on the South.¹¹⁵ When Attorney General Brownell testified before a Senate committee on the 1957 bill, he was queried repeatedly and to his astonishment on whether the bill gave the President the power to use the armed forces to enforce desegregation.¹¹⁶ By stiffening resistance



The Montgomery bus boycott and Martin Luther King, Jr.’s, writings and actions did more to inspire the civil rights activists of the early 1960s than *Brown* or other Supreme Court rulings. Here Dr. King escorts schoolchildren in 1966 to a formerly all-white school in Grenada, Mississippi, where desegregation had already produced several deadly incidents of violence.

and raising fears before the activist phase of the civil rights movement was in place, *Brown* may actually have delayed the achievement of civil rights.

In sum, the claim that a major contribution of the courts in civil rights was to give the issue salience, press political elites to act, prick the consciences of whites, legitimate the grievances of blacks, and fire blacks up to act is not substantiated. In all the places examined, where evidence supportive of the claim should exist, it does not. The concerns of clear attribution, time, and increased press coverage all cut against the thesis. Public-opinion evidence does not support it and, at times, clearly contradicts it. The emergence of the sit-ins, demonstrations, and marches, does not support it. While it must be the case that Court action influenced some people, I have found no evidence that this influence was widespread or of much importance to the battle for civil rights. The evidence suggests that *Brown*’s major

positive impact was limited to reinforcing the belief in a legal strategy for change of those already committed to it. The burden of showing that *Brown* accomplished more now rests squarely on those who for years have written and spoken of its immeasurable importance.

Conclusion: The Fly-Paper Court

This chapter has examined whether the Supreme Court's decision in *Brown v. Board of Education* was able to desegregate schools. Surprisingly, the analysis showed the Court's decision, praiseworthy as it was, did not make much of a contribution. This is the case because, on the most fundamental level, courts depend on political support to produce such reform. Thus, political hostility doomed the Court's contributions.

Courts will also be ineffective in producing change, given any serious resistance because of their lack of implementation powers. The structural constraints built into the American judicial system, make courts virtually powerless to produce change. They must depend on the actions of others for their decisions to be implemented. With civil rights, little changed until the federal government became involved. Where there is local hostility to change, court orders will be ignored. Community pressure, violence or threats of violence, and lack of market response all serve to curtail actions to implement court decisions. When Justice Jackson commented during oral argument in *Brown*, "I suppose that realistically this case is here for the reason that action couldn't be obtained from Congress,"¹¹⁷ he identified a fundamental reason why the Court's action in the case would have little effect.

In general, then, not only does litigation steer activists to an institution that is constrained from helping them, but also it siphons off crucial resources and talent, and runs the risk of weakening political efforts. In terms of financial resources, social reform groups do not have a lot of money. Funding a litigation campaign means that other strategic options are

starved of funds. In civil rights, while *Brown* was pending in June 1953, Thurgood Marshall and Walter White sent out a telegram to supporters of the NAACP asking for money, stating "funds entirely spent."¹¹⁸ Compare this to the half-million-dollar estimates of the cost of the freedom rides, largely due to fines and bail.¹¹⁹ Further, the legal strategy drained off the talents of people such as Thurgood Marshall and Jack Greenberg. As Martin Luther King, Jr., complained: "to accumulate resources for legal actions imposes intolerable hardships on the already overburdened."¹²⁰

It is important to note here that there were options other than litigation. Massive voter-registration drives could have been started in the urban North and in some major Southern cities. Marches, demonstrations, and sit-ins could have been organized and funded years before they broke out, based on the example of labor unions and the readiness of groups like the CORE. Money could have been invested in public relations. Amazingly, in 1957 the NAACP spent just \$7,814 for its Washington Bureau operations. Its entire "public relations and informational activities" spending for 1957 was \$17,216. NAACP lobbyists did not even try to cultivate the black press or the black church, let alone their white counterparts. And even in 1959 the public relations budget was only \$10,135.¹²¹ When activists succumbed to the "lawyers' vision of change without pain,"¹²² a "massive social revolution" was side-tracked into "legal channels."¹²³ Because the NAACP failed to understand the limits on U.S. courts, its strategy was bound to fail.

If this is the case, then there is another important way in which courts effect social change. It is, to put it simply, that courts act as "fly-paper" for social reformers who succumb to the "lure of litigation." Courts, I have argued, can seldom produce significant social reform. Yet if groups advocating such reform continue to look to the courts for aid, and spend precious resources in litigation, then the courts also limit change by deflecting claims from substantive political battles, where success is pos-

sible, to harmless legal ones where it is not. Even when major cases are won, the achievement is often more symbolic than real. Thus, courts may serve an ideological function of luring movements for social reform to an institution that is structurally constrained from serving their needs, providing only an illusion of change.

This conclusion does not deny that courts can occasionally, though rarely, help social reform movements. Sometimes, too, litigation can remove minor but lingering obstacles to change. But here litigation is often a mopping-up operation, and it is often defensive. In civil rights, for example, when opponents of the 1964 and 1965 acts went to court to invalidate them, the courts' refusal to do so allowed change to proceed. Similarly, if there had never been a *Brown* decision, a Southern school board or state wanting to avoid a federal fund cut-off in the late 1960s might have challenged its state law requiring segregation. An obliging court decision would have removed the obstacle without causing much of a stir, or wasting the scarce resources of civil rights groups. This is a very different approach to the courts than one based on using them to produce significant social reform.

Litigation can also help reform movements by providing defense services to keep the movement afloat. In civil rights, the NAACP Legal Defense and Educational Fund, Inc. (Inc. Fund) provided crucial legal service that prevented the repressive legal structures of the Southern states from totally incapacitating the movement. In springing demonstrators from jail, providing bail money, and forcing at least a semblance of due process, Inc. Fund lawyers performed crucial tasks. But again, this is a far cry from a litigation strategy for significant social reform.

These findings also suggest that a great deal of writing about courts is fundamentally flawed. Treating courts and judges as either philosophers on high or as existing solely within a self-contained legal community ignores what they actually do. This does not mean that philosophical thinking and legal analysis

should be abandoned. It emphatically does mean that the broad and untested generalizations offered by constitutional scholars about the role, impact, importance, and legitimacy of courts and court opinions that pepper this chapter must be rejected. When asking those sorts of questions about courts, they must be treated as political institutions and studied as such. To ignore social science literature and eschew empirical evidence, as much court writing does, makes it impossible to understand courts as they are.

American courts are not all-powerful institutions. They were designed with severe limitations and placed in a political system of divided powers. To ask them to produce significant social reform is to forget their history and ignore their constraints. It is to cloud our vision with a naive and romantic belief in the triumph of rights over politics. And while romance and even naivete have their charms, they are not best exhibited in courtrooms.

ENDNOTES

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⁸⁸Fairclough, **To Redeem the Soul of America**, p. 12.

⁸⁹J. Mills Thornton III, "Challenge and Response in the Montgomery Bus Boycott of 1955-1956," *Alabama Review* 33 (July 1980): 194.

⁹⁰Martin Luther King, Jr., **Stride Toward Freedom: The Montgomery Story** (New York: Harper, 1958) pp. 64, 191-92. At a news conference in January 1956, King explained the boycott as "part of a world-wide movement. Look at just about any place in the world and the exploited people are rising against their exploiters. This seems to be the outstanding characteristic of our generation" (quoted in Garrow, **Bearing the Cross**, p. 54).

⁹¹Morris, **Origins**, p. 25 credits the Baton Rouge boycott with more importance than the Court. However, the Supreme Court may have played a vital role in the final victory by allowing the city a way out of a boycott that was costly and damaging. In *Gayle v. Browder*, 352 U.S. 903, (1956), the Supreme Court upheld a lower-court decision prohibiting enforcement of Montgomery's bus segregation law. The Court's decision may have allowed the city to end segregation without "giving in" to the boycotters' demands. On the other hand, without the strength of the boycott, there would have been little pressure on Montgomery to comply.

⁹²Southern Regional Council, **The Student Protest Movement Winter 1960**. Revised. (Atlanta: The Southern Regional Council, April 1, 1960) p. 1.

⁹³Remarks of Julian Bond, University of Chicago, 10 January 1990. In 1960 Bond was a student leader of the Atlanta sit-ins.

⁹⁴"An Appeal for Human Rights," *Atlanta Constitution* 9 March 1960: 13.

⁹⁵Miles Wolff, **Lunch at the Five and Ten** (New York: Stein and Day, 1970) pp. 173, 174.

⁹⁶quoted in Garrow, **Bearing the Cross**, p. 87.

⁹⁷Martin Luther King, Jr., **Why We Can't Wait** (New York: Harper, 1963) pp. 23, 157.

⁹⁸King, **Why We Can't Wait**, p. 157.

⁹⁹quoted in Garrow, **Bearing the Cross**, p. 91.

¹⁰⁰quoted in Morris, **Origins**, p. 123.

¹⁰¹Garrow, **Bearing the Cross**, p. 78.

¹⁰²quoted in Branch, **Parting the Waters**, p. 598.

¹⁰³Garrow, **Bearing the Cross**, p. 85; Fairclough, **To Redeem the Soul**, pp. 30, 31.

¹⁰⁴Clayborne Carson, **In Struggle** (Cambridge: Harvard University Press, 1981) pp. 19, 20; Garrow, **Bearing the Cross**, pp. 131 ff; Mary King, **Freedom Song:**

A Personal Story of the 1960s Civil Rights Movement (New York: Morrow, 1987) pp. 42-46; Juan Williams, **Eyes on the Prize: America's Civil Rights Years, 1954-1965** (New York: Penguin, 1988) p. 137; Paul Good, "Odyssey of a Man—And a Movement," *The New York Times Magazine* 25 June 1967: 44; Cleveland Sellers, **The River of No Return** (New York: Morrow, 1973) p. 16.

¹⁰⁵James Farmer, **Lay Bare the Heart: An Autobiography of the Civil Rights Movement** (New York: Plume, 1985) Appendix A.

¹⁰⁶Quoted in Farmer, **Lay Bare the Heart**, p. 13.

¹⁰⁷Carson, **In Struggle**, p. 16; Williams, **Eyes on the Prize**, p. 11; James W. Vander Zanden, "The Non-Violent Resistance Movement Against Segregation," *American Journal of Sociology* 68 (1963): 545; Howard Zinn, **Albany: A Study in National Responsibility** (Atlanta: Southern Regional Council, 1962).

¹⁰⁸quoted in Williams **Eyes on the Prize**, p. 139.

¹⁰⁹Martin Luther King, Jr., "The Negro is Your Brother" [Letter from Birmingham Jail] as published in 212 *Atlantic Monthly* (August, 1963) pp. 5, 11.

¹¹⁰Howard Zinn, **SNCC: The New Abolitionists** (Boston: Beacon, 1964) p. 18.

¹¹¹James Forman, **The Making of Black Revolutionaries** (New York: Macmillan, 1972) pp. 84, 85.

¹¹²Thomas Gaither, "Orangeburg: Behind the Carolina Stockade." In **Sit-Ins: The Students Report**. Ed. Jim Peck (New York: Congress of Racial Equality, 1960); Minnie Finch, **The NAACP: Its Fight for Justice** (Metuchen, N.J.: Scarecrow, 1981) p. 205; Martin Oppenheimer, "The Genesis of the Southern Negro Student Movement (Sit-In Movement): A Study in Contemporary Negro Protest." Ph.D. Diss. University of Pennsylvania, 1963 p. 103; C. Vann Woodward, **The Strange Career of Jim Crow**. Rev. ed. (New York: Oxford University Press, 1974) p. 197.

¹¹³For confirmation of this analysis, see, for example, the following works by participants: Abernathy, **And the Walls Came Tumbling Down**; Farmer, **Lay Bare the Heart**; Foreman, **The Making of Black Revolutionaries**; King, **Stride Toward Freedom**; King, **Why We Can't Wait**; King, "The Negro is Your Brother" [Letter from Birmingham Jail]; King, **Freedom Song**; various participants in Peck, **Sit-Ins**; various participants in Howell Raines, **My Soul Is Rested: Movement Days in the Deep South Remembered** (New York: Putnam, 1977); Sellers, **The River of No Return**; Elizabeth Sutherland, ed. **Letters from Mississippi** (New York: McGraw-Hill, 1965). Studies of the movement that confirm this analysis include Branch, **Parting the Waters**; Carson, **In Struggle**; William H. Chafe, **Civilities and Civil Rights: Greensboro, North Carolina, and the Black Struggle for Freedom** (New York: Oxford

University Press, 1980); Fairclough, **To Redeem the Soul**; Garrow, **Protest at Selma**; Garrow, **Bearing the Cross**; Henry Hampton and Steve Fayer, **Voices of Freedom: An Oral History of the Civil Rights Movement from the 1950s through the 1980s** (New York: Bantam, 1990); McAdam, **Freedom Summer**; August Meier and Elliott Rudwick, eds. **Black Protest in the Sixties** (Chicago: Quadrangle, 1970); Oppenheimer, "Genesis"; Southern Regional Council, **The Student Protest Movement: A Recapitulation** (N.p.: Southern Regional Council, 1960); Southern Regional Council, **Student Protest Movement**; Southern Regional Council, **The Freedom Ride May 1961** (Atlanta: Southern Regional Council, 1961); Pete Seeger and Bob Reiser, **Everybody Says Freedom: A History of the Civil Rights Movement in Songs and Pictures** (New York: W. W. Norton, 1989); Nancy J. Weiss, **Whitney M. Young, Jr., and the Struggle for Civil Rights** (Princeton: Princeton University Press, 1989); Robin M. Williams, Jr., "Social Change and Social Conflict: Race Relations in the United States, 1944-1964," *Sociological Inquiry* 35 (1965): 8-25; Williams, **Eyes on the Prize**; Wolff, **Lunch at the Five and Ten**; Zanden, "Non-Violent Resistance"; Zinn, **SNCC**.

¹¹⁴Fairclough, **To Redeem the Soul**, p. 21.

¹¹⁵*Civil Rights: Hearings Before the Subcomm. No 5 of*

the House Comm. On the Judiciary, 85th Cong. 806, 1187 (1957).

¹¹⁶*Civil Rights-1957: Hearings Before the Subcomm. On Constitutional Rights of the Senate Comm. On the Judiciary*, 85th Congress 214-16 (1957).

¹¹⁷Quoted in Leon Friedman, ed., **Argument: The Oral Argument Before the Supreme Court in Brown v. Board of Education of Topeka, 1952-1955** (New York: Chelsea House, 1969) p. 244.

¹¹⁸Quoted in Kluger, **Simple Justice**, p. 617.

¹¹⁹Sarratt, **Ordeal**, p. 333.

¹²⁰King, **Why We Can't Wait**, p. 157.

¹²¹Gilbert Ware, "The National Association for the Advancement of Colored People and the Civil Rights Act of 1957." Ph.D. Diss. Princeton University, 1962, pp. 188-89, 189, 190, 13.

¹²²Stuart A. Scheingold, **The Politics of Rights: Lawyers, Public Policy, and Political Change** (New Haven: Yale University Press, 1974) p. 145.

¹²³Morton J. Horwitz, "The Jurisprudence of *Brown* and the Dilemmas of Liberalism." In **Have We Overcome? Race Relations Since Brown**. Ed. Michael V. Namorato (Jackson: University of Mississippi Press, 1979) p. 184.

A Half-Century of Presidential Race Initiatives: Some Reflections

JOHN HOPE FRANKLIN

If context is not everything—and I am one who believes it is not—it is, nevertheless, a valuable instrument for gaining perspective on the past as well as the present. In the scheme of things, fifty years does not seem a very long time, but in the life of a human being it constitutes at least two-thirds of the life span that one can reasonably expect. I was reflecting on such matters not long ago as I was attempting to place the rise of Harry S Truman in the context of his times and attempting to understand the complexities of the period following World War II that had been an extraordinarily brutal affair, in some ways the most brutal in human history. It introduced some of the most impersonal methods of slaughtering human beings, the most brutal of all was, of course, nuclear warfare itself.

Perhaps the type of warfare and the human casualties were the only thing that overshadowed the miserable state of human and race relations that characterized the war years in the United States. It was not only that my brother, drafted from his position as a high school principal, was told by a white sergeant that he would dedicate his years in the army to seeing that my brother did nothing more exalting than peel potatoes. It was not merely that with four years of experience as an office manager and more than adequate secretarial

skills, and a Ph.D. from Harvard, I was told by a Navy recruiter, desperate for people to manage the naval offices after Pearl Harbor, that I had everything but color! It was also the Jim Crow flying field at Tuskegee, the racially segregated blood banks, the Jim Crow facilities at every military installation, the job discrimination in civilian life, and the general segregation of the United States armed forces as the men and women left home to fight abroad for the four freedoms. It was the mockery of the highly touted war aims that caused some white



While African Americans were called on to fight for democracy during World War II, they suffered a raw deal at home. They bore the brunt of segregation, humiliation, and discrimination that this country served up, including second-class status in public facilities and accommodations.

Americans and most black Americans to wonder if the United States was really serious in claiming that its crusade was against tyranny, Nazi racism, and Japanese militarism.

It did not take some foreign ideology or some home-grown radicalism to understand that the carefully cultivated racism in the United States was a powerful force for evil and that the bitterness of African Americans was carefully nurtured by military and public policy. By the spring of 1945, some 497,566 African American men and women were serving overseas in every theater of war, while an equal number served in the armed forces at home. Meanwhile, millions of them worked in every war-related industrial activity in which they were permitted to serve. In every conceivable way, they bore the brunt of segregation, humiliation, and discrimination that this country could serve up without the slightest twinge of conscience that one could observe. Small wonder that there were

innumerable racial clashes on and off military posts. There were riots at Fort Bragg, Camp Robinson, Camp Davis, Camp Lee, Fort Dix, and elsewhere. The emotional conflicts and frustrations that African Americans experienced as they sought to reconcile the doctrine of the four freedoms with their own plight discouraged many and even left some quite disillusioned when they were mustered out of the armed forces.

Coming to the presidency in the spring of 1945, Harry S Truman was not long in recognizing that the racial situation in the United States was not only explosive and dangerous, but that it was the responsibility of the United States government to assume a clear responsibility: to take the initiative in ameliorating, even changing things in fundamentally important ways. The Fair Employment Practices Commission, established by President Franklin D. Roosevelt, had been a first step in providing training and employment for

African Americans. They soon discovered, however, that the opportunities were limited and frequently depended on the mercy of some good-hearted prospective employer rather than the rigorous enforcement of the law. This was the thanks they received for purchasing war bonds, serving in the civilian defense corps, and volunteering in dozens of ways on the civilian front. The experience of living in two worlds, as African Americans had always done, had prepared them to wage two fights simultaneously. Even as they fought on foreign soil, they felt compelled to carry on the fight for better treatment at home. As Eleanor Roosevelt had said early in the war, "The nation cannot expect colored people to feel that the United States is worth defending if the Negro continues to be treated as he is now."

If President Truman had any doubt that racial injustice existed, he had only to look up and down Pennsylvania Avenue, take a ride

through any section of the nation's capital, or look out of the window in any direction from the White House. At the National Theater, a few blocks away, blacks were not admitted to attend performances. At Constitution Hall, they could not perform. Only at the Supreme Court, the Methodist Building, and the Union Station could they find a place to eat within walking distance of the Library of Congress. I remember this period almost too well. During President Truman's first year in office, I spent a portion of that year at the Library of Congress. One Friday afternoon, the distinguished historian C. Vann Woodward came by my study room and suggested that we have lunch the following day. I happily agreed at first, then remembered that the following day would be Saturday and there would be no place close by where we could dine together. I told him that we would have to postpone lunch until the following week, on a weekday. He then asked me what I did about food on the



Although the Truman Committee on Civil Rights had little impact on the deplorable status of African Americans, the formation of the Committee in 1947 by Truman, a descendant of Confederate soldiers, was nonetheless a courageous step. Pictured above is a visit by Catholic officials to the White House in 1950 to congratulate President Harry S Truman on his Civil Rights program.

weekend when I worked in the Library. I told him that on Saturdays I came to the Library a bit later, brought a sandwich, a piece of fruit, or some candy. When I could not bear the pangs of hunger any longer, I would go home to an early dinner. Vann said that my regimen was rather tough, and that if he had to live in such a manner, he was not certain that he would want to be a historian. I responded that for an African American would-be scholar, fending for food on a weekend was one of the *minor* inconveniences.

While President Truman, perhaps, had no knowledge of the inconveniences of a would-be African American scholar, he was not only alert but was particularly sensitive to some of the difficulties that African Americans experienced during the war and continued to face in the postwar years. To a group of fellow Southerners who asked him to "soften" his views on such problems and, in time, everything would turn out well, he replied, "My stomach turned over when I learned that Negro soldiers, just back from overseas, were being dumped out of army trucks in Mississippi and beaten. Whatever my inclinations as a native of Missouri might have been, as President I know this is bad. I shall fight to end evils like this."

One way that President Truman would fight was to establish in December 1946 the President's Committee on Civil Rights. In the preamble of the Executive Order establishing the Committee, the President condemned the "action of individuals who take the law into their own hands and inflict summary punishment and wreak personal vengeance on citizens." He called each action "subversive of our democratic system of law enforcement and public criminal justice, and gravely threatens our form of government." To the Committee he appointed some of the nation's most distinguished leaders from the civic, labor, religious, and educational communities. From labor he named James B. Carey, from education there were John Sloan Dickey and Frank Porter Graham, from the faith community came Father

Francis J. Haas, Bishop Henry Knox Sherrill, and Rabbi Roland Gettelsohn. Dr. Sadie T. Alexander, a distinguished member of the Philadelphia Bar, and Channing Tobias, a former YMCA executive and prominent civic leader, were the two African-American members of the fifteen-person committee.

The committee understandably placed its principal attention on the ways and extent to which Americans were failing to live up to the idea of freedom and equality. Like the President, the Committee fully appreciated the direction in which the nation had moved and was continuing to move toward the ideal of freedom and equality. But, like him, the Committee did not feel that a season of self-congratulation would contribute significantly to the solution of the racial and other social problems that the country faced. While the Committee members harbored some differences that they were unable to reconcile, there was still a significant measure of common ground on which they could stand. Surely, one of these was the unanimous declaration stated early in their report: "The aspirations and achievements of each member of our society are to be limited only by the skills and energies he brings to opportunities offered equally to all Americans. We can tolerate *no* restrictions upon the individual which depend upon such *irrelevant* factors as race, color, religion, or the social position into which a person is born."

After holding meetings and hearings from January to September in 1947, the Committee brought its work to a close and began to write its report. It called for the strengthening of the machinery of civil rights, the right to safety and security of the person, the right to citizenship and its privileges, the right to freedom of conscience, and the right to equal opportunity. This was such high ground that the members could meet on it without serious debate or disagreement. Its rejection of racial segregation, highly controversial in 1947, and its call for an end to lynching have long been accepted goals even when they are, at times, violated in the breach.

It is easy to minimize the importance of the accomplishments of the Truman Committee, and *its* importance does not rest on its long-term achievements. What it achieved in the long-run is as much the responsibility of those living in 1998 as it was for those living in 1947. Taken on its own terms and in its own time, it was a courageous step for Harry S Truman, a descendant of Confederate soldiers—as he was always quick to remind us—to bring together fifteen Americans of varied backgrounds and stations in life and ask them to take on a task as difficult as the one he assigned to them. The assignment was to construct a road map by which the people of the United States could move away from bigotry and hate to a goal of civility and equality. That, in and of itself, was no small achievement. They not only took him seriously, but they complied with his request. In one place they eloquently argued that “the persuasive gap between our aims and what we actually do is creating a kind of moral dry rot which eats away at the emotional and rational bases of democratic beliefs It is impossible to decide who suffers the greatest moral damage from our civil rights transgressions, because all of us are hurt.”

The Committee also emphasized that the economic reasons for the nation to revisit its violations of the rights of some, impoverishes the entire community. The Committee also pointed to the international consequences of short-sighted policies of racial discrimination. Such policies would clearly have an adverse effect on the relations of the United States and other countries, some of which called democracy an empty fraud and a constant oppressor of underprivileged people. The United States was not so strong, they argued, that it could ignore what the world thinks of its civil rights record.

But there were a few signs that suggested to some that the nation was turning an important corner—at least in the area of education. First, there was a legal assault on segregated education. Oklahoma finally opened

its law school to Ada Lois Spuel after a protracted period of resisting, shadow-boxing, and posturing. In *Johnson v. the University of Kentucky*, a young Thurgood Marshall challenged the state to show why it should not open its graduate program in history to Lyman Johnson at the University of Kentucky. As the expert witness in the case, I was prepared to show that the curriculum, library resources, and faculty personnel at the Kentucky State College for Negroes were all hopelessly inferior. But the district federal judge, H. Church Ford, accepted Marshall’s argument that the state did not have a case and ordered that Johnson be admitted to the University of Kentucky.

Shortly thereafter, Heman Sweatt won his right to enter the University of Texas Law School. The battle soon moved to secondary public schools. The outlines of the story are too well known to repeat here. It should be observed, however, that the members of the non-legal midnight seminars at the New York offices of the NAACP Legal Defense Fund, in which I was a regular participant, would doubtless overstate their own importance in the litigation.

In later years, they would insist that they made a decisive contribution in persuading the Supreme Court to strike down segregation in public schools in *Brown vs. Board of Education*. They were diligent and perhaps offered a valuable nugget here and there, but the Supreme Court had its own reasons and its own logic for deciding the case in favor of Thurgood Marshall and his colleagues. In some ways, conditions improved if in no way other than that sensitivities were heightened, and the agitation for additional legislation at every level to secure and protect the civil rights of all continued. With Martin Luther King, Jr., at the height of his powers and influence during the Kennedy and Johnson years, it became clear that the country would do well to consider additional legislation that would guarantee the civil rights and voting rights of all. The March on Washington, the



Members of the National Advisory Commission on Civil Disorders posed during a meeting in 1968 investigating the race riots that had swept across the country that summer. From left to right are Rep. James Corman of California, Rep. William McCulloch of Ohio, Sen. Fred Harris of Oklahoma, Roy Wilkins of the NAACP, New York Mayor John V. Lindsay, Illinois Governor Otto Kerner, David Ginsburg, Victor Palmieri, Atlanta Police Chief Herbert Jenkins, I.W. Abel of the United Steelworkers, Sen. Edward Brooke of Massachusetts, Charles Thornton of Litton Industries, and former Kentucky Commissioner Katherine G. Peden.

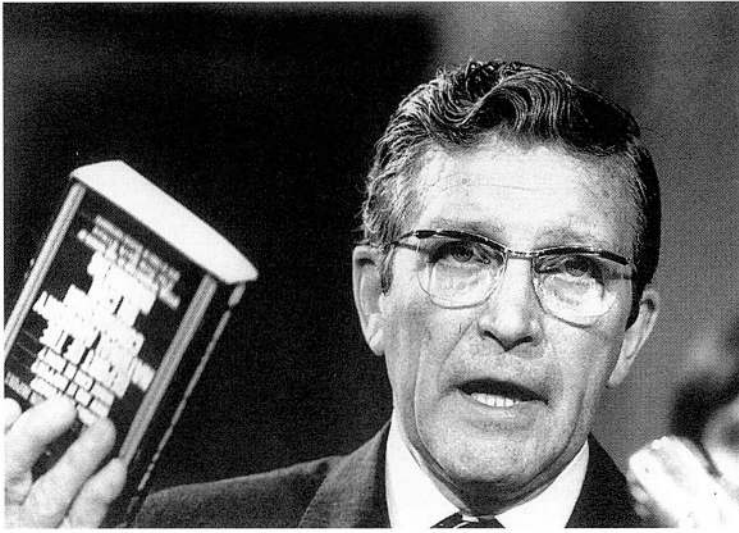
violence in the streets, the bombings of homes and churches, and the March from Selma to Montgomery all served notice on the people of the United States that the situation was becoming more serious and, indeed, more volatile with every passing day. As a participant in the Selma March, I can attest to the determination of the supporters of civil rights to persevere until they had attained their objective.

It was not merely the violence, bad as that was, or even the imprisonment of men and women who claimed the right to function as American citizens. It was the refined and subtle acts by which whites withheld from blacks the right to purchase homes and to secure employment for which they were well qualified. It was quite all right for me to chair the department of history at Brooklyn College, but when I sought to purchase a home in the pleasant residential neighborhood surrounding the College, no real estate dealer would show me a home and when I found one on my

own, no bank in the city of New York would grant me a loan for the purchase. My insurance company had set aside many millions for loans to their customers, but when I sought a loan, it parted company with me, and I hastened to part company with it.

And so it went in those two decades following the report of the Truman Committee. Almost twenty years after that committee made its report, there was yet another, urgent need to reexamine the whole state of race relations in the United States. The summer of 1967 witnessed several serious racial incidents, the very nature of which bespoke an urgency, bordering on desperation, to address the problem. In July, two racial conflicts, one in Newark, New Jersey, the other in Detroit, Michigan, set off chain reactions that indicated the volatile nature of the situation and highlighted the importance of taking immediate steps to prevent the spread of violence.

In a matter of days, President Lyndon B.



Former Illinois Governor Otto Kerner, who headed the 1968 Commission on Civil Disorders, warned a Senate Judiciary subcommittee in 1971 that high unemployment among minority groups could touch off future disorders. Kerner is holding a copy of his commission's Report on Civil Disorders.

Johnson took steps not only to head off additional acts of violence but to inquire into why they occurred; and what could be done to change the conditions that spawned them. On July 29, 1967, the President established a national Advisory Commission on Civil Disorders. It was chaired by Governor Otto Kerner of Illinois, with Mayor John Lindsay of New York serving as vice chairman. Other members included Senators Fred Harris of Oklahoma and Edward Brooke of Massachusetts, Congressmen James C. Corman of California and William McCulloch of Ohio, Roy Wilkins of the NAACP, I.W. Abel of the United Steelworkers, Atlanta Police Chief Herbert Jenkins, Charles Thornton of Litton Industries, and Katherine G. Peden, former Kentucky Commissioner of Commerce. Where, some asked, were those who would truly represent the bold critics of American society, such as Martin Luther King, Jr., Stokely Carmichael, Tom Hayden, and Floyd McKissick? Tom Wicker, a Southern critic himself, said that just as it sometimes takes a hawk to settle a war, so did it take bona fide moderates to validate the case that had to be made.

On the day that he established the Commission, President Johnson addressed the nation. Among other things he called for an end to the violence and made it clear that every

resource, national as well as local, would be used to end it. Then he added, "In America we seek more than the uneasy calm of martial law. We seek peace based upon one man's respect for another man—and upon mutual respect for the law. We seek a public order that is built on steady progress in meeting the needs of all of our people.... The only genuine, long-range solution for what has happened lies in an attack—mounted at every level—upon conditions that breed despair and violence. All of us know what those conditions are: ignorance, discrimination, slums, poverty, disease, not enough jobs. We should attack these conditions, not because we are frightened by conflict but because there is simply no other way to achieve a decent and orderly society in America."

The Commission then went about the work of inquiring into the causes of the disorders, holding hearings in the several affected communities, and examining in great detail what conditions existed that called for the remedies that the Commission could recommend. The members must have been shocked to hear from participants and observers about the extent of violence, the depth of the bitterness and hate, and the deplorable conditions that caused the unrest and violence. The shock was expressed by the Commission in the now famous lines, "Our

nation is moving toward two societies, one black, one white—separate and unequal.” It then pointed out that “No American—white or black—can escape the consequences of the continuing social and economic decay of our major cities ... the major need is to generate a new will—the will to tax ourselves to the extent necessary to meet the vital needs of the nation The major goal is the creation of a true union—a single society and a single American identity.” To achieve that goal, the Commission proposed that the country open up opportunities to those who had been restricted by racial segregation and discrimination, eliminating all barriers in the choice of jobs, education, and housing, providing opportunities for people to take control of their own lives in every way, and increasing opportunities for communities to meet across racial lines. Doubtless, the recommendations flowed out of the strong admonition given the Commission and the American people when the President said, “Let us resolve that this violence is going to stop and there will be no bonus to flow from it. We can stop it, we must stop it, and we will stop it. And let us build something much more lasting: faith between man and men, faith between race and race. Faith in each other—and faith in the promise of a beautiful America.” Numerous specific recommendations spelled out in detail what the Commission hoped the country would do.

Just as there were those who criticized the Commission’s makeup, there were critics of its conclusions and recommendations. Appearing before the Commission to express his views of the ills of America and how they could be treated was the distinguished social psychologist, Kenneth B. Clark. He was not so critical as he was simply weary of seeing a group going over the same ground that its predecessors had covered and, in the long run, failing to make any significant strides towards solving the problems. Referring to the Chicago riot of 1919, Clark said, “I read that report ... and it is as if I were reading the report of the investigating committee of the Harlem riot of

1935, the report of the Cone Commission on the Watts riot [of 1965]. I must again in all candor say to you members of this Commission—it is a kind of Alice in Wonderland—with the same moving pictures re-shown, over and over again, the same analysis, the same recommendations, and the same inaction.” When the Commission concluded its report, it admitted that it had uncovered no startling truths, no unique insights, no simple solutions. Indeed, the Commission observed, “The destruction and bitterness of racial disorder, the harsh polemics of black revolt and the white repression have been seen and heard before in this country. It is time now to end the destruction and a violence, not only in the streets or in the ghetto but in the lives of the people.”

For one who has been concerned over the past fifteen months with many problems with which the Committees dealt in 1947 and 1967, I must admit that, like Kenneth B. Clark, I had a sense of *déjà vu*. When President Clinton appointed an Advisory Board to his Initiative on Race, there was no dire emergency, no riots or bombings, and he concluded that, for once, the country should have the luxury of giving attention to the centuries-old problem of race in the relative quiet of the years, 1997 and 1998. He was quite aware of the persistent inequities in our society, the persistent discrimination in the workplace, the continued if subtle discrimination in housing, unequal opportunities in education and health, and numerous other areas that required attention in any effort to eliminate inequalities based on race and ethnicity in our society.

In addition, the changing demographic picture in the United States added significantly to the complexity of the racial divide as we stood at the threshold of a new century and a new millennium. On June 13, 1997, President Clinton announced the establishment of an Advisory Board to an ambitious Initiative that he was undertaking. The seven-member Board included Governors Thomas Kean of New Jersey and William Winter of Mississippi,

Angelo Oh, a distinguished member of the California Bar, Suzan Johnson Cook, pastor of the Faith of Fellowship Church in Bronx, New York, Linda Chavez Thompson, Executive Vice President of Republic Industries, Bob Thomas, and myself. Once again, the composition of the Board was severely criticized because no Native American was named to the Board. The Board, in turn, sought to address this criticism by appointing a Native American, Laura Harris, as Senior Consultant, and other Native Americans to the Board Staff. The Executive Director, Judith Winston, General Counsel in the Department of Education, saw to it that the staff reflected, to the extent possible, the populations of the United States.

At the Commencement exercises at the University of California at San Diego, on the day following the appointment of the Advisory Board and with all members present, the President indicated that while it was important for the nation to confront the problem of race, we should all be aware of the important changes that had occurred that significantly changed the racial equation. He then pointed out that conditions in the new century would add to the problems of race and ethnicity and usher in a whole new world of race relations. The old minorities would constitute the new majority of people of color, while the old majority would be the new minority of white people. He then called for a new dialogue on race in which the differences among us should be regarded as an asset rather than a liability. He further urged us to respect our differences and never use them as a basis for exploitation. He promised the Board his support and urged us to keep him informed of our activities. In keeping with his request, I made monthly reports to him not only informing him of our activities but making recommendations for him to take action in certain areas. He invariably responded and in virtually every instance, he followed our recommendations with action. They took the form of communications with certain key groups, instructions to Cabinet officers, executive orders, and recommenda-

tions to Congress for action.

Quite early, it became clear to the members of the Advisory Board that many citizens welcomed its creation if for no other reason than it provided them with a mechanism through which they could air their complaints. Many thought that the Advisory Board was *empowered to deal* with their grievances. Thus, they flooded the Board with requests to look into their claims of racial discrimination. One Latino man drove from New Jersey to my home in North Carolina to plead with me to take up his case against his former employer who dismissed him, he was certain, because of his ethnic background. Another man, this time a white resident of Durham, came to my home to urge me to have the Advisory Board turn the heat up on the "white bigots" who were determined to maintain their superior advantage regardless of the costs to our society. We early came to realize that each citizen who took an interest in our existence defined our functions in a way that was consonant with their own needs and aspirations.

In keeping with the President's call for a national dialogue, I spoke at the first meeting of the Advisory Board and used as my subject "Let the Dialogue Begin." I urged my fellow citizens to reach out to their friends and neighbors in a spirit of good will and talk with them about problems of race without acrimony and with civility. Dialogue did, indeed, become a principal centerpiece of the Board's work. It produced a **One America Dialogue Guide** designed to assist community leaders and others who desired to join in the discussion of race. It also sponsored a week of dialogue for schools, colleges, and universities; and numerous other discussions designed to dispel the widespread notion that racial and ethnic problems had already been solved and, if not, the strides of the last generation would set in motion the forces that would *surely* solve them in the foreseeable future.

Another centerpiece was the monthly meetings of the Advisory Board during which explored problems related to education,

housing, employment, health, the administration of justice, stereotypes, and poverty. Experts invited to the meeting provided the Board with invaluable information regarding such matters as the nature and extent of race prejudice and discrimination, increasing diversity in higher education, and ethnic lines. All meetings of the Advisory Board were open to the public, and a period was set aside for public participation. Such activities were not always pleasant or even constructive, but they proved invaluable in ascertaining the attitudes of the public toward what the Board was attempting to do.

In the interim between Board meetings, the members accepted invitations to participate in annual meetings of national groups, meet with public leaders, attend local meetings, and to promote the work of the

Advisory Board in numerous ways. They attended meetings of such groups as the American Council on Education, the American Society of Newspaper Editors, the Children's Defense Fund, the Society of Black Engineers, the Congressional Black Caucus, The Civil Rights Meeting of the AFL-CIO, The Annual Conference of Southern Governors, North Carolina's Governor's Conference on Race, and the Seminar sponsored by the National Conference. It encouraged local groups to develop what it called "Promising Practices" that were illustrations of what communities could do in developing harmony, and which could be replicated in other places. To facilitate such a replication, the Board placed many of these "practices" on its Website and later published a volume called **Pathways to One America in the 21st**



When President William Clinton launched his Initiative on Race in 1997, unlike with previous commissions there was no dire emergency in terms of racial conflict, although racial inequities persisted. Author John Hope Franklin was one of seven members named to the Advisory Board, which was intended to reflect, to the extent possible, the population of the United States. The seven-member Board included (left to right) Governor William Winter of Mississippi; Angelo Oh, a distinguished member of the California Bar; Governor Thomas Kean of New Jersey; Dr. Franklin; Bob Thomas; Linda Chavez Thompson, Executive Vice President of Republic Industries, and Suzan Johnson Cook, pastor of the Faith of Fellowship Church in Bronx, New York.

Century: Promising Practices for Racial Reconciliation. There were other Board activities and other activities of individual Board members too numerous to enumerate here.

There are, indeed, painful similarities in the problems that the Truman Committee, Johnson Commission, and the Clinton Advisory Board faced. If there was more violence in the periods in which the first two served, it should be remembered that violence was not altogether absent during the period in which the Clinton Board served. If there was less violence during the period of the Clinton Board, there was more lethargy and less enthusiasm, born of some resentment that racial bigotry could be laid at the door of this country at the end of the twentieth century. If the first two periods were characterized by open, blatant racism, the last period was characterized by subtle, elusive, and even discreet forms of racism equally sinister and more difficult to handle.

Of course there were disappointments. When I sought to broaden the perspective of a fellow Board Member by reminding her that the *race problem* existed in this country long before the Hispanics or Asians arrived, the press reported it as a wide rift within the Advisory Board. When I told the press that no opponents of affirmative action had been invited to a session on how to increase diversity in higher education, the press reported that I said that I would not invite conservatives to the meetings of the Board because they had nothing to offer. I was invited to address a general session of the American Society of Newspaper Editors with more than 10,000 in attendance, fewer than 100 came to the session. When Native Americans in Denver refused to let me speak on African Americans as stereotypes after Secretary of Energy Frederica Pena had spoken on Hispanic stereotypes, I was disappointed. But I was immensely pleased with the hundreds of promising practices that pointed toward ways of resolving racial

contacts, leveling the playing field by according to others in different racial groups the civility, respect, and equality they deserve *because* they are human beings. These were more than enough to offset insults, brush-offs, and humiliation of any kind.

On September 18, 1999, the Advisory Board made its report to the President. We discussed our experiences with him, told him that, on the whole, the dialogue that he had called on the nation to conduct had gone well, and we urged him to continue the Initiative so that I could complete the work already begun. Among the many things we requested him to do was to establish a President's Council for One America that could develop a long-term strategy designed to build on the vision of one America. We also asked him to create and maintain a public education program to inform the public of the facts about race in America. If a Council for One America was the centerpiece of our recommendations, a presidential "call to action" of leaders from all sections of society was indispensable to the implementation of the Council's agenda. Finally, we asked the President to continue the focus on youth that we had begun. Without engaging the youth in everything that we plan, the future would be dark indeed. The President accepted our report and pledged to continue to work for One America.

In all three periods there was, on the one hand, a strong determination on the part of some Americans to correct inequities, no matter what the cost. On the other hand, there was a cynicism that expressed itself by insisting that nothing could be done to change people's convictions and habits. In all three periods, even when we had a sense of *déjà vu*, there was a vigorous pursuit of the ideal of equality and fairness. That was the strength and the hope of those who worked on the race initiatives of the Truman Committee that produced *To Secure These Rights* and the Johnson commission that produced the Kerner *Report on Civil Disorders*. That was also the guiding light of those who worked on the

Clinton Initiative in 1997 and 1998 and a continued, relentless struggle on the part of all of us can get the task done. produced *One America in the 21st Century*. After fifty years, many problems remain. Only

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